1996 (2)

The Zimbabwe Law Reports 1996 [Part 2]

S v NDLOVU 1996 (2) ZLR 1 (HC)

Court **High Court, Bulawayo**

Malaba J

Criminal trial

28 February 1996 *(1)Judgment No. HB-46-96

Flynote

Criminal procedure (sentence) - common law offences - fraud - potential prejudice of US$25 million - bank employee issuing false letters of credit at instigation of criminal syndicate - chances of fraud succeeding not great - appropriate sentence

Headnote

The accused was convicted of fraud. He had been an assistant accountant at a commercial bank and in charge of the bills and foreign exchange department. At the instigation of a friend of his, who was actually a member of an international crime syndicate, he signed a letter of credit on a bank letterhead in the sum of US$25 million. He signed as manager, foreign department, though the actual holder of that office was in Harare. The letter was stamped with endorsements which purported to show that the amount of currency involved had been approved by the exchange control authorities. The letter was purportedly in favour of a company incorporated in Texas. The normal method of establishing a letter of credit would have been by telex or mail with the foreign correspondent bank; instead, the accused gave the letter to his friend, who passed it to the nominal creditor. This person attempted to negotiate it in London but was arrested when enquiries showed that the letter was fraudulent. In assessing sentence.

Held, that the potential prejudice involved was the largest ever in Zimbabwe and the financial consequences to the accused's bank and to the country could have been enormous. The accused occupied a special and strategic

MALABA J

position in the bank and was guilty of a gross breach of trust. The need for deterrence was emphasised by the appearance of the ugly face of an international crime syndicate. On the other hand, the accused did not benefit from the crime, which was a clumsy effort, perhaps doomed to failure from the beginning.

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Held, that a sentence of 12 years' imprisonment would be appropriate.

Cases cited:

S v Harington 1988 (2) ZLR 344 (S)

S v Khumalo & Ors 1984 (3) SA 327 (A)

S v Rabie 1975 (4) SA 855 (A)

Case Information

J Mahamba, for the State

M Cheda, for the accused

Judgment

Malaba J: The accused has been convicted of fraud involving potential prejudice of US$25 million. My task is to assess an appropriate sentence for the accused and in doing so I have put in the scales of justice the factors that take into account the crime committed, the interests of society and those of the offender. The letter of credit was for US$25 million irrevocable but transferable and drawn on Barclays Bank. It had 15 February 1994 as its date of issue whilst 16 February 1995 was the date of maturity.

The facts are these. The accused is a first offender aged 33 years. He is married with two minor children. The accused was employed by Barclays Bank Zimbabwe as an assistant accountant at its branch situated on Jason Moyo Street, Bulawayo. He was in charge of the bills and foreign exchange department, responsible, amongst other things, for the establishment of letters of credit for the bank's customers.

In 1992, the accused met and befriended one George Tolmay, a South African resident, a man with a membership in an international crime syndicate. On 16 February 1994, George Tolmay drew up a letter of credit No. 2/94 on a Barclays Bank letter head that he had got from the accused. The letter of credit was for US$25 million irrevocable but transferable and drawn on Barclays Bank. It had 15 February 1994 as its date of issue whilst 16 February 1995 was the date of maturity. The letter of credit was established in favour of Dinker Patel Incorporated with its purported registered office in Houston Texas in the United States of America. Dinker Patel was, in fact, a member of the international crime syndicate to which George Tolmay belonged.

MALABA J

The accused signed the letter of credit and endorsed on it his internationally recognised code number. He misrepresented that he was the manager, foreign department. There was only one person holding that title in the bank and that person was based at Barclays Bank's head office in Harare. Only the manager, foreign department could authorise the issue of letters of credit after satisfying himself, from the examination of documents submitted in support of the application,

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that there were sufficient funds in the applicant's account to meet the letter of credit.

The accused stamped the letter of credit with the bank's rubber stamp to the effect that the foreign currency involved had been approved by the foreign exchange control authorities. He also wrote a note to the effect that the bearer of the letter of credit should be afforded all the assistance he might require. Under normal circumstances, letters of credit are established with foreign correspondent banks by telex or air mail.

Two weeks after, the letter of credit was given to George Tolmay by the accused, copies of it had been made and six international banks approached with the view to negotiate the transfer of the letters of credit. Dinker Patel approached a firm of solicitors in London and instructed them to negotiate the transfer of the letter of credit with a London bank. The international banks in Germany, Australia, Switzerland and Eire contacted Barclays Bank Zimbabwe to confirm the authenticity of the letter of credit.

Investigations revealed that the letter of credit was a fraud. The solicitor instructed by Dinker Patel to negotiate the transfer of the letter of credit with Barclays Bank, Baker Street, London, caused him to be arrested by the Fraud Squad.

In assessing the appropriate sentence, I bear in mind the purposes of punishment as summarised by Holmes JA in S v Rabie 1975 (4) SA 855 (A). The principles were again stated by Nicholas JA in S v Khumalo & Ors 1984 (3) SA 327 (A) at 330D where the learned Judge of Appeal said:

> "In the assessment of an appropriate sentence, regard must be had inter alia to the main purposes of punishment, mentioned by Davis AJA in R v Swanepoel 1945 AD 444 at 455, namely deterrent, preventive, reformative and retributive (see S v Whitehead 1970 (4) SA 424 (A) at 436E-F; S v Rabie 1975 (4) SA 855 (A) at 862).
>
> Deterrence has been described as the "essential', "all important',

> "paramount' and "universally admitted' object of punishment. See R v Swanepoel *supra* at 455. The other objects are accessory. The aspect of retribution is considered in modern times to be of lesser importance - see R v Karg 1961(1) SA 231 (A) *per* Schreiner JA at 236A-B:
>
> While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."

In S v Rabie 1975 (4) SA 855 (A) Holmes JA said at 862A-B:

> "The main purposes of punishment are deterrent, preventive, reformative and retributive: see R v Swanepoel 1945 AD 444 at 455. As pointed out in Gordon Criminal Law of Scotland (1967) at 50:
>
> > "The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation ... The other theories, reformative, preventive and deterrent, all find their

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justification in the future in the good that will be produced as a result of the punishment."

It is therefore not surprising that in R v Karg 1961 (1) SA 231 (A) at 236A Schreiner JA observed that while the deterrent effect of punishment has remained as important as ever,

"the retributive aspect has tended to yield ground to the aspects of prevention and correction."

There is no doubt that the circumstances of the offence make it the first fraud in this country with potential prejudice of so colossal an amount. The financial consequences to Barclays Bank Zimbabwe and to the country's foreign currency reserves were potentially grave. The commission of the fraud was facilitated by the accused who was prepared to lend his active

MALABA J

support to the conspiracy to defraud his employer. The accused occupied a special and strategic position in the bank to facilitate the execution of the criminal plan by the international crime syndicate. He was an experienced employee boasting 10 years of service and was possessed of specialised skills and knowledge vital to the successful execution of the fraudulent scheme.

By agreeing to lend his support to the fraudulent scheme, the accused occasioned a gross breach of trust reposed in him by his employer. He stole his employer's time and stationery to enable the conspiracy to achieve its felonious design. Those who work in bills and foreign exchange departments of financial institutions should be men and women of unquestionable integrity and impeccable honesty. The unwavering trustworthiness of the employees possessed of the special skills acquired as a result of working in these departments is fundamental to the confidence foreign investors repose in the financial institutions of this country. These departments are the nerve centres of international trade. Society has an interest in seeing those who seek to affect the confidence of foreign investors in the integrity of the financial institutions of the country severely punished for purposes of general deterrence.

The potential harm was colossal. The deterrent aspect of the punishment is emphasized by the appearance of the ugly face of the international crime syndicate. It is not by accident that millions of dollars were intended to be stolen. The amount would have been deliberately fixed taking into account the needs and numbers of the accomplices involved.

I must however guard against a passionate approach to sentencing and be conscious of the danger of imposing a sentence disproportionate with the accused's moral blameworthiness in the quest for deterrence. Where an international crime syndicate is involved there is a real danger of a sentencing court imposing a sentence that crushes an ant in an attempt to scare an elephant. In *S v Harington* 1988 (2) ZLR 344 (S) Dumbutshena CJ said at 365C-E:

"The appellant has to pay for her crime. But she must be sentenced rationally and fairly. This is one of the principles of criminal justice which requires that the punishments imposed by the court for crimes committed must themselves be just and fair. In balancing the scales of justice it is well to remember that:

"There must be an appropriate degree of severity in the range of punishment available in order that the criminal justice system as a

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MALABA J

whole can rationally demonstrate that a breach of the law is attended by real consequences.'

(see Australian Law Reform Commission Report No. 44 at para 287).

It is also well to remember that too harsh a sentence is as ineffective and unjust as is a sentence that is too lenient. In arriving at a just and fair sentence the court should never assume a vengeful attitude. Francis Bacon said in his essay "On Revenge', "Revenge is a kind of wild justice which, the more man's nature runs to, the more ought law to weed it out.' This is a principle that brings into the scales of justice the values of moral justice and compassion that caution against an 'insensitively censorious attitude' in sentencing a fellow mortal. In S v Rabie *supra* at 861D Holmes JA said:

> "Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognizing that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society. See S v Narker & Anor 1975 (1) SA 583 (A) at 586D.'"

The accused is a first offender aged 33, married with two children and has been the sole breadwinner for the family. The fact that this was the first time in many years for the accused to be convicted of a serious crime and that it has brought shame and suffering to the innocent members of his family, commands a compassionate view of his moral blameworthiness. The accused has suffered part of the punishment by being dismissed from a job that he had nurtured for ten years. To leave employment as a disgraced pauper and without medals for long service is punishment in itself. It is particularly so when one has only the floor of a prison cell to show in return for such a catastrophe in one's life. The accused did not benefit financially from the crime. The fraud was in fact not his brain child. It was conceived and sold to him by George Tolmay.

There are features of the letter of credit that suggest that it was, perhaps, a clumsy exercise condemned to failure *ab initio*. It was written on a bank's letter head. This was unusual. It was established by manual conveyance when under normal circumstances a telex or air-mail would have been used. It bore a second signature which did not appear in the Barclays Bank Zimbabwe

MALABA J

book of recognised signatures. It was in fact the dubious second signature that prompted the six international banks to resist the acceptance of the fake letter of credit.

There is no precedent to guide me in exercising my discretion in fixing the quantum of imprisonment to be imposed on the accused. I have sought the views of my brother judges in Bulawayo and Harare on the matter. In the exercise of my discretion and having considered all the factors relevant to the assessment of sentence, I impose a sentence of 12 years'

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imprisonment with labour on the accused. In view of the length of imprisonment, there is no need to suspend a portion of the sentence. The accused is therefore sentenced to 12 years' imprisonment with labour.

Cheda and Partners, legal practitioners for the accusedlaintiff's right to seek legal representation

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S v CHAWANDA 1996 (2) ZLR 8 (HC)

Court **High Court, Bulawayo**

Malaba J

Criminal review

14 June 1996 *(2) Judgment No. HB-45-96

Flynote

Criminal procedure (sentence) - statutory offences - Miscellaneous Offences Act [Chapter 9:15] - s 11 - making false report of rape to police - whether imprisonment justified

Headnote

A woman had consensual sexual intercourse with a man after he had promised to marry her. The man then informed her that he could not marry her because he was already married. Angered by his duplicity, she made a false report to the police that he had raped her. The man was arrested and was in custody for a few days before being released on bail. He was then on remand for eight months before the charge was withdrawn after the woman admitted that she had made a false report. The woman was convicted of making a false report of a crime in contravention of s 11 of the Miscellaneous Offences Act *[Chapter 9:15]* and was sentenced to three months' imprisonment with labour. On review:

Held, that where the penalty for a statutory offence is either a fine or imprisonment, it is a misdirection for a court to impose imprisonment without giving serious consideration to the imposition of a fine, particularly where the person concerned is a first offender.

Held, that the trial magistrate did not misdirect herself in the present case as she had decided that a fine was not appropriate.

Held, further, that the magistrate had taken into account all relevant mitigating and aggravating features and had properly decided that imprisonment

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MALABA J

was the only suitable punishment in the present case. There was therefore no basis for interfering with the sentence imposed.

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Cases cited:

S v Mayers HB-108-91

S v Muhenyere HB-31-92

S v Rutsvara S-2-89

S v Salah HB-84-90

S v Sobhan S-192-94

S v van Jaarsveld HB-110-90

Judgment

MALABA J: The accused was convicted, on her own plea of guilty, of contravening s 11 of the Miscellaneous Offences Act *[Chapter 9:15]* (the Act), by a magistrate sitting in Gweru on 14 May 1996. She was sentenced to 3 months' imprisonment with labour. The accused was legally represented in her trial. After sentence, her legal representative wrote a letter to the clerk of court requesting that the record of proceedings be referred to the High Court for the review of the sentence. The grounds on which the sentence was sought to be reviewed are contained in a written memorandum that accompanied the letter.

The facts on which the sentence was assessed are these. In the evening of 29 June 1995, the accused and one Anthony Kadozo had consensual sexual intercourse in Mr Kadozo's motor vehicle that they had parked in an open pit at Section 9, Mbizo Township in Kwekwe. In seducing the accused, Anthony Kadozo had promised to marry her. After having intercourse with her, he told the accused that he was unable to marry her because he already had a wife. The accused was annoyed by her seducer's untimely revelation of his marital status. She decided upon a plan to avenge her wounded feelings.

The accused went to Mbizo Police Station where she made a report to the effect that Anthony Kadozo had raped her in his car. The allegations of rape were, of course, false. The police, however, acted on the report; arrested the accused's seducer and detained him on a charge of rape. He was in detention from 1 - 4 July when he was released on bail. Mr Kadozo remained on remand for eight months before the charge was withdrawn by the prosecutor. On 25 October 1995, the accused went to Mbizo Police Station and deposed to an affidavit in which she disclosed for the first time that she had made a false report of having been raped by Anthony Kadozo.

The accused is a first offender aged 20 years, with one child aged three years.

MALABA J

She is unemployed, receiving support from her parents and other relatives. She told the court that she felt exploited and cheated by her seducer when he revealed to her his marital status. The accused also told the court that Anthony Kadozo had forgiven her for what she did and they

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had continued their love affair after his release from custody on bail. It is argued in the written memorandum that the trial magistrate failed properly to exercise the discretion conferred on her by s 11 of the Act. Section 11 provides that a person found guilty of contravening its provisions shall be "liable" to a fine not exceeding $100 or to imprisonment for a period not exceeding six months, or to both such fine and such imprisonment. The argument went on to suggest that the magistrate misdirected herself in imposing a sentence of imprisonment when the penalty section also provided for a fine.

The authority for the proposition that where a statute provided for a penalty of a fine or imprisonment, it is a misdirection on the part of the sentencing court to impose imprisonment without giving serious consideration to the imposition of a fine, particularly on a first offender, is found in the case of S v Muhenyere HB-31-92, cited by the accused's legal practitioner. At p 3 of the cyclostyled judgment in Muhenyere's case *supra* Blackie J, with the concurrence of Cheda J, quoted with approval from the decisions in the cases of S v Rutsvara S-2-89 and S v van Jaarsveld HB-110-90. The learned judge said:

> "It is trite that where the statute lays down a monetary penalty as well as a period of imprisonment the court must give consideration to the imposition of a fine. It would normally reserve imprisonment for bad cases."

The learned judge went on to say:

> "The magistrate clearly misdirected herself in failing to consider the imposition of a fine. The appellant is a first offender. These are not particularly serious offences in themselves and they are not bad examples of such offences. The magistrate herself says that they are not prevalent.
>
> In statutory offences permitting the imposition of a fine, the normal sentence for a first offender is a fine unless the offence is particularly serious or prevalent or there would be serious consequences if the deterrent of imprisonment is not used."

MALABA J

See *S v van Jaarsveld supra*.

The principle stated in the cases of S v Rutsvara and S v van Jaarsveld *supra* takes cognizance of the other principle to the effect that each case must ultimately depend on its own circumstances. In a well reasoned judgement, the trial magistrate applied her mind to the option of the imposition of a fine but exercised her discretion against that form of punishment. She said the reasons for not imposing a fine on the accused were: that she chose a serious offence to settle her scores with her seducer; that the false report led to the interference by the State with Mr Kadozo's personal liberty and that it was in the interests of society in general to deter people who deliberately abused the criminal justice system.

The trial magistrate did not therefore misdirect herself in any way. There is no gainsaying the fact that the crime chosen by the accused as the subject of her false report provokes in the minds of right thinking citizens repugnance towards the alleged rapist. The abhorrence with which the crime of rape is viewed by society finds recognition in the long terms of imprisonment often meted out to those convicted of the offence. If convicted, Mr Kadozo was liable to be sentenced to gaol for ten years, which is the maximum penalty a regional magistrates court can

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impose on a rapist.

The false report had serious consequences for Mr Kadozo. He was arrested, charged with rape and detained for four days before being released on bail. The rigours of incarceration are more painful to a detainee who knows that he is being held on a false charge. The accused did not have to assuage her wounded feelings by causing her seducer to suffer the humiliation and embarrassment of being arrested on a charge of rape and remaining on remand for eight months. She did not have to wait for four months from her seducer's arrest before going to the police station to make a clean breast of what she had done. By then the harm had been done.

The accused deliberately abused the criminal justice system. The police wasted their time and the scarce resources investigating a falsehood. People like the accused can only poison the attitude of the police towards victims of sexual assaults by their false reports in that the police would adopt a more hypercritical approach to reports of sexual crimes.

In my view, unless there are very strong mitigating features, a first offender who deliberately makes a false report of so serious an offence as rape and the victim is apprehended, detained and charged with the offence and placed on

MALABA J

remand before she or he makes a clean breast of what she or he has done, should expect a sentence of imprisonment.

In S v Salah HB-84-90 the appellant drafted a letter which he persuaded his girlfriend to write out for him. He sent the letter to the police under the name of "S E Dube". The letter alleged that the local magistrate was recruiting young men to become dissidents. The allegation against the magistrate was untrue. No action was taken against the magistrate by the police following the false report. Instead it was the appellant who got arrested and charged with contravening s 11 of the Miscellaneous Offences Act [Chapter 9:15]. He pleaded guilty, was convicted and sentenced to six months' imprisonment.

On appeal it was argued on behalf of the appellant that the sentence was excessive and induced a sense of shock. The appellant had previous convictions for offences involving dishonesty and driving but not for this type of offence. Imprisonment was held to be the appropriate sentence. It was, however, held that the maximum penalty of six months' imprisonment should be reserved for the most serious contravention. Suspending three months' imprisonment with labour of the sentence imposed by the trial court, Blackie J, with the concurrence of Muchechetere J (as he then was), said at p 2 of the cyclostyled judgment:

> "The allegations made by the appellant against the magistrate were serious in their content, in the person against whom they were made and the effects that they might have had. They were deliberate and planned and the appellant tried to disguise the true source of the allegations. Nevertheless allegations were crudely made, they had little likelihood of success against the magistrate and, in fact, they had no effect whatsoever."

In my view, the circumstances of this case make it more serious than Salah's case. The false report here had serious effects on Anthony Kadozo. The police arrested and detained him on the false charges instigated by the accused. This is the type of report that could have been

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believed because sexual intercourse would have been admitted by the suspect.

The facts of this case also distinguish it from the case of S v MayersHB-108-91, where a sentence of a fine was found to be the appropriate punishment. The appellant, a 23-year-old first offender and engineering technician, had been drinking on 18 April 1991 and on his way home at11.30 pm went through a red robot. He was seen by traffic police on patrol. When the police tried to stop him, the appellant raced away and escaped from

the police patrol car. He, however, later overturned his vehicle. He left the motor vehicle and went to Bulawayo Central Police Station where he reported that it had been stolen.

The appellant was charged with and pleaded guilty to the contravention of s 11 of the Act. He was sentenced to 8 weeks' imprisonment with labour, of which 6 weeks was suspended on conditions of good behaviour. On appeal the trial magistrate was held to have misdirected himself in sentencing the appellant by failing to distinguish between the stupid and irresponsible behaviour prior to the false report and the nature and effect of the false report itself. In setting the sentence of imprisonment aside and substituting, in its place, a sentence of a fine of $100 or in default of payment 2 months' imprisonment with labour together with 3 months' imprisonment with labour, the whole of which was suspended on condition of good behaviour, Blackie J with the concurrence of Muchechetere J (as he then was) delivered himself of the following at p 3 of the cyclostyled judgment:

> "A false report to the police can be a very serious matter. The police can be put to great and wasted effort. Innocent third parties may be adversely affected. Fortunately none of that happened here and the whole investigation was stopped because the appellant went back to the police and made a clean breast of what he had done."

What was found not to have happened in Mayer's case *supra*, thereby reducing his moral blameworthiness, happened in this case, thereby aggravating the accused's moral blameworthiness. The police were put to great and wasted effort in arresting her seducer, opening a docket for rape and charging him and placing him on remand. Whilst no third party was affected in Mayer's case *supra*, the same cannot be said for the accused's case.

Finally, a sentence of imprisonment was found appropriate in S v Sobhan S-192-94. The appellant had persuaded two of his employees to make false reports to the police of having been kidnapped by a Mr Moyo against whom he nursed a grudge. As a result of the false reports Mr Moyo was pursued by the police until he was apprehended in Chivhu and held in custody before being transferred to Harare. He was detained, possibly overnight. One of the appellant's employees confessed the falsity of the reports.

The appellant was sentenced to 6 months' imprisonment with labour. At the time his case was heard on appeal he had served 35 days of the sentence. It was argued on behalf of the appellant on appeal that as s 11 of the Act

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provided for a penalty of a fine or imprisonment, the trial magistrate had misdirected himself in not imposing a fine on the appellant. Dismissing the argument, McNally JA said the following at pp 2-3 of the cyclostyled judgment:

> "As far as sentence goes, the argument was that the statutory provision ($100 or six months or both) showed that a fine should have been considered.
>
> I am unable to agree. A provision such as this covers a wide variety of offences, from a frivolous accusation of some petty offence to a serious allegation of the commission of a major offence. This case is closer to the top end of the scale. The alleged crime falsely reported was a serious crime."

Whilst approving of imprisonment as the appropriate sentence, the learned Judge of Appeal said the appellant, being a foreigner, would be deported. The sentence of six months' imprisonment with labour was therefore considered too severe. It was set aside and substituted with a sentence of three months' imprisonment with labour, of which two months' imprisonment with labour was suspended on the usual conditions of good behaviour.

The trial magistrate in this case took into account the mitigating features of the case. She said it was because of the weight placed on the mitigating factors that she did not impose the maximum penalty of six months' imprisonment. Some of the mitigating factors she considered were that the accused voluntarily approached the police and made a clean breast of what she had done, was a first offender aged 20 and pleaded guilty showing contrition.

There is no doubt that the accused received a condign punishment for what she did. My brother Chatikobo J, whose views I sought on the grounds raised for review, has authorised me to say he agrees with the decision I reached in this case. The proceedings are therefore confirmed as being in accordance with real and substantial justice.

AFFRETAIR (PVT) LTD & ANOR v M K AIRLINES (PVT) LTD 1996 (2) ZLR 15 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

13 June & 4 July 1996 Judgment No. S-107-96

Flynote

Administrative law - review - role of courts in review of administrative decisions - nature of decisions that should be made - court's powers on review - when matter should be referred back to administrative body for fresh decision - bias previously demonstrated by administrative body - appropriate for reviewing court to substitute its own decision

Aviation - air service permit - issue of by Air Service Board - "need" for service proposed - correct approach to determining whether need exists - reasons for decision - requirement for Board to give reasons

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Headnote

The respondent company, a Zimbabwe-registered cargo airline (MK), applied to the Air Services Board, the second respondent, for an air service permit allowing it to carry air cargo on a charter basis. The first appellant objected to the permit and an enquiry was held in terms of s 18 of the Air Services Act *[Chapter 13:01]*. The Horticultural Promotion Council supported MK's application. The Board refused the application, without giving any reasons.

MK brought an action in the High Court to set aside the Board's decision and to direct the Board to issue a permit. It was contended that the Board's decision was grossly unreasonable and irregular and in breach of the Board's duty as the regulatory authority. It was also contended that the only reason Affretair objected was to stifle opposition.

Joint notice of opposition to MK's application was filed by the two appellants, using the Civil Division of the Attorney-General's Office as their joint legal representative. The Board denied any obligation to give reasons for

its decision, but contended that there was no need for the services because Affretair could satisfy the market. Its chairman, who purported to speak for both appellants, said that even if MK was an operator of the highest quality and no matter what its experience and financial standing, the Board was entitled to refuse to issue a permit. The High Court (Sandura JP) granted MK's application. On appeal:

Held, that the attitude of the Board's chairman demonstrated bias against MK and in favour of the objector. The conduct of the Board and its alignment of itself with Affretair's views suggested that the Board regarded itself as Affretair's ally against competition. There was an unfortunate lack of transparency on the part of the Board.

Held, further, that the role of the court in reviewing administrative decisions is to act as an umpire to ensure fairness and transparency, the latter being a word which could usefully be used to connote openness, frankness, honesty and the absence of bias, collusion, favouritism, bribery, corruption or underhand dealings and considerations of any sort. The duty of the court is not to dismiss the administrative authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. Provided that the court was satisfied that the authority had done that, it could not interfere merely because it did not approve of the authority's decision; though if the decision was hopelessly wrong, the court might say that the decision could only have been arrived at by reference to improper considerations or by failure to refer to proper ones.

Held, further, that the courts will expect from administrative bodies decisions that are legal, rational, procedurally proper, and justifiable, in that the administrative body will give its decision, at least when the decision is challenged, with reasons.

Held, further, that the Board's conclusion that there was no "need" for the service could not be justified on the facts. The Board's interpretation of the word "need" was also somewhat restrictive. The approach should have been to see how the needs of the horticultural industry would be met by a guaranteed, reliable and direct flight to their markets. *Held*, further, that while

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it is rare that the court would be justified in usurping the decision making function of the administrative body, there are four situations where the court might take such action. These are: (1) where the end result is a foregone conclusion and it would be a waste of time to refer the matter back; (2) where further delay could prejudice the applicant; (3) where the extent of bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction again; and (4) where the court is in as good a position as the

McNALLY J

administrative body to make the decision. In the present case (2) and (3) applied and for that reason the decision of the court *a quo* would be upheld.

Cases cited:

Blue Ribbon Foods Ltd v Dube NO & Anor 1993 (2) ZLR 146 (S)

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

Inkosinathi Property Developers v Min of Local Govt 1991 (4) SA 639 (Tk)

National Union of Textile Workers v Textile Workers Industrial Union & Ors 1988 (1) SA 925 (A)

PF-ZAPU v Min of Justice (2) 1985 (1) ZLR 305 (S)

Tikly & Ors v Johannes NO & Ors 1963 (2) SA 588 (T)

Union Govt v Union Steel Corp (SA) Ltd 1928 AD 220

Watchtower Bible & Tract Society of Pennsylvania & Anor v Drum Invstms (Pvt) Ltd & Ors 1993 (2) ZLR 67 (S)

Case Information

A P de Bourbon SC, with him *F Girach*, for the first appellant

Mrs L Hove, for the second appellant

J C Andersen SC, with him *P Nherere*, for the respondent

Judgment

McNally JA: At the inception of these proceedings Mr Andersen advised the court that he would not proceed with his application for the adduction of further evidence, and tendered wasted costs of opposition.

I will refer to the parties as "Affretair", "the Board" and "MK" respectively. The dispute arose when the Board refused MK an air services permit to carry general cargo on a charter basis virtually world-wide using three Douglas DC-8-55T aircraft. Affretair had objected to the issue of the permit. The proceedings were in terms of the Air Services Act *[Chapter 13:01]*, and in

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particular Part III thereof. An inquiry was held in terms of s 18 of the Act.

The inquiry was held on 24 February 1995. MK was adequately represented, and its only objection to the procedure adopted was that Affretair's written objection with supporting reasons was not made available to it prior to the hearing, as it should have been in terms of s 17 of the Act. However, this irregularity is not relied upon as causing any prejudice. Rather it is regarded as symptomatic of undue closeness between Affretair and the Board.

On 9 March 1995, the application was refused. No reasons were given. On 5 May 1995 MK launched in the High Court an application on notice of

motion that the decision be set aside and that the Board be directed to issue a permit in terms of the application, with costs. (The record does not contain a copy of the application). The application succeeded before Sandura JP, leading to the present appeal.

The contention for MK was that the decision was grossly unreasonable and irregular and in breach of the Board's duty as the regulatory authority. As to the objector, the contention was that it sought only to stifle competition.

In response, the Board denied any obligation to give reasons, but said, through its Chairman, Mr July Moyo, the then Secretary for Transport and Energy, that there was no need for the services offered. Affretair was able to satisfy the market, assisted where necessary by foreign airlines. It was necessary to allow these foreign airlines to operate because of the reciprocal nature of air services agreements. Affretair would not be able to operate abroad if foreign carriers were not allowed to operate in Zimbabwe.

He added that:

> "*even if MK can be an operator of the highest quality*, the Board after careful consideration of all the evidence before it refused quite legally to issue the permit" (my emphasis).

In reply to assertions about MK's international aviation experience and contacts, its connection with banks in Britain and Norway, and the availability of aircraft owned by the MK International Group, the Board Chairman said that:

> *"the respondents had no knowledge of these facts, but, even if they were true*, it cannot be said that the Board should therefore grant the permit to applicant when after considering the evidence the Board was satisfied that the application did not qualify" (my emphasis).

Two points emerge from this part of the Board Chairman's affidavit. The first is that he seems to be taking the attitude "We don't know how good you are and we don't even intend to find out how good you are, because the law allows us to refuse you a permit". This emerges from the passages underlined above.

The second noteworthy point is that Affretair and the Board lodged a joint notice of opposition, using the Civil Division of the Attorney-General's office as their joint legal representatives. The Board Chairman's affidavit used the words "the respondents (plural) have no knowledge of the

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above" in para 9 and similar words in para 2. He speaks both for the Board and for

McNALLY J

the objector. In para 10 he says, "It is denied that the second respondent (Affretair) objected for fear of competition". He is giving evidence on behalf of the objector, as to the objector's state of mind.

The first point demonstrates bias against the applicant. The second point demonstrates bias in favour of the objector. Compare Blue Ribbon Foods Ltd v Dube NO & Anor 1993 (2) ZLR 146 (S) at 149A-C.

There is further evidence of bias in the finding by the Board that -

> "The Directors of MK Airlines own companies outside Zimbabwe; Mr Kruger owns MK Airlines (UK) and Mr Ross [actually Rose] owns a company in Panama."

The facts are that MK is a Zimbabwean registered company and Mr Kruger is a Zimbabwean citizen. Mr Rose is a United Kingdom citizen who apparently has connections with Zimbabwe. Is it a matter for shame that a Zimbabwean owns a company abroad? To adopt, as the Board clearly does by these words, the claim by Affretair that MK is using Zimbabwe as a "flag of convenience" seems far-fetched, and consistent again with bias.

It is strange that MK should be anxious to enter a market where, on the finding of the Board, it can only lose money because the market is over-supplied. Should one not give some credence to a company prepared to back its contentions with its money?

It is strange that the expanding horticultural export industry, as represented by the Horticultural Promotion Council, should be supporting MK's application if, according to the Board and Affretair, the horticultural industry does not have a problem. Yet Affretair's assertions were specifically disputed as recently as 6 February 1995, less than three weeks before the Board meeting on the application.

It is strange that a Zimbabwean company should be regarded as a foreigner under a flag of convenience, and therefore suspect, when the Board concedes, and Affretair asserts, that any excess demand can be taken up by SAA and Cargolux who cannot, under any definition, be described as indigenous.

It is strange that the Board does not recognise the argument that a dynamic export orientated organisation like the flower and produce industry will expand its production if it knows that extra freight capacity is available.

McNALLY J

It appears from the papers that Affretair is wholly owned by the Government - I say this because its affidavit speaks of "the shareholder" in the singular as being "the Government". No doubt

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this is why, initially, Affretair was represented by the Government's law officers in the Civil Division of the Attorney-General's office.

It is nowhere claimed by the Board that it is in the public interest to shield Affretair from competition. Indeed, to the contrary, as I have shown, the Board asserts on Affretair's behalf that it is not afraid of competition. Affretair itself claims to be "a commercial operation driven by marketing requirements."

So protection of Affretair from competition is not, at least ostensibly, an issue. Yet the conduct of the Board, and its alignment of itself with Affretair's views, suggests that the Board regards itself as Affretair's ally against competition. There is here a lack of transparency which is unfortunate. It conveys a strong impression that the Board is biased in favour of Affretair.

It must also be said, with due respect, that there is a certain amount of what can only be described as unfounded bluster in the submissions on behalf of the Board and of Affretair. We are told, as one example, that for the courts to intervene in such matters as this would be unwise and could have serious consequences in view of the complex international agreements which govern reciprocal landing rights. However, no specific example of this is given. I consider that if a particular agreement with a particular country would indeed be adversely affected if the granting of a permit to MK were ordered, the Board should have given us chapter and verse. In the absence of any such specific reference, I do not think we should be intimidated by the vague suggestion that the wrath of the international community will descend upon us.

It is true, as Mrs Hove for the Board has pointed out, that the courts will not interfere with an administrative body's decision merely because it is considered unreasonable. She properly cited the words of Stratford JA (as he then was) in Union Government v Union Steel Corporation (South Africa) Ltd 1928 AD 220 at 237:

> "Emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is "inexplicable except on the assumption of mala fides or ulterior motive', ... or that it amounts to proof that the person on whom the discretion is conferred has not applied his mind to the matter ... "

McNALLY J

More recently, our own courts have adopted the test of what has been called "Wednesbury unreasonableness" or irrationality: see *PF-ZAPU v Min of Justice (2)* 1985 (1) ZLR 305 (S) at 326, and the cases which have followed it. We must not overlook the fact, however, that irrationality is only one of the tests propounded by Lord Diplock as a ground for judicial review. He suggests two others - illegality and procedural impropriety - and accepts that there may be other grounds. See the passage from his speech cited at p 326 of the *PF-ZAPU* case *supra*.

It seems to me, to put it in simple terms, that the role of the court in reviewing administrative decisions is to act as an umpire to ensure fairness and transparency. "Fairness" was Lord Denning's favourite word in his decisions on administrative matters. "Transparency" is a more modern but equally valuable word which, I venture to suggest, could usefully be used in such decisions to connote openness, frankness, honesty and the absence of bias, collusion,

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favouritism, bribery and corruption, and underhand dealings and considerations of any sort.

Government or quasi-government Boards and municipal authorities are often in positions of great power and influence when it comes to issuing or denying licences. A great deal of money is often at stake. The danger that they may be unduly influenced in one way or another, in one direction or the other, is therefore appreciable.

The duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. If we are satisfied it has done that, we cannot interfere just because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases we reason backwards from the effect to the cause. We say "the result is so bizarre that the process by which it was reached must have been unfair or lacking in transparency".

So, in the result, the courts will expect from administrative bodies decisions that are -

1. *Legal*, in the sense that they are made within the framework of the law which empowers them to make the decision, and after the application of the appropriate criteria laid down in the statute or statutory instrument;

McNALLY J

2. *Rational*, in the sense that they are not so wrong as to lead to the conclusion that they could only have been reached by a failure to apply the right criteria or by the application, whether deliberately or not, of the wrong criteria.

3. *Procedurally proper*, in the sense that the appropriate procedures required by the statute have been followed and that the principles of natural justice have been observed.

4. *Justifiable*, in that the administrative body will give its decision, at least when the decision is challenged, with reasons. The purpose of requiring reasons is that the court can then more readily determine the propriety and reviewability of the decision.

The learned Judge President set out with telling impact twelve documents which supported the contentions of the applicant. Mrs Hove has argued that they are from interested parties and therefore should be looked at with suspicion. But this, with respect, is perverse reasoning. Of course they are interested parties. Why would uninterested parties write letters of support? The letters were from the customers who use and who depend upon air cargo transport for their livelihood. Their evidence is important and reliable precisely because they are interested parties. Indeed, it is the evidence of the competing and objecting airline, Affretair, which should have been scrutinised with care, because they have a potentially wrongful interest - to protect their own monopoly position. I do not make that accusation. I say only that the danger must be guarded against.

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The effect of the evidence was this:

1. The horticultural producers said the cargo space available for them in the 1994-95 season had been inadequate and they supported MK's application.

2. Affretair said it acknowledged problems in 1994-95, but next year would be better.

3. The horticultural producers responded that even looking at next year's proposed schedules, they would like additional flights to be available. They persisted in their support of the application.

4. One may add that next year's promises and next year's performance are not always the same thing.

McNALLY J

The Board found, on this evidence, that there was no need for further cargo space on a charter basis. It left Affretair virtually in a monopoly situation, because SAA and Cargolux were merely standby facilities. It said (flatly contradicting MK for no apparent reason) that "it is denied that applicant's company will be cheaper". I do not understand how an impartial board could make such an allegation.

One has the impression that the Board's interpretation of "need" is somewhat restrictive. In the case of the horticultural industry (and I speak of it because there was no evidence from or discussions about any other potential customer) one does not say "I must see dead flowers on the tarmac before I am convinced there is a need". The approach should surely be a creative one - "How much more would the growers produce if they had a guaranteed, reliable and direct flight to their markets? And how can we ensure that their need, in that sense, is met?" That, I would suggest with respect, is the standard by which the public interest is served.

All in all, I would agree with the learned Judge President that the decision of the Board is *prima facie* unreasonable. And because of the other indications to which I have referred, of -

1. bias in favour of Affretair, the objector;

2. an unduly restrictive interpretation of the criteria of "need" and "the public interest",

I would agree that the court was justified in setting aside the decision.

But I must confess to some initial hesitation over para 2 of the order made by the learned Judge President for two reasons:

1. I think the cases will be very rare when the court will be justified in virtually usurping the role of the administrative body. The position may be different when the relevant legislation provides for an appeal to the courts, but here we are dealing only with a review. In this context see the distinction made between the two procedures in *Tikly & Ors v Johannes NO & Ors* 1963 (2) SA 588 (T) at 590F-591A, approved in *National Union of Textile Workers v Textile Workers Industrial Union* 1988 (1) SA 925 (A) at

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937C et seq, and in this court in *Watchtower Bible & Tract Society of Pennsylvania & Anor v Drum Investments (Pvt) Ltd & Ors* 1993 (2) ZLR 67 (S).

McNALLY J

2. The evidence adduced in this particular case concentrated exclusively on the flying of horticultural produce to markets in Holland. Nothing was said about all the other destinations, virtually world-wide, for which MK made application. In the circumstances, the Board might properly have wanted further information or might have proposed conditions on the permit, as it is authorised to do in terms of s 14 of the Act. (On the other hand neither the Board nor Affretair raised this issue).

I rely in particular upon that passage in the *Tikly* judgment *supra* where Trollip J (as he then was) said that a review was -

> "a limited re-hearing with or without additional evidence or information, to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly."

I rely also on the comments in Baxter's Administrative Law at p 681, as follows:

> "The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be ultra vires the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise "would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislature'. Thus it is said that: "[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances this principle will be departed from. The overriding principle is that of fairness.'"

In the judgment of the Chief Justice in *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 at 361E et seq and in Inkosinathi Property Developers v Min of Local Government 1991 (4) SA 639 (Tk) at 645B et seq the four criteria set out in the work by Baxter to which I have referred, are cited with approval. It is necessary to consider each of the criteria in turn.

The first situation is where the end result is a foregone conclusion and it would be merely a waste of time to refer the matter back. The situation would normally arise in a simple "yes" or "no" choice. Here, however, it is not just

McNALLY J

a question whether or not to issue a licence. The application, as I understand it, was to conduct unrestricted charter flights to almost everywhere in the world except South Africa. Yet the only evidence led related to horticultural products destined for Holland. It may be that it would be reasonable to impose restrictions or conditions, as authorised by s 14 of the Act. Clearly if such restrictions or conditions were proposed, a proper opportunity should be given to the parties to object to them, or in the case of Affretair, to support them.

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The second situation is where further delay could cause unjustifiable prejudice to the applicant. Obviously any delay prejudices the applicant. The busy season for horticulture is the European winter, and there is very little time to go before that season arrives.

The third situation is where the extent of the bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction again. This has given me the most concern. MK, while not specifically alleging bias, has clearly considered that the unreasonableness of the decision was evidence of an improper motive. That motive could only have been bias, both against MK and in favour of Affretair. I have found that there is clear evidence of such bias. That is a very strong argument for removing the Board's discretion by ordering it to proceed as the learned Judge President has done.

The fourth situation is where the court is in as good a position as the Board to make the decision.

I would hesitate to say that is the situation here, because of the facts to which I have referred under the first situation. We do not know anything about the need or the public interest in relation to cargoes other than horticultural to destinations other than Holland.

Put shortly, the danger of referring the matter back is first, further delay, and second, that the Board, having demonstrated its bias, is unlikely to change. We create the risk that it will simply repeat its earlier decision while choosing its words more carefully to avoid the appearance of bias.

The danger of directing it to issue a licence is that, as I have indicated, there may be reasonable conditions and restrictions or route limitations which it might wish to impose, and about which we have no knowledge.

On balance, having weighed the pros and cons, I see no adequate reason to

interfere with the learned Judge President's exercise of his discretion. The dangers, on a close study of the Act, are limited by the following considerations:

1. In terms of s 14(1) of the Act the Board may impose conditions. In the present case the order of the High Court would not prevent the Board from imposing normal or standard conditions provided only that conditions designed to frustrate the order of the court would not be acceptable.

2. A permit cannot be granted for longer than five years and ss 21 and 23 allow the Board to hold an inquiry if it considers, inter alia, that it would be expedient in the public interest to revoke or vary the permit any time before its expiry. The Board has a continuing monitoring role over the operation of the permit.

3. We are dealing only with charters and not with regular airline services.

In these circumstances I would consider that the balance of advantage lies in following the

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course adopted by the learned Judge President.

Accordingly the appeal is dismissed with costs, save that the wasted costs incurred by the appellants in opposing the respondent's application are to be borne by the respondent.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Rainor Robinson, first appellant's legal practitioner

Civil Division of the Attorney-General's Office, second appellant's legal practitioner

Kantor & Immerman, respondent's legal practitioners

TUBBS (PVT) LTD v MWAMUKA 1996 (2) ZLR 27 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

27 June & 4 July 1996 Judgment No. S-116-96

Flynote

Contract - exemption clauses - principles applicable - vehicle left for repair at garage and parts found to have been stolen from it - notice purporting to relieve garage from liability for loss, however caused - whether exemption notice brought to attention of person contracting - loss caused by theft by director or servant of garage - extent to which exemption clause covers loss caused by *dolus* or other unlawful act

Headnote

By telephone the respondent entered into a contract with the appellant garage. The garage agreed to collect the respondent's vehicle and carry out repairs to it. He later visited the garage to find out what progress had been made in repairing his vehicle. Eventually he decided to retrieve his vehicle. He found that a lot of engine parts were missing from the vehicle. The overwhelming probability was that a former director of the garage had stolen these parts.

The respondent sought to recover the value of the missing parts in an action against the garage. The garage raised the defence that the contract was subject to an exemption that exempted it from liability for any loss or damage however caused. This exemption was contained in notices at the garage. The garage stated that the notices had not been drawn specifically to the respondent's attention but that the respondent must have seen the notices and must have contracted on that basis. The trial judge gave judgment for the respondent and the garage appealed against that decision.

Held, that at common law the right of a party to sue for loss or damage to property may be

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excluded by the express terms of the contract. But any

claim to such exemption must be examined in accordance with these well-established principles:

- The words of the exclusionary clause must be read as part of the contract as a whole and they must be sufficiently clear and comprehensive to require the court to give effect to them.
- Any ambiguity as to the meaning and scope of the exemption must be resolved against the party who inserted it and the latter must prove that the words used clearly and aptly embraced the contingency that has arisen.
- If there is not express reference to negligence in the exemption, the court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence on the part of the defendant or his servants and, if they are, whether the claim for damages may be based on some ground other than negligence.
- Where the existence of an exemption excluding liability for negligence is not in dispute, the burden of establishing any other possible ground for liability, such as gross negligence or *dolus*, rests upon the claimant.
- The exemption must be brought to the attention of the other party or must be within the knowledge of the other party. Where an "owner's risk" notice is displayed so conspicuously that a normal person could hardly have failed to see it, an inference will be drawn that it was seen by the other party.
- The exemption will not avail unless it was known at the time that the contract was entered into; it is not binding if the party against whom it was to be applied only became aware of the exemption after he had already entered into the contract.
- A court may presume notice of the exemption from previous dealings between the parties.
- A party cannot exempt himself from liability for the wilful misconduct or criminal or dishonest activity of himself, his servants or his agents or perhaps even from the loss of or damage to the subject matter of the contract resulting from gross negligence on his part or the part of his servants or agents.

Held, further, that the respondent was not aware of the exemption notice at the time he contracted by telephone with the garage and it was immaterial therefore that he might have become aware of the exemption notice later.

Held, further, that in any event the exemption clause did not apply as the loss was probably caused by the stealing of the parts by a former director of the garage, and a person cannot exempt himself from liability for loss caused by the *dolus* of his servants.

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GUBBAY CJ

Held, therefore, that the appeal must be dismissed.

Cases cited:

Arter v Burt 1922 AD 303

Bristow v Lycett 1971 (2) RLR 206 (A)

Canada Steamship Lines Ltd v Regem [1952] 1 All ER 305 (PC)

East London Municipality v SAR&H 1951 (4) SA 466 (E)

Germani v Herf & Anor 1975 (4) SA 887 (A)

J Spurling Ltd v Bradshaw [1956] 2 All ER 121 (CA)

King's Car Hire (Pty) Ltd v Wakeling 1970 (4) SA 640 (N)

Micor Shipping (Pty) Ltd v Treger Golf & Sports (Pty) Ltd & Anor 1977 (2) SA 709 (W)

Morrison v Anglo Deep Gold Mines Ltd 1905 TS 775

Olley v Marlborough Court Ltd [1949] 1 All ER 127 (CA)

Peard v Rennie & Sons (1895) 16 NLR 175

Shubara Ranch (Pvt) Ltd v Shield of Zimbabwe Ins Co Ltd 1988 (2) ZLR 306 (S)

Stocks & Stocks (Pty) Ltd v T J Daly & Son (Pty) Ltd 1979 (3) SA 754 (A)

Transport & Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd 1991 (1) ZLR 190 (S)

Watt (or Thomas) v Thomas [1947] 1 All ER 582 (HL)

Wells v SA Aluminite Co 1927 AD 69

Case Information

H Simpson, for the appellant

J B Colegrave, for the respondent

Judgment

Gubbay CJ: At all times material to this appeal the business of a garage and service station, under the name of Avonlea Service Station, was carried on by the appellant. It specialised in the servicing and repair of Mercedes Benz and BMW motor vehicles. Mr Peter Turnbull was the managing director. His co-director and shareholder was a Mr A Underwood. He was certainly

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not a mere figurehead, for Mr Turnbull termed him as his "partner".

The appellant's business was located at the corner of Lomagundi Road and Avonlea Drive in Harare. The premises comprised a reception area adjoining to which was a large covered workshop known as the service bay. In the front of the building was the forecourt with a number of petrol pumps. At the rear of the service bay was a yard, fully enclosed by a high wall. Vehicles not under immediate repair were parked there. In the reception area a notice board was displayed which warned customers that any item left in motor vehicles was at their own risk. A glass partition extending from floor to

ceiling divided the reception area from the service bay. Secured to the far wall of the service bay was another board measuring approximately four feet by two feet. Upon it, in bold white capital letters, were the words: "All motor vehicles are left totally at owners risk and the management accepts no responsibility for any loss or damage however caused." The glass partition did not face the main entrance to the reception are; but a customer upon entering, and looking to the right, would have been able to read the "owner's risk" exemption through the glass partition.

One of the appellant's long-standing and esteemed customers was the respondent. He was the owner of a Mercedes Benz 350S sedan. The respondent had high regard for Mr Turnbull's expertise as a motor mechanic, especially with regard to the servicing and repair of Mercedes Benz motor vehicles. Consequently, whenever the need arose, he would take his motor vehicle to be attended to by Avonlea Service Station.

In January 1991 the engine of the respondent's Mercedes Benz required major repair. The engine had seized through lack of oil. The respondent telephoned the appellant and, in all probability, spoke to Mr Underwood. It was agreed between them that the appellant would strip the engine, examine the damage sustained and carry out the repair. So the respondent arranged for the Mercedes Benz to be towed to Avonlea Service Station. He did not accompany its arrival there.

The engine was duly stripped and the parts detached in the process were placed in the boot of the vehicle. The examination revealed that numerous parts had to be replaced. These the appellant undertook to procure and thereafter carry out the repair. In the interim the Mercedes Benz was locked and parked in the enclosed yard, with its keys hung upon a board in the service bay.

From time to time the respondent either went personally or telephoned to Avonlea Service Station in order to ascertain what progress was being made with the repair of the engine. He was told of the continuing difficulty in obtaining the necessary spare parts.

In June 1992 the respondent learned that the appellant was shortly to move its business to Msasa. This decided him to retrieve the Mercedes Benz and engage another mechanic to effect the repair. He visited Avonlea Service Station with Mr Ignatius Govere the mechanic and Mr Richard Mashave an insurance broker.

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GUBBAY CJ

It was on that occasion that a lot of the engine parts were found missing. These were listed in the presence of an employee of the appellant and were later valued at $35 436,82. Mr Turnbull readily acknowledged that the engine parts had been stolen from the boot of the Mercedes Benz. He was absolutely convinced that his erstwhile "partner" was the thief. The latter, he explained, had been arrested on charges of fraud, car theft and dealing in drugs, and upon being admitted to bail, had fled the country.

All I have recounted so far was common cause between the parties.

The respondent instituted proceedings in the High Court for payment of the sum of $35 436,82 with interest thereon a *tempore morae* from the date of summons, and costs of suit. The appellant admitted that the notice exempting liability "for any loss or damage however caused" had not been drawn specifically to the respondent's attention. Nonetheless, it raised as a defence to the action that the respondent must have seen the notice, which was prominently displayed, and had contracted on that basis. Mubako J, who presided at the trial, gave judgment for the respondent. It is the appellant's complaint that he erred in so doing.

At common law the right of a party to sue for loss or damage to property may be excluded by the express terms of the contract entered into. But any claim to such exemption of liability should be examined in accordance with the following well-established propositions:

(1) The words of the exclusionary clause must be read as part of the contract as a whole. See *Bristow v Lycett* 1971 (2) RLR 206 (A) at 221G-H; *Transport & Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd* 1991 (1) ZLR 190 (S) at 195F-G. They must be sufficiently clear and comprehensive so as to require a court to give effect to them. See the *Transport & Crane Hire* case *supra* at 196A-B.

(2) Any ambiguity as to the meaning or scope of the excluding or limiting term must be resolved against the party who inserted it - the proferens. It is for the latter to prove that the words used clearly and aptly embrace the contingency that has arisen. See *Shubara Ranch \(Pvt\) Ltd v Shield of Zimbabwe Insurance Co Ltd* 1988 (2) ZLR 306 (S) at 309H-310A.

(3) If there is no express reference to negligence in the exemption clause, the court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence on the part of the proferens and/or his

GUBBAY CJ

servants; and if they are, whether "the head of damage may be based on some ground other than negligence", *per* Lord Morton of Henryton in *Canada Steamship Lines Ltd v Regem* [1952] 1 All ER 305 (PC) at 310C, quoted with approval in the *Transport &*

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Crane Hire case *supra* at 198B-D.

(4) Where the existence of an "owners risk" clause excluding liability for negligence is not in dispute, the burden of establishing any other possible ground of liability, such as gross negligence or *dolus*, rests upon the claimant. See *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at 643B: *Stocks & Stocks (Pty) Ltd v T J Daly & Son (Pty) Ltd* 1979 (3) SA 754 (A) at 760E-F.

(5) The excluding or limiting term must be brought to the attention of the party against whom its protection is sought; or otherwise be within his knowledge. See *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd & Anor* 1977 (2) SA 709 (W) at 713H-714A. Where an "owner's risk" notice is displayed so conspicuously that a normal person could hardly have failed to see it, an inference that it was seen will be drawn.

(6) The time when the excluding or limiting term is alleged to have been given is of great importance. Such a term will not avail the proferens unless the other party was aware of it before the contract was entered into. A belated notice is valueless. To give effect to it would be to alter unilaterally the terms of the contract. See *Olley v Marlborough Court Ltd* [1949] 1 All ER 127 (CA) at 134C-D; *Peard v Rennie & Sons* (1895) 16 NLR 175 at 183.

(7) A court may, however, presume notice of the exempting term from previous dealings between the parties. See *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121 (CA) at 125H-I.

(8) A party cannot exempt himself from liability for the wilful misconduct or criminal or dishonest activity, of himself, his servants or agents; or perhaps, even from the loss of or damage to the merx resulting from gross negligence on his or their part. See Christie *The Law of Contract in South Africa* 2 ed at 213-214.

The learned trial judge believed the evidence of the respondent that he had never seen the "owner's risk" notice on the wall of the service bay at any stage of his dealings with the appellant. He also accepted the word of Mr Mashave

and that of Mr Govere that when visiting Avonlea Service Station they, too, did not observe the notice board in the service bay. The apposite passage in the judgment reads:

> "On the other hand there is no evidence that the plaintiff saw the sign. In point of fact three witnesses who did business with the garage on a number of occasions never saw the notice on the wall. The plaintiff himself had much less opportunity to see the notice since he would come to see his car which was parked at the far end of the back yard. It was indeed possible for a customer to come to the reception and not see the sign. I believe him when he says that nobody drew his attention to the existence or purport of the notice. No-one of the defendant's members of staff came forward to say he did. If the plaintiff had known of such an exclusion clause it is unlikely that he would have accepted it. Most probably he would not have left the car in the custody of the defendant for eighteen months if he knew that he could not claim for any loss or damage to the car while it was in that garage."

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In my view, the finding that the respondent was not aware of any measure taken by the appellant to limit its liability to its customers is beyond interference. See *Arter v Burt* 1922 AD 303 at 306; *Germani v Herf & Anor* 1975 (4) SA 887 (A) at 903D; *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 (HL) at 590B-D.

Even if it were to be assumed that the respondent in fact observed the "owners risk" notice, he decidedly did not do so at the critical stage of entering into the agreement. For the agreement was concluded over the telephone, and the respondent only visited the appellant's premises two or three weeks later. The exclusion of liability "for any loss or damage however caused" cannot be taken therefore as a term of the agreement between the parties.

It is, of course, true that the respondent had dealings with the appellant prior to January 1991. But it was never the appellant's contention that the respondent would have become aware of the notice by reason of such earlier visits.

In short, notwithstanding the existence of the notice board on the wall of the service bay, there was direct and cogent evidence that the respondent was unaware of it.

Accordingly it is unnecessary to consider whether the wording of the notice,

which contained no express reference to negligence, was such as to exclude liability arising from negligence. To put it differently, whether the words used were wide enough to cover the negligence of the appellant committed through the agency of its servants.

I should state, however, that the overwhelming probability that the engine parts were stolen by the appellant's former director Mr Underwood constituted yet another insuperable obstacle to the appellant's defence. As already indicated, a party cannot seek to exempt himself from liability for loss or damage to the property of another caused by his own *dolus* or that of his servants. To permit of such a situation would be contra bonos mores. See *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775 at 784 in fine - 785; *Wells v SA Aluminite Co* 1927 AD 68 at 72; *East London Municipality v South African Railways & Harbours* 1951 (4) SA 466 (E) at 490C-D.

It follows that I am in respectful agreement with the decision of the court *a quo*. The appeal fails and is dismissed with costs.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Byron, Venturas & Travlos, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

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LAWSON v MINISTER OF HOME AFFAIRS & ANOR 1996 (2) ZLR 35 (HC)

Court **High Court, Harare**

Chinhengo J

Civil action

17 June & 10 July 1996 Judgment No. HH-91-96

Flynote

Damages - delict - actio injuriarum - wrongful arrest and detention - young man accused of malicious injury to property - summoned to police station and denied access to parents and legal adviser - on arrival at court, lodged in detention cells

Headnote

The plaintiff, a young man of 20, had been involved in an incident at a cafè which resulted in a report being made to the police. Three days later, he went to the police station at the request of the police. He was there told by the second defendant, a police sergeant, that he would be appearing in court that morning on a charge of malicious injury to property. He was denied permission to contact his parents or legal adviser. The sergeant then asked the plaintiff to drive him and some other accused persons to the court. The other persons were to appear in court on charges unrelated to the plaintiff's. The plaintiff obliged. On arrival at the court, the second defendant handcuffed the plaintiff and lodged him in the holding cells, where he remained for over 2 hours. There he was verbally abused by other inmates of the cells and by prison officers. Again, he was denied access to his parents and legal adviser.

Held, that there was no lawful basis for arresting and detaining the plaintiff. He was needlessly deprived of his liberty. The second defendant's moral blameworthiness was high, and he exhibited a degree of vindictiveness that was completely out of proportion to what the plaintiff had done. High handed action by law enforcement agencies infringes the precious commodity of liberty and should be deprecated in clear terms. In the light of other precedents, damages

CHINHENGO J

in the sum of $4000 would be appropriate, with costs on the High Court scale.

Cases cited:

Chitunya v Min of Home Affairs HH-261-89

Feldman v Min of Home Affairs 1992 (2) ZLR 304 (S)

Masawi v Chabata \& Anor 1991 (1) ZLR 148 (H)

Min of Home Affairs v Allen 1986 (1) ZLR 263 (S)

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Muzondo v Min of Home Affairs 1993 (1) ZLR 92 (S)

Case Information

J O'Brien, for the plaintiff

H Mukonoweshuro, for the defendants

Judgment

Chinhengo J: The plaintiff claims against the Minister of Home Affairs (the first defendant) and Sergeant Muzondiwa (the second defendant) the sum of $12 000, being damages for wrongful arrest and detention. The Minister of Home Affairs is cited as a defendant because he controls the Ministry of Home Affairs which employs the second defendant as a member of the police force. The Minister is, therefore, vicariously liable because, at the relevant time, the second defendant was about his official duties and acted within the course and scope of his employment.

At the conclusion of the trial, the legal practitioners for both the plaintiff and the defendant prepared written submissions. In his submissions, Mr Mukonoweshuro for the defendant, conceded that the plaintiff's arrest and detention was unlawful. This concession meant that the only issue which remained for the court to determine was the quantum of damages which the defendant was liable to pay to the plaintiff.

It is necessary for me to outline, in brief, the facts in this case in order to provide the basis on which I will make a determination of the quantum of damages.

The plaintiff is a 20-year-old male. When the cause of action arose, the plaintiff was unemployed and was living with his parents. On l July l994, the plaintiff and his friends went to the Italian Bakery at Avondale Shopping Centre for some coffee. At the end of their gathering the plaintiff conducted himself in such a manner as led to the damage of property belonging to the Italian Bakery, to wit, a table. This incident was reported to the police at Avondale Police Station. The plaintiff was called to the police station and charged with malicious injury to property. The plaintiff was subsequently

found guilty of this offence and was sentenced to a fine of $800, or in default of payment, to 30 days' imprisonment with labour.*(3)

The plaintiff's conviction on the charge of malicious injury to property was not in issue in this trial. The court was concerned only with the events of 4 July l994. On that day the plaintiff reported to Avondale Police Station early in the morning at about 8.00 am as he had been required to do. Upon reporting, the plaintiff was advised by the second defendant that he was required to appear in court that morning. The plaintiff asked the second defendant for permission to contact his legal practitioner and his parents. He was denied such permission. Needless to mention, it was plaintiff's right to seek legal representation and that the second

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defendant violated plaintiff's rights in that regard.

When the plaintiff was advised that he had to appear in court forthwith that morning he believed that he no longer had any choice in the matter. The second defendant then asked the plaintiff to drive him (i.e. the second defendant), a State witness and two other accused persons to Harare magistrates court. The latter two persons were unconnected to plaintiff's case and were to appear in court on separate charges. No evidence was adduced in court to suggest that the plaintiff was compelled to transport these persons to Harare magistrates court in his motor vehicle which, incidentally, he had borrowed from a friend. The plaintiff co-operated with the police and obliged.

When they arrived at the court, the plaintiff's evidence is that the second defendant arrested him by handcuffing his hands, required him to remove his personal property and lodged him in the holding cells. He was, in consequence of this action by the second defendant, detained in custody for 2 hours. Throughout the period of his detention the plaintiff was denied access to his legal practitioner and to his parents. He was lodged in the holding cells together with l5 to 20 other accused persons. The holding cells have one open toilet. There is no privacy in these cells and the inmates relieved themselves in or about the holding cell without regard to the imperatives of hygiene. The plaintiff was mocked and verbally abused by both the inmates and some prison guards. He told the court that he was horrified by the conditions in the holding cell and terrified by the manner in which he was treated therein.

The second defendant's evidence was that when the plaintiff reported to him at the police station on the morning of 4 July l994, the police station did not have motor vehicles on hand to transport accused persons and the witness to

Harare magistrates court. The plaintiff offered to use his vehicle for this purpose. On arrival at the court, the second defendant handed the plaintiff over to the prison guards who then handcuffed him and lodged him in the holding cells. The second defendant denied that he himself handcuffed the plaintiff or lodged him in the holding cells or that he directed the prison officers to detain the plaintiff. He told the court that he only followed the normal procedures for bringing accused persons to court and so, after handing the plaintiff over to prison officers, he returned to his station. In view of the concession made by counsel for the defendants, it is no longer necessary for me to make a finding on the facts in this matter or analyse the evidence for this purpose.

The second defendant admitted under cross examination that the plaintiff had co-operated with him all the time. He admitted that at no time did he suspect that the plaintiff would abscond or interfere with the State witness. This evidence seems to support the view that the plaintiff was not forced to transport the second defendant, the State witness and the two accused persons to Harare magistrates court. He may have been obliquely required to do so but all the same he obliged.

The evidence of the second defendant was not truthful in the main. Faced with the

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overwhelming evidence against the second defendant, which evidence I shall not, as already mentioned, analyse any further in this judgment, the concession by Mr Mukonoweshuro, that the plaintiff was wrongfully arrested and detained, could not be faulted. On the facts and evidence in this matter, I would have arrived at the same conclusion had the concession not been timeously made. I am therefore satisfied that the plaintiff was unlawfully arrested and detained for about 2 hours and that there was no lawful basis for arresting and detaining the plaintiff in the circumstances.

The arrest and detention of the plaintiff was uncalled for. The plaintiff had co-operated with the police and assisted them in transporting to the court the investigating officer, the State witness and two other persons. The plaintiff's reward was an arrest and detention. He was needlessly deprived of his liberty. The deprivation of a person's liberty is a serious invasion of the freedoms and rights of the individual. It is the court's duty to safeguard the individual's freedoms and rights against their invasion. The liberty of the individual is a precious commodity. High handed action by the law enforcement agencies infringes on this precious commodity and should be deprecated in clear terms.

CHINHENGO J

In *Muzondo v Min of Home Affairs* l993 (l) ZLR 92 (S) an elderly grandmother in her early sixties was unlawfully arrested and detained for twenty one hours on the eve and morning of Christmas. She was awarded $3 000 as damages.

In *Feldman v Min of Home Affairs* l992 (2) ZLR 304 (S) the plaintiff was strip-searched and detained overnight. She was awarded $2 500.

In *Min of Home Affairs v Allan* l986 (l) ZLR 263 (S) the plaintiff was detained in a police station for a number of hours. His movements were restricted when he was allowed but required to spend the night with his friend on the undertaking that he would return to the police station the following morning. The plaintiff was not actually imprisoned. He was awarded the sum of $3 000 in damages by the High Court. This amount was reduced to $2 000 on appeal. In making this award McNally JA said at p 272 F to 273C:

> "It does seem to me, however, that there was a failure to give full weight to the relative considerateness of the police officers after the first, arbitrary and wrongful decision to arrest had been taken. The arresting detail acted from a good motive. He was concerned about the security of the State. He made an error of judgment on the facts of this particular case in allowing that concern to override his concern for the rights of the individual. Similarly, the investigating officer, having failed to release Mr Allan after brief questioning, as he should have done, was again considerate enough to suggest that Mr Allan spend the night at a friend's house. The next morning he agreed to an arrangement for developing the film privately so as to minimise the inconvenience caused to Mr Allan. One must, of course, suspect that much of this considerateness arose from at least a sneaking suspicion on the part of the police that the arrest and detention were unjustified. Be that as it may, the fact remains that Mr Allan was neither harassed nor put behind bars. He was inconvenienced and put to unnecessary worry by some clumsy but well intentioned actions of the police.
>
> In the circumstances it does seem to me that the sum of $3 000, which was the full amount of the damages claimed, was an excessive award. It would have been appropriate had there been ill-treatment and/or incarceration. In the circumstances I think $2 000 is an appropriate award and I consider the difference significant

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enough to warrant interference."

The learned Judge of Appeal considered a number of factors which in his view justified an award of damages lower than $3 000. He was satisfied that

CHINHENGO J

the police had acted with good intentions and had been considerate in their treatment of the plaintiff. The plaintiff (respondent on appeal) was not at any time harassed nor was he imprisoned or incarcerated. He was, however, "inconvenienced and put to unnecessary worry by some clumsy but well-intentioned actions of the police". In the case before me, the second defendant displayed an indifference to the assistance which the plaintiff had rendered to the police and his willingness to co-operate with them and in my view this would justify a high award in damages. The plaintiff was imprisoned. Even though the duration of imprisonment was short compared to the periods of detention in some of the cases to which I have referred, I am satisfied that the treatment which the plaintiff received and at his age are such factors as would entitle him to an award of damages higer than in other comparable cases.

In *Masawi v Chabata* *& Anor* l99l (l) ZLR 148 (H) at 159F, Greenland J summarised the facts of the case as follows:

> "In the present case, the plaintiff was deprived of his liberty for some 2 hours 40 minutes as a result of the misguided but well intentioned actions of the police. Having seen Inspector Bunga give evidence I have no doubt that the police genuinely believed that theirs was the best course of action to avoid a potentially explosive situation getting out of control. It is all too easy to now take an armchair view of the matter and say that they ought to have counselled Mr Chabata to let things await morning when lawyers could be contacted at their homes even though the day would be a Sunday."

This was a case in which the plaintiff was arrested wrongfully by the police in his home, taken to the police station and detained unlawfully for 2 hours 40 minutes. He was insulted and humiliated by the police but was not assaulted. He was awarded $3 000 in damages.

The good intentions of the police in Allan's case and in the Masawi cases were redeeming features which are not present in the case before me.

In articulating the principle upon which the quantum of damages should be determined, Greenland J in Masawi's case *supra* said at 159A-B:

> "As regards *quantum* it must be borne in mind that the primary object of the *actio injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as *solatium* for the injury to his

CHINHENGO J

> feelings. The court has to relate the moral blameworthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim.
>
> Because of the various subjective aspects involved, which must necessarily be peculiar to the case, precedence can only be of general assistance."

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In *Chitunya v Minister of Home Affairs* HH-261-89 Chidyausiku J, in assessing damages in a claim for contumelia arising from unlawful arrest, said at p 12 of the cyclostyled judgment:

> "If the plaintiff were claiming $5 000 for unlawful deprivation of liberty and contumelia that amount would be appropriate. He is claiming for contumelia alone and $5 000, in my view, despite the aggravating features I have referred to, is rather high. In my view, $2 000 would be more appropriate."

In the instant case, the plaintiff is claiming damages for unlawful deprivation of liberty. He is not claiming damages for *contumelia*. Taking the cue from Chidyausiku J's reasoning, a minimum award of not less than $3 000 would appear to be appropriate in this case.

The plaintiff co-operated with the police in regard to his attendance at court; he assisted the police by transporting, in his vehicle, a number of persons including the investigating officer to Harare magistrates court; he did not show any intention to abscond and in fact, even though he was denied the right to call his legal practitioner on that day, he appeared in court as required. No reason at all was given for the plaintiff's arrest and detention except the lame excuse that the second defendant was merely following established procedures for bringing accused persons to court. The plaintiff was abused by holding cell inmates. He was abused by some prison officers. He was unnecessarily exposed to unhygienic conditions of the holding cells. In my view, there was no justification at all for the treatment which the plaintiff received at the hands of the second defendant. The second defendant's moral blameworthiness was high. He exhibited a degree of vindictiveness completely disproportionate to what the plaitiff had done on that day.

The awards in all the cases to which I have referred were made some five years or more ago. The value of money has depreciated since then. I will take this factor into account in assessing the *quantum* in the present case.

CHINHENGO J

I am satisfied in all the circumstances that an award of $4 000 would be appropriate.

With regard to costs, I consider that an order of costs on a High Court scale is justified despite that the award is within the jurisdiction of the magistrates court. I fully subscribe to McNally JA's statement in Allan's case *supra* at p 273D that -

> "The matter was a serious one of general public importance and it was not unreasonable to claim a sum in excess of the jurisdiction of the magistrates court."

Accordingly, the following order is made:

Judgment with costs be and is hereby entered for the plaintiff against the defendants in the sum of $4 000.

McNaught Wickwar, plaintiff's legal practitioners

Civil Division of the Attorney-General's office, defendant's legal practitioners

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CHINGWISHU v MAPFUMO & ANOR 1996 (2) ZLR 43 (HC)

Court **High Court, Harare**

Robinson J

Opposed application

3 June 1994*(4) Judgment No. HH-94-96

Flynote

Family law - divorce - division of assets - marriage contracted in terms of Customary Marriages Act [Chapter 5:07] - whether magistrate has jurisdiction to make order relating to property - "separation of goods" - meaning

Headnote

In 1992 the first respondent was granted a divorce from the applicant. They had been married under the Customary Marriages Act *[Chapter 5:07]*. The applicant had been granted various items of property and the right to occupy the former matrimonial home until the child of the marriage attained the age of majority or became self-supporting. Until the Act was amended on 25 March 1993 by the Customary Law and Local Courts Act 2 of 1990 (now *[Chapter 7:05]*), the appropriate court to dissolve a customary law marriage and to make orders relating to the division of assets of the marriage was a community court. After that date, the appropriate court became the magistrates court. In 1994 the first respondent brought proceedings in the magistrates court for the ejectment of the applicant from the property, the minor child now being over the age of majority. An order of ejectment was granted by the provincial magistrate (the second respondent). The proceedings were brought on review by the applicant, arguing, among other hings, that as the house was matrimonial property and as ownership had not been determined in terms of the Matrimonial Causes Act *[Chapter 5:13]*, the magistrate had no jurisdiction to determine issues of matrimonial property.

ROBINSON J

The first respondent's stance, at the time of the divorce, was that as registered owner of the property, he was entitled to recover the house.

Held, that if the applicant was not satisfied with the ancillary relief granted at the time of the divorce, she should have taken steps to have the order set aside. Alternatively, she, not he, should have applied to the appropriate court for an order for the division of the matrimonial property.

Held, further, that the applicant had completely misconstrued the provisions of the Magistrates Court Act as they stood before they were amended by the Customary Law and Local Courts Act 2 of 1990. The former Act had said that a magistrates court should not have jurisdiction in any action in which was claimed "separation from bed or board or of goods of married persons".

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This phrase dealt with the situation of a judicial separation and not with the division of matrimonial assets after a divorce. In any event, the amendment to the Act gave the magistrates court jurisdiction in such matters where the marriage was solemnised in terms of the Customary Marriages Act [Chapter 5:07].

Held, therefore, that the application should be dismissed.

The court referred to the following statutes:

Customary Law and Local Courts Act 2 of 1990 (now *[Chapter 7:05]*), ss 16 and 30

Customary Marriages Act *[Chapter 5:07]*, s 16

Magistrates Court Act *[Chapter 7:10]*, s 14(1)(a)

Matrimonial Causes Act 33 of 1985(now *[Chapter 5:13]*), s 16

Matrimonial Causes Amendment Act 11 of 1987, ss 2(1)(b) and 7

Case Information

I J Muvingi, for the applicant

Miss A M Gowora, for the first respondent

No appearance for the second respondent

Judgment

Robinson J: I find it astounding, to say the least, that my clerk should have telephoned me at home on l0 July l996, when I was recuperating from an operation, to inform me, that I was required to give my reasons for dismissing the opposed application in this matter, with costs, in chambers over two years ago, on 3 June l994.

On examining the registry file, I noted that on 12 March l996 the applicant's legal practitioners wrote to the Registrar, referring to their letter of 20 June, l994 (which is missing from the Registry file) and inquiring how far preparation of the record had gone. The Registrar replied by letter dated 30 May l996, asking the applicant's legal practitioners to furnish him with the

notice of appeal so that preparation of the record could commence. On 5 June l996, the applicant's legal practitioners forwarded the Registrar a copy of the notice of appeal. From this it is noted that copies of the notice were filed with the Supreme Court and served on the first respondent's legal practitioners and on the second respondent 1(5) on l6 June l994, but that, apparently, no copy of the notice was filed in the High Court registry.

What I find both surprising and disconcerting is that there should have been no follow up by the applicant's and the first respondent's legal practitioners in regard to the prosecution of the

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applicant's appeal from 20 June l994 until 12 March l996.

Fortunately, despite the length of time which has elapsed since I delivered my *ex tempore* ruling in chambers on 3 June l994, I am readily able to furnish and amplify my reasons for summarily dismissing this application with costs.

At the outset, I would draw attention to the fact that the applicant's legal practitioners failed to produce proof at the hearing that a copy of the application to bring the second respondent's proceedings under review had been delivered to the second respondent, as required by r 256 of the High Court Rules, nor was the original record of the proceedings held before the second respondent lodged with the Registrar in terms of r 260(1). However, because I was satisfied that the application was devoid of all merit, rather than dwell on procedural technicalities, I chose to dispose of the matter then and there on the merits.

The background facts to this matter are as follows.

1. On 7 August l992, the first respondent was granted a divorce in respect of his marriage to the applicant under the African Marriages Act *[Chapter 238]* 2(6) on the ground of the irretrievable breakdown of their marriage. It was ordered, inter alia, that the applicant would be entitled to occupy the house in Munga Lane, Mufakose ("the property in issue") until the minor child of the marriage, Memory Mapfumo ("Memory") became self-supporting or attained the age of l8 years. The applicant was also awarded a bed and wardrobe as well as a stand in Chiweshe with two kitchens, two bedrooms, one granary and a toilet.

It appears from the record of the judgment, which was not annexed to the applicant's founding affidavit as alleged in para 3 thereof but which was filed

separately - and this is confirmed by the applicant in para 5 of her answering affidavit - that the first respondent obtained his divorce in default of the applicant's appearance.

At this point it is to be noted that s l6 of the African Marriages Act [Chapter 238 of 1974, now *Chapter 5:07*], as amended by s 16 of the Matrimonial Causes Act, 33 of l985 (now *Chapter 5:13*) and by s 7 of the Matrimonial Causes Amendment Act ll of l987, provides that no marriage solemnized in terms of that Act shall be dissolved except by order of a court of competent jurisdiction in terms of the Matrimonial Causes Act *[Chapter 5:13]*. At the material time, when the first respondent was granted a divorce by the community court of Harare, the relevant definition of "appropriate court" in s 2(l)(b) of the Matrimonial Causes Amendment Act l987 provided that, in relation to any marriage entered into in accordance with customary law, "appropriate court" meant a community court established in terms of the Customary Law and Primary Courts Act 6 of l98l.

That definition was amended by s 30, as read with Part VI of the Schedule, of the Customary Law and Local Courts Act 2 of l990 (now *Chapter 7:05*) which, by SI 127A of l993, fixed 25 March l993, as the date on which all the parts of that Act, other than Part II, would come into operation. The amended definition provides that s 2(l)(b) of the Matrimonial Causes Amendment

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Act l987 was to be repealed and substituted by defining an "appropriate" court to mean, in relation to any marriage entered into in accordance with customary law, a magistrates court.

Accordingly, from 25 March l993 the magistrates court became, in respect of a marriage entered into in accordance with customary law, the appropriate court, to grant a decree of divorce, judicial separation or nullity of marriage or at any time thereafter, to make an order under s 7(l)(a) of the Matrimonial Causes Act [*Chapter 5:13*] with regard to "the division, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other".

2. After his divorce and Memory's attainment of the age of l8 years, the first respondent instituted proceedings against the applicant in the magistrates court for the province of Mashonaland at Harare on l4 June l993 for the ejectment of the applicant and all other persons claiming rights of occupation through her from the property in issue, with costs of suit. It was alleged by the first respondent that he was the registered tenant of the property in issue, which he was purchasing from the City of Harare, and that since Memory was

ROBINSON J

then 21 years of age, he was entitled to recover occupation of the property in issue on the ground that, in terms of the divorce order, the applicant was entitled to occupy the property in issue only until Memory became self-supporting or attained the age of l8 years.

I pause here to point out that when it was judicially provided that the applicant was entitled to occupy the property in issue until Memory became self-supporting or attained the age of l8 years, it was not made clear whether the material event contemplated was that which occurred earlier or later. However, insofar as the first respondent has proceeded on the basis that the material event was to be that which occurred earlier and this has not been challenged or disputed by the applicant, I shall accept that the applicant was entitled to occupy the property in issue until Memory attained the age of l8 years, assuming this event to have been the earlier.

3. As a result of the applicant's entering an appearance to defend, the first respondent's action in the magistrates court - there is, incidentally, nothing in the papers to indicate on what grounds the applicant entered an appearance to defend - the first respondent applied for and on 24 August l993 was granted summary judgment for the applicant's ejectment from the property in issue.

4. In mounting her application for a review of the proceedings by virtue of the summary judgment granted against her by the second respondent, the applicant submitted as follows in paras 5 to 8 inclusive of her founding affidavit:

> "5. There is no dispute over the point that the house in question was part of the matrimonial property which therefore fell to division at or after divorce in terms of the Matrimonial Causes Act.
>
> 6. First respondent has claimed the house as his although we purchased the house together and I have a claim to it too. The second respondent has also treated it as such despite the fact that it is matrimonial property and second respondent has no jurisdiction to determine such issues.

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7. The second respondent therefore proceeded to hear the matter incorrectly as:

(a) ownership in terms of the Matrimonial Causes Act has not yet been determined, and

ROBINSON J

(b) second respondent has no jurisdiction.

8. I therefore pray for an order setting aside the proceedings in toto and directing that first respondent proceed in the community court should he wish to do so."

5. While in his opposing affidavit the first respondent admitted para 5 of the applicant's founding affidavit, it is clear from the first sentence of para 6 of the applicant's founding affidavit, as read with para 4 of the first respondent's opposing affidavit, that the first respondent's stance at the time of the divorce was that, as the registered tenant of the property in issue, he was entitled to recover occupation of the property in issue when Memory attained the age of l8 years on the ground that the applicant's right of occupation thereto had terminated. Indeed, insofar as in para 6 of her founding affidavit the applicant alleges that the first respondent had "claimed the house as his although we purchased the house together and I have a claim to it too" and in para 5 of her answering affidavit the applicant says that the first respondent "became registered owner of the house during and because of our marriage", it would appear that at the time of the divorce the first respondent proceeded on the basisthat he was the spouse entitled to the property in issue and that, in the absence of any opposition by the applicant or any claim by her in respect of the property in issue, there was no need for him to seek any order in regard to the property in issue save that of limiting the applicant's right of occupation of the property in issue until Memory became self-supporting or attained the age of l8 years. The fact that at the time of the divorce the applicant was awarded the stand in Chiweshe is indicative that while she was to have and occupy that property as hers, the first respondent was to retain the property in issue as his, subject to the applicant's being entitled to occupy it until Memory became self-supporting or attained the age of l8 years.

6. If the applicant was not satisfied with the ancillary relief granted in default of her appearance at the time of the divorce, then she should have taken steps to have the order set aside in that regard, that is, assuming that there was no legal objection to her pursuing such a course. Alternatively, if she contends that the matter of division of the property in issue is not *res judicata*, it is she, not the first respondent, as wrongly submitted by her, who should have applied or should apply to the appropriate court for an order of division or otherwise in respect of the property in issue under s 7(l)(a) of the Matrimonial Causes Act [*Chapter 5:13*].

Against this background the issue defined by the applicant in her heads of

ROBINSON J

argument was whether "the magistrates court had the jurisdiction in terms of the Magistrates Court Act [*Chapter 7:10*] to grant an order of ejectment against applicant".

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Apart from the fact that the applicant failed to pick up that s l5(a) 3(7) of the Magistrates Court Act [*Chapter 18 of 1974*] was amended by s 30 of the Customary Law and Local Courts Act l990, as read with s 2 of Part II of the Schedule, she has completely misconstrued the provisions of the former s l5(a) of the Magistrates Court Act (which are not even correctly quoted by her) when she submits as follows in para 2 of her heads of argument (I give the correct wording of s l5(a) below):

> "2. In terms of s l5(a) of the Magistrates Court Act, 'no court shall have jurisdiction in or cognizance of any action or suit wherein the dissolution of a marriage or separation from bed and board or of goods of married persons is sought'. This means essentially that once it is established or one party avers that certain property is matrimonial property, the magistrates court shall not recognise or have jurisdiction or entertain a matter wherein a party to such marriage seeks the separation of goods of the marriage concerned. Right in the house, being goods in the legal sense, cannot therefore be decided by the magistrates court as long as they are rights relating to matrimonial assets."

The reference to "separation from bed and board or of goods of married persons" has to do with the situation where a spouse is suing for a decree of judicial separation and for an order of separation of goods ancillary thereto.

In van Zyl's The Judicial Practice of South Africa 23 ed it is stated at p 644 that in Holland the subject of judicial separation was specially legislated upon by the 92nd section of the Placaat of 18 March 1656 (GPB, vol 2 p 2445), the second part of which provided as follows:

> "If the domestic troubles should become excessive, and last long, and the above-indicated judicial remedies should be of no avail, the Court may grant a decree of separation from bed, board and cohabitation, but not of the marriage tie, with the object ever in view of the parties uniting again."

At p 645 van Zyl explains as follows:

> "It will be noticed that by the canon law, as well as by this Placaat,

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ROBINSON J

> reference is made only to a separation of Ôbed, board and cohabitation', and not to a Ôdivision of the property'. The reason is simply this, that as by the Roman law there was no community, and the property of the spouses was always kept separate, the canon law could not affect it, and so was it formerly also in Holland. In course of time - the exact date is not certain, but it was before the passing of this Placaat - community of property was introduced by custom into Holland (Regts. Obs. 2.32); and similarly after the passing of the said Placaat, when a separation a mensa et thoro was applied for between parties who were married Ôin community of property', practice and custom introduced the application for also a separation of the property held Ôin community'".

At p 648 van Zyl says that when "the parties have been married in community of property, a decree for the division of the property should also be asked for in the summons, and when the parties cannot agree upon a division the Court should make it, or appoint some one to do it".

Hence the simple explanation of the correct meaning of the words "separation of goods". Accordingly, it will be seen that the interpretation sought to be placed by the applicant on the words "separation of goods" was fanciful in the extreme and totally ill-founded. Consequently, the submission made by the applicant was nothing short of nonsensical. There was no substance in the applicant's contention in para 4 of her heads of argument that it "is clearly ultra

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vires the Magistrates Court Act for the magistrate to grant an order of eviction, effectively deciding the issue of rights in what is evidently matrimonial property".

In passing, I would mention that after its amendment by s 30 of the Customary Law and Local Courts Act l990, s 15(a)(ii) (now s 14(1)(a)(ii)) now provides that no -

> "court shall have jurisdiction in or cognizance of any action or suit wherein
>
> (a) is sought -
>
> (i) ...
>
> (ii) separation from bed and board and of goods of spouses of a marriage, other than a marriage solemnized in terms of the Customary Marriages Act [Chapter 5:07]; or
>
> (iii) ... "

ROBINSON J

In the premises, it follows that in being asked to grant an order evicting the applicant from the property in issue on the ground that, by virtue of Memory's having attained the age of l8 years - a condition the fulfilment of which was not disputed by the applicant - the applicant's right to occupy the property in issue had terminated in terms of an order of divorce clearly cognizable by the magistrates court. As pointed out, the magistrates court has now superseded the former community court as the appropriate court to dissolve a marriage entered into in accordance with customary law. The second respondent most definitely had jurisdiction to entertain the first respondent's action and to grant the order sought. Indeed, one wonders how the applicant could, in a founding affidavit signed on 4 October l993, ask for an order that the first respondent be directed to institute proceedings in the community court when, with the coming into operation of the Customary Law and Local Courts Act l990 with effect from 25 arch l993, the appropriate court now to deal with ancillary matters relating to a marriage entered into in accordance with customary law is a magistrates court.

As already pointed out, if the applicant was unhappy about the ancillary relief granted in the divorce order in default of her appearance, then she should have taken steps to have the order set aside in that regard if there was no legal objection to her adopting that course. Alternatively, if she contends that the matter of the division of the property in issue is not *res judicata*, she could apply to the appropriate court for an order of division or otherwise in respect of the property in issue under s 7(l)(a) of the Matrimonial Causes Act [*Chapter 5:13*].

Furthermore, and in any event, since it was not evident what the status of the property in issue was, that is to say, whether it was still being acquired by the first respondent from the City of Harare, it was not possible to know whether it would have been competent for an order of division or otherwise to have been made in regard to the property in issue without infringing or prejudicing the rights of the City of Harare, as owner of the property, in issue, or whether, without its being joined as a party to the proceedings, the City of Harare would have objected to such an order. This matter should have been clarified by the applicant in her papers in the face of the first respondent's allegation that he was only a registered tenant of the property in issue

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pending its acquisition by him from the City of Harare.

It was for these reasons that I dismissed the application with costs.

Muvingi & Machaya, applicant's legal practitioners

Makarau & Gowora, first respondent's legal practitioners

TRIBAC (PVT) LTD v TOBACCO MARKETING BOARD 1996 (2) ZLR 52 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

4 & 11 July 1996 Judgment No. S-121-96

Headnote

Agriculture - tobacco - sales - control and regulation thereof - Tobacco Marketing Board - issue of licences to buyers and sellers of tobacco - refusal by Board to grant licence - whether appeal lies to Minister of Agriculture against Board's decision - when Minister's directive may be set aside

Practice and procedure - interdict - mandamus - criteria on which may be granted

Headnote

The appellant company submitted to the respondent Board an application in terms of s 37(1) of the Tobacco Marketing and Levy Act [Chapter 18:20] for the issue of a licence to it as an "A" class buyer of auction tobacco. The appellant's application was supported by all three tobacco auction floors. The Board refused the application, on the grounds that the issue of a licence would result in there being too many buyers for the efficient and orderly marketing of tobacco, this being one of the grounds set out in s 10(3) of the Tobacco Marketing and Levy Rules 1987 (SI 6 of 1987). The appellant appealed to the Minister of Agriculture in terms of s 37(3) of the Act and the Minister directed the Board to issue a licence. The Board refused to comply with the Minister's directive, on the primary ground that no appeal lay to the Minister other than for a refusal on the grounds set out in s 37(2) of the Act, that the Board was not satisfied with the applicant's financial standing. As the appellant's financial feature was never open to question, the Board argued that no appeal lay. In any event, the Board maintained that the Minister's reasons for allowing the appeal were ill-founded.

The appellant applied to the High Court for a mandatory interdict compelling the Board to comply with the Minister's directive but Chinhengo J up*Held* the Board's interpretation of the Act. On appeal:

Held, that an application for a mandamus or mandatory interdict can only be granted if all the requirements for a prohibitory interdict are established. These are: (1) a clear and definite right;

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(2) an injury actually committed or reasonably apprehended; and (3) the absence of a similar protection by any other ordinary remedy. If an appeal lay to the Minister, the first requisite would be established; and in this case the other two would likewise be met.

Held, further, that s 37(3) of the Act had to be examined in the context of several other provisions of the Act which dealt with the powers of the Board in regard to the registration of growers, the licensing of graders and auctions floors, the right of appeal to the Minister and the options available to the Minister on appeal. It was clear that had the right of appeal under s 37(3) been limited as argued, similar restrictions would have been found in other sections. Section 37(3) would also have been differently cast. Section 15(1)(b) of the Tobacco Marketing and Levy (General) Regulations 1985 (SI 71 of 1985), which gives a person aggrieved by the refusal of the Board to issue him a licence thirty days within which to lodge a notice of appeal, did not restrict such appeals to the limited grounds of s 37(2).

Held, further, that the Minister has an unfettered power in dealing with an appeal from the Board. The initial decision rests with the Board, but the final say rests with the Minister. His directive is binding on the Board and may only be set aside and the matter remitted if one of the recognised grounds of review has been established. In this case, it was not open to the court *a quo* to review the Minister's decision. The decision had not been brought on review and the Minister was not before the court.

Cases cited:

Kaputuaza & Anor v Executive Cttee of the Administration for the Hereros & Ors 1984 (4) SA 295 (SWA)

Lipschitz v Wattrus NO 1980 (1) SA 662 (T)

Moll v Civil Commissioner of Paarl & Anor (1897) 14 SC 463

PF-ZAPU v Min of Justice (2) 1985 (1) ZLR 305 (S)

PTC Pension Fund v Standard Chartered Merchant Bank Zimbabwe Ltd & Anor 1993 (1) ZLR 55 (H)

Sec for Transport & Anor v Makwavarara 1991 (1) ZLR 18 (S)

Setlogelo v Setlogelo 1914 AD 221

GUBBAY CJ

The court referred to the following statutes and statutory instruments:

Tobacco Marketing and Levy Act [*Chapter 18:20*], ss 16, 32, 34, 35, 37, 38, 41, 42 and 70(2)

Tobacco Marketing and Levy (General) Regulations 1985 (SI 71 of 1985), ss 3 and 15(1)(b)

Tobacco Marketing and Levy Rules 1987 (SI 6 of 1987), ss 2 and 10(3)(a)

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Case Information

A P de Bourbon SC, for the appellant

A Kara, for the respondent

Judgment

Gubbay CJ: The appellant, a limited liability company, was registered in 1995 for the main purpose of buying and selling tobacco on the tobacco auction floors in Harare. The respondent is the Tobacco Marketing Board ("the Board"). Its prime functions, as set out in s 16 of the Tobacco Marketing and Levy Act [Chapter 18:20] ("the Act"), are to control and regulate the marketing of tobacco and to promote, protect and maintain the sale of tobacco. It is the licensing authority under the Act.

Flue-cured virginia and air-cured burley tobacco have been declared to be auction tobacco by s 3 of the Tobacco Marketing and Levy (General) Regulations 1985 (SI 71 of 1985) ("the Regulations"). Auction floors are licensed to sell auction tobacco under Part VIII of the Act. Any person who wishes to buy auction tobacco is required to be licensed in terms of Part VII of the Act.

There are two classes of buyers of auction tobacco who may be licensed under Part VII of the Act. An "A" Class buyer is defined in s 2 of the Tobacco Marketing and Levy (Marketing) Rules 1987 (SI 6 of 1987) ("the Rules") as one "who buys on auction floors during a selling season such minimum quantity of tobacco as is determined by the Board and does not resell on auction floors during that selling season more than five *per* centum of the tobacco which he has bought". A "B" Class buyer is defined as "any other buyer of tobacco on auction floors".

On 29 January 1996 the appellant submitted to the Board, pursuant to s 37(1) of the Act, an application for the issue of a licence as an "A" Class buyer of auction tobacco. The application complied with the requirements of s 10(1) of the Rules and was accompanied by letters of support from all three auction floors. Each stated its preparedness to do business with the appellant.

GUBBAY CJ

In a letter of 12 February 1996 the Board advised the appellant of the refusal of its application. The reason for the refusal, which was given later, was that, in accord with s 10(3)(a) of the Rules, the Board was of the opinion that "the issue of the licence would result in too many buyers for the efficient and orderly marketing of tobacco."

The appellant was aggrieved by the Board's refusal to issue to it a buyers licence. It appealed to the Minister in terms of s 37(3) of the Act by letter dated 23 February 1996. The Minister remitted the application to the Board for reconsideration. The Board re-confirmed its decision. On 12 April 1996, the Minister wrote to the Board as follows:

> "I appreciate your main concern, which is over-congestion in the buying line. But having given it due consideration, I believe that an extra person in the line can be accommodated. In terms of the powers provided to me by s 37(4)

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> of the Tobacco Marketing and Levy Act, 1977, I have therefore decided to grant Tribac's appeal. A further point which influenced my decision, was that this is a new company which has met all the requirements and criteria as laid down by s 37 of the Act. Furthermore, the company has no affiliation to any of the already established companies, and would therefore introduce more competition into the market ...
>
> I therefore direct that, in terms of the above-mentioned Act, Tribac be granted an ÔA' licence with immediate effect, in order that they may participate on the auction floors by the opening date of 23 April 1996."

The Board declined to implement the Minister's directive. Faced with this impasse, the appellant made an urgent application to the High Court for a mandamus. In essence it sought an order compelling the Board to issue it an "A" Class buyers licence for auction tobacco in terms of the directive given by the Minister acting under s 37(4) of the Act. The application was opposed by the Board.

The Board took the stance that the ground upon which it had refused the licence was not appealable under s 37(3) of the Act; consequently, the Minister's directive was not competent in law. It contended that the only appealable ground was that specified in s 37(2), that is, where the Board is not satisfied with the financial standing of the applicant for the licence - a feature which, insofar as the appellant was concerned, was never open to question. The Board further maintained that the reasons given by the Minister

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GUBBAY CJ

for allowing the appeal were ill-founded; and that its own decision in refusing the licence was based on practicality and upon the efficient and orderly marketing of tobacco.

An application for a *mandamus* or "mandatory interdict", as it is often termed, can only be granted if all the requisites of a prohibitory interdict are established. See *Lipschitz v Wattrus NO* 1980 (1) SA 662 (T) at 673C-D; *Kaputuaza & Anor v Executive Committee of the Administration for the Hereros & Ors* 1984 (4) SA 295 (SWA) at 317E. These are:

1. A clear or definite right - this is a matter of substantive law.

2. An injury actually committed or reasonably apprehended - an infringement of the right established and resultant prejudice.

3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection.

The locus classicus of the cases which sets out these criteria is, of course, *Setlogelo v Setlogelo* 1914 AD 221 at 227. See also *PTC Pension Fund v Standard Chartered Merchant Bank, Zimbabwe Ltd & Anor* 1993 (1) ZLR 55 (H) at 63A-C.

If, therefore, an appeal lay to the Minister under s 37(3) of the Act against the Board's refusal and the Minister was empowered to direct the Board, as he did, to issue the buyers licence, non-compliance by the Board would satisfy the first requisite for a mandatory interdict. And following upon the acknowledgement of a clear right, in the circumstances of this matter, the

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remaining two requisites likewise would be met.

I should perhaps clarify that although s 70(2) of the Act enables the Minister to obtain from the High Court an order compelling the Board to remedy its default, the right of an aggrieved person to have recourse to the common law and seek a mandamus has not been removed or in any way interfered with. See Moll v Civil Commissioner of Paarl & Anor (1897) 14 SC 463 at 467. Put differently, that right may be exercised independently of whether the Minister proceeds against the Board in terms of s 70(2) of the Act. The appellant, as the most vitally interested party, was entitled to seek to enforce the issue of the licence pursuant to the directive of the Minister.

GUBBAY CJ

Acting in terms of para 48 of the Schedule to the Act, the Board promulgated the Rules. In s 10(3) thereof it decreed that -

> "The Board shall not issue a buyers licence to an applicant if, in the opinion of the Board -
>
> (a) the issue of the licence would result in too many buyers for the efficient and orderly marketing of tobacco; or
>
> (b) the applicant's financial standing or the size and nature of his business is such as to warrant the refusal of the issue of a licence; or
>
> (c) the issue of a licence would be detrimental to the tobacco industry in the particular circumstances pertaining on the auction floors in the season for which the applicant applies to be licensed."

These grounds are not exhaustive. The Board would be entitled to refuse the issue of a buyers licence on any other just and rational ground. But it is only subs (b) of s 10(3) of the Rules that carries the mandate of Parliament in s 37(2) of the Act. This provision reads:

> "The Board shall refuse to issue a licence to buy auction tobacco if it is not satisfied with the financial standing of the applicant for the licence" (emphasis added).

The learned judge accepted the submission that under s 37(3) of the Act no appeal lies from the refusal of the Board to issue the buyers licence since such refusal was based on the ground set out in s 10(3)(a) of the Rules. In other words, the right of appeal under s 37(3) is limited to a refusal by the Board on the ground mentioned in s 37(2).

Sections 37 (3) and (4) of the Act read:

> "(3) An applicant who is aggrieved by the refusal of the Board to issue to him a buyers licence shall have a right of appeal to the Minister ...
>
> (4) On an appeal in terms of subsection (3), the Minister may confirm the decision of the Board or direct the Board to issue to the applicant a buyers licence."

The learned judge construed the words "the refusal" in subs (3) as being the

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refusal referred to in subs (2). As a consequence he *Held* that subss (3) and (4) do not apply to any other refusal by the Board.

I respectfully disagree with this interpretation. Sections 37 (2) and (3) are to be examined in the context of other provisions in the Act which deal with the powers of the Board in regard to the registration of growers, the licensing of graders and auction floors, the right of appeal to the Minister, and the options available to the Minister on appeal. I refer in particular to ss 32, 34, 35, 37, 38, 41 and 42. What emerges is this:

1. If the legislature had been minded to limit the right of appeal given in s 37(3) to a refusal made on the ground specified in s 37(2), it surely would have used the same formula as in ss 32(3), 35(3), 38(3) and 42(3). And cast s 37(3) to read:

   "An applicant who is aggrieved by the refusal of the Board made in terms of subsection (2) shall have a right of appeal to the Minister."

   It did not do so.

2. Only ss 37(2) and 41(2) make it obligatory for the Board to refuse the application once the factual situations alluded to are found to exist.

3. The wording of ss 37 (3) and (4) is virtually the same as ss 34 (2) and (3); yet s 34 contains no provision which equates to that of ss 37(2) and 41(2). Save then for the different type of licence (graders licence), the issue of which is refused, the right of appeal to the Minister is in identical language.

These features convince me that the right of appeal to the Minister under s 37(3) of the Act is not confined to a position in which the issue of a buyers licence was refused by the Board, because it was not satisfied with the financial standing of the applicant.

Wholly consistent with this construction is s 15(1)(b) of the Regulations. This gives a person aggrieved by the refusal of the Board to issue him with an auction floor licence, a buyers licence or a graders licence, thirty days within which to lodge a notice of his intention to appeal to the Minister. The refusal is not in any way restricted to s 37(2) or s 41(2).

Although unnecessary for the purpose of deciding this appeal, I tentatively

venture the opinion that if any right of appeal is excluded by ss 37(3) and 41(3), it is that relating solely to the refusal of the Board made under ss 37(2) and 41(2) respectively. This would leave the aggrieved person with the right to take the decision of the Board on review to the High Court.

The alternative basis upon which the learned judge dismissed the application may be disposed of shortly. It was not open to him to purport to review the decision of the Minister in directing the Board to issue the buyers licence. The Board had not sought to bring that decision on review

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and so the Minister was not before the court. He had not been afforded the inherent right to be heard in defence of his decision. Moreover, the criticism that the Minister had substituted his discretion for that of the Board was unjustified. Section 37(4) gives the Minister an unfettered power in dealing with an appeal from the Board. The initial decision is made by the Board but the final say rests with the Minister. His directive is binding upon the Board. It may only be set aside and the matter remitted if one of the recognised grounds of review has been established. See *PF-ZAPU v Min of Justice (2)* 1985 (1) ZLR 305 (S) at 325H-327C; *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 18 (S) at 20A-D.

Accordingly, I would allow the appeal with costs and alter the order of the court *a quo* to read:

"1. The respondent is to issue forthwith to the applicant a licence as an ÔA' Class buyer of auction tobacco.

2. The costs of the application are to be paid by the respondent."

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

Manase & Manase, respondent's legal practitioners

MAKARUSE v HIDE AND SKINS COLLECTORS (PVT) LTD 1996 (2) ZLR 60 (SC)

Court **Supreme Court, Harare**

Korsah JA

Chambers application

17 July 1996 Judgment No. S-140-96

Flynote

Costs - security for - order for - whether a final order - after order granted, application to proceed in forma pauperis - whether court entitled to hear application

Practice and procedure - order that appellant furnish security for costs of appeal - appellant then applying to be granted in forma pauperis representation to pursue appeal - whether court entitled to hear application

Headnote

An indigent person wished to appeal against the decision by the High Court in his case. The respondent obtained an order from a judge of the Supreme Court that the appellant provide security for costs of the appeal. The appellant then applied to be granted in forma pauperis representation.

Held, that the order to provide security for costs was not a final order precluding a court from extending the time for fulfilment of the order.

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Held, further, that though the appellant in making his application for in forma pauperis assistance had failed to comply with certain of the rules, this was an appropriate case for the court used its discretion to condone this failure.

Held, further, that the grant or refusal of leave to appeal in forma pauperis is a matter for the court's discretion and in the present case to refuse the application would lead to grave injustice to a person whose only failure is attributable to his indigent circumstances. His appeal was not without merit and it would be unjust to refuse the application.

KORSAH JA

Cases cited:

General Accident Ins Co SA Ltd v Zampelli 1988 (4) SA 407 (C)

Hudson v Hudson & Anor 1927 AD 259

Moulded Components v Coucourakis & Anor 1979 (2) SA 457 (W)

Standard Chartered Bank Zimbabwe Ltd v Matsika 1996 (1) ZLR 123 (S)

The court referred to the following statutes and rules of court:

Supreme Court Act [*Chapter 7:13*], s 26(1)

Supreme Court Rules 1964, rr 4, 36(3), 38 and 46(2)

Case Information

Applicant in person

G S Wernberg, for the respondent

Judgment

Korsah JA (in chambers, in terms of r 38 of the Supreme Court Rules, 1964):

The applicant was an employee of the respondent. In May 1992, the respondent suspended and subsequently dismissed him. The applicant, a self-actor, claimed that his dismissal was wrongful for non-compliance with s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations (SI 371 of 1985) (the Regulations), and applied to the High Court for redress.

On 2 August 1995, the High Court, Harare, dismissed with costs the applicant's action against the respondent for reinstatement or damages in lieu thereof. Aggrieved by and dissatisfied with that decision, the applicant noted an appeal against the whole of the judgment.

On 5 September the respondent's legal practitioners addressed a letter to the applicant, copied to the registrar of this court, in which they demanded that the applicant places "the Registrar of the Supreme Court in funds in an amount of $7 000 as security for costs of the Supreme Court

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matter."

On 7 December 1995, a chamber application made in terms of r 46(2) of the Supreme Court Rules (the Rules), by the respondent's legal practitioners to enforce payment of the security for costs of appeal was placed before me. I granted the application in terms of the draft order filed by the respondent's legal practitioners which was as follows:

> "That the appellant be and is hereby directed to lodge with the Registrar

KORSAH JA

> of the High Court an amount of $7 000 as security for respondent's costs of appeal within seven days of service of this order upon him.
>
> That in the event the appellant fails timeously to comply with the terms of paragraph 1 of this order the appeal shall lapse.
>
> That in the event that the appellant does timeously comply with the provisions of paragraph 1 of this order, the respondent is directed to file heads of argument by no later than 20 December 1995.
>
> The costs of this application shall be costs in the appeal."

Heads of argument were duly filed by both parties and the matter set down for hearing on 12 March 1996 on an application to have the appeal dismissed for non-compliance with r 36(3). On that day, in a court presided over by the Chief Justice, the following order was made:

> "That the appeal be and is hereby postponed to a date to be arranged with the Registrar after the appellant has complied with the order of 7 December 1995."

Presumably this order was made after counsel for the respondent had drawn the attention of the panel to the appellant's failure to comply with the order of 7 December 1995.

Subsequent to the order of 12 March 1996, the applicant herein lodged this application on 17 June 1996, requesting to be granted in forma pauperis representation. This application was strenuously opposed.

The applicant, a self-actor throughout all proceedings, averred that he had been unemployed since May 1992 when he was unlawfully dismissed by the respondent from his employ. He is married and has four children by his wife. He had vainly striven to raise money to look after his family since his dismissal. The house he occupies with his family is about to be repossessed by the City Council for non-payment of rent. Zimbabwe Electricity Supply Authority has cut off supply of electricity to the premises because the applicant, due to lack of means, is unable to settle the bills for the services of ZESA.

Ever since the applicant's dismissal he has been unable to secure employment. He alleged, and it was not denied, that the respondent had refused to furnish him with a reference to enable him to obtain employment as a purchaser of

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KORSAH JA

hides and skins which is his speciality. The applicant averred that he has no saving account with any bank and no well-to-do relatives upon whom he can rely for the facility of a loan. He is, therefore, in indigent circumstances and can furnish no security for costs.

Regarding the prospects of success of his appeal, the applicant, while denying any wrongdoing as an employee of the respondent, points to the Regulations and contends that they require the respondent, after suspending him, to inform the labour relations officer *forthwith* of the suspension in its application for dismissal, so that the labour relations officer can embark upon an investigation as soon as possible to determine the matter. He alleged that he was suspended in May and the application for his dismissal was only lodged with the labour relations officer some eight weeks thereafter, in July. He took this point, that the application for his dismissal was bad in law because it was not made forthwith, in the court below and was overruled by the learned trial judge. He has raised the issue again in the appeal to this Court, praying in aid this Court's decision in *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1996 (1) ZLR 123 (S).

Mr *Wernberg*, for the respondent, contended that by s 26(1) of the Supreme Court Act [*Chapter 7:13*] "There shall be no appeal from any judgment or order of the Supreme Court" and that this court having ordered as it did on 7 December 1995: "That in the event the appellant fails timeously to comply with the terms of para 1 of this order the appeal shall lapse," upon the failure of the applicant to comply with the said para 1, the matter was rendered *res judicata* and this court became *functus officio.*

This argument does not find favour with me because the respondent did not apply to have the matter struck off the roll for non-compliance with the order but rather had it set down for hearing on 12 March 1996. On that day a panel of three judges, in open court, made an order postponing hearing of this matter pending compliance by the applicant with the order made in chambers by a single judge. The order of 12 March 1996 did not only supersede the order of a single judge, but had the effect of extending the time within which the appellant was to furnish security for costs. In my view, an order to perform any task within a prescribed time is not a final order precluding a court from extending the time for fulfilment of the order.

Secondly, r 4 of the Rules provide that:

> "*Departure from rules*

KORSAH JA

> Subject to the provisions of subsection (3) of section 19 of the Act, a judge of the court may direct a departure from these rules in any way where this is required in the interests of justice and additionally or alternatively, may give such directions in matters of practice and procedure as may appear to him to be just and expedient."

The above rule demonstrates that adjectival law is not immutable, and that upon good cause shown, this court has the power to make an order extending or abridging any time prescribed by the rules or by an order of court. As de Villiers JA stated in Hudson v Hudson & Anor 1927

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AD 259 at 267:

> "Every court has the inherent power to prevent an abuse of the machinery provided for the purpose of expediting the business of the court."

Mr *Wernberg* also contended that the applicant had not complied with the provisions of r 38(3) in that the respondent's consent to the applicant proceeding in forma pauperis was not sought prior to the launching of the application to a judge of this court on notice of motion. I do not consider this a serious irregularity, as the application was served on the respondent, and, had the respondent indicated its consent, a consent order would have been made without the necessity of a formal appearance before a judge. The failure to apply for the prior consent of the respondent, to be allowed to proceed in forma pauperis, did not prejudice the respondent in any way. On the papers, it was clear that the respondent was exacting what was due to it under the judgment and was not going to consent to such an order being made.

Next, Mr *Wernberg* pointed to non-compliance by the applicant with sub-rules (4) and (6) of r 38. He said the statement in which the applicant set forth his financial circumstances does not, as mandated by sub-rule (4), state that the applicant was not possessed of property to the amount of $100 and that the applicant's statement as to his means was not accompanied by a certificate of a legal practitioner that he has considered the case of the applicant and that he has reasonable grounds to prosecute the appeal.

The applicant had been a self-actor from the inception of this matter in the High Court, not because he chose to represent himself, but because he could not afford the services of a legal practitioner. How was he to obtain the certificate of a legal practitioner without paying for it?

With regard to sub-rule (6), if I understood Mr *Wernberg's* argument, when the applicant is granted leave to prosecute his appeal in *forma pauperis* he

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KORSAH JA

shall not be required to lodge security for costs of the opposite party. He contended that as the trial court rightly found the applicant's claim to be prescribed by the effluxion of time, the applicant's reasonable prospects of his appeal succeeding are non-existent, and the respondent would be severely prejudiced if no security for costs were furnished.

The applicant raised as an issue in his notice of appeal that the learned trial judge strayed from the path of justice by raising mero motu the issue of prescription. In a supporting affidavit to the respondent's opposition to this application, Mr Dyke, who appeared for the respondent in the court below, averred that he personally raised the issue of prescription at the hearing of the matter. Support for Mr Dyke's averment can be found at p 16 of the record in para 5(vi) of the affidavit of Mr Artur Caburueinra. However, as to whether the trial court was right in declaring the applicant's claim to be prescribed is a matter to be determined on appeal.

By virtue of the power conferred on this court by r 4 *supra* to condone any non-compliance with the rules, none of the provisions of the rules are strictly peremptory. "The rules are, however, there to regulate the practice and procedure of the Court in general terms and strong grounds

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would have to be advanced, in my view, to persuade a court to act outside the powers provided for specifically in the Rules": *per* Botha J (as he then was) in *Moulded Components v Coucourakis & Anor* 1979 (2) SA 457 (W) at p 462-3. Thus the inherent power to prevent abuse of the machinery of the court is a power which has to be exercised with great caution, and only in a clear case: *Hudson v Hudson supra* at 268. Non-compliance of the rules will only be condoned upon good cause shown by the applicant. There must be a reasonable and acceptable explanation for the failure to comply with the Rules, and the applicant for condonation must also show reasonable prospects of success. See *General Accident Insurance Co SA Ltd v Zampelli* 1988 (4) SA 407 (C) at 411C-D.

The grant or refusal of leave to appeal in forma pauperis is a matter for the exercise of the court's discretion. The court will consider whether having regard to all the surrounding circumstances, it is more in accord with justice to grant leave than refuse it.

I am firmly of the view that to refuse the present application would be to inflict grave injustice on a person whose only failure is attributable to his indigent circumstances. His appeal is not without merit and it would be unjust to refuse him the assistance he craves.

KORSAH JA

The registrar is hereby ordered to grant the applicant in *forma pauperis* representation.

There will be no order as to costs.

NYAKAMBIRI FARM (PVT) LTD v ZIMNAT INSURANCE CO LTD 1996 (2) ZLR 67 (HC)

Court **High Court, Harare**

Chidyausiku J

Civil trial

17 July 1996 Judgment No. HH-93-96

Flynote

Insurance - policy - exclusion clause - all risks policy - fire - exemption clause providing disclaimer of liability when claimant has failed to comply with legislation governing clearing of land by using fire -burning of wheat stubble - failure to notify neighbour - whether exemption applied

Headnote

The plaintiff took out an insurance policy in terms of which the insurance company would indemnify the plaintiff, up to a maximum specified amount, for any legal liability that the plaintiff might incur to pay a compensation for damage to property. Under the policy, the insurer was exempt from liability to indemnify where the insured, in clearing land by fire, failed to comply with all legislation relating to the burning of vegetation.

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After the plaintiff had harvested his wheat, stalks a few inches high were left behind. Underneath these stalks there was dead wheat stubble. When the plaintiff was trying to clear his land by burning the waste, the fire spread to the adjoining property and caused damage. When the plaintiff sought to claim under the policy the insurance company sought to repudiate liability on the basis of the exemption clause, claiming that the plaintiff had breached ss 67(2) and 78(b)(ii) of the Forest Act [*Chapter 19:05*], in that he did not give notice to occupiers of adjoining land and to the police and that he allowed the fire to spread to the adjoining land.

Held, that the plaintiff had not breached the law relating to burning of fires on land. He had not contravened s 67(2) of the Act by burning the fire without notice to his neighbour because this section only applied when

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CHIDYAUSIKU J

there was burning of growing or standing vegetation. The materials burnt did not fall into this category.

Held, further, that although s 78(b)(i) of the Forest Act imposes absolute liability for a person who lights a fire that spreads and causes damage, it could not have been the intention of the parties that liability would be excluded whenever a fire was lit that caused damage as this would have defeated the whole purpose of the policy, which was to provide indemnity for harm caused by fire spreading during land clearance.

Held, therefore, that the insurance company was liable under the policy.

The court referred to the following statutory provisions:

Forest Act [*Chapter 19:05*], ss 67(2) and 78(b)(ii)

Case Information

J B Colegrave, for the plaintiff

D P Carter, for the defendant

Judgment

Chidyausiku J: The plaintiff in this case is a duly registered company which carries out farming operations at Lyndhurst Farm near Harare. On 5 November 1991, the plaintiff's employees at the above farm were burning windrows of wheat with, of necessity, the underlying wheat stubble. This was consequent upon the harvesting of wheat which had been done by a combine harvester. The rows of cut wheat or windrows were 3 to 4 feet in height and underneath them was stubble or dead vegetation of one to four inches in height. The fire spread to the adjoining Parklands Farm and caused damage estimated at $159 559,98 to the wheat crop on that farm. The quantum of the damage is not in dispute.

In October 1991, a month before the fire, the plaintiff and the defendant had entered into a written agreement of insurance. In terms of the agreement, the defendant, inter alia, undertook

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to insure the plaintiff against all sums of money, up to an amount of $500 000 which it might be required to pay in respect of any compensation arising out of a claim against it. A copy of the insurance agreement was attached to the declaration as Annexure "A".

In January 1992, Parklands Developments (Pvt) Ltd, the owners of Parklands Farm, claimed the sum of $159 559,98 from the plaintiff, being the damage caused to its wheat by the fire of 5 November 1991.

The plaintiff duly notified the defendant of the claim by Parklands Development (Pvt) Ltd and complied with all other obligations under the policy. Notwithstanding this, the defendant repudiated the policy and has

refused to pay the plaintiff any amount of money in respect of the above claim. The plaintiff paid Parklands Development (Pvt) Ltd the increased sum of $171 748,98 in satisfaction of its fire claim. The increased claim is not in dispute.

The defendant repudiates liability in terms of clause 7(q) of the policy, which provides for a disclaimer in the event of the plaintiff failing to comply with the provisions of any legislation while clearing the land by fire. In particular, the defendant contends that the plaintiff did not comply with the provisions of ss 67 (2) and 78(b)(ii) of the Forest Act [Chapter 19:05], therefore the exception covers it.

The only issue between the parties is the legal point concerning the applicability of the Part II Specific Exceptions 7(q) of s 13 of the policy (at p 26 of Annexure A). The issue is, is the defendant entitled to repudiate the policy on the basis of the exception?

I will now deal with this issue. The plaintiff is *prima facie* entitled to some cover under the insurance policy. Paragraph 1 of s 13 of the policy provides that:

> "The company (defendant) will indemnify the insured (plaintiff) against all sums which the insured shall be legally liable to pay as compensation arising out of any claim:
>
> (a) ... or damages to property happening within Zimbabwe ..."

Prima facie, therefore the plaintiff was insured against the destruction of crops on Parklands Farm as a result of the fire of 5 November 1991 which started on the plaintiff's adjoining farm.

The defendant relies for its repudiation on the exception in clause 7(q) of the policy. The exception reads as follows:

> "The company shall not be liable in respect of:
>
> *Veld Fire* (q)
>
> Veld or forest fire or the clearing of land by fire unless the insured shall have complied with all legislation relating to the burning of vegetation."

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The defendant contends that the plaintiff failed to comply with legislation relating

CHIDYAUSIKU J

to the burning of vegetation in that he did not give notice to occupiers of the adjoining land and to the police as is required by s 67(2) of the Forest Act and that the plaintiff allowed the fire to spread to an adjoining property contrary to the provisions of s 78(b)(ii) of the same Act.

I will deal with the exception based on the provisions of s 67(2) of the Act first. This section prohibits a person from burning -

> "... growing or standing vegetation on any land except in accordance with notice given in terms of subsection (3) to occupiers of all adjoining land and to a police officer at the nearest police station."

It is common cause no notice was given. Mr *Colegrave* for the plaintiff has argued that what occurred on the plaintiff's farm on 5 November 1991 was not the burning of growing or standing vegetation on any land, therefore no notice was required in terms of s 67 of the Act. Mr *Carter*, on the other hand, argues the contrary. He argued that the wheat stubble that was burned was "growing or standing" vegetation within the meaning of s 67 (2) of the Act.

In this regard, the only evidence on this point is that of Mr Hill. His evidence was to the effect that what his employees burned were windrows of wheat with, of necessity, underlying wheat stubble. The burning of windrows followed the harvesting of the wheat which had been performed by a combine harvester. The rows of cut wheat stalk were three to four feet in height and underneath the windrows there was nothing but wheat stubble or dead vegetation. The stubble was between one inch to four inches. In between the windrows on D block, where the fire started, the stubble had been ploughed in. I find the evidence of Mr Hill acceptable. He was an impressive witness. Indeed the defendant appears to accept the evidence of Mr Hill and argues that on that evidence the court should find for the defendant. It is the contention of the defendant that the burning of the wheat stubble that was under the windrows was a burning of growing and standing vegetation in terms of the Act.

It is accepted by both counsel that the burning of windrows does not fall under the provisions of s 67(2) of the Act. Windrows are neither growing nor standing vegetation. The evidence is that these windrows were three to four feet high and the whole exercise was to burn these windrows. The stubble was only burned as a necessary consequence of burning the windrows. The stubble on its own could easily be ploughed under. In view of stubble's height of one to four inches, it would be difficult to burn stubble on its own. The

CHIDYAUSIKU J

burning of the stubble was inevitable during the burning of the windrows. It is this burning of the stubble that Mr Carter has argued constitutes the burning of growing or standing vegetation envisaged in s 67(2) of the Act. I am unable to accept this submission for a number of reasons.

In my view, the whole purpose of s 67(2) of the Act is to ensure that the police and neighbours

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are warned of the existence of the fire and the potential danger always inherent in such a fire at a particular farm. It seems to me absurd that Parliament intended that such notice be given when burning wheat stubble, which is about 1 inch to 4 inches, is intended and no notice is required when burning wheat windrows usually about three to four feet high. This interpretation of s 67(2) produces an absurd result. There is nothing in the wording of s 67(2) to show that Parliament really intended this absurd result. The literal meaning of the words of the section do not point in that direction. Indeed, the word vegetation is defined in s 2 of the Act as:

> '"Vegetation' includes any tree, bush, shrub, brushwood, undergrowth or grass and any other vegetation."

Stubble is not specifically mentioned in the definition, like "shrub" for instance. The only possible category it could fall under in that definition is "any other vegetation". That categorisation is not particularly helpful as it amounts to defining "vegetation" as "any other vegetation". The ordinary grammatical meaning of "vegetation" given in the *Oxford Dictionary* is "plants collectively". In my view, nobody in everyday life refers to wheat stubble as vegetation.

Even if one accepts that wheat is vegetation and that wheat stubble as part of the wheat plant is of necessity vegetation, the vegetation that was burned, as Mr *Colegrave* correctly pointed out, was not standing. It had been cut down by the combine harvester. Standing vegetation or growing vegetation is different from vegetation that has been cut. I agree with the contention that no significance attaches to the fact that under the windrows was the stubble, some of which had a height of four inches.

In any event, even if one were to be pedantic and assume that stubble was standing vegetation, the issue in the final analysis is that the intention of the parties to the contract should prevail. If an officious bystander had asked the parties whether or not one to four inch wheat stubble constituted standing vegetation for the purposes of s 67(2) of the Act the inevitable answer would have been "Don't be ridiculous, of course not".

CHIDYAUSIKU J

For the above reasons, the exception based on the provision of s 67(2) of the Forest Act must fail.

I now turn to deal with the second ground of exception, namely, that the plaintiff contravened s 78(b)(ii).

In terms of this section, any person who in open air on any land alights a fire that spreads or causes injury shall be guilty of an offence. As Mr Colegrave submitted, this section is framed in very wide terms and imposes an absolute liability on any person who lights a fire not to allow it to spread or cause damage. If a person lights a fire and that fire spreads or causes damage then s 78(b)(ii), if given the interpretation contended by the defendant, is contravened.

In my view, it can hardly have been the intention of the parties that the plaintiff would not be indemnified if the fire it lit spreads or cause damage. The whole purpose of entering into an insurance contract would be defeated. The clear intention of the parties was that the plaintiff would be indemnified for damage arising out of the clearing of land by fire. I agree with Mr

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Colegrave's submission that exception 7(q) is not intended to remove all protection to insured persons from the consequences fires that spreads or cause damage.

In the result, the plaintiff succeeds and judgment is entered for the plaintiff in terms of the summons.

Scanlen & Holderness, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

BOTHA & ANOR v BARRETT 1996 (2) ZLR 73 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

25 June & 18 July 1996 Judgment No. S-133-96

Flynote

Real rights - possession - spoliation order - requirements for - onus - applicant must show that he did not consent to taking of the property - implied consent - factors establishing - application for spoliation order - delay in seeking order - relevance in deciding whether consent given

Headnote

The first appellant (Botha) was managing director of the second appellant (DAB Haulage), a company which carried out a haulage and transport business. The respondent (Barrett) had also carried out a transport business, which DAB Haulage acquired in October 1992. The respondent was granted a 50% shareholding in DAB Haulage. DAB Haulage ran into substantial debt, resulting in the relationship between Barrett and the appellants being severed. This was subject to an equitable apportionment of the liabilities of DAB Haulage, which Botha and Barrett had personally guaranteed payment of.

On 10 April 1995, Barrett signed two agreements. Under the first agreement, he agreed to hand over to Botha and DAB Haulage various items of property, including 2 trucks, three trailers and two sets of fuel tanks. Under the second, it was agreed that Barrett would retain one trailer and set of fuel tanks. In the evening of that day, Botha learned that the trucks and trailers had been returned to Barrett's premises. He went there and, in Barrett's absence, removed the trucks, two trailers and the fuel tanks to the premises of DAB Haulage. On 5 June, Barrett obtained a provisional order of spoliation from the High Court, directing the appellants to return the property. The appellants complied but on the return day argued for

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the discharge of the order. The order was confirmed on the grounds that there was no satisfactory evidence that Barrett had consented to or acquiesced in the removal of the property.

Barrett disputed the validity of the agreements on the grounds of duress, which Botha denied. Botha maintained that Barrett had not been forcibly or wrongfully deprived of his property without his consent; alternatively, Barrett's delay in seeking a spoliation order was consistent only with acquiescence in the deprivation.

Held, that, while the period of delay may not in itself constitute a bar to the grant of a spoliation order, it could well be relevant in deciding whether the dispossession had been consented to. In this case, though, the delay of seven weeks in applying for a spoliation order was far too short to warrant refusal of the order.

Held, further, that public interest demands that agreements in terms of which the contracting parties authorise one another to take the law into their own hands must be regarded as invalid. This does not mean, however, that an agreement in terms of which one party undertakes to hand over property in settlement of a debt cannot be relied on as evidence of consent where the creditor proceeds to secure the property which it was agreed that he take. The agreement in this case did not allow the appellants the use of self-help. They were not seeking to retake property whose ownership has passed to Barrett.

Held, further, that the trial court should have judged the question of duress on the affidavits, by adopting a robust and common sense approach. If the court was satisfied that there was no duress, the resulting validity of the contract would have been material in assessing whether Barrett had been illicitly ousted from possession. It was plain, from the facts, that Barrett's claim of duress was lacking in good faith.

Held, further, that to obtain a spoliation order, it must be shown that the applicant was in peaceful and undisturbed possession of the property and that the respondent deprived him of his possession forcibly or wrongfully against his consent. The onus is on the applicant to show that he did not consent. Consent may be given expressly or by implication.

Held, further, on the facts, that Barrett voluntarily agreed to parting with possession of the property in settlement of his indebtedness. The registration books of the trucks were delivered to Botha. No complaint was made to the police. One of the trucks was still subject to a hire-purchase agreement and Barrett took steps to have the agreement ceded to Botha. These facts and other subsequent conduct on Barrett's part allowed of no other conclusion than that Barrett consented to the removal

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GUBBAY CJ

of the property; at the very least, he failed to show that he did not consent. The spoliation order should, therefore, not have been confirmed.

Cases cited:

Davis v Davis 1990 (2) ZLR 136 (H)

Erasmus v Dorsyd Farms 1982 (2) SA 107 (T)

Jivan v National Housing Commission 1977 (3) SA 890 (W)

Kramer v Trustees Christian Coloured Vigilance Council, Grassy Park 1948 (1) SA 748 (C)

Manga v Manga 1991 (2) ZLR 251 (S)

Nino Bonino v de Lange 1906 TS 120

Zimbabwe Bonded Fibreglass \(Pvt\) Ltd v Peech 1987 (2) ZLR 338 (S)

Case Information

F Girach, for the appellants

A P de Bourbon SC, for the respondent

Judgment

Gubbay CJ: On 5 June 1995, the respondent obtained from the High Court, upon a certificate of urgency, a provisional order of spoliation. It directed the appellants, pending confirmation, to restore to the possession of the respondent -

> Scania truck 113h, registration number 487-779T,
>
> Scania truck 114h, registration number 517-710C,
>
> tri-axle trailer, registration number 488-161J,
>
> tri-axle trailer, registration number 521-812C,
>
> tri-axle trailer, registration number 495-262C,
>
> two sets of fuel tanks, each with a holding capacity of 2 x 20 000 litres.

The appellants complied with the order but on the return day vigorously argued for its discharge. Nonetheless, the learned judge presiding confirmed the provisional order with costs. He was not satisfied on the affidavits filed by and on behalf of the parties that the respondent had either consented to or acquiesced in the physical removal by the

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appellants of the afore-described trucks, trailers and fuel tanks.

The first appellant is the managing director of the second appellant, which carries on a haulage and transport business from premises at Msasa. The respondent previously operated a transport business, also at Msasa, under the name Barrett's Transport. Under an oral agreement entered into on 1 October 1992, the second appellant acquired the assets and liabilities of Barrett's Transport as well as those of Concourse Rebuilds (Pvt) Ltd, which was

effectively owned by the respondent. He, in return, was granted a fifty *per* centum shareholding in the second appellant.

The entry of the respondent into the second appellant, far from improving its fortunes, ran it into substantial debt. It became apparent that the relationship between the respondent and the appellants had to be severed, subject to an equitable apportionment of the liabilities of the second appellant which the first appellant and the respondent had personally guaranteed payment of. In the event, on 10 April 1995 the respondent signed the two agreements set out below:

"I E.A. Barrett of 8 Chelmsford Road agree to Option 1 (one) to hand over property in lieu of debt to D.A. Botha and D.A.B. Haulage (Pvt) Ltd.

	Item	**Description**	**Estimated Value**
a)	1 Chelmsford Rd, and bond to be transferred.	House	$700 000
b)	1 Scania 113h	Reg. 487-779T	$400 000
c)	1 Scania 114h	Reg. 517-710C	$193 000
	Cession for balance to Scotfin Limited to be signed.		$257 000
			$34 000
			$223 000
d)	1 tri-axle trailer	Reg. 488-161J	$85 000
e)	1 tri-axle trailer	Reg. 521-812C	$85 000
f)	1 tri-axle trailer	Reg. 495-262C	$85 000
g)	1 set fuel tanks 2 x 20 000 litres		$40 000
h)	1 set fuel tanks 2 x 20 000 litres		$40 000
Total			**$1 628 000**

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This in full and final settlement of any claims D.A.B. Haulage or D.A. Botha has against E.A. Barrett, Concourse Alarms, Concourse Rebuilds, Barrett's Transport, A.M. Barrett, Adriennes and Barrett's Dental Laboratory.

As I understand it and agree to it and bind myself in person and property to adhere to this agreement as I sign."

And:

"As our agreement between D.A.B. Haulage, D.A. Botha and E.A. Barrett. Mr Barrett has agreed to option 1 (one).

a) D.A. Botha has agreed to take over balance of H.P. on Horse Reg. No. 517-710C amounting to ±$275 000.

b) D.A. Botha has agreed to take over the balance of bond on 1 Chelmsford Rd ±$60 000, transfer costs to the account of D.A. Botha.

c) Mr E.A. Barrett will retain one tri-axle trailer and one set fuel tanks - this will be done on an option to buy which will be agreed upon between D.A. Botha and E.A. Barrett.

d) On signing of this agreement amounting to $1 628 000, the balance of $351 853.40 and all further costs i.e. interest to date $20 666 and ÔFINDERS' fee of $336 576 will fall away and no further monies will be owed to D.A. Botha, D.A.B. Haulage by Mr E.A. Barrett or any of his companies.

I bind myself in person and property to adhere to this agreement."

On the evening of 10 April 1995, the first appellant learned that the trucks and trailers, the subject of the main agreement, had been returned to the respondent's premises. He went there and, in the absence of the respondent, exhibited a copy of the agreement to the drivers. They then conveyed the trucks, two of the trailers and the fuel tanks to the nearby premises of the second appellant.

The respondent disputed the validity of the agreement of 10 April 1995 on the ground of duress by the first appellant and his associate. He claimed that the trucks, trailers and fuel tanks were removed from his possession without

his consent. The first appellant denied the exercise of any duress over the respondent. He maintained that the respondent had not been deprived forcibly or wrongfully of his property against his consent. Alternatively, the first appellant contended that even if it be assumed that the respondent was dispossessed of possession by stealth, the delay in seeking a mandament van spolie within a reasonable time was consistent only with acquiescence in the wrongful deprivation.

This alternative submission may be disposed of at the outset. It is entirely devoid of merit. In *Manga v Manga* 1991 (2) ZLR 251 (S) at 255B, this Court held that a delay of five months could not be regarded as consistent only with acquiescence on the part of the appellant in the dispossession. Nor was the delay so extreme as to disable the lower court from granting practical relief. In the present matter the delay was seven weeks. It was far too short a duration to warrant a refusal of the order. See also the

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remarks of Steyn J in *Jivan v National Housing Commission* 1977 (3) SA 890 (W) at 892 in fine - 893C.

Although, depending on its length, the period of delay may not *per* se constitute a bar to the grant of a spoliation order, it could well be a relevant factor in deciding whether the dispossession had been consented to.

The learned judge *a quo* considered it unnecessary to determine the validity or otherwise of the agreement of 10 April 1995. In adopting that approach he would appear to have been influenced by the case of *Erasmus v Dorsyd Farms* 1982 (2) SA 107 (T). The facts were these. The applicant had bought certain cattle from the respondent and had given a cheque in payment of the purchase price. The parties had agreed in writing that if the cheque were dishonoured the agreement of sale would be regarded as cancelled and the respondent would have the right, without further notice, to take the cattle back. The cheque having been dishonoured, the respondent gave a letter to one of his servants in which it was requested that the cattle be handed over to the servant. On presentation of this letter to one of the applicant's servants, the cattle were delivered. In an application for a mandament van spolie it was submitted by the applicant that he had not consented to the return of the cattle and that his servant had no authority to return them. Following *Nino Bonino v de Lange* 1906 TS 120 at 123-124, Eloff J held that the agreement giving the respondent the right to take back the cattle without further notice amounted to an authorisation of self-help, and that it was not enforceable. It was emphasised that public interest demands that agreements, in terms of which the contracting parties authorise one another to take the law into their own hands, must be regarded as invalid.

GUBBAY CJ

I do not read the judgment in *Erasmus v Dorsyd Farms* as authority for the proposition that an agreement, in which one party undertakes to "hand over property" in settlement of a debt owed to the other, cannot be relied upon as evidencing consent where the creditor proceeds to secure the property which it was agreed he was to take. In my view, there can no question of the agreement signed by the respondent allowing the appellants the use of self-help. The appellants were not seeking to retake property, the ownership of which had passed previously from them to the respondent. What had been agreed was simply that, in full settlement of the respondent's liabilities, the items specified were to be handed over to the appellants.

Accordingly, the learned judge ought to have endeavoured to resolve the disputed issue of duress on the affidavits, by adopting a robust and common sense approach. See *Zimbabwe Bonded Fibreglass \(Pvt\) Ltd v Peech* 1987 (2) ZLR 338 (S) at 339C-D. If, being satisfied that there was no real possibility of such a resolution doing an injustice to

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the other party concerned, he had then found that the agreement was devoid of duress, its resultant validity would have been a material feature in the assessment of whether the respondent had been illicitly ousted from possession.

It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:

(a) that the applicant was in peaceful and undisturbed possession of the property; and,

(b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.

See *Nino Bonino v de Lange supra* at 122; *Kramer v Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 753; *Davis v Davis* 1990 (2) ZLR 136 (H) at 141C.

It was for the respondent to show that he had not consented to being deprived of possession. No onus rested upon the appellants, as the learned judge perceived, to establish the respondent's consent.

Consent to the deprivation may be expressly given, as where the possessor is present at the time, is spoken to and gives his permission. Or it may be implied from the conduct of the possessor both before and after the removal of his property. In casu, as I have mentioned, it was for the respondent to satisfy the court on a balance of probabilities that any actions or omissions,

bearing upon his loss of possession, did not warrant a finding that he had been a consenting party.

It is plain to me that the respondent's claim that he signed the agreement of 10 April 1995 under duress was lacking in *bona fides*.

The respondent is an experienced businessman. He is by no means an unworldly person. He met with the first appellant on 5, 6 and 7 April 1995 to discuss the extent of his personal liability as reflected in the set of accounts that had been prepared. He raised queries, which were answered. At none of these meetings did the respondent deem it essential, or even advisable, to be accompanied and assisted by a legal practitioner, an accountant, or even a friend. If he genuinely felt he was being unfairly pressurised or over-reached by the first appellant, it is surprising that he would not have taken such an elementary precaution.

During the course of the discussions on 7 April 1995, the first appellant happened to mention that he intended to buy a stereo music system for his daughter. He asked the

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respondent if he were able to obtain one at the wholesale price. The respondent said he could and, in fact, was as good as his word. That was hardly the reaction of a person who averred he had become by then extremely alarmed and in fear of threats of bodily violence.

On 10 April 1995, the respondent yet again attended the meeting unaccompanied. He was handed three written "options" of liability in varying amounts and elected to accept option number one. It reflected his indebtedness to the appellants as just under two million dollars. After further discussions which centred around the value of the vehicles, the fuel tanks and the respondent's residential property, the first appellant agreed to accept the worth of those assets at $1 628 000 in full and final settlement. The agreement was then typed and signed by the respondent and the first appellant. The respondent also wrote out the agreement in longhand. In addition, he signed a document authorising a Mr M Graves to act on his behalf in the transfer of the trucks and trailers to the second appellant. In all, the meeting lasted about two hours. Depositions from Harry van Biljon, the first appellant's daughter Ashley, Alwyn Botha and the second appellant's bookkeeper, Barbara Hoply, were all to the effect that the meeting was cordial. A most telling incident, which was not denied, was recounted by Alwyn Botha, the first appellant's father. It is best described in his own words:

GUBBAY CJ

> "When the meeting had obviously finished Barrett walked out of the offices and I spoke to him outside. I knew that Barrett had a BMW motor cycle and asked whether he was interested in selling it. Barrett indicated that he was not but gave me the name of someone else who might be keen on selling a motor cycle. We had a general discussion regarding DAF spares which Barrett required and he then left."

I think it inconceivable that the respondent would have been able to engage in such a conversation with a close relative of the first appellant if he had just been forced against his will to rid himself of virtually all he owned.

It seems to me that if the learned judge had undertaken an analysis of the areas of dispute relating to the allegation of duress, he would have appreciated the strength of the appellants' case and the unconvincing nature of the defence raised to the validity of the agreement of 10 April 1995.

It was thus against the background of the respondent having voluntarily agreed to parting with possession of the trucks, trailers and fuel tanks in settlement of his indebtedness, that the issue of whether he was later ousted illicitly from his right of possession should have been determined. There were, moreover, other relevant features, established on the affidavits, that had to be taken into account.

In the first place, the registration books of the two Scania trucks were delivered to the

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first appellant. This could only have occurred upon the authority of the respondent.

Second, no complaint was ever made by the respondent to the police in an effort to regain possession of the trucks, trailers and fuel tanks.

Third, the sales manager of Scotfin Limited, Mr E F Burke, was informed by the respondent of the agreement he had entered into with the first appellant. As the agreement concerned one of the Scania trucks still under hire purchase with Scotfin Limited, Mr Burke advised that it would be necessary for the respondent and the first appellant to sign cession forms which he would prepare; and that all arrears had to be brought up to date by the first appellant before effect could be given to the cession. The respondent was anxious that the cession forms were signed before the end of May 1995 so as to avoid any further instalment being debited to his account. He telephoned Mr Burke on several occasions to enquire how the matter was progressing. On 24 May 1995 he asked whether the cession forms were ready. Mr Burke told him that

the first appellant was due to sign them in two days time. However, on 30 May 1995 the respondent again telephoned to say that his legal practitioner had advised him against signing the cession forms.

Fourth, at the earliest the respondent did not consult a legal practitioner as to his rights until 17 May 1995. And, being dissatisfied with the advice received, he waited for about two weeks before consulting another.

Fifth, on 22 May 1995 the legal practitioner acting for the appellants wrote to the respondent requesting that he attend to the transfer of the immovable property in accordance with the agreement of 10 April 1995. The letter elicited no protest from the respondent. It went unanswered.

Sixth, the respondent delayed for a period of seven weeks before launching the application on 3 June 1995. For the first time the complaint of duress was revealed to the appellants in the founding affidavit.

It is my view that the validity of the agreement of 10 April 1995, together with the aforementioned features of the respondent's subsequent conduct, allowed of no other conclusion than that the respondent consented to the removal from his possession of the trucks, trailers and fuel tanks. At the very least, he failed to establish that the taking was against his consent.

It follows that the learned judge erred in confirming the provisional order.

The appellants are entitled to the return of the trucks, trailers and fuel tanks. The third

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trailer taken by the appellants from the respondent's premises on or about 30 May 1995, was done so contrary to para (c) of the agreement of 10 April 1995. It is to remain in the possession of the respondent.

Accordingly I would allow the appeal with costs and alter the order of the court *a quo* to read:

> "Except for the one tri-axle trailer taken from the applicant's possession on or about 30 May 1995, the provisional order is discharged with costs."

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Lofty & Partners, appellants' legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

ROBINSON v GRIMM 1996 (2) ZLR 83 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

11 & 23 July 1996 Judgment No. S-134-96

Flynote

Landlord and tenant - tenant - ejectment - rights - whether lessee entitled to dispute the title of landlord when landlord seeks eviction of the tenant

Headnote

The respondent purchased shares from a company. The purchase of these shares gave him the exclusive right to occupy a flat in a block of flats. He was issued with a share certificate and this constituted *prima facie* evidence of his title. The company also passed a special resolution that the respondent was entitled to the exclusive right and occupation of the flat. The appellant was the previous lessee of the flat and when given notice to quit by the respondent, contended that the company, not the respondent, was the owner.

Held, that the general rule at common law is that a lessee may not dispute the lessor's title when the landlord seeks to terminate the lessee's tenancy.

Held, further, that in any event in the present case the respondent had brought forward clear proof that he was the owner of the premises.

Cases cited:

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Clarke v Nourse Mines Ltd 1910 TS 512

Hillock & Anor v Hilsage Invstms (Pty) Ltd 1975 (1) SA 508 (A)

Loxton v Le Hanie (1905) 22 SC 577

Case Information

The appellant in person

A J Dyke, for the respondent

KORSAH JA

Judgment

Korsah JA: The appellant applied to adduce further evidence at the hearing of this appeal in challenge of his landlord's title. The application was opposed. To avoid a duplication of hearings we decided to hear and determine the application together with the appeal.

This appeal raises one question only: Should the lessee be allowed to challenge the title or right of the lessor in this action for ejectment? A brief rehearsal of the facts is necessary to illustrate how this question arises:

On 4 February 1992, the respondent bought seventy-five shares in Fairway Estate (Pvt) Ltd ("the company"). The shares gave him the exclusive right of occupation of Flat No. 5 at 179 Fife Avenue, Harare. The shares were valued at $150 000. On the same day the respondent was issued with a share certificate, which is *prima facie* evidence of the respondent's right, title and entitlement to those shares. On that same day, i.e. 4 February 1992, the company passed a special resolution that the respondent was entitled to the exclusive right and occupation of Flat No. 5 of the said block of flats.

On 27 February 1992, the respondent, as the new owner, wrote to the appellant intimating that as the owner of the flat he was desirous of taking occupancy of it. He gave the appellant two months' notice of termination of the lease and requested the appellant to vacate the premises not later than 30 April 1992.

The appellant resisted the notice of termination of the lease. His main contention was that the respondent was not the owner of the flat, and that the company was the owner of the flat.

The appellant supports his stance with the spurious argument that on 12 July 1995 the company informed all its tenants occupying flats at 179 Fife Avenue, inclusive of himself as tenant of Flat No. 5; that it intended to apply for an increase in rentals; that on 4 September 1995 the company lodged such an application with the Northern Region Rent Board. On 8 February 1996 the Board decided that the application was premature. The appellant, however, offered to pay a rental of $1 250 *per* month, which was accepted on behalf of the company. The appellant, who had been paying rent directly to the respondent since April 1992, concluded that by these acts by or on behalf of the company, ownership of Flat No. 5 had reverted to the

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company as of 12 July 1995, and has since been paying rent to the company from March 1996.

This argument overlooks the fact that the respondent, by virtue of his

KORSAH JA

shareholding in the company, is entitled to be represented by the company in such matters.

The appellant also alleged that at the time the respondent served upon him notice of termination of the lease of Flat No. 5, the respondent's shares had not been fully paid up as enjoined by the contract of sale, which stipulated that transfer of the shares sold could only take place upon receipt of the full purchase price. Thus, the notice of termination was invalid, as at that time the respondent had only paid $70 000 out of the full purchase price of $150 000. Other technical objections were raised before us at the hearing which I hope to deal with in my consideration of the general law.

In terms of s 3 of the Rent Regulations, SI 626 of 1982, "owner" in relation to a dwelling included:

> "(a) where the dwelling is subject to an exclusive right of occupation by reason of a shareholding in the company owning the dwelling, the person entitled to occupy the dwelling;
>
> (b) ..."

The respondent, as the share certificate stipulates, was the owner of Flat No. 5 as of 4 February 1992, and was entitled to give notice, as he did, in the letter of 27 February 1992 addressed to the appellant. The company affirmed that the respondent is the owner of the flat.

The general rule of the common law is that a lessee may not dispute the lessor's title. This rule that a lessee may not dispute the lessor's title has been applied where a lessee, upon termination of the lease, refused to vacate the property. See Loxton v Le Hanie (1905) 22 SC 577 at 578, where Buchanan ACJ said:

> "The defendant has set up the defence that the title of the ground is in dispute, and, therefore, the magistrate has no jurisdiction. But it is not competent to dispute his landlord's title."

So also in Kala Singh v Germiston Municipality 1912 TPD 155 at 159-160, where, upon the point being taken that the municipality, being a statutory body, was not entitled to let the stand to the appellant, de Villiers JP expressed himself thus:

> "But, in answer to this, we have the rule of the English law, which it was

KORSAH JA

> decided amongst others in Clark v Nourse Mines Ltd (1910 TS 512) is also a rule of our law, that as between lessor and lessee it does not lie in the mouth of the lessee to question the title of his landlord. He could be met by the exceptio doli mali; and this exception, in my view, would lie equally between the parties even if the relationship between them is not, strictly speaking, that of landlord and tenant" (emphasis added).

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The opinion of Solomon J in Clark v Nourse Mines *supra* at 520-521, which received approval in Hillock & Anor v Hilsage Investments (Pty) Ltd 1975 (1) SA 508 (A) at 516E, is as follows:

> "It seems to me that the rule (that a lessee cannot dispute a lessor's title) may be based on one or other of two very simple grounds. The first is, that the lessor, having performed his part of the contract, and having placed the lessee in undisturbed possession of the property, is entitled to claim that the lessee should also perform his part of the contract and should pay him the rent which he agreed to pay for the use and enjoyment of the premises. The second ground is that the lessee, having had the undisturbed enjoyment of the premises under the lease, and having had all for which he contracted, it would be against good faith for him to set up the case that the lessor had no right to let him the property" (emphasis added).

Professor Kerr, in his work The Law of Sale and Lease in footnote 25 at p 169 explains that:

> "As anyone can let another's property it appears that the learned judge meant not that the lessor had no Ôright to let' but that he had no proprietary right in the property the use and enjoyment of which had been given."

In the instant case, the company, as well as the respondent, has exhibited proof in the form of a share certificate to buttress the respondent's claim to ownership of Flat No. 5. Apart from that, the appellant accepted the respondent as his landlord and paid rent to him from March 1992 until February 1996. It does not lie in the mouth of the appellant to deny the respondent's title to Flat No. 5 at 179 Fife Avenue, Harare.

Accordingly:

(1) The application is dismissed with costs;

KORSAH JA

(2) The appeal is dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Kantor & Immerman, respondent's legal practitioners

S v MAGORE 1996 (2) ZLR 88 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Criminal appeal

24 July 1996 Judgment No. S-164-96

Flynote

Criminal procedure - trial - conduct of - unrepresented accused - court's duty to ensure that charge properly understood - plea of guilty - rape charge - allegation of legal rather than actual penetration - whether plea of

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guilty properly accepted

Headnote

The appellant, who was not legally represented at his trial and was not a person who could be regarded as educated or intelligent, pleaded guilty to a charge of rape. The magistrate questioned him about his plea. During that questioning the magistrate queried whether the medical report did not "indicate that penetration was effected because he insists that penetration was not effected." The prosecutor then said that the State was alleging that "legal penetration" had occurred and the accused remarked that he understood "the legal part of the case." The magistrate accepted the accused's plea and convicted him.

Held, that, where an accused is not legally represented, and particularly where that person is uneducated and unintelligent, the court must be very careful to ensure that the accused fully understands the charge and all its essential elements and that he genuinely and unequivocally admits to the charge and its essential elements and to the facts alleged by the prosecution.

Held, further, that in the present case it was clear that the appellant was denying that he had penetrated the complainant. The legal concept of penetration was not even understood by many medical practitioners and this difficult legal concept was not explained to the accused. It was very doubtful whether the appellant did indeed understand it.

Held, therefore, that the plea of guilty had not been properly accepted.

1996 (2) ZLR p89

MUCHECHETERE JA

Cases cited:

R v Muchena 1966 RLR 731 (A)

S v Chirodzero HH-14-88

S v Dube & Anor 1988 (2) ZLR 385 (S)

S v Mteiswa 1976 (1) RLR 314 (G)

Case Information

D Mbidzo, for the appellant

Miss B Hammond, for the respondent

Judgment

Muchechetere JA: This is an appeal against the judgment of the magistrate's court, Harare, on 4 May 1995 in which the appellant was convicted of rape and thereafter sentenced to seven years' imprisonment with labour, of which two years' imprisonment with labour was suspended for five years on the usual conditions of good behaviour. At the end of the hearing we made the

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following order and indicated that our reasons for so ordering would follow:

> "The appeal is allowed. The conviction and sentence are set aside. The case is remitted for trial before a different magistrate on a plea of not guilty. In the event of the appellant being convicted of rape or a lesser charge, the period of imprisonment served by the appellant is to be taken into account in the assessment of sentence."

These are they.

The facts in the matter are that the complainant is a sister-in-law of the appellant. She was staying with the appellant and his wife at the time the incident occurred.

On 1 May 1995, the appellant and the complainant were left together at the house while the appellant's wife went to work at Concession Hospital. It was alleged by the State that at about 2030 hours that day the appellant went into the complainant's bedroom and started caressing her. This awakened the complainant who thereafter protested and threatened to report him to the authorities. The appellant went back to his bedroom but returned after a few minutes. This time he got into the complainant's blankets and pulled her to himself. He pulled down her underpants to her thighs and climbed on top of her. He thereafter prised her legs apart, got between them and inserted his penis into her vagina but later removed it without ejaculating.

The following morning the complainant reported the matter to the appellant's

wife. She in turn reported it to the police. The complainant was taken to Concession Hospital for examination. In connection with the section as to whether penetration had been effected, the following is indicated in the medical report:

> "Unlikely since hymen intact, but presence of bruise on fourchette indicates force used in genital area."

The appellant tendered a plea of guilty to the charge of rape. In the circumstances the learned trial magistrate adopted the procedure outlined in s 255(2)(b) of the Criminal Procedure and Evidence Act [Chapter 59] (now s 271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07]). The following transpired during the canvassing of the essential elements:

" Q. Do you admit these facts?

A. Yes.

Q. Do you have anything to add or subtract?

A. Your Worship I did not penetrate the complainant. All along I was in love with the complainant. I would like to point out to the court the fact that I intended to marry the complainant. I am the one who is responsible for taking care of the complainant's family and my family.

Q. But those are not facts relating to the crime?

A. Furthermore since I co-operated with the police as far as this charge is concerned I pleaded in toto as it is being said. My father-in-law passed away.

Comment by magistrate:

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I do not think that has any relevance to the issue before us.

The medical report does not indicate penetration was effected because he insists that penetration was not effected?

BY THE PROSECUTOR: (To court):

What the State was going for was merely legal penetration?

BY THE ACCUSED: (To court):

I understand the legal part of the case.

MUCHECHETERE JA

.....

Q. Do you consent to its (the medical report's) production by the State and you waive your right of notice?

A. Three days before, this document (was) handed to me by the doctor.

Q. Were you shown this medical affidavit before?

A. The police explained to me.

Q. When was that?

A. It was explained to me the very day I was arrested.

.....

Q. You understand it?

A. Yes I understand it.

Q. You do not dispute the doctor's finding?

A. I do not dispute the doctor's findings.

Q. You consent to its production by the State?

A. Yes.

Q. The essential elements of the charge of rape (are) having unlawfully and intentionally having sexual intercourse with a woman without her consent or having sexual intercourse with a girl under the age of twelve who is presumed to be incapable of giving such consent. You understand?

A. I understand.

.....

Q. You admit your conduct (having sexual intercourse with the complainant without her consent) was wrongful and unlawful?

A. Yes.

Q. Do you have any defence to this case?

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A. No defence to offer.

Q. So may I take your plea to be an admission of (the) facts and essential elements of this case?

A. Yes." (The underlining is mine).

MUCHECHETERE JA

In the first instance, the appellant was unrepresented. Secondly, the appellant was not a person one could regard as educated or intelligent - he was a general hand with the Grain Marketing Board, Concession. Thirdly, he was facing a very serious charge, in that if convicted he faced a long prison term.

In view of the above, it was incumbent upon the court to assist the appellant and ensure that he fully understood the charge and the essential elements. See R v Muchena 1966 RLR 731 (A) at 736H where Beadle CJ said:

> " ... This court has repeatedly stated that where an accused person is undefended, and particularly where the accused person is not particularly intelligent, there is an obligation on the court to see that the accused's case is fairly put before the court and also assist the accused in his defence, where that is required. There is also an obligation to see that the prosecutor does not take unfair advantage of the accused."

See also S v Chirodzero HH-14-88, where Reynolds J stated that the procedure in s 271(2)(b) of the said Act is an extraordinary procedure for disposing of criminal trials after the briefest of hearings and that safeguards that form an integral part of a full trial are absent. In the circumstances, magistrates must therefore be constantly alert to ensure that this truncated form of trial does not result in any injustice taking place. They must be satisfied that the admission of guilt is genuine, unqualified and unequivocal before acting upon it and must establish that the accused fully understands and admits the charge and all its elements as well as all the facts alleged by the prosecution to have occurred. In addition it must be established that the accused is in fact and in law guilty of the crime charged on his own story.

From the canvassing of the elements in this case, it is clear that the appellant denied that he had penetrated the complainant. The trial magistrate should have been alert to the fact that the appellant was denying the most important element of the charge. The prosecutor, however, sought to redeem the situation by talking about the concept of legal penetration. This legal concept, which often is not understood by medical practitioners who examine complainants in cases of this nature, was not canvassed with the appellant. It is, therefore, difficult to accept that when he stated that he understood "the legal part of the case" the appellant was admitting that he had properly understood the legal concept. See also *S v Dube* & Anor 1988 (2) ZLR (S), where it was stated that magistrates faced with a plea of guilty must be very careful to establish what it is that the accused is admitting especially where there is a difficult legal concept such as the one above.

MUCHECHETERE JA

In the circumstances, we were not satisfied that the appellant's plea of guilty was properly

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accepted. We therefore followed the procedure set out in *S v Mteiswa* 1976 (1) RLR 314 (G).

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Chihambakwe, Mutizwa & Partners, appellant's legal practitioners

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CHIRAMBASUKWA v MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS 1996 (2) ZLR 94 (HC)

Court **High Court, Harare**

Adam J

Civil trial

20 & 21 February & 31 July 1996 Judgment No. HH-102-96

Flynote

Administrative law - administrative decision - notification of - whether affected person can claim benefit of decision before it is officially notified to him - Deputy Ombudsman - increased salary and allowances stipulated in Cabinet Minute, which was withdrawn before he was formally notified - not entitled to such salary and allowances

Headnote

The plaintiff was appointed as Deputy Ombudsman in 1982. After his appointment, he made representations about his salary, claiming that he should be paid the same salary as the Secretary for Justice. In 1989, a letter from the Vice-President, who was Acting President at the time, was addressed to the Minister of Justice about the plaintiff's salary and conditions. The letter ordered that the plaintiff be paid the same as the highest-paid Permanent Secretary and set out other allowances. The Minister passed the letter to the Secretary, who instructed law officers to draft a Cabinet Minute to give effect to the Vice-President's instructions. The Cabinet Minute was duly drafted, signed by the Vice-President and returned to the Ministry. Before the plaintiff could be formally advised of the Cabinet's decision, the Secretary of Justice received two letters from the Secretary to the Cabinet. These instructed him not to alter the plaintiff's conditions of service until the President had reviwed the matter.

The plaintiff had become aware, unofficially, of the contents of the Vice-President's letter and the Cabinet Minute, but the contents were never officially communicated to him through the normal channels. Nonethless,

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ADAM J

he claimed that the Acting President, by signing the Cabinet Minute, had "fixed" his salary and allowances in terms of s 5 of the Ombudsman Act [*Chapter 10:18*]. Accordingly, he claimed the

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difference between what he had been paid and what the Cabinet Minute said he should be paid. It was argued on his behalf that the President could not withdraw the Cabinet Minute, but that even if it could be withdrawn, the plaintiff was entitled to make representations.

Held, that an administrative determination or decision has no legal efficacy until it has been duly communicated to the individual concerned and until it has been established that there has been such communication there is no determination or decision that can be relied on. What constitutes communication depends on the procedures contemplated by the statutory provisions in question. In this case, there has been no official communication to the plaintiff of the Cabinet Minute, which gave effect to the Acting President's decision and so the plaintiff's salary and allowances could not be said to have been "fixed."

Cases cited:

Hall v R 1940 NPD 184

Health Professions Council v McGown 1994 (2) ZLR 329 (S)

Lek v Est Agents Bd 1978 (3) SA 160 (C)

The court referred to the following statutory provisions:

Constitution of Zimbabwe 1980, s 31H(5)

Ombudsman Act [*Chapter 10:18*], s 5

Case Information

E I Manikai, for the plaintiff

L Hove, for the defendant

Judgment

Adam J: The plaintiff in his amended declaration claims the amount of $26 760.50, together with interest and costs. The issues arising between the parties at the pretrial conference was agreed as being whether the plaintiff was entitled to be paid the increased salary and allowances approved on 6 September l989 by the Acting President and whether that approval had been revoked before it had been communicated to the plaintiff.

THE EXHIBITS

Before outlining the evidence, it may be useful to itemise the documentary exhibits which will be referred to in the analysis of the evidence.

Exhibit "1" is a photocopy of Cabinet Minute No. 250/89 with the original

date 20 September l989 of the Office of the Ombudsman, with original initials and original in red

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marked "file Chirambasukwa". It amends Cabinet Minute 23/88 relating to the conditions of the Deputy Ombudsman, by substituting a salary of $45 000 *per* annum from l July l989 and providing that in respect of any continuous period exceeding 30 days during which the plaintiff acts as Ombudsman he must be paid the salary of the Ombudsman. He must have a housing allowance applicable to Judges. For the period from l March l988 to 31 July l989 the plaintiff would be deemed to have been entitled to a salary of $40 812 *per* annum. The housing allowance for the Deputy Ombudsman would be deemed to be applicable to him with effect from l4 August (the year has been altered), the date of his appointment as Deputy Ombudsman.

Exhibit "2" is a confidential letter from Vice-President Muzenda of 22 June l989 (copied to the Senior Minister of Finance), addressed to the Minister of Justice about the Deputy Ombudsman's Salary and Allowances. That letter refers to the previous discussion on the subject between the Vice-President and the Minister and says that, after due consultations with the President, the President has agreed and directed that with effect from l March l988 the Deputy Ombudsman should, pursuant to s 5 of the Ombudsman Act 16 of l982 (now *Chapter 10:18*), have been paid at the same rate as the highest-paid Permanent Secretary, namely $40 812 *per* annum. It continues that from the date of the plaintiff's appointment on 14 July l982 to 20 February l988, he should be paid a housing allowance of $400 a month and from l March l988 at the same rate applicable to judges (presently $9 600 *per* annum) and that he should be paid an acting allowance when the Deputy Ombudsman acted as an Ombudsman.

Exhibit "3" is the original of the letter of 31 October 1990 from the then Secretary for Justice (now Mr Justice Cheda) to the plaintiff, in which the Secretary said that all he did was to state the present position according to the correspondence and pointed out that the Deputy Ombudsman's reply rejected an amendment, despite the legal opinion given to that effect. It also said that the Secretary could not implement a Cabinet Minute which had been withdrawn.

Exhibit "5" is a photocopy of a confidential letter of 21 September l989 from Dr Utete, the Secretary to the President and Cabinet, addressed to the Secretary for Justice. It refers to Cabinet Minute No. 250/89 (exhibit 1) signed by the Minister of Justice and the Vice-President. It says that the President wishes to examine that Minute and that nothing should be done to

bring about changes to the salary and housing allowance for the Deputy Ombudsman.

Exhibit "6" is a photocopy of a letter dated 26 September l989 from S J Galloway, for the Secretary to the President and Cabinet, addressed to the Secretary for Justice. It refers to the letter from the Secretary for Justice dated 22 September l989 and asks that the Secretary for Justice confirm that no action will be taken to alter the Deputy Ombudsman's conditions of service until the matter has been reviewed by the President.

Exhibit "8" is the original of the letter of 30 October l990 from the Deputy Ombudsman the plaintiff in which he accepts that he raised the issue a year ago with the former Secretary for Justice, but the issue had been taken care of by the aborted Cabinet Minute 250/89 so the Ministry's minute of l7 January l989 and 6 March l989 were not an appropriate reply; that he

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believed that this did not need an amendment to the Ombudsman Act and that the issue should merely be righted by a Cabinet Minute like Cabinet Minute 250/89.

Exhibit "9" is the original of the letter of l6 October l990 from G E Kayela, for the Acting Ombudsman, addressed to the Secretary for Justice, enquiring whether the Acting Ombudsman is not entitled to an acting allowance. It points out that the records show that the Ombudsman, Mr Justice Moodley, took leave from 12 September l988 to 28 October l988, from 8 December l989 to 22 January l990, and from 13 March l990, and that the Deputy Ombudsman during that time acted as Ombudsman.

Exhibit "l0" is a carbon copy of the reply from the Secretary for Justice, dated 26 October l990. The Secertary said that the Ombudsman had raised this issue before and an explanation had been forwarded after legal opinion had been sought. He said that he was surprised to be asked that question again as if the Deputy Ombudsman did not know, so he was referred to the Ministry's minute of 17 January l989 and to the former Secretary of Justice's minute of 6 March l989. The Secretary suggested an amendment to the Act.

THE PLAINTIFF'S EVIDENCE

The plaintiff in his evidence alleged that the President prescribed his conditions of service as Deputy Ombudsman. He said that he had first approached the Minister of Justice and the Ministry. When they did not consider his representations about his salary, he resorted to the President's Office. He wanted his salary to be set at the scale of the Secretary for Justice and the allowances set at the same level as other constitutional appointees.

ADAM J

He stated that subsequently Cabinet Minute 250/89 exhibit "1" - was approved by the Vice President, then Acting President, to which was attached a memorandum signed by the Minister. Before that he had obtained a copy of a letter - exhibit "2" - through the Permanent Secretary in the Vice President's Office. He asked the Secretary for Justice if he had seen this. The Secretary replied that he had not done, so the plaintiff gave him a copy. The Secretary for Justice said that if he had been given that letter by the Minister he would have acted. He said that he was going to do something about it. The plaintiff said that a long period then elapsed. When he inquired from the Permanent Secretary in the Vice President's Office about the delay, he was told that a Cabinet Minute had been approved. He then contacted the Secretary for Justice, who said that he had not heard of such a minute *(8) ... He agreed that the Secretary for Justice wrote to him on 31 October l990 - exhibit "3" - saying that he could not implement a Cabinet Minute which had been withdrawn. No explanation was given to the plaintiff about the withdrawal. He had complained about this to the President, who told him that it was a matter of time before it was settled. The plaintiff said he was not afforded an opportunity to be heard before it was withdrawn. He was not aware of any other Cabinet Minute. Under cross-examination he stated that after he receive a photocopy of the Cabinet Minute he did not check with the Ministry of Justice. It was put to him that that particular Cabinet Minute had not been sent by the Ministry of Justice to the Ombudsman and he replied that it had. He conceded that he had spoken to the Secretary for Justice before the photo-copy of the Cabinet Minute was

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received by him. He repeated under cross-examination that he did not know until later that the Cabinet Minute had been withdrawn. He agreed that he had direct access to the Vice President's Office and that he had spoken to the Vice President, who said that he would talk to the Minister. The Vice President did not inform him that the Cabinet Minute had been withdrawn. In answer to the questions from the Court he said that it was 4 months after he received the photo-copy of the Cabinet Minute that he learnt about this withdrawal. That was the plaintiff's case.

THE DEFENDANT'S EVIDENCE

The defendant called the Honourable Mr Justice Cheda, who was the Secretary for Justice at the relevant time. He said that he had known the plaintiff when the latter was the Master of the High Court. The plaintiff's appointment as Deputy Ombudsman was before Cheda J became the Secretary for Justice. Cheda J said the plaintiff had contacted him about his conditions

ADAM J

of service and that he had told the plaintiff what the Ministry's files disclosed about this. The plaintiff had complained that he had not been getting the same salary that Mr Zamchiya (the previous Secretary for Justice) was getting. Cheda J explained the position to the plaintiff. He was shown exhibit 2. He said that on receiving it from the Minister he had instructed law officers in the Attorney General's Office to draft a Cabinet Minute. This was done and brought to him. He took it to the Minister who sent it on to the Office of the President. The Cabinet Minute No. 250/89 - exhibit 1 - came back signed by the Vice President. Cheda J did not contact the plaintiff after that Minute was received, nor did he officially communicate the Minute to the plaintiff. Cabinet Minutes are confidential, so a person affected is normally advised by the Ministry by means of a letter being addressed to the person under whom he works. The Cabinet Minute would be filed in the Ministry's Head Office. He received exhibit "5" to which he responded and then he received Ex "6". He complied as directed. He did not communicate with the defendant until the exchange of correspondence in October l990 when he wrote and told the plaintiff that he could not implement Cabinet Minute No 250/89 which had been withdrawn. The plaintiff could have contacted him over the phone and asked him verbally about the Cabinet Minute. He maintained that, from his knowledge of the Ministry, a covering letter would have been forwarded from the Ministry with a photocopy of the Cabinet Minute. There was nothing in the records of the Ministry indicating that Cabinet Minute 250/89 had been officially sent to the Office of the Ombudsman. It was indicated to him that the plaintiff had testified that there was a covering letter attached to the photo-copy and he replied that that could not be true. The Ministry's position was that those changed conditions had been withdrawn because they had not yet formally advised the plaintiff about this. They did not know who gave the plaintiff copies of the Vice-President's confidential letter to the Minister and the Cabinet Minute. It was put to him under cross-examination that the plaintiff said that he was entitled to new conditions under Cabinet Minute 250/89 and he replied that the Executive issued the Cabinet Minute and the Executive withdrew it. He said that the Ombudsman had talked to him about the Deputy Ombudsman's conditions. He maintained that Cabinet Minutes were confidential and they remained within the Ministry's Head Office. He believed he was given the original of exhibit "2"

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by the Minister. It was put to him that the plaintiff had testified that he had made a photocopy and gave it to him. He replied that he felt it difficult to believe this. The letter was addressed to the Minister of Justice, who gave it to him sometime after 22 June l989, when he acted on it. He did not act on a photocopy of such a letter, since he would only act on the original being given to him by the Minister. He said that from the time he became Secretary for Justice there was

a lot of correspondence about the plaintiff's conditions of service and he even suggested an amendment to the Act. He was asked whether he considered the plaintiff's approach to the Vice-President as "going behind the back of the Ministry" and replied that it is possible that the plaintiff went behind the back of the Ministry. He could not recall if a Mr Nyathi had collected the Cabinet Minute; he would have to check the records. He could not dispute that exhibit "1" had been initialled but he did not know the signature of the then Ombudsman. When asked how he thought xhibit "1" was received, he replied that the plaintiff could have got it from the Vice President's Office, since he got exhibit "2" from the same place. He was shown exhibits "5" and "6" and asked whether they stated that Cabinet Minute 250/89 was being withdrawn. He replied that this was a matter of interpretation and he understood it as it being withdrawn. He was asked if "suspend" might not be a better description. He replied it could be so and as far as he was concerned it was to nullify it. He did not consider it necessary that there was a formal revocation order. He did not follow it up since exhibits "5" and "6" were very clear. In answer to a question from the Court, he said that if Cabinet Minute 250/89 had been officially sent to him the plaintiff would have come running to ask the Ministry to action it and not have waited. There is little doubt that if they had sent the Ombudsman a covering letter along with the Cabinet Minute 250/89, because of exhibits "5" and "6" they would have written to the Ombudsman. He also said that after his reply exhibit "3" on 31 October l990 he would have expected the plaintiff to have written to the Ministry that Cabinet Minute 250/89 could not have been withdrawn since his conditions had been fixed by the President and the plaintiff was entitled to it. The plaintiff did not do so. He did not recall any discussions that he had with the plaintiff about this. I accept Mr Justice Cheda's evidence on this whole aspect in preference to the plaintiff's evidence; I found it was more credible.

In his address, Mr *Manikai* on behalf of the plaintiff, submitted that s 5 of the Ombudsman Act provides that the President may fix the payment of salary and allowances and that the ordinary definition of "fix" applied. He cited Hall v R l940 NPD 184 where Act l4 of l9ll gave the Minister power to order or cause any cattle to be dipped within such periods as may be prescribed by the Minister and at such times within those periods as may be "fixed" by officers described in the Minister's order. A notice had been served on the appellant by a Government Veterinary Officer giving ll am to 12 noon on every Saturday as his dipping time. Selke J said at 186:

> "Given a period of a number of days it seems to me that you can properly be said to Ôfix a time' within it for the commencement or performance of

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> an act, whether you merely indicate a named day as a whole, or a portion of a named day, for example, the forenoon, or whether you particularise further, by fixing a given hour of a named day. If you do any of these things, I think you 'fix a time.'"

Mr Manikai argued that exhibit "2" "fixed" the plaintiff's salary and allowances. Further, he submitted, once the Vice-President signed Cabinet Minute 250/89 it could be said that the President "fixed" the salary and allowances of the Deputy Ombudsman. He also submitted that before Cabinet Minute 250/89 had been "withdrawn", the plaintiff, because of exhibit "2", should have been given an opportunity to be heard and that the "legitimate expectation doctrine" applied. He referred to *Health Professions Council v McGown* l994 (2) ZLR 329 (S). He argued that exhibits "5" and "6" were not verified. In any case, he submitted, the President could not "withdraw" Cabinet Minute 250/89. I should indicate that "legitimate expectations" had not even been pleaded by the plaintiff.

In his address, Mr Hove, on behalf of the defendant, submitted that Cabinet Minute 250/89 did not become binding on the defendant, and that exhibit "2" did not "fix" the plaintiff's salary and allowances since it was merely a preliminary document which envisaged another instrument being prepared. Exhibit "2" did not give the plaintiff anything and the plaintiff appreciated this: that is why, in his letter of 30 October l990 (exhibit "8"), he sought a Cabinet Minute similar to the aborted Cabinet Minute 250/89. He argued that s 5 of the Ombudsman Act envisaged that certain administrative procedures would have to be followed in the President "fixing" the Deputy Ombudsman's salary, allowances and pension. Before those administrative procedures were completed the President had revoked Cabinet Minute 250/89 since it had not been "officially" communicated to the plaintiff. It is a clear principle of administrative law that notice must be given to any person who is affected by any administrative action. He relied on Joubert Law of South Africa vol 1 (Administrative Law) at para 76 where it was stated:

> "An administrative act acquires legal force as soon as notice of the act has been duly given ... In the case of individual administrative acts individual notification is required before the act acquires legal force, ie becomes operative."

He also submitted that exhibit "8" supported the defendant's position. The Oxford English Dictionary gives various meanings of "fix", depending on the context in which it is used. Some of these meanings are "to take up one's position, settle one's choice, decide on or upon".

ADAM J

Section 5(l) of the Ombudsman Act provided that the Deputy Ombudsman "shall hold office on such terms and conditions ... as the President may fix".

Now it is clear from the terms of s 31H(5) of the Constitution of Zimbabwe 1980 that, in the exercise of his functions, the President shall act on the advice of the Cabinet, except where it is required by the Constitution or any other law that he act on the advice of any other person or authority. This will obviously need certain administrative actions to be taken before it can be said that the President has carried out his functions.

Further, a determination or decision made by someone has no legal efficacy until such time as it has been duly communicated to the individual concerned and until it can be established that

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there has been such due communication there is no determination or decision that one can rely on: Lek v Estate Agents Bd l978 (3) SA 160 (C) at 167. What constitutes communication will depend upon the procedures contemplated by the statutory provisions in question.

It is not disputed that the administration of the Ombudsman Act was assigned to the Minister of Justice, Legal and Parliamentary Affairs. The plaintiff accepts that the confidential letter of 22 June l989 (exhibit "2") was addressed to the Minister of Justice requesting that a Cabinet Minute be prepared. He himself in his letter of 30 October l994 (exhibit "8") regarded the issuing of Cabinet Minute 250/89 as being required to right the problem that he had raised. If exhibit "2" had "fixed" the Deputy Ombudsman's salary and allowances, he would not have requested that a Cabinet Minute be prepared. Nor would the plaintiff have regarded the issuance of a Cabinet Minute to right his problem. It follows that the broad interpretation which Mr Manikai gives to "fix" cannot be sustained. Exhibit "2" cannot be said to have fixed the Deputy Ombudsman's salary and allowances.

It is common cause that Cabinet Minute 250/89 (exhibit 1) (described by the plaintiff as "the aborted Cabinet Minute") was prepared as a result of exhibit "2". It is also clear that both the plaintiff in his evidence and Mr Justice Cheda in his evidence dealt with the issue of the communication of that Cabinet Minute. Therefore, the whole issue in this trial only concerns that aspect.

Mr Justice Cheda's evidence on the proper procedure pertaining to this whole matter was not contradicted. He testified that in his capacity as Secretary for Justice, he is sent the original of a minute by the Minister of Justice giving instructions that a Cabinet Minute be prepared. The Secretary of Justice

causes law officers in the Attorney-General's Office to draft it. When that is done it is brought to the Secretary who takes it to the Minister, who in turn sends it on to the Office of the President. The Cabinet Minute comes back after it has been signed by the President. A Cabinet Minute is a confidential document, the original of which is kept in the Ministry's Head Office. Since Cabinet Minutes are confidential, the person affected is normally informed by means of a letter from the Ministry addressed to the Head of the Office under whom the person affected works.

From Mr Justice Cheda's evidence, the crucial document would be the so-called covering minute from the Ministry of Justice that the plaintiff testified about to which was attached exhibit "1". This, according to the plaintiff, was removed from the file in the Office of the Ombudsman by him and mislaid. Since he maintained that copies of the same minute had been sent to the Treasury, Auditor-General and to Salary Services Bureau, no explanation was provided by the plaintiff as to why one was not produced or could not be produced before the Court. Its production would have shown official communication.

Mr Justice Cheda, when pressed under cross-examination, was emphatic that there could not have been a covering letter since the plaintiff was not officially informed by the Ministry of

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Justice since their records do not have a copy of that so-called covering minute. There is little doubt that on receipt of the minute of 21 September l989 (exhibit "5"), Mr Justice Cheda would have had before him that particular file before his reply of 22 September l989 and when he received the minute of 26 September l989 (exhibit "6"). If there had been the so-called covering minute (which would undoubtedly have had a date on it only a few days earlier) Mr Justice Cheda could not have failed to see a copy of it. As he testified, if in fact the so-called covering minute had been sent with exhibit "1", the plaintiff would have come running to him, particularly as he claimed that he had "unofficially" obtained a copy of exhibit"2". Even more surprising is the fact that in the letter of l6 October l990 (exhibit "9") written for him by G E Kayeya there is no mention and no claim that his conditions had been altered by Cabinet Minute 250/89 (covering salary, allowances and acting allowances) but merely an inquiry as to whether or not he was entitled to acting allowances for the periods disclosed which he later stated on 30 October 1990 could be righted by a Cabinet Minute similar to Cabinet Minute 250/89. Further, in his letter of 30 October l990 (exhibit "8"), he candidly refers to Cabinet Minute 250/89 as the "aborted Cabinet Minute 250/89". This must surely be regarded as an acknowledgment by him that that Cabinet Minute 250/89 had not been made

ADAM J

operative by the President. All this distinctly reveals that the plaintiff's conditions had not been altered in the sense that they had been officially communicated to him. If that had been the position one would have expected the plaintiff to have produced before the Court copies of correspondence from himself to the Ombudsman since he only retired in early l99l or from the Ombudsman to the Ministry of Justice. Also, no explanation is given by the plaintiff as to why he only commenced proceedings in this matter on 26 April l993, some 3 years later.

It is clear that when s 5(l) of the Ombudsman Act speaks of "terms and conditions relating to the payment of salary, allowances and pension benefits as the President may fix", it must mean the President acting in terms of the provisions of the Constitution deciding (or determining) them by communicating directly that decision (or determination) or deciding (or determining) them by communicating that decision (or determination) through the proper procedures laid down.

The plaintiff has not discharged the onus placed upon him that the defendant was under any obligation to pay the amounts claimed by him. Accordingly the plaintiff's claim is dismissed with costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

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

VAN NIEKERK NO v MASTER OF THE HIGH COURT 1996 (2) ZLR 105 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

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Civil appeal

23 July & 1 August 1996 Judgment No. S-145-96

Flynote

Administration of estates - executor - removal - grounds - when executor may be removed in terms of s 117(1) of the Administration of Estates Act [*Chapter 6:01*]

Headnote

The appellant was the executor of a deceased estate. The deceased died in September 1992. There were a number of complaints about the delays in finalising the account, but it was eventually advertised as lying for inspection in June 1994. An objection was received from a firm which was assisting the widow of the deceased. The objection led to correspondence between the appellant and the firm about a number of matters which the firm disputed in the account. Eventually, in October 1995, the Master decided to seek an order removing the appellant from his position in terms of s 117(1) of the Administration of Estates Act [Chapter 6:01]. The judge *a quo* concluded that there were serious disputes between the appellant, the Master and the heir, represented by the firm, which disputes he could not decide on the papers. While no finding had been made against the appellant in his conduct in relation to the estate, the judge concluded that the only practical solution to resolving the disputes was to remove the appellantfrom office and appoint an experienced accountant as executor dative.

Held, that in order to justify removal of an executor from office under s 117(1), it had to be shown that the executor had failed to perform satisfactorily any duty or requirement imposed on him by or in terms of any law and that the executor was no longer suitable to hold office as such. There was no finding adverse to the appellant on either of these

ADAM J

grounds. The fact that interested parties objected to the account was not in itself a ground for removal of the executor. It might have been a ground for proceeding in terms of s 52(9) of the Act, under which the Master may give such directions as he thinks fit, having considered the account and any objections to it. The objections raised were, in any event, either explicable or capable of resolution by the Master acting in terms of s 52(9). The appellant accordingly should not have been removed from office.

Cases cited:

Bonsma v Meaker NO & Ors 1973 (2) RLR 16 (G)

Fey & Whitehead NNO v Serfontein & Anor 1993 (2) SA 605 (A)

Ex p Khan 1962 (4) SA 119 (C)

Letterstedt v Broers (1884) 9 AC 371

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Master v Edgecombe's Exors 1910 TPD 263

Sackville West v Nourse & Anor 1925 AD 516

Volkwyn NO v Clarke & Damant 1946 WLD 456

The court referred to the following statutory provisions:

Administration of Estates Act [*Chapter 6:01*], ss 52(9) and 117(1)

Case Information

T Nyambirai, for the appellant

J B Colegrave, for the respondent

Judgment

McNally JA: The appellant (the Executor) is the executor of the estate of the late J J Botes. The widow, who was the heir in terms of her late husband's will, complained to the respondent (the Master) about his progress in finalising the estate, her husband having died on 18 September 1992.

After a number of such complaints, which at this stage were only about delay, the Master wrote to the Executor "advising him" to hand over the estate to a firm which had been assisting the widow, called Accounting and Executor Services (Pvt) Ltd (A & ES). But a few days later the Master received from the Executor the First and Final Liquidation and Distribution Account in the estate. As a consequence, he decided not to pursue his "advice", and authorised the Executor to proceed to advertise the account. The account was duly advertised as lying for inspection on 3 and 10 June 1994.

A & ES attempted to inspect the accounts, but for some reason (not the fault of the Executor) the file could not be found. However on 8 July 1994 an objection was lodged and details of the objection were lodged on 8 August 1994.

McNALLY JA

The Master accepted these objections, though they were technically out of time. There followed correspondence with the Executor (defending his account) and A & ES, later replaced by a firm called Combined Accounting Services (CAS). Eventually the Master, on 10 October 1995, decided upon the drastic step of seeking an order in terms of s 115B(1) (b) and (d) of the Administration of Estates Act [Chapter 301 of 1974] - now s 117(1)(b) and (d) of Chapter 6:01 - removing the Executor from his position.

The order was granted on 6 December 1995, and the Executor has appealed against it.

The learned judge who heard the application came to the conclusion that there were serious disputes between the Executor, the Master, and the heir as represented by CAS. He further concluded that he could not on the papers decide upon the rights and wrongs of the disputes,

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which dealt with -

1. income tax liability;
2. the provision for deferred tax;
3. the valuation of the deceased's share in Botes & Botes (Pvt) Ltd;
4. the debt, if any, owed by Botes & Botes (Pvt) Ltd to the deceased;
5. the executor's fee.

In those circumstances, and as a matter of practicality, he decided that the only solution was to grant the order and remove the Executor from office. He further ordered that an experienced chartered accountant be appointed in his place. And finally he ordered the costs of the application to be borne by the estate.

The authorities to which we have been referred are: Meyerowitz The Law & Practice of Administration of Estates 5 ed pp 99 et seq; Letterstedt v Broers (1884) 9 AC 371; The Master v Edgecombes Executors 1910 TPD 263 at 269-272; Sackville-West v Nourse & Anor 1925 AD 516; Volkwyn NO v Clarke & Damant 1946 WLD 456; Ex p Khan 1962 (4) SA 121 (C); to which should be added, for completeness, Bonsma v Meaker NO & Ors 1973 (2) RLR 16 and (for an instructive historical analysis) Fey NO & Whiteford NO v Serfontein & Anor 1993 (2) SA 605 (A).

The strength of Mr Nyambirai's well presented argument lay in his perfectly correct submission that no finding had been made against the Executor in his conduct in relation to the estate. The strength of Mr Colegrave's response was the point that a discretionary decision had been reached to resolve a practical problem in a practical way.

McNALLY JA

The Master's application was made, not under the common law, but specifically in terms of s 117(1), subsections (b) and (d), of the Act, namely:

> "(b) that he has failed to perform satisfactorily any duty or requirement imposed upon him by or in terms of any law"

and

> "(d) that in his opinion such person is no longer suitable to hold such office."

It is apparent from the learned judge's judgment that the matter was postponed on a number of occasions because it was hoped to reach a settlement. But there was not a great deal of delay because the application was dated 10 October 1995 and the judgment 6 December 1995.

In the event, the learned judge had to come to a conclusion. He decided specifically, and, with respect, correctly, that on the facts before him he could not deal properly with the various disputes. But there were undoubtedly serious disputes. These disputes had to be resolved. The only practical way to do so, he heald, was to remove the Executor and arrange for the

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appointment of an executor dative who should be a chartered accountant of ten years' experience.

I must confess I have two difficulties with that conclusion. The first is that it does not involve a finding against the Executor under either of the two subsections relied upon. He is not found to have "failed to perform satisfactorily any duty or requirement imposed upon him". Nor is there a finding that the Master was justified in holding the opinion that the Executor "is no longer suitable to hold such office."

Secondly, it does not seem to me, with respect, to be correct to say, as the learned judge did, that "the only practical way of resolving the issues" was to order the removal of the Executor. The whole purpose of advertising the account for objection under s 52(6) is to enable interested parties to object. The fact that they do object is not, *per* se, a ground for the removal of the Executor. It is a ground for proceeding in terms of s 52(9), which reads:

> "(9) The Master shall consider such account, together with any objections that may have been duly lodged, and shall give such directions thereon as he may deem fit."

McNALLY JA

There are safeguards for anyone dissatisfied with the Master's directions.

I should say that the point was taken by the Executor that the objections were not "duly lodged" because they were lodged well out of time. However a perfectly acceptable explanation for the delay was given to and accepted by the Master. There is no basis for interfering with his condonation of the delay.

The fact that there is no finding adverse to the Executor under either of the two subsections (or for that matter, under any other head) is really decisive of the matter. It is unnecessary to go into the oft quoted passages from the judgments which make the point that one does not lightly dismiss an Executor for "every mistake or neglect of duty or inaccuracy of conduct".

The fact is too that the Executor had virtually completed his job. That is not to say that the objections were insubstantial. But let us look at them.

1. *That he had delayed unduly*

   He explained the delays reasonably satisfactorily, and anyway they were over by the time the application was made.

2. *That he over charged*

   In the first place it was wrong, it seems, to say he had already paid himself. He had merely made provision for his fee. If it is too high, s 56 of the Act gives the Master the power to assess and tax it.

3. *That he should have paid the Estate Duty in full, and not asked for time to pay without giving reasons*

   It seems that there was not sufficient cash in the estate to pay the duty in full. If the Executor was remiss in not pointing this out, it is a minor matter. He contends, as I understand him, that it is apparent from the accounts where a surplus is shown, but where some of the assets are debts not yet paid. So it is not an

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available surplus.

4. *That he should not have kept funds in a composite account*

He has given an explanation, which has not been rejected. It does not seem a major matter.

5. *The objections of substance raised by CAS*

These are certainly substantial matters, but they are pure accounting matters. By now the income tax position should be clear; the enormous difference in the two valuations of the deceased's share in Botes & Botes

McNALLY JA

(Pvt) Ltd must be resolved by discussion between the Executor and CAS. If necessary they will have to call in a chartered accountant to arbitrate; the debt to the deceased by the company must be agreed in similar fashion.

It seems to me that all these matters can be resolved if the Master simply directs the Executor, as s 52(9) authorises and requires him to do, to resolve these issues with CAS, calling in a chartered accountant if necessary. Once these issues are determined, the Master can assess the appropriate fee.

I am satisfied therefore that the appeal must succeed, with costs to be borne by the estate. The order of the High Court is altered to read:

"The application is dismissed. The respondent's costs are to be borne by the estate."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Kantor & Immerman, appellant's legal practitioners

McNaught Wickwar, respondent's legal practitioners

CHIDODA v MHANGAKI 1996 (2) ZLR 111 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

9 July & 6 August 1996 Judgment No. S-147-96

Flynote

Local authority - election - candidate - eligibility - requirements for eligibility to stand for mayoral elections - ordinary residence in area - what constitutes

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Headnote

In order for a person to be eligible to stand as a candidate for executive mayor in the local authority area, the person must be ordinarily resident in that area and must also have been ordinarily resident in that area for the five years immediately preceding the election. The appellant had submitted nomination papers for election as executive mayor of Masvingo. They were rejected by the respondent, the Town Clerk of Masvingo, on the grounds that the appellant had not been ordinarily resident within the Masvingo municipal area as required.

The appellant had been a councillor of the Masvingo Rural District Council until 9 months earlier, and it was a requirement for election as a councillor that he be ordinarily resident in the rural council area. He had, through a company, purchased a farm within the rural council's area and gave that farm as his address when he sought selection as a councillor.

Held, that to be ordinarily resident in a place the person must have resided there with some degree of continuity apart from incidental or temporary absences. It is doubtful that a person can be ordinarily resident in two places at the same time.

Held, further, that the appellant had not been ordinarily resident in the Masvingo urban council area for the required period. For most of the five year period he had been ordinarily resident in a rural council area where

KORSAH JA

he had served as a rural councillor. He was therefore not eligible to stand as a candidate in the Masvingo mayoral elections.

Cases cited:

Gout v Cimitian [1922] 1 AC 105

Lewis v Lewis [1956] 1 All ER 375 (PDA)

Macrae v Macrae (2) [1949] 2 All ER 34 (CA)

The court referred to the following statutes:

Rural District Councils Act [*Chapter 29:13*], s 28(b)

Urban Councils Act [*Chapter 29:15*], s 49(1)(c)

Case Information

A P de Bourbon SC, for the appellant

J B Colegrave, for the respondent

Judgment

Korsah JA: One and only one issue engages attention in this case. That issue is: Whether the

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appellant was ordinarily resident in the Municipality of Masvingo for the five years immediately preceding the mayoral elections of June 1996. The circumstances out of which this question arises are simple enough:

The respondent is the town clerk of the Municipality of Masvingo. In terms of the Urban Councils Act [Chapter 29:15] ("the Act"), he is the returning officer of the Municipality of Masvingo. In his capacity as the returning officer for the election for the post of executive mayor scheduled for 29 and 30 June 1996, he caused a notice to be published in the Masvingo Provincial Star and the Masvingo Mirror, declaring the post of executive mayor vacant and indicating that nominations for the post would be closed on 14 June 1996.

The appellant submitted his nomination papers to the respondent on 10 June 1996. In terms of s 49(1)(c) of the Act, one of the qualifications for a mayoral candidate is that: "he is and has been, for the five years immediately preceding the election, ordinarily resident in the local authority area concerned". The respondent was of the view that the onus was on the appellant to satisfy him that he (the appellant) had been ordinarily resident within the Municipality in terms of s 49(1)(c) of the Act. The respondent was not satisfied that that onus had been discharged on the papers submitted by the appellant.

On 11 June 1996, the respondent drew the appellant's attention to the fact that he (the appellant) was a serving councillor of the Masvingo Rural District Council and had only resigned from that post with effect from 20 September 1995. By s 28(b) of the Rural District Councils Act [Chapter 29:13], one of the necessary qualifications for a councillor is that he "is ordinarily resident

KORSAH JA

in the (rural) council area". The question consequently arises whether, if the appellant was ordinarily resident in the rural council area up to 20 September 1995, he could claim to have been ordinarily resident as well in the Municipality of Masvingo for the five years immediately preceding the mayoral elections.

In the appellant's founding affidavit in the court of first instance he averred that around June 1993 he put forward his name for election as councillor for Ward 3 in Mshagashe for the Masvingo Rural District Council. He further stated that he was required to fill in a form which he alleged was in compliance with the relevant provisions relating to councillor nomination. In substantiation of this allegation he attached Annexure B to his affidavit. Incidentally Annexure B is entitled:

> "APPLICATION FORM FOR ENROLLMENT ON THE VOTERS ROLL BY AN OWNER OR OCCUPIER OF IMMOVABLE PROPERTY IN A COMMERCIAL WARD OR AN URBAN WARD",

in terms of s 14 of Chapter 29:13. It has nothing to do with "qualifications" to be appointed a councillor in terms of s 28 of Chapter 29:13. It therefore detracts from the appellant's assertion that there was no provision for an aspiring candidate for the post of a rural council to indicate whether he is ordinarily resident in the area concerned. Section 28 of Chapter 29:13 is unequivocal on the issue. There is but little or no doubt that the appellant's qualification as

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councillor for the rural council was based on his being ordinarily resident at his farm 208 of Mshagashe.

Mr de Bourbon, for the appellant, levelled a two-pronged attack on the determination to disqualify the appellant as a candidate for the mayoral election. He contended that the respondent erred in basing his decision to disqualify the appellant on that legislation (the Act) because:

1. Firstly, there is nothing entitling him to assume that the appellant qualified as a rural councillor, and the mere fact that he served as one does not prove such qualification; and

2. Secondly, it does not negate the fact that he was ordinarily resident in the municipal area of Masvingo.

To be ordinarily resident in a place there must be some degree of continuity of abode apart from incidental or temporary absences. To be ordinarily

KORSAH JA

resident in a place is a matter of fact to be deduced from all the surrounding circumstances: Gout v Cimitian [1922] 1 AC 105 at 109-110.

At some stage in 1991 the appellant purchased, through a company, farm 208, Mshagashe. The farm is situated in the area of the Masvingo Rural District Council. The appellant gave forth that that farm was his residential address. In the result he was appointed as a member of the rural council in or around June 1993 and remained a rural councillor until his resignation on 20 September 1995. When consideration is given to his actions from 1991 up to 20 September 1995, I am of the opinion that the appellant was and intended to be ordinarily resident in the rural area for which he served as councillor.

A rural councillor, by virtue of s 28 of *Chapter 29:13*, is ordinarily resident in the council area. Mr Colegrave, for the respondent, submitted that the very fact that the appellant was a councillor on the rural council from 1993 until 20 September 1995 is completely inconsistent with the appellant's contention that he was ordinarily resident within the urban council area. In terms of s 29(1) of *Chapter 29:13*, the moment the appellant ceased to be ordinarily resident in the rural council area, he was obliged to resign from the council. The appellant did not resign as councillor for Ward 3 in Mshagashe until 20 September 1995; and that date must be assumed as being the effective date of his ceasing to be ordinarily resident in the rural council area.

Mr *Colegrave* prayed in aid the maxim that "all things are presumed to have been rightly and duly performed until it is proved to the contrary", which is expressed in the aphorism "omnia praesumuntur rite esse acta". That is to say: The appellant was lawfully appointed as a rural councillor because he was qualified to be appointed as such.

I doubt very much whether it were possible for a person to be ordinarily resident in two places at the same time, for as Somervell LJ observed in *Macrae v Macrae (2)* [1949] 2 All ER 34 at 36:

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"Ordinary residence ... can be changed in a day. A man is ordinarily resident in one place up to a particular day. He then cuts the connection he has with that place - in this case (*Macrae v Macrae (2)*) he left his wife; in another case he may have disposed of his house - and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place."

KORSAH JA

In the present case all the indications are that from 1991 up to 20 September 1995 the appellant, by his acts and declarations, was ordinarily resident in the Mshagashe rural council area. By his resignation from the rural council on 20 September 1995, he exhibited an intention to end his ordinary residence within that rural area and take up residence elsewhere. The culminating factor terminating his being ordinarily resident in the rural council area was, whichever way you view it, his resignation as a councillor of the rural council on 20 September 1995. See also *Lewis v Lewis* [1956] 1 All ER 375 (PDA) at 377.

Nowhere in the appellant's affidavit does he claim that he was unaware of the statutory requirements for membership of the Masvingo Rural Council. He merely states that when he applied to be put on the voters' roll, he was not asked whether he was ordinarily resident within the council area. We have not been favoured with sight of any other representation which the appellant made in support or disqualification of him being appointed a councillor of Mshagashe Rural Council, save his resignation as a councillor. Yet the appellant, with his worldly experience as an ambassador of his country, is precisely the sort of person who would have been expected to have ascertained the qualifications for the office as councillor in 1993. It would have been remarkable if the appellant had made no attempt to satisfy himself that he was statutorily qualified for office of councillor for that rural council.

There is also positive evidence, as Mr Colegrave rightly submitted, apart from the only possible inference to be drawn from his membership of the rural council, that the appellant was indeed residing within the rural council area. This information can be gathered from a letter dated 10 September 1993 which the appellant wrote to a certain firm of legal practitioners, wherein he makes it clear that when he returned from his tour of duty as ambassador to Ethiopia he chose to retire from Government service and settle on farm 208. This is an affirmation of his choice of residence, which is reflected by becoming a councillor on the Mshagashe Rural Council. Furthermore, Annexure H, which is a court process, attached to the opposing affidavit, and the particulars of the various directors of A M Chidoda and Family (Pvt) Ltd, both testify to the appellant's residential or business and postal address being furnished as farm 208, Mshagashe.

All this evidence, rightly submitted Mr *Colegrave*, is far more compelling than the affidavits recently deposed to by the appellant's relatives, in which they aver that the appellant had always been ordinarily resident in the Municipality of Masvingo. As I said earlier, to be ordinarily resident in a

KORSAH JA

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place is an issue of fact to be deduced from all the surrounding circumstances, and not what blood relatives believe is the case.

After all is said and done, there can be but no doubt that, from all his actions and stipulations, the appellant intended to be and was ordinarily resident in the Mshagashe rural area until 20 September 1995. It follows that he had not been ordinarily resident in the Municipality of Masvingo for five years immediately preceding the mayoral elections of 1996, and his candidature as mayoral aspirant is unacceptable in terms of s 49(1)(c) of the Act.

The appeal is accordingly dismissed with costs.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Chikumbirike & Associates, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

WALLS v WALLS 1996 (2) ZLR 117 (HC)

Court **High Court, Harare**

Chidyausiku J, Bartlett J & Gillespie J

Application for variation of maintenance order

5 October 1995, 31 May & 7 August 1996 Judgment No. HH-74-96

Flynote

Court - jurisdiction - High Court - continuance of jurisdiction - maintenance order - order for maintenance granted by High Court - parties long since both resident outside Zimbabwe - whether Zimbabwean court has jurisdiction to deal with case

Family law - maintenance - variation - maintenance order made in terms of previous legislation - provision of that law allowing court to direct that certain maintenance orders be not regarded as such for purposes of Maintenance Act - effect of subsequent legislation - whether retrospective in effect - distinction between true retrospecting and inference with existing rights - either effect pressure not to the intended unless clearly expressed or by necessary implication

Interpretation of statutes - presumption against retrospectivity - matters to be considered in deciding whether statute has retrospective effect - reforming statutes - whether purpose of statute would be defeated if retrospective effect not given - effect of retrospectivity on previously accrued rights - effect of transitional provisions - re-enactment of statute in revised edition of statutes - omission of transitional provisions - effect - distinction between true retrospectivity and interference with existing rights - either effect presumed not to be intended unless clearly expressed or by necessary indication

Headnote

The parties were divorced in what was then the General Division of the High Court in 1977. In

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terms of the consent paper, it was agreed that the

respondent would pay the applicant maintenance in the sum of $150 a month. It was also agreed that in terms of s 9(4) of the former Matrimonial Causes Act [*Chapter 39*], which was then in force, the maintenance order should not be regarded as a maintenance order for the purposes of s 23 of the then Maintenance Act [*Chapter 35*]. This meant that it could not be increased without the consent of the spouse against whom it was made.

The Matrimonial Causes Act [*Chapter 39*] was repealed and replaced by the Matrimonial Causes Act 33 of 1985, which did not contain any provisions similar to s 9(4) of the repealed Act. Section 7(1)(b) of the 1985 Act allowed an appropriate court, in granting a decree of divorce or at any time thereafter, to make an order with respect to the payment of maintenance. The question arose whether this section was retrospective in operation and gave the court the power to make an order for the payment of maintenance. It was argued for the applicant that the original maintenance order was not made in conformity with s 9(4) of Chapter 39. Even if it was, the intention of the legislature, in enacting Act 33 of 1985, was to remove the rights given under Chapter 39 with effect from the date of promulgation and convert the order into one deemed to have been made under the new Act. Counsel for the respondent argued that as the parties had been resident in South Africa for many years, they should look to the South African corts to resolve the maintenance dispute, particularly as questions relating to the cost of living there could be more appropriately considered by a South African court.

Held (*per* Bartlett J), that the court should be slow to refuse to exercise jurisdiction, just because the parties are no longer resident in the jurisdiction, when there is, because of the provisions of the Maintenance Orders (Facilities for Enforcement) Act [*Chapter 5:10*], a realistic possibility that the order could be enforced. It was most unlikely that a South African court would consider amending or varying a decision of the Zimbabwean High Court, but even if a South African court would have been prepared to hear this application, the court in Zimbabwe should not refuse to hear it.

Held, further, that the original maintenance order was properly made in terms of s 9(4) and (5) of Chapter 39, which meant that maintenance could not be increased without the respondent's consent.

Held, further, that in deciding the question of retrospectivity, a number of questions had to be considered. These are:

(1) the general approach to be adopted, which is that the most careful regard has to be given to the presumption against retrospectivity;

(2) the reforming zeal of Parliament: where there is a reforming Act of

KORSAH JA

wide scope, it may defeat the reforming purpose of Parliament to hold that new and

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enlarged powers could not be exercised retrospectively. That did not, however, apply to Act 33 of 1985. It is, in any case, the court's duty to interpret legislation from the words used, not to interpret the reforming zeal of Parliament;

(3) accrued rights, the existence of which stands against any interpretation of retrospectivity in the absence of the clearest indications to the contrary;

(4) the transitional provisions in the repealing Act. Those in Act 33 of 1985 made provision for the continuation of proceedings under Chapter 39, or, with suitable amendments and the leave of the court, under the new Act;

(5) the presence of any wording in other sections specifying non-retrospectivity. Although there were none in Act 33 of 1985, there were very few indicators establishing retrospectivity;

(6) continuity: *Faria v Claridge* 1988 (2) ZLR 202 (H), which held that s 7(1)(b) of Act 33 of 1985 was not retrospective in effect, had stood unchallenged for almost a decade.

Held, therefore, that s 7(1)(b) of Act 33 of 1985 was not retrospective in operation.

Held, further, that an order under s 9(4) of Chapter 39 gave the respondent a substantive right, in that the maintenance order was not regarded as maintenance for the purposes of s 23 of the Maintenance Act and there could be no variation without his consent. Act 33 of 1985 could not be regarded as reducing or cancelling those rights unless it did so by express words or necessary implication, and there was no such indication in the Act.

Held, further, that the omission of the transitional provisions of Act 33 of 1985 from the Matrimonial Causes Act [*Chapter 5:13*] of the Revised Edition of the Laws 1966 did not mean that the provision was spent.

Held, further (*per* Gillespie J), that the theory of continuance of jurisdiction showed that the court which originally had jurisdiction to determine a cause remained vested with that power. Where the order which was given was subject to subsequent variation, the jurisdiction to effect that variation itself continues. Accordingly, the High Court had jurisdiction. A South African court would not.

Held, further, that the purpose of s 9(4) of Chapter 39 was to eliminate any possible prejudice arising from the enforcement provisions of the Act to a person who upon divorce bound himself, as a matter of grace rather than of obligation, to pay maintenance to his former spouse. The terms

KORSAH JA

of the consent paper made quite clear the status of the maintenance payment to which the respondent bound himself. There were a number of reasons for suggesting that the order made was not an order for maintenance made under Chapter 39, for the purposes of s 17(2)(b) of Act 33 of 1985. Firstly, it is in terms not a maintenance order under Chapter 39, being incapable of registration, enforcement or variation. Secondly, if an application is made to vary the order, the

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judge would generally exercise no discretion, being faced with a consensual request. Thirdly, the reason for variation is the mutual consent to variation, rather than the continuing obligation of support. Finally, Act 33 of 1985 contains no similar provision, which indicates that the order is *sui generis*.

Held, further, that a distinction has to be drawn between retrospectivity, which declares that at a particular date the law shall be taken to have been that which it was not, and interference with existing rights. In each case, however, a general approach has to be followed in interpreting statutes, namely, an enquiry whether the retrospective affect, or the determination of existing rights, as the case may be, is clearly expressed or is a necessary intendment of the legislation under consideration. While this was not an instance of true retroactive operation, the approach of declining to find an intention to remove existing rights, in the absence of express provision or necessary intendment, was the proper one. There was nothing in s 7 of Act 33 of 1985 to persuade the court that the intention of the legislature was to legislate with retroactive effect or to interfere with existing rights. Section 17(2)(a), although it provided for interference with existing rights, did so to a minimal extent and then only sbject to good cause shown to a court.

Held, further, that the inclusion in s 17(2) of Act 33 of 1985 of words dealing with the division of assets did not allow for the variation of an order that had been final under the repealed Act. The words should be regarded as pro non scripto and could be given no effect. There was nothing in the wider context of the new Act which advanced the case for the applicant.

Application dismissed.

Cases cited:

Cape Town Municipality v F Robb & Co Ltd 1966 (4) SA 345 (C)

Chaterjee v Chaterjee [1976] 1 All ER 719 (CA)

Chebaro v Chebaro [1987] 1 All ER 999 (CA)

Faria v Claridge 1988 (2) ZLR 202 (H)

Industrial Council for the Furniture Mfg Industry, Natal v Min of

Manpower & Anor 1984 (2) SA 238 (D)

Joseph v Joseph 1958 R & N 500; 1958 (4) SA 268 (SR)

Joss v Bd of Exors 1979 (1) SA 780 (C)

Lewis v Beeson (unreported), High Court Harare 7 March 1995

Lewis v Lewis & Anor [1984] 2 All ER 497 (CA)

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Lewis v Lewis & Anor [1985] 2 All ER 449 (HL)

Luyt v Luyt 1926 WLD 179

McConnell v McConnell 1981 ZLR 12 (G)

Madden v Madden [1974] 1 All ER 673 (Fam D)

Mohamed v Union Govt 1911 AD 1

Nkomo & Anor v A-G & Ors 1993 (2) ZLR 422 (S); 1994 (3) SA 34 (ZS)

Papadakis v Wessels 1976 (3) SA 593 (C)

Parow Municipality v Joyce & McGregor (Pty) Ltd 1974 (1) SA 161 (C)

Powys v Powys [1971] P 340; [1971] 3 All ER 116 (PDA)

Rabie v Rabie 1992 (2) SA 306 (W)

R v de Jager 1953 (2) SA 197 (T)

Schlimmer v Rising's Est Executrix 1904 TH 108

Shewan Tomes & Co v Commr of C&E 1955 (4) SA 305 (A)

Steyn v Steyn 1990 (2) SA 272 (W)

Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A)

Vale v Vale 1966 RLR 56 (G)

Watson v Cox 1917 WLD 151

Williams v Williams [1971] P 271; [1971] 2 All ER 764 (PDA)

Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 (PC)

The court referred to the following statutes:

Interpretation Act [*Chapter 1:01*], s 17(1)

Maintenance Act [*Chapter 35 of 1974*], s 23

Maintenance Orders (Facilities for Enforcement) Act [*Chapter 5:10*]

Matrimonial Causes Act [*Chapter 39 of 1974*], s 9(4)

Matrimonial Causes Act 33 of 1985, s 7(1)(b), 17(1)

Case Information

A J Dyke, for the applicant

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A P de Bourbon SC, for the respondent

Judgment

Bartlett J:

INTRODUCTION

It seems that old soldiers do not fade away: they resurface to battle against

BARTLETT J

maintenance claims. The battle in this case is not unlike some First World War battlefields as it covers ground over which the parties have already fought.

On 5 May l977, the applicant (Mrs Walls) obtained in the General Division of the High Court of Rhodesia a decree of divorce against her husband, the respondent (General Walls). The custody, maintenance and proprietary rights of the applicant and respondent were ordered to be as specified in terms of the consent paper filed of record. In regard to maintenance the order was that respondent pay the applicant $150 *per* month until her death or remarriage.

On 28 February l995, the applicant filed an application for a declaratory order and an order increasing the sum of maintenance payable. The declaratory order sought is that this court has the power to increase the amount of maintenance payable by the respondent to the applicant. The increase asked for is to the sum of R600 *per* month (or the equivalent in Zimbabwe dollars). In the fullness of time (time not appearing to be of the essence since the matter had already lain dormant for l8 years) opposing papers and an answering affidavit were filed. The matter was then set down for hearing on 5 October l995. At the hearing I referred both counsel to a line of English authorities which had not been referred to in the heads of argument and which it appeared might be relevant to the interpretation of the relevant clauses of the Matrimonial Causes Act 33 of 1985. I ordered that the matter be postponed to allow both counsel to file supplementary heads of argument dealing with the possible applicability and relevance o these English authorities. No time limits were imposed for the production of these heads of argument and time continued to be not of the essence as counsel for the applicant took some 2 months to file supplementary heads of argument and counsel for the respondent a further 3 1/2 months after that.

In his supplementary heads of argument Mr de Bourbon referred to the principle of stare decisis and argued that since in view of the line of English authorities this court might need to consider overruling two of its own decisions, it would be appropriate for a full Bench to sit. I was in agreement with the suggestion made by learned counsel and accordingly made arrangements for this matter to be heard before a full Bench, with my learned brothers, Chidyausiku and Gillespie, sitting with me.

At the commencement of the hearing on 31 May l996, the respondent's counsel sought to produce a further supplementary affidavit updating General Wall's financial position. This affidavit had only been filed on 28 May

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BARTLETT J

- 3 days before the hearing. The applicant objected to the production of the affidavit. But we decided after hearing argument to allow its admission.

ISSUES

This application raises a number of important and not uncomplicated issues in regard to matrimonial law and the interpretation of several sections of the Matrimonial Causes Act l985 (hereinafter referred to as -Act 33 of 1985') as considered against the repealed Matrimonial Causes Act [Chapter 39] (hereinafter referred to as -Chapter 39'). These issues which we will need to deal with in detail may be summarised as follows:

(l) *Jurisdiction*

Both the applicant and respondent have been resident in South Africa for a number of years. It is Mr de Bourbon's contention that jurisdiction in this matter would accordingly rest with the appropriate South African court and not with the High Court of Zimbabwe

(2) *Section 9(4) and 9(5) of Chapter 39*

The question arises as to whether the original divorce order was made in terms which brought into operation subs (4) and (5) of s 9 of Chapter 39.

(3) *Section 7(1)(b) of Act 33 of 1985*

The interpretation of s 7(l)(b) of Act 33 of 1985 needs consideration and in particular the issue arises as to whether that section is retrospective in its operation. This will require a decision as to whether the ruling of Blackie J in *Faria v Claridge* l988 (2) ZLR 202, as followed by me in Lewis v Beeson (unreported) is correct - or whether an English line of decisions commencing with Williams v Williams [l971] 2 All ER 764 and ending with Chebaro v Chebaro [l987] 1 All ER 999 is to be preferred.

(4) *Section 17(2)(b) of Act 33 of 1985*

The meaning of s l7(2)(b) of Act 33 of 1985 is also in issue as is the question of any retrospectivity in regard to this provision.

(5) *The effect of Act 33 of 1985 on orders made under s 9(4) of Chapter 39*

If it is held that the original divorce order complied with s 9(4) of Chapter 39, the question arises as to what effect the provisions of Act 33 of 1985 have on such an order made under the Chapter 39. This issue is of course intermingled with the previous issue of retrospectivity.

BARTLETT J

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(6) *Increase of Maintenance*

The final issue is what increase (if any) of maintenance should be awarded to the applicant - if the court decides that an increase in maintenance should be considered.

I now turn to give consideration to the various questions in issue.

JURISDICTION

Mr *de Bourbon* argues that since both applicant and respondent have been resident in South Africa for many years, they should look to the South African courts to resolve the maintenance dispute. He emphasises that in view of the residence of both parties this court is being asked to consider questions relating to the cost of living in South Africa which are much more appropriately considered by a South African court.

Mr *de Bourbon* referred to the principle of effectiveness - *Schlimmer v The Executrix in Estate of Rising* l904 TH 108 at lll and *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* l969 (2) SA 295 at 309-310. Mr de Bourbon also argued that the theory of continuance did not assist the respondent - referring to *Watson v Cox* l9l7 WLD 151 and *McConnell v McConnell* l981 ZLR 12 at p 13. He argued that the continuance theory related to the exercise of jurisdiction in regard to children - *Luyt v Luyt* l926 WLD 174 and James v James 1929 WLD 17. But that there was no authority suggesting that exclusive jurisdiction applied in respect of variations of maintenance.

Mr *Dyke* argued on the basis of *Papadakis v Wessels* l976 (3) SA 593 (C), Joss v Board of Executors l979 (1) SA 780 (C) at 781D-G, Steyn v Steyn l990 (2) SA 272 (W), and Rabie v Rabie l992 (2) SA 307 (W), that no other court would have jurisdiction to vary the previous order of this court.

Joss v Board of Executors supra is, in my view, of particular relevance. In this case the parties had been granted a divorce by the Transvaal Provincial Division and an agreement to pay maintenance was incorporated in the order of court. After the divorce the appellant and her late husband became *incolae* of the Cape Provincial Division (and the estate of the late husband was administered under the jurisdiction of the Master of that Division). The wife instituted an application in the Cape Provincial Division for an order varying the amount of maintenance.

In a full bench decision, the Cape Provincial Division upheld the decision of

a single judge that the court had no jurisdiction to vary the order granted in the Transvaal Provincial Division. At p 781D-G Vivier J stated as follows:

> "The general principles regarding a court's jurisdiction in applications of this kind are well established. They appear from cases such as Luyt v Luyt l926 WLD 179; Botha v Botha l965 (4) SA 581 (T); Eckard v Olyott l962 (4) SA 189 (O); Murphy en 'n Ander v Venter l967 (4) SA 46 (O); Brecher v Brecher l947 (3) SA 225 (SWA); Papadakis v Wessels l976 (3) SA 593 (C); Bruckman v Bruckman l976 (4) SA 204 (C).
>
> In Luyt's case Greenberg J said in the course of his judgment that ordinarily the only court which could set aside

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> or vary a judgment of any court is a superior court which has such appellate or reviewing jurisdiction; but that there are certain exceptions where the same court can alter or amend its own orders, as in the case of orders which are temporary in nature and therefore subject to variation as circumstances vary. The power to vary in such cases is, however, confined to the court which granted the original order.
>
> The decision in Luyt's case has consistently been followed by our courts in the cases to which I have referred, and can in my view now be accepted as a correct reflection of our common law on this subject.
>
> Under common law, therefore, this court would have no jurisdiction to vary an order for maintenance granted by the Transvaal Provincial Division."

Mr *de Bourbon* argued that this case should effectively be regarded as concerning a delimitation dispute between different Divisions of the South African Supreme Court. My view, however, is that it enunciates a basic principle - and that principle is not supportive of the contention put forward by Mr de Bourbon.

As to the question of effectiveness of any variation decision made by this court, Mr Dyke referred to the applicability of the Maintenance Orders (Facilities for Enforcement) Act [Chapter 5:10] and the statutory instrument extending the operation of that Act to South Africa. It is correct that if the applicant were granted a variation by this court she could utilise the provisions of that Act and the regulations made under it to ensure the enforcement of the variation in South Africa. Mr de Bourbon certainly did not contend otherwise.

BARTLETT J

It is certainly unusual for this court to be asked to vary a maintenance order when both parties are no longer resident in Zimbabwe (and have not been resident in Zimbabwe for many years). It also causes obvious practical difficulties for such parties to bring their application before this court and to ensure enforcement of the court's order. Those difficulties are not, however, as I have indicated, insuperable. I am of the view that this court should be slow to refuse to exercise jurisdiction to vary an order originally made by itself - just because the parties are no longer resident in the jurisdiction - when there is a realistic possibility that the order can be enforced.

I find it difficult to agree that if the application had been commenced in a court in South Africa and that court had been asked to apply Zimbabwean law, it would have countenanced granting an order amending or varying an order of a Zimbabwean court. It seems to me that if one Division of the South African Supreme Court will not countenance amending or varying an order made by another Division of the South African Supreme Court, that it is most unlikely that a South African Court would consider amending or varying a decision of the Zimbabwe High Court. Mr de Bourbon certainly did not refer us to any decision indicating that such approach might be taken by a South African Court. But even if a South African court would have been prepared to hear this application, I do not think that this court should refuse to hear the matter. I agree with Mr Dyke that this court very clearly has jurisdiction. Accordingly the first issue is decided in the favour of the applicant.

WHETHER THE ORIGINAL ORDER WAS MADE IN TERMS WHICH BROUGHT SS 9(4) AND (5) OF CHAPTER 39 INTO OPERATION

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Section 9(4) and (5) of Chapter 39 stated as follows:

> "(4) The court granting a divorce may, notwithstanding the dissolution of the marriage, make any agreement between the spouses for the maintenance of one of them an order of court. If the court is satisfied that in the circumstances the spouse who has agreed to pay the maintenance was under no legal obligation to do so, then the court when making such agreement an order of court shall further direct that the order to pay maintenance shall not be regarded as a maintenance order for the purpose of section 23 of the Maintenance Act [Chapter 35] and thereafter the provisions of that Act shall not apply to such maintenance order.
>
> (5) The court may on good cause shown rescind, suspend or vary any order made in terms of this section:

BARTLETT J

> Provided that the amount payable under a maintenance order to which the provisions of s 23 of the Maintenance Act [Chapter 35] do not apply shall not be increased without the consent of the spouse against whom it is made.'

It is the respondent's contention that the original divorce order, granted by the General Division of the High Court of Rhodesia on 5 May l977, was made in conformity with the requirements of s 9(4) and that accordingly the Maintenance Order made thereunder cannot be increased without the consent of the spouse against whom it was made (the respondent). Mr Dyke for the applicant argues that the court could not have been satisfied that the respondent was under no legal obligation to pay maintenance. Mr Dyke also argues that the original divorce order was not made in conformity with the requirements of s 9(4) and that accordingly s 9(4) and (5) never related to the divorce order in question.

In order to deal with this issue it is initially necessary to look at the precise details of the original divorce order as granted on 5 May l977. The plaintiff in the original divorce is the applicant in this matter and the defendant in the original divorce order is the respondent in this matter.

The divorce order reads as follows:

> "Before the Honourable Mr Justice Davies
>
> Mr O'Meara of Counsel for the Plaintiff.
>
> Defendant in default.
>
> WHEREUPON, after reading documents filed of record, examining plaintiff and hearing Counsel, who applies for a decree and other relief on the grounds of desertion under the provisions of s 2(3) of the Matrimonial Causes Act [*Chapter 39*],
>
> IT IS ORDERED:
>
> That a decree of divorce be and is hereby granted.
>
> > That custody of and maintenance for the minor child of the marriage, VALERIE ANN WALLS, born on 2nd day of May l959, maintenance for the plaintiff, the proprietary rights of the parties and costs of suit be ordered in terms of the consent paper filed of record and marked 'Exhibit 2."

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BARTLETT J

The order is then signed by the court registrar and in the applicant's founding papers the copy of the order is certified as a correct copy.

The relevant paragraph of the consent paper filed of record and annexed to the order reads as follows:

> "3. The Defendant will pay maintenance for the Plaintiff in the sum of ONE HUNDRED AND FIFTY DOLLARS ($150) *per* mensem until her death or remarriage and such payment will be binding on Defendant's estate. It is especially recorded that the order to pay maintenance to Plaintiff in terms of this clause shall not be regarded as a maintenance order for the purpose of s 23 of the Maintenance Act [Chapter 35].'

The difficulty Mr Dyke faces is the wording of the court order and consent paper. The relevant part of the order states:

> "WHEREUPON, after reading documents filed of record, examining the plaintiff and hearing Counsel, '
>
> IT IS ORDERED: '
>
> That ' maintenance for the plaintiff, ' be ordered in terms of the consent paper filed of record.'

And the relevant part of the consent paper states that -

> "It is especially recorded that the order to pay maintenance to the plaintiff in terms of this clause shall not be regarded as a maintenance order for the purposes of s 23 of the Maintenance Act [Chapter 35].'

Section 9(4), as I have indicated, requires that -if the court is satisfied that in the circumstances the spouse who has agreed to pay maintenance was under no legal obligation to do so, then the court making such an agreement an order of court shall further direct that the order to pay maintenance shall not be regarded as a maintenance order for the purpose of s 23 of the Maintenance Act [Chapter 35]'. The court order, as I have summarised it, records that the learned judge read the documents, examined the plaintiff, heard counsel and then allowed a maintenance order to be made part of the court order when that maintenance order incorporated the specific wording of s 9(4).

Mr *Dyke* is in effect asking this court to find that the learned judge ignored

the requirements of s 9(4) and, despite having read the documents and questioned the plaintiff, granted an order incorporating the wording of s 9(4) when he knew that the defendant was in fact under an obligation to pay maintenance. Mr Dyke's argument alternatively suggests that the learned judge was unaware of the relevant provisions of the Matrimonial Causes Act, did not read the papers and did not properly question the plaintiff or her counsel to satisfy himself as required by the provisions of s 9(4). These in my view are untenable propositions. They go clearly against the specific wording of the court order which was made in the applicant's presence (and the presence of her counsel) and at her specific request.

It is much more probable that the judge (a judge of considerable acumen and experience who

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graced this Bench for many years and has since similarly graced Benches in South Africa), was well aware of the requirements of s 9(4), and satisfied himself on reading the papers and hearing the plaintiff (and her counsel), that it was appropriate to incorporate an order encompassing the wording of s 9(4). I find it difficult to accept that Mr Dyke can seriously suggest otherwise. The court order clearly goes against his contention and furthermore it was a requirement in l977 that the plaintiff give evidence herself before the granting of the divorce. In view of the constrictive contents of the consent paper in relation to maintenance and the requirements of s 9(4), it is most unlikely that the learned judge did not raise these matters with the plaintiff and her counsel. If Mr Dyke were to suggest that we should seriously consider finding otherwise, he should at the very least have produced the original court record ofthe hearing to try and provide some basis on which to make his submissions. But even if Mr Dyke were correct, the order as it stands (and has stood for l9 years) clearly indicates that the requirements of s 9(4) were complied with - and that order has not been challenged. I do not consider that we could properly look behind the wording of the order at this stage - even if it were wrong.

Although Mr *Dyke's* contention - that since it was apparent that the respondent had deserted the applicant, it could not be suggested that the respondent was under no legal obligation to pay maintenance - is the strongest aspect of his argument, I reiterate that the nature of the consent paper, indicates that the plaintiff (presumably on legal advice) was prepared to agree that there was no such obligation. I again emphasis that I do not consider that this court can look behind the wording of the court order. It would appear from the order that the applicant was prepared to accept that there was no legal obligation to pay maintenance and to ask the court to order accordingly. The applicant's protestations l8 years later that this was not case

cannot change the clear wording of the court order, which, as I have said, has stood for close on two decades.

It might also be observed that the declaration was signed on 31 March l977 and filed on l April l977. While the applicant might not now regard the date of filing as coincidental, the declaration was filed shortly after the applicant had signed the consent paper on 28 March l977. The declaration (which was prepared by counsel) also specifically asked that maintenance for the plaintiff be governed by the consent paper. These factors, in my view, further indicate a distinct probability that the parties had agreed as *per* the consent paper that there would be no legal obligation to pay maintenance and were asking the court to accept and record that agreement. Mr *de Bourbon* argued that in any event the overall terms of the consent paper were of such a generous nature that they clearly indicated agreement not to make payment of maintenance a legal obligation. The terms of the consent paper were not as generous as Mr de Bourbon indicated - the respondent kept the matrimonial home and the $l8 000 the applicant receive was apparently intended to enable her to purchase another home - but the overall terms of the settlement cannot be regarded as detracting from the clear wording of the maintenance clause.

Accordingly, it is my view, that the maintenance order was made properly in accordance with the provisions of s 9(4) and 9(5) of Chapter 39. That means that the order when granted on 5

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May l977 meant that maintenance could not be increased without the consent of the respondent. I will need at a later stage in this judgment to consider the effect of that final order once Act 33 of 1985 replaced Chapter 39.

THE INTERPRETATION OF S 7(1) OF ACT 33 OF 1985

Section 7(l) of Act 33 of 1985 reads as follows:

> "Subject to the provisions of this section, in granting a decree of divorce, judicial separation or nullity of mariage, or at any time thereafter, an appropriate court may make an order with regard to -
>
> (a) the division, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other;
>
> (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.'

BARTLETT J

The question which needs to be resolved is whether the wording of this section makes the section retrospective in operation. If the section is held to be retrospective in operation then the effect of that retrospectivity on the maintenance order made in this matter on 5 May l977 will need to be considered.

BLACKIE J in *Faria v Claridge supra* carefully considered the correct interpretation of s 7(l) and ruled that the section was not retrospective and only applied in respect of orders made once Act 33 of 1985 came into operation (2 February l986). I followed Blackie J's decision in Lewis v Beeson - an unreported decision handed down in the Fast Track Court on 7 March l995. Neither Blackie J nor I had considered the line of English cases to which I referred counsel in this matter on 5 October l995. It is the need to consider the English line of cases and the possibility of thereafter disagreeing with *Faria v Claridge* and Lewis v Beeson which necessitated the hearing of this matter before a full bench.

THE ENGLISH DECISIONS

The English line of cases all concern the interpretation of matrimonial Acts in England which contain wording very similar to that of s 7(l) of the Matrimonial Causes Act 33 of 1985.

The first of the relevant English decisions is *Williams v Williams* [l971] P 271; [l971] 2 All ER 764. In this matter, Lord Simon P considered the interpretation of s 4 of the Matrimonial Proceedings and Property Act l970 which stated as follows:

> "On granting a decree of divorce, ' or at any time thereafter (whether, in the case of a decree of divorce ' before or after the decree is made absolute), the court may, subject to the provisions of sections 8 and 24(l) of this Act, make any one or more of the following orders, that is to say - (a) an order that a party to the marriage shall transfer to the other party, ' such property as may be so specified, being property to which the first mentioned party is entitled, either in possession or reversion; "

The learned President held, as quoted in the headnote:

> " that the section could only be retroactive if an intention to make it so were express or implied; there were no

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express words of retrospection; but an implication of retrospection could be collected from reading the Act as a whole and because retrospection was necessary to make the Act workable; s 4 was therefore retroactive.'

BARTLETT J

The learned President considered that the wording in question was neutral but that reading the Act in question as a whole, -a number of small indicia have made me feel that it was intended to be retrospective'. The learned President later added at p 281B-C:

"I hope it will not be thought presumptuous if I suggest that it is best that it is desirable that wherever possible a statute should indicate in express and unmistakable terms whether or not it is intended to be retrospective (and that, if so, how far). The expenditure of much time and money would be thereby avoided.'

I can only echo Lord Simon's sentiments in that regard.

In *Powys v Powys* [l971] P 340; [l971] 3 All ER 116 Brandon J construed the provisions of s 2 of the Matrimonial Proceedings and Property Act l970 which stated as follows:

"(l) On granting a decree of divorce, ' or at any time thereafter (whether, in the case of a decree of divorce ' before or after the decree is made absolute), the court may, ' make ' (a) an order that either party to the marriage shall make to the other such periodical payments ' (b) an order that either party ' shall secure to the other ' periodical payments ' (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified.'

He also considered s 4 (quoted above in regard to *Williams v Williams supra*).

Brandon J had no hesitation about the words of these sections being retrospective. He stated at p 352E-F:

"I am equally of the opinion that the words used in ss 2 and 4 of the Act of l970 mean 'on granting, or at any time after having granted, a decree'. I am further of opinion that, on the ordinary and natural meaning of those words, they apply not only to cases where a decree is granted after the date of coming into force of the Act of l970, but also to cases where a decree was granted before that date; and I would give effect to that meaning even if it does involve giving the statute retrospective effect'.

The learned judge added at p 353B-D:

"The Act of l970 was a reforming Act of wide scope. It gave the court new

BARTLETT J

and enlarged powers in relation to both financial provision and property adjustment after judicial separation, divorce and annulment, and also financial provision in cases of wilful neglect to maintain during a subsisting marriage. Many of these new and enlarged powers were given for the benefit of children of the family (the definition of which was itself enlarged), either directly, or indirectly by enabling better provision to be ordered for parents having the custody or the care and control of them. In my view it would frustrate the reforming purpose of Parliament to hold that these new and enlarged powers in respect of financial provision and property adjustment after judicial separation, divorce and annulment could only be exercised in cases where a decree is granted on or after 1 January l971.'

In *Chaterjee v Chaterjee* [l976] 1 All ER 719 (CA) Ormrod LJ applied the approach laid down in

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Williams supra and *Powys supra*, holding that the provisions enacted by ss 2 and 4 of the l970 Act empowering the court to make orders for the payment of a lump sum or the transfer of property 'On granting a decree of divorce ' or at any time thereafter', were retrospective in effect and so empowered the court to make an order in cases where the decree had been granted before the commencement of the l970 Act and at a time before the court had power to make such orders.

The learned Lord Justice stated at p 722g-723a as follows:

> "The question whether the relevant sections of the 1970 Act were intended to have retroactive effect is more difficult. This Act was an integral part of the fundamental revision of our divorce law which was begun by the Divorce Reform Act 1969, and completed by the 1970 Act. New and far-reaching powers were given to the court to make property adjustment orders of a kind which had not previously been contemplated. Moreover the courts were instructed to approach the exercise of these and the older powers to award ancillary relief along markedly different lines, some of which were described in detail in s 5 (now s 25 of the Matrimonial Causes Act l973); others flow from the change in the basis of divorce from matrimonial offence to irretrievable breakdown. It would not have been surprising if Parliament had restricted the exercise of these new powers, in the new ways, to spouses whose marriages were dissolved on the new basis of breakdown, leaving the financial affairs of those who had been divorced under the ol law to be governed by it. But there is no such provision in the l970 Act.'

BARTLETT J

Referring specifically to the words 'or at anytime thereafter' Ormrod LJ stated at p 723c-d:

> "It is difficult to think of wider language, or of a situation which called more clearly for the use of limiting words, if limitation were intended.'

In *Chebaro v Chebaro* [l987] 1 All ER 999 the Court of Appeal held that:

> "On its true construction s 12(l) of the Matrimonial and Family Proceedings Act l984 (which provides, inter alia, that where a marriage 'has been' dissolved by a valid foreign divorce either party to the marriage may apply to the court for financial relief) has retrospective effect. It follows that a former spouse whose marriage was dissolved by a foreign divorce before the l984 Act came into force is entitled to apply under s 12(l) for financial provision.'

The words "has been dissolved' were given special significance in the interpretation and reference was made to this interpretation being consistent with the interpretation placed on the similar though less obvious words in the statutes - namely the use of the phrase "or at any time thereafter'.

In *Madden v Madden* [l974] 1 All ER 673 Stirling J dealt with s 7(4) of the Matrimonial Proceedings and Property Act l970, which section reads as follows:

> "If after the grant of a decree dissolving or annulling a marriage either party to that marriage remarries, that party shall not be entitled to apply for an order under section 2 or 4 of this Act against the person to whom he or she was married immediately before the grant of the decree "

Stirling J stated at p 675e-f that:

> " in my judgment the wording of s 7(4) points expressly away from retrospection. I accept the submission of counsel for the husband that 'if after the grant of a decree either party to the marriage remarries' points to the future.'

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Stirling J accordingly disagreed with Lord Simon P's view in Williams *supra* as to the retrospectivity of the Act in question. In Madden's case, however, the section in question did not concern legislation using the words "or at any time thereafter".

BARTLETT J

In *Lewis v Lewis & Anor* [l984] 2 All ER 497 the Court of Appeal held that:

> "On its true construction Schedule 2 to the Matrimonial Homes Act l967 (which was inserted in that Act by Schedule 2 to the Matrimonial Homes and Property Act l981 in place of the original provisions of s 7 of the l967 Act) does not have retrospective effect. Accordingly, the power given to the court by Schedule 2 to the l967 Act to make an order for the transfer of a statutory tenancy from one spouse to another 'on granting a decree of divorce ' or at any time thereafter' cannot be exercised in favour of a party who obtained a decree of divorce before the commencement of the l981 Act.'

Anthony Lincoln J at 502c-d, dealt with the decisions in Williams *supra*, Powys *supra* and Chaterjee *supra* as follows:

> "It is a weighty consideration (and which is favourable to the wife's contention) that the three decisions, Williams, Powys and Chaterjee, all gave retrospective effect to broadly similar provisions in matrimonial statutes. But against this has to be weighed the need to prevent further and continuing erosion of an important principle of our unwritten constitution: the presumption against retrospective operation.'

The matter then went on appeal to the House of Lords and in Lewis v Lewis & Anor [l985] 2 All ER 449 the House of Lords ruled as follows:

> "The power conferred on the court by Schedule 2 to the Matrimonial Homes Act l967 (which was inserted in that Act by s 6 of and Schedule 2 to the Matrimonial Homes and Property Act l98l) to make an order for the transfer of a statutory tenancy from one spouse to another 'on granting a decree of divorce ' or at any time thereafter' cannot be exercised in favour of a party who obtained a decree of divorce before the commencement of the l98l Act, because para 3(l) of Schedule 2 to the l967 Act presupposes the existence of a statutory tenancy at the date when application is made for a transfer and does not enable the court to revive a statutory tenancy which had ceased to exist before the application for a transfer was or could have been made'.

Explaining this Lord Bridge of Harwich stated as follows on 451h-452a:

> "The language...gives the court power to order the transfer of a statutory tenancy from one spouse (or ex-spouse) to another in the future tense:

BARTLETT J

> 'shall cease to be entitled to occupy', 'shall be deemed to be the tenant'. This language, to my mind, quite clearly presupposes the existence of a statutory tenancy at the date when application is made for a transfer ' But I do not at all understand how it is possible to extract from the language of para 3(l) a power to revive a statutory tenancy which ceased to exist before the application for a transfer order was, or indeed in this case could have been, made.'

The House of Lords did not determine the same question of retrospectivity of the legislation as dealt with in the Court of Appeal - saying that it was a question of some nicety which did not need to be considered.

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Accordingly, the English cases may be summarised as follows. In Williams, the court found that language similar to that in s 7(1)(b) of Act 33 of 1985 was neutral as to retrospectivity - but that overall detailed consideration of the English Act satisfied the court that the English provision was clearly intended to be retrospective; in *Powys and Chaterjee* the courts found that language similar to that of s 7(l)(b) of the Matrimonial Causes Act 33 of 1985 clearly indicated that the wording created retrospectivity; in Chebaro, the court, although dealing with a statute which did not include words similar to s 7(l)(b) of Act 33 of 1985, indicated apparent agreement with the approach in *Powys and Chaterjee; Madden*, while also dealing with a statute not having similar wording to the Zimbabwean statute implied disagreement with the approach adopted in *Williams* (and accordingly by implication with that adopted in the later cases); *Lewis* (in the Court of Appeal) indicated disagreement with the approach laid down in the *Williams, Powys and Chaterjee* decisions - and the House of Lords upheld the Court of Appeal decision, but without deciding the issue of general retrospectivity.

THE ZIMBABWEAN APPROACH

In Zimbabwe the leading authority is *Faria v Claridge supra* the headnote of which states as follows:

> "The plaintiff was formerly married to the defendant, but they were divorced in terms of the Matrimonial Causes Act [Chapter 39] in October l985. That Act was repealed by the Matrimonial Causes Act No. 33 of l985, which came into effect in February l986. Section 7(l) of the new Act provides that 'in granting a decree of divorce ' or at any time thereafter' the court may make an order for the division or distribution of the asets of the spouses. The plaintiff, relying on this provision, sought

BARTLETT J

> a division of the assets of her former marriage, and in particular sought to have the former matrimonial home transferred into her name. The defendant excepted to the claim on the grounds that the provisions of the new Act do not apply to marriages dissolved under the old Act.
>
> *Held*, that there was a vast difference between the old and the new Acts in respect of the grounds of divorce and the courts' powers in relation to the proprietary rights of the parties and maintenance. Under the old Act, divorce was granted on the guilt principle, and maintenance could only be claimed at the time of divorce by the innocent party. The new Act replaces fault with failure and gives the courts wide powers to deal with the assets and maintenance for either party. These powers may be exercised at the time of the divorce or at any time thereafter.
>
> *Held*, further, that there is a presumption against retrospectivity of legislation. If the legislature had intended persons divorced under the old Act to acquire the rights provided under the new Act, the new Act would have said so expressly and clearly. The grammatical construction and plain meaning of s 7(l) of the new Act showed that it could only apply to a decree of divorce granted under the new Act'.

It can be seen that the learned judge in *Faria's* case was not referred to and did not consider any of the relevant English authorities. This court accordingly needs to decide, considering the decisions of the English cases to which I have referred, and the decision of Blackie J, whether s 7(l)(b) of Act 35 of 1985 is retrospective.

RETROSPECTIVITY

Whilst I appreciate the distinction drawn between general retrospectivity and an interference

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with existing rights as referred to by my learned brother Gillespie, I feel that the distinction in practice often becomes blurred. While in no way disagreeing with the discerning analysis of my learned brother, I propose to view the question of retrospectivity from the wider, general perspective I believe that the result at the end of the day amounts to the same.

A number of aspects will need to be given careful consideration in deciding the question of retrospectivity:

(a) *The approach to be adopted*

An important starting point in considering the retrospectivity of the legislation in question is the observations of Innes JA in *Mohamed v*

BARTLETT J

Union Government l9ll AD 1 at 8 (as quoted in *Faria v Claridge supra* at 205B-C:

"The principle that (in the absence of express provision to the contrary) no statute is presumed to operate retrospectively is one recognised by the civil law as well as by the law of England. The lawgiver is presumed to legislate only for the future; and therefore a statute which repeals another is considered not to interfere with vested rights under that other, unless it does so in clear terms. Very frequently, however, the legislature when it repeals one statute and enacts another in its place, inserts a clause in the repealing enactment defining with greater or less elaboration the extent, if any, to which the repeal is to operate retrospectively.'

I would also refer to the fundamental and correct approach as stated in *Maxwell on the Interpretation of Statutes* as quoted in *Madden v Madden supra* at 675a-b:

"Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation ' They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. 'Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.' But if the anguage is plainly retrospective it must be so interpreted.'

I am of the view that the most careful regard should be given to the presumption against restrospectivity. In this regard I echo the sentiments of Anthony Lincoln J in Lewis v Lewis *supra* at p 502c.

(b) *The reforming zeal of Parliament*

In *Chaterjee supra* and *Powys supra* considerable emphasis was placed

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BARTLETT J

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on the fact that the new English Matrimonial Act was a reforming Act of wide scope. In *Powys supra* at p 353c-d by Brandon J stated that -

"In my view, it would frustrate the reforming purpose of Parliament to hold that these new and enlarged powers in respect of financial provision and property adjustment after judicial separation, divorce and annulment could only be exercised in cases where a decree is granted on or after January l971'.

In *Lewis v Lewis supra*, however, Anthony Lincoln J emphasised that the earlier English Matrimonial Acts dealt with in Williams, *Powys and Chaterjee* were in danger of leaving the mischief which brought them into existence unremedied. He indicated that this apparently was one of the reasons which led to the courts -so readily interpreting them as retrospective'. He added, however, (at 502d-e) that the Act with which he was dealing was -not designed to deal with an urgent reform or substantial vacuum arising from a new crop of matrimonial Acts conferring novel powers, as was the case in the l960s and l970s.'

I agree with those sentiments. While Act 33 of 1985 is undoubtedly a reforming Act making very wide changes, there is no basis from the wording used in the Act to conclude that it was designed to deal with urgent reform or a substantial vacuum. It was an important reform but there was no basis on which I can say (as Brandon J said in Powys *supra*) that it would frustrate the reforming purpose of Parliament to hold that the new and enlarged powers could not be exercised retrospectively. Indeed Mr Dyke did not seek to suggest such a proposition. I emphasise that in view of the wide ranging nature of the reform and taking into account the presumption of retrospectivity - I consider that if the Act was intended to be retrospective that would have been clearly stated and not needed to be presumed or decided.

It is, at any rate, the Court's duty to interpret legislation from the words used - not to seek to interpret the reforming zeal of Parliament. It is up to Parliament to make its intentions clear. I again reiterate that the criteria emphasised in Powys and Chaterjee have no apparent relevance to the interpretation of the Zimbabwean Act. I would also emphasise that it would appear from the description of the English Matrimonial Acts in the relevant authorities that they were of a far wider ranging and comprehensive nature than the Matrimonial Causes Act 33 of 1985 (although the full text of the English legislation is not available to me).

BARTLETT J

(c) *Accrued rights*

A further relevant factor concerning retrospectivity is the effect of retrospective legislation on long accrued rights. Several of the English authorities emphasise the importance of bearing in mind that the husband has long ordered his financial affairs in the belief that he was quit of his financial obligations to his former wife. It appears from *Chaterjee* and *Williams* that under the English legislation special leave was required from the court to allow applications to be made under the new legislation. Reference is made in Chaterjee (quoting Williams) to the courts not granting leave unless such

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leave is specifically called for by the needs of justice. It is stated that the courts in particular are unlikely to look with favour on attempts to reopen cases long concluded. The requirement for leave to be granted is a factor in the English statutes which supports the existence of retrospectivity - there are no such requirements in Act 33 of 1985, which in my view is a factor going against the suggestion of anyretrospectivity.

The question of accrued rights is also particularly relevant in an assessment of the effect of ss 9(4) and 9(5) of Chapter 39 on s 17(2)(b) of Act 33 of 1985. I deal with this as a separate issue later in this judgment. The effect is that the existence of accrued rights stands against any interpretation of retrospectivity in the absence of the clearest indications to the contrary.

(d) *The transitional provisions*

A further factor in the English decisions which led to the conclusion that the English legislation was retrospective is referred to in Chaterjee at p 723a-b where Ormrod LJ stated:

"Moreover, the l970 Act repealed the relevant provisions of the l965 Act altogether except insofar as the transitional provisions preserved them for certain limited purposes. In Williams v Williams *supra* Lord Simon P, in a careful analysis of these transitional provisions, demonstrated that if the l970 legislation was not retroactive in its effect that the court would be unable to deal with many cases arising under the old law because its powers under the old laws had gone with the repeal of the l965 Act.'

That is not the position under the Zimbabwean Matrimonial Causes Act 33 of 1985. The relevant section of the Act reads as follows:

"17.(1) The Matrimonial Causes Act [Chapter 39], hereafter called the repealed Act, is repealed.

BARTLETT J

(2) Notwithstanding the provisions of subsection (l)-

(a) any proceedings which were commenced in terms of the repealed Act may, on and after the date of commencement of this Act, be continued and completed in terms of the repealed Act which shall, for such purposes, be deemed to continue in full force and effect:

Provided that the court may grant leave to the parties to continue the proceedings, with suitable amendments, relying upon any of the provisions of this Act, which proceedings may then be determined in terms of this Act;

(b) any order for the division of assets or for maintenance which was made in terms of the repealed Act shall be deemed to have been made under the relevant provision of this Act.'

This section clearly makes provision for the continuance of proceedings under Chapter 39 or with suitable amendments (and the court's leave) under the new Act. It also makes provision for any order of division of assets or maintenance made in terms of Chapter 39 to be deemed to be made under the relevant provisions of Act 33 of 1985. Accordingly, in my view, the restrictive transitional provisions which are referred to in the judgments of the English courts, that I have referred to above as the basis for requiring the English legislation to be interpreted as retroactive are not applicable

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under Act 33 of 1985. Indeed it is my view that the provisions of s 17(2)(a) and (b) indicate the absence of any intention that Act 33 of 1985 be regarded as retrospective. If s 7(l)(b) were retroactive there would be only a limited need for s 17(2)(b). Similarly s l7(2)(a) hardly indicates that the drafter of Act 33 of 1985 had in mind that the Act would be retroactive in operation.

(e) *Wording of other sections specifying non-retrospectivity*

Another aspect referred to in Chaterjee's case *supra* which led to the conclusion that the statute in question was retrospective is referred to by Ormrod LJ at p 723c-d where the learned Lord Justice stated:

"Moreover, in one case where this Act was certainly not intended to have retroactive effect, specific words to that effect were included in the section : see section 21 (which relates to the effect of remarriage) in which the words 'after the commencement of this Act' occur.'

BARTLETT J

There is no indication in Act 33 of 1985 of any such language indicating that certain sections would only apply after the date of commencement of the Act.

Accordingly, very few, if any, indicators which were included in the English authorities as establishing retrospectivity exist in Act 33 of 1985.

(f) *Continuity*

An additional factor which I consider to be of some importance is the fact that Faria's case *supra* has stood unchallenged for almost a decade as stating the appropriate interpretation of s 7(l)(b) of Act 33 of 1985. I am of the view that this Court should only upset this settled continuity if it is satisfied that the decision in Faria's case is clearly incorrect.

I might also add that the question of the possible retrospective operation of s 7(l)(b) had not been raised by either counsel - indicating their apparent acceptance of the settled nature of the decision in Faria's case. A related factor (alluded to in Lewis v Lewis in the House of Lords decision at p 452e) is that with the passage of time questions of retrospective operation tend to become academic. While the question of the retrospective operation of Act 33 of 1985 would very much have been a live question in l986 and still a matter of concern in l988, it is very probably much less a live issue in l996. I make that observation in view of the question of retrospectivity being raised by the court and not by the parties.

(g) *The English decisions*

If the clear and consistent interpretation by the High Court and Court of Appeal in England of identical legislation is that the wording was retrospective in operation, such decisions though not binding on this court, would be of a very persuasive nature. The English authorities do not, however, present a united front. Williams regarded the

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relevant wording as neutral, while Powys and Chaterjee regarded it as retrospective. Lewis (in the Court of Appeal) disagreed with *Powys* and *Chaterjee*. The House of Lords, when it had the opportunity to decide the issue, limited its decision to a narrower ground, while not disturbing the reasoning adopted in the Court of Appeal. Madden and Chebaro, though not dealing with precisely the same wording, came down on opposite sides of the fence. The overall picture is more of a battlefield than a victory conclusively achieved by one camp.

BARTLETT J

A further aspect, as I have indicated, is the fact that the English statutes are apparently much more detailed, wider ranging and comprehensive than Act 33 of 1985. This, as I have tried to emphasise, together with all the other factors I have referred to in considering retrospectivity, means that the relevant English authorities cannot be regarded as clearly suggesting that Act 33 of 1985 must be interpreted as being retrospective in operation.

RETROSPECTIVE OR NOT?

In the final analysis, I consider that the decision of Blackie J in Farai's case *supra* is correct. It is my finding that s 7(l)(b) of Act 33 of 1985 is not retrospective in operation. I do not read the language of s 7(l)(b) of Act 33 of 1985 as plainly retrospective or indicating a retrospective effect by necessary implication. At best I see the language as neutral as described by Lord Simon in *Williams supra*.

As the learned judge stated in Faria's case *supra* at 206B-C, Act 33 of 1985 made very substantial changes in respect of the grounds of divorce and the right to claim maintenance and -if the Legislature had intended persons divorced under the old Act to acquire such rights I would have expected the new Act to have said so expressly and clearly. There is no such clear statement in the Act'. I note with surprise and relief that this finding on retrospectivity would indicate that my decision in Lewis v Beeson was also correct.

THE EFFECT OF S 17(2)(a) and (b) OF THE MATRIMONIAL CAUSES ACT 33 of 1985

This aspect has already been dealt with under my consideration of the retrospectivity of s 7(l)(b) - in particular when dealing with the question of transitional provisions. Section l7(2)(b), is, however, the section in particular on which Mr Dyke relies for his application in regard to an increase of maintenance. Mr de Bourbon concedes that the effect of the section is to deem maintenance orders made under Chapter 39 to be made under the relevant provisions of Act. Mr de Bourbon's comment, however, is that this would not apply to orders made under the restrictive provisions of s 9(4) and (5) of Chapter 39. That argument will be dealt with in considering the next issue. It is, however, clear that, subject to the question of orders made under the restrictive provisions referred to, s 17(2)(b) clearly allows maintenance orders made under Chapter 39 to be varied in terms of Act 33 of 1985. I

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would, however, point out that some of the wording of s l7(2)(b) is difficult to comprehend. The section refers to an order for the division of assets made in terms of Chapter 39 being deemed to have been made under the relevant provisions of Act 33 of 1985. But Chapter 39 did not make provision for an order for the division of assets.

I leave the consideration of s l7(2)(b), reiterating that this section is only of assistance to Mr Dyke if Mr de Bourbon's argument as to the effect of a maintenance order made under s 9(4) and (5) is not correct.

THE EFFECT OF SS 9(4) AND (5) OF CHAPTER 39 ON S 17(2)(b) OF ACT 33 of 1985

Section 17(2)(b) of Act 33 of 1985 deems any order made in terms of Chapter 39 to be made under the relevant provision of Act 33 of 1985. This effectively allows orders which were made under Chapter 39 to be varied under Act 33 of 1985. But what about restrictive maintenance orders made under s 9(4) and (5) of Chapter 39 which could not be varied without the consent of the person paying the maintenance? Does the repeal of Chapter 39 cancel the maintenance orders with their restrictive provisions and allow them to be varied under Act 33 of 1985? Or is the right to non-variation an accrued right which cannot be altered without an express indication that that is the Legislature's intention? Or does the deeming provision under s 17(2)(b) mean that it is the maintenance order with its restrictive provisions which is deemed to have been made under the relevant provision of Act 33 of 1985 (even though that Act does not allow such restrictive provision)? Hopefully this is not a case of more questions than answers.

Mr *de Bourbon* argued that what needed to be considered was whether Act 33 of 1985 was intended to take away rights established as ordered by the High Court prior to the introduction of the new Act. He argued that whilst it was true in terms of s 17(2)(b) of Act 33 of 1985 that an order for maintenance made in terms of Chapter 39 is deemed to be an order made under the relevant provision of Act 33 of 1985, that did not mean that the restrictions lawfully imposed in terms of Chapter 39 would be deemed to be omitted from the order made under Chapter 39. He emphasised that it was well established that an Act would not be interpreted as being retrospective where it has the effect of impinging on, reducing or cancelling existing rights, unless the Act, in express words or by necessary implication leads to that conclusion: *Yew Bon Tew v Kenderaan Bas Mara* [l982] 3 All ER 833 (PC) at 839; *Industrial Council for the Furniture Manufacturing Industry, Natal v Minister of*

Manpower & Anor l984 (2) SA 238 (D) at 234 and *Nkmo & Anor v Attorney-General Zimbabwe & Ors* l994 (3) SA 34 (ZS) at 41H-I; 1993 (2) ZLR 422 (S) at 429.

I am in agreement with Mr *de Bourbon* that the effect of the order under s 9(4) of Chapter 39 gave the respondent a substantive right in the sense that the maintenance was not regarded as maintenance for the purposes of s 23 of the Maintenance Act [*Chapter 35*] and there could be no variation without his consent. I agree that Act 33 of 1985 should not be regarded as reducing or cancelling those rights unless the Act by express words or by necessary implication, leads to

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that conclusion. As indicated in my examination of the legislation in respect of the previous issue, I see no such indication. If the legislature had intended to take away rights accrued (which rights may well have been in existence for very many years) I would have expected it to say so - particularly in view of the very specific provisions of s 9(4) and (5) of Chapter 39.

Furthermore, the provisions of s l7(l) of the Interpretation Act [Chapter 1:01] are instructive in this regard:

> "Where an enactment repeals another enactment, the repeal shall not -
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed."

The approach in Lewis v Lewis (the House of Lords decision) is also perhaps analogous. In that case it was held that the Act presupposed the existence of a statutory tenancy at the date when the application was made and did not enable the court to revive a statutory tenancy which had ceased to exist. By analogy, since the maintenance order in this matter in a variable form without the respondent's consent had ceased to exist, it could be stated that Act 33 of 1985 had presupposed the existence of a maintenance order capable of being varied.

Accordingly, I am satisfied that Act 33 of 1985 does not affect the rights already accrued under s 9(4) of Chapter 39.

BARTLETT J

THE REVISED EDITION OF THE LAWS

Since this matter was argued, the Revised Edition of the Laws l996 has been published and s l7 of Act 33 of 1985, which has featured largely in this judgment, has been omitted in the revised edition of that Act, namely the Matrimonial Causes Act [Chapter 5:13]. The omission does not affect this judgment and I only mention the matter for the sake of completeness and in case it may be thought that the point has been overlooked or is in some way significant. The omission does not affect this judgment because the court must be entitled to rely on the transitional provision as it appeared in the Act that was passed by Parliament to ascertain what Parliament's intention was, even though the provision has been omitted in the revised edition. The Law Reviser has power in terms of the Statute Law Compilation and Revision Act [Chapter 1:03] to omit from the Revised Edition provisions which he considers are spent (s l0(2)(g)). However the mere omission of a provision does not mean that that provision is spent, otherwisethe Law Reviser would be assuming the role of Parliament, which could not have been intended.

Finally, I should mention that in terms of s l6(l) of the Statute Law Compilation and Revision Act [Chapter 1:03], where the Law Reviser does omit any law or provision thereof, he is required to give statutory notice thereof. At the time of publication no such notice has appeared but, no

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doubt, it will appear in due course and s l6(2) makes it clear that any such notified and omitted law or provision thereof shall have the same effect as if it had *not been omitted* (my emphasis).

THE MERITS

In view of the findings on the other issues, there is no need to consider the merits since the applicant cannot succeed.

I would, however, point out that the matter is somewhat unusual in the sense that the applicant, from the papers, seems to regard the maintenance payment not as a contribution towards monthly expenses but rather as an amount to be put aside for when she visits Zimbabwe. That is not what a maintenance payment is intended for. Furthermore, the applicant's description of her monthly expenditure is lacking in detail. Nevertheless, the fact remains that the maintenance has not been increased for over l8 years and there have been very dramatic increases in the cost of living since then.

On the other hand, the respondent makes a fervent plea of lack of means to

support any increase. While the respondent would have been very marketable in South Africa as an ex-Rhodesian General in the early and mid-l980s, it is not likely that that would be the case in the South Africa of the mid-l990s. It is accordingly not improbable that his financial status has diminished as indicated in his affidavits (including the late filed supplementary affidavit). Nevertheless, it is clear that the respondent is a man of substance owning substantial immovable properties. While he might have to realign his expenses in order to accommodate any increase in maintenance, I am of the view that his legal obligation towards his ex-wife would require him to do so.

Balancing all the factors in the papers, I would consider that if the other issues had been decided in favour of the applicant, she would very likely have been awarded the increase she asked for. I make these observations should my findings on the other issues be regarded as being incorrect.

In the overall circumstances, the applicant's request for a declaratory order and claim for an increase in maintenance are dismissed with costs.

Gillespie J: The applicant has instituted these proceedings in order to claim the variation of a consent paper agreed between the parties upon the occasion of their divorce from one anotherin 1977. The action for divorce was uncontested and the consent paper was made an order of court. Since then the applicant has been paying to the respondent the sum of $150 *per* mensem. However generous a stipend that may have been in 1977, it is in 1996 a pittance; it is this part of the order that the applicant would have varied by the increase of the amount paid to her.

The respondent, perhaps sensible of a strategic weakness in his position on the merits, has prepared a tactical fortification against the impending siege upon his pocket. The outermost of

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his defences is perhaps more of an exclusion zone than a wall; the point raised is that this court has no jurisdiction to entertain the application. If this succeeds, then the applicant's attack will have been completely repulsed. Should it fail then, as an inner rampart, the respondent relies upon an argument that the periodical payment ordered at the time of divorce is not a maintenance payment susceptible to increase in terms of the law in force at the time of the divorce. The argument continues that the order by which the payments are made is not one brought within the scope of the existing law by transitional provisions enacted in amending legislation. If this fails then the applicant will be able to advance directly to argument on the merits of the claim for an increase. Should it succeed, however, then the applicant wll be left with only one avenue to

BARTLETT J

victory: the submission that the current law has altered with retroactive effect the law in force at the time of the divorce so as to permit the applicant to claim an increase in terms of the current law.

The facts and background of the matter are fully summarised by Bartlett J, whose judgment I have had the inestimable benefit of perusing in draft before preparing my own reasons. From the learned judge's treatment of the issue are also to be seen respective submissions on the point of jurisdiction. It is apparent that Mr de Bourbon's argument has to be that this court has no power to determine the issue whereas the relevant provincial division of the Supreme Court of South Africa is vested with jurisdiction to adjudicate the application for a variation of the order of this court. I cannot accept this submission.

At the time of commencement in this court, of those proceedings for divorce and other matrimonial relief that culminated in the order of Davies J (as he then was), this court patently had jurisdiction.

> "Jurisdiction having once been established at that time, it continues to exist to the end of the action or proceedings even though the ground upon which the jurisdiction was established ceases to exist.' 1(9)

This is the theory of continuance of jurisdiction. It shows that the court which originally had jurisdiction to determine a cause remains vested with that power. Where, moreover, the order that is given by a court is one which is subject to subsequent variation; then the jurisdiction to effect that variation itself continues. 2(10)

The law as regards such variation was stated by Greenberg J (as he then was) in *Luyt v Luyt.*3(11) It is that ordinarily the only court which may set aside or vary a judgment of any court is a superior court which has such appellate or reviewing jurisdiction. There are, however, certain exceptions where the same court can alter or amend its own orders, as in the case of orders that are temporary in nature and therefore subject to variation as circumstances vary. The power to vary in such cases is confined to the court that granted the original order. The learned judge said this:

> "It seems to me that the basis of the power that the court has to vary its own

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BARTLETT J

> order, is that the order is an interim order subject to variation as circumstances vary, and it seems to me inherent in that power that the court which has granted the original order is the proper court to vary that order. The power only arises because the order is a temporary one granted on the facts put before the court at the time; and in my opinion the right to vary that order as circumstances change is confined to that court.'

This statement of the law has remained undisputed.

The point was made in different language but to the same effect in *R v de Jager*, 4(12) where Roper J observed that the ordinary rule of law is that an order made by a court cannot be varied except by the court itself (except by way of appeal or review in a higher court); and that in maintenance cases where there is a change of circumstances the court that made the original order must be approached for a variation. He went on besides show that for a parallel order not being a variation to co-exist with the original order is open to objection on the principle of *nemo debet bis vexari pro una et eadam causa. de Jager's* case has been approved in this jurisdiction by Young J (as he then was) in *Joseph v Joseph*. 5(13)

Luyt's case itself has been followed in South African courts in a number of cases relating to the variation by one provincial division of a temporary order in matrimonial or family matters made by another division. It has been suggested that there might be good reason to allow a court, within the jurisdiction of which a child or its father resides, to vary an order, made in a different court, relating to the custody of that child. See *Papadakis v Wessels*.6(14) Nevertheless, any temptation to alter even to this extent the rule in Luyt's case has been resisted. Most particularly, the statement of the law has been approved as a correct statement of the common law by a full bench of the Cape Provincial Division in *Joss v Board of Executors.* 7(15) Applying this law the court in Joss held that it had no jurisdiction to vary an order for maintenance made by the Transvaal Provincial Division, even though the appellant and her late husband had become incolae of the Cape and the deceased estate of the husband was being administred by the Master in the Cape. *Joss* was, in addition, referred to with approval by Gubbay J (as he then was) in this court in *McConnell supra*.

BARTLETT J

Mr *de Bourbon* has attempted to avoid these authorities with the pronouncement that the South African cases involve no more than a delimitation dispute between the various divisions of the Supreme Court of South Africa. This submission fails to take cognizance of the status of these various divisions as courts in their own right, separate and distinct one from the other, and each with its own exclusive area of jurisdiction. If they were not so, then there could be no justification for the rule in Luyt's case. In my judgment, the authority of these cases is overwhelming. I have no hesitation in following them and in agreeing with Bartlett J that this court has jurisdiction to entertain the matter. I go further and hold that the appropriate division of the Supreme Court of South Africa, the only other court that it has been suggested has the power to determine this matter, in truth would have no such jurisdiction.

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The applicant has thus invaded the respondent's cordon sanitaire and may now invest directly the General's wall. Properly abstracted, the defence on this point may be put in either of two ways, each of which is in my judgment compelling. It may simply be said that the order in the consent paper of periodical payment is not an order susceptible of variation under the current law. Put another way, the thrust that I apprehend Mr de Bourbon to have adopted, it can be argued that the order, although theoretically possible of variation by the same court, may not be varied without the consent of the respondent, which consent is withheld. If this position, no matter how it is rationalised, is incorrect then the direct assault upon this rampart will have succeeded and there will be nothing left for the applicant to do but to prove how much she is entitled to by way of maintenance. I say so because, although the law under which the order was made has since been repealed,8(16) the new law, that presently applicable, makes secific provision by which any order for maintenance made under the previous law shall be deemed to have been made under the new law and therefore susceptible of variation according to the new law.9(17) To prevail against this defence, therefore, the argument of the applicant must show that the existing order is one presumed to have been made in terms of, and variable according to, the present law. If it fails to do so then the direct attack will have been repulsed with much loss and an attempt will have to be made to undermine the respondent's position.

It has already been demonstrated in the treatment of the point of jurisdiction that those orders given in matrimonial causes which may be susceptible of

BARTLETT J

variation are orders pertaining to relief which is temporary in nature and subject to variation as circumstances vary. An order for the periodical payment of maintenance is one which is pre-eminently temporary and subject to variation. The Matrimonial Causes Act [*Chapter 39*] expressly provided for the making of an order for the payment of maintenance. It did so in these terms:

> "9.(1) If in an action for divorce the plaintiff claims against the defendant an order for the maintenance of herself after divorce and the court is satisfied that in all the circumstances of the case it is just and equitable that the defendant should be compelled to contribute to the support of the plaintiff after divorce, the court may make such order for maintenance as to the court may seem just.'

In the absence of any order for maintenance being made at the time of divorce, then no order for maintenance could be made thereafter.10 This it was that led to the former practice of claiming an order of nominal maintenance of $1 *per* annum. An order, even an order for nominal maintenance, having been made, then that order could at any time thereafter be modified. By the same enactment:

> "9.(5) The court may on good cause shown rescind, suspend or vary any order made in terms of this section "

An order for maintenance so made could be enforced by means of the established methods of enforcement in the High Court. It could in addition, however, be registered as a maintenance order in terms of the Maintenance Act [*Chapter 35*].11(18)

The registration of an order for maintenance as a maintenance order had the consequence that the maintenance court (presided over by a magistrate) could effect the variation or

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discharge of the order. It allowed payment to be enforced through the clerk of the maintenance court. In addition it rendered any breach of, or failure to comply with, the maintenance order a criminal offence. 12(19) In order to eliminate any possible prejudice arising from these provisions of enforcement to a person, who upon divorce bound himself, as a matter of grace rather than of obligation, to pay maintenance to his former

BARTLETT J

spouse, the Matrimonial Causes Act 13(20) included the following further enactment relating to maintenance:

> "9.(4) The court granting a divorce may, notwithstanding the dissolution of the marriage, make any agreement between the spouses for the maintenance of one them an order of court. If the court is satisfied that in the circumstances the spouse who has agreed to pay the maintenance was under no legal obligation to do so, then the court when making such agreement an order of court shall further direct that the order to pay maintenance shall not be regarded as a maintenance order for the purpose of section 23 of the Maintenance Act [Chapter 35] and thereafter the provisions of that Act shall not apply to such maintenance order.'

This provision shows that where the maintenance payment is not ordered in fulfilment of an obligation to maintain then failure to comply with the order cannot be rendered a criminal offence under s 23 of the Maintenance Act. More, where the relevant direction by the court has been given, then the provisions of the Maintenance Act as a whole shall not apply to the order. It cannot be registered in the maintenance court nor be dealt with in any way by that court.

Further provision imposes even greater restriction upon the power to vary a maintenance order which is subject to a direction in terms of subs (4) of s 9 of the Matrimonial Causes Act. A proviso to s 9(5) reads as follows:

> " Provided that the amount payable under a maintenance order to which the provisions of section 23 of the Maintenance Act [*Chapter 35*] do not apply shall not be increased without the consent of the spouse against who it is made.'

This is as clear as it possibly can be.

The consent paper in this case makes equally clear provision regarding the status of the maintenance payment to which the respondent bound himself.

> "It is especially recorded that the order to pay maintenance to Plaintiff in terms of this clause shall not be regarded as a maintenance order for the purpose of section 23 of the Maintenance Act [Chapter 35].'

Faced with the inevitable exigency of this acknowledgement, Mr *Dyke*

BARTLETT J

has sought refuge in specious technicality. He has submitted that Davies J, in making the consent paper an order of court, did not - in the words of s 9(4) - "direct that the order to pay maintenance shall not be regarded as a maintenance order for the purpose of s 23 of the

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Maintenance Act [*Chapter 35*]."

In ordering, as he did, that maintenance for the applicant be regulated in terms of the consent paper, the learned judge embodied those terms as part of his order. Where that paper records that the maintenance payment is not an order for the purposes of the Maintenance Act, the learned judge has made that provision his own direction. The direction was, moreover, made by consent as part of an overall settlement. The parties, using the wording of subsections (4) and (5) of s 9,14(21) placed before the learned judge their mutual acknowledgement that the maintenance payment was not one that was made in pursuance of a legal obligation; was not one that could be registered and enforced through the maintenance court; was not one subject to criminal sanction; and was not one susceptible of variation in the absence of consent by the parties.

It is a nice point whether this order should be regarded as a maintenance order variable only with the consent of both parties or as an order sui generis not being a maintenance order at all. It is undoubtedly an order. It is expressed as such and is enforceable by the usual process of execution in the High Court. But is it a maintenance order? Only if it is will it be brought within the ambit of the repeal and savings provision enacted to this effect in the Matrimonial Causes Act 1985:

> "17.(1) The Matrimonial Causes Act [Chapter 39], hereinafter called the repealed Act, is repealed.
>
> (2) Notwithstanding the provisions of subsection (1) -
>
> (a) ...
>
> (b) any order for the division of assets or for maintenance which was made in terms of the repealed Act shall be deemed to have been made under the relevant provision of this Act.'15(22)

BARTLETT J

There are a number of reasons for suggesting that an order such as the present is not an order for maintenance made under Chapter 39 for the purposes of s 17(2)(b) of Act 33 of 1985.

First among these is a consideration of the order itself. Although it describes itself as an order for maintenance, it is fundamentally different from any other order of maintenance made under Chapter 39 in that it cannot be registered, dealt with or enforced under Chapter 35. It is, in its terms, not a maintenance order for the purposes of Chapter 35. It lacks too that feature which is characteristic of a maintenance order: its susceptibility to variation by the same court on application for good cause shown by either party.

Consideration next of the judicial function in ordering any such consensual variation tends to reinforce the view that this order is entirely unlike a maintenance order strictly so called. A judge, seized of an application to vary an order subject to a direction in terms of s 9(4) of Chapter 39, decides no issue of fact. He applies no law. It seems to me that he exercises no discretion. He is only ever faced with a consensual request and I cannot see that he could ever have reason to refuse it. Truly, he would not grant such an order were he satisfied that the parties were attempting to put in place a device for the purposes of fraud; for instance, in order

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to export foreign currency from the country. That, however, would be a discretion related to an abuse of process of court and not one related to a power to refuse a genuine consensual variation of the order in question. There therefore does not appear to me to be any judicial act involved in ordering any such variation. This shows a substantial divergence rom the situation of an opposed application to vary an existing order.

Further, when one considers the cause upon which a maintenance order is varied, one sees that this cause is entirely foreign to that allowing the variation of an order that is not a maintenance order for the purposes of the Maintenance Act. The former cause is the continuing obligation of support which one spouse owes to the other arising out of the equities as enacted by s 9(1) of Chapter 39. The cause for variation of an order subject to the direction enacted in s 9(4) is nothing more nor less than the mutual consent to that variation. It cannot be any continuing obligation to maintain for such an order can by definition be made only where there is no abiding duty of support. This leads one further towards the conclusion that the limited order is not properly to be regarded as a maintenance order at all.

Finally, consideration of the amending legislation shows that there is in Act

BARTLETT J

33 of 1985 no provision for a maintenance order to be given subject to any direction equivalent to that previously legislated under s 9(4) of Chapter 39. Act 33 of 1985, in its provision relating to maintenance orders, simply states:

> "7.(1) Subject to the provisions of this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to -
>
> (a) ...
>
> (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.'

Further, regarding variation of a maintenance order the same Act provides:

> "9. Without derogation from the provisions of the Maintenance Act [Chapter 35], an appropriate court may, on good cause shown, vary, amend, suspend or rescind an order made in terms of section 7, and the provisions of subsections (2) and (3) of that section shall, mutatis mutandis, apply in respect of any such variation, amendment, suspension or rescission.'16(23)

Note particularly the reference in s 9 to the Maintenance Act. Maintenance orders give under Act 33 of 1985 may still be dealt with in terms of the Maintenance Act but cannot be excluded from the operation of that legislation in terms of any direction such as could previously be given under Chapter 39.

It therefore follows that an order constraining the periodical payment of monies by one spouse to another is an order that is substantially different from the concept of a maintenance order under Chapter 39. It is in terms not a maintenance order under Chapter 35. It is an order for which no provision exists in, and the idea of which is foreign to, Act 33 of 1985. I am persuaded to the view that it is not a maintenance order properly so called but is an order sui generis. Even

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if the reference in s 17(2) to an -order with regard to ' the payment of maintenance' is in its phraseology wide enough to encompass such an order, in its intendment it cannot possibly embrace this concept. (I

enlarge upon this consideration more fully below where I address the argument on retrospectivity.) Such an order cannot be deemed to have been given under Act 33 of 1985 because no such order can in fact be given under that Act.

My conclusion, therefore, is that the order is not a maintenance order properly so called but is an order unique in its time and one no longer provided for in law. In my judgment it cannot be one that is imported into the operation Act 33 of 1985 by the transitional savings enacted with that latter legislation. Mr de Bourbon is therefore correct in his submission that the order at issue is one that could have been varied neither under Chapter 39 nor under Act 33 of 1985.

If this conclusion is correct, then it follows that the saving provisions of s 17 cannot apply to the order under consideration. It is not an order imported into Act 33 of 1985. The applicant's only path to success in this event is to show that s 7 applies retrospectively to give the appropriate court power to vary an order which is not saved in terms of s 17.

It is at this point that one finally reaches the issue of retrospectivity which caused Bartlett J to refer the matter to a full bench. The effect of the finding above, on whichever basis it is rationalised, is that unless this Act 33 of 1985 allows the court to reopen settled matters in such a way as to alter existing rights, then the applicant must yield before the dikes and battlements of the respondent's defence. Mr Dyke therefore takes his courage in both hands and argues that Act 33 of 1985 is retroactive in its operation.

The well-known presumption against retrospectivity has been invoked in interpreting Act 33 of 1985 by Blackie J in *Faria v Claridge* 17(24) and defined in this matter by Bartlett J. Although it has not always emerged clearly in judgments, this concept actually involves two cognate presumptions, one against retrospectivity and another against interference with existing rights.18(25) In the stricter connotation of the word, a meaning often expressed by the term retroactive, an enactment is only retrospective if it provides or has the effect that, as at a particular date, the law shall be taken to have been that which it was not. A statute is nevertheless also considered to be retrospective in a wider sense when it interferes with existing rights or obligations. A law will be retrospective in this usage where it imposes a new disability upon a person. The matter was put thus by van Winsen AJP in *Parow Municipality*

v Joyce & McGregor (Pty) Ltd, 19(26) dealing with a provision alleged to be retrospective:

> "The section applies to a state of affairs existing at its inception, viz., that a certain area of land shewn upon an approved sub-division plan comprises a public street. The fact that the aforementioned requisites for its operation existed antecedent to the time when the section was promulgated does not in itself render it retrospective in its

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operation. Cf *R v St Mary, Whitechapel* 12 QB 120 at p 127; *Master Ladies Tailors Organisation v Minister of Labour* [1950] 2 All ER 525 at 527; *R v A* Solicitor's Clerk [1957] 1 WLR 1219. It would, in my view, have been retrospective in its operation if it had sought to provide that as from a date anterior to its promulgation the local authority had become vested with ownership in what were then public streets. But this it does not do. The remarks of Buckley LJ in *West v Gwynne* [1911] 2 Ch 1 at 11, quoted with approval by Schreiner ACJ, in *Shewan Tomes & Co Ltd v Commissioner of Customs & Excise* 1955 (4) SA 305 (A), are apposite in this connection. The learned judge obsrved as follows:

> "During the argument the words 'retrospective' and 'retroactive' have been repeatedly used, and the question has been stated to be whether s 3 of the Conveyancing Act, 1892, is retrospective. To my mind the word 'retrospective' is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law."

To similar effect is this formulation by Corbett J (as he then was) in Cape Town Municipality v F Robb & Co Ltd:20(27)

> "As has been pointed out before, the words 'retrospective' and 'retroactive' are often used in a loose sense to describe another canon of construction, *viz*. that a statute is generally presumed not to interfere with vested

BARTLETT J

private rights under contracts or vested rights to property (see Steyn Uitleg van Wette 3 ed pp 85-6; Halsbury, 3 ed p 413). In *Shewan Tomes & Co v Commissioner of Customs & Excise* 1955 (4) SA 305 (A), Schreiner ACJ quoted with approval the following remarks of Buckley LJ in *West v Gwynne* [1911] 2 Ch 1 at 11: (the learned judge then set out the above quotation of Buckley LJ and continued:)

Despite the logic of these distinctions there is a tendency on the part of the courts and the text-book writers to merge these principles in their application to a particular statute. Thus Halsbury 3 ed vol 36 p 423 states:

> 'In general, however, the courts regard as retrospective any statute which operates on casesor facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct."

Craies on Statute Law 5 ed p 357 defines 'retrospective' in the following terms:

> 'A statute is to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past.'

(See also Peterson v Cuthbert & Co 1945 AD 420 at p 430; Steyn Die Uitleg van Wette 3 ed p 85). Inasmuch as both principles relate to rules of construction leading in the same direction, little, if any, harm can come of such a merger.'

The reason why such a merger of concepts should not lead to inappropriate results is perhaps explained by Schreiner ACJ in *Shewan Tomes:*21(28)

> "Where one is dealing with a case of true retrospectivity it will generally, I apprehend, be more difficult to draw inferences as to the legislature's presumed intention not to produce injustice, since ex hypothesi the legislature is creating a situation in which the conduct of persons is affected by rules that did not exist at the time of the

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conduct. However, that may be, true retrospectivity is no doubt for present purposes to be

BARTLETT J

dealt with on the same general lines as interference with existing rights, and where there is real room for doubt as to the meaning of a provision, the interpretation producing the less harsh results should be favoured.'

In this matter, were the applicant's case to be upheld, the effect of a favourable judgment would be to deprive the respondent of a benefit, namely the benefit of not suffering any increase in a periodical payment of maintenance made by himself to his former wife. This benefit is one that accrued to him by statute in force at the time of accrual and is also one that arises out of contract. The consequence would be to oblige him to pay an increased amount from the date of the judgment. It would not alter his situation for the worse from a date prior to the judgment, far less from a date before the promulgation of Act 33 of 1985. For instance, it would not oblige him to pay arrears of maintenance. The issue, therefore, is not one of true retrospectivity, but rather whether the statute ought to be so interpreted as to have an application that interferes with the existing right, as defined above, of the respondent.

Argument upon the issue has concentrated upon two areas of the statute, s 7(1) and s 17(2) (both of which have previously been set out in this judgment). Mr Dyke has submitted that the words -in granting a decree of divorce ' or at any time thereafter' in the former provision show unmistakably an intention to legislate for retrospective effect. He essayed a similar argument concerning the wording of the latter provision, referring specifically to s 17(2)(b). This argument can now be seen to have been somewhat misdirected. His position would more properly have been put on this basis: that although the order of Davies J could not be given in those terms under Act 33 of 1985, bestowing upon the respondent as it does a privilege not provided for in Act 33 of 1985, and despite the fact that the respondent accordingly enjoyed certain rights as at the date of promulgation of Act 33 of 1985, nevertheless the intention of the legislature was to remove those rights with effect from the date of promulgation and to convet the existing order into one deemed to have been made under, and variable according to, Act 33 of 1985.

Although this is not an instance of true retroactive operation, the approach of declining to find such an intention to remove existing rights in the absence of express provision or necessary intendment is still the proper approach. I therefore examine the sections relied upon with a view to determining whether or not they disclose the inention to effect this drastic alteration of rights.

BARTLETT J

I turn first to an examination of s 7, upon which Mr Dyke attempted to refine considerably. The words -in granting a decree of divorce ' or at any time thereafter' do not in my opinion address any issue of retrospectivity or interference with existing rights. Their literal sense is entirely neutral as to any issue of retrospective operation. The words are possessed of ample and complete meaning and effect if they are understood as referring only to a decree issuing after the date of promulgation of Act 33 of 1985. In my judgment, the phrase -or at any time thereafter' is included in order to alter the previous law, which, as I have shown, was to the

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effect that the giving of an order of proprietary relief was the function of the court granting the divorce and to be exercised at the time the decree issued. In consequence of the inclusion of these new words, the court may grant proprietary relief on a separate cause independent of the cause for divorce after the marriage has already been dissolved.

I refer with respect to the treatment of these words by Blackie J in Faria:

> "The grammatical construction and plain meaning of s 7(1) shows that it can only apply to a decree of divorce granted under the new Act. The draftsman has used the present participle in the words 'in granting a decree of divorce'. That can only mean a divorce granted in terms of a new Act. The words which follow, 'or at any time thereafter', are linked grammatically and in meaning with the decree of divorce in the previous phrase. They cannot be stretched to refer to a divorce granted under the old Act without doing violence to their obvious meaning.'22(29)

Whilst still at the Bar, I had the honour of persuading my learned brother Bartlett, as he has since become, to follow this reasoning in the unreported case of Lewis v Beeson. This latter decision is not an authority dealing with the issue of retrospectivity; rather, it shows that where a marriage is dissolved by a foreign court, this court has no power under Act 33 of 1985 to make a property distribution order. It is relevant to the present case only to the extent to which it shows judicial acceptance of the reasoning of Blackie J in the passage cited above. The lack of further authority dealing with *Faria*, as has been pointed out by Bartlett J in this matter, is indicative of the fact that the authority of that judgment has been undisputed, albeit untested, since it was delivered. I find nothing in s 7 which persuades me that the intention of the legislature was to legislate with retroactive effect or to interfere with existing rights.

BARTLETT J

Turning to s 17 of Act 33 of 1985, this undoubtedly shows an intention to alter, to some extent, existing rights. Thus s 17(2)(a) allows for the conversion of proceedings pending at the time of promulgation from proceedings under the repealed Act to proceedings under the new. Such conversion, however, could only be accomplished with the leave of the court. In the absence of leave the proceedings were to be determined according to the repealed law which was for that purpose saved. Far from demonstrating an intention to effect substantial inroads upon existing rights, this provision demonstrates to the contrary a properly conservative approach whereby existing rights are interfered with to a minimal extent and then only upon good cause shown to a court. The inclusion of this provisions evinces an awareness on the part of the draftsman of the rule against the interference with existing rights and a desire entertained by the legislator to accomplish such an interference within a very limited sphere. It is intende to allow either party to rely upon the newly created cause of action only in the case of proceedings which have not yet been completed.

Paragraph (b) of the same subsection similarly displays a limited purpose prospectively to alter existing rights. This appears from the provision that orders made under the repealed law are to be deemed to have been made under the new, which provision is to be read with the powers of variation enacted in Act 33 of 1985. These powers show that the criteria upon which orders may be varied is different from the considerations which pertained under Chapter 39. Such a provision is very necessary in this legislation to enable the existing orders made under the

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repealed law to be amended in terms of the amending legislation. In its absence, the previous law would have to have been saved, either expressly or by virtue of the operation of the provisions of the Interpretation Act.23(30) A decision has been made by the legislator not to save the previous law but to deem the existing orders as having been made, and therefore subject to variation, under the new Act.

The question that arises is therefore as to the extent of this interference with existing rights. In its terms, subs 2 saves "any order for the division of assets or for maintenance".

Unfortunately, the wording that has been used is not at all conducive to clarity but rather creates no little difficulty. Had it been possible under Chapter 39 to make an order for the division of assets it would have been a final order and not susceptible of variation by the same court. The effect of deeming such an

order, could any such order have existed, to have been made in terms of the amending legislation might arguably have been to have rendered that order for the division of assets variable according to s 7 of Act 33 of 1985. This provision reads:

> "Without derogation from the provisions of the Maintenance Act [Chapter 35], an appropriate court may, on good cause shown, vary, amend, suspend or rescind an order made in terms of section seven, and the provisions of subsections (2) and (3) of that section shall, mutatis mutandis, apply in respect of any such variation, amendment, suspension or rescission.'

In such an hypothetical circumstance, the inclusion in s 17(2) of the words -for the division of assets' gives rise to the argument that the wording in s 9 is wide enough to embrace the variation even of a final order for the division of assets and since such a final order under the repealed law is deemed an order under the amending law, that final order may be varied under the new law. This would be an argument of no insignificant weight for retrospectivity of operation of the amending legislation. As Bartlett J has pointed out, however, there could have been no order for division of assets made under Chapter 39, an enactment which afforded a spouse no right to a division of assets upon the dissolution of the marriage. I too can conceive of no occasion where an order for a division of assets could have been made under and by virtue of the repealed law. One therefore casts about for some explanation for the inclusion in subs (2) of s 17 of the offending words.

The only possible answer that suggests itself is this. In the event of a marriage in community of property the court would have had the power at common law to divide the joint estate. In terms of s 7 of Act 33 of 1985 it had also the power to order a forfeiture of benefits. Any such order of forfeiture operates against a guilty party. In addition, an order might incorporate a consensual property settlement. All three of these might be said to be an order of division of assets; only one, however, the second, would be such an order made in terms of the repealed Act. In neither case, however, am I able to discern any basis on which it can be said that such an order would be variable under the new Act. Each of these orders would be final in operation and not susceptible of variation under the old Act. The notion of their being variable by the same court which ordered them is repugnant to be very fundamental principles on which orders are

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variable. It would require the clearest possible expression to alter the lawso as to render such a capital disposal subsequently variable.

Although the literal theory of the construction of statutes requires that the

BARTLETT J

words of an enactment be given their natural and ordinary meaning, without any addition or subtraction of words, I confess that I find it impossible to give these problematic words any sensible meaning. I would have to regard them *pro non scripto*. Applying a subjective or a purposive approach to this difficulty of interpretation I can still find no sensible reason for the inclusion of the words, given that no order such as they refer to could have been in existence. However I approach the task, I am driven to conclude that the words can be given no effect and can cast no light upon the intent or purpose of the legislation. The only words describing deemed orders which can have any meaning attributed to them are therefore the words: -any order for maintenance " It follows that para (b) has a deeming effect upon maintenance orders only. This is in accordance with one's expectation that only orders subject to variation by the same cout under the former law are deemed to be orders subject to variation under the amended law.

There accordingly remains nothing in subs (2) which can have the effect of extending, or which shows any purpose to extend, the deeming provisions of that subsection beyond those orders for maintenance variable by the court of first instance by which they were made. This conclusion is in harmony with my earlier finding that the order of Davies J is not an order to which subs (2) applies and leads inevitably to the conclusion that the neither the effect nor the purpose of the enactment is to subject any person to a new disability beyond that inevitable in in having an order given and variable under Chapter 39 henceforth subsceptible of variation in terms of the criteria defined in Act 33 of 1985.

The combined effect of these two provisions shows unmistakeably an intention to legislate in such a way that the newly enacted matrimonial relief is to be available only to parties proceeding, de novo or by amendment with leave of the court, in terms of the amending legislation, and to variable orders deemed to have been made under the law as amended. From these two provisions, one may deduce that appreciable thought has been given to the question of interference with existing rights but that only this very circumscribed interference is enacted. In particular, no purpose can be deduced to grant to the applicant the entirely new right of overriding the respondent's opposition to the variation of that which was initially granted as an indulgence; nor to deny the respondent that right of vetoing any variation of his obligation, which obligation he only undertook upon the express term that it be not varied without his consent.

Even if this conclusion were incorrect, however, one would still need to

BARTLETT J

determine whether the wording and purpose of the Act is such as to expose the respondent in

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this case to the new disability which would be entailed in allowing the variation of the existing order in the face of his objection. I consider that there is no warrant for such a conclusion. Since the very essence of the presumption against retrospectivity or interference with existing rights is to hold against any invasion save where it is provided expressly or by necessary implication, it seems to me that it is appropriate to draw from this express provision, coupled with the lack of any other such interference, the conclusion that no other such interference is intended. This is an example where the process of reasoning summed up in the maxim *expressio unius est exclusio alterius* is entirely appropriate.

Looking beyond ss 7 and 17 of Act 33 of 1985 to the wider context of the enactment itself, one encounters the long title. This is silent on the issue. It suggests no intention whatsoever to make retrospective provision, neither in the strict sense nor in the looser sense of interfering with existing accrued rights. It states that the Act is -to repeal the Matrimonial Causes Act [*Chapter 39*]; and to provide for matters incidental thereto or connected therewith'. In my judgment, that formulation is entirely consistent with an intention to enact certain necessary transitional provisions of strictly limited effect and is quite inappropriate as an expression of intention to interfere with existing rights beyond those necessarily adjusted so as to provide the transitional effect expressly provided.

Consideration of the wider context of the enactment - the mischief sought to be prevented or the reform to be instituted - does not in my judgment advance the cause for the applicant. This was an exercise essayed by Blackie J in a further passage in the judgment of the learned judge in Faria:

> "If s 7 of the new Act were to apply generally to a divorce granted in terms of the old Act, the new Act would have created a whole series of new rights to the person involved in those divorces. For example, an innocent party, who did not claim maintenance at the time of divorce, would now be able to claim it. A 'guilty' spouse could claim maintenance from an 'innocent' one. Property claims between former spouses which had otherwise become prescribed could be revived.
>
> If the legislature had intended persons divorced under the old Act to acquire such rights I would have expected the new Act to have said so expressly and clearly. There is not such clear statement in the Act. Sections 7 and 17 say the opposite.' 24(31)

BARTLETT J

This passage shows that the learned judge, although he did not express the distinction between true retrospectivity (or retroactive operation) of an enactment and an interference with existing rights, decided the issue on the basis that an interference with existing rights could not have been contemplated by the statute. I respectfully agree with his decision and with the reasons he gave. To similar effect is the reasoning of Bartlett J in that portion of his judgment in this matter under the head 'The reforming zeal of Parliament.' I align myself with respect with the view that there was no serious vacuum in the law prior to the reform which could impel one to the view that retrospectivity in any sense beyond that expressly provided for in the transitional provisions must have been the purpose of the legislator.

Finally, the English cases referred to in detail by Bartlett J do not represent any persuasive authority to the contrary. The particular statutes and general legislative scheme of matrimonial

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matters in the English law is evidently vastly different and considerably more comprehensive than in this jurisdiction. Although the presumption against retrospectivity is applied in England according to the same principles applicable in our law, the statutes to which is applied in the cases cited to us cannot be considered in pari materia. Indeed the manner in which retrospectivity has been found to exist in much of the English legislation is such as to persuade me that retrospectivity is not intended in our statute.

In *Williams v Williams*, 25(32) *Powys v Powys* 26(33) and *Chaterjee v Chaterjee* 27(34) the important point at issue was whether the English Matrimonial Proceedings and Property Act 1970, and in particular s 4 thereof, was retrospective. In all three matters the decision was in favour of retrospectivity. The particular wording of the enactment relied upon was to be found in two provisions: a clause in s 4 providing that -On granting a decree of divorce ' or at any time thereafter ' the court may' make a settlement of property order; and a transitional provision, para 1 of Schedule 1, which provided that pending proceedings would be saved and would continue as if begun under the corresponding provision of the 1970 Act.

In *Williams* the answer to the question would determine whether a wife, divorced by a decree absolute on 10 July 1970, could proceed for relief in the form of a settlement of property order in terms of the 1970 Act which had come into force on 1 January 1970. It is of the first importance to note that

under the law in force prior to the 1970 Act the wife could obtain ancillary relief to the decree of divorce, which ancillary relief did not include a settlement of property order, at any time after the granting of that decree. Lord Simon P, in considering the argument that the wording referred to above clearly evinced a purpose of retrospectivity, said the following:

> "It was argued before me that a retrospective intention was to be gathered from two sources: (a) the words at the beginning of s 4, 'On granting a decree of divorce ' or at any time thereafter "; and (b) the words of para 1 of Schedule 1 to the 1970 Act. But as I have indicated, Schedule 1 tends to militate against, rather than in favour of, a general retrospective operation. And the words 'or at any time thereafter' seem to me to be entirely neutral; they make perfectly good sense if limited to proceedings instituted after the Act came into force; and there is certainly nothing in them to rebut the presumption against retrospection.' 28(35)

I am emboldened to suggest that this is precisely the same view which I have expressed concerning the words in s 7 of Act 33 of 1985.

Notwithstanding this consideration of the wording of the enactment, Lord Simon P went on to hold the legislation retrospective. He found there to be a number of small indicia in favour of retrospectivity, indicia which cannot be found in our legislation, and concluded as follows:

> "But what really clinches the matter to my mind is that the Act will not work properly in one extremely important respect unless it is reads retrospectively. This is where a petition was presented before 1 January 1971, but no application for ancillary relief has been made before that date. No application for ancillary relief can then be made under the 1965 Act, since all powers to give ancillary relief under that Act have been repealed; nor can any application be made under the 1970 Act unless it applies to pending proceedings, i.e. is retrospective ' I cannot pretend that the implication of retrospectivity is 'distinct'; but it seems to me to be necessary to give reasonable

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efficacy to the Act " 29(36)

No such hiatus could occur under our legislation which by s 17(1) saves the repealed law for the purpose of pending proceedings. In our legislation not only is there no distinct implication of retrospectivity but also there is no need to imply it in order to give reasonable efficacy to Act 33 of 1985.

BARTLETT J

In *Powys*, Brandon J, while reaching the same conclusion on retrospectivity as had Lord Simon P, and in very similar circumstances, went rather further than he did and held that the words -On granting a decree ' or at any time thereafter' in the 1970 Act necessarily apply not only where the decree is granted after the coming into force of the amending Act but also to cases where it had been granted before that date.30(37) The Court of Appeal in *Chaterjee* agreed with the analysis of Lord Simon P but went on to say of these particular words that it is difficult to think of wider language or of a situation which more clearly called for the use of limiting words if limitation were intended. 31(38) I am bound to say that I disagree with this grammatical view, although of course I cannot comment on the contextual application to the English legislation. In any event, it seems to me that the reasoning of Lord Simon P is far more compelling.

The same preference for the reasoning of Lord Simon P which I entertain can also be found in a later decision of the Court of Appeal in *Lewis v Lewis & Anor.*32 (39)In construing a very different enactment, Anthony Lincoln J noted this divergence of approach to the literal effect of the words 'On granting a decree of divorce ' or at any time thereafter', words which also appeared in the provision which the learned Judge was obliged to interpret. He cited the passage of the judgment of Lord Simon P concerning the neutrality of the words in question which I have set out above 33(40) and continued as follows:

> "Unless certain decisions to which I will advert in a moment have cast doubt on that finding, I would respectfully accept the reasoning as applicable to the same words [in the Act before the learned Judge]. It follows that unless other considerations are present (such as the unworkability of the Act), the neutrality of the phrase 'on or after' leaves untouched the sovreignty of the presumption against retrospectivity.' 34(41)

The learned judge then considered Powys and Chaterjee and reached this conclusion:

> "Lord Simon P's approach in *Williams* may in my view be said to remain

BARTLETT J

> unaffected by the later decisions. If there be any apparent inconsistency between Lord Simon P's view that 'On granting a decree ' or at any time thereafter' was a phrase neutral in its effect on the question of whether a retrospective interpretation should be given to the power already thus introduced and the view of Brandon J and Ormrod LJ that the use of that phrase supported a retrospective construction, the latter view should, in my judgment, be taken to be based on no more than a consideration that the phrase is entirely consistent with the retrospective interpretation if there are other factors to justify that interpretation.' 35(42)

I take some confidence from the fact that the approach of Lord Simon P to the meaning of the

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particular words has received this express approval. It fortifies my own view as to the literal meaning of s 7 of Act 33 of 1985.

There is another aspect of the judgment of Anthony Lincoln J which is helpful. In considering questions of mischief and the need for retrospective operation in the legislation before him, the learned judge noted that the Act was not designed to deal with an -urgent reform or a substantial vacuum'. He noted that it accomplished its purpose -effectively and without any glaring lacuna'. As I have already stated, I consider that precisely the same can be said of our Act.

Madden v Madden 36(43) involved the same Act as that considered in *Williams, Powys and Chaterjee* but a different section of the legislation. Stirling J came to the conclusion concerning retrospectivity contrary to that in the other cases. Although his reasoning may be instructive in relation to the enactment he considered, however, the conclusion cannot really assist in this case, just as the decisions in the other judgments are of little value, for the reason that the English law is so very dissimilar to our own. *Chebaro v Chebaro*37(44) is another case which in fact is of no assistance. Not only was the legislation considered very different in scope but the wording under examination also was quite unlike the wording of Act 33 of 1985. 38(45)

I do not wish to leave this treatment of the English cases without mention of the decision of the House of Lords in *Lewis v Lewis* 39(46) on appeal from the

judgment of Anthony Lincoln J above. The case is of interest since it demonstrates the distinction between true retroactive operation and an interference with existing rights. Anthony Lincoln J in the Court of Appeal had held against retrospectivity in a certain provision which allowed a divorced spouse to apply, after the issue of a decree of divorce, to have a statutory tenancy ceded to him or her by the erstwhile partner, in whose name the tenancy had subsisted. The finding was to the general effect that this provision did not permit of the interference with existing rights so as to provide a remedy to a person whose divorce had been made absolute before the coming into operation of the legislation under study.

In the House of Lords, the appeal was dismissed but on a different ground. The facts showed that the statutory tenancy in question had ceased to exist well before the legislation had come into effect. Their Lordships were therefore able to find with no hesitation that the Act could only apply to an existing statutory tenancy; any other result would have involved the retroactive resuscitation of a right which had long since been moribund. Having found a lack of intention to legislate with true retroactive effect to that extent there was no need to address the more general issue of an intention to interfere with existing rights. In my understanding of the decision, however, the reasoning of Anthony Lincoln J remains intact.

My conclusion after a study of these foreign decisions is this. In many respects, the reasoning adopted by the courts helpfully exemplifies the approach I have attempted to adopt. In particular, assistance can be derived from the opinion expressed by Lord Simon P and by Anthony Lincoln J upon the ordinary meaning of the words -on granting a decree of divorce or at

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any time thereafter.' The judgments, however, provide no persuasive authority on the interpretation of our legislation which is by no means comparable in language or in scope to the various enactments under examination in the foreign courts. There is certainly nothing in those decisions which persuades me that *Faria v Claridge* is wrongly decided.

It therefore follows that I hold the Matrimonial Causes Act 1985 to be devoid of any retrospective effect save that expressly provided for in the savings provision, s 17. That section does not in my judgment embrace any order which may have been made under the Matrimonial Causes Act [*Chapter 39*] and which did not constitute a maintenance order under the Maintenance Act [*Chapter 35*]. It does not operate so as to place a husband under the new disability of being vulnerable without his consent to a variation of a periodical payment which is not a maintenance order under the said legislation.

BARTLETT J

The respondent is therefore spared the embarrassment of a debate as to whether it is fair that he pay his former wife as little as $150 a month. I too would dismiss the application with costs.

CHIDYAUSIKU J: I agree.

FIRST MERCHANT BANK OF ZIMBABWE LTD v COMMISSIONER OF TAXES 1996 (2) ZLR 171 (HC)

Court **High Court, Harare**

Blackie J

Application for declaratory order

4 April & 7 August 1996 Judgment No. HH- 107-96

Flynote

Set off-debt-debt owed by Govermnent to tax - whether taxpayer can set off taxes due by it to Government against such debt

Headnote

The applicant had loaned money to a statutory corporation, for which loan the Government stood as guarantor. When the loan was not repaid by the corporation, the Government, after several demands, undertook to pay the loan, plus interest - It failed to honour this undertaking for nearly a year and only did so when legal action was threatened. During the period between the making of the demand for payment and the actual payment, the applicant became liable to pay various amounts to the Government by way of taxes. The respondent objected to any suggestion that the taxes be set off against the debt and appointed the applicant's bankers as agents for the collection of the tax. The applicant paid the tax under protest but sought an order

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declaring that it was entitled to set off the taxes due, against the debt owed by the Government.

Held, that although at common law set off does not operate agains tthe fiscus, s 48(1) of the Audit and Exchequer Act *[Chapter 22:03]* makes it clear that any debt, which includes a tax, due by a person to the State may be set off against any amount due by the State to that person. Set-off operates automatically and by operation oflaw not merely at the election of the State.

Cases cited:

Garlick's Wholesale Ltd v Davis 1928 AD 157

BLACKIE J

Great North Farms (Pty) Ltd v Ras 1972 (4) SA 7 (T)

KweKweMuMcipality v Space Age Invstms (Pvt) Ltd 1985 (1) ZLR 300 (S)

Mahomed v Nagdee 1952 (1) SA 4 10 (A)

Pentecost & Co v Cape Meat Supply 1933 CPD 472

Schierhout v Union Gavt (Min of Finance) 1926 AD 286

The court referred to the following statutory provisions:

Audit & Exchequer Act *[Chapter 22:03], s* 48(1)

Income Tax Act *[Chapter 23:06], s 77(1)*

Case Information

A P de Bourbon SC, for the applicant

B Patel, for the respondent

Judgment

Blackie J: The applicant seeks declaratory order that it is entitled to set off the taxes due by it to the Government of Zimbabwe (the Government) against an amount due to it by the Government and that such set off automatically discharges the applicant's liability to pay those taxes from the date of set off.

The background to this application is as follows. The applicant is a merchant bank. It agreed to lend money to a company called Affretair (Pvt) Ltd (Affretair) on condition that the Government acted as guarantor for the loans. Guarantees for the loans, signed by the Senior Mnister of Finance, were provided by the Government and the money was advanced. Affretair did not repay the loans. The applicant called on the Government to honour its undertakings. Despite several demands,nopaymentwas madeby Government However, after considerable delay, the Senior Minister of Finance wrote to the applicant on 16 March *1994,* stating that "(the Government) hereby irrevocably undertake(s) to provide (the applicant) with an amount of *$47*

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749 106,40... plus accrued interest and bill charges atprevailing market rates, as determined by yourselves, from 1 February, *1994* until date of payment, on or before *31* October, *1994."* The Government failed to honour this undertaking. On 1 December *1994,* the applicant gave notice to the Government in terms of s 6 of the State Liabilities Act *[Chapter 98:14]* that it intended to proceed against the government for the recovery of the money owed to it Finally, on 22 November *1995* Gust two weeks short of a year from the date on which the applicant had demanded payment of the amount due to it), the Government made payment.

Between the time when the applicant had demanded payment of the amount due to it by Government and the delayed date of payment of that amount by

BLACKIE J

the Government, the applicant became liable to pay various amounts to the Government for taxes. The applicant advised the respondent of its intention to set off the amount due by it in tax against the amount owed by Government to it and, as each tax payment fell due, the applicant applied that set off. The respondent in marked contrast with the Government's tardiness in honouring its irrevocable undertakings to the applicant, immediately objected to this action and appointed the applicant's bankers as agents for the collection of the tax which he claimed must be paid to him by the applicant. The applicant paid the tax under protest.

It is common cause that, at common law, set off does not operate against the fiscus. Voet Commentary on the Pandects 16.2.16; *Schierhout v Union Goverment (Min of Finance)* 1926 AD 286 at 291; and *Pentecost & Co v Cape Meat Supply* 1933 CPD 472 at 479; Wessels The Law of Contract in South Africa 2 ed (1951) vol 2, paras 2567-2568, at p 699. The applicant submits, however, that s 48(1) of the Audit and Exchequer Act [Chapter 22:03] has overturned that rule of common law and allows set off to operate against the fiscus.

Section 48(1) reads as follows:

> "(1) A debt due to the State may be
>
> (a) sued for and recovered by action in any court of competent jurisdiction at the suit of the responsible Minister;
>
> (b) subject to the provisions of subsection (2), set off against any amount due by the State to the person by whom that debt is due.
>
> (2) In the case of set off in terms of paragraph (b) of subsection 0) againsta payable to aperson who remains in the employment of the State or a pension, the debt may be recovered in full or in monthly instalments at a rate fixed by the Treasury."

The applicant says that the wording of subs (1)(b) is clear and specific and can only mean that the applicant is entitled to set off the amounts due. The respondent denies this and denies that the subsection creates a general right of set off. He submits that the true meaning of, and the only right given by, the subsection is a right to the State to elect to apply set off. In making that submission, the respondent has drawn attention to the basic rules for the interpretation of statutes, the purpose of the Audit and Exchequer Act the

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BLACKIE J

history of the amendments to that act and this section. While I am grateful to the respondent for his critical and careful analysis of the purpose and history of the Act and the amendments to it, and 1 have no doubt that the accuracy of that analysis, I cannot agree with the interpretation which he seeks to put on *s 47(1)(b).* There are two difficulties with it. The first is linguistic - the plain meaning of the words used; the second is legal - the nature and meaning of set off. As far as the wording is concerned, the section is concerned with the recovery of debt. A tax due under the Income Tax *[Chapter 23:06]* is undoubtedly a debt due to the State (see s *770)* of the Act). Section *48(1)* provides that a debt due to the State can be recovered in two ways; either by action, as provided in subs (a) or set off, as provided in subs (b). The whole section is expressed in general terms. That generality is not limited in any way by or in subs (1)(b), except by specific reference to subs (2). Subsection (2) is only concerned with the recovery of amounts due by State employees and pensioners with the option to recover these debts in instalments. The legal difficulty with the respondent's interpretation is this. Set-off operates automatically and by operation of law. Once the mutual debts exist, set-off takes place *ipse jure GreatNorth Farm (Pty) Ltd v Ras* 1972 (4) SA 7 M at pp 8-10, *Schierhow v* Union *Government (Min of Justice)* 1926 AD 186 at pp 289-290; *Garlick's Wholesale Ltd v Davis* 1928 AD 157 at p 164; *Mahopwa v Nagdee* 1952 (1) SA 4 10 (A) at p 416*; Municipality of Kwekwe v Space Age Investments \(Pvt\) Ltd* 1985 (1) ZLR 300 (S) at p 302.

Once, therefore, set off is permitted by the legislation it cannot, without changing the whole meaning of the concept and without specific wording so that effect, take place only if the State elects to apply it.

In the result, therefore, the applicant is entitled to the declaratory order which it seeks and an order in those terms, together with costs, will issue

Winterton Holmes & Hill, applicant's legal practitioners

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

DUBE v GOLD TRAVEL (M) LTD & ORS 1996 (2) ZLR 175 (HC)

Court **High Court, Harare**

Adam J

Civil application

29 February & 21 August 1996 Judgment No. HH- 112-96

Flynote

Practice and procedure - execution - sale - immovable property application to set aside sale-who may make application-not limited to persons having real as opposed to personal rights - grounds for setting aside

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sale-sale may be set aside on any good grounds- court may take into account equitable considerations

Headnote

The applicant bought a house under a deed of sale. The agreed price was $640 000 of which $111212 was paid as a deposit with the balance to he paid in monthly instalments. The property was already mortgaged to a building society and the applicant agreed to pay the seller's monthly payments to the society. No caveat was registered against the property by the purchaser. However, the first respondent, a judgment creditor of the seller, had registered a caveat, claiming some $72000.

The applicant fell into arrears in her payments to the building society. The first respondent issued a writ of execution against the seller and the property was sold by public auction. The winning bid of $620 000 was made by the seventh respondent, who was the first respondent's managing director, bidding for himself, not for his employer. The bid was accepted by the Deputy Sheriff and confirmed three weeks after the sale. A letter of objection from the applicant's legal practitioners was sent to the Deputy Sheriff before the date of confirmation but was only brought to his notice a full month after the auction had taken place. A valuation certificate set the market value of the house at $750 000 and its forced sale value at $675 000. By the time of the sale, the applicant had paid

$311000 towards the purchase of the house, as well as some $57 000 on renovations.

An application was made for the sale to be set aside on the grounds that the failure to place the objection before the deputy sheriff was a fatal irregularity. in any event, the equities supported the setting aside of the sale. The judgment creditors would not be prejudiced; and the seventh respondent had shown a conflict of interest and a lack of good faith. The first and seventh respondents argued that the applicant had only a personal right against the seller of the house, not a real right in respect of the property, and thus had no "interest"in the sate as would entitle her to apply for it to be set aside.

Held, that the seventh respondent had not acquired a real right in the property. There was a clear conflict of interest in his conduct. He had not acted in the best interests of the first respondent, who obtained nothing from the forced sale. It was difficult to understand why an offer of settlement of the seller's debt had been rejected by the first respondent, who would have benefited without having to rely on the proceeds, if any, of a forced sale.

Held, further, that in interpreting the phrase "any person having an interest in the sale in r 359 of the High Court Rules, it was permissible for the court to take into account equitable considerations. The list of persons having "an interese"was not closed. The equities favoured the applicant as opposed to the first and seventh respondents.

Held, further, that it was not necessary for the applicant to establish that the amount obtained at the public auction was unreasonably low, since a sale in execution may also be set aside on any good ground. The facts that the price realised was lower than the market value, that the first respondent's 8 debt would be paid without having a forced sale, that the letter of objection had been sent timeously and that the applicant had paid nearly half the purchase price constituted

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good grounds to set aside the sale.

Cases cited:

Bhura v Lalla 1974 (1) RLR 31 (A)

Cairns' Exors v Gaarn 1912 AD 181

Chasfre Invstms (Pty) Ltd v Majavie & Ors 1971 (1) SA 219 (C)

Lalla v Bhura 1973 (2) RLR 280 (G)

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

Naran v Midlands Chemcial Industries (Pvt) Ltd S -220-91

Reynders v Rand Bank Bpk 1978 (2) SA 630 (7)

Woods v Spence & Anor 1978 RLR 254 (G)

Zimbabwe Teachers Assn & Ors v Min of Education 1990 (2) ZLR 48 (R)

ADAM J

The court referred to the following rules of court

High Court Rules 1971 (RGN 1047/71), r 359

Case Information

J B Colegrave, for the applicant

M J Gillespie, for the first and seventh respondents

Judgment

Adam J: The applicant seeks a final order that the We in execution bypublic auction held on 4 August 1995 of Stand 353 Glen Lome Township 13 of Lot 38 Glen Lorne Township (die "immovable propelty") to the seventh respondent be set aside; that the fourth respondent's (the Sheriff`s) confirmation of 24 August 1995 of such sale also be set aside; that the applicant pays to the first respondent within 30 days of this final order the outstanding judgment debt in case No. HC-8121-93 and that the fiat respondent bears the costs of this application.

In this matter the applicant purchased the immovable property from Cheryl Latimer (the second respondent) by deed of sale on 12 November 1993 for $640 000, of which $111212,77 was paid as a deposit, with the balance to be paid in equal monthly instalments of $8 925,87. Her legal practitioners failed to put a caveat against the immovable property which was mortgaged to the third respondent so the monthly payments on behalf of the second ~dent were made by the applicant to the third respondent.

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The first and sixth respondents are also judgment creditors of the second respondent. The first respondent had registered a caveat against the immovable property claiming $72 443,30 together with interest plus taxed costs of $1246,22.

The second respondent also owned a half share of 8 Grosvenor Road, Highlands, Harare. A valuation was made of it on 19 August 1995.

The applicant fell into arrears in her payments to the third respondent. This led to the first respondent issuing a writ of execution against the second respondent. As a result, the applicant's legal practitioners wrote on 4 May 1994 to the first respondent's legal practitioners. inquiring whether the first respondent would grant the applicant the indulgence of paying all the arrears by 31 July 1995. The first respondent's legal practitioners' reply was they would hold legal action in abeyance until the third respondent instructed the Sheriff to proceed with the sale of the immovable property in which case they would participate.

Subsequently, the third respondent and the sixth respondent were prepared

ADAM J

to cancel the sale in execution by public auction on 4 August 1995 of the immovable property due to their acceptance of the arrangements made with the applicant. But the first respondent insisted dig the sale by public auction beconducted on 4 August 1995. At the public auction, the seventh respondent, who was the managing director of the first respondent, had the "good fortune" of obtaining the immovable property for $620 000. On 14 August 1995, the bid was accepted by the fourth respondent. On 15 August 1995, the applicant's legal practitioners phoned him when he learnt that the sale in execution had not been confirmed by the fourth respondent and that the fourth respondent had no instruction not to do so.

On 16 August 1995, the applicant's legal practitioner's letter of objection to that sale in execution by public auction was hand delivered to the offices of the fourth respondent. The fourth respondent confirmed that sale in execution on 24 August 1995; the letter of objection was only brought to his notice on 4 September 1995.

On 5 September 1995, the valuation certificate given for the immovable property by Redfern Mullett Abacus Valuation Services (Pvt) Ltd, Chartered Valuation Surveyors, was $750 000 for its market value and $675 000 for its forced sale value. On 5 September 1995, the applicant learnt of the fourth respondent's confirmation, so on 7 September 1995 these proceedings were launched. Prior to the public auction, the applicant's offers to try and settle by payment of the first respondent's judgment was rejected, despite the fact that the third respondent, as secured judgment creditor, would appropriate most of what would be obtained and then the *sixth respondent and the first* respondent might not get anything at all. This was confirmed in the seventh respondent's opposing affidavit on behalf of the first respondent, as well as himself, that the first respondent was entitled to refuse to liquidate the second respondent's indebtedness to the first respondent.

By September 1995, the applicant had paid $311000 towards the purchase of the immovable property. She asserted that she had spent $57 000 towards its renovation. The balance

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outstanding on the mortgage on it was $549 075,07. With the applicant's payment of $11000 on 1 September 1995, it was $538 075,07.

The seventh respondent asserts that he paid a commission of $19 000 to the auctioneer and $6 000 on arrears rates for that immovable property.

It was submitted on behalf of the applicant that there is a dispute between her

ADAM J

and the first respondent's agent as to whether the first respondent had also agreed with the third and sixth respondents that the sale in execution was not to be held on 4 August 1995 but that the matter may be determined without having to resolve that dispute.

Mr *Colegrave,* for the applicant, argued that the circumstances in which a sale in execution will be set aside have been dealt with in *Lalla vBhura* 1973 (2) RLR 280 (G); *Bhura v Lalla* 1974 (1) RLR 31 (A); Wood v *Spence* 1978 RLR 254 (G) and *Naran v Midlands Chemical Industries (Pvt) Ltd* S-220-9 1.

He submitted submitted that the decision in *Chasfre Investments (Pty) Ltd v Majavie & Ors* 1971 (1) SA 219 (C) was wrong and should not be followed. This case held that a prior purchase of immovable property with a personal right to it was not one of the persons who was an interested party in a sale of execution. The applicant, he submitted, had a substantial interest as to whether the sale in execution should have taken place and accordingly has *locus standi: Zimbabwe Teachers Association & Ors v Minister of Education* 1990 (2) ZLR 48 (H).

Mr *Colegrave* also argued that the sale in execution was not properly confirmed, as the failure in the Sheriffs office to place the applicant's letter of objection the matter before the Deputy Sheriff was a fatal irregularity. Alternatively, it was submitted that, from the decisions cited above this court can set aside such a sale after confirmation, though the circumstances in which it will do so are more stringent than before confirmation. In deciding whether to set aside a sale in execution, regard may be had to equitable considerations: *Bhura v Lalla v Minister of Education* at 36. It was further argued that the suggestion in *v Minister of Education v Rand Bank Bpk* 1978 (2) SA 630 (T) - that the equities were only between the judgment creditor and the judgment debtor - was wrong.

It was submitted for the applicant that the attitude adopted by the agent of the second respondent judgment debtor was very difficult to understand, since she would have benefited from a higher price being obtained for the immovable property. This puts into question whether the agent had properly advised the second respondent of the full facts. The applicant would be severely prejudiced if the sale in execution were not set aside, while none of the judgement creditors would be prejudiced, as the third and sixth respondents had been agreeable and the first respondent would have not received any benefit at all. The seventh respondent had acted unconscionably, since, on his own version, he did not disclose to the first respondent or to anyone else that

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ADAM J

he was bidding for himself. A clear conflict of interest had arisen, as it was in his own interest for the price to be low as possible and in the interest of the first respondent that it be as high as possible if die first respondent was not bidding for itself. The seventh respondent benefited against the first respondent, in that it was denied the "good fortune that the seventh respondent had acknowledged he had obtained for himself. An agent was obliged to show the utmost good faith to his principal and not acquire a secret profit at his principal's expense, which was precisely what the seventh respondent had achieved.

In the heads of argument on behalf of the first and seventh respondents, it was submitted M the applicant had only a personal right against the seller of the immovable property in respect of which the real rights in it had been acquired by others. The rationale behind the procedure of registration against title was to supply to the holder certain added protection. The purchase at a sale in execution by the buyer was something which the applicant could not prevent as her personal right must yield to a real right: *Reymkrs v Rand Bank Bpk supra* at 634. The power to approach the court to impeach such a sale was given only to persons having an interest in the sale under r 359 on the grounds set out thereon and those persons were the judgment debtor, the judgment creditor and other creditors who might have wished to participate in such a We: *Chasfre Invesownts (Pty) Ltd v Majavie & Ors supra* at 222 and 224.

It was also submitted for the first and seventh respondents that there was no evidence of exceptional circumstances such as would have justified this court's interference: *Naran vMidlands Chendcal Industries (Pvt) Ltd supra*. Further, the price realised at a public auction where there were a number of competing bidders was itself a good indication of the real market price: *Lalla v Bhura supra*. Rule 359 of the High Court Rules 1971 states:

> 'Any person having an interest in the sale may make a court application to have it set aside on the ground that the sale was improperly conducted or the property was sold for an unreasonably low sum, or any other good ground. Any such person shall give due notice to the sheriff of the application stating the grounds of his objection to the confirmation of the sale. On the hearing of the application the court may make such order as it deems just."

In *Lalla v Bhura supra* at 283 when referring to r 359 DAVIES J (as he then was) observed.

ADAM J

> "The wording of the rule itself is all-important. The concluding portion of the rule provides that 'on the hearing of the application the court may make such order as it deems just' and it seems to me those words clearly indicate that in considering what is meant by the ride, and particularly what is meant by the phrase 'any other good ground' the court can and should properly have regard to equitable considerations."

He then proceeded further by adopting, as an appropriate approach, what

SOLOMAN J said in *Cairns' Executors v Gaarn* 1912 AD 181 at 189-190:

> "The discretion of the court is a very wide one, and, in my opinion, it is impossible, and even if it were possible it would be undesirable, to lay down any hard and fast line as to the principles upon which its discretion should be

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exercised. Every case must be judged on its own facts, and these may vary indefinitely. But though we ought not, in my opinion, to lay down any principles as to the special circumstances which will justify the court in granting relief, we are on the other hand bound by the rule itself, and we can only assist a party 'upon sufficient cause shown'."

In *Bhura v Lalla supra* at *37* BEADLE CJ agreed with the interpretation of r *359* as well as the approach adopted by DAVIES J. I am bound by the decision of BEADLE CJ.

In *Reynders v Rand Bank Bpk supra* the applicant acquired a claim under a divorce settlement that formed part of a divorce court order made in April 1969, whereby the former husband undertook "as soon as reasonably possible" to transfer the immovable property for the benefit of their 3 children. In breach of his obligations under the agreement, he failed to do so but now had consented to it. In the meantime, the respondent bank obtained judgment against the former husband in February 1976 for R2 357,22 and a writ of execution was at that time originally issued against movables and in November 1977 reissued against the immovable property. NESTADT J (as he then was) held that knowledge by the judgment debtor of a prior personal right in the immovable property would not destroy the validity of a subsequently acquired real right in such a property when the judgment creditor had levied execution against it.

In the case before this court, it is the first, third and sixth respondents that have acquired a real right, but not the seventh respondent. The first respondent, by insisting on execution against the immovable property had, albeit, an illusory right as it turned out since it did not obtain anything at all from the proceeds of the sale in execution.

ADAM J

In *Chasfre Investments (Pty) Ltd v Majavie & Ors supra* the appellant purchased in May 1969 certain immovable property under a written contract from the first respondent. The third respondent had a mortgage bond over the immovable property and on the first respondent falling into arrears the third respondent issued a warrant of execution. The sale in execution was not conducted in accordance with the magistrate's court rules since there was defective advertisement about such a sale in execution. WATERMEYER J said at 221:

"There can be no doubt that the third respondent's right to have the property sold in execution, arising as it did from a mortgage bond, was a right *in rem*, and that this right could not normally be defeated by the appellant who merely had a right *in personam*."

He then referred to *Messenger of Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) where VAN DEN HEEVER JA had held that the provisions of the rule had been conceived in the interest of the judgment debtor and judgment creditor, but WATERMEYER J did not think that the learned JUDGE OF APPEAL intended to imply that it was only those two persons who were interested parties. He continued at 222-223:

"The persons who would primarily be interested in the property being sold for an adequate price would be creditors ranking in priority to the judgment creditor, the judgment creditor himself, all other creditors who had lodged warrants of execution and the judgment debtor. It is not necessary for the purpose of this case to decide whether other creditors of the judgment debtor would also be similarly interested, and I expressly refrain from doing so. The only question which arises is whether the appellant has a sufficient interest in the observance of r

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43(6) to give it locus standi ...

Mr Dison, who appeared for the appellant, submitted that the appellant had a sufficient interest in the compliance ... appellant was a potential ~tor ... he might have a claim for damages for breach of contract ...

With regard to the first of these submissions ... firstly, appellant has not claimed damages in the pending action. All it has claimed is transfer of the property. secondly, appellant has shown no prejudice flowing from the defective advertisement. On the papers before the court, it may well be that the price of R 13 900 realised a very high price for the property. thirdly, appellant has placed no information before the court to show that

ADAM J

first respondent would be unable to meet any claim for damages which appellant might have if it decided to amend its claim to include one for damages as an alternative to transfer."

In his judgment, WATERMEYER J was careful to observe that a person with a real right could not normally be defeated by someone who merely had a right *in personam* and to leave open the question, whether other creditors of the judgment debtor would also be similarly interested. These "other creditors" would only have a right *in personam* unless they had registered a caveat against that immovable property.

As correctly submitted on behalf of the applicant by Mr *Colegrave,* the attitude of the second respondent's agent in her affidavit was difficult to comprehend, since as a judgment debtor the second respondent would have benefited from a higher price. More significantly, the seventh respondent admitted in his affidavit that he did not disclose to his principal, the first respondent, or to anyone else, that he was bidding for the immovable property. There is little doubt in my mind that there was a conflict of interest. It is most difficult to understand why the seventh respondent, acting for the first respondent, rejected the applicant's offer of settlement of the second respondent's debt. The seventh respondent acted unconscionably since from the sale in execution the first respondent obtained nothing. The affidavit in support filed by the other director also shows that he was not acting in the best interest of the first respondent. To leave recovery of a debt owed by the second respondent to a chance that the immovable property in question will fetch a much higher price, as against the certainty from an offer of settlement of dig debt by the applicant, cannot be said to have been in the best interests of the first respondent. It is even more perplexing in light of the terms of the applicant's final order whereby that offer of settlement has been perpetuated that the first respondent has persisted in its opposition when it would clearly be to its benefit to consent to that final order. On the other hand, the applicant has shown that she will be severely prejudiced if the sale in execution of the immovable property is not set aside. She could only recover from the second respondent after the second respondent has satisfied the judgment debts owed to the third, sixth and first respondents.

The issues for determination under r 359 are, firstly, whether the applicant is a person having an interest in the sale and secondly, whether there are grounds to set aside that sale by the applicant.

Since rules of court are made pursuant to the High Court Act *[Chapter* 7:06]

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they should be interpreted in the same way as any other legislative enactments. Any person having an interest in the sale must be given its ordinary meaning. The list of persons that would constitute "any person having an interest" is not closed. As pointed out by DAVIES J, the rule itself is allimportant and this court"can and should properly take into accountequitable considerations".

In this matter, the equities favour the applicant as against the first and seventh respondents. Taking everything into consideration, the applicant has shown that she is an interested person under r 359 in the sale in execution. Both the third and sixth respondents, as the main judgment debtors, are not opposed to this application. It is not essential for the applicant to establish that the amount obtained at the public auction for the immovable property was an unreasonably low sum since sales in execution may also be set aside on "any other good ground". Also, the valuation certificates of $750 000 as the market value and $675 000 as the forced sale value for the immovable property have not been contradicted. When this is taken into account, along with the fact that the first respondent's debt will be paid, as well as her letter of objection of 16 August 1995 to the Sheriff, and that she had paid $311000 towards the purchase price of $640 000 and so she will be most severely prejudiced, I am satisfied that she has established that there are sufficient grounds to set aside the sale in execution.

Accordingly, it is ordered that the sale in execution of Stand 353 Glen Lorne Township 13 Lot 38 Glen Lorne Township heldon 4 August l995 be set aside, that the confirmation of that sale by the fourth respondent also be set aside; that the applicant pay to the first respondents within 30 days of this order, the outstanding judgment debt under Case No. HC-8121-93 and that the. first and seventh respondents pay the costs of this application.

McNaught Wickwar, applicant's legal practitioners

Gollop & Blank, sixth respondent's legal practitioners

Coghlan Welsh & Guest, first and seventh respondents' legal practitioners

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S v CHIGOVANYIKA 1996 (2) ZLR 185 (HC)

Court **High Court, Harare**

Smith J

Criminal review

21 August 1996 Judgment No. HH- 114-96

Flynote

Criminal law - statutory offences - Dangerous Drugs Act [Chapter 15:02] -possession of dagga or prepared Indian hemp - distinction between the two -importance of the distinction as regards penalty - sentence -prohibition from driving of motor vehicles -applicability of certain provisions of Road Traffic Act [Chapter

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13:11]

Headnote

The accused, a lorry driver, was caught entering Zimbabwe from Malawi in possession of 2131 cobs of dagga, weighing 36 kg. The dagga had been supplied to him by a Malawi national, who paid the accused to transport it to Zimbabwe. The accused was charged with "importing prepared or pm~ opium" (*sic*), alternatively with possessing prepared Indian hemp. He pleaded guilty to the main charge. When the elements were explained and the accused was questioned, no attempt was made to ask him whether he knew the difference between Indian hemp (dagga) and prepared Indian hemp. He was sentenced to 10 years' imprisonment, of which three were suspended, and prohibited from driving for 15 years.

Held, that it was very important M the distinction between ordinary dagga and prepared Indian hemp be made because of the vast differences between the Penalties applicable, depending on whether the offence relates to one or the other.

Held, further, that a prohibition from driving vehicles was not mandatory, nor was the period of prohibition. It would have been appropriate in this case to order a shorter period .

Held, further, that where a prohibition is contemplated by die court, the accused should not be asked whether there am special circumstances

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1996 (2) ZLR p186

SMITH J

why he should not be prohibited from driving. The only provisions of the Road Traffic Act relevant to a prohibition imposed under the Dangerous Drugs Actare those generally relating to the consequences of prohibition, such as cancellation of the licence, surrender of the licence for cancellation, and the creation of an offence of driving while prohibited from doing so.

The court referred to the following statutory provisions:

Dangerous Drugs Act *(Chapter 15:02],* ss 3(2),7,8,9(b), 19 and 20(1)

Road Traffic Act *[Chapter 13:031, ss* 52, 53, 54, 5 5, 65, 66 and 67

Judgment

Smith J: The accused was charged with contravening s 8, as read with s 19(1), of the Dangerous Drugs Act *[Chapter 319]* (which was the Act in force prior to the Revised Edition of the Laws came into operation) "Importation or Exportation of Prepared or Prepared Opium (*sic*)- and then the particulars referred to prepared Indian hemp. Alternatively, he was charged with contravening s 9(b) as read with s 19(1) of the Dangerous Drugs Act *[Chapter 319]* -"Possesion of Prepared Indian Hemp." There was obviously a mistake in the main charge - there should have been a reference to Indian hemp, not opium. This error was repeated on the review case cover which showed that the accused was convicted of the importation of prepared opium. The accused pleaded guilty to the main charge, saying that he was not guilty on the alternative charge because he was not the owner of the dagga. He was duly convicted on the

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main charge and sentenced to 10 years' imprisonment, of which 3 years were suspended for 5 years on condition of good behaviour. The forfeiture of the dagga was ordered. In addition, die accused was prohibited from driving for 15 years and his driver's licence was cancelled. The magistrate felt that she had erred, because she should have asked the accused whether there were special circumstances why she should, not prohibit him from driving, and asked for the matter to be referred back to her so that she could comply with the provisions of the Act.

The statement of agreed facts states that the accused, who was employed as a truck driver. drove a truck to Malawi and whilst there he acquired 4 bags of prepared Indian hemp from a Malawian national, which he agreed to transport to Zimbabwe for $4 000. At the Nyamapanda Border post his truck was searched and the 4 bags of dagga were discovered. The bags contained 2131 cobs of dagga which weighed 36 kilograms. The accused admitted the charge and the relevant facts were put to him. It was put to him that he imported or attempted to import prepared Indian hemp and he said yes. He was then asked if the Indian hemp had come from Malawi mid he said it had. Thereafter, all the questions put to him referred to dagga. At no stage was the

accused asked if he knew what prepared Indian hemp was and how it differed from ordinary Indian hemp or dagga. It is very important that this distinction is made known to the accused, because there is a vast difference between the penalties that the court will impose, depending on whether the offence relates to ordinary dagga or to prepared Indian hemp.

Part II of the Dangerous Drugs Act [Chapter 15:02] (which is the revised edition of the Act now in force) deals: with Indian hemp (dagga) and Pen III thereof deals with prepared Indian hemp. "Dagga" is defined in s 3(2) of the Act as meaning the whole or any portion, whether green or dry, of the plant. whereas in s 7 of the Act "prepared Indian hemp" is defined as meaning any portion of the dagga plant *(cannabis sativa L)* which has been prepared for smoking and any dross or other residue remaining after Indian hemp has hem smoked. There was no evidence before the court as to whether the dagga that the accused attempted to import was prepared for smoking or was merely dry parts of the dagga plant. Subsection (1) of s 19 of the Act provides that any person who contravenes any provision of the Act shall be guilty of an offence and liable to a fine not exceeding (dagga) 10 000 or to imprisonment for a period not exceeding 10 years or to both. However, in subs (3) it is provided that if a person is guilty of an offence involving the unlawful dealing in any drug. other than Indian hemp, to which Part II of die Act applies (ie coca leaves and raw opium) or any drug to which Part III (prepared opium and prepared Indian hemp) or Pan IV (medicinal opium, cocaine, morphine, etc) applim he shall be liable to imprisonment for a period of not less than 15 and not more than 20 years and to a fine of not less than (dagga) 15 000 or, in default of payment to imprisonment for an additional period of not less than five and not more than 19 years. The subsection then specifically provides that~ notwithstanding anything to the contrary contained in any other enactment, the court shall not order that the operation of the whole or any part of the sentence be suspended. The proviso to subs (3) provides that where, on conviction, the convicted person satisfies the court that there are special circumstances in the particular case why the sentence specified in

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the subsection should not be imp~ which circumstances shall be recorded by We (dagga) then the convicted person is liable to a lesser sentence. There is no definition of what the em "special circumstances" means. It is left to the disc~ of the court. However the onus of proving special circumstances rests on the convicted person

Section 20(1) of the Act provides for the compulsory forfeiture of drugs to which the conviction relates mid that the court may order that any vehicle, (dagga) vessels. boat. animal, etc in or on which the drug was R~ or which

SMITH J

was used in connection with the drug be forfeited to the State. Subsection (2) of that section then provides that if the convicted person used a motor vehicle of a~ to convey die drug in question, the court may order that the convicted person shall be prohibited from driving all classes of motor vehicles or from flying all types of aircraft, as the case may be, for a period not exceeding 15 years and the appropriate provisions of the Road Traffic Act *[Chapter 13.11]* or the Aviation Act *[Chapter 13:13],* as the case may be, shall apply. In applying the appropriate provisions of the Road Traffic Act *[Chapter* 13:11], must the convicted person be asked if there me special circumstances why he should not be prohibited from driving? I do not think so. The term "special circumstances" is defined in s 52 (negligent or dangerous driving), 53 (reckless driving), .54 (driving with prohibited concentration of alcohol in blood) and 55 (driving while under influence of alcohol or drug or both) of the Road Traffic Act *[Chapter 13:11].* That is because in each of those sections there is a provision requiring the court to prohibit the convicted person from driving unless there are special circumstances in the case which justify the court declining to order such a prohibition. These provisions are specific to the offence created by the section concerned and therefore are not applicable to a conviction under the Dangerous Drugs Act *[Chapter 15:02].* Part IX of the Road Traffic Act *[Chapter 13:11]* deals with prohibitions from driving and the endorsements of licences. In my opinion, it is ss 65, 66 and 67 Of that Part which, *mutatis mutandis,* apply when a court prohibits a person from driving in terms of s 19 of the Dangerous Drugs Act *[Chapter 15:02].*

In this case, I am of the opinion that the conviction and sentence must be set aside so that the charge can be amended by deleting the reference to opium and then for evidence to be led as to whether the dagga the accused &W to import into Zimbabwe was or was not prepared Indian hemp. If the court finds that the dagga concerned was prepared Indian hemp, it must then ascertain from the accused if he considers, and can establish. that there are special circumstances why the minimum sentence specified in s 19(3) of the Act should not be imposed. If he satisfies the court that them are special circumstances, the special circumstances must be recorded and a sentence Of imprisonment not exceeding 15 years or a fine not exceeding $ 15 000 or both, must be imposed. If the accused does not satisfy the court that there are such special circumstances, then a sentence of not less than 15 years' imprisonment plus a fine of not less than $ 15 000 or, in default of payment, not less than five years' imprisonment must be imposed. The court shall not suspend any part of die sentence. In addition, the court may order that the accused be prohibited from driving for a period not exceeding 15 years. In this case, the

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SMITH J

court prohibited the accused from driving for the maximum period permitted. I would have thought that a shorter period would have been more desirable. The magistrate did not order the forfeiture of the truck the accused was driving because it belonged to the employer of the accused consider that she acted correctly in not ordering forfeiture.

For the reasons set out above, the conviction and sentence are set aside and the case is referred back for the magistrate to deal with the matters 1 have mentioned.

BARTLETT J agrees.

S MACHOKOTO 1996 (2) ZLR 190 (HC)

Court **High Court, Harare**

Chinhengo J & Gillespie J

Criminal review

28 August 1996 Judgment No. HH- 115-96

Flynote

Criminal law - statutory offences - stock theft - *animus* furandi accused's knowledge of whether owner of stray animal is ascertainable -res derelicta- belieft ha tproperty is abandoned-not necessary that belief be reasonable, provided it is genuinely held - ownership of property alleged to have been stolen - progeny of stolen animal whether ownership of progeny may vest in accused - charge as to ownershipowner of property unknown- not correct to allege that properly is that of the State

Criminal law - claim of right - genuine belief in fact which would constitute a defence suffices

Criminal procedure - plea - guilty plea - explanation of charge and elements to accused-magistrate's duty-necessity to explain possible defences to unrepresented accused - rernitted for re~ -whether appropriate where plea of guilty incorrectly entered

Criminal procedure (sentence) - statutory offences - stock theft - stray cow and then its progeny kept by accused's father, then by the accused, for period of several years

Headnote

The accused, who was unrepresented at his trial, pleaded guilty before a magistrate to a charge of stock theft. He was sentenced to 36 months' imprisonment, of which 10 months were suspended on conditions. The facts were that the accused during 1986, when the accused was a

teenager, his father found a stray cow and kept it at his home in the rural arm The finding was

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never reported. The accused's father died in 1993. In 1994 the cow had a calf. In 1996 the accused exchanged the cow and its progeny for two oxen. The charge sheet alleged that the animals were the property of the State.

Held, that even if the conviction could be upheld, the considerable element of temptation and the fact that the accused did not actively go outand take the animals showed that the sentence was manifestly excessive.

Held, further, that the animals were not the property of the State and the charge sheet should not have made such an allegation.

Held, further, *per* CHINHENGO J, that it is an essential element of the crime of theft that there be an owner or possessor of the property alleged to have been stolen, even if that person's identity is unknown. In view of die general conditions of rural life in Zimbabwe, there must have been an owner of the cow that the accused's father had acquired When he acquired it, he effected a contrectatio though he never acted secretively or actually claimed ownership. He kept the cow for 7 years. Animus furandi on the part of the accused's father could not be inferred. Accordingly, it was not possible to infer animms furandi on the part of the accused either. Ibis, though, did not dispose of the question, because the accused, knowing that the animals did not belong either to his father or himself, bartered them for two oxen.

Held, further, that after 10 years of absence, the cow's original owner must have written it off and it would then have become *res derelicta*. Even if the animal's owner was ascertainable in 1986, it would not be possible to hold that after 10 years the accused reasonably believed that the owner could be ascertained. He was, therefore, entitled to deal with the animal as lost property.

Held, further, that there was every reason for the accused to think the cow had been abandoned. The defence of claim of right is not limited to those cases where the belief is reasonable or justifiable. All that is required is that the belief be genuinely entertained, the reasonableness of the belief only being relevant to determining the genuineness of the belief. If the belief is genuine, then the possession is *bona fide*.

Held, further, with regard to the calf, that as the accused was a *bona fide* possessor of the cow, the ownership of the calf was not vested in the owner of the cow but in the accused, who was entitled to its fruits.

Held, further, *per* GILLESPIE J, that the plea of guilty was not properly entered, because there was a failure to explain the charge and the essential elements to the accused. The essential elements must be explained in such a way as is calculated to inform the accused, if he is

unrepresented, of the nature of the charge in sufficient clarity and detail as will, suggest to him, in his knowledge of the matter, whether he has a defence to offer. This does not imply that the magistrate should suggest defences to the accused, but it should not be forgotten that, where the accused is unpresented the magistrate is the only source of independent assistance

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towards an understanding of the nature of his predicament. The fact that the accused wishes to plead guilty is not a mason to be cursory in the explanation of the essential elements; on the contrary, it is necessary to ensure that the accused has applied his mind to the true import of the charge and is properly aware that anything he may wish to say could not constitute a defence. The questions posed to by magistrate should be adapted to the individual circumstances of the case. The facts of this case were such that the defence of a claim of right should have been apparent.

Held. further, that the averment that the allegedly stolen property was the property of the State was a fatal defect in the charge

Held, further, that the beasts could not be supposed to belong to anyone at the time of the accused's *contrectatio* Even if they were, he would entertain a genuine belief that they were abandoned.

Held, further, that a remittal for retrial on a plea of not guilty is not appropriate where the defence is so clear and in any event the charge is defective.

Cases cited:

S v Banet 1973 (1) R.L.R 335 (A)

R v Coetzee 1944 CPD 298

R v Geddes 1964 RLR 288 (A)

S v Madito & Anor 1970 (2) SA 534 (NC)

R v Mawadze 1967 RLR 206 (G)*;* 1967 (4) SA 21 (R)

R v Ncube 1968 (1) RLR 65 (G); 1968 (2) SA 476 (R)

R v Zuma 1942 NPD 181

Judgment

Chinhengo J: The accused was, on his plea of guilty, convicted of stock theft under the Stock Theft Act *[Chapter 9:18].* He was sentenced to *36* months' imprisonment with labour, of which 10 months were conditionally suspended.

It is necessary for me to recount the facts of this case as they appear in the outline of the State case. They are that -

> "2. Sometime during the year *1986,* the accused's father found a stray beast and kept it at his homestead. He never reported it to the authorities.

> 3. The accused's father passed away in 1993, and the beast, which was a heifer by then, remained at the

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homestead. The heifer had a calf, a heifer, sometime in 1994.

4. Sometime during the month of Febuary 1996, theaccusedexchanged the two beasts for two oxen. He exchanged with one Lameck Kashaka.

5. The accused knew fully well that the beast was found property and did not belong to his deceased father.

6. The two heifers (*sic*) are valued at $2 300 and they have been recovered.

7. The accused had no right to steal the beasts."

It is to these facts that the accused who was not legally represented, pleaded guilty and was convicted."

In the charge sheet the accused's age is given as 24 years and yet in his reasons for sentence the magistrate says that the accused is 26 years old. There is no explanation regarding this discrepancy in the age of the accused, am does the record indicate that the magistrate investigated this matter and satisfied himself that the accused was indeed 26 years old. The relevance of the accused's age will be apparent later on in this judgment.

In his reasons for sentence, the magistrate said:

"... the accused knew that the two beasts in question did not belong to his father. When the father died he disposed of the beasts. Stock theft is a serious offence which invariably attracts a prison term. A suspended portion will deter him from committing similar offences in future."

In passing sentence, the magistrate was not alive to the desirability of taking due account of mitigatory factors in a case such as this. One of the major factors of mitigation - apart of course, from the factors that the accused is a young person and a first offender - is that there existed a very high degree of temptation.

In R *v Mawadze* 1967 RLR 206 (G); 1967 (4) SA 21 at 22H-23A (R) LEWIS J, considering the moral blameworthiness of the accused in a similar case, stated:

CHINHENGO J

"In my view, there existed a considerable degree of temptation. When a stray cow, whose owner is unknown,wanders into the kraal of an African cattle owner, she practically invites adoption by him. He should, of course, decline the invitation and report her presence immediately to the Police. The temptation to accept it is, however, very great, even for an otherwise law-abiding African cattle owner who would never venture abroad to steal a beast out of somebody else's kraal.

It seems to me, therefore, that the magistrate misdirected himself in placing so much emphasis on the prevalence of stock theft generally in the area and paying so little regard to the element of temptation in the particular circumstances of this case, and this wrong approach has led to the imposition of a sentence which is manifestly excessive."

The learned judge set asida sentence of 12 months, imprisonment with labour and substituted one of eight months, imprisonment with labour of which four months were conditionally suspended. Apart from the learned judge's obviously pejorative and condescending reference to an African cattle owner, which is understandable in the political context of the day, the principle of law which he enunciated is sound and should guide our courts in the matter of sentence in

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applicable cases.

In the case before me, the magistrate did not at all consider the element of temptation as a significant factor of mitigation. He did not at all consider the accused's moral blameworthiness which by any stretch of legal reasoning was very low. The accused's father must have been tempted to keep the animal. He did so for seven years. The accused himself could only have suffered a greater temptation to keep the animal, considering that it had been at their homestead over a long period of time. The sentence imposed by the trial magistrate is manifestly excessive in the circumstances. If this was the only matter of concern, 1 would have without further ado substituted a much lighter penalty for the one imposed on the accused.

But quite apart from the severity of the sentence, the facts of this case raise a number of issues which distinguish this case from the run of the mill cases of stock theft, and render the conviction open to attack for a number of reasons. I am not at all satisfied with the propriety of the conviction of the accused.

A person may be convicted of theft of property of a person unknown to the public prosecutor, but it is an essential element of the crime that there be an owner or possessor of such property, even though the owner or possessor

CHINHENGO J

cannot be identified by the State. In the present case, an owner or possessor of the stock must be or have been in existence. In R v Zuma 1942 NPD 182 the court was seized with a case in which a horse had strayed on to a farm. The accused had failed to report it, used the horse and put his brand on it. He was convicted of stock theft In considering the question of the rightful owner or possessor of the ham, BROOME J (as he then was) said at p 182:

> "I am satisfied from the circumstances of the present case that there was in existence an owner of the horse which was the subject of the charge. The general conditions of rural life in South Africa, of which we are entitled to take judicial notice, negative the idea that die horse could have been abandoned by its owner or could have been unowned *ab initio*."

I, too, am satisfied that 1 can take judicial notice of the general conditions of rural life in Zimbabwe. I therefore reach the conclusion that the heifer which was found by the accused's father was owned by someone. As in *Zuma's* case *(supra*), this is a case in which the accused's father was in possession of stock which belonged to another person, even though the heifer was a stray animal.

> "It thus falls into the category of lost property and it is necessary to consider the circumstances in which the appropriation of lost property will amount to the crime of theft."

(*Zuma's* case *supra* at bottom of p 182).

In the present case, the accused's father retained the heifer for a period of seven years and must have used it or at least have appropriated its manure, thereby effecting a *contractio* (see R *v Ncube* 1968 (1) R.L.R 65 (G) at 66; 1968 (2) SA 476 (R) at 477). There is no evidence, however, that the accused's father acted secretively in respect of the heifer or that he ever

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claimed ownership of it. This case can be distinguished from *Ncube's* case only on the basis that in *Ncube's* case, the animal concerned was not of the class of animals which the accused owned or possessed and so the accused could not have acted secretively in respect of it. But the conclusion which the learned judge reached in that case, that there was no logical justification for inferring *animus* fur andi on the part of the accused, can also be safely reached in the present case. As 1 have stated above, there is no suggestion that the accused's father's conduct in respect of the heifer was secretive in any sense. He kept the heifer for seven years. He must have done so openly. 1 am therefore satisfied that *animus* furandi cannot be inferred on his *animus* With the effluxion of time it is possible that he changed his mind and regarded it as his own property.

CHINHENGO J

Having reached this conclusion in respect of the accused's father, it follows too that the accused himself did not have the requisite *animus* fur andi when he retained the heifer among his herd for another three years up to February 1996. While he may have appropriated the manure from the animal, he did not, at least from the information in the record, conduct himself secretively in respect of the animal or claim ownership of it. 1 therefore find that *animus* furandi was not proved in respect of the accused. This, however, on its own would not be sufficient for me to quash the conviction. The accused, knowing fully well that the animal and its issue did not belong to either his late father or to himself as the case may be proceeded to barter the two animals for two oxen. He did not report the matter to the Police.

The questions which arise are two-fold. Was the accused entitled to regard the heifer as *res derelicta* and its issue as his property?

In S *v Madito & Anor* 1970 (2) SA 534 (NC) a cow had been away from its owner (who was unknown to the State) for about 20 months. It had strayed onto one Shorty Simane's employer's farm It remained on the farm, until the accused, with the said Shorty Simane's permission, took the animal and slaughtered it. The accused were convicted of stock theft, the lower court holding that the accused had stolen or received the beast well knowing that it had been stolen. On review, the conviction was set aside and in so doing, the reviewing judge said at p 535:

> "The converse of the maxim *actus non facit reus nisi mens sit rea* applies as much as the maxim itself. 1 may ask myself and creep about in the dark, wholly convinced that 1 am contravening the seventh commandment; but if the book or buck or whatever it is that I take is my own or *res nullims,* my evil intent or moral blameworthiness has no criminal result.
>
> The guilty conscience of the accused was not evidence *per* se that the animal concerned has an owner. The finding that it had been proved beyond a reasonable doubt that the animal 'belonged to the farm where Shorty worked or that vicinity' is contrary to the only evidence which was adduced, viz that of Shorty himself., and that of the investigating officer that the latter could not trace the owner does imply that he looked for him; and would this search not have been centred around the place from which the animal disappeared, as a matter of logic?
>
> In the particular circumstances of the present case, there is in my opinion no proof beyond a reasonable doubt that theft had been committed. The

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> animal concerned, which was about two years old, was absent from its previous owner for a period which could have been as long as 20 months. Its value when it was slaughtered was only R40, it is possible that when it arrived at Frenchdale (Shorty's employer's farm) it had so small a value that the owner wrote it off in his mind so that it was in fact res *derelicta."*

The evidence in this case is that the animal strayed and the accused's father retained it in his herd for seven years before he died. Thereafter the accused also retained the animal (and its calf from 1994) for about three years. There was no evidence that the accused dealt with the animals with any degree of haste, which would have suggested a guilty mind on his part. Applying the reasoning in S *v Madito supra*, I am satisfied that, after about 10 years of absence from its previous owner, and considering that the value of the heifer in 1986 must have been small, that owner must have written it off in his mind and it had become *res derelicta*. On this basis alone I would set aside the conviction and sentence.

There is yet another angle to this case which I think leads to a similar conclusion. The law relating *to* lost property was, in my opinion, correctly stated by BROOME J in *Zuma's* case *supra* at p 183 in which the following statement from Anders & Ellson's *Criiminal Law of South Africa* at p 227 was quoted with approval:

> "Where a person finds goods that have been lost or are reasonably supposed by him to have been lost, and he appropriates them with the intention of taking ownership in them, when he reasonably believes the owner can be found, he commits theft."

Can it be said that when, in the present case, the accused appropriated the animals he believed that the owner was ascertainable? I do not think so. When the accused's father first kept the animal in 1986, the accused was only 16 years old (or 14 years old, depending on which age is accepted as at the time of accused's conviction). Even though neither the accused's father nor the accused himself reported the presence of the animals within their herd, it would be stretching it too far to hold that after 10 years the accused reasonably believed that the owner could be ascertained. The magistrate did not inquire into this question, but so too, the State did not discharge the onus on it of proving the accused's guilty mind in that regard (see *Zuma's* case *supra* at p 184). 1 am satisfied, therefore, that in the circumstances of this case the accused could not have had reason *to* believe that the owner could still be

found. He was, in my view, entitled to deal with the animal as lost property. In the absence of evidence to the contrary, this conclusion is reasonable as it is possible the accused may have believed the an~ now belonged to himI will give him the benefit of the doubt. On this score the accused's conviction would again not stand.

The question of the calf raises another interesting point which, although not directly relevant to this judgment is nonetheless of some significance to warrant an address.

In our law the ownership of young animals is, as a general rule, vested in the owner of its mother. One of the exceptions to this general principle is where the mother is possessed by a

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person who mistakenly, but *bona fide*, believes that he is the owner thereof. The significant element is that of *bona fide* possession. Silberberg and Schoeman in *The Law of Property 2* ed state on *p 209* as follows:

> "The right of a *bona fide* possessor to the offspring of animals was considered in *Mlombe v Fourie* 1964 (3) SA 350 where the plaintiff claimed the return of certain cattle owned by him which the defendant had acquired from a third party. While the cattle had been in the defendant's possession a number of calves had been born. The plaintiff now also claimed delivery of the calves still in the defendant's possession and compensation for those which the defendant had previously sold.
>
> It was accepted that, normally 'in a vindicatory action for an animal its offspring should and would generally follow the mother'. But the court pointed out that there was an exception to this general rule which relates 'to the situation where the offspring is born and appropriated by a person other than the owner who is at the time in *bona fide*, possession of the mother.`

At p 210, the learned authors conclude that

> "the better view, and one which is supported by the majority of our common law authorities, seems to be that the *bona fide* possessor need not account for any fruit acquired before *litis contestatio*

I respectfully agree with the learned authors' view regarding our law on the subject. I have read the judgment in *Mlombe v Fourie supra* and I am satisfied

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CHINHENGO J

that the position in our law cannot but be as stated by the learned authors and as eloquently laid out in that case albeit *obtier*.

The accused inherited his father's herd. He was in my view a *bona fide* possessor of the heifer. At the pain of repeating myself I have to reiterate that the heifer had been a part of his father's herd for 7 years and a part of his own herd for another 3 years. Although the accused admitted that he knew that the heifer did not belong to his father, it is reasonable to hold that after seven years, there was very little, if anything, that he could do with the animal. It is quite possible that he regarded it as his property. The animal was found property by accused's father, it had not been stolen and the accused's possession of it, in my view, could not have been other than *bona fide*. When the magistrate asked the question.'Were you aware that they (the animals) did not belong to your deceased father?" and the accused answered "Yes," it is difficult for anyone to conclude that by so answering the accused was admitting a guilty mind on his part. The question, like all the other questions asked by the magistrate, was not contextually relevant, While the accused may have known that the first animal did not belong to his father as the owner, it is quite another to say that the accused believed that his father did not regard the animal as his on some other basis. The legal concepts of ownership and of the treatment of lost property should have been explained to the accused and proper answers solicited from him. Mere knowledge that the animal did not belong to his father does not, in my view, translate to making the accused a *mala fide* possessor of the animal in the circumstances of this case. That he did not report the matter to the appropriate authorities is not enough to infer *mala fides.* It was too late, in my view, to do that and it is doubtful if that would have been of any practical use in so far as finding the owner was concerned. The calf was accordingly the accused's property and his conviction in regard thereto was a misdirection. Unfortunately, in this case, there is no

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information to indicate that the accused's father's estate was settled according to law. If that had been the case then the case against the accused could very well have been differently viewed.

The failure of the magistrate to investigate all the issues to which 1 have referred and in particular his failure to have regard to the points of law which arise from the facts of this case leave me in no doubt at all that the conviction and sentence of the accused should be set aside. The benefit of the doubt must weigh in his favour.

Having said this, it remains for me to determine what should be done about the animals. I have determined that the first animal was *res derelicta* and that

the second animal belongs to the accused. These animals should be returned to the accused. The exchange of the two animals for two oxen with Lameck Kashaka was a valid transaction.

My last criticism of the proceedings in this case is directed at the charge itself. It reads:

> "charged with the crime of theft as defined in the Stock Theft Act *[Chapter 72*], in that on a date to the prosecutor unknown, but during the month of February 1996 and at Manga Village, headman Zihute, Chief Mangwe, Murehwa, Thompson Tendai Machokoto unlawfully and intentionally stole two heifers the property of the State."

The animals were not the property of the State. As I have already mentioned, the first animal could only have been die property of some person to the S~ unknown. The last part of the charge should have read "the property of a person to the State unknown". The attention of those who draft charges is accordingly drawn to this observation so that a charge relating to the theft of property whose owner or lawful possessor is unknown should at least read correctly.

In the result, the conviction and sentence are set aside. The accused should be released from prism forthwith. 1 have accordingly issued a warrant for his liberation. In addition the following order is made in relation to the animals:

> "It is ordered that the cow and heifer, the subject matter of the charge in this case, should be returned to the accused forthwith."

Gillespie J: I agree with the decision of my learned brother. There are some comments of my own which 1 would like to add. Although the accused pleaded guilty to the charge, his plea has not been properly entered in that there has been a failure to explain the charge and the essential elements of the offence as required by s 271(2)(bXi) of the Criminal Procedure and Evidence Act *[Chapter 9:071.*

Where it is necessary to invoke this provision, then the essential elements of the offence must be explained in such a way as is calculated to inform the accused, if unrepresented, of the nature of the charge in sufficient clarity and detail as will suggest to him, in his knowledge of the matter, whether he has a defence to offer. Obviously, 1 do not intend to imply that the magistrate should be suggesting defences to the, accused. On the other should it must not

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be overlooked that where a person on trial has not had the benefit of legal advice, the only possible source of independent assistance towards an understanding of the nature of his predicament will be the bench. The mere fact that the person wishes to plead guilty is no reason to be cursory in the explanation of essential elements. On the contrary, it is precisely because an admission of guilt is tendered that it is necessary to ensure that the accused has applied his mind to the true import of the charge and is properly aware that anything he may wish to say in his behalf could not constitute a defence.

The questions which were put to the accused in this case were the following:

"Q. Do you agree with the facts read to you? A. Yes

Q. Anything to add or subtract?

A. No

Q. Do you agree that you wrongfully and unlawfully took the two heifers and exchanged them for two oxen?

A. Yes

Q. Were you aware that they did not belong to your deceased father?

A. Yes

Q. Any right to do so?

A. No

Q. Any defence to offer?

A. No."

I consider that these questions singularly fail to explain to the accused the essential elements of this particular charge.

In Hunt *South African Criminal Law and Procedure* Vol II Common law Crimes 2 ed by Milton at p 602, theft is defined as the unlawful *contrectatio* with intent to steal of a thing capable of being stolen. This definition is accepted as accurately embodying the cardinal elements of the offence. It involves four essential elements - the taking, the unlawfulness the intent and the fact that the property was capable of being stolen. Obviously, these four elements can be, and most frequently are, explained to the accused by three questions:

Q. Did you take this property?

Q. Did it belong to the complainant?

Q. By doing so did you intend to deprive him permanently of his ownership?

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A fourth question:

Q. Did you have any right to do so?

is usually, and often unnecessarily, added. These questions, it must be said, by no means necessarily constitute a proper explanation of the essential elements in all possible circumstances in which a theft might be committed and charged. Had the magistrate used this formula, however, he would surely have stumbled upon that defect in the charge which is mentioned by CHINHENGO J, namely, the insupportable averment that the allegedly stolen animals were the property of the State. However, leaving aside that point, which needs no further remark by myself, these questions, even had they been put, are by no means such that they would have constituted adequate explanation of the essential elements of this particular charge. The facts of this case provide an exemplary lesson in the need to adapt one's questioning, by way of explanation of the charge, to the individual circumstances of the case.

The charge was theft of stock by the conversion to the accused's own use of a beast that had strayed into his father's herd. This herd was, moreover, subsequently transmitted to the accused upon his father's death. In addition, laid to the accused's charge was the taking of progeny of that beast, born to it after the death of the accused's father. This charge immediately suggests to any thinking lawyer the possibility that the property was not capable of being stolen: the stray because it may have been abandoned; the calf because it may have been the property of the accused himself. But more than that, it suggests the possible existence of a claim of right, that is to say the defence that the accused may have had no intention to steal because of a genuine belief that the property was not owned by any other person and was owned by himself. Any explanation of the essential elements must, therefore, perforce draw to the accused's particular attention the fact that if the property was not owned by someone else, or if he did not believe it to be owned by someone else, or he genuinely believed that he was entitled to dispose of it, then he would have a defence.

That this is the law must be beyond doubt. One needs reference to no authority to support the proposition that a res derelicia cannot be stolen. It is,

GILLESPIE J

moreover, by no means unknown that an accused might be afforded adefence on the basis of M reasonable possibility that stray stock mingled in his herd might be abandoned. S *v MaMo en 'n Ander* 1970 (2) SA 534 (NC) is a case where a conviction theft of stock, where the stolen beast was a stray, was set aside on review on the grounds of the possibility of it being an animal written Off in the formerlowner's mind as of little value and permanently lost. The same reasoning applies in this case: the stray animal was apparently young when lostand it had remained unsought and unclaimed for seven yew while the father was alive, and for a further three years after his death before the accused exchanged the beast.

On this basis alone, the conviction is suspect.

Even if one were to prefer the view that the ownernever formed any intention to abandon die aninial, there is every reason to suppose that ffle accused may have thought it to be an

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abandoned cow. In R v Zuma 1942 NPD 182, a person was charged with the offence of theft by finding of property belonging to a person unknown. The conversion to his own use of that property was held to constitute theft since it was considered that the true owner of the property might easily have been ascertained or that the accused ought reasonably to have believed that the owner could be found (at 184 *per* BROOME J and 185 *per* HATHORN JP). In R v Coetzee 1944 CP1) 298, a person was acquitted on appeal of the crime of theft of a lost or stray sheep in circumstances where there was no evidence to contradict his assertion that he came into possession of the animal found straying in the veld in an emaciated condition and which despite enquiry was not claimed by neighbouring farmers. It was held that thew was a justifiable inference that it had been abandoned by a trekking fanner willing to sacrifice one sheep *in* ewremis in order to protect the rest of his flock.

In each of these cases, there isa suggestion thatanybelief in theabandonment Of the allegedly stolen animal ought to be "reasonable" or "justifiable". This ought not to be taken as an indication that the accused is entitled to a defence only where the belief asserted is objectively held. A claim of right,is sustainable where the belief in an entitlement to deal in the property alleged tobave been stolen is no more than genuinely entertained. InR v *Geddes* 1964 RLR 288 (A) at 29OF-Q it was noted that a defence of abandonment is indistinguishable from any other defence of claim offight and that it is settled law that for a defence based upon a claim of right to succeed all that is required is the existence of a *bona fide* belief. This was confirmed in S *YBanet* 1973 (1) RLR 335 (A) at 342-3. Whether or not such a belief is reasonable

is relevant only to a determination of whether or not the belief can be said to have been genuinely held.

It follows that if the accused genuinely, even if wrongly, believes an animal to be abandoned or without owner, then he may assert a claim of right as a defence to the charge of theft. More than that, if such was his state of mind, then he is properly to be regarded as a *bona fide* possessor of the animal and thus entitled to its fruits. This provides a defence to the charge relating to the second of the animals, the progeny of the first. The defence here is not based so much on a claim of right but on the circumstance that the animal cannot be stolen, since it is properly that of the accused.

From this brief analysis of the law it can be seen how wanting were the questions put by the magistrate. I would venture to suggest that, in all cases where them is a charge of theft of stock involving the appropriation of stray animals, the questions to be put to an accused pleading guilty and designed as an explanation of die essential elements of the offence should include the following:

Q. When you took the animal as your own, did you know that it belonged to somebody else?

Q. Did you know that the true owner might be ascertained?

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Q. Did you believe that you had any right to keep it as your own?

Unless the answers to these questions are respectively "yes", "yes" and no then a plea of not guilty ought to be entered.

It may be thought that this matter ought to be remitted for trial on a plea of not guilty. 1 do not, however, consider that a course to be desirable in the interests of justice. First of all, if the accused were to assert a claim of right such as 1 have surmised, 1 have no doubt that it ought to prevail. A belief in the abandonment of the property by the time it came into the accused's possession would be not only reasonable but virtually irresistible in the circumstances. Next, as 1 have said, there is a reasonable doubt as to whether the goods are in fact owned by any person.

On top of this, the charge averring property to inhere in the State is fatally defective. Setting aside the conviction on the charge ought to be regarded as an acquittal on the merits. It is at least a subversion of the proceedings such as would render it most unjust to order a remittal. In the circumstances, a warrant of liberation was issued immediately upon my learned brother and

myself reaching consensus as to the result. It would be appropriate if the magistrate were to request the accused to be brought before him in order that his unexpected good fortune can be properly explained to him; no such attendance, however, can be enforced.

BIDDULPHS REMOVALS & STORAGE (1981) (PVT) LTD v STANDARD CHARTERED BANK ZIMBABWE LTD & ANOR 1996 (2) ZLR 206 (HC)

Court **High Court, Harare**

Garwe J

Civil Trial

1 & 2 February, 20 May &

4 September 1996 Judgment No. HH- 116-96

Flynote

Delict- loss- liability for purely economic loss caused by cheque fraud cheque stolen and endorsement forged cheque deposited into building society account and cleared by building society - Plaintiff S bank clearing cheque and debiting plaintiff saccount-money then withdrawn from building society - whether building society or bank liable for economic loss caused to plaintiff

Headnote

The plaintiff issued a cheque to a fuel company to pay for petrol products it had bought. The cheque was stolen before it reached the fuel company and an endorsement was forged on the

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back of the cheque to make it look as if the fuel company had endorsed over the cheque to the person named in the endorsement. The cheque was deposited into a building society account. The building society cleared the cheque and banked it with Standard Bank, who were their own bankers as well as the plaintiffs bankers. The bank then cleared the cheque, as a consequence of which the plaintiff S account with the bank was debited. The person who had stolen the cheque was then able to withdraw money from the building society account. The plaintiff sued the building society and bank to recover the amount it had had to pay the fuel company to make up for the lost cheque.

Held, that in terms of S 59 of the Bills of Exchange Act *[Chapter* 14:05] a banker is protected in all cases where in good faith and in the ordinary course of business, he pays out to a person whose title to payment

purports to be derived from an endorsement, whether or not the endorsement is genuine. If he pays out in good faith he will not be liable even if he has been negligent. However, the effect of the proviso to this section is that only the banker on whom the cheque is drawn is protected; the collecting bank is not protected.

Held, further, that a collecting bank is liable for purely economic loss that is caused as a result of the bank failing to exercise reasonable care to avoid causing loss to the owner of a stolen cheque.

Held, further, that as banks and building societies are aware of the incidence of fraud involving forged cheques, they are obliged to adopt reasonable measures to guard against such fraud. There is an even greater need for care in respect of third party cheques. Where there are facts or circumstances which would lead a reasonable banker to inquire further, it would be negligent to fail to make such further inquiries.

Held, further, that taking into account the duties of the building society and the bank when dealing with a cheque of this nature and taking into account the information the respective tellers had before them when handling the cheque, the building society had been negligent. It is a moot-point whether the bank in these circumstances should have exercised more care than it did. In this sort of situation, the building society will usually have considerably more information than the bank and must therefore appreciate that the bank will rely to a large extent on the fact that the building society would have made preliminary investigations and satisfied itself of the entitlement of the account holder to the proceeds of the cheque.

Held, futher the building society had failed to exercise reasonable care in the handling of the cheque to ensure that the account holder was entitled to the proceeds before the cheque was referred to the bank and had negligently allowed the forged cheque to be deposited with it. The building society had been the proximate cause of the loss and was therefore liable under the Aquilian action for the economic loss sustained by the plaintiff. The bank was not liable.

Cases cited:

Fedgen Insurance Ltd v Bankorp Ltd 1994 (2) SA 399 (W)

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Kwamashu Bakery Ltd v Standard Bank of SA 1995 (1) SA 377 (D)

Indac Electronics (Pty) Ltd v Volkas Bank Ltd 1992 (1) SA 783 (A)

Philsam Invstms (Pvt) Ltd v Beverley Bldg Soc 1977 (1) RLR 78 (G)

Rhostar \(Pvt\) Ltd v Netherlands Bank of Rhodesia Ltd 1972 (1) RLR 56 (G); 1972 (2) SA 703 (R)

Standard bank of SA Ltd v Sham Magazine Centre 1977 (1) SA 484 (A)

GARWE J

Zimbabwe Banking Corp v Pyrayrd Motor Corp 1985 (1) ZLR 358 (S); 1985 (4) SA 553 (M)

Case Information

A P de Bourbon SC, for the plaintiff

M R D Stonier, for the first defendant

D D Ross, for the second defendant

Judgment

Garwe J: In this action, the plaintiff seeks, as against both defendants jointly and severally the one paying the other to be absolved, an order for payment of

(a) damages in the sum of $24 249,98;

(b) interest in the above sum at the prescribed rate from the date of judgment; and

(c) costs of suit.

The facts giving rise to the present proceedings are not seriously in dispute. On 10 July 1991, plaintiff issued a cheque to Shell Zimbabwe (Pvt) Ltd in the sum of *$24 249,98.* Ibis was in respect of various petroleum products sold by Shell Zimbabwe to the plaintiff. It is not seriously in dispute that the cheque never found its way to Shell Zimbabwe. The cheque fell into the hands of an unknown person who then typed the following words on the back of the cheque:

" Pay Mr M. Machimbidzofanado

CABS Account No: 9039884768

Block 40-1308

Mpoporna

Bulawayo

The unknown person further typed the following words on the back of the cheque:

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"Shell Zimbabwe (Pvt) Ltd

30 Samora Machel Avenue,

P.0. Box 982

Harare"

He then inserted a signature just above the words "Shell Zimbabwe (Pvt) Ltd"creating the impression that the endorsement had been duly authorised by a representative of the payee.

GARWE J

It is common cause the cheque was deposited into a CABS account in Harare on 13 July 1991. The account with CABS had been opened on the 9th July 1991. CABS cleared the cheque and in turn banked the cheque with **Standard Bank** who were their bankers. Standard Bank ("the bank") in turn cleared the cheque as a consequence of which plaintiffs account with the bank's Southerton branch was debited. From the CABS account, a sum of $ 15 000 was withdrawn on 29 July 1991 and a further sum of $8 000 on 31 July 1991.

The present action is to recover, from both defendants, the sum of $24 249,989 paid by plaintiff to Shell Zimbabwe. Both defendants however deny liability. The first defendant relies on the provisions of s 59 of the Bills of Exchange Act [*Chapter* 14.02] and states that the cheque was paid in good faith. The second defendant denies that it owed plaintiff a duty of care to take reasonable steps to ensure that its client was entitled to payment of the cheque. The second defendant further avers that the cheque must have been stolen by an employee of the plaintiff who thereafter forged it and negotiated it.

The plaintiff called four witnesses.

The first was Aft Enock Moyo, employed by Beverley Building Society as Area Manager, Mashonaland. He told the court that building societies in Zimbabwe operate along similar lines. In respect of savings accounts. building societies operate on the same basis as banks. When a savings account is first opened, Beverley Building Society would insist on positive identification such as a driver's licence, passport or national identity card. The teller must be satisfied that the identity document is for the person opening the account. Where a cheque is deposited, fourteen days clearance would be required in respect of local cheques and twenty-one in respect of country cheques. However managers are given the discretion to vary the practice in cases where they know the client. Inrespect of third party cheques, the general rule is that Beverley Building Society does not accept such cheques but the manager is allowed some discretion and may allow such a deposit in certain cases. He told the court that all building societies have been victims of fraud and for that reason take special precautions to counter such activities. He told the court that he would find it very suspicious were someone to deposit a cheque issued by Biddulphs and payable to Shell Zimbabwe but which cheque has been endorsed in favour of a third party.

He told the court that it is not the procedure to check whether the address given is genuine

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unless there is a basis for suspicion.

GARWE J

The second witness was Mrs Paula Annette Parsons, a white female aged thirty. That she is a white female has relevance in this case. She denies passing off as a black male. She was employed by the plaintiff company as an estimator clerk for local and international furniture removals. She would however take over the responsibility of cashier whenever the cashier was away. She admitted writing the cheque for $24 249,98 bearing the date 10 July 1991. She denied endorsing the cheque in favour of a third party or negotiating it with CABS. She denied opening an account with CAB S on 9 July 1991. She could not remember specifically what she did with the cheque after writing it but told the court the normal procedure would have been to forward it to the bookkeeper or to whoever would have brought the voucher to her for processing.

She could not say why the statement from Shell - Exhibit 1 - suggests that the cheque was prepared on 25 June 1991 and yet the date reflected on the cheque is 10 July 1991.

She told the court she could not remember writing over some of the letters on the cheque. She denied completing the CABS application form - Exhibit 2 - or the deposit and withdrawal forms. She told the Court once the cheque had been negotiated, it would have been sent back together with the bank statement and the bookkeeper would have received these.

The third witness was Mr Brian Richard Gibbons. He told the court that he was the managing director of the plaintiff company. There were a total of four directors in the plaintiff company. The company has been operating a bank account with Standard Chartered, Southerton Branch, for the past forty to fifty years. He told the court that the two signatures on the cheque - one at the bottom and one above the alteration - appear to be his. He was made aware that the cheque in question had not been received by Shell Zimbabwe. Shell Zimbabwe eventually issued summons and the plaintiff decided to pay as the company needed a constant supply of fuel. He told the court that once a cheque had been issued, it would go to the bookkeeper for posting or delivery. He further told the court dim the date which appears on the statement - 25 June 1991 - was the closing date of the accounts for the month. The fact that the cheque itself is dated 10 July 1991 would not be unusual.

The fourth witness, Maxwell Chisewe, is a treasury manager with BP Shell. He told the court payments by the plaintiff company were either cash on delivery for bulk deliveries in Harare or by statement for deliveries outside Harm. BP Shell were also banking with Standard Chartered, Park Street

GARWE J

Branch but have since moved to Karigamombe Branch. He told the court that from the time he joined BP Shell some twenty years ago, all cheques received would be stamped "NOT NEGOTIABLE". It is his belief that Standard Bank were aware of this situation because BP Shell

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have been banking with the bank for a very long time indeed. BP Shell depots also make deposits at a number of Standard Bank branches countrywide. He further told the court that Shell would not endorse a cheque payable to it in favour of a third party. All cheques drawn by Shell would bear two signatures.

He could not say whether the cheque in question was received at the premises of BP Shell. There is no record that it was.

He admitted that on the face of it the endorsement on the back of the cheque appears valid. A bank would not be expected to know the signing arrangements at BP Shell. He told the court that the BP Shell depot at Southerton does conduct business transactions at the Southerton Branch of the Bank.

The first defendant, Standard Chartered Bank ("the Bank') called a Mr Kujinga employed as an internal controller. He told the Court he. has worked for the bank for eighteen years, twelve of which were in the internal control sectlon. As internal controller, he gives management re-assurance that procedures and systems in operation are complied with.

Regarding the cheque he told the court the first port of can would have been the teller at the Bank's West End branch. The teller would scrutinize the deposit slip to check for the date, branch name, account number and name of depositor. The next thing would have been to peruse the cheques included in the deposit for crossing and any endorsements on the back. He explained that crossing such as "& Co", "not negotiable" or two parallel lines on the face of the cheque would denote an ordinary crossing. There are special crossing such as "Account Payee Only" or a more restrictive crossing such as 'Not transferable". In the latter cases, the cheque would only be deposited into the account of the payee. He told the court that a cheque generally crossed can be endorsed in favour of a third party. Where a cheque is generally crossed and is endorsed to a third party, the practice has been for the bank to accept it if deposited by CABS.

All cheques received by the bank would be sent to the bank's item processing centre. There the depositor's account is updated and the drawers account debited. The cheques and deposit slips are then sent back to their respective branches. In this case the cheque would have been sent to the Southerton

GARWE J

Branch of the bank. At the branch, the cheques would be sorted out into account number orders. They are dealt with by different team leaders or clerks. The cheques are then scrutinized by the team leaders who then clear them. The team leaders ensure that the cheque is correctly dated, that it bears the name of the payee, the amount in words and figures and the drawer's signature. All alterations should be countersigned. The signature is then compared against the index card which bears the drawer's signing arrangement. If everything is in order, the cheques are filed pending despatch to the customer together with the monthly statement.

He told the court that the Southerton branch would deal with approximately 2 700 vouchers *per* day. The cheque in question appears in order. So too does the endorsement. In his opinion, there was no reason why the cheque should not have been passed, as the cheque was

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generally crossed and bore a CABS stamp on it.

He told the court further that Shell BP operates all its accounts from the Karigarnombe Branch of the Bank. He was not aware the company had any dealings with the Southerton Branch. In his view the employees at the Southerton Branch could not have been expected to know about the BP Shell amount unless a particular employee had come across the account elsewhere. He told the court that the only situation where one could ascertain whether an endorsement is authorised is where both the payee and the drawer maintain an account at the same branch in which case copies of their specimen signatures would be available. The fact that a cheque drawn by Biddulphs in favour of Shell had been endorsed in favour of a third party would not have raised suspicion as the cheque itself appears in order. The fact that the Southerton Branch of the bank has been dealing with Biddulphs for more than forty yew should not, on its own, have made the bank employees suspicious when the cheque was referred to them showing an endorsement in favour of a third party in Bulawayo. He told the court that this is because the bank employees were not aware of the signing arrangements at Shell BP. He told the court however that as far as he was aware this was the first case of its kind where a Biddulphs cheque for fuel payable to Shell had been enodrsed in favour of a third party.

The second defendant called Nk Stephen Michael Jennings, employed by CABS as manager, Investigations and Security. It is his responsibility to investigate all fraud-related matters affecting the Society. He only started investigating this matter in February this year. Using the national identity particulars on the application to open a savings account - Exhibit 2 - he

examined the photographic register at National Registry and found that the particulars were for a Mr G Ngwenya. Checking through the fingerprint register, it was found that the identity number referred to one Angeline Takawira of Mutare No further useful information was found. He approached the police and found that the matter had not gone beyond the inquiry stage and the file had since been destroyed. It was in that file that the original documents were contained.

He told the court that at the time of this incidents the use of fictitious identity documents was prevalent. At that time he was employed by Unifreight. It was brought to his attention that some criminals were even manufacturing green identity forms. There was also a large cardboard box at Mbare Police full of recovered metal cards and green identity documents to which members of the public had access. It was well known that accounts opened using forged particulars could be used to launder stolen cheques.

He told the court that no investigations into the matter had been undertaken before he joined the Society in 1994.

He admitted that the account must have been opened by a black male. Regarding the cheque in question, he told the court at that time a teller need not have inquired why Shell RP would endorse a cheque to a third party but the practice of accepting such cheques has since been stopped. He admitted that the signature at the back of the cheque is similar to that on the deposit slip dated 13 July 1991. He admitted that there are some discrepancies on the

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documents e.g. the depositor was not the owner of the account, the depositor was the same person who had signed the endorsement on the back of the cheque and the name of the account holder was misspelt on the endorsement. He told the court however that these were not so outstanding as to arouse suspicion.

He admitted that CABS had more information than the bank. All that the bank had was the forged cheque whereas CABS had the various documents including the cheque and deposit slip completed by the depositor.

The second defendant further called Mr Phillip Sewera who in 1991 was the Manager, CABS Investments Branch. He explained the procedure followed in opening an account with CABS. The client would insert his name, surname, address, date and signature on the application form. He would bring the form, duly completed, with the amount to be deposited, as well as the deposit slip and positive identification. If a cheque is to be deposited the teller

would scrutinize it to ensure that everything is in order. The teller would then print a book and enter the transaction into the book and the client would then be asked to sign using special paper which enables the signature to be visible only under ultra-violet light.

In the present case, the application form was completed on the 9 July 1991 and the account opened on the same day at CABS Mall, Bulawayo. There was a deposit of $20 on the same date. He told the court it is not normal procedure to check the authenticity of the account holder's address. Nor would the society query an identity document unless there is something suspicious. The cheque deposit for $24 249,98 was processed - without the book - at CABS First Street, Harare on 13 July 1991. He told the court in 1991, the Society permitted the deposit of cheques endorsed in favour of third parties. This was, however, stopped in October 1993 because of the incidence of fraud involving stolen cheques. In his view, the endorsement on the back of the cheque appeared to be regular.

The cheque was accepted by Teller 12 at the Society's First Street Branch. The cheque was to be cleared in 14 days and this was complied with in the present case. He admitted that the signature on the deposit slip and that on the endorsement look similar. He explained however that tellers were not expected to verify the signatures on the deposit slips. Moreover this is a busy branch. Nor would the teller be expected to inquire into the genuineness of the signature on the endorsement. It is not their duty to verify the identity of the signatory.

He admitted that CABS tellers read the paper and watch television. They are aware of various fraudulent activities carried out by fraudsters. They know about Biddulphs and Shell. He told the court however that the endorsement on the back of the cheque appeared regular. There was no basis for ascertaining whether two signatures were necessary for the endorsement and in any event it is not the duty of the Building Society teller to make that inquiry.

The second defendant further called Mr Ronald Percival Blackmore, a questioned document examiner. He examined the cheque in question. He came to the conclusion that the original writing on the cheque had been overwritten with the exception of the date, the signature and

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the amount in figures. He told the court that this was his first time to come across this type of overwriting - which in his view does not serve any particular purpose. He also looked at some CABS withdrawal forms. He formed the opinion that the writing on the withdrawal form was by the same person who wrote on the

GARWE J

cheque. He also formed the opinion that the signature above the alteration on the cheque is forged. He also told the court that it would have been apparent that the signature on the endorsement and that on the deposit slip were similar. One would have wondered why the person signing the endorsement was also the person depositing the cheque.

He could not say how it is that the writing on the cheque is similar to the writing on the CABS documents. The account was for a black male. HIs opinion is that the person who did the overwriting is the same person who wrote the CABS document

THE QUESTION OF CREDIBILITY

It is necessary to say a word or two regarding the credibility or otherwise of all the witnesses who gave evidence in this matter. The submission by Mr *de Bourbon* that all witnesses have tried to give an honest account appears well made. I did not detect a deliberate attempt on the part of any of die witnesses to mislead the court, although the question whether or not the bank and the building society's suspicion should have been aroused will require separate comment

The allegation was made by the second defendant that Mrs Parson may have been the person responsible for the endorsement on the back of the cheque and subsequent deposit of that cheque into the CABS account. The allegation was also made that it must be Mrs Parsons who must have withdrawn the *money* from the account. It goes without saying that Mrs Parsons, who is a white lady, could not, have passed off as a black male. For this reason, it is unlikely that it would have been Mrs Parsons who was involved in the fraudulent transactions. The evidence by Mr Blackmore shows that there are certain similarities between her writing and that of the person who committed the fraud. It was also the evidence of Mr Blackmore that for some unknown reason the original words on the cheque were overwritten. The overwriting served no practical purpose. This court has had the opportunity to compare the writing on the cheque in question and on another cheque written by Mrs Parsons against that on the CABS documents. Whilst it is true that there are similarities in the character of some of the words, it is however, also clear that generally speaking the handwriting appears to be by different people.

On the evidence before me, I reach the conclusion that it is highly unlikely that Mrs Parsons was involved in this fraud.

GARWE J

THE QUESTION OF NEGLIGENCE

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This was an issue raised by all three parties to this action. Both defendants say that the plaintiff was negligent. The plaintiff denies this and states that it was the first and second defendants who were negligent. The first defendant also says it was the second defendant who was negligent.

(a) *The plaintiff*

Mr *Stonier* submitted that the cheque must have been stolen from the premises of the plaintiff by the culprit. The cheque was prepared on 10 July 1991 - a day after the CABS account had been opened. In his view someone at Biddulphs must have been involved as it would have served no purpose for the account to be opened without the connivance of someone working for the plaintiff. He also submits that the cheque was not specially crossed but was generally crossed with the words "& Co".

Mr *Ross* also submitted that an employee of the plaintiff - either Mrs Parsons or a Mr Ngwenya - must have been involved.

It is true that the cheque was generally crossed and that had it been specially crossed plaintiff would have been better protected. However no proper basis for the submission that die cheque must have been stolen at the phaintiff's premises has been laid. The situation is that no-one knows what happened to the cheque once it had been processed. It may have been forwarded by post or given to a messenger who was waiting for it. It could have been stolen at the plaintiffs premises or even at the premises of BP Shell, the payee. No one will ever know.

In my view, it cannot properly be said the plaintiff company was itself negligent. Perhaps with hindsight the plaintiff should have ensured that the cheque was specially crossed. Perhaps plaintiff should have exercised more caution in the despatch of the cheque. The fact that plaintiff failed to do so is not suggestive of negligence.

(b) *The bank*

The bank acted both as the drawee bank and as the collecting bank. It was the drawee bank in the sense that the plaintiff company was operating a current account with the bank. It was a collecting bank in the sense that it received a deposit from CABS - the second defendant - at its West End branch after which the cheque was processed and in due course paid out.

GARWE J

At the time the West End branch of the bank received the deposit from CABS all that was before the teller was the forged cheque and the deposit slip completed by CABS. The forged cheque was eventually forwarded to the Southerton branch where the plaintiff main~ a current account.

The only issue is whether the bank's suspicion should have been aroused when die cheque was deposited. The cheque had been made, out by the plaintiff. It was and is common knowledge that the plaintiff company is involved in the business of household removals. The cheque indicated the payee as BP Shell Zimbabwe. Again it was common knowledge that BP

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Shell is involved in the sate and distribution of petrol and petroleum products. The cheque bore on its reverse an endorsement in favour of one Machimbidzofanado - a private individual of Block40 - 1308. Mpopoma Bulawayo.

Was the bank negligent? In my view the situation is not that clear. although alarm bells should have sounded. Why would a cheque by a well-known haulage company payable to Shell *BP* be endorsed by the latter in favour of an individual residing in Mpopoma, Bulawayo?

Why would *BP* Shell conduct its affairs in that fashion? Moreover, the endorsement at the back of the cheque was countersigned by only one person. Why would *BP* Shell allow one authorised signatory to endorse a cheque in this fashion? It is common cause the bank did not cause any inquiries to be undertaken. It did not ascertain whether the signature appearing against the endorsement was genuine or authorised. It seems to me that the circumstances were such that the bank could have inquired from BP Shell whether the endorsement was regular As collecting bank, the bank would obviously have relied on CABS to have ascertained the right of its account holder to ~ funds. All that the bank had was the forged cheque and nothing more. As the drawee bank, the bank would have been more concerned about the signature of the drawer of the cheque and whether the cheque, on the face of it, appeared regular. The one feature that distinguishes the bank from CABS is that the bank had very little to go by.

Whilst the circumstances are such that the bank could have inquired, the endorsement on the bank of the cheque appeared regular. Most of the Witnesses in this case said much the same thing. In the absence of further detail before it it is in my view, a moot point whether the bank could be said to have been negligent

GARWE J

(c) *CABS*

The chronology of events was aptly described by Mr *de Bourbon in* his address. The account was opened on 9 July 1991. On 10 July 1991, the cheque was then made out by the plaintiff. On 13 July 1991, the same cheque was deposited into the CABS account but without the book. On 26 July 1991 i.e. a day before the expiration of the 14-day clearing period, the person went to CABS and deposited a sum of $5 "as a feeler". The account was still in order.

On 27 July 1991 i.e. on the expiration of the 14-day period, the period started withdrawing money from the account. By 31 July 1991, he had virtually drawn all the money leaving a balance of about $500.

At the time the cheque was deposited, the following would have been available to the CABS teller (a) the cheque in question (b) the deposit slip and (c) information from the computer.

What 1 have said in respect of the bank also applies here. The CABS teller, who was not called by the second defendant, must have been aware that plaintiff is a haulage company and that BP Shell is involved in the sale and distribution of petroleum products. The teller should have asked himself why a company such as BP Shell would endorse a cheque from one of its big

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customers, Biddulphs, in favour of a private individual in Bulawayo. More than the Bank, CABS had all the documents in its possession. The circumstances should have aroused some suspicion. Why did the CABS teller not inquire from BP Shell whether the endorsement was genuine? Moroever, as we now know, the person who endorsed the cheque on the back and signed the endorsement is the same person who signed the deposit slip. This court was advised that a teller even in a building society is expected to peruse the face of the cheque, the deposit slip and any endorsement One does not have to be handwriting expert to appreciate that the signature appearing against the endorsement is the same or at least looks substantially similar to that on the deposit slip.

There was also the misspelling of the third party's name on the endorsement. The account had been opened in the name of "Machimbidzofamndo The cheque was endorsed in favour of a "Mr Machimbidzofanado". Moreover, so it appears, the identity card produced at the time the cheques were requested bore the particulars 63-80073SQ-80. The particulars were inserted on the back of the cheque withdrawal forms - see exhibits 10(a) and 10(b). Yet the

identity particulars on the computer and which were punched by computer onto the back of the cheque withdrawal form were 63-800635Q-83.

The totality of all these features was such that a teller, acting reasonably, should have been put on his guard. Alarm bells should have started sounding. All witnesses who gave evidence admitted that tellers are aware of the possibility of fraud. They read the paper. The circumstances were crying out for an investigation. The claim by Aft Sewera of CABS that there was nothing suspicious cannot be accepted. No investigation was undertaken. The result was that the culprit withdrew virtually all the money. I have no doubt that CABS was, given the circumstances of this case, negligent.

THE LAW

What then is the law? The first defendant relies on s 59 of the Bills of Exchange Act *[Chapter 14:02]* which states:

> "When a bill payable to order on demand is drawn on a banker and the banker pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to 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 banker is deemed to have paid the bill in due course although such endorsement has been forged or made without authority:
>
> > Provided such endorsement does not purport to be that of a person who is a customer of the bank at the branch on which the said bill is drawn."

In his submissions, Mr *Stonier* for the Bank, urged this court to find that even if it is shown the bank acted negligently it is still protected since the transaction was in the ordinary course of business and negligence is not incompatible with good faith. 1 agree with Mr *Stonier* on his analysis of the law on this aspect.

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The effect of s 59 is to protect a banker in all cases in which he has in good faith and in the ordinary course of business paid a bill in the hands of a person whose title to it purports to he derived through a prior endorsement whether that endorsement was in fact genuine or not - Cowen on the *Law of Negotiable Instruments in South Africa 4* ed p 377. A particular act of negligence need not necessarily stand in the way of the conclusion that the bank has made a payment in the ordinary course of business. *Byles on*

GARWE J

Bills of Exchange 26 ed by Frank Ryder on pp 299-300 makes the same point. The author comments:

> "This Provision Protects Only the banker on whom the bill or cheque is drawn. It does not protect a collecting banker. Its object is to protect the paying banker against forged or unauthorised, indorsements. Hence it applies to an indorsement by an agent in fraud of his principal. Where however the paying banker fails to exact, where he should, a proper indorsement and pays upon an indorsement which is irregular, he is not protected by the section. Nor is he protected where the bill or cheque is materially altered, since the instrument has been avoided by the alteration and he is under no duty to pay it ...
>
> The fact that the banker is guilty of negligence does not necessarily deprive him of protection. Negligence is clearly not incompatible with good faith and an act which is done negligently may yet be done in the ordinary course of business. Where however, the paying hanker happens to be the collecting banker also, any negligence on his part will, in the case of a crossed cheque, deprive him of protection ..."

In fact, s *96* of our Act provides that a thing is deemed to be done in good faith, within the meaning of the Act, where it is done honestly, whether it is done negligently or not.

The proviso to s *59* also calls for comment. This is so in the light of the fact that BP Shell had an account with the Park Street branch of the Standard Bank. The implications of the proviso have so far not been fully considered. Cowen on the *Law of Negotiable Instruments in South Africa* at p 370 cites the case of *Stapelberg NO v Barclays Bank* 1963 (3) SA 120 at 123 where a bank successfully relied on the section despite the fact that the person whose signature was involved was a customer of the bank at the branch on which it was drawn because it appeared the bank had no knowledge of the customer under the particular name used. The learned author also comments on what is meant by "banker at the branch on which the cheque is drawn" In particular, he submits that:

> "while theproviso only comes into operation where the forged indorsement purports to be that of a customer of the particular branch on which the cheque is drawn, the various branches of the bank would not be regarded as having a separate corporate existence for purposes of the **substantive protection** of s *58.* In terms of the act, the substantive protection of s 58

GARWE J

> applies to a bill 'drawn on a banker'; and, in considering the scope of this protection, it would seem reasonable to hold both that a cheque drawn upon any branch is drawn upon the bank as whole, and that die bank as a whole pays the cheque for the purposes of s 58, even though a branch other than the drawee branch makes the actual payment But it must be conceded that the. point is not free from difficulty."

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The evidence led during the trial is that BP Shell was operating a number of bank accounts at the Park Street Branch of the Standard Bank although the company has since moved its accounts to the Karigamombe Branch. The court was also told that BP Shell depots scattered all over the country~ had dealings with branches of the bank nearest to them. The Southerton depot had transacttions with the Southerton Branch of Standard Bank, the drawee bank in this case. The West End branch of the Bank acted as the collecting bank.

The position appears now settled that a collecting banker owes a duty of care to avoid causing loss to die owner of a stolen cheque by dealing negligently with it. The issue was considered at length in *Zimbabwe Corporation v Pyramid Motor Corporation* 1985 (1) ZLR 35B (S) at 368; 1985 (4) SA 553 (M) at 559H, where McNALLY JA remarked

> "... After all, every cheque ~ is issued has to be collected, even if the collecting bank and the drawee bank are one and the same. The collecting of the proceeds of a cheque is an essential part of the system. The collecting bank is not only a necessary part of the mechanism but also, as pointed out by Golden J in the *Rhostar* case, the last line of defence for the drawer. To describe a collecting banker as 'one of the intermediate possessors of a cheque' and 'a mere agent for his customer' is to ignore his essential role in a system thanks to which he exists, a system moreover which depends for its justification upon the fact that it and he con be relied upon (one might even say, 'banked upon'). The banking system, in short, creates a relationship of care between a drawer of crossed cheques and a collecting banker..."

In a concurring judgment, GUBBAY JA (as he then was) concluded that although Golden J in the case of *Rhostar \(Pvt\) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 (1) RLR 56 (G); 1972 (2) SA 703 (R) had failed to appreciate that a claim against a collecting bank is for economic loss unto damage to property or injury to aperson and that the foreseeability is not sufficient to give rise to liability unless it is also shown that the defendant acted unlawfully. considerations of justice and convenience

GARWE J

warrant a recognition of a common law duty of careon the part of a collecting bank to the owner of a stolen cheque to prevent loss by negligently dealing with M cheque. The learned JUDGE OF APPEAL remarked at p 565:

> "Professor Malan ... writes convincingly of the 'professional responsibility' of bankers as a class. He, like Mr *de Bourbon,* argues that as a banker, by virtue of his calling, has or ought to have special *fit and competence, it is unsound and illogical to equate his position in collecting payment of a stolen cheque with that of an ordinary *bona fide* purchaser of stolen goods who subsequently disposes of the goods in good faith. For in the exercise of his expertise and responsibility which arises from the professional services he renders the public, the banker owes a duty of care (in the policy-duty sense) to avoid causing loss to the owner of a stolen cheque by negligently dealing with it. In my view the argument is attractive. After all the collecting banker appreciates or ought to appreciate the significance of instructions upon a cheque and that they are to be observed. He can verify whether the payee designated on the cheque is his client. He alone is in a position to know whether it is being collected on behalf of the person entitled to receive payment; the paying banker has no knowledge of that- a critical fact 1 did not understand Mr *Chaskalson* to dispute. If the cheque indicates that his client is not so entitled, the collecting banker is able to safeguard the drawer from loss by acting as a buffer. He has the machinery at his disposal to do so ... By exercising reasonable diligence in this regard the collecting banker is able to minimise if not neutralise, the relatively high risk affecting a cheque in the sense that payment can be obtained by a unlawful possessor with comparative ease

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The learned JUDGE OF APPEAL continued at p 576G:

> "The need to display vigilance has become a fact of their daily lives and there is no basis upon which to suppose that they are unable to cope with it..."

The decision in the *Zimbabwe Banking Corporation v Pyramid Motor Corporation* case *supra* was cited with approval in the South Afirican Appellate Division case of *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 0) SA 783 (A). It was held in that case that for a banker to be held liable under the extended Lex *Aquilia* for negligence to the true owner of a cheque, the following elements must be established: (a) that the collecting banker received payment of the cheque on behalf of someone who was not entitled

to it (b) that in receiving such payment the collected banker acted negligently and unlawfully; (c) the conduct of the banker caused the true owner to sustain loss; and (d) that the damages claimed represent proper compensation for such loss. In determining whether the collecting banker was under such a duty not to act negligently (for without this legal duty there can be no unlawfulness),the court is required to exercise a value judgment embracing all relevant facts and involving considering of policy. VIVVIER JA at p 799 of the judgment remarked.

> "Furthermore, the collecting banker undertakes in the course of his professional services to collect other persons' cheques payable to his client and he should be aware that his failure to take reasonable care may result in loss to the true owner of the cheque. The collecting banker, by virtue of his calling possesses or professes to possess special skills and competence in his field and can, or ought to, appreciate the significance of instructions upon a cheque. He is thus able to reduce. if not avoid, loss to the true owner by exercising reasonable care in the collection of cheques. If there were no legal duty to take reasonable care, it would mean the collecting banker need not examine or even look at the cheque to ascertain to whom it is payable. the crossing of a cheque would be of little consequence if no legal duty existed on the part of the collecting banker... The collecting banker, however, remains the only person who is in a position to know whether or not a cheque is being collected on behalf of a person who is entitled to receive payment, and the drawee bank has to rely on the collecting banker to ascertain this fact. The latter is fully aware of this position and it might therefore, well be said that it is his duty to ensure that he only presents a cheque for payment on behalf of a client who is entitled to receive payment of a cheque ... the drawer or true owner of a cheque is unable to take any steps to protect himself from the loss he will suffer if the collecting banker negligently collects payment on behalf of a person who is not entitled thereto..."

The issue also came up before VAN ZYL in *Fedgen Insurance Ltd v Bankorp* Ltd 1994 (2) SA 399 (W). The learned judge held that a banker must be placed on his guard if there are facts or circumstances which might lead a reasonable banker to suspect that the customer is not the true owner of the cheque. A banker would be required to investigate the position if there were "a circumstance of an unusual character calculated to arouse suspicion and provoke inquiry" He also noted that:

> "... this does not mean that the banker must examine every cheque

> minutely to determine whether the customer has title thereto. But if, in the course of the transaction, something unusual, untoward or anomalous should attract his attention, or arouse his suspicion, it may reasonably be

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expected of him to institute an inquiry and to take such steps as may be required to prevent loss or damages ..."

The reasoning in the above cases was followed by COMBRINCK J *in Kwamashm Bakery Ltd v Standard Bank of South Mica* 1995 (1) SA 377 (D). The learned judge remarked at p 394G:

"Moreover, it offends against one's sense of fairness and reasonableness for bankers who by statute are the only institutions entitled to take and collect negotiable instruments and are regarded by society as professional persons and institutions competent in dealing in money matters to, on the one hand, procure custom by inviting the public to bank with them and representing that they will collect cheques on behalf of their customers and, on the other hand saying

'there is a risk that when we collect a cheque it may not be for the true owner but although we are aware of this risk it is going to cost us too much to guard against it and therefore we are going to take no steps to protect the true owner.'

As argued by Mr Kemp the bank voluntarily decides to participate in a situation that has the inherent and well-recognised risk that the collection of a cheque may prove to have been for someone not entitled thereto. The bank is free not to accept such a cheque and it should therefore not be entitled to complain and state that it should not be held to a duty of care to deal carefully with that cheque because it would cost too much or disrupt its practice too much..."

The learned judge in the above case went further to suggest at p 39*SH* what enquiries could be undertaken by a banker to satisfy himself of the identity of a new client. In his view, this would in no way impact adversely on the banking system or involve an inordinate amount of time or cost.

That a collecting bank owes a duty of care to the drawer of a cheque not to deal negligently with that cheque is now settled law. But what is the position with a "collecting" building society as in this case?

The cheque forming the basis of this action was generally crossed with the

GARWE J

words "& Co". What does this mean? The drawer of a cheque may place across it two parallel transverse lines simply. This means that the banker on whom it is drawn shall not pay it to any other person other dun a banker - s 79 of the Bills of Exchange Act *[Chapter* 14.02]. In other words, it cannot be paid over the counter. The addition of the words "and company" or any abbreviation thereof between die two lines takes the matter no further *Centre* 1977 (1) SA 484 (A).

In *Philsam Investments (Pvt) Limited v Beverley Budding Society* 1977 (1) ZLR 78 (G), one of the issues that came up for consideration was whether a building society also owes a duty of care to drawers of cheques to take reasonable steps to ensure that its clients are entitled to payment on cheques which they present to it for deposit to their accounts. NEWHAM J concluded that whilst the *Rhostar* case *supra*:

"concerned the negligence of a bank teller ... I do not see that a building society teller is in a better position when it is admitted that the danger is appreciated and no reasonable precautionary steps are taken to guard against it"

The evidence given during this trial was that building societies in Zimbabwe operate along similar lines and that, in respect of savings accounts they operate on the same basis as banks.

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The procedure for opening accounts, deposits and withdrawals is almost the same as in the case of banks. I see no reason why there should not be a duty of care on a building society towards drawers of cheques deposited with it Members of the public would be surprised were they to be advised that a building society owes no such duty. Indeed all the witnesses who gave evidence appreciated the possibility of fraud in cheque deposits. Building societies are involved in the "banking business" as defined by the Banking Act *[Chapter* 24:01]. 1 see no proper basis for expecting them to exercise a lesser degree of the duty of care. 1 certainly agree with the remarks by NEWHAM S in the *Philsam* case *supra* that:

> "Building societies have become an important part of the ~em commercial system and are not to he compared with supermarkets ... They are not bankers and do not deal with the republic at large but only with their clients in regard to deposits and the negotiation of cheques. 1 consider that they are in a similar position to that of the Cape of Good Hope Savings Bank Society in the *National Housing Commission* case *supra* AS such I consider that when there are circumstances which

GARWE J

> should put it upon inquiry, a building society owes a duty of care to the drawers of cheques to take reasonable steps to ensure that its clients are entitled to payment of cheques which they present to it for deposit to their accounts."

I am not persuaded by Mr Ross's argument that building societies and building society tellers should be considered in different light from banks and bank tellers for the reason that the former do not possess the same skill and professional expertise as is the case with the latter. I do not believe that the dictates of policy would demand a lesser degree of care on the part of building societies in the handling of cheques belonging to third parties deposited with them.

ARE THE DEFENDANTS LIABLE?

It is now necessary to consider this issue in the light of the law.

(a) *The first defendant - the bank*

The bank acted both as collecting bank and as drawee bank. As a collecting bank, it cannot invoke the provisions of s 59 of the Act. The decision in the *Zmbabwe Bankng Corporation v Pyrandd Motor Corporation supra* and the other cases cited are authority for that proposition.

As a drawee bank, it seems to me, given the circumstances, the bank is entitled to the protection afforded by s 59. True, BP Shell operated an account with the Park Street branch of the bank. There is evidence the BP Shell Southerton depot had dealings with the Southerton Branch of the bank. This was only mentioned in passing. It does appear BP Shell was operating a number of accounts at the Park Street branch of the bank but its depots countrywide had transactions with the local branches of the bank. The BP Shell deposit at Southerton would have had dealings with the Southerton Branch of the bank - perhaps mostly in the form of deposits.

It is not disputed that all that was presented to the bank - both as collecting and as drawee bank - was the cheque in question. The cheque in question bore a CABS First Street stamp on the

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back. It purported to have been endorsed in favour of a third party by Shell BP.

I have already indicated elsewhere in this judgment that perhaps the bank teller's suspicion should have been aroused when he saw the cheque drawn

GARWE J

by a well-known removal company in favour of a well-known oil company bearing an endorsement purporting to have been made by a single signatory of the oil company in favour of a third party of Mpoporna, Bulawayo.

I accept that the endorsement on the face of it looked regular. The bank was to a large extent entitled to rely on the CABS teller to verify the correctness of the endorsement. As noted in the Philsam *Invesownts* case *supra* at pp 89-90

> "This cheque was deposited by a building society whose teller is in the best position to query and check such authority ... It seems to me that in those circumstances it cannot be expected of a collecting bank that it make a very close and accurate survey of all the circumstances connected with a cheque deposited for collecting by a building society ... In the present case, the cheque gave no indication to the bank that it had not been transferred to the building society by the payee, through an endorsement by her agent, for a deposit to the payee's account with the building society. I consider that the Standard Bank was entitled to rely on building society to check the authority of the agent if it was in any doubt and the bank was not negligent in collecting this cheque from Barclays Bank and paying the proceeds to the credit of the building society's account with it..."

In my view, the above remarks apply in the present matter. The cheque had been deposited by CABS. The bank would have assumed that CABS would have satisfied itself on the genuineness of the endorsement and the entitlement of its client to these funds. Moreover the endorsement, on the face of it, appeared regular. The cheque had been properly signed by Biddulphs as the drawer. The bank was under obligation to ensure that the cheque was correctly signed. The bank both as collecting banker and as drawee banker did not have any other documents besides the cheque. Although a collecting banker is not entitled to the protection afforded by s 59 of the Act, there was but very little that could have put the bank on its guard. And although Shell Zimbabwe had an account with Standard Chartered Bank, this was at a different branch. I do not believe that the Southerton Branch would have been expected to know what was happening at the Park Street Branch.

In my view, whilst the Bank could have been more vigilant it is arguable whether the bank was, given the circumstances of this case, negligent. That the bank owed a duty of care is not in dispute. 1 would accordingly give the bank the benefit of the doubt. In the result 1 would therefore find that it has

GARWE J

not been established that given the circumstances of this case, the bank was negligent.

(b) *CABS*

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Different considerations apply in respect of the building society. Building societies, like banks, are aware of the incidence of fraud involving forged cheques. Evidence given during the trial was that building societies, like banks, are forced to adopt various measures to minimise the incidence of fraud. Building society tellers, like their bank counterparts, are aware of the need to scrutinize cheques deposited. There is even a greater need for vigilance in the case of third party cheques. Mr Enock Moyo of Beverley Building Society told the court that Beverley does not, as a general rule, accept third party cheques unless the bank manager, in the exercise of his personal discretion, so allows.

The account with CABS had been opened on 9 July 1991. On 13 July 1991, the cheque issued by Biddulphs was then deposited. On 26 July 1991, there was a deposit of $5 which was clearly "a feeler" to ascertain whether the cheque deposit had not been reversed. Thereafter there were two big withdrawals.

The CABS teller was not called to give evidence. The court does not therefore have the benefit of his evidence on how he came to process the transaction. Nevertheless, there were a number of features that should have put the teller on his guard. Unlike the Standard Bank teller. the CABS teller had more information before him.

This was a cheque issued by a well known removals company in favour of Shell Zimbabwe, another well known company involved in the supply of petrol and petroleum products. As in the case of the bank, the question that should have come to the mind of the teller was "Why would a big company like Shell Zimbabwe endorse a cheque payable to it by Biddulphs in favour of some individual residing in Mpopoma, Bulawayo?" Was such an endorsement likely to be made by just one signatory or perhaps by more than one? There was also the dimension that the signature of the person signing on behalf of Shell Zimbabwe was similar to that of the person who signed the deposit slip. Why should the signatory at Shell Zimbabwe have also signed the deposit slip? The court was advised that tellers at the various building societies have to cheek the cheques as well as the deposit slips to ensure that everthing is regular. Had the CABS teller given both documents oven a

cursory glance, it would have been apparent that an was not well. There was also the misspelling of the account holders name on the back of the cheque. The endorsement is made in favour of Machimbidzofanado and yet the amount was in favour of Machimbidzofanando. In the circumstances, there was a duty of care on the building society teller to satisfy himself that the cheque was indeed payable to the account holder. The situation clearly cried out for an inquiry. The possibility of fraud is something that a building society, like a bank, must guard against. I accept that building society bank tellers do on occasions operate under a lot of pressure. But that is no excuse for dealing negligently with cheques. Like a collecting bank, CABS wore really the last line of defence. A building society must surely appreciate that the collecting branch of the bank as well as the drawee bank would have considerably less information than itself In these circumstances there is a duty upon the building society teller to satisfy himself that the account holder is indeed entitled to be credited with the funds indicated on the cheque. In the present case the teller failed to do so. The result was that the money was

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credited to an account opened with forged identity papers and was withdrawn almost immediately.

I am satisfied that not only was there a duty of care on CABS to exercise reasonable care in handling the cheque in question but also that CABS failed to exercise such care and negligently allowed the forged cheque to be deposited with it. It is necessary that in cases such as the present one the building society exercises reasonable care in dealing with cheques and ensures that the account holder is entitled to the proceeds before the cheques are referred to its banker. The building society will usually have considerably more information than the bank and must therefore appreciate that the bank will rely to a huge extent on the fact that die building society would have made preliminary investigations and satisfied itself of We entitlement of its account holder to the proceeds of that cheque.

I am of the view that CABS is the proximate cause of the loss in this matter. The plaintiff has therefore proved its claim against CABS.

On the question of costs, I am satisfied that the costs must follow the event. The bank has also been largely successful. I have considered whether the plaintiff or CABS should pay the bank's costs. It was the plaintiff who brought the bank to court It follows that the plaintiff should pay the bank's costs.

In the result, it is ordered as follows:

GARWE J

1. That plaintiffs claim against the first defendant be and is hereby dismissed with costs.
2. That judgment with costs be and is hereby entered against the second defendant in favour of the plaintiff in the sum of $24 249,98 together with interest at the prescribed rate from 4 September 1996 to the date of payment.

Gill, Godlonton & Gerrans, plaintiff s legal practitioners

Winterton, Holmes & Hill, first defendant's legal practitioners

Scanlen & Holderness, second defendant's legal practitioners

S v MAKANYANGA 1996 (2) ZLR 231 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

4 September 1996 Judgment No. 111-1-118-96

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Flynote

Evidence - sexual cases - cautionary rule - corroboration - whether required - nature of evidence required - suspect witness must be acceptable, then further evidence sought to satisfy court that danger of false incrimination removed- complaint- admissibility- necessary that complaint be made at first reasonable opportunity - relevance of complaint as corroboration

Headnote

A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, but the fact that such credence is given to testimony for the State does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond a reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. lt demands that a defence succeed wherever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence. The administration of justice would otherwise be the hostage of the plausible rogue whose insincere but convincing blandishments must prevail over the starnmering protestations of the truth by the diffident, frightened or confused victim of false incrimination.

In any case involving a sexual offence, the court must adopt an approach which is regarded as cautious because it involves deliberate advertence to die wed to ensure objectively that the risk of false incrimination is

excluded before it acts on any belief in the complaint advanced. Belief in the complainant is, of course, essential, but further evidence is required, which is often given the rather elusive label of corroboration. What is required is not a search for corroboration in any strict or technical sense, but something which is really a matter of logic, depending on the nature of the charge, upon the type of witness whose evidence is being cautiously assessed and upon the issues in the trial. Whatever it may be that gives rise to the possibility of false incrimination should be identified by the judicial officer and addressed in such a way as shows that he was aware of the danger but considered that evidence extraneous to the of the complainant or other suspect witness removes the danger. In exceptional cases, the manifest mendacity of the accused concerning a fact established to the court's satisfaction might provide the required confirmation; and there are even some situations where the accused has not been proved to be lying but where the merits of the complainant and the demerits of the accused are beyond question.

The rule that magistrates ought to adopt is that, where the cautionary rule is applicable, the prerequisite is a reasoned belief in and acceptance of the evidence of the suspect witness. That acceptance can never be enough to justify a conviction, even if one is not inclined to believe the defence. There must be a conscious adversaries to the risk of false incrimination. Some further significant feature of evidence must be sought, external to the complainant's evidence, to satisfy the court that the danger of false incrimination is no remote and illusory as not to constitute a reasonable doubt. The more cogent the danger of false incrimination, the greater the need for corroboration in its strictest sense.

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Evidence of complaint in sexual cases is admissible, as an exception to the rule against evidence of prior consistent statements, in order to show the consistency of the complainant and lack of consent. But it may be received only on certain conditions, in particular, that the complaint must have been made at the first opportunity after the offence which reasonably offers itself. What constitutes reasonable promptness depends on the circumstances. Such a complain twould not consfitute corroboration in the proper sense of the word, though it could possibly constitute a significant factor in deciding whether the danger of false incrimination has been excluded.

Cases cited:

Mackery v Ballot 1921 TPD 430

S v Chatiyo 1989 (2) ZLR 144 (S)

S v Chogova 1992 (2) ZLR 206 (S)

GILLESPIE J

R v Gannon 1906 TS 114

R v Judson 1965 RLR 501 (A)

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

S v Mubaiwa 1980 ZLR 477 (A)

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

S v Mutandi 1996 (1) ZLR 367 (H)

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

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

S v Sibanda 1994 (1) ZLR 394 (S)

R v W 1949 (3) SA 772 (A)

Judgment

Gillespie J: The accused has been convicted by the regional magistrate *of* the offence *of* rape and sentenced to imprisonment for *7* yew, with *2* years suspended on certain conditions. The evidence against the accused consists *of* that *of* the complainant and of her parents. The complainant's testimony shows that the complainant left her family home on Christmas Day in 1990 without her parents' blessing in order to live with her husband. She regarded herself as married to him but no bride price had been paid. Very shortly after committing herself to her husband, she went to live at the kraal where her husband's family dwelt. Within a week of her arrival, on *3* January *199 1,* and within a fortnight of commencing her life with her husband, she

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was called to see the accused, her brother in law, and his wife.

She recounts that these two relatives by marriage then demanded that she have sexual intercourse with the accused, pretending that it was something Of a local custom that a new wife entering the family must lie with her brothers-in-law. Upon her denying any knowledge of such a local variant of the right *of primae noctis,* and declining to adopt the practice as her own, she was nevertheless forced by the accused to the ground and, with the assistance of his wife, was stripped of her undergarment and raped. After M violation, her person was once again invaded by the accused's wife who inserted a finger into the complainant's private parts, completing her humiliation. She was warned with death should she utter any word of report or complaint. Notwithstanding this dire admonition she nevertheless reported to her newly found mother-in-law a few days later, on or after *5* January, when that person returned to the rural home from a trip to town with the complainant's husband The elder woman, though shocked, ordered that no further report be made lest it cause murderous dispute between the two brothers. The complainant accordingly held her peace.

Some ten months later, in October *of* the same year, the young woman felt

GILLESPIE J

the spirit move her to join the local sect of the apostolic religious movement. The rites of admission to this body demanded of her full confession of her past sins. In baring her soul to the leader of the group, one Energy Nyagwizo, she finally revealed her dark secret. This man was appalled at the sin within his flock and insisted upon confrontation between the two brothers, the accused and the complainant's husband. The confrontation ended in the husband beating both the complainant, for her secretiveness, and his sister in law, for her unnatural conduct, and in his demanding compensation in the sum of $500 from the accused. The amount was said to have been duly paid with acknowledgement of wrong having been done.

The truth, however, made no-one free. Rather, it spoiled the relationship between the complainant and her husband, who thereafter failed to provide the complainant with affection or the necessaries of life. She was accordingly moved, in December 199 1, to return to her parents' home in shame. This she did and on arrival at the place of her girlhood the prodigal daughter begged admission to the home and sought the assistance of her progenitor to right the dreadful wrong done to her. She informed her parents, to their horror, of all that had befallen her. Her mother and father took her to a paralegal officer for advice, and then, in early 1992, acted on this advice; namely, to cause the police to take action against the accused.

The defence. whilst admitting an act of sexual intercourse between the complainant and the accused in the presence of the accused's wife, reveals nevertheless a very different account. It shows that the complainant, frustrated by the inability of her new husband to consummate their relationship, applied to her sister-in-law for assistance. It was said that the husband, for some rather ill-defined reason, was unable to deflower his bride. The two women together sought the intervention of the accused. He, faced with a joint embassy by his wife and sister-in- law, agreed to use his own person to perform that task which his brother could not. He insisted, however, on his wife's presence in order to remove from that which he intended as a clinical coupling any

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hint of concupiscence. So he engaged in sexual intercourse with the complainant. He knows nothing of a report to his mother. He is aware of a report eventually being made to Energy Nyagwizo but avers that her public confession of wrongdoing was initially a confession of adultery which was later amended to one complaining of a rape. He admits the wrath of his brother when the illicit conduct was revealed but claims that his anger was at the adultery, rather than at any rape. He admits paying damages but claims this to have been in token of his fornication rather than as a confession of viblence.

GILLESPIE J

The evidence of the complainant was supported by the testimony of her mother and father who gave evidence of the report received by them in December 1991. Neither of them testified to any admission of rape by the accused. The evidence for the defence included not only the accused's oath, but also that of Energy Nyagwizo, who stated that the complainant's confession upon her induction into the fellowship was of adultery, and not of rape. The explanation given for the adultery was the need to solicit the assistance of her brother in law to deflower her, her husband being unable to accomplish that function. In addition, the accused's brother and complainant's husband, Bumhira Makanyanga, gave evidence at the request of the court. He swore that his awareness of die incident stemmed from the intervention of Energy after public confession by the complainant to adultery. He dealt with his wife as an adulterous woman rather than a rape victim, and with his brother similarly. He was aware of it being said that the brother's intervention was in order to accomplish a function which he had been unable to perform but he denied this as a valid reason, protesting that he had already fulfilled his husbandly duties before the event.

The learned regional magistrate was rightly perplexed at this evidence and did well to insist upon the adduction of further evidence. Nevertheless, despite the care he took in order to arrive at a decision, I am obliged to hold that he has misdirected himself in his assessment of the evidence. The mistake he appears to have made is to act solely upon his belief in the truth of the matter. Whilst it is axiomatic that a conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint still, the fact that such credence is given to testimony for the State does not mean that conviction must necessarily ensue. This follows irrestibly from the truth that the mere failure of an accused person to win from an acquittal. Proof beyond a reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeed wherever it appears reasonably possible that it might be true. This insistence upon far transcends mere considerations of subjective persuasion officer may entertain towards any evidence. If it were not so then the administration of criminal justice would be the hostage of the whose insincere but convincing blandishments must prevail over the stammering protestations of truth by the diffident, frightened or victim of false incrimination. It is precisely to protect the bench the very human tendency towards belief or disbelief that there are evolved rules of evidence and cautionary rules as to the assessment of evidence. These rules are of the first importance in those cases

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where belief in a complaint, allied to repugnance of the alleged evil-doer, is the easiest to elicit, and firm proof the hardest to establish.

Thus in any case involving a sexual offence the court is enjoined to adopt an approach which is regarded as cautious because it involves deliberate advertance to the need to ensure objectively that the risk of false incrimination is excluded before it acts upon any belief in the complaint advanced. Belief in the complainant is of course the *sine qua non.* In the words of BARON JA:

> "The court looks for corroboration of the suspect witness. But - perhaps precisely because of the search for corroboration- trial courts frequently forget that the court must first decide whether the witness is credible; in other words, the court must first decide whether, taking into account all the circumstances of the case, including demeanour, the probabilities and all other considerations which triers of fact properly take into account in assessing credibility, it believes the witness. If not, the matter is at an end, and the question of corroboration does not arise; it is only if the court believes the witness that in cases where a cautionary rule applies it then proceeds to consider whether it might still not have been deceived by a plausible witness." 1(47)

Belief in the witness the regional magistrate certainly had. He should, however, have looked for more.

The further evidence he should have sought is often given the rather elusive label, corroboration. Thus, GUBBAY CJ has observed:

> "The general rule is that, in sexual cases, the complainant must be a credible witness and her version must be corroboration. In exceptional cases, corroboration in the strict sense may be absent but there may be significant factors which rule out the possibility of falsification. In the absence of corroboration there can usually be no conviction. In the absence of corroboration and of strong supporting factors, there can never be a conviction." 2(48)

Other formulations of the correct approach to be adopted, where by ancient Practice caution is required, may appear to be contradictory to this dictum. So KORSAH JA has declared:

> "There appears to be no rigid requirement in our law that a child's evidence

> must be corroborated - see the exposition of the law on this issue by McNALLY JA in S *v Santos S-138-85* (unreported) at pp 7 and *8.*" 3(49)

I intend to show that these two passages reveal no more than a difference of emphasis and not divergent views of the law.

The difference in emphasis perhaps arises out of the use of the word corroboration. Attempts to define the term include the following by KORSAH JA:

> "Now, corroborative evidence, in my view, is evidence which, although not of itself sufficient to support a conviction, tended to show that the complainant was telling the truth and that she was not falsely implicating the accused." 4(50)

Other general formulations of the nature of corroboration stress that it embraces evidence which

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is not that of the complainant and which is consistent with the truth of the complaint but inconsistent with the innocence of the defence. On the question of what constitutes corroboration more or less complex casuistic rules as to what might or might not amount to Sufficient corroboration of different sorts of suspect witness have evolved. An attempt to classify such rules and to answer the question "what is corroboration?" may be found in May *South African Cases and Statutes on Evidence* 4 ed 193.

Any tendency to require corroboration of suspect witnesses in any strict or technical fashion has in the Roman-Dutch law been avoided. Thus, in connection with the question whether "corroboration" is required of an accomplice and whether it need implicate the accused, SCHREINER JA has said.

> "The cautious court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to ten lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that

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GILLESPIE J

> his lies are die truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone; so that satisfaction of the requirements of a 285 [a statutory requirement for proof *aliunde* of the commission of the offence] does not sufficiently protect the accused against the risk of risk of falsefalse incrimination byan accomplice. The risk that he may be convicted wrongly although a 285 has been satisfied will be reduced, and in the most satisfiactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question." 5(51)

Similarly, WATERMEYER CJ held that:

> "I am satisfied that in criminal cases of the kind now in question the true rule does not insist that there must be corroboration of the comphainant's evidence before the accused can be legally convicted. In rape cases, for instance, the established and proper practice is not to require that the complainant's evidence be corroborated before a conviction is competent. But what is required is that the trier of fact should have clearly in mind that these cases of sexual assaults require special treatment. that charges of the kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid." 6(52)

In this jurisdiction, BARON JA has made it perfectly clear that what is required is not a search for corroboration in any strict or technical sense. Rather, he shows that

> "a 'suspect witness' case, in which a cautionary rule must be applied, is different from the ordinary case in which the decision will turn on findings as to credibility; there must be something more than is required

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GILLESPIE J

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in the ordinary case to satisfy the trier of fact that the danger of false incrimination has been eliminated." 7(53)

The nature of this extra something generations of judges have sensibly refrained from attempting to define.

The additional persuasive factor required to satisfy die cautious approach in cases of potentially suspect witnesses is really a matter of logic depending upon the nature of the charge; upon the type of witness whose evidence is being cautiously assessed; and upon the issues in the trial.8(54) From these factors one is able to determine what it is that gives rise to a danger of false incrimination and to act accordingly. Thus in the case of an accomplice who manifestly committed an offence in the company of another one might seek evidence independent of the accomplice's word that his collaborate was the accused and not some other man whom the accused would shelter. Where one deals with a acomplainant who has evidently been raped by some person, one seeks confirmation aside from her own evidence that her identification of the accused as her violator is reliable. Should a complaint of rape be made in circumstances where there is an admitted intercourse but the defence is that it was consensual, all that one might require may be independent evidence of lack of consent Where a young child has complained of molestation one might wish to be satisfied that the incident is not a flight of fancy -that being established, all else may follow. Whatever it may be that gives rise to the possibility of false incrimination ought to be identified by the judicial officer and addressed in such a way as shows that he was aware of the danger but considered that evidence extraneous to that of the complainant removed the danger.

Some misunderstanding might arise among magis outof the observation of SCHREINER JA above, 9(55) accepted by all, dim a conviction in the absence of corroboration is only permissible where the merits of the evidence of the suspect witness and the demerits of that of the accused are beyond question. This is not to be taken as licence to ignore the need to search for confirmatory circumstances removing the danger of false incrimination; it is rather a recognition of the possibility of the exceptional case, referred to by GUBBAY CJ; 10(56) a case where the confirmation required, the significant factor referred

GILLESPIE J

to by the learned CHIEF JUSTICE, is to be found nowhere other than in the manifest mendacity of the accused concerning a fact established to the court's satisfaction. Even in the absence of proven falsehood on the part of the accused, patent unreliability of the accused as a witness has been remarked upon as being possibly sufficient provided always that the trier of fact is scrupulously aware of the dangers of false incrimination and is able conscientiously to exclude the danger.

This emanates from another eminent Chief Justice, WAMMEYER G, who commented as follows upon the observation of SCHREINER JA concerning the "merits and demerits" situation.

"No doubt, applying what was said in Ncanana's case (loc cit), it is Permissible for a court m convict in these sexual cases even where there is no corroboration of the complainant and even where the accused has given evidence and has not been proved to be a lying wit~. But that is only the position where the court is fully appreciative of the risks involved and where the merits of the complainant and the demerits of the accused as

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witnesses are beyond question." 11(57)

This observation makes it necessary to stress that a conviction, which is no more than an acceptance of the plaintiffs evidence and rejection of the accused's; one which is based on precisely the same considerations as are taken into account in assessing the evidence and credibility of a witness in any ordinary case, is incorrect. 12(58)

> "It is not sufficient *for* the trial court merely to warn itself of the dangers of false incrimination and then to convict simply on its faith in the honesty of the [suspect witness] based on nothing more than his demeanour in the witness box and the plausibility of his story." 13(59)

1 myself have previously said that caution, where it is required, is not demonstrated by the mere statement that one is aware of the need *for* caution where the assessment of the evidence shows nothing more than a superficial comparison of demeanour and probabilities. 14(60)

The rule that magistrates ought to adopt, then, is this. The approach in any

GILLESPIE J

case involving the application of a cautionary rule must always involve as a prerequisite ar easoned belief in and acceptance of the evidence of the suspect witness. That acceptance, however, can never be enough to justify a conviction, even if one is not inclined to believe the defence proffered. There must in addition be a conscious adversaries to the risk, as it may be demonstrated by the peculiar circumstances of the case, of false incrimination. Some further significant feature or evidence is to be sought, external to the unsupported evidence of the complainant, and which serves to satisfy that the danger of false incrimination arising in any particular case is so remote and illusory as not to constitute a reasonable doubt. Where the inherent risk of false incrimination is negligible in the circumstances of a particular case, then the extra factor required may be no more than the manifest unreliability of the accused's defence. The more cogent the danger of a false complaint, however, the more stringent the demand for confirmatory evidence, even to the extent of a requirement for corroboration in the strictest sense. Turning to the facts of this case, the magistrate, as I have noted, found the complainant to be worthy of belief. Speaking for myself, I doubt that 1 would have done so had 1 been presiding at the trial. There are too many question marks as to details in her evidence upon which she has appeared to be equivocal. I do not propose to recite these various causes of concern, however, I prefer to approach the matter assuming the magistrate to have found correctly that she was a credible witness. The next step of his enquiry should have been to caution himself as to the dangers inherent in a complaint of sexual offence such as this.

Aware of the existence of the cautionary rule, the magistrate said the following:

> "For the foregoing reasons, although I am aware of the dangers attendant in cases of this nature, in this case 1 am satisfied beyond reasonable doubt that the danger of false incrimination has been wholly excluded."

This remark came at the very end of the judgment. It is unaccompanied by any analysis of how any such danger arises in the particular case or by any demonstration of how the danger is excluded. The uttering of cautionary words is only of any value where it is accompanied by a demonstration in the reasoning of a properly cautious approach, identifying and excluding the

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risk of false incrimination which itself has caused one to acknowledge the need for caution.

The danger of false incrimmationin this case ansesas follows. The complainant

GILLESPIE J

left home without her parent's consent with a man who made no payment of any portion in order to legitimise their union in the customary manner. in doing so, she did, according to custom, estrange herself from her family. She subsequently found herself in marital difficulties. She undoubtedly wished to restore her relationship with her mother and father. She told them she had been raped in circumstances calculated to inculcate in them a repugnance for the family to which she had linked herself and unquestionably won for herself their support and acceptance. This forgiveness was sufficiently important to her that there is a danger that she may have fabricated an account of rape in order to attain it. More than that, the rift in her marriage had been caused by nothing other than an act of sexual intercourse with her brother-in-law. Any enquiry by the complainant's family must reveal this. So much the greater, therefore, may she have perceived the need falsely to claim this intercourse to have been an act of rape rather than an adultery to which she assented, for whatever reason. Add to this that there is absolutely no outcry raised at the time, nor, on the best evidence for the complainant, for ten months thereafter, and one has not only the theoretical danger, but all the objective indications, of a fabricated complaint. Ibis danger has gone wholly unremarked by the magistrate.

In my judgment, the danger is sufficiently compelling M one cannot in this case safely convict in the absence of corroboration on the material issue; that is to say, without there being evidence other than that of the complainant herself, showing that the admitted intercourse was forced upon her and was not consensual. The search for any such corroboration leaves one emptyhanded. A medical report was produced but, obtained as it was over a year after the event, could scarcely have been anything other than. completely irrelevant. Evidence was led of a complaint made by the complainant - but herein lies another of the errors of the regional magistrate.

Evidence of complaint in sexual cases is admissible, as an exception to the rule against evidence of prior consistent statements, in order to show the consistency of the complaint and the lack of consent. 15(61) It is received, however, only on certain conditions. In particular, the complaint must have been made at the first opportunity after the offence which reasonably offers itself. As to what would constitute reasonable promptness in making the first complaint, INNES CJ has said this:

> "In my opinion, each case must depend to a large extent upon its own

GILLESPIE J

> circumstances. It is for the judge to decide whether the delay has been unreasonable, whether the opportunity taken advantage of by the assaulted person is the earliest opportunity which under the circumstances she could reasonably have been expected to take." 16(62)

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In the absence of compelling masons to the contrary, I would have thought that generally a complaint could reasonably be expected to be made to the first sympathetic person, in whom one could expect the complainant to confide so intimate an experience, whom the complainant might see after she is removed from the perpetrator's control.

As I have recounted, the complaint which is sought to be proven in evidence was not made until over a year after the event. In considering how to judge this evidence the magistrate said:

> "It is an established rule of our law that in sexual cases the complainant must have made a report as soon as possible to a person she is reasonably expected to make the report (*sic*). On the face of it, it might appear that she delayed in maikng the report. If however one believes the complainant as I am inclined to do the delay cannot be said to be unreasonable having regard to all the surrounding circumstances of the case!'

This reasoning fails to withstand scrutiny. The purpose of admitting evidence of the complaint is to show lack of consent; in order to admit evidence of the complaint it must be made timeously; this complaint is found to have been made within a reasonable time not for any mason surrounding the delay but because the magistrate believes the complainant. This belief then justifies the admission of the evidence of complaint which itself may be used to justify belief in the evidence of a lack of consent. The reasoning is wholly circular and misdirected.

In fact, the substance of the report adduced in evidence was not the first report made, on the complainant's evidence. She states that she had previously told her mother-in-law within days of the event. That might have been admissible in evidence. No attempt was made, however, to prove the report. She states that she told the local religious supremo, Energy Nyagwizo. He, however, gave evidence entirely inconsistent with her alleged report The complaint to the parents is so late in time and so susceptible of subsequent fabrication that it cannot possibly be regarded as admissible and ought to have been excluded.

GILLESPIE J

Had the evidence of the complaint been admissible, it would still not have constituted corroboration in the meaning of that term of art. Corroboration must be found in a source independent of the complainant. Self-cormboration is not permitted. It could possibly, however, have constituted a significant factor not being corroboration in the strict sense. As it is, it is lacking entirely from the State case.

Finally, to the extent it may be thought that the demerits of the accused's testimony can constitute the corroboration or significant extra factor required to eliminate the danger of false incrimination, I say this.

First, the risk of false incrimination in this instance is sufficiently compelling that one would require to dispel it corroboration indicating an absence of consent by the complainant to the intercourse. I cannot see that any defects in the accused's demeanour or credibility supply that corroboration.

Second, the magistrate did not even find the man to be an unsatisfactory witness of bad demeanour, far less a lying witness. He said of him:

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> "The accused was not a good witness. Although he is a gifted orator and a crafty cross-examiner he told an incredible and bizarre story which is not worthy of belief. I cannot for one moment accept dim a girl who has recently eloped to her boyfriend's home would go about soliciting for sexual intercourse with her husband's brother in the presence of the brother's wife."

Ibis passage shows that the magistrate rejected the defence for no reason other dun that he believed the complainant and regarded her story as more probable than that of the accused. Ibis, as the authorities have demonstrated, is an error in cases where a cautious approach is required.

Third, the very rejection of the defence as bizarre and incredible flies in the face of portions of the evidence. Two people have given evidence to show that the complainant publicly admitted an adultery. One of these, the religious leader, Energy, even gave evidence that the complainant had explained her adultery in the following terms:

> "Firstly, [the complainant] did indicate that her husband who is the young brother to the accused failed to deflower her during the time that they had been staying together ... [She] explained further that she did approach the accused's wife and narrated her problem to her ... In response the accused's wife asked [the complainant] as to what form of action did she expect her to do, to take, rather ... [She] then responded by advising the

GILLESPIE J

> accused's wife that since she was the elderly female person within the family she was supposed to inform the accused as regards that problem ... After (the accused] had been informed of the problem by his wife he in turn inquired from his wife as to what form of action was he expected to take as regards that problem ... This matter was actually discussed on a number of days which days I cannot tell but eventually the accused and his wife did agree that they were going to assist [the complainant] ... On the last meeting the accused, his wife and [the complainant] did sit down and discussed as to what form of action was going to be taken in assisting [the complainant] as regards the problem in question ... They did agree that the accused was going to assist [the complainant] by deflowering her virginity but not that they were going to have a child out of the act"

In the face of this evidence of a prior and grossly inconsistent statement by the complainant, I cannot begin to understand how the magistrate could discount as a reasonable possibility the accused's defence. He simply dismisses this evidence on the sole ground that the cuckolded husband denied that this masculinity had failed him in the manner alleged. His failure to admit this intimate matter, which if true may be a source of considerable shame to him, shame aggravated by the manner of its being made public, is by no means to be unexpected.

Fourth, it is not unknown that a man may encounter difficulties in consummating his marriage where the wife has an unusually constricted hymen and especially if he may be lacking in vigour. Surgical procedures for the removal of the maidenhead are available, but it cannot be considered bizarre and incredible to suppose that rural dwellers may elect for a more direct remedy. If this were the truth of the situation here, it would moreover explain completely the otherwise most repugnant invasion of the complainant's person by the accused's wife. She unfortunately has since died and cannot explain herself.

In all the circumstances, the factors extraneous to the evidence of the accused and the complainant, far from supporting the truth of the complaint, give greater corroboration to the defence. The magistrate ought to have held, despite his beliefs, that there is a reasonable

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possibility that the defence might be true and ought to have given the accused the benefit of the doubt. He failed to do so and accordingly it falls to me in the exercise of my powers on review to quash the conviction and to set aside the sentence, as 1 do.

DEVITTE J agrees.

GARIYA SAFARIS (PVT) LTD v VAN WYK 1996 (2) ZLR 246 (HC)

Court **High Court, Bulawayo**

Malaba J

Civil application

6 September 1996 Judgment No. HB-65-96

Flynote

Practice and procedure - parties - substitution of - action instituted against non-existant company in term of deed of suretyship-summary judgment obtained -subsequent acknowledgement by third party that he was bound by deed but amount of claim disputed - no consent to substitution - whether court has power to amend judgment so as to substitute new person as judgment debtor who does not consent to the substitution

Headnote

The applicant obtained judgment against a company in respect of liability under a deed of surety. It then emerged that there was no company registered in that name. The respondent, who had signed the deed of surety, accepted that he was personally bound to the applicant under the deed, but he denied that the sum claimed was due to the applicant. The applicant sought an order to amend the judgment by substituting the respondent for the non-existent company. The respondent did not consent to the substitution.

Held, that it is only in exceptional circumstance that a court may amend a judgment. It may not do so if there is prejudice to the parties which cannot be compensated by an order for costs. In an application for substitution of another party as the debtor, the court must be satisfied that the new person is a necessary and proper party to be before it. Where the application for substitution involves a material amendment to the judgment, it is likely to be adjudged to be too late if made after judgment unless it involves the mere correction of a wrong name without changing the identity of the party to a judgment.

MALABA J

Held, further, that in the presentcase the proceedings and judgment following the issuing of summons were null and void because the proceedings had been brought against a non-existent defendant. Therefore there could be no question of the substitution of a new judgment debtor as there was no old judgment debtor.

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Cases cited:

A-G v Gane [1907] 2 KB 264

Bullock v London General Omibus Co [19071] KB 264

Curtis-Setchell & McKie v Koeppen 1948 (3) SA 1017 (W)

Dawson (Bradford) Ltd &Ors v Dove & Anor [I971] I All ER 554(QB)

Devonia Shipping Ltd v M V Luis (YeomanShipping Co Lld Intervewing) 1994 (2) SA 363 (C)

Fosa v Commercial Properties (Pty) Ltd & Anon [1996] 2 All SA 611 (D)

Gihwala v Gihwala 1946 CPD 486

Goldberg v Tomaselli & Sons Ltd 1940 TP1) 409

Greef v Janet & & Anon 1986 (1) SA 647 M

Hip Hop Clothing Manufacturing CC v Wagener NO 1996 (4) SA 222 (C); 1996 (1) All SA 93 (C)

Lazard Brothers & Co v Midland Bank Ltd [1933] AC 289

MacFoy v United Africa Co Ltd [1962] AC 152; [1961] 3 All ER 1169 (PC)

Ngani v Mbanje & & Anon 1987 (2) ZLR 111 (S)

O'Sullivan v Heads Model Agency CC 1995 (4) SA 253 (W)

PearIman (Veneers) SA (Pty) Ltd v Bartels [1954] 3 All ER 659 (CA)

Que Que Bakery (Pvt)Ltd v Model Entprila Model Bakery 1973 (2)RLR 292 (G)

van Heerden v du Plessis 1969 (3) SA 298 (0)

van Vuuren v Braun & Summers 1910 WD 950

Case Information

J K H Stirling, for the applicant

A Morris-Davies, for the respondent

Judgment

Malaba J: This is an opposed application for an order that C van Wyk be substituted for what was thought to be the debtor against whom judgment was granted to the applicant on 10 February *1995* in Case No. *HC-2482-94.* The judgment was entered for the applicant against what was cited as "Con and Son (Pvt) LWfor the sum of *R74 025,75* with interest a *tempore morae* from *14* May *1993* to the date of payment The applicant also applies for leave to execute the judgment against there spondent following the order of substitution and amendment to the

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judgment.

MALABA J

It is convenient to state the facts out of which the dispute arose in a chronological order. The applicant is a company duly registered according to the laws of Zimbabwe and carrying on the business of safari operators. The respondent is a businessman trading as "Connell Safaris".

At the beginning of 1993, five hunters from South Africa took part in an elephant hunting safari conducted by the applicant in Tsholotsho. The respondent had taken part in arranging the safari with the applicant on behalf of the hunters. At the end of the safari the hunters agreed to pay the applicant R253 000 for the trophies of the elephants that they had shot.They issued two cheques that were not met by the South African authorities.

On 5 March 1993, the applicant entered into a deed of suretyship with "Con and Son (Pvt) Ltd" in terms of which the latter purported to bind itself jointly and severally as surety and co-principal debtor, for the due performance by die hunters of all their obligations under their agreement with the applicant, to pay the sum of R253 000 by 14 May 1993. It also purported to bind itself for the due payment of all amounts due to the applicant by the hunters in terms of the agreement. The respondent signed the deed of suretyship. The hunters subsequently paid to the applicant the sum of R138 97425. An amount of R40 000 was deducted from the sum of R253 000 in respect of two of the elephants shot, because they were declared problem animals. There was, according to the applicant, an outstanding balance of R74 025,75 due to it by the hunters. The applicant claimed the payment of the money from "Con and Son (Pvt) Ltd" on the basis of the deed of suretyship.

Believing that it had entered into a contract with a legal *persona,* the terms of which were recorded in the deed of suretyship, the applicant issued summons commencing action against "Con and Son (Pvt) Ltd" on 18 August 1994 claiming R74 025,75, interest *a tempore morae* and costs of suit. "Con and Son (Pvt) LW' was described, by the applicant in the summons, as "a company duly registered according to the laws of Zimbabwe and carrying on business as ranchers and safari operators at Silver Springs Ranch Bulawayo".

In the declaration, the applicant framed its case as being that "Con and Son (Pvt) Ltd" in its capacity as a legal *persona,* signed the deed of suretyship in terms of which it accepted liability for the payment of R253 000 due to it by the South African hunters. It went on to acknowledge receipt of R138 974,25 and the deduction of R40 000.

On 16 September 1994, Webb Low and Barry recorded in the appearance

MALABA J

book, maintained in the office of the registrar, that the "defendant W entered appearance to defend the action". On 3 October, the applicant applied for summary judgment. Its director deposed to a founding affidavit in which he said "Con and Son (Pvt) LW was the defendant in

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the action, that it had accepted liability under the deed of suretyship and had no *bona fide* defence to the claim. He then prayed for judgment against "Con and Son (Pvt) Ltd."

On 18 November, Webb, Low and Barry gave notice of the intention of Con and Son (Pvt) Ltd to oppose the application for summary judgment. They filed an opposing affidavit deposed to by C van Wyk in which he described himself as "the Managing Director and Principal Shareholder of the respondent company". He opposed the claim on the ground that the hunters had discharged their indebtedness to the applicant, thereby extinguishing any claim the latter may have had against Con and Son (Pvt) Ltd. He also queried the allegation that the amount guaranteed in the deed of suretyship was R253 000, suggesting instead M the figure was R 173 000.

The matter was argued by both counsel on the basis that the defendant was "Con and Son (Pvt) Ltd. On 10 February 1995, summary judgment was granted to the applicant against "Con and Son (Pvt) LW for the amount claimed with interest a *tempore morae* from 14 May 1993 to the date of payment and costs of suit On 31 May 1995, a writ of execution was issued against the movable property of "Con and Son (Pvt) Ltd". Attempted execution of the judgment was made by the Deputy Sheriff on 27 June 1995 at Silver Springs Ranch. He was advised by the respondent's father that "Con and Son (Pvt) Ltd" did not exist. On 17 July, the Deputy Sheriff interviewed C van Wyk who confirmed that them was no company by that name. The respondent aid he had signed the deed of suretyship in his personal capacity. The applicant's legal practitioner, for the first time in the action, conducted a search in the register of companies for "Con and Son (Pvt) Ltd". There was indeed no company registered in that name.

It became clear to all concerned, that the judgment was a *brutum fulmen* as the judgment debtor was non existent. On 27 July, C van Wyk wrote to the applicant's legal practitioners, through his new legal practitioners Morris Davies and Company saying that be. was at a loss as to where the name "Con and Son (Pvt) Ltd". came from. He accepted in the letter that he was personally bound to the applicant in terms of the (Pvt) of suretyship. He however denied that the sum of R74 025,75 was due to the applicant

The applicant then instituted fresh proceedings by summons in case No.

MALABA J

HC-2296-95. It sued C van Wyk personally for the payment of R74 025,75 together with the wasted costs in cases Nos. HC- 1828-94 and HC-2482-94. The claim was based on estoppel. The applicant sought to prove that the respondent was estopped from raising any defence, in view of his admission of the fact that he signed the deed of suretyship in his personal capacity and that judgment was granted in case No. HC-2482-94.

The defendant entered appearance to defend after which the applicant applied for summary judgment. The opposed application succeeded in respect of the wasted costs but failed on the ground that the claim, being based on issue estoppel was excipiable. Without withdrawing the proceedings in case No. HC-2296-95. the applicant launched the present application for an order of substitution of the respondent for "Con and Son (Pvt) Ltd" in the judgment granted to it

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in case No. HC-2482-94.

Mr *Stirling* argued that there would be no prejudice to the respondent if the order of substitution was made. He said the respondent brought the situation upon himself by misrepresenting that he was the managing director and shareholder of a fictitious company. He said the respondent acted as if he was the defendant in cases Nos. HG 1828-94 and HC2482-94. He opposed the claim on the merits. The respondent should not be given a second chance to oppose the claim.

Mr *Morris-Davies* argued that there was no evidence to show that the respondent fraudulently misrepresented that he was the managing director and shareholder of a fictitious company. The applicant had not challenged the evidence that the respondent told his erstwhile legal practitioner, before the opposing affidavit filed for purposes of opposing the summary judgment application in case No. HC-2482-94 was prepared, that he traded as "Connell Safaris". The respondent's allegation that he did not notice, at the time he signed the opposing affidavit, that it bore the name "Con and Son (Pvt) Ltd" was also not challenged.

Mr *Morris-Davies* argued further that the respondent would suffer prejudice if the order of substitution was granted. He would be denied the opportunity C to defend himself as a party to the action. The respondent's own case was that the hunters discharged their indebtedness to the applicant He had documentary evidence which he received from the lawyers who represented the hunters in the negotiations that led to the payment of R 138 974,25 to prove his defence. As he got hold of the evidence after the judgment in case No. HC-2482-94 had been granted, he would be prevented from putting it to the court if the

MALABA J

order of substitution was granted. He also said that there was no power, under the rules of court, to amend a judgment in a manner that introduces a new person as a party to the action.

The applicant is praying for an order of substitution of a new person for the judgment debtor by amendinent to the heading and the body of the order granted in case No. HC2482-94. Assuming for a moment, that the judgment is valid, it is not proposed that it should be rescinded The question is, whether or not I have the power under the High Court Rules 1971, to order an amendment of a judgment to substitute a new person who does not consent to the substitution, as the judgment debtor?

The general rule is that, a court should allow the substitution of one party for another by the amendment of summons, or pleadings. In exceptional circumstances may a court amend a judgment. In each case the test is whether there is prejudice to any of the parties which cannot be compensated by an order for costs. The court must also be satisfied that the new person is a necessary and proper party to be before it, so that it may effectually and completely determine the cause between the existing parties.

In *Devonia Shipping Ltd v MVLids (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) ROSES-INNES J put the position succinctly at 369F-I saying:

> "The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in an

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> action, will always be allowed unless the application to amend is *mala fide* or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for costs or, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the notice of motion which it is sought to amend was filed. *Moolman v Estate Moolman & Anor* 1927 CPD 27 at 29 A material amendment such as the alteration or correction of the name of the applicant, or the substitution of a new applicant should in my view usually be granted subject to the considerations mentioned of prejudice to the respondent. Compare *Trustees Africa Explosives Pension Fund v New Hotel Properties (Pty) Ltd, Trustees African Explosive Pension Fund v Nestel* 1961 (3) SA 245 (W) at 247A-E. The risk of prejudice will usually be less in the case where the correct applicant has been incorrectly named and the amendment is sought to correct the misnomer than in the case where it is sought to substitute a different applicant. The criterion in both cases,

MALABA J

> however, is prejudice which cannot be remedied by an order as *to* costs and there is no difference in principle between the two cases."

See also: *Goldberg v Tomaselli and Sons Ltd* 1940 TPD 408*; GihWala v Gihwala* 1946 CPD 486*; Curtis-Setchell v Koeppen* 1948 (3) SA 1017 (W)*; Que Que Bakery (Pvt) Ltd v Model Enterprise* 1973 (2) RLR 292 (G)*; Greef v Janel & Anor* 1986 (1) SA 647 (7)*; O'Sullivan v Heads Model Agency* 1995 (4) SA 253 (W)*; Hip Hop Clothing Manufacturing CC v Wagener NO* 1996 (1) All SA 93 (C); 1996 (4) SA 222 (C). Rule *87* prescribes the procedure *to* be followed to effect a substitution of one party for another by amendment to the summons.

It is clear from the study of the decided cases that an application for an order of substitution should be made promptly. It is only in exceptional circumstances that the application will be entertained when it involves a material amendment to the judgment. It is likely to be adjudged *too* late if made after judgment *(Bullock v London General Omnibus Co* [1907] 1 KB 264; *A-G v Gane* [1907] 2 KB 487) unless it involves the mere correction of the wrong name without changing the identity of the party to a judgment *Pearlman (Veneers) SA (Pty) Ltd v Bartels* [1954] 3 All ER 659 (CA)). There should still be something left to be done in the action after judgment. for example, where the damages are still to be calculated.

In cases where orders of substitution were granted, there were, at least, existing parties with causes between them. The court had parties before it whether one of them was the wrong person to be a party or not. In other words, there was in each of the cases a legal *persona* or a natural person to be substituted. The proceedings were valid. The question was whether or not the court should exercise its discretion to order the substitution of one person for another as a party to the action. That was not the case here.

The plaintiff is, of course, entitled to choose the person against whom to proceed and leave out any person against whom it does not desire to proceed. *A* summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void *ab initio*.

In *van Vuuren v Braun & Summers* 1910 TPD 950 WESSELS J at p 955 said.

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MALABA J

> "Now in order to bring a defendant legally into court a summons is required. In order that a summons may be valid it must comply with the requirements of r 6. It must purport to be a summons, a mere request or letter to the effect that the defendant is kindly requested to appear in court on a certain day is an invalid citation. Next the summons must specify the defendant. It is true that it will not be a flaw in the summons if the defendant is not described as accurately as he should be. If a man is baptised 'George Smith' it is no defect in the summons to call him 'John Smith' because the individual is pointed out with sufficient accuracy. But if there were no mention of the defendant at all the summons would be a wholly worthless document and could not be amended by inserting the defendant's name in count."

In this case, the person against whom the plaintiff thought it was proceeding as a defendant was non-existent at the time summons was issued. The proceedings and judgment that followed the summons were null and void. To try an action in which there is only one party is an exercise in futility. There were no two parties to give rise to the existence of a cause of action between them. There was nothing to be substituted by the respondent as a new judgment debtor. There was no old judgment debtor.

This proposition is not without authority. In *van Heerden v du Plessis* 1969 (3) SA 298 (0) a summons was issued against a person who had already died. Application was made for an order of substitution of the executor testamentary for the deceased. The application, which was opposed, was refused on the ground that the summons was wholly invalid. In *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening) supra*, the leamed judgement men~ that cases in which the summons has been issued against a non-existent person are exceptions to the application of the general rule on the approach cowls should adopt in deciding applications for orders of substitution. The learned judge at 369J-370A had this to say:

> "The correction of a misdescription of an applicant differs also from the cases where the courts have regarded a summons or notice of motion as *ab initio* invalid because the plaintiff or applicant was a non-existent person.

In *Fosa v Commercial Properties (Pty) Ltd & Anor* [1996] 2 All SA 611 (D) the summons was issued in the name ofanon-existentplaintiff. An application for substitution was refused by NILES-DUNER AJ on the ground that, the fact that the *persona* described in the summons did not exist at the date of issue

MALABA J

of the summons, called into question the validity of the proceedings before him. The learned acting judge concluded at p 614 by saying:

> "There is, in my opinion no difference in principle between the situation in van Heerden v du Plessis *supra* and the present case. I accordingly take the view that the summons is a nullity and that I cannot by the process of substitution revive it to the date of its issue."

See also Dawson *(Bradford)Ltd* & Ors v Dove & Anon [1971] 1 All ER 554 (QB) where it was held that substituting the defendants for the deceased . whom the summons had been issued after his death was not an act of substitution but of creation.

Finally, the case *of Lazard Brothers & Co* v Midland Bank Ltd [1933] AC 289 is, in my view, direct authority against the granting of the order the applicant is praying for in this case. Before

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the Bolshevik Revolution of October 1917 in Russia, the respondent bank in London owed a Russian bank a large sum of money. The Russian bank in turn owed money to L Brothers, also bankers in London. Between October 1917 and 3 August 192 1, the Russian bank was liquidated and all its assets taken over by the Government of Russia. The Russian bank ceased to exist. Unbeknown to them that the Russian Bank was now non-existent, Lazard Brothers and Company issued summons against the bank in October 1930. No appearance to defend was entered. The plaintiff obtained a default judgment.

They obtained a garnishee order against Midland Bank Ltd attaching all debts due from the Midland Bank to the Russian bank. The issue subsequently arose for trial which was whether the Midland Bank was indebted to the Russian bank and to what extent. During the trial, evidence was led from Russian lawyers, which proved that the Russian bank had in fact ceased to exist before October 1930. Holding consequently that the summons, the judgment and the proceedings were null and void, LORD WRIGHT, who delivered the judgment of the House of Lords, said at p 296-297:

> "I shall deal first with question (2) which is most important and is decisive, since it is clear law, scarcely needing any express authority that a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and as soon as it appears to the court that the person named as the judgment debtor was at all material times at the date of writ and subsequently non-existent: such a case is afortiori than the case which LORD PARKER referred to in Daimder & Co v Continental Tyre & C & Co [1916] 2 AC 307-337. There the directors being all alien

MALABA J

> enemies could not give a retainer. LORD PARKER said: 'But when the court in the course of an action becomes aware M the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed.' In such a case the plaintiff cannot be before the court In the present case if the defendants cannot be before the court, because there is in law no such person, 1 think by parity of reasoning the court must refuse to treat these proceedings as other than a nullity."

In this case, there is the added complication of the fact that there may have been no cause of action in the first place. What was believed to be a legal *persona,* capable of entering into a contract and binding itself as a surety and co-principal debtor with the hunters through the deed of suretyship was nonexistent. There was nothing capable of giving the applicant as he believed at the time, a cause of action. What it thought was the other party to the contract was not capable of discharging the obligation of paying the money in the first place. I however do not have to decide this question of the existence of a cause of action because I am satisfied that the proceedings and the judgment that arose from them are null and void.

In Ngani *v Mbanfe & Anor* 1987 (2) ZLR 111 (S) KORSAH JA quoted with approval from the judgment of LORD DENNING in *Macfoy v UnitedAfirica Co* Ltd [1961] 3 All ER 1169 (PC) where his Lordship said at 11721:

> "If an act is void then it is in law a nullity. It is not only bad but incurably had. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. 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. So will **this** judgment collapse if the

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statement of claim is a nullity."

In light of the pendence before this court of the fresh proceedings instituted . st the respondent in Case No. HC-2296-95, it is convenient to declare the proceedings in HC 1828-94 and HC-2482-94 null and void.

It is therefore declared that the proceedings and the judgment in cases HC-1828-94 and HC-2482094 respectively are null and void and are set aside.

The application for an order of substitution of C van WyK for "Con and Son (Pvt) Ltd" in HC 1828-94 and HC-2482-94 is dismissed with costs.

Coghlan & Welsh, applicant's legal practitioners

Morris-Davis & Company respondent's legal practitioners

ZIMBABWE ELECTRICITY SUPPLY AUTHORITY v MODUS PUBLICATIONS (PVT) LTD 1996 (2) ZLR 256 (HC)

Court **High Court, Harare**

Ziyambi J

Exception

1 July & 11 September 1996 Judgment No. HH-122-96

Flynote

Delict - actio injuriarum - defamation -plaintff- statutory corporation -Zimbabwe Electricity Supply Authority- whether entitled to sue for defamation

Headnote

A trading corporation has a personality distinct from its members and can sue for defamation in its corporate name for a statement that affects its trade or business, whether or not actual damage is proved. The State and its organs, on the other hand. are not entitled to sue for defamation. In determining whether a trading corporation established by statute is merely an extension of the State, a close examination of the Act *which* establishes the corporation is necessary.

The Zimbabwe Electricity Supply Authority is a statutory corporation, but it has a sufficient degree of separation in identity and independence from the State to enable it to sue in its corporate name.

Cases cited:

Boka Entprs (Pvt) Ltd v Manatse & Anor 1989 (2) ZLR 117 (H)

Derbyshire County Council v Times Newspapers Ltd [1993] 1 All ER 1011

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National Social Security Authority v Min of Defence 1994 (2) ZLR 162 *(S)*

Case Information

A P de Bourbon SC, for the excipient/defendant

A J Dyke. for the respondent/plaintiff

ZIYAMBI J

Judgment

Ziyambi J: The plaintiff, a corporation established by statute, issued summons againstthe defendant, aduly incorporated limited liability company Claiming damages in the sum of $ 15 000 for defamation. The cause of action arose from the publication, in the *Financial* Gazette. of an article entitled:

> "CZI confirms ZESA lied on tariff hikes."

The plaintiff alleged that the said words, in the context of the article, are at wrongful and defamatory of plaintiff in that they were intended and were understood by readers of the newspaper to mean that the plaintiff is dishonest in the manner in which it carries on its business".

The defendant took exception to the declaration on the following grounds:

> "a. Tle plaintiff, as a statutory corporation, is not entitled in law to sue for damages for defamation.
>
> b. There is insufficient separation in identity between the plaintiff and the State such as would entitle the plaintiff in law to sue for damages for defamation.
>
> c. Any right to claim damages for defamation granted to the plaintiff would constitute an infringement of s 20 of the Constitution of Zimbabwe, would not be reasonably justifiable in a democratic society, and hence would be an unenforceable claim.
>
> d. The plaintiff relies on an allegation made against it *which* it is physically incapable ofundertaking, namely theplaintiff isincapable itself of lying, and cannot claim damages basedon anallegation that it (as opposed to any person on its behalf) has lied."

Dealing with the first ground, it is settled law that a trading corporation, being in law a person distinct from its members and having therefore a reputation of its own to maintain, can sue for a defamatory statement which affects it in its trade business or property whether or not actual damage is proved. See McKerron The *Law* ofDelict 7 ed at p 181. See also *Boka Enterprises (Pvt) Ltd v Manalse & Anor* 1989 (2) ZLR 117 (H). It was submitted by MrDyke that the plaintiff being a trading corporation established by statute is in no different position. Section 3 of the Electricity Act [Chapter 13:05] empowers the plaintiff to sue and be sued and to perform all acts that bodies corporate may by law perform.

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ZIYAMBI J

However, Mr *de Bourbon* for the excipient argued that the right of a trading corporation to sue for defamation ought not to be extended to a statutory corporation which, like the plaintiff, is but a manifestation of the State. He submitted that a perusal of the Electricity Act makes it quite clear that the plaintiff is merely an extension of the State.

In order to determine whether or not the plaintiff is "an entity completely severed from the State," a close examination of the Act is necessary. See *National Social Security Authority v Min of Defence* 1994 (2) ZLR 162 (S). In that case, the court found sufficient separation in identity between the NSSA and the State to distinguish it from the State thus enabling it to bring an action against the State. The court examined the provisions of the National Social Security Act [*Chapter* 17:04] and came to the conclusion that, apart from s 4 which specifically established the NSSA as a body corporate, other sections of the Act supported separation.

In the presentcase, *Mr de Bourbon drew* the court's attention to the following sections of the Electricity Act [*Chapter 13:05*]:

> "Section 5: provides for the appointment by the Minister of the Board members.
>
> Section 6: by virtue of which the Minister fixes the period and sets the conditions of office of the Board members.
>
> Section 9: in terms of which the Minister may dismiss or suspend Board members.
>
> Section 20: the authority is obliged to submit to the Minister such reports as the Minister may require.
>
> Section 21: the Minister (after consultation with the Board) may give directions relating to the exercise by it of its functions as appear to the Minister to be requisite in the National interest.
>
> Section 22: the Minister's approval of the appointments and terms and conditions of office, of the General Manager.
>
> Section 26: moneys not immediately required by the Authority may be invested in such a manner as the Minister and the Minister for Finance may approve.

ZIYAMBI J

> Section 28: the operation of a general reserve fund with the approval of the Minister.
>
> Section 57: by virtue of which the Minister has power to order the general manager or any member of the Board to comply with the requirements of the Act within a specified time.
>
> Section 61: pursuant to which the Minister may make regulations for the better carrying out or giving effect to the Act."

On the other hand, in addition to s 3 which empowers the plaintiff to sue and be sued in its own name, s 19 of the Act empowers the authority to "do or cause to be done ... all or any of the things specified in the First Schedule either absolutely or conditionally and either solely or jointly with others". There are listed in the schedule 33 powers, of which ten require the plaintiff to seek the Minister's approval.

It seems to me that the plaintiffs position is analogous to that of the NSSA as was found in

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NSSA *v Min of Defence supra*. To quote the words of GUBBAY CJ at p 170 of the report, which I respectfully adopt:

> "This analysis of the relevant sections of the Act convinces me that the appellant is not an entity completely severed from the State. The extent of miniserial control over it renders unacceptable the argument advanced to the contrary. But I am wholly persuaded that what is revealed as a sufficient separation in identity between the appellant and the State.The requisite degree of independence is afforded the appellant by the cumulative effect of the unqualified powers which the lawmaker has bestowed upon it. 1 would stress especially the right to sue in its own name... and its varied and wide-ranging activities as set out in the schedule."

I therefore hold that the plaintiff is not an organ of the State.

It was submitted by Mr *de Bourbon* that from the viewpoint of public policy, the right to sue for defamation ought not to be extended to a public corporation. In support of this submission, he relied on a decision of the House of Lords in *Derbyshire* County Council v *Times Newspapers Ltd* [1993] 1 All ER 10 11 (HL), in which their Lordships held that, under common law, a local authority did not have the right to maintain an action for damages as it would be contrary to the public interest for the organs of Government whether central or local, to have that right.

ZIYAMBI J

However, in view of my finding that the plaintiff is a separate entity from and not an organ of, the State, it is unnecessary to decide this point.

As to the final point raised by *Mr de Bourbon,* it is conceivable that a corporation like the plaintiff, in its dealings with the public, may misrepresent certain facts. Such misrepresentation in my opinion would amount to lying.

The exception is therefore dismissed with costs.

Scanlen & Holderness, plaintiffs legal practitioners

Atherstone & Cook, defendant's legal practitioners

TOWERS v CHITAPA 1996 (2) ZLR 261 (HC)

Court **High Court, Harare**

Gillespie J

Civil action

7, 8 & 11 September 1997 Judgment No. HH 126-96

Flynote

Practice and procedure - *res judicata* - requirements of- issue estoppel -whether part of our law-previous default judgment- relevance Of -whether court entitled to raise the matter mero motu

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Delict- actio legis Aquiliae- unlawful occupation of property- whether damages available against a *bona fide* possessor

Property - *bona fide* possessor - nature of- knowledge of completing claim -whether dealings *bona fide*

Legal practitioner - conduct and ethics - client - duty to - whether unprofessional conduct on part of legal practitioner to act for two parties with conflicting interests

Headnote

The plaintiff claimed damages under the Aquilian action for unlawful occupation of her residential property by the defendant. The defendant sought to deny that the plaintiff was the owner of the property and to claim that she had acquired a right lawfully to occupy the property through a third party who had purchased the property from the plaintiff.

The court held that the third party had not become the owner of the property and that the third party could not have given the defendant any right to the property that was not precarious of the plaintiff`s rights.

The court also held that a default judgment previously handed down was an insuperable obstacle to any claim by the defendant to have been in lawful occupation. Although there was no plea of *res judicaia* in respect of this

previous judgment, the court was entitled to address this point *mero motu* In order for the matter to be encompassed under the defence of *res jufficata,* the proceedings relied upon must have been between the same parties or their privies and the same issue must arise in the subsequent proceedings that was decided upon in the previous proceedings. This latter requirement was now interpreted expansively so as to permit the possibility of the defence being successfully invoked in respect of an issue determined as part of the ratio *decidendi of* the previous decision. In the present case the defendant was not a party to the previous litigation, but she was asserting a right that was derived through the party who was the defendant in the previous litigation. Although the same cause *of* action was not relied upon in the previous proceedings, relief of the same type was nevertheless sought in both cases. Additionally, despite the differences in the cause of action in the two cases, there was still an identity of question arising. The doctrine of *res judicata* therefore applied in the present case.

The defendant sought to raise the defence that she was protected against this claim due to the fact that she had been a *Bona fide* possessor. The court found the defendant could not have acted in good faith in continuing to occupy the premises after she had notice of the plaintiff s claim. After such notice, the state of mind of the defendant must have been one *of* doubt as to whether she had the right to remain in occupation. Additionally, she had been at fault, in that a reasonable person, faced with the plaintiff's claim, would have foresseen the possibility of harm to the plaintiff if her claim was valid. The plaintiff was thus entitled to damages for unlawful occupation by the defendant.

A legal practitioner has the clearest *of* duties not to act for parties with conflicting interests. His duty to place his best endeavours at the services of a client necessarily precludes him from exerting those efforts for another whose interests oppose those of the first client. Although in

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some cases it may be appropriate to make disclosure of the conflict and to continue to act with the parties' consent, in others it is improper even to seek that consent. In the present case the legal practitioner had acted unprofessionally by acting for two parties with conflicting interests to the prejudice of one *of* the parties.

Cases cited:

BC v Coo 1958 (1) SA 172 (SR)

Boshoff v Union *Goverment* 1932 TPD *345*

de Kuszaba-Dabrowski et Uxor v Steel NO 1966 RLR 60 (A)

Erasmus v Mittel & Reichman 1913 TPD 617

GILLESPIE J

Hefer v van Greuning 1979 (4) SA 952 (A)

Kommissaris van Binnelmidse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A)

Lydenburg Properties Ltd v Min of Copunswity Developnwnt 1963 (1) SA 167 M

Madondo v Fyfe \& Ors 1988 (1) ZLR 138

Munemo v Muswera 1987 (1) ZLR 20 (S)

Wolfenden v Jackson 1985 (2) ZLR 313 (S)

Case Information

B Mugabe, for the plaintiff

F Girach, for the defendant

Judgment

Gillespie J: One cannot have practised law in Harare since the mid 1980s and not have encountered the name of the plaintiff. There have been numerous suits at her instance over the last decade and all have arisen out of the same set of circumstances which have given rise to this claim. The evidence shows that the plaintiff was the registered owner of certain piece of in the district of Salisbury and known as Subdivision A of Plot 1 Greencroft Estate of Subdivision A & B of Mabelreign Ibis is a property in an older residential area of Harare and has on it a very old house. In April 1986, the plaintiff entered an agreement of sale in respect of portion of the property with Lizzy Ndaima. That only portion of the property was sold appears from the agreement itself which describes the property sold as "a certain piece of land situate in the district of Salisbury being main house at York Cottages Wyatt Road. Stand *A* of Greencroft Township". The deed of sale included terms which allowed the purchaser the right of occupation of the property from the date of the agreement on conditions which included payment by

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instalments of the purchase price and the obligation to pay all raw and taxes levied on the property from the time that the purchaser should take occupation, and certain other terms not relevant to the dispute.

The rather cryptic description of the property sold to Mrs Ndaima reflects the fact that at about the same time as die agreement of sale was entered, the plaintiff, on the advice of an attorney, T K Scott, another whose name achieved an unhappy notoriety within the legal profession in Harare, formed a company in association with Mr A D Lamb, whom I gather to be her son. The purpose of the formation of this company was in order that it might take transfer of the whole of Subdivision A; subdivide it further; build a series of cottages on that portion of it not occupied by the original house and sell them on sectional title. That the transfer was accomplished is shown by exhibit *8,* a deed of transfer in favour of York Cottages (Pvt) Ltd, the company

incorporated by the plaintiff and her son. It was executed in September 1986. The evidence of Mrs Towers, supported by exhibit 1, a copy of the relevant agreement, shows that after the incorporation of York Cottages, the rights of the seller under the agreement of sale with Mrs Ndaima were transferred to the company by means of the replacement of the original agreement with a new agreement, having effect from the same date as the original agreement and reflecting the seller as York Cottages. The terms of the agreement: including the description of the property sold, remained unaltered.

That the subdivision of the property was also accomplished is apparent, although again the deeds by which it was registered have not been produced. The fact of the subdivision appears from exhibit 11, a certificate of registered title executed in September 1990, showing that York Cottages holds title to Stand 701 Greencroft Township of Subdivision A of Plot 1 Greencroft Estate of Subdivision A & B of Mabelreign. This, so the accompanying diagram clearly shows, is portion of the original Subdivision A. The certificate shows in addition that building shares have been registered against the property and enclosed in the certificate is a list of transferees of various shares in York Cottages representing rights of occupation of cottages built on the property. A further exhibit, 10, is (or is portion of) a deed of transfer whereby the remaining portion of the original Subdivision A, that upon which the old house was built, was transferred from York Cottages back to the plaintiff. The document was executed in December 1990 and shows that this portion of land is properly described as the Remainder of Subdivision A of Plot 1 Greencroft Estate of Subdivision A & B of Mabelreign.

The reason for the transfer of the Remainder of Subdivision A back to the plaintiff emerges from the plaintiffs evidence. In October 1988, York Cottages cancelled the agreement of sale with Mrs Ndaima on the grounds that the purchaser had allegedly failed to comply with its obligation to make any payment at all of the rates and taxes levied on the property that had fallen due since the time when she first took occupation. The original notice of cancellation has not been produced but two letters, exhibits 3 and 4, show that the plaintiff undoubtedly communicated the notice of cancellation to the purchaser, together with clamant demands that she should vacate the premises. It should be noted that although there is nothing to show that the purchaser was given an opportunity to rectify the breach before cancelling, she was, Nk Girach's submissions

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to the contrary notwithstanding, not entitled to any such opportunity. The forfeiture clause, clause 11, entitles cancellation forthwith for the failure to pay "any instalments due in terms hereof or any other sum owing in terms hereof on due date". Notice of twenty one days was

GILLESPIE J

required to be given only for other breaches not constituting a failure to pay money due.

Mrs Ndaima did not act upon the letters. Mrs Towers accordingly embarked upon litigation. The sheer volume of Towers and York Cottages litigation over the last ten years arises from the fact that not only was this agreement cancelled but so too were the, or many of the, other agreements relating to the neighbouring cottages. The real cause for the miasma of unreasonable litigiousness which has hung around the Towers name, however, is not simply the number of cases instituted but the manner in which they have been prosecuted. Mrs Towers has engaged the services of a succession of attorneys, none of whom (1 exclude *Mr Mugabe from* this stricture) seem to have served her at all well. In fairness to them, this may be because she is a person who is most persistent in the production and filing of unhelpful and vexatious documents and insistent upon results of an immediacy which the law cannot supply. This, of course, has merely led to greater and greater delay and to her opponents regarding her, and her complaints, as possibly unstable, but of no greater account than that The evidence of the defendant shows me beyond doubt that she paid no heed at all to the plaintiff 's demands for the very ~on that she was assured by other Towers defendants and by her witness, Mrs Kamangwana, that the extravagant language and apparently exaggerated demands were marks of the woman and to be ignored.

This, unfortunately for the defendant, was a misunderstanding of the situation. It is, however, now important to explain how it is that the defendant entered the picture. She is a person who has been occupying the old house on the Remainder of Subdivision A since January 1989. This occupation has been in accordance with the provisions of a succession of leases entered between the defendant and, for the first two years, Mrs Ndaima, and thereafter, a Mrs Kamangwana. Mrs Ndaima evidently claimed the right to let the premises as arising out of her occupation in terms of the deed of sale, notwithstanding the fact that prior to the date upon which the first lease was signed, the agreement had purportedly been cancelled. Mrs Kamangwana for her part claims to enjoy a right to 1~ the premises arising out of the following circumstances.

Mrs Ndaima was her sister. In September 1988, Mrs Ndaima vested Mrs Kamangwana with her power of attorney to deal with the property on her behalf. The written power is exhibit 16. Mrs Kamangwana claims dial this writing is not a genuine transaction but it cloaks the real intention of the sisters which was that Mrs Kamangwana was at all times the purchaser of the property; that Mrs Ndaima lent her name to the transaction solely in order to

GILLESPIE J

hide from the relatives of Mrs Kamangwaria's deceased husband the fact of her ownership of

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property lest these relatives should claim the property from her, notwithstanding the fact that she acquired it only after his demise; and that the power of attorney was merely in order to enable Mrs Kamangwana to deal with the property as the owner. Mrs Ndairna, it must be noted, died in about February 1991. Despite this death, Mrs Kamangwana has never sought to make any claim against her deceased estate in respect of these alleged facts.

The defendant has throughout her occupation of the property paid the amount of the rental promptly every month. Of the rentals due, she has for a considerable period been paying the sum of $400 monthly to Mrs Kamangwaria's attorney, Miss Ahmed, who also happens to be her own attorney (a fact to which I shall return at the conclusion of this judgment). These amounts have been retained in trust for the plaintiff, being the amount of the monthly instalments of the purchase price due in terms of the agreement, and which she has refused to accept ever since the purported cancellation. The balance between this amount and the total amount of the rentals has been paid to Mrs Kamangwana.

One final fact needs to be recounted. It is that the plaintiff, as co-plaintiff with York Cottages, has successfully sued the estate of the late Lizzie Ndaima and on the 2nd February this year obtained from the Judge President judgment in the following terms:

> "(i) That eviction from 1 WyaLL Road Greencroft, Harare, be and is hereby granted in favour of the plaintiffs against the estate of the late L. Ndaima and all persons claiming through the estate.
>
> (ii) That defendant pay $32 600 being arrear rentals for the period extending October 1988 to February 1991.
>
> (iii) That defendant pay interest a *tempore morae* from October 1988 to date of payment.
>
> (iv) That defendant pay costs of suit"

1 Wyatt Road is the street address of the property in dispute. Neither the defendant nor Mrs Kamangwana have attempted at any time to intervene in any of a number of suits instituted by the plaintiff against Mrs Ndaima or her estate arising out of the same cause; nor has there been any attempt to cause the rescission of this default judgment in order to permit of an intervention.

GILLESPIE J

On the contrary, subsequent to the handing down of the judgment, the defendant in compliance with it vacated the premises.

The sole issue of substance in these proceedings was accordingly the question of liability for damages for the period of unlawful occupation. Nevertheless, in order to determine whether the defence advanced is sound it has been necessary to debate a right of occupation asserted by the defendant despite her having vacated in pursuance of the judgment. This ambivalence of attitude speaks of a failure on the part of the defendant's attorney (where was responsible for the pleadings, Mr *Girach* only having become involved in order to conduct the trial itself) to give due consideration to all that was involved. The pleadings for the plaintiff were unhappily drawn by herself since she had exhausted the stock of attorneys willing to represent her at the time the suit commenced. Argumentative and verbose as the declaration may have been, it nevertheless contained the averments necessary to found the cause of action for damages for unlawful

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occupation, although the prayer for relief is framed as a claim for unpaid rent. The plea filed for the defendant read simply:

> "1 Defendant denies being in breach of any agreement or of failing to pay any payment due in terms of the agreement of sale and puts plaintiff to the proof thereof.
>
> 2. Defendant denies that plaintiff is entitled to evict defendant or any other person claiming occupation through defendant and avers that defendant was not in breach and that plaintiff despite instituting numerous actions against defendant for eviction of defendant has never prosecuted any one such claim to finality. Defendant avers this is so as plaintiff is aware she has no chaim."

It needs no forensic genius 0 see how painfully inadequate is this plea. It does not deny ownership of the property by the plaintiff. It does not deny cancellation of the agreement with Mrs Ndaima by the plaintiff. It does not assert any right of occupation of the premises arising other than through Mrs Ndaima. The denial of any breach of any agreement by the defendant herself is extraordinarily evasive and is as vexatious and irrelevant as the reference to numerous other proceedings not prosecuted to finality. It failed to disclose a defence.

At the commencement of the trial, Mr *Girach* moved an amendment. By this amendment averments in the declaration showing that the plaintiff owns the

property; that Mrs Ndaima breached the agreement which was accordingly validly cancelled; and that the defendant, as being Mrs Ndainia's tenant, has been in wrongful occupation without payment for seven years are met with a plea of no knowledge. There is no denial of these matters. The facts averred in the plea are that the defendant took occupation under a lease with Mrs Ndaima; has held occupation since, under successive leases; and that there is no nexus between the parties and consequently no right to recover in law. This, although it may be a defence to a claim for payment of rent, does not disclose a defence to a claim for damages arising out of wrongful occupation, which I consider to be the substance of the claim. In addition, a point of prescription is raised in respect of claims for damages arising out of occupation prior to a period three years before the service of summons. Mr *Girach* also orally requested of NU *Mugabe* particularity as to whether the claim was founded in contract or delict. Mr *Mugabe* rather confusingly suggested it was founded in both. Since no cause in contract could be sustainedl directed that the trial proceed as a claim for damages for wrongful occupation, a course to which both counsel assented. The amendment to the plea was made, no further amendment being sought, and the evidence commenced. With the consent of both counsel 1 also took the opportunity at the commencement of the evidence to remove from the record any number of irregular proceedings and documents irregularly filed and to which 1 had had no regard.

This treatment shows that despite the appalling state of the pleadings, and a complicated set of facts, the issues actually resolve themselves into very simple definition. They are whether the plaintiff owns the property; whether the defendant has been in unlawful occupation of the same, whether the plaintiff has suffered loss caused through the defendant's fault; and the amount of any loss. Despite Mr *Girach's* attempts to raise technical doubts concerning the proof by the

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plaintiff of her ownership of the property; of the cancellation of the lease by the York Cottages; and of the validity of that cancellation, I have no doubt that I must accept these matters as proven. Not only are the facts as I have recounted them above sufficient to establish these elements of the cause but also they are not denied in the amended plea, rather being the subject of a plea of lack of knowledge. The effect of this is that evidence to contradict the averments could not be led. Indeed, the only evidence for the defendant touching on the issues, that of Mrs Kamangwana, shows that there is no issue of substance relating to the fact of ownership by the plaintiff and the purported cancellation in 1988. More, this lady claims that she herself was responsible for all payments that were made from the time of the deed of sale and that she never made any payment of rates or taxes.

GILLESPIE J

I doubt the verity of her evidence to have been responsible for all payments, but whether or not she was telling the truth on this point, the acknowledgment that there was no payment of note supports the testimony of the plaintiff to the effect that a breach involving just such a non-payment was committed.

I should say at this stage that the evidence of Mrs Kamangwana that she was the true owner of the property and that she let it to the Mrs Chitalia cannot assist the defendant. I do not believe the evidence of Mrs Kamangwana concerning the ruse she claims to have perpetrated with Mrs Ndaima. The facts sustaining this claim are not setout in any of thepleadings, not even that amended plea prepared at the last moment by Mr Girach. Worse than that, she has deposed an affidavit in the related matter before the learned Judge President which contradicts her present evidence. The affidavit is exhibit 21 and it contains the unequivocal averment that she herself leased the property from Mrs Ndaima who had purchased it from Mrs Towers and that she sublet the property to Mrs Chitapa with the consent of Mrs Ndaima. A corroborating averment to the same effect is to he found in an affidavit by Mrs Chitapa, exhibit 20, filed simultaneously with that of Mrs Kamangwana in the same matter. Her evidence, in addition, was given with such unease, and with so many hesitations and lengthy silences, as to create a definite unpression of decided unreliability. She has an interest in the matter. She should have been joined by Mrs Chitapa, to whom she might possibly owe an indemnity should the claim succeed, as a third party in these proceedings (as appears from facts I deal with below); and she has received regular payments from Mrs Chitapa which she would have to account for to Mrs Towers in the event of success by the latter. Her failure to attempt to enforce umsfer of the property to herself upon her sister's death, relief to which she would have been entitled were her evidence true, I regard as entirely imonsistent with her present stance. I do not accept her word where it is unsupported by independent confirmation.

Even if her evidence were true, ownership of the property was not transferred to the purchaser, whoever it was, but was reserved to the seller until such time as the deed of sale had been complied with in full. It has been a matter of no little bemusement to me that both parties appear to have skirted around the principle *nemo dat qui non habet.* I have no doubt that Iks Kamangwana installed Mrs Chitapa in the residence, that she did so on the basis of the power given by exhibit 16; and that she encouraged Mrs Chitapa in the belief that the plaintiff`s claim

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was frivolous and to be ignored, promising her that her tenure was secure. Never, however, did she become the owner of the

GILLESPIE J

property. Never could she have given to Mrs Chitapa a right not precarious to Mrs Towers' rights.

Aside from this, however, I consider that the default judgment given by the learned Judge President is an insuperable obstacle to any claim by the defendant to have been in lawful occupation. No plea of *res judicata* has been taken, but the evidence which has been led and traversed during the trial has been such that I cannot overlook the fact of the existing judgment. Were I to do so and to find for the defendant on the points that Mr Girach has argued concerning proof of the locus *standi* of the plaintiff, of the lawfulness of the cancellation and of the alleged right of the defendant to have occupied the property, my decision would appear to be flying in the face of an existing final judgment of this court I consider therefore that I can and must address this point mero motu To the extent that 1 need to do so, I have examined the file in the previous judgment that of Towers v *Estate Late* Ndaima Case No. HC-5579-95. In determining the weight and effect, I should attach to the existing judgment I have considered the principles of the exceptio rei judicata, as this has been received into our law, as if there had been taken to the defendant's plea an exception that itbdisclosed no defence to the claim that occupation by the defendant was unlawful, since this point had been determined by the existing judgment. The defendant is not prejudiced by this approach since it was on an application of this approach that I dismissed Mr Girach's motion for absolution at the close of the plaintiff s case. He had the opportunity in argument at that stage and thereafter at the close of the case to make any submissions he wished to on the point. What he chose to say in final argument was that he abided by the submissions he had earlier made and, without making any concessions in respect of the points traversed, he wished to add nothing further.

The requisites of a plea of *res judicata* have been examined in *Woffienden v Jackson* where GUBBAY JA, as he then was, said:

> "The origin of the doctrine is to be found in the civil authorities, which laid down two requirements for its successful invocation, namely, that the proceedings relied upon must be between the same parties or their privies, and that the same question, eadem *questio, must* arise. (See *Bertram v* Wood (1893) 10 SC 177 at 180) In Roman-Dutch law the requisites were divided into three. Voet 44.2.3 says that there must also be the same cause of action." 1(63)

GILLESPIE J

There must be an identity of parties to the litigation, of the thing or relief claimed and of the cause of action advanced. As to the first of these elements, patently the defendant herself was not a party to the default judgment. This, however, would not disqualify a plea of *res judicata* provided that the judgment in question were one either *in rem* 2(64) or, if relating solely in *personam*, the rights asserted by the party in the later case were derivative through the party in

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the previous matter. 3(65) This is what is meant by a person being *privy* to a party to previous litigation. 4(66) The judgment of the learned Judge President had as a premise the ownership by the plaintiff of the property in question, but was not *in rem*, relating as it did solely to rights of occupation of the premises as between the plaintiff and the defendant in that case. That the present defendant was *privy* to the defendant in that case admits of no doubt, however, as can be seen from a perusal of the very terms of the order. These included eviction from the premises of the plaintiff and all persons claiming occupation through the late Mrs Ndaima. From the present pleadings and evidence, the defendant asserts just such a derivative right.

Concerning the other two requirements for a plea of *res judicata*, those of identity of relief claimed and of cause of action asserted, it has long been debated whether these requirements are to be construed narrowly or more expansively so as to embrace a principle known to the English law as issue estoppel. If they are to be applied strictly, then only in a case where the same relief is sought by the same *causa petendi* can a party seek the protection of the doctrine of *res judicata*. 5(67) The broader application of these requisites, however, has received much judicial approval in South Africa and Zimbabwe since it first found acceptance in our law in *Boshoff v Union Goverment* where GREENBERG J accepted as correct the principle stated in Spencer Bower and Turner *Res Judicata* at para 162 that:

> "(w)here the decision set up as a res *judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms." 6(68)

GILLESPIE J

This approach has been approved by the Supreme Court in Zimbabwe, 7(69) although subsequent to that approval further doubt appeared to be cast on the issue by the same court. 8(70) Any doubt must now, however, be regarded as having been dispelled by the decision in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk.* 9(71) In this case the elements of the defence of *res judicata* were explained as consisting of an identity of plaintiff, defendant, thing in contest and cause of action. 10(72) It was held that the latter two requirements in particular ought in the appropriate case to be interpreted expansively so as to permit the possibility of a defence of *res judicata* being invoked in respect of an issue determined as part of the *ratio decidendi* of the earlier decision, a defence that may conveniently be termed issue estoppel, despite the fact strictly speaking, a different cause of action and different relief may be sued for in both cases. The defence ought only to be allowed, however, with caution, and only where the underlying requirement that the same question 11(73) should arise in both cases is satisfied.

Applying these principles to the matter before me, I conclude the following. It may be correct to say that the same cause of action was not relied upon both in the matter before the learned Judge President and that with which 1 am seized, since in the former the cause was the alleged cancellation of a lease for breach thereof and for damages for holding over in occupation, whereas in the latter (as the issues were settled by agreement at the commencement of trial) reliance is placed upon the *actio legis Aquiliae* for damages for wrongful occupation. Relief of

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the same type was nevertheless sought in both cases, namely eviction from the premises of the occupant together with damages. In addition 1 am satisfied that despite the differences in cause of action in each case there exists an identity of question. The identity arises out of the circumstance that in each case the issues of the ownership of the same property and of the wrongfulness of its occupation must turn upon the whether the same contract at issue in both cases between Mrs Towers and Mrs Ndaima was validly cancelled. If it were not, then her estate, and those claiming occupation through her, could not have been ejected from occupation of the premises and the present defendant could have derived an enforceable right of occupation. In my judgment, the decision of the Judge President could not have been given without him being satisfied as to the existence of the breach and the validity of the cancellation of the lease. These were

necessary parts of his *ratio decidendi*. In addition, his award, apportioning damages for holding over as between the two plaintiffs in the earlier matter, Mrs Towers and *York* Cottages, is premised foursquare upon an acceptance of the facts, asserted again in this action, that *York* Cottages was owner at the time of cancellation and was entitled to the damages awarded between the time of cancellation and the time the property was transferred to Mrs Towers. I consider then that the issues in this case of ownership of the property by Mrs Towers, cancellation of the contract with Mrs Ndaima, and the unlawfulness of the occupation by her successors in title, are settled by the decision in the earlier matter and that the defendant cannot reopen them while the default judgment stands intact.

The finding that the plaintiff has established that the defendant was in unlawful occupation of the property does not lead directly to judgment in the plaintiff's favour. It is necessary to apply the usual principles of Aquilian liability in order to determine whether fault, in addition to the wrongfulness disclosed thus far, has been established. Acknowledging that the owner is entitled to bring an Aquilian action for damages arising out of the wrongful occupation of his property by another, 12(74) Mr *Girach* has sought to avoid judgment against the defendant by quoting to me a rule that:

> "A claim for damages under the *actio legis Aquiliae* does not lie against a *bona fide* possessor as his good faith protects him against claim in delict." 13(75)

He has drawn to my attention the opposing view, that

> *"bona fides* does not necessarily exclude negligence and in appropriate circumstances the *bona fide* possessor who has negligently consumed destroyed or damaged a thing can be held liable despite his *bonafides."* 14(76)

Citing the discussion of these two opposing views, and the preference concluded for the former, by Carey Miller,15(77) he has urged me to find the defendant to be a *bona fide* possessor and to dismiss the claim against her on the ground that her good faith absolves her from any possible finding of fault.

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GILLESPIE J

1 am unable to accede to this motion. The argument for the defendant is flawed. First of all it equates the position of a defendant, who, even if she could he said to be in good faith, is not a *bona fide* possessor of that property in the strict sense of that word. That is to say, she does not claim to exercise dominion over that property in the genuine belief of the soundness of such a claim. Even on her own case, her occupation is precarious. She is to be regarded as a *bona fide* occupier rather than a *bona fide* possessor. I can see nothing in the discussion referred to above which seeks to extend to an occupier other than *a bona fide* possessor, 16(78) in the strict sense of that term, the protection enjoyed by the *bona fide* possessor.

More importantly, however, 1 do not consider that the defendant can properly claim to have been in good faith from the time she had notice of the plaintiff's claim. Upon an examination of her evidence and her demeanour in the witness stand, 1 am left with no doubt that she honestly chose to believe the blandishments of Mrs Kamangwana rather than the effusions of Mrs Towers. That, however, is of no assistance to her. She cannot claim to have acted in good faith after the date upon which she had notice of the plaintiffs claim.

> "I do not think that a man who remains in possession after having been lawfully told to quit can be said to be in *bona fide* possession pending the decision of a suit to eject him. In my view, [the defendants state of mind during this period must have been one of doubt as to his right to remain in possession. A man whose state of mind is that of doubt cannot be classed as a *bona fide* possessor: see. Voet 41.3.9 *(Gane p 2*59):
>
> > 'Nevertheless one is not understood to be of such good faith when he has a doubt whether he from whom he holds the thing was or was not the owner and had the capacity of alienation. It is one thing to believe, and another thing to doubt. Nay doubt is something midway between good and bad faith, between knowledge and ignorance, just as, when looked at in itself, the silence of one who is under question involves neither admission nor denial.'
>
> In *George v Shimwell Brothers* 1910 TPD 890,WESSELSJ,inajudgment in which DE VILLERS JP concurred, said that a person who is doubtful

GILLESPIE J

> as to his right to possess because he fears an adverse claimant is not a *bona fide* possessor." 17(79)

Notice was given to her no later than 7 December 1989, when the plaintiff wrote exhibit 5 to the defendant, addressing her as 'the illegal occupier' and demanding vacant possession and putting to her the basis of her claim.

Not only can she not claim to be in good faith, for the purposes of definition as a *bona fide* possessor or occupier from that date, but also I am satisfied that fault, for the purpose of the Aquilian remedy asserted by the plaintiff, is established. The reasonable person in the position of the defendant, faced with the claim of the plaintiff, would have perceived the possibility of harm to the plaintiff should her claim be true and should she, the defendant, remain in occupation in defiance of that claim. It was not reasonable simply to remain in occupation, lending support to the position of Mrs Kamangwana in defiance of the plaintiffs rights.

As to the question of damages, the evidence for the plaintiff is unsatisfactory. No attempt has

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been made to lead independent evidence of loss, and in particular of the rental value of the premises, as a convenient measure of loss to the plaintiff. The evidence that has been led is the arbitrary and subjective assessment of the plaintiff. 1 do not accept it. The defence case shows that throughout the relevant period, the defendant paid rent to Mrs Kamangwana in an amount of $650 monthly. The suggestion is fairly strong that this amount is much less than the rental value on the open market, but the evidence of these payments is the only reliable evidence 1 have. It has been conceded by Mr *Mugabe,* and properly so, that the plaintiffs claim prior to the date three years before the service of summons, that is to say prior to 4 May 1992, is prescribed. In addition, it is common cause that the defendant vacated the premises on 13 March 1996. The period of unlawful occupation for which damages may be awarded is therefore a period of forty six months. The plaintiff is accordingly entitled to damages in the sum of $29 900, the product of the rent paid by the defendant by the relevant period of unlawful occupation.

Before concluding this judgment I have, reluctantly, to say something concerning professional ethics. The defendant has throughout been represented by Messrs S Ahmed & Associates. This firm of attorneys has in addition acted

for Mrs Kamangwana in all her proceedings against the plaintiff. The defendant appears to have had independent advice from lawyers only once at the very inception of the dispute with the plaintiff and was, on her evidence, apparently advised nothing more than that if the plaintiffs claim were true then the defendant would be evicted by her. The defendant was, on the evidence, introduced to her present attorneys, by Mrs Kamangwana, for whom they were already acting. She has never been advised by these attorneys of a possible conflict of interest between herself and Mrs Kamangwana. Not until Mr *Girach* was instructed for her, a scant month before the trial commenced, was she advised of the possibility, far less the desirability, of joining Mrs Kamangwana as a third party for an indemnity or contribution.

It appears to me that the defendant's attorneys have allowed themselves to act, to the defendant's prejudice, in a case where there is the clearest conflict of interest between the defendant and Mrs Kamangwana. The attorneys should never have allowed this to happen. It was unprofessional. A legal practitioner has the clamant of duties not to act for parties with conflicting interests. His duty to place his best endeavours at the service of a client necessarily precludes him from exerting those efforts for another whose interests oppose the first client. Although in some cases it may be appropriate to make disclosure of the conflict and to continue to act with the parties' consent in others, it is improper even to seek that consent. 18(80) As a result of what has happened, the defendant will now have a judgment against her which is enforceable whereas had she been advised timeously of her rights, show would, 1 think inevitably, have been able to claim an indemnity from Mrs Kamangwana. That she would have made such a claim is clear from her answers to questions which I put to the defendant.

I was sufficiently alarmed at the close of the case at this apparently questionable conduct to direct that the attorneys should appear to explain why they had acted as they did and to satisfy me as to whether an order of costs ought not to be made against them. There was no such appearance, Mr *Girach* informed me that despite attempts made by himself, between my

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making the direction at the close of evidence and the hearing of argument, he had been unable to communicate with his instructing attorneys. No explanation has since been placed before me. In the absence of that explanation, 1 am unable to draw any conclusion other than that the defendant was not properly advised of her rights by her attorneys who wrongly accepted instructions

GILLESPIE J

from her when they owed a conflicting duty to their existing client, Mrs Kamangwana. In the circumstances, I consider a mark of disapproval to be warranted and will make it in an order of costs. I will order that the defendant's attorneys should recover no remuneration for themselves from the defendant, without resorting to the more dire expedient of awarding costs *de bonis propriis.* Since this order is given without hearing any explanation from the attorneys, 1 will give leave to them to show cause, if so advised, within 30 days of the judgment, why this order should not be rescinded. 19(81)

In the result, I order judgment for the plaintiff in the sum of $29 900 and costs of suit. The defendant's attorneys of record are to recover no fees or costs from the defendant, save in respect of the plaintiffs taxed costs of suit and for necessary dibursements incurred on the defendant's behalf, including counsel's fees on brief. Leave is given to the defendant's attorneys of record, would they be advised to do so, to show good cause, by chamber application not later than 30 days from the date of this judgment, for the rescission of this punitive order of costs.

Mugabe & Partners, plaintiff's legal practitioners

Sengwayo, Mwonzuro & Partners, defendant's legal practitioners

MADAMOMBE v MADAMOMBE 1996 (2) ZLR 278 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

30 July & 12 September 1996 Judgment No. S- 165-96

Flynote

Review - magistrates court proceedings - decision of magistrates court (customary law) - court to which review should be brought - what decisions may be brought on review - court's powers on review

Headnote

The respondent sued the appellant in the court of the assistant magistrate (customary law), Harare, claiming divorce and associated relief. Dissatisfied with the decision of the assistant magistrate, the respondent applied to the provincial magistrate for a review of the judgment. He

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alleged, but gave no evidence of, bias and interest on the part of the assistant magistrate. The provincial magistrate, purportedly acting in terms of s 74(3)(b) of the Magistrates Court Act *[Chapter 7:10],* dismissed the respondent's allegations of bias and interest, but said that the assistant magistrate had misdirected herself on the law relating to the distribution of matrimonial property, which misdirection had prejudiced the respondent. He purported to set aside the assistant magistrate's order and substituted another, more favourable to the respondent.

Held, that the only circumstances in which a provincial magistrate could review a decision of an assistant magistrate exercising customary law jurisdiction is where there is an allegation that it was not competent for the lower court to give the judgment or order. Once that is alleged, the other common law grounds of review, such as bias, interest and irregularity, would also come into play. In this case, there being no allegation that the assistant magistrate made an incompetent order, the provincial magistrate should have dismissed the application for review.

Held, further, that even if the provincial magistrate did have jurisdiction to

hear the case, all he could do was either set aside the judgment or order and send the matter for further hearing or for hearing *de* novo, or annul the proceedings if the lower court had no jurisdiction. He could not substitute his own order for that of the assistant magistrate. On the other hand, under s 74(3)(a) of the Magistrates Court Act *[Chapter 7:10]* or s 24(1) of the Customary Law and Local Courts Act *[Chapter 7:05],* there was a right of appeal to the provincial magistrate.

Cases cited:

Gondo v Gondo S-147-94

Takafunw v Takafuma 1994 (2) ZLR 103 (S)

Zvorwadza v Zvorwadza 1996 (1) ZLR 404 (S)

The court referred to the following statutory provisions:

Customary Law and Local Courts Act *[Chapter 7:05],* ss 16 and 24(1) Magistrates Court Act *[Chapter 7:10],* ss 25 and 74(3)

Case Information

The appellant in person

D W Mhiribidi, for the respondent

Judgment

Muchechetere JA: The respondent issued summons in the magistrate's court, Harare, against the appellant claiming divorce, custody of the three minor children of the marriage, and a share

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of the matrimonial property. The appellant opposed the claim.

The suit was heard by an assistant magistrate (customary law), Harare. The magistrate delivered her judgment on 21 September 1995. She granted the divorce and awarded custody of the three minor children to the appellant. The respondent was ordered to pay maintenance for the minor children to the appellant. In connection with the matrimonial property, the magistrate ordered that the matrimonial home, 18 Bideford Road, Hatfield, Harare, be divided equally between the parties. The movable property was ordered to be divided in accordance with the schedule agreed to between the parties and produced as "Annexure W' during the trial, but it was made clear that the respondent was to have a 14 inch colour television set and a motor vehicle.

On 13 October 1995, the respondent applied to the provincial magistrate for a review of the judgment. He wanted the judgment to be set aside and the matter to he heard by a different magistrate. His reasons for the application were that the trial magistrate had, during the trial, refused to recuse herself from the case. The record indicates that some time after the hearing but before

MUCHECHETERE J

the judgment was delivered the respondent made an application for the trial magistrate to recuse herself from the case. He alleged that the trial magistrate had an interest in the matter, in that the appellant had told him that she was to discuss the matter with the trial magistrate beforej udgment was delivered. He believed the discussion did eventually take place. Further, he alleged that the appellant was related to some officials in the Ministry of Justice, Legal and Parliamentary Affairs and that they would influence the court's decision. No evidence was, however, given in support of the allegations.

The trial magistrate replied, denying the allegations that she had an interest in the matter, that she was biased, and that she might be influenced in her decision. She also indicated that, in any event, the application came after she had already written the judgment in the matter and had set a date for the judgment to be delivered - 6 October 1995.

The provincial magistrate agreed to review the matter. His review judgment was delivered some time in February 1996. He rejected the respondent's allegations of interest and bias by the trial magistrate. In this connection he said the following:

> "On review, the review courts only look (at) procedural matters and (at) gross irregularities. On these two, this court finds that the allegations o bias on the part of the learned assistant magistrate are false and unsubstantiated."

The provincial magistrate, however, went on to say:

> "The other point which the review court looks at is whether any party in the dispute has been prejudiced. On this question I tend to see that the application (now the respondent) was highly prejudiced by this judgment and especially on the division of property."

He thereafter went on to indicate that the trial magistrate had misdirected herself on the law

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relating to the distribution of matrimonial property and that this misdirection ("misconception" of the law) resulted in a wrong judgment which "will result in grave injustice against the application." He added:

> "If the court *a quo* had arrived at the 50% share of immovable property by way of s 7(3) of the Matrimonial Causes Actno-one could have asked, as (the) court can use its discretion to take what belongs to one party and give it to the other. This court is unaware of the law which says that a

> spouse can get a 50% share because she stayed with the application for many years. In the final analysis, because of the great misconception of the law and the precedent system that this court feels that there was gross irregularity on the distribution of immovable property ... Hence the order of 50% share of the immovable property is set aside. It is substituted as follows:
>
> The defendant (now the appellant) is entitled to a 25% share of the immovable property at number 18 Bideford Road, Hatfleld."

The law in connection with reviews of this nature is set out in s 74(3)(b) of the Magistrates Court Act *[Chapter* 7:10], which reads:

> "Notwithstanding any other provision of this Act
>
> (a) ...
>
> (b) a provincial magistrate may, in relation to judgments and orders of assistant magistrates referred to in subsection (1) [former presiding officers in terms of the Customary Law and Primary Courts Act, 1981 (No. 6 of 1981)], whose courts are situated within his province, exercise the same powers as he may exercise in terms of section 25 of the Customary Law and Local Courts Act *[Chapter 7:05],* in relation to judgments and orders of local courts within his province."

And s 25, subsections (1), (2) and (3) read:

> "(1) Where it comes to the notice of a magistrate that a local court within his province may have given a judgment or order which it is no competent to give he shall direct the local court to refer the case to him, together with such report thereon as the person presiding over the community court or primary court may wish to give.
>
> (2) Where it appears to a designated officer that a local court has given &judgment or order which it was not competent to give he shall refer the case to a magistrate for the province within which the local court is situated.
>
> (3) Where the case has been referred to him in terms of subsection (1) or (2), a magistrate may, if he considers that
>
> (a) the local court concerned had no jurisdiction

> (i) set aside the judgment or order concerned and return the case for further hearing with such advice or directions as appear to him to be necessary or desirable; or

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(ii) set aside the judgment or order concerned and direct the case to be heard, *de novo,* before the same or another local court which such advice and directions as appear to him to be necessary or desirable; or

(iii) confirm the judgment or order concerned:

Provided that any such confirmation shall not affect the rights of any party to appeal against the judgment or order or to bring the proceedings concerned on review before any court of competent jurisdiction;

(b) ...

(c) no local court has jurisdiction, annul the proceedings

Provided that a magistrate shall not exercise the powers conferred upon him by this subsection in any case

(i) unless the parties concerned have been afforded a reasonable opportunity of making representations as to the proposed exercise of any such powers; or

(ii) which was determined more than twelve months prior to the case being referred to him." (The underlining is mine).

From the above, it is clear that the provincial magistrate can only review the judgment or order of an assistant magistrate when there is an allegation that it was not competent for the court to give the judgment or the order. I would agree that the other common law grounds of review, such as bias, interest and irregularity in the proceedings, would also come into play.

In this case, there was only one allegation which was relevant - that the assistant magistrate was either biased or had an interest in the matter. This was rejected by the provincial magistrate. After that, the provincial magistrate should have dismissed the whole application.

However,as shown above, he went on to alter one of the orders of the assistant magistrate, on the ground that her understanding of the law on the matter wad faulty. Ibis was not proper because there is no provision for such action under the above sections. What the provincial magistrate did was to act as an appeal court. He could only exercise that power in terms of either s 74(3)(a) of the Magistrates Court Actors 24(1) of the Customary Law and Local Courts Act.

MUCHECHETERE J

Further, after the provincial magistrate improperly interfered with the judgment and order of the assistant magistrate, he compounded his error by setting aside a portion of the order and substituting it with another order. From the relevant sections it is clear that what the provincial magistrate should do after finding that a judgment or order is incompetent is to either set aside the judgment or order concerned and send the matter for further hearing or for a hearing *de novo,* or annul the proceedings if the court had no jurisdiction. There is no provision for him to substitute his own order for that of the assistant magistrate.

Clearly the provincial magistrate acted under the wrong section. As already indicated above, his actions were, however, in accord with the appeal powers under the said s 74(3)(a) of die

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Magistrates Court Act, which reads:

> "(3) Notwithstanding any other provision of this Act -
>
> (a) an appeal shall lie from a decision of an assistant magistrate referred to in subsection (1) to the provincial magistrate for the province in which the court of the assistant magistrate is situated... "

From the submissions of the parties at the bearing, it is also clear that they also treated the hearing as an appeal against the judgment of the assistant magistrate on the merits.

In the result, it would be in the interests of finality that the proceedings before the provincial magistrate be treated as an appeal against the judgment of the assistant magistrate. The appellant and Mr *Mhiribidi,* who appeared for the respondent, were content to have the matter resolved in this manner.

During the hearing the appellant sought to introduce new matters which were never mentioned in the proceedings before the assistant magistrate. After it was pointed out that she could only appeal on what is on the record, she confined herself to complaining that the respondent was not abiding by the terms of the assistant magistrate's maintenance order. And she also submitted that the maintenance order was inadequate. She, however, conceded that if there had been full compliance with the order there would have been little or nothing to complain about.

In connection with the distribution of the matrimonial home, the appellant maintained that the assistant magistrate's order was fair. She reiterated that she contributed financially and indirectly to the upkeep of the home - she

worked throughout the subsistence of the marriage and at times she, supported the respondent during the time he was out of employment.

At some stage during the hearing, the appellant also sought to challenge the order in connection with the distribution of the movable property. It was, however, pointed out that that distribution was made in accordance with the agreement between the parties the Annexure B, produced by consent in the assistant magistrate's court. In the circumstances, it would not be proper to challenge that award in this court.

Mr Mhiribidi, on the other hand, did not seek to make any submissions on the question of custody, maintenance or the distribution of the movable property. On the distribution of the matrimonial home he conceded that the provincial magistrate's understanding of the law in the matter was faulty. And that the approach of the assistant magistrate was correct. 'The provincial magistrate's view seemed to have been that s 7 of the Matrimonial Causes Act *[Chapter* 5:13] does not apply in a marriage under the Customary Marriages Act *[Chapter* 5:07]. This is not correct because the amended s 16 of the Customary Marriages Act enjoins any court to apply the principles of s 7 of the Matrimonial Causes Act in the distribution of matrimonial property.

Further, the provincial magistrate misunderstood the message in *Takafuma v Takafuma* 1994

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(2) ZLR 103 (S). It was not held in that case, as the provincial magistrate contended, that where an immovable property is registered in the name of one spouse the other party had no right to a share in the property. All that was stated was that, in the circumstances, the court should commence its enquiry under s 7 of the Matrimonial Causes Act by allocating that property onto the side of the registered spouse. At pp 105 H- 1 06B McNALLY JA stated the following:

> "The registration of rights in immovable property in terms of the Deeds Registries Act is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name property is registered. See the definition of 'real right' in s 2 of the Deeds Registration Act *[Chapter* 139]. The real right of ownership, of jus *in re propria,* is 'the sum total of all the possible rights in a thing' the see *Wille's Principles of South African Law 8* ed, at 255.
>
> The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion

---

MUCHECHETERE J

> which must be exercised judicially. The court does not simply lumpall the property together and then hand it out in as fair a way as possible. It must begin, 1 would suggest, by sorting out the property into three lots, which 1 will Term'his','hers" and' theirs' Then it will concentrate on the third lot marked 'theirs'. It will apportion this lot using the criteria set out in s 7(3) of the Act. Then it will allocate to the husband the items marked 'his' plus the appropriate share of the items marked 'theirs'. And the same to the wife. That is the first stage.
>
> Next it will look at the overall result. again applying the criteria set out in s 7(3) and consider whether the objective has been achieved. namely. 'as far as is reasonable and practicable and. having regard to their conduct is Just to do so. to place the spouses ... in the position they would have been in had a normal marriage relationship continued...'
>
> Only at that stage. I would suggest. should the court consider taking away from one or other of the spouses something is actually 'his' or 'hers'." (The underlining is mine).

In other words, the court would be justified to take away from "his", in this case the matrimonial property which was registered in the respondent's name, to do justice between the spouses. In that consideration, the duration of the marriage plays a significant part. See *Gondo v Gondo* S-147-94; *Takafuma v Takafuma supra*; Zvorwadia v Zvorwadia 1996 (1) ZLR 404 (S) and other cases referred to therein.

The assistant magistrate therefore applied the proper law in the matter, Her conclusion on the facts and her discretion in the award were not challenged by Mr *Mhiribidi* We agree that her decision was just and equitable.

In the result, the appeal is allowed with costs. The order of the provincial magistrate is set aside and the following is substituted:

> "The application is dismissed with costs. The order of the assistant magistrate is upheld in its entirety."

KORSAH JA: 1 agree.

EBRAHIM JA: 1 agree.

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Kadandara, Mhiribidi & Chinhengo, respondent's legal practitioners

Z-WAYS CORPORATION (PVT) LTD v SHERIFF OF ZIMBABWE & ANOR 1996 (2) ZLR 286 (HC)

Court **High Court, Bulawayo**

Chatikobo J

Civil application

13 September 1996 Judgment No. HB-64-96

Flynote

Practice and procedure - execution - sale - immovable property confirmation of sale - when may be made - declaration of purchaser -separate act from confirmation of sale

Headnote

Rule 360 of the High Court Rules provides that the Sheriff shall confirm a sale in execution of immovable property only if, within seven days from the date the Sheriff declares the highest bidder to be the purchaser in terms of F 356, no objections are made to the court. The sale cannot be confirmed before that seven day time period has elapsed. In terms of F 355, a public auction must be held in the presence of a commissioner appointed by the Sheriff, who shall certify to the Sheriff that the acution was properly conducted. The Sheriff is thus not obliged to attend such a public auction. After he receives the commissioner's certificate he is obliged to consider the reasonableness of the price before declaring the highest bidder to be the purchaser. It is at this stage that the declaration of the highest bidder is made. The seven day period for objections runs from this date and not from the date when the property is sold at the public auction.

It was therefore irregular for the Sheriff to declare the purchaser to be the highest bidder of immovable property that was sold in execution at a public auction and then immediately to confirm this sale. The Sheriff should also not have confirmed the sale when he was aware that a court application had already been made objecting to the sale.

The sale price in respect of the property was found to be unreasonably low and the sale was set aside by the court.

CHATIKOBO J

Cases cited:

Lalla v Bhura 1973 (2) RLR 280 (G)

Mapedianhamo v Comtnercial Bank of Zimbabwe of Zimbabwe Anor 1996 (1) ZLR 257(S)

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Morfopoulos v Zimbabwe Banking Corporation Ltd of Zimbabwe Ors 1996 (1) ZLR 626 (H)

Smith of Zimbabwe Anor v Acting Sheriff of Zimbabwe Anor 1995 (1) ZLR 158 (S)

Woods v Spence of Zimbabwe Anor 1978 RLR 254 (G)

The court referred to the following rules of court:

High Court Rules *1971* (RGN *1047* of *1971),* rr *355, 356 of Zimbabwe 360*

Case Information

A Morris-Davies, for the applicant

No appearance for the first respondent

S Takundwa, for the second respondent

Judgment

Chatikobo J: The applicant beseeches me to set aside the sale in execution of an immovable property situate in the district of Bulawayo called stand 44079 Bulawayo Township of Bulawayo Township Lands 270 square metres in extent which was sold by public auction to the second respondent (Kachere) on *5* May *1995* for a price of $100 000. The applicant that the price is unreasonably low. The sale was conducted by a firm of estate agents acting on the instructions of the Sheriff, who in turn an acting at the behest of UDC who had a judgment entered against the applicant.

After the sale in execution, the applicant's managing director filed a court application in his own name seeking the setting aside of the sale on the ground that the price fetched at the forced sale was unreasonably low. This application was filed with this court on 16 May 1995, eleven days after the auction sale. In it the applicant's managing director cited UDC, the judgment creditor, the Deputy Sheriff and the estate agents as respondents. Kachere was not a party to those proceedings. On 7 June 1995, the Sheriff wrote to applicant's manaing director pointing out that the application had procedural defects in that it did not cite UDC and Kachere, and that the Sheriff should have been cited in place of the Deputy Sheriff. In fact, UDC had been cited through it should not have been cited. The applicant's managing director latched on to this advice, wrong as it was in some respects. He filed a notice of amendment on *26* June *1995* in which he sought to substitute as respondents UDC, Kachere and the Sheriff. He did not serve this document on any of these parties. Thinking he had done everything that was necessary to save his

company's property from the hammer under which it had already fallen, he sat back and did nothing until 17 Janury 1996 when the Sheriff instructed lawyers to attend to the transfer of the property into the name of Kachere. The letter reads:

> "I refer to the sale in the above matter and advise that no objections were received and on 16 January 1996, the

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Sheriff declared and confirmed the highest bidder W Kachere the purchaser at the sum of $ 100 000. "

The lawyers are then instructed to pass transfer to Kachere. The applicant's managing director says he received a copy of this letter on 29 January 1996. On receiving the letter, he immediately instructed his legal practitioners of record. The result was the institution of this court application which was filed on 28 February 1996. The application in case No. HC- 1231-95 was eventually withdrawn on 5 August 1996, a mere 4 days before the present application was argued in court and after the point of its pendency had been taken in Kachere's opposing affidavit.

In the present application, the applicant contends that the price realised at the action is unreasonably low and should be set aside.

The principles governing the setting aside of sales in execution are to be found in Order 40 of the High Court Rules. They have been the subject of several decisions both by this court and the Supreme Court, most of which are conveniently collected in the recent judgment of my brother GILLESPIE in Mor*fopoulos v Zimbabwe Banking Corporation Ltd & Ors* 1996 (1) ZLR 626 (H). All the cases 1 have looked at, do not, however, directly deal with the interesting point which arises in this case. It arises in this way. In terms of r 355 of the Rules, a public auction shall be held in the presence of a commissioner appointed by the Sheriff, who shall certify to the Sheriff that the auction was duly and properly conducted, if such be the case. In his certificate, the commissioner is required to state the name of the execution debtor, the amount of the purchaser price, the name of the purchaser and the conditions of the sale. It must be apparent from a reading of this rule that the Sheriff does not have to be present at the auction. The question of the Sheriff's absence from the place of auction will become clearer when I come to deal with a submission advanced by Mr *Takundwa* on behalf of Kachere concerning the way in which a purchaser is declared in terms of r 356. This latter rule provides that if the Sheriff is satisfied that the price offered is reasonable having regard to the circumstances of time and place and to the state of the property market he shall declare the highest bidder to be the

purchaser subject to the sale being subsequently confirmed. Rule 360 provides that is no objections are made to the court within seven days from the date of that the Sheriff declares the highest bidder to be the purchser in terms of r 356, he shall confirm the sale.

As can be seen from the Sheriffs letter of 17 January 1996 quoted above, he declared the purchaser and confirmed the sale on the same day. By doing so he failed to accord those who may have wished to object an opportunity to do so within the seven day period provided in r 360. The declaration of the purchaser is an independent and separate act which must take place seven days before the sale is confirmed It is irregular to declare the purchaser and then immediately confirm the sale on 16 January 1996 having received no objections. No objections could be made before the purchser was declared. It is here that 1 think Mr *Takundwa's* submission fails. He submitted that the rules do not contemplate There after the properly has been knocked down to the highest bidder the Sheriff will then sit down and consider whether to declare the highest bidder to be the purchaser or not. It was his submission that the drop of the

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hammer at the auction symbolises the declaration of the highest bidder to be the purchaser and that the seven day period within which to object runs from that day. This cannot be so. As 1 have already said, a reading of r 355, dealing with the duties of the commissioner, makes it clear that the Sheriff himself does not have to be present at the auction. I would be surprised if he attends any of the auctions. That is why the commissioner appointed by him has to submit a certificate to the Sheriff certifying that the auction was properly conducted. Thereafter the Sheriff is required to bring his own mind to bear on the matter by considering to bring his own mind to bear on the matter by considering the reasonableness of the price before declaring the highest bidder to be the purchaser. All M goes to show that the declaration of purchaser is a separate act from the auctioneer's announcement of the highest bidder.

That is why the Sheriff himself says he declared the highest bidder to be the purchaser on 16 January 1996, nearly nine months after the sale. There was nothing wrong with him doing so. What was wrong was for him to roll into one as he did, the two separate juristic acts of declaring the purchaser and he put it beyond the power of interested parties to object. Had the sale not been confirmed when applicant's representative received the letter of 17 January 1996, steps could have been taken to lodge objections timeously. In my view, it would be proper to treat the sale as uncofirmed because of the way in which the Sheriff dealt with the issue of confirmation. As GILLESPIE J stated in *Morfopoulous supra*:

CHATIKOBO J

> "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 Sheriffs 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."

I have said there was no declaration of purchaser before 16January 1996. The simultaneous declaration of purchaser and confirmation of the sale makes it proper for me to treat the sale as unconfirmed.

In any event, r 360 entitled the Sherif to confirm the sale within seven days after the declaration of purchaser if no objections are made to the court. The seven day period is meant to set a time limit before whose expiry the sale cannot be confirmed. It is not meant to restruct the time within which to make objections. Objections can be made to the court at any time after the auction and before the Sheriff confirms the sale in terms of r 360. That means that even before the highest bidder is declared to be the purchaser an interested party can object. The objection has to be made to the court. See Smith & Anor v Acting *Sheriff & A*nor 1995 (1) ZLR 158 (S).

In casu, the applicant's representative filed a court application in court on 16 May 1996 entreating the court to set aside the sale on account of the low price. Although the applicant's representative did not cite the correct parties the application makes it clear what the cause of complaint was. It was directed tot he court, the authority to whom objections should be made. Although the Sheriff was not a party to the application he was aware if it because as 1 have already said, he wrote to the applicant's representative on 7 June 1995 advising the latter that he had cited the wrong people. When he purported to confirm the sale on 16 January 1996, he was aware of the objection that had been made to court on 16 May 1995. It was therefore not

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correct for him to say no objections had been received. One had been received by the court and by the Sheriff himself. It was therefore not open to him to confirm the sale before that court application had been resolved one way or another. The confirmation of the sale is consequently invalid on this ground as well. The matter should therefore be approached on the basis that the sale was not confirmed.

In terms of r 359, any person with an interest in a sale can apply to have it set aside on the ground among others, that the price realised at the auction is unreasonably low. A price is unreasonably low if it does not approximate to

CHATIKOBO J

the market place. It has been said that a market price a] ways varies between an upper and lower limit and it is always a matter of opinion: *Lalla v Bhura* 1973 (2) RLR 290 *(G)* at 282D.

It is also a truism that courts do not always readily set aside sales in execution because if they do the efficacy of such sales would be undermined. Equally, where die sale has not been confirmed, the purchaser has no firm rights in connection with the property. It is, until the stage of confirmation, a conditional sale: Woods v *Spence & Anon* 1978 RLR254 *(G);Mapedzanhamo v Commercial Bank of Zimbabwe & & Anon* 1996 (1) ZLR 257 (S). The applicant does not give a lot of details on how the auction was conducted All that is averred is that at the auction the auctioneer asked if any of the parties were prepared to make any bids. When none of those present did, the auctioner asked if anyone was prepared to bid at $100 000.

Kachere put his hand up. The auctioneer called for higher bids and when he got none he knocked down the sale at $100 000. After the sale, the applicant's representative erroneously believing that he could still sell the property by private treaty and pay the creditor, secured a buyer at a hefty price of $550 000. He says he also received two other offers, one for $550 000 and another for $350 000. He has produced a sworn valuation which puts the market price of the property at $400 000. Even if one takes the lowest figure of $350 000, the difference between this figure and the $ 100 000 which was realised at the auction is $250 000. It cannot be said that a price which is a quarter of a million dollars less than the market price (1 may say the lower limit of the market price) is not unreasonably low.

Bearing in mind that the sale is unconfirmed and that consequently the onus which the applicant has to discharge is slightly less stringent, 1 am satisfied that applicant is entitled to the relief which it seeks.

The applicant has offered to indemnify Kachere in respect of all the costs connected with the sale in execution. 1 will make an order in that regard.

As far as the costs of this application are concerned, it is my view that in spite of its success in this court the applicant should not recover its costs. It came to this court to seek an indulgence. Kachere was put to the expense of defending a deal which he clinched in proper compliance with the rules of court. His opposition was not at all unreasonable. The application on its part was quite tardy in protecting its rights. Had the application in case No. HC- 1231-95 been put on

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its proper footing and pursued diligently, Kachere

CHATIKOBO J

may not have resisted it since it was mounted a few days after the sale and before he was declared purchaser. The applicant appreciates as much and does not ask for costs in the event of success.

It is therefore ordered as follows:

(1) That the sale in execution of the applicant's property known as stand 44079 Bulawayo Township carried out on 5 May 1995 to the second respondent be and is hereby set aside.

(2) That the first respondent be and is hereby directed to cause the property to be sold afresh by public auction.

(3) That the applicant be and is hereby ordered to pay to the second respondent all costs connected with the sale in execution, including costs incurred consequent upon the declaration of the second respondent as purchaser.

(4) There will be no order as to costs in this application.

Morris-Davies & ConWany, applicant's legal practitioners

Lazarus & Sarif, second respondent's legal practitioners

WIZARD POOLS (M) LTD v MASHONALAND TURF CLUB 1996 (2) ZLR 293 (SC)

Court **Supreme Court, Harare**

Gubbay CJ McNally JA & Muchechetere JA

Civil appeal

25 June & 24 September 1996 Judgment No. S- 148-96

Flynote

Gambling -pools- conducting of pools betting on horse races-whether thereby conducting totalizator without holding a totalizator licence

Interpretation ofstatutes-maxims-generalia specialibus non derogantmeaning -when applicable

Headnote

A turf club sought to prevent a pools company from conducting pools betting on horse-racing in Zimbabwe. The club contended that the pools company was conducting a totalizator without holding a totalizator licence. The pools company argued that it was entitled to conduct its pools

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betting on horse racing as it was a licensed pools promoter. The case revolved around the interrelationship between two pieces of legislation, namely the Betting and Totalizator Control Act *[Chapter10.02]* ("die totalizator legislation") and the Pools Control Act *[Chapter 10*:19] ("the pools legislation"). The totalizator legislation was the older of the two. Under the totalizator legislation a turf club was entitled to operate a totalizator at the race course on race day and this was later extended in 1963 to allow "off-course" totalizator betting. All pools betting other than that allowed under the totalizator legislation was originally prohibited under the pools legislation. However, in 1960 this legislation was amended in such a way that pools betting was allowed provided it was conducted by post. Later, in 1969, the words "by post" were deleted in this legislation, the effect of which was that there was now a general right to engage in pools betting.

Held, that maxim *generalia specialibus non derogant* means that general

McNALLY JA

provisions do not override pre-existing provisions or that general provisions do not derogate from special ones.

Held, further, this maxim did not apply in the present situation. What was being suggested by the turf club was that because the club had been granted a right under the totalizator legislation, others could not have a similar right under the pools legislation, even though the pools legislation says that they may. The provision allowing the turf club to run a totalizator under the totalizator legislation was not a special provision. Even if it was to be assumed that this provision was a special provision, the 1969 legislation did not derogate from the special provision. The turf club was still entitled to run its totalizator as before. All that it had lost was its exclusive right.

Held, further, that the 1969 pools legislation amendment did not amend the provisions of the totalizator legislation except that the offence under a 17 of that legislation must beread so as to make it a defence to a charge under that section that the person charged is a licensed pools promoter under the pools legislation.

Held, therefore, that the trial court should not have granted the interdict sought by the Turf Club.

Cases cited:

Corp of Blackpool v Starr Ests Co Ltd [1922] 1 AC 27

De Villiers & Ors v Sports Pools (Pvt) Ltd & Anor 1975 (1) RI-R 221 (A)

Dokotera v Master of the High Court & Ors 1957 R & N 697; 1954 (4) SA 468 (SR)

Fitzgerald v Champneys (1861) 30 U Ch 777; 70 ER 958 In re *Smith's Est, Clements v Ward* (1887) 35 ChD 589

Khumalo v Director-General of Co-Operation & Development 1991 (1) SA 158 (A)

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Norman & Co (Pty) Ltd v Hansella Construction Co (Pty) Ltd 1968 (1) SA 503 (T)

R v Fanaken 1947 SR 155

R v Landman 1966 RI-R 363 (A)

S v C 1970 (2) RLR 180 (A); 1971 (1) SA 162 (RA)

Seward v The Vera Cruz (1884) 10 App Cas 59

The court referred to the following statutory provisions:

Betting and Totalizator Control Act *[Chapter 10.02]* , ss 17 & 18 Pools Control Act *[Chapter 10:19], ss 10 & 19*

Judgment

McNally JA: This appeal from a decision of MR JUSUCE SMITH in the

McNALLY JA

High Court on 19 January 1994 concerns the overlapping provisions of two Statutes. They are

1. the Betting and Totalizator Control Act [*Chapter* 10:02]; and
2. the Pools Control Act *[Chapter 10:19].*

I shall refer to the parties as "Wizard Pools" and "the Turf Club", and to the Acts as "the Tote Act" and "the Pools Act."

The Turf Club came to court applying for an interdict against Wizard Pools and another company (which has not appealed). It sought to prevent both companies from conducting pool betting on horse-racing in Zimbabwe. The Turf Club's contention was that they were in effect conducting a totalizator without being the holders of a totalizator licence.

This argument succeeded and the interdict was granted. Wizard Pools appealed.

I note in passing a certain confusion. The affidavit of the Turf Club's chief executive, Mr Wilson, complained of Wizard Pools and the other company conducting "pool betting on the result of selected horse-races taking place in South Africa". Yet the relief sought in the draft order was that the respondents should "desist from engaging in pool betting on horse-racing in Zimbabwe." And the relief granted was that the respondents "desist from engaging in any Pool betting business in Zimbabwe on horse-racing." The change in word order is significant. The order went further than the relief asked for and incorporated the complaint of Mr Wilson which in turn was not consistent with the relief he sought. No point has been made of these differences, but they do illustrate a fact to which 1 will revert- that the Turf Club's totalizator is by no means limited to betting on races at Borrowdale.

The appeal is essentially one of law, relating to the interpretation of the statutes in question. It is

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contended that the court *a quo* erred in the application of the maxim *"generalia specialibus non derogant";* that the two statutes are in *pari materia* and should be read together; and that the court erred in holding that "when the Pools Act was introduced it must have been intended that it would permit and regulate pool betting on sporting events other than those covered by the Tote Act."

It is common cause, as noted by the learned judge, that the totalizator

McNALLY JA

operated by the Turf Club constitutes a pool betting business as defined in the Pools Act, and that the betting business conducted by Wizard Pools is a totalizator as defined in the Tote Act. See R *v Fanaken* 1947 SR 155; *de Villiers & Ors v Sports Pools (Pvt) Ltd & Anor* 1975 (1) RLR 221 (A) at 230C-D and 240B-G.

The history of the two Acts is well set out by the learned judge. 1 will not repeat it in full.

Essentially, the Tote Act is the older, starting as an Ordinance in 1914. It allowed a Turf Club to operate a totalizator on a race day on a race course, subject to a licence to he granted by the Administrator. It did not actually specify that it related only to horse-races. Perhaps that was assumed, given the state of communications in 1914. In 1961 it was extended to allow motorracing clubs to operate a totalizator at specified motor-races; in 1963 it was extended to cover "off-course" totalizator betting; and in 1990 it was extended to allow dog-racing associations to operate a totalizator for a specified period.

Pool betting other than as permitted above was prohibited by Act 10 of 1950. Only in 1960 was pool betting allowed, and then only by post. So there was no conflict. But it must be noted that there was nothing specific in the Act to prevent a licensed pool promoter from conducting a pool betting business in relation to a horse-race, so long as he did it by post. Indeed it appears that this was done.

The problem arose with s 5 of Act No. 8 of 1969 which simply deleted the words "by post" from s 9 of Act 51 of 1960. At once there was a conflict, on the face of it, between the two Acts. Did the Turf Club need a licence under the Pools Act as well as under the Tote Act? Was Wizard Pools in breach of the Tote Act, in that it was conducting a totalizator in respect of a horse-race?

His Lordship resolved the conflict by applying the maxim *"generalia specialibus non derogant".* He relied on a number of cases, such as *Seward v The Vera Cruz* (1884) 10 App Cas 59 at 68; *Fitzgeraid v Champneys* (186 1) 70 ER 958 at 968; In re *Smith's Estate* (1887) 35 Ch D 589 at 595; *Corporation of Blackpool v Starr Estates Co* Ltd [1922] 1 AC 27 at 34; *Khumalo v Director-General of Co-Operation & Development* 1991 (1) SA 158 (A) at 164.

Mr *de Bourbon* has since directed our attention to a number of decisions in this jurisdiction where the maxim has been referred to, namely *Dokotera v*

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McNALLY JA

Master of the High Court& Ors 1957 R& N697at703,alsoreported in 1957 (4) SA 468 at 471-2 (SR); R *v Landman* 1966 RLR 363 (A) at 366-7; 1966 (3) SA 679 (RA) at 68 1; *S v C* 1970 (2) RLR 180 (A) at 182; 1971 (1) SA 162 (RA) at 163.

Mr *Simpson* added a reference to *Norman & Co (Pty) Ltd v Hansella Construction Co (Pty) Ltd* 1968 (1) SA 503 (T) at 504.

The maxim is undoubtedly sound, and expresses an entirely proper means of reconciling *two prima facie* conflicting provisions, But it is not easy *to* apply in this situation if one looks at the step-by-step development of the two Acts.

Until the passing of the Pools Control Act of 1960, the Tote Act provided the only mechanism in this country by which a person could indulge in pool betting on sporting events.

When the Pools Act was enacted it provided a new mechanism - that of postal betting. It allowed organisations other than turf clubs to arrange pool betting on sporting events by post. There was no limitation as to the scope of the phrase "sporting events." Pool operators could conduct pools on any sporting event, including local horse-races. In the *de Villiers* case *supra* the dispute was about bets placed with Sports Pools (Pvt) Ltd on the Castle Tankard run on 5 May 1973. There was no suggestion that Sports Pools was breaking the law by conducting the pool in relation to that horse-race. As recently as 1987 the general manager of the Turf Club wrote to Wizard Pools agreeing to assist it by supplying horse-racing details "to enable you to establish a private racing pools venture."

However, the explanation given by the Turf Club is that Sports Pools (Pvt) Ltd had not operated a totalizator. The papers do not make it clear what they did operate, but reference to the *de Villiers* case *supra* shows that they operated a postal betting system. It was for this purpose that the Turf Club was willing to assist Wizard Pools.

This explanation is confirmed by other correspondence.

Yet it seems to me with respect that this was wrong. Sports Pools (Pvt) Ltd did operate a scheme which fell within the definition of 'totalizator' in the Tote Act. That definition reads:

> "'totalizator' means an apparatus or *scheme* for classifying and recording

McNALLY JA

> the various amounts of money staked by the persons using it, the total of all such amounts forming a pool which, after deduction of a percentage commission, is divided amongst those who successfully forecast the result of the race or *other event* concerned" (my emphasis).

Anyone who conducts pool betting under the Pools Act, and complies with the requirements under s 10 of the Act, must, it seems to me, be conducting a totalizator as defined in the Tote

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Act. Whether or not it is done by post is immaterial.

It follows therefore that in 1960, when the Pools Control Act was first introduced, pool betting could be conducted in respect of any sporting event, so long as it was conducted by post. There was no need to apply the maxim, no need to place any restrictive interpretation on the term "sporting event" because there was no overlapping of the provisions of the two Acts.

It was only in 1969, when the Pools Control Amendment Act 8 of 1969 was passed, that potential conflict arose. It arose when the words "by post" were deleted from s 9(1)(a) of the Pools Act. By that simple change, the legislature on the face of it created a major overlapping between the two Acts.

On the one hand, the Tote Act provides in s 17 that:

> "(1) No person shall operate or cause or permit to be operated a totalizator unless he is the holder of a totalizator licence issued in respect thereof.
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence."

And in s 18, that totalizator licences may be issued only to a turf club, a motorracing club or a dog-racing association.

On the other hand, the Pools Act allows for the licensing of persons to promote pool betting on sporting events. On the face of it, a pools company, not being a turf club or a motor-racing club or a dog-racing association, could now conduct pool betting, which is not distinguishable from a totalizator, on any sporting event including horse-races, motor-races and dog-races, here and abroad. As in the case of the Tote Act, the Pools Act contains a provision (s 19) that:

McNALLY JA

> "No person shall carry on any business involving the receiving or negotiating of bets made by way of pool betting unless he is a licensed pool promoter or a licensed representative."

Quite clearly, the legislature could not have meant that the Turf Club, already licensed under the Tote Act, should now have to obtain another licence under the Pools Act. Nor could it have meant that Wizard Pools, licensed under the Pools Act but not capable of being licensed under the Tote Act (because it is not a turf club, a motor-racing club or a dog-racing association), would be committing an offence under the latter Act, by operating a totalizator in contravention of s 17 of that Act.

It was in order to avoid this presumably unintended overlapping that the learned trial judge called in aid the maxim of interpretation *"generalia specialibus non derogant".* The general terms of the Pools Act, he decided, should be held to cover only those aspects of pool betting not already covered specifically by the Tote Act. Or, as he put it:

> "Therefore, when the Pools Act was introduced it must have been intended that it would permit and regulate pool betting on sporting events other than those covered by the Totalizator Act."

If His Lordship really meant to say "When the Pools Act was introduced" then 1 would with

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respect disagree, because when it was introduced in 1960 it allowed pool betting only by post. There was no conflict, no overlap. There was no reason to suppose that it was introduced to cover only sporting events not already covered under the Tote Act. Nor did anyone interpret it that way.

If His Lordship meant to say "When the Pools Act was amended in 1969" then it is equally difficult to agree. If since 1960 pools companies had been conducting pool betting on horse-races by post, and in 1969 the legislature deleted the limitation contained in the words "by post", then *prima facie* the legislature intended pools companies to continue what they had been doing before, without that restriction.

Moreover, I have some difficulty in deciding how the maxim is to be applied, on the facts of this case.

What are the specific aspects of pool betting which were already covered in the Tote Act? The Act, in s 18, is remarkably unspecific. 1 find, for example, nothing in the Act or section to say that a totalizator licence issued to a turf

McNALLY JA

club may not be used for pool betting on, say, the World Cup or the Olympic Games or a motor-race or a dog-race. (It has to relate to a "sporting everif' because of the definition of "bet" in s 2.) The Act provides simply:

> " 18(1) The Secretary may, on receipt of an application in writing by
>
> (a) a turf club, issue to the club a licence in the prescribed form authorising the turf club to operate a totalizator fora period specified in such licence, not exceeding twelve months, on any day other than Good Friday or Christmas Day ..."

Put another way, the point is this: 1 see nothing in s 18 of the Tote Act which ,provides that

a. a turf club may operate a totalizator only in relation to horse-races at race courses under the jurisdiction of that turf club;

b. a motor-racing club may operate a totalizator only in relation to (as opposed to "at") a specified motor-race meeting;

c. a dog-racing association may operate a totalizator only in relation to dograces at race tracks under its jurisdiction.

Indeed we know that the Turf Club has for years operated its totalizator, not only in relation to the day's horse races at Borrowdale, but also in relation to horse races in South Africa.

My difficulty then is: once one acknowledges that a totalizator licence may be issued to a turf club, and that turf club may then entertain bets on any sporting event anywhere in the world, in what sense is the ambit of that totalizator *"specialis" so* as to give rise to the application of the maxim *"generalia specialibus non derogant"?*

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I take the maxim to mean "general provisions do not override pre-existing particular provisions" or,as *Claassen's Dictionary* more strictly translates it: "general provisions do not derogate from special."

This gives rise to a second difficulty: it seems to me that the learned judge is reversing the maxim to mean "special provisions do derogate from general". Because even if we assume that the provision in regard to totalizators in the Tote Act is a "special" provision, the newly worded Pools Act in no way

McNALLY JA

derogates from it No-one is suggesting that the Turf Club has any less rights because of the Pools Act. No-one is suggesting that the Turf Club must now apply for a licence under the Pools Act.

What is being suggested is that because the Turf Club has been granted a right under the Tote Act, no-one else may have a similar right under the Pools Act, even though the Pools Act says they may. The special right is derogating from the general right. To my mind, the general right under the Pools Act is not taking away any right from the Turf Club. The latter is still entitled to run its totalizator as before. All that it has lost is its *exclusive* right. Yet the result of the amendment to the Pools Act was, precisely and logically, to remove the exclusivity, though not the right.

The point is made in *Khwnalo supra* at 164C where van HEERDEN JA says, quoting *Gluck*

> "... the exception applies when the earlier enactment is a special one, because it should not be presumed that the Legislature intended *to repeal* the special enactment ..." (my emphasis).

Similarly in *Smith's* case *supra*:

> "... where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the court ought not to hold that general words in such a general Act of Parliament *effect a repeal* of the prior and special legislation unless ..." (my emphasis again).

In the present case, there is no question of the Pools Act repealing any provision of the Tote Act except in one important respect. Section 17 of the Tote Act, which makes it an offence for any person to operate a totalizator "unless he is the holder of a totalizator licence issued in respect thereof" must now clearly be read as if it contained the words "or unless he is a licensed pools promoter in terms of *Chapter 10:619."*

It does not seem to me therefore that there is a basis for the application of the maxim.

In short, if the legislature has done more than it intended to do, this is a. case where the legislature must re-enact the legislation.

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McNALLY JA

I would allow the appeal with costs. The order of the court *a quo* is set aside and replaced with an order that the application is dismissed with costs.

GUBBAY G: 1 agree.

MUCHECHETERE JA: 1 agree.

Vasco, Shamm & Associates, appellant's legal practitioners

Winterton Holmes & Hill, respondent's legal practitioners

TAUNTON ENTERPRISES (PVT) LTD & ANOR v MARAIS 1996 (2) ZLR 303 (HC)

Court **High Court, Harare**

Malaba J

Civil trial

25 September 1996 Judgment No. HH 135-96

Flynote

Agency- agent -personal liability- disclosed principal - when agent may be held personally liable

Contract - illegality - effect - illegal payment made to mitigate loss caused to another - whether loss thereby caused may found action

Delict -negligence - negligent misstatement of fact causing loss- when delictual liability arises -principles

Headnote

The defendant was a dealer in new and second hand cars. The plaintiff company, through the second plaintiff, who was one of its directors, expressed an interest in acquiring a new Mercedes Benz car. About a month later, the defendant was approached by a man who asked him to sell, on his behalf, a new imported car of the type the plaintiff wanted. The second plaintiff went to examine the car. He was made aware that the car was being sold on behalf of another person. The second plaintiff said he would buy the car if it was cleared through customs and if it was not stolen. He gave the defendant a blank cheque which was used to pay the customs duty. The defendant promised to check with police computers; whether the car was stolen or not. Four days later, he told the second plaintiff that the car was not stolen. A cheque was handed to the defendant and the second plaintiff took possession of the car.

Several months later, the car developed a problem, which necessitated disconnecting the radio. A special code, peculiar to that vehicle, was needed to reconnect the radio to the battery and the manufacturers in

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South Africa were contacted to ask for the code. The manufacturers told the second plaintiff that the car was one of a batch of eight that had been stolen before they had even been registered. The insurance underwriters in South Africa wanted the vehicle returned to them. The second plaintiff offered to buy the underwriters' rights in the vehicle for R85 000 and eventually had the value reduced to R70 000, which he paid. He claimed the equivalent from the defendant. The basis of the claim was that the defendant; (1) assumed personal liability for any loss suffered by the plaintiffs if the vehicle turned out to be stolen; and (2) caused loss to the plaintiffs by negligently stating that the vehicle was not stolen, when in fact it was.

It was accepted by the plaintiffs that the defendant was acting as agent for the seller of the vehicle.

Held, that only if an agent assumes personal responsibility for a contract entered into on behalf of a principal may he be sued together with the principal. Otherwise, a person who acts as an agent and contracts with a third party in the name of his principal is not party to the contract and is not personally liable on it. The onus is on the plaintiff who faces the presumption against the assumption of personal liability by an agent who contracted in the name of a disclosed principal. In each case, the question is: to whom was credit given by the third party, to the knowledge of the parties? Where it is alleged that the agent's liability is based on a written contract, the answer lies in the interpretation of the contract. If it is based on an oral contract, there must be clear evidence of the terms by which the agent expressly or impliedly assumed personal liability.

Held, further, that on the facts the plaintiffs failed to discharge the onus of showing that the defendant assumed personal liability for any loss suffered as a result of the vehicle turning out to be stolen.

Held, further, that as the payment of money to a foreign resident had not received the necessary ministerial approval, both the agreement to pay and the payment itself were unlawful in terms of s 8(1)(a) of the Exchange Control Regulations 1977 (S 1399 of 1977). Accordingly, the loss was the result of an illegal contract and thus could not found a cause of action.

Held, further, that an action in defict for a negligent misstatement causing financial loss lies in the following circumstances:

(a) the plaintiff should have made a serious enquiry of or sought important information from the defendant on a matter relating to a business or professional transaction whose nature he revealed to the defendant;

(b) the defendant should have voluntarily undertaken or assumed the

responsibility of providing the plaintiff with the correct information; (c) he defendant should have known that the inquiry was serious, that the information was wanted for serious purposes and that the inquirer intended to rely on the answer;

(d) the defendant should not have made any disclaimer of responsibility or qualification of

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the accuracy of the statement;

(e) the plaintiff should have relied on and acted on the misstatement; (f) it should have been reasonable for him to rely on the statement.

It is not necessary that the defendant should be in the business of giving advice, nor that he should hold himself out as possessing any special skill or competence in the subject-matter.

Held, further, that there was sufficient *prima facie* evidence that the defendant had made a negligent misstatement for the application for absolution to he dismissed.

Cases cited:

Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A)

Allen v du Preez 1950 (1) SA 4 10 (W)

Autorama (Pvt) Ltd v Farm Eqpt Auctions (Pvt) Ltd 1984 (1) ZLR 162 (H)

Bayer SA (Pty) *Ltd* v frost 1991 (4) SA 559 (A) *Blaker v Freedman* 1930 TPD 230

Candler v Crane Christmas & Co [1951] 2 KB 164; [1951] 1 All ER 426 (CA)

Currie Motors (Pvt) Ltd v Motor Union Ins Co Ltd 1961 (3) SA 872 (T)

Dhlamini & Anor v Protea Assurance Co Ltd 1974 (4) SA 906 (A)

Esso *Petroleum Co Ltd v Mardon* [1976] 2 All ER *5 (CA)*

Gascoyne v Paul *& Hunter* 1917 TPD 170

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 2 All ER 575 (BL)

Henry v Branfield 1996 (1) SA 244 (D)

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

Huizenga NO v Zwinoira 1987 (2) ZLR 276 (H)

Macape (Pvt) *Ltd v Forrester* 1991 (1) ZLR 315 (S)

Marais *v Perks* 1963 (4) SA 802 (E)

Munhuwa v Mhukahuru Bus Svc (Pvt) Ltd 1994 (2) ZLR 382 (H)

Murray v McLean NO 1969 (2) RLR 541 (G)

Myburgh v Kelly 1942 EDL 202

Natal Trading & Milling Co Ltd v Inglis 1925 TPD 724

Overseas Trust Corp *v Godfrey* 1940 CPD 177

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Santam Ins Ltd v Ferguson 1985 (4) SA 843 (A)

MALABA J

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

Wood v Northwood Svc Station (Pvt) Ltd 1974 (1) RLR 49 (G)

Wood v Visser 1929 CPD 55

Case Information

M J Gillespie, for the plaintiffs

A P de Bourbon SC, for the defendant

Judgment

Malaba J: At the close of the case for the plaintiffs Mr *de Bourbon* applied for the absolution of the defendant from the instance. The application was opposed by Mr *Gillespie* for the defendant. At the end of the argument both counsel asked that I reserve my decision and hand down a written judgment. At the time of judgment plaintiff's legal practitioner had been elevated to the High Court bench. Reference to him as Mr *Gillespie is* as he then was at the time the application for absolution from the instance was made.

The background facts are these. The first plaintiff is a company incorporated according to the laws of Zimbabwe and carries on the business of fanning in Raffingora. The second plaintiff (Mr Taunton) is one of first plaintiff's directors.

The defendant (Mr Marais) is a dealer in new and secondhand cars. Mr Taunton and Mr Marais have known each other for no less than 13 years. Sometime in June *1991* Mr Taunton told Mr Marais that he was looking for a new Mercedes Benz 230 E motor vehicle to buy. Mr Marais promised to contact Mr Taunton should he be asked to sell the model of the vehicle the latter wanted.

During the second week of July *199 1,* Mr Marais was approached by Herbert Nyaunde who asked him to sell, on his behalf, a new and imported white Mercedes Benz 230 E with Botswana registration numbers BE 818 A. On *23* July, Mr Marais telephoned Mr Taunton to tell him about the vehicle, at the same time inviting him to come to his business premises in Harare to look at it. On *24 July 1991,* Mr Taunton drove to Harare in the company of his common law wife Margaret Dominic. When they arrived at Mr Marais' business premises the motor vehicle was not there. It was brought shortly after their arrival. The man who brought the motor vehicle spoke to Mr Marais but was not introduced to Mr Taunton.

Mr Taunton was, however, made aware by Mr Marais of the fact that the

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motor vehicle was being sold on behalf of someone else. Mr Marais then took Mr Taunton in the vehicle for a test drive. The latter 1 liked the vehicle but told Mr Marais that he would buy it if it was cleared with the Department of Customs and Excise and was not a stolen car. Mr Marais told MrTaunton that customs duty on the vehicle was $90 000. Mr Taunton signed a blank cheque which he gave to Mr Marais for purposes of payment of Customs duty. Mr Marais endorsed on the cheque the name of the payee and the amount to be paid. The cheque was cashed at the Reserve Bank of Zimbabwe, Harare on 25 July.

On the day Mr Taunton told Mr Marais that he would buy the vehicle if it was not stolen, the latter promised to cheek with police computers in which details of stolen vehicles are recorded in South Africa Botswana and with Southerton Police (Car Theft Department) Zimbabwe whether the car was stolen or not.

On 28 July Mr Marais telephoned Mr Taunton to advise him that the checks he had carried out had proved that the motor vehicle was not stolen. Margaret Dominic received the message, which she passed on to Mr Taunton. On 29 July, Mr Taunton and Margaret Dominic drove to Mr Marais' business premises. Mr Marais told Mr Taunton that he had investigated the provenance of the vehicle and that he had satisfied himself that the vehicle was not stolen. A purchase price of $360 000 was demanded for the vehicle. Mr Taunton signed a blank cheque and gave it to Mr Marais to endorse the name of the payee and the amount to be paid.

The motor vehicle was registered in Mr Taunton's name and he took delivery of it on 29 July. On 1 August 1991, Mr Marais endorsed on the cheque the amount of $360 000 payable to Buwi Farms (Fvt) Ltd, a company in which he and his wife are the only shareholders. The cheque was presented to Mr Taunton's bank on the same day the endorsements were made.

The vehicle was equipped with a radio. There was a special code one needed to know and use to make the radio work again after it had been disconnected from the battery. When Mr Taunton took delivery of the motor vehicle, Mr Marais said the special code could be in the owner's manual which was not in the car. He promised to get the owner's manual from the seller. Mr Taunton visited Mr Mardis' business premises on a number of subsequent occasions to get the owner's manual, to no avail.

In May 1992, the motor vehicle developed a mechanical problem near Chinhoyi. The carrying out of repairs necessitated the disconnection of the

radio from the battery. To put the radio back to a working condition on being reconnected to the battery Mr Taunton needed to know and use the special code. He decided to contact Mercedes-Benz of South Africa who were the manufacturers of the vehicle and sent its chassis number and engine number to Margaret Dominic's son who worked for the company in East London.

On 15 May 1992, a telefax message came from East London advising that the details supplied

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by Mr Taunton related to one of eight motor vehicles stolen from a transporter in June 1991 en route from the manufacturer to the distributor in Pretoria. The vehicles had not yet been registered in South Africa at the time they were stolen. Mr Taunton was also advised that the insurance underwriters wanted the vehicle returned to them in South Africa. Mr Taunton took the telefax to Mr Marais who expressed surprise at being told that the motor vehicle was a stolen car. On the same day that the fax was shown to Mr Marais, Herbert Nyaunde made a written statement declaring that Mr Marais acted as his agent for the purpose of selling the vehicle to Mr Taunton.

On 2 June 1992, Peter Saffin of Claims Assessors (Pvt) Ltd, Zimbabwe, actingon behalf of Daly'sand Associates (Pty)Ltd, South Africa, representing the insurance underwriters, made demand of Mr Taunton for the return of the vehicle. Mr Taunton acknowledged the unassailability of the claim of ownership of the vehicle by the insurance underwriters. He however, made an offer to buy the rights of the insurance underwriters in the vehicle for him to return title. He was asked to pay R85 000.

Mr Taunton turned to Mr Marais and asked that those involved in the sale of the motor vehicle to him should amongst themselves raise the R85 000. A meeting was arranged by Mr Marais and those who attended it were Mr Taunton; Mr Marais, Mr Nyaunde and his business partner Mr Gomwe. Amongst the three men from whom Mr Taunton expected the money to come, no one committed himself to its payment.

Mr Taunton engaged Daly's and Associates (Pty) Ltd in further negotiations and succeeded in having the insurance underwriters reduce the salvage value of the vehicle to R70 000 which he agreed to pay. The money was paid to Daly's and Associates (Pty) Ltd in South Africa on behalf of Mr Taunton by one Pat Abrahams.

On 26 August 1992, Mr Taunton issued summons against Mr blarais and

MALABA J

Herbert Nyaunde claiming $450 000 against both of them jointly and severally, one paying the other to be absolved.

The main cause of action was that Mr Marais sold the motor vehicle to Mr Taunton from which the latter was evicted by its lawful owner. He however, cast his net as widely as possible by pleading a number of alternative causes of action. Of significance are allegations contained in paras 7, 8 to 13 of the declaration which reads as follows:

> "In the further alternative, in the event that the first defendant (Mr Marais) was acting as an agent, and in any event:
>
> 8. The first defendant represented to the plaintiff tha the bad investigated the provenance of the vehicle and that he had satisfied himself that the vehicle was not stolen.
>
> 9. The representation of the first defendant was false, that is to say the vehicle was stolen; the first defendant has not satisfied himself as to the issue and had not made any investigation.
>
> 10. The first defendant knew of the falsity of the representation, that is to say he knew that the vehicle was

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stolen or knew that he had not satisfied himself nor made any investigation or knew all such facts.

11. The representation was made fraudulently with intent to deceive.

In the alternative to paragraphs 10 and 11:

12. The representation was made negligently in that the first defendant ought to have been aware:

12.1 Of the possible falsity of the representation in any particular as averred in para 10 above; and

12.2 that the plaintiff would be misled thereby to his loss; and ought to have refrained from making any such representation.

13. The representation was made wrongfully in that:

13.1 the plaintiff had expressly required of the first defendant the assurance that the vehicle was not stolen prior to agreeing to purchase it; and

MALABA J

13.2. the plaintiff to the first defendant's knowledge, intended to rely upon such assurance; and

13.3. the plaintiff was entitled so to do."

At the commencement of the trial, the plaintiff amended the declaration by adding para 14 A alleging that "Whether acting as principal or as agent, by reason of the facts set out in paras 8-13 above" the first defendant "assumed personal liability for any loss which might be suffered by the plaintiff as a result of the vehicle being stolen."

The plaintiff further amended the declaration by inserting para 16 which reads:

"16. The plaintiff has paid to the true owner of the vehicle the sum of R70 000 in the currency of the Republic of South Africa in full settlement of all claims to the vehicle which it formerly held and has in consideration of such payment obtained tide to the vehicle."

The plaintiffs claimed damages in the sum of R70 000 from Mr Marais which they alleged they suffered as a result of payment of the money to the true owner of the vehicle.

The trial proceeded against Mr Marais alone because Herbert Nyaunde did not enter appearance to defend following service of summons and default judgment was granted to the plaintiff on 19 March 1993. The judgment remained unsatisfied.

Mr Marais admitted in his plea the fact that he represented to the plaintiff that he had investigated the provenance of the vehicle and that he had satisfied himself that the vehicle was not stolen. At the commencement of the trial he also made formal admissions of the following facts:

"1. the Mercedes Benz motor vehicle was stolen on 26 June 1991 at 5.30 am at or near Vereeniging, Transvaal, from a vehicle transporter belonging to Mercedes Benz, South Africa;

2. the report of the theft of the vehicle was inserted into the South African Police computers a few minutes after 4 pm on 26 June 1991;

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3. the computer report included the chassis and engine numbers of the stolen vehicle;

MALABA J

4. the report of the theft of the vehicle was communicated to Zimbabwe Republic Police within days of the loss occurring; and

5. the plaintiff has obtained title to the vehicle in consequence of the agreement reached with the true owners of the vehicle."

At the close of the plaintiff`s case Mr *Gillespie* indicated that it was no longer the intention of the plaintiffs to prove the main cause of action. No evidence had been led to raise a *prinw facie* case to show that the defendant sold the motor vehicle as its owner. It was the evidence of Mr Taunton and Margaret Dominic that they knew that the defendant was selling the vehicle for some one else.

Mr *Gillespie* also indicated that the plaintiff no longer wished to persist in trying to establish the allegation that Mr Marais fraudulently misrepresented to Mr Taunton that the motor vehicle was not stolen. Mr Taunton said in evidence that it was not plaintiffs' case that Mr Marais acted dishonestly or that he knew for a fact that the car was stolen property.

Two causes of action were left in contention: (1) that the defendant assumed personal liability for any loss which was suffered by the plaintiffs if the vehicle turned out to be stolen; and (2) that the defendant negligently caused the damages suffered by the plaintiffs by making a misstatement that the motor vehicle was not stolen when in fact it was a stolen car.

The evidence led up to the close of the case for the plaintiffs is to the following effect. Mr Taunton knew Mr Marais well. Before he dealt with Mr Marais in respect of the Mercedes Benz he had earlier on taken to Mr Marais his manager who was looking for a half tonne truck. He said Mr Marais had advised his manager, within his hearing, to he careful not to buy imported motor vehicles without thorough investigation because many of the imported cars brought to him for sale turned out to be stolen.

He said when he told Mr Marais to be on the look-out for a new Mercedes Benz 230E, he recalled to memory what he had said about imported cars brought to his premises to be sold. He told Mr Marais during the test drive in the Mercedes Benz on 24 July 1991 that he would buy the car if he was satisfied that it was "clean". By "clean" he meant "not stolen". Mr Marais voluntarily undertook to cheek with police computers in South Africa, Botswana, and Southerton Police (Car Theft) in Zimbabwe whether the car was stolen or not. Mr Marais also Look it upon himself to clear the motor vehicle with the Department of Customs and Excise.

MALABA J

He said Mr Marais was aware that he intended to rely on the results of his checks. Five days later, Mr Marais telephoned him to say he had conducted the checks with the data centres he had mentioned on 24 July and was satisfied that the car was "clean". On 29 July 199 1, he went

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to Mr Marais' business premises in response to the telephone message. Before taking delivery of the motor vehicle, Mr Marais again assured him that the motor vehicle was not stolen property. When he asked him to vouch for the truth of the statement that the car was "clean" Mr Marais said he had given money to a friend of his who worked at Southerton Police Station to clear the vehicle quickly. In the presence of Margaret Dominic, Mr Marais repeated his statement that he had checked with police computers in South Africa and Botswana. He said Mr Marais said the seller was a trustworthy man. He said the man lived in Mt Pleasant suburb and worked for the Government.

Mr Taunton said he decided to buy the motor vehicle because of the assurance from Mr Marais that the motor vehicle was not stolen. He said that, in light of his insistence that Mr Marais should check and satisfy himself that the car was not stolen before he took delivery of it, he felt justified in relying on the statement that the checks had established that the car was not stolen.

Margaret Dominic said she knew that Mr Taunton had told Mr Marais that he was on the look out for a new Mercedes Benz 230E model. On 24 July 1991, she was with Mr Taunton at Mr Marais' business premises to see the motor vehicle. She heard Mr Taunton tell Mr Marais that he would buy the car if the latter had checked and satisfied himself that it was not stolen. She heard Mr Marais promise to check with police computers in South Africa, Botswana and with Southerton Police (Car Theft) in Zimbabwe. A few days later Mr Marais advised Mr Taunton by telephone that the car was "clean" ' She went with Mr Taunton to Mr Marais' business premises on 29 July. She said she heard Mr Marais say he checked with police computers in South Africa and Botswana. he also said he checked with Southerton Police (Car Theft). She remarked saying that Southerton Police often cleared stolen cars. She said Mr Marais assured them that his cheeks had established that the car was not stolen.

When her son sent a telefax from South Africa to the effect that the car was stolen they took it to Mr Marais. When asked by Mr Taunton how he had conducted the checks with police computers in South Africa, Mr Marais first said he gave the registration numbers of the car but later changed to say he used engine numbers and chassis numbers.

MALABA J

It was in light of this evidence that Mr *de Bourbon* applied for absolution of the defendant from the instance at the close of the plaintiffs' case. The principles to be applied in considering an application for absolution from the instance at the close of the plaintiffs case have been stated in a number of decided cases. In *Munhuwa v Mhukahurm Bus Service (Pvt) Ltd* 1994 (2) ZLR 382 (H) at 383G CHATWOB0 J made the observation of the fact that "it is axiomatic that an application for absolution from the instance stands much on the same footing as an application for the discharge of an accused at the end of the State case in a criminal trial."

The test is whether at the close of the plaintiffs case there is evidence upon which a reasonable man acting carefully might (not should) give judgment for the plaintiff on the issues before the court The judical officer is enjoined by law to bring to bear upon the evidence what the judgment of a reasonable man might be, but not what he thinks the judgment is: *Gascoyne v Paul & Hunter* 1917 TPD 170 at 173*; Myburgh v Kelly* 1942 EDL 202; *Huizenga NO v Zwinoira* 1987 (2)

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ZLR 276 (H) at 280A-B.

In *Supreme Service Station \(1969\) \(Pvt\) Ltd v Fox \& Goodridge \(Pvt\) Ltd* 1971 (1) RLR 1 (A), BEADLE CJ drew attention to some of the features of the application which a court should bear in mind when considering what the judgment of a reasonable man might be on the evidence adduced at the end of the plaintiffs case. The learned CHIEF JUSTICE said the court should bear in mind that the defendant has not yet given evidence and cross-examined on it. If the plaintiff has made some case for the defendant to answer and the defence is something peculiarly within the knowledge of the defendant, justice demands that he should be heard. He pointed out that the general attitude of judges is that they should be very loath to decide upon questions of fact without having all the evidence on both sides. In case of doubt as to what the judgment of a reasonable man might be the safest course for a judge to take is that which allows the case to proceed.

Applying the principles to the evidence led in this case, 1 consider first the allegation that the defendant assumed personal liability for any loss which might be suffered by the plaintiffs as a result of the vehicle being stolen.

The evidence from Mr Taunton and Margaret Dominic was to the effect that they knew that W Marais was acting as an agent of the seller of the motor vehicle. It must be accepted that Mr Alaraisacted as agent and contracted with the plaintiffs in the name of his principal. It is only on the allegation that the agent assumed personal liability on a contract he entered into for his principal

MALABA J

that an agent may be sued together with the principal jointly and severally, one paying the other to be absolved. Otherwise the plaintiff must make an election as to whom to sue between the two, because the defendant will have acted as an agent or as a principal: *Natal Trading & Milling Co Ltd v Inglis* 1925 TPD 724 at 744.

The general rule is that a person who acts as an agent and contracts with a third party in the name of the disclosed principal is not a party to the contract and is not personally liable on the contract: *Wood v Visser* 1929 CPD 55; *Marais v Perks* 1963 (4) S A 802 (E); de Villiers & Macintosh *The Law of Agency in South Africa* 3 ed at 560.

After pointing out the fact that the general rule, that an agent who contracts with a third party in the name of a disclosed principal is not personally liable to the third party on the contract, is founded on general convenience and sound policy, Joseph Story in *The Law of Agency* states that our law does not however exempt the agent from personal responsibility where he has chosen, "by his own conduct or form of the act or contract," to create personal liability or where personal liability is implied or created by the operation of the law. These are obvious exceptions to the general rule.

The learned author sets out in para 393 the forms in which the exceptions may find expression. Of relevance to this judgment is the first exception which is mentioned as being:

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"Where the contract is made in writing expressly with the agent and imports to be a contract personally with him, although he may be known to act as an agent."

The exception extends to oral contracts: *Alien v du Preez* 1950 (1) SA 4 10 *(W); Overseas Trust Corporation v Godfrey* 1940 CPD 183.

Whether the alleged personal liability of an agent is based on a written or oral contract, the onus is on the plaintiff who faces the presumption against the assumption of personal liability by an agent who contracted in the name of a disclosed principal: B *laker v Freed*~ 1930 TPD 230 at 23 3; Kerr *Law of Agency* 3 ed at p 23.

In each case the big question to ask in order to decide whether or not the agent is personally liable on the contract: is to whom was credit given by the third party according to the knowledge of the parties? Where the allegation is that

MALABA J

the personal liability of the agent is based on a written contract the answer to the question lies in the construction of the terms of the written contract. If the alleged personal liability is based on an oral contract, clear evidence of the terms by which the agent expressly or impliedly assumed personal liability to the third party must be led.

It becomes a question of fact whether on the evidence of the oral contract credit was given to the agent who should bear personal liability to the third party: Story op cit paras 275, 278 and 288.

There is no evidence in this case of the defendant having entered into a written contract with the plaintiff as an agent or in his personal capacity. This is therefore a case of an alleged oral contract in terms of which the defendant assumed personal liability to the plaintiffs for any loss which they suffered if the car turned out to be stolen. Did the plaintiff establish a *prima facie* case of the defendant having assumed personal liability in terms of an oral contract?

The effect of the evidence of what the parties did is that credit was, in the knowledge of the parties, given to the seller of the motor vehicle. These are my reasons. Mr Marais told Mr Taunton that he was going to check with police computers in South Africa, Botswana and with Southerton Police in Zimbabwe whether the car was stolen or not. He then reported back to Mr Taunton that the results of his investigations were that the vehicle was not stolen. There was no evidence of Mr Marais saying anything further than the statement that he was satisfied that the vehicle was not stolen. He did not then voluntarily and in express terms bind himself to make good any loss which should be suffered by the plaintiffs as a result of the vehicle being stolen. There was no evidence of Mr Taunton saying to Mr Marais

"I rely on you. I will hold you personally liable for any loss 1 shall suffer if the vehicle turns out to he stolen."

There was no evidence of Mr Marais accepting to be held personally liable on those terms. He did not, for example, say:

"Yes, hold me liable."

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It was clear from the evidence of Mr Taunton and Margaret Dominic that they understood Mr Marais to be making the statement that the car was not stolen in his capacity as an agent of the seller. The statement induced Mr Taunton

MALABA J

to enter into a contract with Mr Marais' principal rather than with him in his personal capacity.

The statement related to what Mr Marais had done. There are no words in the statement that expressly or impliedly show an intention on the part of Mr Marais to assume personal liability for any loss which the plaintiffs suffered as a result of entering into the contract with the seller on the basis of the statement and the car turning out to be stolen. It may not be inferred from the making of the statement and the conduct of the parties that the defendant assumed personal liability. Firstly, the presumption is against an agent assuming personal liability to a third party on a contract the latter enters into with the principal. Secondly, personal liability is not claimed on the basis of the statement but on the alleged express terms of an oral contract. The effect of the evidence is also that Mr Taunton was clear in his mind that the purchase price was being paid to the seller of the motor vehicle. Mr Marais did not receive the money in his personal capacity. The first cheque for $90 000 was not endorsed with his name as the payee. It was drawn in favour of the Department of Customs and Excise. The second cheque for $360 000 was also not endorsed with his name as the payee. Credit was therefore not being given to Mr Marais. Although what Mr Marais said as an agent induced Mr Taunton to view the seller favourably, he believed in the seller's credit worthiness and had the purchase price paid to him.

In the letter dated 6 July 1992, MrTaunton's legal practitioners acknowledged the difficulty the plaintiffs faced in alleging that Mr Marais was personally liable for the loss suffered by them as a result of the vehicle being stolen. The letter reads in part as follows:

> "Our client is aware of the difficulties which he faces to the extent that he may endeavour to saddle your client personally with liability for his potential loss in the event that the vehicle is repossessed."

The plaintiffs have failed to discharge the onus on them of leading evidence on which a reasonable man might find that the defendant assumed personal liability for any loss which they suffered as a result of the vehicle turning out to be stolen.

The finding on the defendant assuming personal liability for any loss suffered by the plaintiff as a result of the vehicle being stolen affects the basis of the claim for damages of R70 000. There is, however, no doubt that the payment of R70 000 by Mr Taunton to a foreign resident in South Africa was in

MALABA J

contravention of s 8(1)(a) of the Exchange Control Regulations SI 399 of 1977. Mr Taunton admitted in his evidence in chief that he did not have the mandatory ministerial authority before entering into the contract which involved the payment of the money to a foreign resident outside

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the country.

In *Macape (Pvt)Ltdv Forrester* 1991 (1) ZLR 315 (S) at 320C-D McNALLY JA said:

> "The essential point to be noted is that there is a clear difference between ss 7 and 8. The former proscribes only the actual payment. The latter proscribes both the payment and the underlying agreement to pay. In other words, when one is concerned with payments inside Zimbabwe it is perfectly lawful to enter into the agreement to pay. But without authority from the Reserve Bank the actual payment may not be made. By contrast when dealing with payments outside Zimbabwe it is unlawful even to enter into the agreement to pay without first obtaining the authority of the Minister whose powers have been delegated to the Reserve Bank."

Mr *de Bourbon* argued that the contract Mr Taunton entered into with the insurance underwriters through Daly's and Associates (Pty) Ltd and the payment to them of R70 000 in South Africa through Mr Pat Abraharns were illegal. He argued, on the basis of the decisions in the cases of *Dhlamini & Anor v Protea Assurance Co Ltd* 1974 (4) SA 906 (A) and *Santam lnsurance Ltd v Ferguson* 1985 (4) SA 843 (A), that it would be in breach of public policy to compensate the plaintiffs for damages for loss incurred as a result of an illegal payment in terms of an illegal agreement. He argued further that Mr Taunton's agreement with Mr Pat Abrahams amounted to the former borrowing foreign currency in contravention of s 3(b) of the Exchange Control Regulations. Without the requisite ministerial authority the agreement was unlawful: *Henry v Branfield* 1996 (1) SA 244 (D) at 250C.

The brief facts in *Dhlatnini's* case were that the first appellant was married to the second appellant in community of property. Since 1951 the first appellant had sold fruit without a licence and was making a weekly profit of R 14 from which she supported the second appellant and 11 children. In 1971 she was injured in a motor collision. In addition to general damages she claimed from the insurer of the motor vehicle which collided with her she claimed two amounts on behalf of second appellant for loss of income already suffered and of future loss of income.

MALABA J

It was held by RUPFF dismissing the appeal against the judgment of the Witwatersrand Local Division, that damage calculated according to the amount of income obtained from an activity which was immoral or criminal will not be compensated because it would be contrary to public policy to compensate it. The CHief JUSTICE held further that this rule would also apply to income from a colourless statutorily forbidden activity (colourless in the sense that it cannot be described as criminal or immoral) when the income from that activity is not enforceable because of invalidity. Compensation for lost income of such a nature would also be against public policy.

In *Santam Insurance Lid's* case a widow claimed damages for loss of support arising from the death of her husband in a car accident. The deceased used to support his family from income derived from the business of panel beating without a licence. The judgement is in Afrikaans but the headnote reads in part that, dismissing the widow's claim for damages, it was held that:

> "the carrying on of his business as a panel beater was not only unlawful but the income he acquired thereby was not legal. The court found that the respondent's (as a defendant) claim for damages for loss of her right to support brought about by the death of the deceased was influenced by the fact that the deceased had supported her out

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of his unlawful income. "

Mr Gillespie acknowledged the decisions in *Dhlapdni & Santam Insurance Ltd supra* as being authorities for the proposition that damages for loss resulting from being prevented from continuing with an illegal activity from which the right to claim the loss is derived will not be compensated because to do so would be against public policy. He argued, however, that the financial loss on which the damages were calculated in this case was not a result of an illegal activity. The argument was that the loss was caused by the defendant's conduct and Mr Taunton did what he did to mitigate the loss. This argument is ingenious but does not persuade me. The amount of R70 000 on which the damages were calculated was a result of the illegal payment in terms of an illegal contract. Mr Marais was not party to the illegal contract and payment. He did not know about it until the declaration was amended during trial to add the claim for the damages. In my view there was a cut off point in the chain of causation of damages when the plaintiff got to know that the car was stolen.

The agreement and the payment of R70 000 did not lose their inherent illegality because of the motive for their commission. In other words, the plaintiffs did not have to break the law to mitigate their loss. In any case, the

MALABA J

claim for R70 000 damages would not have been pleaded in the alternative if the amount on which the damages were calculated was expended in mitigation of the loss of $450 000 which had already been suffered by the plaintiffs at the time Mr Taunton decided to buy the motor vehicle from its owner.

The facts establish that the loss with respect to which the damages were calculated was a direct consequence of an illegal payment in terms of an unlawful contract. It is a prohibited consequence of unlawful acts and is void as far as it is sought to be used as a basis for the calculation of the damages claimed. There is therefore no evidence on which a reasonable man might find for the plaintiffs on this cause of action.

The last alternative cause of action is in negligence, the allegation being that the defendant made a negligent mis-statement on which the plaintiffs relied, to their detriment. It is now trite that the *lex Aquilia* recognizes an action for damages for a negligent mis-statement causing financial loss not based on physical injury to a person or property. In *Murray v McLean NO* 1969 (2) RLR 541 (G) LEWIS J said at 5441:

"Now there is no doubt that our law recognizes that, within certain limits, a delictual action for damages may lie at the suit of a person for loss resulting from negligent statements made to him."

The learned judge made reference to *Herschel v Mrupe* 1954 (3) SA 464 (A) as the leading authority on the subject.

The headnote to the case of *Adiministrateur Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) states as follows at pp 825H-826R

"The ground of action for damages for negligent misstatement can and ought to be placed in the extended range

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of application of the *lex Aquilia* From this it would follow that, according to our current norms unlawfulness is required and a guilty mind. The feat of the so-called 'limitless liability then only he allayed if in every give case it is the task of the court to decide whether in the particular circumstances there was a legal duty resting on the defendant not to make a misstatement to the plaintiff and also whether the defendant in the light of all the circumstances exercised reasonable care *inter also,* in determining the correctness of his representation.

In the absence of a legal duty there is no unlawfulness. The court will also

MALABA J

keep the ground of action within reasonable limits by giving proper attention to the nature of the misstatement and the interpretation thereof and also by giving proper attention to the problem of causation."

In *Currie Motors (Pvt) Ltd v Motor Union Insurance Co Ltd* 1961 (3) SA 872 (7), BRESLER J said that in each case in which the claim is for damages for a negligent misstatement, the conditions must be sought under which it might be reasonable to recognize an obligation to take care in making a reply.

The important point to bear in mind is that not every negligent misstatement creates a cause of action. It is only where it is shown that the maker of the misstatement was under a duty to act carefully and not give incorrect information to the plaintiff and the misstatement is evidence of the negligence which is the breach of the duty of care that a cause of action lies in the negligence. The big question is always: was the defendant under a duty of care not to make an incorrect statement to the plaintiff.)

The authorities suggest that the following essential elements should be looked for in die circumstances of the case to determine the question of duty of care in an action for damages for a negligent misstatement (the list is not meant to be exhaustive):

1 . The plaintiff should have made a serious inquiry of or sought important information from the defendant on a matter relating to a business or professional transaction whose nature he revealed to the defendant.

2. The defendant should have voluntarily undertook or assumed the responsibility of providing the plaintiff with the correct information on the subject matter of the inquiry.

3. The defendant should know or ought to have known from the nature of the transaction of the gravity of the inquiry, and by the importance and influence attached by the inquirer to the answer, that the information was wanted for serious purposes and that the inquirer intended to rely and act on the answer.

4. The defendant does not have to be in the business of giving advice on the matters asked for nor does he have to hold himself out to be in possession of a special skill or competence in the subject-matter of the inquiry.

5. The defendant should have made the misstatement to the plaintiff without a disclaimer of responsibility for or qualification of its accuracy.

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6. The plainfiff should have relied and acted on the misstatement as a result of which he suffered financial loss.

7. It should have been reasonable in the circumstances of the case for the plaintiff to rely and act on the statement made by the defendant.

See *Candler v Crane Christms & Co* C195112 KB 164 at 182-183; Herschel *v Mrupe* 1954 (3) SA 464 (A) at 480; *Hedley Byrne & Co Ltd v Helier & Partners Ltd* [1964] AC 465 at 502-503; *Murray v McLean No* 1969 (2) RLR 541 (G) at 544-546; Wood *v Northwood Service Station (Pvt) Ltd* 1974 (1) RLR 49 (G) at 55-56; Esso *Petroleum Co Ltd v Mardon* [1976) 2 All ER 5 at 14h, 21 h-22a; *Autorama (Pvt) Ltd v Farm Equ~nt Auctions (Pvt) Ltd* 1984 (1) ZLR 162 (H); *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 568B-F

I now turn to apply these principles to the evidence led up to the close of the case for the plaintiffs. The evidence shows that this was not a case of a benevolent man acting out of magnanimity to help a friend. The interest of the plaintiffs in the transaction of the sale of the motor vehicle was clear to NU Marais. Mr Taunton was about to buy a very expensive motor vehicle that had recently been imported into the country. Mr Marais had previous experience as a car dealer of imported cars that he was asked to sell to members of the public turning out to be stolen. Mr Taunton made it abundantly clear that he would buy the motor vehicle if it was not stolen property. His concern that the motor vehicle should not be stolen was serious in nature.

Mr Marais undertook to obtain the information and give it to Mr-Taunton. The need to take care not to give Mr Taunton incorrect information was obvious. The consequences of the failure to exercise due care and check the accuracy of the information received from the original sources before making the statement to Mr Taunton should have been foreseen by a reasonable man in the defendant's position.

Mr Slarais was not under an obligation to undertake to obtain the information needed by Mr Taunton. He decided on his own to collect that information with full knowledge of the fact that the information was important to Mr Taunton and that he intended to rely and act on it.

Mr Marais did not disclaim responsibility for the accuracy of the statement that he was satisfied from the results of his cheeks that the car was not stolen. Mr Taunton relied on the statement and paid the purchase price for the motor

vehicle. It was reasonable in the circumstances of the case for Mr Taunton to rely on Mr Marais and to act on the statement.

The evidence led might persuade a reasonable man to find that the defendant owed the plaintiffs a duty of care not to make the misstatement he made.

The evidence of the misstatement having been made *is prima facie* probative of negligence in breach of the duty of care. It is up to the defendant to rebut the *prima facie* case of negligence

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by leading evidence of the steps he took to establish whether or not the car was stolen. It is on the steps found proven by the evidence of the defendant that the court may decide whether or not a reasonable man would have taken the same steps. It may well be that the defendant may be able to show that he exercised reasonable care to prevent the consequences of the *misstatement or* he may be able to show that he had no good reason to doubt the reliability of the source of the information to make further inquiries.

These are matters peculiarly within his knowledge.

It is therefore ordered as follows:

(1) The application for absolution from the instance is dismissed in so far as it relates to the cause of action founded in the making of the negligent misstatement.

(2) There will be absolution from the instance on all the other causes of action on which the claim is based save that relating to the negligent misstatement.

(3) The costs of the application for absolution from the instance are to be determined at the end of the trial.

Atherstone & Cook, plaintiff's legal practitioners

Winterton, Holmes & Hill, defendant's legal practitioners

CHRISTIAN CARE v MUPEDZANHAMO CO-OPERATIVE 1996 (2) ZLR 323 (HC)

Court **High Court, Harare**

Adam J

Civil application

25 September 1996 Judgment No. HH-137-96

Flynote

Practice and procedure - pleading - heads of argument - date of filing - effect on date of set-down

Headnote

The provisions of r 238 of the High Court Rules 1971 should be observed and complied with strictly. Where the applicant's heads of argument are to be served, this must be done first on the other side. It is then necessary to file with the Registrar proof of such service, which must be done either before or simultaneously with the applicant's heads being filed with the Registrar. The time when a respondent has to file his heads of argument in reply is calculated from the date when the applicant's heads are thus filed (and not from the date of service). A respondent cannot be barred for failing to file his heads within the prescribed time unless there has been, in terms of the Rules, proper service - including filing proof of that service with the Registrar - and then filing of the applicant's heads of argument.

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Case cited:

Muzerengi v Muchekwa 1992 (1) ZLR 58 (H)

The court referred to the following rules of court:

High Court Rules 1971 (RGN 1047 of 1971), r 238(2a) and (2b)

Case Information

P Nherere, for the applicant

A Billie, for the fourth respondent

Judgment

Adam J: The applicant's court application was filed on 2 October l995 and

ADAM J

served on 21 October l995. On 24 October l995, the fourth respondent's legal practitioner wrote to the applicant's legal practitioners, complaining that the papers served on his client were not legible, requesting proper documents and saying that this would have a bearing on the l0 days within which opposing papers had to be filed. On 24 November l995, a notice of opposition and an opposing affidavit were filed. There is nothing before me to indicate that the applicant's legal practitioners and the respondent's legal practitioners agreed to an extension of time within which the fourth respondent could file his papers. On 5 June l996, an affidavit was filed by the deponent of the founding affidavit in the court application.

On 24 July l996, the applicant's heads of argument were filed.

On 24 August l996, a certificate of service, showing that the applicant's heads of argument had been served on the fourth respondent's legal practitioners on 26 July l996, was filed on behalf of the applicant.

On 28 August l996, a notice of set down fast track roll for 25 September l996 was filed on behalf of the applicant and served on the fourth respondent's legal practitioners on 29 August l996.

On 5 September l996, the fourth respondent's heads of argument were filed.

In *Muzerengi v Muchekwa* l992 (l) ZLR 58 (H) Robinson J pointed out that there must be strict compliance with the provisions of the High Court Rules l971, which prescribe how long prior to the hearing heads of argument must be filed.

Rule 238 of those Rules provide that in an application, exception or application to strike out, where parties are to be represented by legal practitioners, the matter shall not be set down unless the legal practitioner concerned (a) files with the Registrar proof that a copy of the heads of argument has been served on the other side and (b) files with the Registrar those

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heads of argument.

Rules 238(2a) provides that heads of argument shall be filed by the other side's legal practitioners not more than l0 days after those heads of argument have been filed with the Registrar and at least 3 days before the hearing.

Rule 238(2b) provides that where heads of argument that are required to be filed are not filed within the time specified in r 238(2a) the parties concerned shall be barred.

ADAM J

In the present matter, the applicant did not file with the Registrar proof that the applicant's heads of argument had been served on the other side, either before or simultaneously with the filing of the applicant's heads of argument. Instead, the applicant's heads of argument were filed on 24 July l996 only. Thereafter, the applicant's heads of argument were served on the fourth respondent on 26 July l996 and proof of service of this was filed on 24 August l996. This was not in accordance with r 238.

Since the period when the fourth respondent has to file his heads of argument is calculated from the date when the applicant's heads have been filed in terms of r 238(2a) before a party can be barred under r 238(2b), it is imperative that the provisions of r 238 be strictly complied with.

It follows that in this matter this period cannot be determined as the applicant's heads of argument were not properly filed under r 238.

Legal practitioners are once again reminded that they must observe and comply with r 238 strictly. I would warn legal practitioners that failure to do so may result in this court ordering costs to be paid de bonis propriis by them.

This matter is postponed *sine die* in order to permit the applicant to comply with the provisions of the High Court Rules l971 and to regularise matters.

The costs for today's hearing shall be paid by the applicant's legal practitioners.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Mkinya & Associates, fourth respondent's legal practitioners

MAKOVA v MODUS PUBLICATIONS (PVT) LTD 1996 (2) ZLR 326 (HC)

Court **High Court, Harare**

Gillespie J

Civil action

4 July, 9 August & 2 October 1996 Judgment No. HH-132-96

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Flynote

Practice - pleading - innuendo in defamation cases - pleading of

Delict - actio injuriarum - defamation - jest - liability of person uttering words in jest - absence of *animus* injuriandi - defamatory meaning of words - approach to determining - *animus* injuriandi - place of in law of defamation - exception - approach on

Headnote

The plaintiff was employed as the head of the Army's public relations section. A newspaper owned by the defendant published an article about him. The newspaper intended its article as a satire directed at the obesity of the plaintiff. The plaintiff felt that his reputation had been harmed by this article and sued the newspaper for defamation.

Held, that in order determine whether the published words carries a defamatory imputation the test to apply is how the words would be understood by ordinary, reasonable readers. When attempting to discover the ordinary meaning of a passage it is plainly necessary to strike a balance between subtle analysis and hasty misconception; between cool reserve and excitability. In doing so, the court should tend to favour the more reasoned approach to the illogical, for that is at the heart of the definition of a reasonable person. The court is entitled to assume that, although the ordinary reader may be prone to a certain amount of loose thinking, he will, after getting a general impression, look at the article again before coming to a conclusion.

Held, further, that the only defamatory meaning that the article could have suggested to the ordinary readers was that the plaintiff's obesity made

GILLESPIE J

him unsuitable to perform effectively his public relations job because he would present such a poor image of a fit and efficient soldier that people would not take him seriously.

Held, that there was some confusion as to what the present law regarding *animus* injuriandi is in our law. The leading case in Zimbabwe is still the 1972 case of Smith NO & Anor v Wonesayi and this case has not been overruled. It lays down that there is strict liability for defamation and that absence of subjective intention to defame is no defence and that a mistake, even a reasonable mistake, does not constitute a defence. Recently, in the cases of Zimunya v Zimbabwe Newspapers the High Court and Supreme Court erroneously interpreted the decision in the Wonesayi to lay down that a mistake is a defence in our law, provided it is a reasonable mistake. The Supreme Court did not intend, it seems, to overrule the decision in Wonesayi.

Held, further, that the approach in Wonesayi that even a reasonable mistake provides no defence needs to be reconsidered in the light of later developments in South Africa and various policy considerations. The Supreme Court should, when the opportunity presents itself again, decide whether or not this case is still good law or whether this decision needs to be revised.

Held, in regard to the defence of jest, that as the law presently stands a person can only rely

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successfully upon this defence if the words that the defendant intended to be understood in a jocular sense would actually be understood in this sense by ordinary readers. If ordinary readers would not have understood them in this sense but would have understood them in a sense that was defamatory of the plaintiff, the defendant is liable despite the intention of the defendant to make a joke.

Held, that ordinary readers would have understood the article in question in a jocular vein and would not have regarded it as defamatory. The defendant was therefore not liable for defamation.

Quaere: whether a subjective approach to *animus* injuriandi ought to be adopted in line with the South African law.

Cases cited:

Argus P & P Co & Ors v Esselen's Est 1994 (2) SA 1 (A)

Auridiam Zimbabwe \(Pvt\) Ltd v Modus Publications \(Pvt\) Ltd 1993 (2) ZLR 359 (H)

Channing v SA Financial Gazette Ltd & Ors 1966 (3) SA 470 (W)

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

Conroy v Stewart Printing Co Ltd 1946 AD 1015

Demmers v Wyllie & Ors 1978 (4) SA 619 (D)

GILLESPIE J

Demmers v Wyllie & Ors 1980 (1) SA 835 (A)

Dublin, Wicklow & Wexford Rlys Co v Slattery (1878) 3 App Cas 1155

HRH King Zelithini of KwaZulu v Mervis & Anor 1978 (2) SA 521 (W)

Johnson v Rand Daily Mails 1928 AD 190

Lewis & Anor v Daily Telegraph Ltd [1963] 2 All ER 151 (HL)

Madhimba v Zimbabwe Newspapers \(1980\) Ltd 1995 (1) ZLR 391 (H)

Masch v Leask 1917 TPD 114

National Union of Distributive Workers v Cleghorn & Harris Ltd 1946 AD 984

Neethling v du Preez & Ors 1994 (1) SA 708 (A)

Smith NO & Anor v Wonesayi 1972 (1) RLR 262 (A); 1972 (3) SA 289 (RA)

SA Associated Press v O'Malley 1977 (3) SA 394 (A)

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Young v Kemsley & Ors 1940 AD 258

Zimbabwe Newspapers (1980) (Pvt) Ltd v Zimunya 1995 (1) ZLR 364 (S)

Zimunya v Zimbabwe Newspapers 1994 (1) ZLR 35 (H)

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

Case Information

G M Muganhu for the plaintiff

E W W Morris for the defendant

Judgment

Gillespie J: Colonel Claudias Makova ZNA (ret.) has been called a fat man. He has been called that in print. The organ which comments upon his size is a newspaper publisher, Modus Publications (Pvt) Ltd. Fat, of course, is a term of broad generality. The specific phrase applied to his person was "the rotund Colonel". To listen to him give his evidence, one gets the impression that his brother officers, quick to recognise and appreciate a felicitous formulation, have made the epithet their own. He has been made the butt of "fat" jokes. The joke has now worn thin.

He has instituted proceedings for defamation against the defendant claiming damages totalling $70 000. The publication which has caused such affront is the Financial Gazette of 13 October 1994. This weekly newspaper carries a feature "Media Circus" under the by-line "Muckraker". Muckraker published a piece which reads:

> "A picture in The Daily Gazette recently showed reporters touring mined areas along the eastern border. With them was the army's public relations officer, Lt Col Claudius Makova. The caption told us the Press group's helicopter had been forced to land on a mountain in the Chimanimani range.

GILLESPIE J

> We were not told why the helicopter was forced to land. Judging by the size of Col Makova the answer was obvious: it could proceed no further with a load like that on board. The rotund colonel, featured in the Gazette picture with hands in pockets and a bulging patriotic front, is hardly a suitable advertisement for the leaner army of tomorrow that we have been promised.
>
> And there was no prospect of him climbing down that mountain without mechanical assistance. A rapid deployment of Col Makova to the nearest army gym would be highly recommended. He could save the tax-payer a fortune in food bills."

The complaint of the plaintiff is put thus in the declaration:

> "4. The plaintiff contends that the words ... were wrongful and ordinarily defamatory of him.
>
> 5. As a result of the defamation the plaintiff has been damaged in his reputation and integrity and claims damages.

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ALTERNATIVELY

6. The plaintiff contends that the words complained of were false and defamatory of the plaintiff in that they imputed and were intended by the defendant to impute and were understood by the readers to whom they were published to impute that the plaintiff, although a director of public relations in the army, was a joke and not fit to be in the army, or to occupy such a position in the army, and the army was guilty of unconscionable conduct contrary to its claims that it intended to create a leaner army."

On these averments is claimed, according to the prayer, "$40 000 for contumelia" and "$30 000 for injuria, an impairment of the plaintiff's society within the army, and community as a director of public relations".

This is pleading which is less than perfect. The expression "ordinarily defamatory" is horribly ambiguous but I suppose has to be taken as meaning defamatory *per* se. It is not stated, however, which of the words used are defamatory. The allegation that the plaintiff has been damaged in his integrity is quite meaningless. The averment pleaded in the alternative suggests at some passing awareness of a difference between the primary and

secondary meaning of words, but betrays no real knowledge either of how to plead an innuendo; or how properly to "point the sting" of an allegedly defamatory imputation; or of the consequences of doing so.

Where the defamatory meaning relied upon is a matter of inference to be drawn from the words this is not a case of innuendo. An innuendo only arises where words *prima facie* unobjectionable are rendered harmful by certain facts known by the audience to which the words complained of are published. 1(82) An implication which arises from the ordinary use of words alone in the absence of special circumstances is as much part of their ordinary meaning as the literal meaning of those words.2(83) That which para 6 advances is not a secondary meaning or innuendo but an implication said to arise in the ordinary meaning of the words complained of.3(84)

To this declaration the defendant has taken exception. The exception advances the following grounds:

"1. the words complained of are not defamatory of the plaintiff;

2. the innuendo declared is one that no reasonable reader of average intelligence would draw."

The exception was not set down for prior hearing, rather the defendant chose to plead over. The plea admits the publication of the article but denies that the words were intended and would be understood as "light-hearted banter." In reference to para 6 of the declaration it is pleaded that the averment suggesting that unconscionable conduct has been imputed to the army is irrelevant and embarrassing. A defence of fair comment is raised. Damages are put in issue. At the pre-trial conference, Robinson J directed that the exception should be argued separately. I heard the exception on 4 July 1996 and gave brief oral reasons dismissing it on 5 August. The trial itself

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was heard on 9 August.

I would like first to set out my reasons for dismissing the exception. During argument, Mr Muganhu for the plaintiff wisely abandoned any notion that he

GILLESPIE J

was relying upon a secondary meaning. In the absence of the averment of special circumstances giving a peculiar defamatory meaning to the words 4(85), the test on exception, as is well-known, is:

> "whether a reasonable person of ordinary intelligence might reasonably understand the words of the article to convey a meaning defamatory of the plaintiff. This is unquestionably the correct approach and, as this formulation indicates, the test is an objective one. In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the court must take account not only of what the words expressly say, but also of what they imply." 5(86)

It has been suggested to me that the Financial Gazette is a newspaper read by the more affluent, sophisticated members of society, person who are less likely to draw unexpected and extravagant conclusions as to defamatory meaning where none such is intended. 6(87) It does not seem to me that it is appropriate to impute any special characteristics to readers of particular publications at the stage of exception, particularly since at this point in the proceedings one has no evidence of the portion of the public to which any particular newspaper might appeal. This approach seems to me to be better reserved for consideration in determining the issue whether an imputation which could have been understood in a defamatory way probably was so understood. I have accordingly dispelled from my mind at this stage any notion that a reader of this paper might be more urbane and logical than the reader of some other publication.

The plaintiff, as I have already noted, has averred the implied sense in which the words complained of are alleged to bear a defamatory meaning. He has "pointed the sting" relied upon. The consequence of this is that:

> "once a plaintiff has selected the meanings of the offending words upon which he relies, he is bound by that selection and, if he should fail to establish that the words bore or bear such meaning or meanings, he cannot then fall back on any other defamatory meaning or meanings

GILLESPIE J

> which he contends that the words bear *per* se, unless he has pleaded the selected meanings as an alternative to a general allegation that the words are defamatory *per* se." 7(88)

The defamatory imputations to be inferred from the publication are, according to para 6 of the declaration, that the plaintiff is a joke; that he is not fit to be in the army; that he is not fit to occupy the position of Director of Public Relations in the army; and that the army is guilty of unconscionable conduct. These are the meanings to which the plaintiff would be confined but

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for the fact that para 6 is averred in the alternative to para 4 of the declaration. Although I cannot help feeling that this is more by chance than design, nevertheless the quasi-innuendo is pleaded as an alternative to the alleged defamatory meaning *per* se of the whole article. The effect of this is that I have entertained in addition to the foregoing imputations, a further imputation advanced in argument on exception, namely that the plaintiff's size is an indication of his appetite and consumption of food which must be so great as to constitute an unacceptable drain upon the tax-payer.

The first of these alleged meanings, that the plaintiff is a joke, is most ambiguously put. I am not at all certain what is meant by this. It may be that the plaintiff has been held up as someone to be laughed at, an object of ridicule. If this is what is meant, then the enquiry is not as to a meaning of the words but as to their effect, that is to say, whether he has been defamed. As I understand the plaintiff's case, therefore, the thrust of the complaint is that the words mean that the plaintiff is a person who is of no account and not to be taken seriously in the position which he occupies. In common parlance, one refers to a person as a joke when he is incompetent or ineffective in his position; when his actions or pronouncements are of no weight. One of the meanings that has been attributed to the words complained of is that it is imputed to the plaintiff that he is not fit to occupy the position of Director of Public Relations in the army. I shall deal with this meaning more fully below. It is enough nw to say that this meaning is said to arise by inference from the suggestion that the plaintiff, who was the army's public relations officer, does not fit the image which the army is attempting to convey. This, which I consider to be the main thrust of the complaint, suggests to me that the alleged meaning that the plaintiff is a joke is no more than a particularly confusing repetition of the suggestion that the plaintiff, because of his unfortunate physical appearance, is of no account or effectiveness as a public

GILLESPIE J

relations officer to the army. Certainly, nothing has been said to me in evidence or in argument which suggests that anything other than this is intended by this particular complaint. I need dwell no further on this suggested meaning, therefore, because it is embraced in the other meaning, which I shall consider in due course.

The next meaning attributed to the words is that the plaintiff is not fit to be in the army. Examining the publication as closely as I can, I am able to find nothing which properly supports the inference that the plaintiff is unfit to be in the army. I have also attempted to consider the article more or less superficially, rather in the manner as would the ordinary person sitting down to read his weekly newspaper. I can see nothing which a less strict approach would find as justifying an inference that the plaintiff is unfit to be in the army. No person could possibly take seriously the suggestion that the plaintiff could not in fact be carried by a helicopter. The reference to him not being a suitable advertisement is so obviously connected with the man's position as Director of Public Relations that it is that connection which would immediately commend itself to the ordinary casual reader and not a suggestion that the plaintiff is unfit to be a member of the armed forces. I therefore find that the words comlained of are not reasonably capable of bearing the meaning that the plaintiff is unfit to be in the army.

The third meaning which the plaintiff relies upon is that concerning the plaintiff's unfitness to be

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the army's public relations officer, the meaning which embraces that imputation alleged by the plaintiff that he is a joke. This inference is said to arise from the words, "The rotund Colonel Makova, featured in the *Gazette* pic with his hand in the pockets and a bulging patriotic front, is hardly suitable advertisement for the leaner army of tomorrow that we have been promised." I have no doubt whatsoever that the words complained of are capable of meaning that the plaintiff, in his obese appearance, presents so poor an image of a fit and efficient soldier that he is ill-chosen to be the main liaison between army and public.

Although the point of jest has been raised in the plea and not in the exception, Mr *Morris* argued that this meaning cannot be regarded as defamatory since it was written and intended in jest. The question of a jocular intent being a defence to a cause of defamation is in no little measure connected with the place of *animus* injuriandi in the law of injuries. It is said that:

> "If the intention to defame (*animus* injuriandi) is clearly absent, then there

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GILLESPIE J

> will be no liability ... There may be such absence of intention even where the words, taken in themselves, are clearly defamatory. As an instance, we may take the case of words uttered in joke. What is said in joke, during social or friendly intercourse, is as a rule not actionable. But even here much will depend on the circumstances; and it will be within the discretion of the court to say whether, even if a jocular intention be proved, the result was or was not to hurt the character or reputation of the plaintiff." 8(89)

And again:

> "So too, one who has used words capable of a defamatory meaning, relating to another, in joke or play, is not liable. This in effect, amounts to saying that the *animus* injuriandi will be judged of from the circumstances. The truth is that in such cases the words are not really understood in a defamatory sense, being either inoffensive, or clearly partaking of the nature of 'chaff', or in circumstances showing that there was something in the way of legitimate 'fun'. But it must be perfectly clear that there was no intention to injure, and where the words are defamatory, so that the hearers may attach an injurious meaning to them, the defendant will not, as a rule, be exonerated. It is, therefore, not enough for the defendant to say that he meant the words in jest, this being no more than stating that he had no injurious intention, which, as we have seen, is no defence by itself. Consequently, in an action for slander, the defendant who says the words were spoken in jest must prove that they were so understood, nd a plea of jest is of no avail if the words were defamatory *per* se and injure the reputation or business of another." 9(90)

This highlights two major considerations relating to an asserted defence of jest. One relates to the subjective intent of the alleged wrongdoer, the other to the effect of the words on the audience, which is to say the possible defamatory nature of the words.

Both of these factors have been recognised in other pronouncements relating to the defence of jest.

> "It is perfectly clear the *animus* injuriandi lies with the person who uses the words, but if a person utters words that are *per* se libellous, he is

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GILLESPIE J

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> responsible for what he does, and he is responsible if he injures the business of another. If, therefore, he was to excuse himself that he merely spoke in jest, he must prove to the court that it was in jest, and that the words must have been accepted as such by the bystanders. If, of course, it is patent to the court that the words could have been used in no other sense than as a joke, then the court will not give damages. If, however, the court comes to the conclusion that the words may have been used as a joke, but that it was not taken as such by the general public, and if the words by themselves can injure another person, then I do not think that the court would be justified in holding, because a man utters dangerous words as he intends in a joke, that for this reason he is not liable in damages." 10(91)

Academic writers comment that this is therefore a situation in the South African law where lack of *animus* injuriandi is not alone a defence, the court must in addition investigate whether the audience reasonably accepted the utterance as a joke. 11(92)

The question of the extent to which an innocent intent may be relevant is one which I have addressed in some detail below. For the purposes of determining the exception, however, no examination of *animus* injuriandi is required. The existence, to the extent it may be relevant, of a humorous intention is something which is to be proven by the defendant and is therefore not cognisable on exception. Moreover, should it be that the words said to be uttered in jest are reasonably capable of being understood in a defamatory sense, then the normal test on exception concerning the defamatory meaning of words shows that an exception that the words are a joke and not defamatory cannot succeed. Such an exception can only prevail where the publication complained of is not reasonably capable of being understood in anything other than a jocular and non-defamatory vein. The only consideration that can be material at the stage of exception is whether words could only be reasonably understood as being in jest or whether they ae capable of being interpreted as an injurious imputation.

Applying this criterion to the particular meaning alleged and under consideration, I have no doubt that the words complained of could be understood by the ordinary reader as meaning that the plaintiff is not a

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suitable person to be the publicity supremo of the army. That his size and appearance is such that his utterances for his employer cannot carry any weight. If such a meaning were shown to be the imputation, it would, I think, be defamatory in that it would tend to lower the esteem in which the plaintiff would be held in his position as the army's director of public relations.

The final defamatory meaning relied upon is alleged to be that the plaintiff, through his gargantuan appetite, is an unfair burden on the tax-payer. This meaning I reject. The words which allegedly give rise to this inference are to my mind incapable of being understood in any serious sense. It is such a gross overstatement - it would be so inaccurate a suggestion, were it to be taken as seriously made - and so obviously designed to be a humorous sally, that the plaintiff is provided with free food in his service and consumes so much of it, and so much more than his fair share of tax dollars, as to constitute an unacceptable drain on the army budget, that I cannot conceive that any person would think that it was suggested in earnest. These words can only be understood as a metaphorical and hyperbolic description of the plaintiff as considerably overweight.

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Of the various defamatory meanings relied upon, then, I am persuaded that only one is reasonably capable of being understood in a defamatory sense. That is sufficient for the exception to be dismissed. I therefore ordered the trial to proceed. In doing so I did not direct that the issues be restricted to any particular defamatory meaning since I did not give my reasons in any great detail, and did not consider that the trial would be prolonged by any lack of such a restriction.

The plaintiff himself testified. He is a man of considerable and undoubted corpulence. He does not appear to possess the fabled lightness of foot enjoyed by many storied men of size. He weighs some 200 kilograms; he is approximately 1,5 metres tall. "Rotund", as a description of his physique, seems moderate.

His testimony is by no means convincing. His theme was that, for some inexplicable reason, the defendant has embarked upon a campaign to besmirch his reputation. This endeavour commenced with the publication some time ago of an article concerning suggested corruption within the army where he was named as having declined interview or comment on the subject. His allegation was that this article constituted a defamation imputing to him a knowledge of, and an intention to suppress information concerning, the wrongdoing reported. He took no action for this defamation because he was

a serving member of the army and could do nothing to embarrass the force. Having failed to dislodge him from his position by this means, the defendant then sought to do so by publication of the Muckraker piece. This he says caused him deep personal humiliation and public ridicule. He became aware of the imputation upon the morning of its publication when officers attending a lecture given by him at a staff college drew it to his attentin asking his explanation as to how he could continue in office in the light of the article. Brother officers took to hailing him as "the rotund Colonel". He felt it impossible to discharge his duties since he no longer commanded respect. He therefore retired from the defence forces and took employment in the private sector. This he claims caused considerable financial loss.

The imputations of Muckraker, he says, are false. He is not fat - fat he declares to be a "relative term". Even were he fat, it does not matter if a soldier is fat or if a public relations man is fat. He is not overweight - he is the appropriate weight for his height; Muckraker has given him "a shape which did not exist before and which people see now"; it has, in his jargon, "mobilised people towards a particular image of himself". His weight did not force the helicopter to land - bad weather interrupted the flight. He is not unfit - regulations oblige him to participate in sports every Wednesday; he plays soccer and goes jogging; he can only miss sports sessions with permission; sometimes "a whole month goes by" without him seeking leave to absent himself from sports. He eats no more than any other soldier; and his food is not provided by the army.

As for his abilities to act as public relations officer for the army, before the publication of the offending piece he was a Lieutenant Colonel, Director of the Army Public Relations Directorate and public spokesman of the army; he was the adviser to the commander on all matters

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pertaining to communications; the link with the media between the army and the public. He had many ideas and "a vision for the defence forces". The article, however, humiliated him; it mobilized people's opinion to humiliate him; it manifested an intention to destroy him. It wrought such a "disaster on his career" that, despite the fact that none of it was true, he felt he could not in conscience maintain his position. Reluctantly, he retired. He did not do so voluntarily. He applied to his commanding officer to be considered for redundancy. He received no benefit on retiring that he would not have obtained by staying in the force.

The article was not intended as any satirical or light-hearted jest - had it been he would not have come to court. A newspaper "should not make people laugh at another person". The piece was published in an intention to "take up

GILLESPIE J

where the previous article had left off" in order to destroy the plaintiff. It was intended by the article to "punish him for the fraud". It was not simply repeating in print some good natured banter concerning his size and to much the same effect as the publication that had occurred between journalists and the plaintiff during the helicopter flight. There had been no such exchange.

This evidence is manifestly grossly overstated. In many respects it is so utterly unconvincing as to demand summary rejection. The allegation of an intention to destroy I doubt can be seriously entertained by the plaintiff, but if it is, that is a mark of paranoia rather than anything else. The allegation of a concerted campaign of articles, unsupported by any pleading or discovery of previous articles, coming very late in the day and with no action having been taken over the earlier story, is entirely unpersuasive. The claim to have been forced into a premature and disadvantageous retirement not only appeared untrue but is contradicted by other evidence including that of the terms of the retirement package. The testimony was given with such passion and heat on the part of the plaintiff that I am bound to hold myself extremely sceptical of it. It was wild in its allegations; emotional in its delivery; lacking in factual content; and unreliable as a whole. I reject it where it is not supported by other evidenc.

Some support is to be found in the word of Major Maregedze. This person, who seems to me an officer and a gentleman, was at the lecture given immediately after the publication of the Muckraker piece. He confirms that there was some laughter over the article, and the words "rotund Colonel", before the lecture; some scarcely stifled amusement during its course; and that a question was put after the lecture concerning the article. He personally felt sympathy for the plaintiff, who was a popular figure, and who appeared surprised and depressed at the article. In addition to being a popular figure, the plaintiff was well-loved by his commander. Despite that, the Major was not personally surprised at the plaintiff's decision to retire which he regarded as a gentleman's decision made in light of the fact that the plaintiff felt he no longer commanded respect. The witness did not appear to consider the plaintiff's reputation to have suffered harm.

This witness reveals that the retirement package taken by the plaintiff was one being offered by the Army as part of its drive to reduce its establishment (the promise of the "leaner army of

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tomorrow" referred to by Muckraker). This package, as is confirmed by its terms in exhibit 1, was an inducement to accept an early retirement and carried a number of benefits including a pension; a deemed increase by one-third of the actual pensionable service of

GILLESPIE J

the retiring member; promotion one rank up "to increase pension benefits"; participation in a vocational training course; a vehicle purchase scheme if retirement was as a full colonel; and for all officers, placement on the retired list, entitling them to retain and wear ceremonial uniform on appropriate occasions. The package, as its terms make clear, "is not voluntary. Those who insist on retiring will do so under normal conditions." A most important piece of evidence from the Major was that the plaintiff was not of a category of person to be considered for enfrced redundancy under this scheme. In its terms those upon whom it was to be enforced were members with a bad disciplinary record; those ineffective through illness; the incompetent; and those of 46 years and over who are not specialists. The plaintiff fits none of these categories. We are not told his age. He does not look over 45, but even if he is he was a specialist. He certainly does not claim to have been ill-disciplined, ill or incompetent. It is clear from the evidence of the Major that the plaintiff's inclusion in this redundancy package could only have been brought about on the plaintiff's particular request and as an extraordinary favour. The evidence gives meaning to the plaintiff's own testimony that he had to apply to his commander for permission to be included in the package.

I am left in no doubt whatsoever that the plaintiff left the army because he was able to persuade the powers to include him in this scheme. The attractions, although he seeks to deny or to minimise them, are undoubted. He was in the army since 1982, he retired in 1995. In terms of the package his pensionable service is deemed to be increased by one third to some seventeen or eighteen years. His pension is further enhanced by retirement as Colonel rather than Lieutenant Colonel. This retiring rank in addition caused him to qualify for the vehicle purchase scheme. The honorific aspects of placement on the retired list I am quite certain meant much to the plaintiff. All this, and the allure of employment in the private sector. I have no hesitation in rejecting completely the plaintiff's false, self-serving and most undignified attempt to assert that he was forced out of the army by the article. He took the opportunity that offered itself and has deliberately attempted to capitalize on it in this claim for damage. He has tried to deceive me.

The defendant led the evidence of Trevor Ncube, formerly the editor of the *Financial Gazette*. This gentleman gave evidence in a manner which I cannot fault. He revealed that Muckraker is not one newshound but a collective *nom-de-plume* shared by a number of contributors to the Media Circus feature. This feature was his creation and was intended to be humorous , to "give the public the opportunity to laugh at itself". Its role was seen as showing the

GILLESPIE J

human side of public figures especially those displaying a tendency to self-importance. It purported to reveal the imagined "issues behind the headlines". What this means is

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demonstrated by the following. In the same Muckraker piece, after the paragraphs concerning the plaintiff, appeared the revelation that a photograph, in the same issue of the *Daily Gazette* as had published the photograph of the plaintiff, showed Crown Prince Hassan of Jordan. Muckraker described him as looking anxious and attributed this unease of mind to the fact that the newspaper had referre to that dignitary as "plain old 'Mr' Hassan". As editor he took responsibility for the publication of the paragraphs concerning the plaintiff. He admitted the publication of a previous article mentioning the plaintiff but denied any connection whatsoever between the two. He stated the newspaper's intention to have been solely humorous and satirical without any intention to injure.

Mr Iden Wetherell also testified. He is the reporter who actually wrote the offending paragraphs. He explained that the photograph of the plaintiff, which appeared in the *Daily Gazette* accompanying the article concerning the tour of minefields by journalists under the escort of the plaintiff, seemed a suitable matter for comment by Muckraker. It struck him that the image of the "leaner, more efficient, defence force", which recent publicity had been promising, was absurdly contradicted by the photograph. The article and photograph were produced. The substance of the story is irrelevant and concerns the danger posed by minefields seeded by Rhodesian forces during the "Chimurenga" war. The photograph depicts the plaintiff and a number of journalists standing, apparently disconsolately, and looking at nothing in particular. The caption of the picture reads "What next ...? this was the question these journalists were asking themselves after a helicopter taking them on a tour of mined areas along the eastern border as forced to land on a mountain ..." The journalists are all identified. The plaintiff is in the centre foreground of the picture and is slouching with his hands in his pockets. The photograph accurately depicts his short and obese stature. His stomach, by an ill chance, is perhaps the focal point of the composition.

It is a very large stomach. The plaintiff seems anything but lean and efficient. It is this which appealed to Mr Wetherell's sense of irony. He felt that the fact of the army public relations officer being pictured so overweight could properly be the subject of acceptable humorous satirical comment. He wished to juxtapose the vaunted leaner image of the army with that of an overweight and slovenly looking officer. He adds that he did not personally know the plaintiff; that he had had no dealings with him and no intention to

defame him nor to "mobilise public opinion against him". Much of his idea for the paragraphs came from what had been reported of the incident by the *Daily Gazette* reporter present.

Finally, Lincoln Nkala gave his evidence. He was present on the tour with the plaintiff. (He is in fact standing next to the plaintiff in the picture and wrote the accompanying article.) He recounted an atmosphere of some tension because of the forced landing, tension which was relieved by jocular, rather personal, remarks addressed to the plaintiff by a number of reporters about his size. These remarks were said to have been taken by the plaintiff in good part as witticisms with no offence.

What I find proven in his evidence is the following. The plaintiff learned of the article and its

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contents, in circumstances somewhat embarrassing to himself, when those attending his lecture drew his attention to it in what appears to have been intended as a humorous exchange. He has had to tolerate a certain amount of good-natured ribaldry from fellow officers. He may have been the subject of previous publicity by the defendant, but that publication, whatever it may have been, is not before me for comment. There is no basis upon which I could regard it as having been wrongful or injurious, particularly in that the plaintiff took no action about it. There appears to be no reasonable ground for the plaintiff to consider that the defendant had engaged upon any campaign against him, and because of the general deficiencies of his evidence I am not prepared to accept that he entertained any genuine belief that this was the case. His reputation within the army, secure before the event, was unharmed thereafter. No-ne thought less of him or his abilities, even if they may have laughed at the report. There was no need for him to resign his position. His feelings may have been distressed by the incident but he has dishonestly exaggerated the affair.

The evidence for the defendant persuades me completely. There was certainly no intention to defame. There was an intention to make satirical comment and to highlight the absurd juxtaposition noticed by the journalists. The remark was deliberately included in a feature which makes absurd suggestions and comments on matters of news for the sake of their humorous content. There was no link at all between the Media Circus paragraphs and previous articles mentioning the plaintiff's name. This alleged innocent intent raises the subject of the question of *animus* injuriandi in our law.

The law in Zimbabwe has of course been left behind the development of the Roman-Dutch law in South Africa since the cases of *Smith NO & Anor v*

GILLESPIE J

*Wonesayi*12(93) and *South African Associated Press v O'Malley.* 13(94) In the former of these two decisions the Rhodesian Appellate Division held the law regarding the place of *animus* injuriandi in actions for injury to be that whereas in all cases, the intent to injure is a necessary element of liability, proof of the commission of an action *per* se injurious carries with it a presumption of intent which it becomes the defendant's burden to rebut, 14(95) but that this presumption can only be rebutted by proof of the existence of circumstances which the law regards as excusing the wrong. 15(96) Proof by the defendant of his genuine but mistaken belief in the existence of such circumstances does not afford a defence. 16(97) Perhaps the weakest part of the reasoning in the judgment, if I may respectfully suggest any such lack, is the fact that the decision of Beadle CJ is premised upon an understading of the existing special defences to a cause of defamation (that is truth for the public benefit, fair comment and privilege) as being defences excluding intention. That this is the premise is manifest from such formulations as "a defendant cannot ... rebut the presumption of *animus* injuriandi without proving objectively that his statement was made in circumstances which, in the eyes of the law, justified his making it".17(98) This statement is only possible if one fails to acknowledge and to give effect to the difference in theory between a defence excluding unlawfulness and one showing the absence of intent. The consequence has been to leave the requirement of *animus* injuriandi as a fiction. The insistence that the existence of *animus* injuriandi can be rebutted only

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by proof of objective circumstances of defence results in a regime where strict liability for all injuriae is imposed upon all wrongdoers and where any mistake, whether of law or fact, whether reasonable or not, is irrelevant. The decision, whethe or not it was an accurate comment on the state of the law at the time at which it was pronounced, failed to recognise the trend, already apparent then (perhaps one has the benefit of hindsight) towards a more theoretically consistent subjective approach.

This subjective approach became the law in South Africa with the pronouncement of the decision in *O'Malley*. This decision declared the law to be that proof of the objective wrongdoing does indeed give rise to a presumption of intent to injure. This intention is defined as a state of mind of

GILLESPIE J

intending the particular result of the action with the knowledge that the action will be unlawful.18(99) Intent is different from motive 19(100) and in particular it includes constructive intent. 20(101) The presumptive ill intent is to be rebutted by the defendant by appropriate evidence. The existing defences were acknowledged to be defences excluding unlawfulness.21(102) Since intention to injure includes knowledge of unlawfulness of the conduct, it therefore follows that proof of the existence of a genuinely mistaken belief in the existence of one of these defences would itself constitute a defence. 22(103)

That the South African and Zimbabwean theory of *animus* injuriandi should diverge was the last thing Beadle CJ wished. He said as much:

> "Ever since the days when the Appellate Division of South Africa was our court of appeal, we have treated the decisions of that court with the greatest respect, almost in the same manner as we would treat one of our own decisions; and it is right that this should be so. It is to be sincerely hoped that the Roman-Dutch law in Rhodesia will not develop on different lines from that in South Africa. The decisions in our own courts are relatively few in number and practitioners in Rhodesia must of necessity look to the South African decisions and South African textbooks for guidance. Above all, the law must be certain. Practitioners must know where to find it and they must know on what decisions of the courts they can place almost complete reliance. In the past, decisions of the Appellate Division of South Africa have been regarded as such decisions, and if they are no longer still to be so regarded, the future of the Roman- Dutch law in Rhodesia will be uncertain indeed. The sheet anchor of the Roman-Dutch law in his part of the world is the decisions of the Appellate Division of South Africa." 23(104)

I therefore suggest that had O'Malley been decided prior to Wonesayi, its subjectivist approach vis-ˆ-vis the individual, if not also the subsequent development of strict liability for the press would now be our law too. I suggest that had the learned former Chief Justice had the opportunity to reconsider his judgment after the decision in O'Malley, he would have seized it and restored a unity in theoretical approach on the point.

GILLESPIE J

I say theoretical approach advisedly, because despite the difference in theory which has emerged, the source, at least co-equal with the decisions of this court, of all our law and precedent on defamation has for all practical purposes continued to be the decisions of the

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Supreme Court of South Africa and academic writings from that country. *O'Malley* has been cited with approval, and followed in our courts. 24(105) The recognition of the special defences as excluding unlawfulness rather than intent, has been adopted as a matter of course. 25(106) Later decisions of the Appellate Division owing much to *O'Malley* have equally been cited with approval and even followed. Thus, where *O'Malley* suggests that there should be strict liability on the part of the mass media for the publication of defamatory utterances, this has since become law in *Pakendorf en Andere v de Flamingh*, 26(107) a case that has been cited in our courts. Similarly, *Neethling v Du Preez & Ors; Neethling v Weekly Mail & Ors*, 27(108) which applied both *O'Malley* and *Pakenorf*, has been accepted in our law. It appears to me, therefore that the time has come to give full and proper consideration to the place of *animus* injuriandi in our law of injuries and to re-examine whether Wonesayi ought still to be regarded as stating our law.

I am not so presumptuous as to suggest that this judgment is the proper vehicle for such an exercise, sitting alone as I am and without even having had the advantage of full argument on the point. Nevertheless, I am bound to give some consideration to the point if I am to reconcile my decision on *animus* injuriandi and jest with Wonesayi's case and certain recent pronouncements pertaining to intent to injure in this jurisdiction. The recent judgements to which I refer are those in the matter *Zimunya v Zimbabwe Newspapers* (1980) (Pvt) Ltd.28(109)

This matter concerned a claim brought by a person whose photograph had been published in the newspaper. Whilst this might seem unexceptionable enough, indeed a fate welcomed by many, what caused the plaintiff to complain was that the photograph appeared to show him, although fully

GILLESPIE J

clothed, with his penis protruding from his fly. The best view of the evidence would seem to have been that this was an unintended trick of light and shade that went unnoticed by the newspaper staff prior to publication. If that is so, the result was as realistic as it may have been uncontrived. In the resultant suit for injuria, the learned judge in the High Court was faced with the defence of an absence of *animus* injuriandi. In the course of his judgment, the learned judge attempted to trace the development of Roman-Dutch jurisprudence on the question of intent to injure and concluded that from its early beginnings demanding positive proof of a subjective intent it had now reached the stage of being a hollow fiction and was contining to evolve. 29(110) Having cited in support of his thesis both *O'Malley*, as authority for the proposition that the media are subject to strict liability, and Wonesayi, as showing that in our courts an objective approach is applied to the question of *animus* injuriandi, the learned judge stated:

> "What matters now is not what went on in the defendant's mind, but what the fictional level-headed reasonable man would have thought."30(111)

His process of reasoning led him to conclude that where a defendant claims to have published without intent to harm, he is obliged to prove more than a mere genuine state of mind, he must establish reasonableness as well. On the facts of that case he said:

> "It is not enough for the defendant to say that he was mistaken in thinking that the picture he published was

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innocuous whereas it was highly offensive. In certain circumstances a *bona fide* mistake may operate to negative the *animus* injuriandi but that is so only when the mistake is not attributable to the negligence or recklessness of the defendant: Hassen v Post Newspapers Ltd *supra*.

Moreover for us the highest binding authority on the question of mistake and intention still is Smith & Anor NNO v Wonesayi in which Beadle CJ categorically rejected those South African cases which followed the subjective test to *animus* injuriandi in favour of an objective approach. That decision is the law of the land which I am obliged to follow. A *bona fide* but mistaken belief in the defendant's mind about a state of affairs is irrelevant in deciding whether or not the act was done animo injuriandi. What is decisive is whether in the circumstances a reasonable man would have done the deed without intention to injure." 31(112)

GILLESPIE J

The difficulty which this decision poses is this.

First of all, it appears to me that the true course of development of the application of *animus* injuriandi in the South African law ought not to be seen as being from an approach of subjectivity to one of objectivity, but rather from a received objective application owing much to English influence to a deliberate return to principles more consistent with the Roman-Dutch origins. Hence the use by Beadle CJ in Wonesayi of the terms "old school" and "purist school" to describe the competing theories. This understood, one can see immediately that it is, with great respect, incorrect to regard liability for negligence in injuriae as the culmination of a steady process. It is equally inaccurate to talk of Beadle CJ as having "categorically rejected" South African decisions requiring a subjective approach to the question of intent to injure. To allow the learned Chief Justice to speak in his own words:

"As I appreciate my task here, I must declare the law as I see it to be in this part of Southern Africa today, and not as it was in the Netherlands 300 years ago; and I must declare it as it is and not as some may consider it ought to be." 32(113)

He found a consistency of approach in the "old school" and was unable to find any direct authority in favour of the subjective approach, having concluded that cases representing the "purist school" were vulnerable, chiefly as being obiter. He nevertheless showed quite clearly that had there been a Full Bench decision of the Appellate Division directly in point, he may have felt himself unable to reach the conclusion which he had done. Far from categorically rejecting South African decisions, I think the clear impression is created that the learned Chief Justice felt reluctantly constrained to hold that there were no decisions directly supporting a subjective approach, despite his uncomfortable awareness that such a decision would not be long coming.

Nevertheless, as the learned judge in Zimunya *supra* correctly said, the decision of the learned Chief Justice became our law. It is misleading, however, to say that Wonesayi adopted an objective approach to *animus* injuriandi and incorrect, again I write this with the greatest respect, to hold that what is important, according to Wonesayi is "whether in the circumstances a reasonable man would have done the deed without intention to injure". In suggesting, as he does, that Wonesayi is authority for the proposition that a *bona fide* and reasonable mistake as to the existence of a ground of defence is itself a defence, whereas a genuine but unreasonable mistake is not, the

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GILLESPIE J

learned judge misinterprets Wonesayi. The ratio of this case is that in the absence of the grounds constituting a defence no mistake as to the existence of those grounds can supply the lack. There was no attempt to draw a distinction between reasonable and unreasonable mistakes. 33(114) It is possible that he leaves some scope for argument in favour f future development of the law to allow a reasonable error as to the existence of a defence as proof of rebuttal of the *animus* injuriandi but the case certainly does not adopt an objective approach to *animus* injuriandi in the sense that negligence is permitted as the basis of the cause of action for defamation. As it stands, Wonesayi imposes a liability which may be termed strict in that it does not permit of any defence, based upon an innocent mistake as to the existence of a defence, outside the existence of objective facts which the law recognises as a defence.

Zimunya, however, effectively holds that negligence is a cause of action for defamation. This is the inevitable consequence of the decision since the negligence relied upon by the learned judge was not a mistake as to the existence of a recognised defence, but an inadvertence to the publication of defamatory matter. In Zimunya, the newspaper did not know that it was publishing a photograph that appeared to show the plaintiff exposing himself. It was nevertheless held liable on the basis that it ought to have realised what it was doing. This is negligence founding a cause of action for an injuria. As I have already suggested, in Wonesayi, Beadle CJ appeared to acknowledge the proposition that *animus* injuriandi consists of intending the particular harmful result of one's actions together with the knowledge that the result will be unlawful.34(115) He then reduced the requirement of *animus* to a fiction by insisting that a presumption of its existence could be rebutted only by proof of the existence of objective facts cnstituting what is one or other acknowledged defence excluding unlawfulness. This is strict liability with any inquiry into intention, or into mistake, or into unreasonableness or negligence, being irrelevant. The concept of negligence as founding a cause of action for injuria is therefore entirely foreign to Wonesayi's case.

It is foreign too, to the South African law. In propounding it in Zimunya, the learned judge relied35(116) upon *Hassen v Post Newspapers (Pty) Ltd & Ors* 36(117) where Colman J said:

GILLESPIE J

> "I deduce the following rule: A defamation is not actionable if it was published in the honest, though mistaken, belief in the existence of circumstances which would have justified or excused its publication; but that is only so if the mistake is not attributable to the recklessness or negligence of the defendant, or of those for whose acts or omissions he is responsible."

It is to be seen that this passage does not establish negligence as a cause of action but uses negligence as a ground negating any claim to an innocent intent where it is claimed that there was an honest mistake as to the existence of one of the recognised defences. Moreover, this passage, and negligence as a criterion for liability, was expressly rejected in the *O'Malley* case.

On its facts, the result in Zimunya was no doubt in accordance with the strict liability approach

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of Wonesayi. I would venture to suggest, however, with the utmost respect to the learned judge in Zimunya, that the legal principles enunciated and applied were done so erroneously.

This is not to say that some cognizance of the objective assessment of fault might not be desirable. Burchell has argued against a completely subjective approach to fault, and has proposed the following:

> "An individual defendant's *bona fide* (genuine) and essential mistake of factor law relating to publication of defamatory matter referring to the plaintiff, can, and should, serve to rebut the defence of *animus* injuriandi. A *bona fide* (genuine) and essential mistake of fact or law regarding the existence of a ground of justification (defence excluding unlawfulness) should not alone be sufficient to rebut the inference of *animus* injuriandi - it should have to be reasonable as well." 37(118)

Wonesayi blocks this development to our law. Zimunya, with respect, unwillingly departed from Wonesayi which was binding. It did, however, give the Supreme Court the opportunity to reconsider the point.

The Supreme Court has failed to take the opportunity. In a short judgment occupying two pages, the following consists of the complete examination of the law on the issue which I have been addressing:

GILLESPIE J

> "the appellant in this case could not rely upon the defence of lack of *animus* injuriandi because of its stated negligence. See Hassen v Post Newspapers Ltd 1965 (3) SA 562 (W); Shamuyarira v Zimbabwe Newspapers (1980) Ltd 1994 (1) ZLR 445 (H); and Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor 1994 (1) ZLR 133 (H)." 38(119)

I am bound to observe, with the very greatest of respect, that this proposition, for all the clarity it may have of phrasing, serves to throw the law into considerable uncertainty. The reference to Hassen's case undoubtedly supports the proposition as phrased in the quotation, but that judgment is, as I have shown, inconsistent with Wonesayi as the latter stands. Moreover, as I mentioned above, this specific formulation in Hassen was disapproved in *O'Malley*. 39(120) In addition, even if Hassen were correct in this dictum, neither it, nor Wonesayi, serves to establish negligence as a cause of action for injuria, - the effect of the application of this passage to the facts in Zimunya. The other cases cited in support by the learned Judge of Appeal provide even less support for the statement of law. The learned Judge of Appeal provided no reference to any particular part of the two judgments which were relied upon and I am unable to identify any passage which supports the dictum which he advanced. In neither of the tw decisions is the question of negligence part of the *ratio decidendi* and there is no passage in either of them applying a criterion of negligence as a basis of liability. 40(121) In short, the passage is unsupported by recognised authority and constitutes a departure, all unrecognized, from the principle underlying Wonesayi.

There is a further possible indication in the Supreme Court decision that Wonesayi is no longer to be regarded as good law. It appears in the following:

> "This court was not urged to rule on the most interesting enquiry as to whether or not one should follow the South African Appellate Division and hold that the press should be made strictly liable when it injures the reputation or

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dignity of another. See SAUK v O'Malley 1977 (3) SA 394 (A); and Pakendorf & Anor v de Flamingh 1982 (3) SA 146 (A). I do not consider that this enquiry is relevant for a decision to be reached in this case." 41(122)

GILLESPIE J

The significance of this passage is this. If Wonesayi remains our law, then there is no question as to whether the press is strictly liable. 42(123) Both it and the individual are strictly liable in the sense that a defence is only disclosed where the existence of one of the recognised defences is established and that a belief in the existence of a defence is immaterial. This is the ratio of Wonesayi. It is only necessary to decide whether strict liability applies to the media if Wonesayi is being departed from. I cannot believe, however, that this is what the Supreme Court means. I very much doubt that it would have moved away from Wonesayi without actually saying so. If the passage is not to imply a departure from Wonesayi, then that means that the latter pronouncement has come about *per* incuriam. If that statement has been made incautiously, then what of the earlier statement adopting negligence as a cause of action? Academics, as I have said, have urged the adoption of an element of negligence objectivity in inuria matters, but that too is an innovation that could not be brought about without considerable argument and thought.

In conclusion, this lengthy examination of the topic leaves me in a state of considerable uncertainty as to the place of *animus* injuriandi in our law of injuries. I am unable to hold that Wonesayi has knowingly been abandoned and therefore can neither follow O'Malley nor formulate a principle of intent in injuriae. Despite the clear application of negligence as a cause of action in Zimunya I am unable to apply such a rule because that application has manifestly occurred inadvertently and as a result of misapplication of other authority. If I may respectfully make the suggestion without impertinence, Zimunya needs urgent reconsideration by the Supreme Court. In the absence of such reconsideration I must do the best I can to discover a principle concerning *animus* injuriandi as it relates to a defence of jest while doing the least violence to the pronouncements I have so far examined.

It seems to me that if Wonesayi remains our law, then that does not stand in the way of an application of a defence of jest. Beadle CJ, as I noted above, conceded ample room for development of further circumstances approved by law as constituting a defence to a claim for defamation. He did not mention jest but in the light of the existing authority in favour of such a defence there can be no doubt of its availability. The reasoning in Wonesayi is entirely consistent with an approach that a subjective intention to joke is not sufficient

GILLESPIE J

and that a defence will be afforded only if the utterance is in fact understood as a jest. Where a defamation is published which is intended as a joke but which is understood by the ordinary reader as an imputation against character then no defence would be disclosed. The application of the Pakendorf principle, predicated on strict liability of the press alone, would lead to the same result. Were O'Malley to be followed, without an application of strict liability to the press, then a defence would be established if there were the subjective intention to jest and an

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absence of any subjective foresight of the possibility that a defamatory meaning might be attributed to the words. That is to say there would be a defence in the absence of *dolus* eventualis. A logical extension of Zimunya might hold that a defence would only be established where no reasonable person would foresee that the words could be understood in a defamatory sense.

It is now necessary to determine whether the defamatory meaning advanced by the plaintiff and which commended itself to me as reasonably within the purview of the words probably did in fact communicate itself to the audience it reached. During argument, Mr Muganhu for the plaintiff based his case squarely on the proposition that the following defamatory meanings are to be understood from the Muckraker piece: that the plaintiff is so fat that the helicopter could not fly; that he is so fat that the tax-payer spends a fortune feeding him; and that he is so fat that he is unfit to remain in the army. As I have shown, the only defamatory meaning alleged, which in my judgment at the exception stage, might reasonably have suggested itself to the ordinary reader, is the suggestion that he was unfit to be public relations officer. In the absence of objection to these new alleged meanings, however, I heard all the argument that was sought to be advanced for the plaintiff. These new assertions, still, take his case no urther forward.

The suggestion that a reasonable reader could have supposed that a military transport helicopter, carrying a delegation of journalists on a tour of inspection, in fact had to undertake a forced landing because of the weight of the plaintiff is absurd. No-one could take the suggestion seriously. Had this been a sole meaning advanced at exception stage I would have allowed an exception. To any reader this is pre-eminently metaphorical speech and could not possibly, far less reasonably, be taken literally. I am surprised that Mr Muganhu chose to espouse the submission.

The unacceptability of the alleged meaning that the plaintiff is literally an intolerable burden on the tax-payer for the amount of food he consumes I have already demonstrated. This, as I held above, is obviously hyperbole and

is no more capable of being taken literally and seriously than is the meaning concerning the lifting capacity of the helicopter.

The alleged meaning that the plaintiff is unfit to remain in the army is also one that I have already disposed of. There is undoubtedly an insinuation that the plaintiff is unfit: the remark that he would be unable to negotiate the terrain on foot and the exhortation that he hie himself to a gymnasium undoubtedly have that meaning. The plaintiff, however, just as he has not alleged the imputation that he is fat to be defamatory, has not alleged the imputation that he is wanting in physical fitness to be defamatory. What is advanced for the plaintiff as the substance of this alleged meaning is not the imputation that the man wants physical condition, but that he is unsuitable for employment in the army. I showed at the exception stage why this could not reasonably possibly be taken as the meaning of the article.

Surprisingly, Mr Muganhu did not advance argument upon the one defamatory meaning that I

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consider could reasonably possibly be inferred from the writing complained of, namely, the meaning that the plaintiff is unfit to hold the position of army public relations officer. I nevertheless propose to consider this meaning as if it had been advanced upon me. Out of caution, I will in addition give further consideration to the alleged meaning that the plaintiff is unfit to be in the army, lest it be thought by others that such a meaning is reasonably possibly to be inferred. My investigation here, then, is whether these meanings would probably have commended themselves to the ordinary reader.43(124)

It is in fact rather a difficult matter for a judge to decide how the reasonable man would understand an article. The judge will have his own understanding of its meaning. That understanding may or may not be one which commends itself to all and sundry. In order to ascribe a meaning, therefore, an objective approach is necessary 44(125) which adopts the standard of the -

> "ordinary reader ... who has no legal training or other special discipline. He is taken to be a reasonable person of average intelligence and education." 45(126)

This still does not suggest what a "reasonable man" is, for -

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GILLESPIE J

> "the reason and fairness of one man is manifestly no rule for the reason and fairness of another." 46(127)

He will be defined by various attributes.

> "A member of [an] audience cannot be said to be a reasonable person of ordinary intelligence if he seizes on certain words and ignores others."47(128)

He does not interpret according to any malice or jump to outrageous conclusions:

> "What type of mind or intelligence ought the judge to impute to the audience? Not, I think, that they are of the class who accept and act on the wickedest proverb that was ever invented: 'There is no smoke without fire'. On the other hand perhaps he should not impute to them the charitable decency of gentlemen." 48(129)

On the other hand:

> "The ordinary sensible man reading an article in a popular newspaper is not expected to analyze it like a Fellow of All Souls." 49(130)

Indeed:

> "it is wrong to overlook the shortcomings of the average reader - the fact that he does not concentrate but skims through his newspaper, the fact that he has a capacity for implication and is prone to draw derogatory inferences, the fact that he is guilty of loose thinking and will jump to a conclusion more readily than a man trained in the caution of the law." 50(131)

It is plainly necessary, when attempting to discover the ordinary meaning of a passage, to strike a balance between subtle analysis and hasty misconception; between cool reserve and excitability. In doing so, in my view, one should nevertheless tend to favour the more reasoned approach to the illogical for

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GILLESPIE J

that is at the very heart of the definition of a reasonable man. One is entitled to assume of the ordinary reasonable reader that, although prone to a certain amount of loose thinking:

> "he gets a general impression and one can expect him to look again before coming to a conclusion and acting upon it."

With these strictures in mind, I examine whether the publication was probably understood in any of the defamatory senses in which I have held it to be, or am prepared to treat it as, grammatically and reasonably susceptible.

If it were appropriate, I could at this stage consider the nature and inclinations to be imputed to the reader of the Financial Gazette. To do so, however, I would have to have evidence. Although I would be prepared to take notice of the paper itself as boasting a brow rather higher than that of its competitors, I am not willing to take judicial notice that its readers are any more or less prone to sensation seeking or unjustified leaps of logic. In the absence of testimony as to their more reasoned tendencies, I am not willing to regard this readership as in any way different from the hypothetical reader normally prominent in this type of case.

At the very heart of this investigation is the allegation that the matter is intended in light-hearted vein. If I am to resolve the dispute as it has thus coalesced, the dispute as to a defamatory imputation on one hand, and jocular intent on the other, I must determine whether what would commend itself to the ordinary reader is the defamatory imputation or the lampoon. I ought not to be swayed by the fact that laughter, if it is incited amongst the readership of the paper (as it undoubtedly was elicited from both counsel), comes to the plaintiff's discomfort. It is true that the exposure of a person to ridicule is a test upon which depends a finding whether a meaning, proven to have commended itself to the ordinary reader, is a defamatory meaning. I am not here engaged upon determining whether an accepted imputation is defamatory, I am determining whether the imputation ought in the first place to be accepted as the meaning of the words. In any event, laughter, even at a person's expense, is by no means insearable from thinking less of that person.

Thus it is that it has been said:

> "[The plaintiff] no doubt was also held up to some ridicule; but in order to be defamatory, ridicule must have an element of contumelia. The mere raising of a laugh is insufficient."

GILLESPIE J

In this case, therefore, if, on a normal application of the ordinary reader test, it appears that this individual would understand the article to be calling into question the plaintiff's professional fitness, then any jocular intent cannot assist the defendant. If, however, the result of that test is my satisfaction that the reader would understand nothing more than an invitation to mirth , albeit at the plaintiff's expense, then the humorous purpose is fulfilled and the defence

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succeeds.

Looking at the article as a whole, and in its context, as I must, the following strikes me. Media Circus itself contains a number of snippets. Some are very funny, as is the matter concerning the plaintiff and the ascribing of motives of self-importance to Crown Prince Hassan. Others are by no means funny, for instance, for instance paragraphs concerning human rights in Cuba and Nigeria drip with sarcastic criticism but have no pretence at wit or humour. Other pieces are critical of various individuals to differing degrees of seriousness. The point to be made is that the difference in tone between the Mukova paragraphs and almost all of the others is emphatic and pronounced. The humorous intent is telegraphed by a number of little plays on words - the plaintiff's "bulging patriotic front" (containing an allusion to the name of the ruling political party); the "leaner army of tomorrow"; even the headline (which did not find its way into the plaintiff's argument) "Expansion in the armed forces", are all such asbring a smile to the face. The use of hyperbole, upon which I have already remarked, and the ridiculous nature of many of the averments serve only to amuse. But that the reader is expected to content himself with amusement and go no further is beyond question. The mordant criticism present in other paragraphs is entirely lacking towards the plaintiff. I cannot believe that anyone reading this piece would do anything other than enjoy an innocent laugh.

It is true, as I was constantly urged by Mr Muganhu, that a joke can go too far. As Jack Point would have put it, the laughter may have an echo that is grim.51(132) In any matter so patently designed as caricature, one must allow a certain latitude. The principles which I have discovered as to the defence of jest show the limits of what is permissible in the poking of fun. They are to be determined primarily according to how the lampoon is understood, if understood in jocular vein alone, then no actionable conduct is disclosed. If understood as conveying a defamatory imputation then depending upon the place accorded *animus* injuriandi in the law, liability might still be avoided if an acceptible state of mind is disclosed. Hence, on *Wonesayi's* case, a

genuinely mistaken belief that people will see the joke and no more, is insufficient to permit the defence. On *O'Malley* a private individual with such a belief may find he has a defence, whereas on Zimunya such an individual will only be relieved of the consequence ofhis publication where the mistaken belief that he will be understood to jest is a reasonable one. The media, according to Pakendorf, cannot hide behind a jocular intent where a harmful meaning has been conveyed.

Fortunately, by my finding that a humorous meaning is all that the reasonable reader would understand, I am spared the need to state which of these approaches correctly reflects our law. I am also spared the need to investigate the defence of fair comment which was advanced. It is, enough for me to hold, as I do, that the defendant genuinely intended a joke and nothing more. I am prepared to go further and say in any event that the belief that its sally would be regarded as humorous only was, in addition, entirely reasonable. Moreover, a joke is all that was probably understood. There was no proper pleading of an injuria consisting of an affront not to his reputation but to his dignity. Such a wrong was neither defined as an issue for trial nor was it

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addressed in evidence or argument. I must say, however, that even had it been advanced, such an argument would, I think, have failed for the same reason as this cause has. The objective element by which a jest is judged for the purpose of a defamation ought equaly to apply to the determination whether the act complained of constituting other injury is wrongful. A statement that would not be regarded by the ordinary man as defamatory, ought not to be considered by a court as offending the dignity.

I therefore give judgment for the defendant with costs.

Kawonde & Co, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

PYMOR INVESTMENTS (PVT) LTD v FRANK PANTONY (PVT) LTD 1996 (2) ZLR 357 (HC)

Court **High Court, Harare**

Chinhengo J

Civil trial

22-26 July & 9 October 1996 Judgment No. HH-141-96

Flynote

Enrichment - condictio indebiti - payment of money not due - payment under protest - building contract - agreement to set maximum price to be paid - excess paid after threats by builder to stop working

Contract - building contract - interpretation - agreement as to maximum price to be paid for building work

Headnote

The plaintiff employed the defendant to carry out building construction work. The terms of the contract were contained in a loose agreement referred to as a working agreement. The plaintiff claimed that, after delays had occurred in completion of the work, the parties had agreed to a set a specific upper limit on what would be charged for the building work. The plaintiff alleged that the defendant had sought to claim an amount in excess of the maximum amount agreed upon, and it had paid the amount under protest. The plaintiff brought an action to recover the amount of money it had paid in excess of what it asserted was the agreed maximum.

Held, that despite absence of some terms in the working agreement that would have been contained in a more standard building contract, the court should give effect to the agreement because it sufficiently provided for matters that needed to be provided for.

Held, further, that the parties had later varied the contract by agreeing that the cost of construction was not to exceed $2 million but that the defendant had later demanded payment in excess of $2 million agreed.

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CHINHENGO J

Held, further, that the defendant had failed to discharge the onus resting on it to prove that the amount paid was due under the contract.

Held, further, that as the plaintiff had paid under protest, under reservation and under duress and since the excess was not due under the contract, the plaintiff was entitled to recover the amount in excess of the limit set for charges. The plaintiff had been pressured into paying because the defendant had threatened to abandon the remaining work unless the excess demanded was paid. Such abandonment of the work would have been highly financially prejudicial to the plaintiff. The plaintiff had also paid subject to the reservation, impliedly accepted by the defendant, that if it was found that the excess over the $2 million was not due the defendant would refund the excess.

Held, further, that it was not necessary for the plaintiff to place the defendant in mora because the agreement provided that the work was to be completed within a specified period of time and the plaintiff had allowed a more than reasonable period of time for the work to be completed after the expiration of the specified period.

Cases cited:

Lilienfeld & Co v Bourke 1921 TPD 365

Port Elizabeth Municipality v Uitenhage Municipality 1971 (1) SA 724 (A)

Sibanda v Kona & Anor HB-100-95

Union Government v Gowar 1915 AD 426

Wienand & Farr NO v Union Government 1939 EDL 343

Zimbabwe Credit Ins Corp (Pvt) Ltd v Consol Mutual Invstms (Pvt) Ltd S-111-95

Case Information

J C Andersen SC, for the plaintiff

E W W Morris, for the defendant

Judgment

Chinhengo J: The parties in this action are Pymor Investments (Pvt) Ltd (plaintiff) and Frank Pentony (Pvt) Ltd (defendant).

What started off in 1988 as a friendly business chat after a game of squash between the major shareholders of plaintiff and defendant, Mr Peter Joseph Moor and Mr Frank Peter Pentony respectively, has unfortunately developed into a legal dispute of some major proportion between the parties.

Mr Moore intimated to Mr Pentony that his company intended to build a complex of town houses

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on its property along Ceres Road, Avondale, Harare.

CHINHENGO J

Mr Pentony also intimated that he had a property along King George Road and that he intended to built town houses on it. He expressed an interest to be the contractor for Mr Moor's company and outlined the advantages of his company being so engaged. Afterwards Mr Andrew John Pycroft, a co-shareholder with Mr Moor was brought into the picture. Formal negotiations between the parties commenced and resulted in the parties concluding a "working agreement" on 17 November 1988. The agreement provided as follows:

"1. It was agreed that Pymor Investments (Private) Limited will employ the services of Frank Pentony (Private) Limited to construct the duplex flats in terms of the plans provided by Mr H. Krause at the property situate at 5 Ceres Road, Avondale, Harare. Frank Pentony (Private) Limited will build the duplex flats on the following terms and conditions:

(i) All materials will be supplied by Frank Pentony (Pvt) Ltd at cost price. Any trade discounts received by Frank Pentony (Pvt) Ltd will accrue for the benefit of Pymor Investments (Pvt) Ltd.

(ii) All machinery, plant and equipment will be supplied by Frank Pentony (Pvt) Ltd free of charge.

(iii) Pymor Investments (Pvt) Ltd shall pay to Frank Pentony (Pvt) Ltd the cost price of material and labour plus 20% mark-up. Payment will be made in terms of normal stage development procedures.

(iv) That an independent book-keeper/accountant shall be appointed to examine, verify and supervise the invoices, vouchers and receipts relating to the construction costs and payments.

2. It was agreed that Frank Pentony (Pvt) Ltd will attempt to commence the construction work in March 1989 and complete the work in March 1990.

3. It was agreed that Frank Pentony (Pvt) Ltd would liaise with Mr H. Krause in order to have produced the final building licence and plans on the construction of the said flats for submission to the Municipal Authorities and their subsequent approval as soon as possible

CHINHENGO J

4. It was further agreed that Frank Pentony (Pvt) Ltd would provide a general quote on the estimated costs of construction applicable to the said flats as soon as reasonably possible."

Mr Moor and Mr Pycroft are senior legal practitioners and partners in the legal firm known as Winterton, Holmes and Hill. Frank Pentony (Pvt) Ltd was a construction company which had been engaged in the business of construction for more than a decade judging by the period of twelve years during which the defendant's contracts manager, and first defendant's witness in this trial, was employed by the defendant. It has now ceased operation as separate company. Mr H Krause is an architect who had practised as such in Germany in 1981. He came to Zimbabwe in 1986 and set up his practice as an architect in 1987 after passing the relevant local examinations.

It is evident that working agreement concluded by the parties is not a standard form of a building contract but one which the parties referred to as a "negotiated contract." Both plaintiff

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and defendant are agreed that it was a loose form of contract which in some way contributed to the emergence of a dispute between them. I did not find any great deal of fault with the agreement and I must, as I should, give efficacy to a commercial agreement even if it is not elegantly phrased or drafted (Zimbabwe Credit Insurance Corporation (Pvt) Ltd v Consolidated Mutual Investments (Pvt) Ltd S-111-95).

To set the ball rolling, Mr Krause prepared a sketch plan for the town houses which it appears was the basis upon which defendant was satisfied as to what was required of it in respect of building the complex. In the meantime, the plaintiff had, on 2 September 1989, obtained an estimate of the cost of construction at $1.8 million from Casling and Rigby, Chartered Quantity Surveyors. It appears that in terms of the working agreement, the defendant was to commence construction without formal drawings. This is clear from a letter by the defendant dated 1 March 1989, by which he advised the plaintiff that the start up date of the project was to be postponed because the workers needed another month to complete the demolition of a building on the site, i.e. 5 Ceres Road, Avondale. It is also clear from the minutes of 8 May 1989 that when Mr Krause prepared the formal drawings and submitted them to the defendant on 22 May 1989 and the defendant gave its estimate of the cost of construction on 4 July 1989, constructin work had already commenced. The first site meeting minutes of 7 June 1989 indicate that work had already started before the formal drawings had been submitted

to the defendant and before the defendant had given his estimated costs of construction. That the work had been commenced before all the necessary documentation had been prepared and before the defendant had quoted for the building, in my view, shows that the parties' relationship was based on friendship and trust. This explains why in the early stages of the project when the defendant did not appear to be making significant or satisfactory progress the completion date of the project was extended by mutual agreement.

In its particulars of claim the plaintiff alleges that the completion date of the project was extended on 7 February 1990 to 31 August 1990, on 10 April 1990, the completion date was further extended to 30 June 1991, and in June 1991 it was yet further extended to 30 July 1991. On 10 April 1990, the parties agreed, in addition to the new completion date of 30 June 1991, that the defendant would limit the costs of construction to not more than $2 million basing such an agreement on defendant's estimated cost of construction of $1.6 million. The defendant completed the complex in October 1991, at a cost of $2 756 499,15. During the trial the plaintiff amended this figure to $2 828 313,87 in order to incorporate a further payment by it as reflected on progress payment certificate No. 32 the defendant did not object to this amendment.

It is the plaintiff's case that the defendant was in breach of the working agreement by completing the complex in October 1991, and at a cost of $2 828 313,87. In the alternative the plaintiff avers that it was an implied term of the working agreement that the construction of the complex would be completed within a reasonable time and at a reasonable cost and further that completion within a reasonable time meant completion by 31 March 1990, and at a cost not in excess of $2 million.

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The plaintiff paid the amount in excess of $2 million under protest and it is this amount of money which it claims together with interest calculated from the date of the summons to the date of payment and costs of suit.

In its plea, the defendant denied that it was an express or implied term of the working agreement that the construction work was to be completed by 30 March 1990. It averred that the proper construction of clause 2 of the working agreement is that the defendant was to attempt or endeavour to complete the construction work in March 1990. The defendant pleaded that it did not give any guarantee with regard to the completion date and further that even if such a term was express or implied by agreeing to extend the date of completion as alleged in plaintiff's particulars of claim, the plaintiff had in fact waived its reliance on that term. It also denied that on 10 April 1990, it had agreed

CHINHENGO J

to limit the cost of construction to not more than $2 million. Its position was that the cost of construction was that agreed between the parties in clause 1(iii) of the working agreement and that the cost calculated in terms thereof was the sum of $2 828 313,87. The defendant therefore denied that it was in breach of any termof the agreement, whether express or implied or that the plaintiff suffered any damages. The defendant accordingly considered itself entitled to refuse to pay to the plaintiff, or refund to it, the sum of $828 313,17.

The plaintiff has given two dates as being the dates on which the construction of the complex was finally completed, the one being October 1991 and the other being January 1992 (see para 8 and 11 respectively of the particulars of claim.) I could not quite reconcile these dates. I do not however consider that this discrepancy because the plaintiff's claim is essentially for a refund of monies paid under protest and in excess of what it alleges to be the agreed cost of construction.

Turning to the evidence adduced during the trial I must again state that the sheer volume of the evidence makes the task of summarising it a daunting one and, even more daunting, the attempt to summarise it in a manner capable of easy understanding. In this endeavour I will try to narrow down the issues involved so that I can focus the summary of the evidence onto those issues. The issues as I understand them are the following:

1. Did the parties reach an agreement on 10 April 1991 that the construction of the complex would be completed by 30 June 1991 and at a total cost not exceeding $2 million?

2. Did the plaintiff pay the amounts in excess of $2 million under protest and if so is the plaintiff entitled to a refund of that amount?

3. Was the failure to complete the complex by 30 June 1991 attributable to -

   (a) the plaintiff

   (b) the defendant; or

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(c) factors beyond the control of either the defendant or the plaintiff?

4. Did the defendant complete the complex within a reasonable time and at a reasonable cost?

CHINHENGO J

Both counsel, Mr Andersen for the plaintiff and Mr Morris for the defendant, were generally agreed that this matter depended to a large extent on the credibility of the witnesses. I agree with them.

[The learned judge analysed the evidence and continued.]

It would be treating this case rather superficially if I were to reach my decision only on the basis of the credibility of the witnesses. Having established facts which were common cause and making a finding of other facts on the basis of the evidence adduced during the trial, I feel comfortable to make the following conclusions:

(a) the parties entered into an agreement on 17 November 1989 in terms of which the defendant undertook to build for plaintiff a complex of town houses over a period of 12 months and at a cost of about $1.6 million.

(b) the commencement of the construction work was initially delayed by demolition work which had to be carried out on site before actual construction work commenced;

(c) the delay to the completion of the complex did indeed arise but the defendant neglected to keep a record of the delay placing it in the unenviable position in which it could not properly allocate or attribute such delay. In this regard the defendant neither kept a site diary or utilised a bar chart in its possession, the latter for the purpose of monitoring the progress of the works and the former to maintain a record of the causes and length of the delays.

(d) when the lack of progress of the construction work became unacceptable to the plaintiff, the plaintiff demanded, on 10 April 1991 a commitment from the defendant that the complex would be completed by 30 June 1991 and at a cost not exceeding $2 million. The plaintiff gave this assurance or undertaking.

(e) when the project remained uncompleted and the costs of construction exceeded $2 million, the plaintiff effected all payments in excess of $2 million under protest.

(f) the plaintiff was constrained to effect payments under protest because the defendant had threatened to abandon the construction work. If plaintiff had refused to pay defendant's claims, and defendant had moved off from the site, the costs of completing the complex would have escalated to the obvious prejudice of the plaintiff.

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(g) the defendant appreciated that all payments in excess of $2 million were made in protest and did not, at the time the payments were made, dispute the basis thereof;

(h) the delay to the completion of the complex is attributable to the defendant.

The agreement of 17 November 1989 was no doubt a loose form of agreement. It did not contain the usual details found in the more standard building contract which invariably contains clauses dealing with the calculation and allocation of delays, the role of the architect, the penalties for mal-performance or late performance, among other details. The agreement, however, sufficiently provided for the matters which the parties intended should have been provided. It stipulated the nature of work to be undertaken, the time of completion of the project, the discounts available to the plaintiff and the free supply of labour and machinery. As I have already said, I am satisfied that effect should be given to the working agreement despite any deficiencies.

The defendant argued that clause 2 of the working agreement did not impose an obligation on it to complete the construction work by March 1990. By using the words "will attempt to commence the construction work in March 1989 and complete the work in March, 1990", the defendant contended that the agreement did not bind it to complete the complex within 12 months. From the evidence before me, I am satisfied that the completion date of March 1990 was not of any great moment to the parties and so was the date of commencement of the construction work. The parties were generally flexible on these matters What, in my view, the parties had in mind was that whether or not the project commenced as stipulated in the agreement, it had in any case to be completed within a reasonable time, not necessarily by March 1990, but within 12 months.

Whatever interpretation is put on the word "attempt" in clause 2 of the working agreement, I do not believe that it would make any difference to the determination of the real issues between the parties. The real dispute between the parties as I see it arises out of a failure by the defendant to complete the complex within a reasonable time, that is, within about 12 months after the commencement of the works. It is also the pit of the dispute that, regard being had to the meeting of 10 April 1991, the defendant should have completed the complex by June of that year and at a cost of less than $2 million. The defendant only completed the building 2 years and 9 months from the date

of commencement and at a cost well in excess of $2 million. In my view, the failure to complete the complex within a reasonable time of 12-15 months lays the defendant open to a claim for damages. It is difficult to assess the quantum of plaintiff's claim for damages on the basis of defendant's failure to complete the complex within a easonable time. This task is complicated by both parties' failure to deal with the delays in the conventional way. They mutually extended the completion date on three occasions but they did not at the time consider the question of increased costs, if any, which were to accompany the extensions of the completion date. The

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answer in my view lies in the agreement to keep the total costs of construction at no more than $2 million. The evidence of Mr McCormick that the costs could not have exceeded $2 million in any case was not rebutted and this evidence plays a significant part in my decision. the defendant conceded that it was responsible for the delays. I am satisfied that the meeting of 10 April 1991, fixed the cost price at no more than $2 million and the defendant should not have claimed payment in excess of that amount. The parties should be held to their agreement. The amount of damages is more easily arrived at by resorting to plaintiff's alternative claim, which is a claim for a refund of all moneys pai to the defendant under protest.

In the pleadings, it was common cause that the plaintiff paid sums in excess of $2 million under protest. In oral evidence the defendant denied this fact but latterly conceded. That fact is therefore settled. I have already found in favour of the plaintiff on this point.

I am grateful to both counsel for referring me to a number of case authorities on the question whether or not money paid under protest is legally recoverable. In Sibanda v Kona & Anor HB-100-95, a matter which commenced as a court application but referred to trial, Chatikobo J had occasion to address this point. He said at p 5 of the cyclostyled judgment, that -

> "it is clear ... that if a person makes payment purely for the purposes of obtaining goods which are being held by another, such payment is recoverable provided of course that at the time of making such payment, the payer expressly protests or makes an unequivocal statement of objection."

The cases in England and South Africa which have decided the question of payments made protest and to which I have been referred have dealt with

payments made under duress of goods or protest payments made to a department of government for transfer duty or other similar charges. In Union Government v Gowar 1915 AD 426 the facts as they appear in the headnote were as follows:

> "A testator, married out of community of property by his will bequeathed certain land to his son subject to a life usufruct in favour of the plaintiff, who was his widow. Thereafter the Registrar of Deeds, upon application made to him, refused to register plaintiff's usufruct except upon payment of transfer duty. Plaintiff (who might under s 23 of Act 5 of 1884, have submitted the matter to a judge in Chambers) paid the amount of the duty under protest and sued the Government to recover the amount so paid by her."

The court found in favour of the plaintiff. Innes CJ at p 434 stated that the principles of English decisions had been adopted by the South African courts. He went on to state that:

> "Where goods have been wrongly detained and where the owner has been driven to pay money in order to obtain possession and where he has done so not voluntarily, as by way of a gift or compromise, but with an express reservation of his legal rights, payment so made can be recovered back, as having been exacted under dures of goods."

Further at p 434-35, he said:

> "The law being as stated above, we have to enquire whether its doctrines are applicable to a case like the present. It may be said that here there is no detention of goods. That is true; but there is a refusal to perform a public duty which is a denial or a detention of a right. I can see no difference in principle between the two cases. If payment

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made under protest to obtain possession of goods wrongly detained is involuntary, then a payment similarly made to obtain delivery of a right wrongly withheld is also involuntary. A man who under protest pays transfer duty not legally claimable in order to secure registration in the Deeds Office is surely in the same position as a man who similarly pays customs dues wrongly demanded in order to obtain possession of goods."

In the same case de Villiers AJA examined a number of Roman and Roman-Dutch authorities on this point and stated at p 445-6 that:

CHINHENGO J

"The result of the authorities therefore is ... if a person pays a debt not due, knowingly and voluntarily he is not able to recover. But if he pays under protest he is entitled to recover, for the protest is inconsistent either with the idea of a gift or of a compromise between the parties. The other party was not bound to accept the money so paid, but if he accepts it he must be considered to have agreed that it should be recoverable if not due ..."

The law as stated above was applied in Port Elizabeth Municipality v Uitenhage Municipality 1971 (1) SA 724 (A). This is a case in which the appellant had paid 5 *per* cent increase in electricity tariffs under protest and was able to recover it.

The prerequisites for recovering money paid under protest are as outlined by Chatikobo J in the passage quoted above, in Union Government v Gowar *supra* at p 434 and Wienand & Farr No v Union Government 1939 EDL 343. Having established that it is a principle of our law that a payment made under protest is recoverable as a general rule, I have now to determine whether this principle is applicable in the instant case.

The evidence in this case is that when the plaintiff received from the defendant a demand for payment which took the cost of construction of the complex beyond the $2 million mark, the plaintiff initially refused to effect payment. The defendant then threatened to move off from the site and abandon the works. It is after this threat was made that the plaintiff wrote the letter of 22 August 1991 to accompany the payment. It is common cause that the payment was made under protest. But the question has to be answered whether by stating that the plaintiff was paying under protest, did that mean that payment was in fact being made under pressure. Lilienfield & Co v Bourke 1921 TPD 365 contains the statement by Wessels JP as to what de Villiers AJA meant by protest in Gowar's case *supra* and this statement is quoted with approval in Port Elizabeth Minicipality v Uitenhage Municipality *supra* at 741 as follows:

"I do not think the learned judge meant to lay down the general rule that a protest always makes a payment made under it an involuntary payment. The learned judge shows clearly when dealing with the passages quoted from the Digest that what was meant was that if a person says I will pay you now subject to the condition that if it is afterwards found that payment was not due then we will consider it as if no payment had been made. If the word protest is as an abbreviation of that form of expression, if it is used to mean a payment under the condition that if it is afterwards

CHINHENGO J

found that the payment was not due, it must be handed back. I have no quarrel with what was said by the learned Judge. But if he meant that any payment made which is accompanied by words protesting against the payment is sufficient to enable the solvents to get the money back again, I do not agree with such a view. I do not think that if

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> a person pays money simply saying that he pays it under protest that that is equivalent to payment underpressure."

It appears to me therefore that the law is quite clear that if a person makes a payment involuntarily and says so in unequivocal terms, he can recover that payment if that payment is found not to be due to the receiver. This is not however the only basis upon which a protest payment can be recovered. It can also be recovered even where it is not made involuntarily or under pressure but it is made by the payer and accepted by the receiver on the condition that if that payment is found not to be due it will be recovered back. This latter ground, I think, is the basis upon which Port Elizabeth Municipality v Uitenhage Municipality was decided. In that case "the payments were made not by reason of any pressure brought to bear on the Municipality of Uitenhage - such as for example the withholding of property or a right of refusal to continue supplying electricity under the contract but with the object of obtaining the benefit of the discount allowed under the contract of prompt payment ... the moneys in the instant ase are recoverable on the alternative basis - namely, as moneys paid on condition that the same should be recoverable if found not due ..."

In my view, the position in our law is that moneys paid under protest can be recovered under two conditions either:

(a) if such payment is made involuntarily and under pressure brought to bear on the payer; and

(b) even if no pressure is brought to bear on the payer, if the payer makes it clear that the money is paid on condition that if it is found not to be due the payer will claim it back.

and in either case the payer expressly protests or makes an unequivocal statement of objection.

I have stated the law as I understand it to be enunciated in the cases referred to above. I do not however quite accept that the element of involuntariness or pressure of some kind can be missing from any protest payment. In that

regard, but without being firm on the point, I think that in Port Elizabeth Municipality v Uitenhage Municipality *supra* the fear of losing the discount for prompt payment could well be regarded as some form of pressure giving rise to an involuntary payment. If my reasoning is correct then I dare say, with the same reservation as to firmness of view, that involuntariness arising from some form of pressure is a pre-requisite for the recovery of money paid under protest.

Is the instant case one to which the law as stated above is applicable? The protest payment was not made to obtain goods wrongly withheld or to enjoy a right wrongly denied. It was a protest payment to secure the performance of an obligation by the defendant, which if not performed, the consequences to the plaintiff would have been highly prejudicial, if not disastrous. If moneys paid in protest to obtain possession of goods wrongly detained or to secure a right wrongly denied can be recovered, I do not see any justification that moneys paid

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under protest to secure the performance of an obligation by a party to a contract, such as in the instant case, cannot also be recovered on the same principle. The elements of involuntariness and pressure exist in either case.

The plaintiff by letter of 22 August 1991, clearly reserved its rights to recover the moneys paid under protest. It paid the moneys under pressure arising from the threat by the defendant that it would move off the site if it was not paid. The plaintiff was pressured into paying the defendant's claims by the realisation that if it did not effect payment, the defendant would abandon the work rendering if financially burdensome for the plaintiff to continue the construction of the complex with another contractor. The threat was real. The defendant knew it. It worked. When the defendant reserved its right to claim back the money, the defendant did not object to that reservation. By implication therefore it accepted the money subject to the reservation made by the plaintiff and to the condition that if it was not found to be due the defendant would refund it. Both criteria for the recovery of moneys paid in protest are satisfied in the case before me. It is, I think, not necessary to determine which of the two crteria is operative. In any case, I have stated that the two criteria are in fact one in essence.

The onus to prove that the money paid under protest was due lies on the person who received payment. Both counsel were agreed that this is the position in our law. I will not say more on this. Mr Morris, however, argued that in this case the contract was on a cost-plus basis. The receiver of the protest payment in a cost-plus contract needed only to show what the cost of

CHINHENGO J

labour and materials plus his mark-up were, to succeed. As such the onus in such a case shifts to the payer to show that the money was not due. I do not find any justification for laying the onus on the plaintiff in the present case. First I do not think that the agreement between the parties was a cost-plus contract in the true sense of that phrase. It was not an open ended contract in so far as costs of construction was concerned. If it was a cost-plus contract, it was so up to the limit of $2 million being the sum of money which the parties agreed on 10 April 1991 should not be exceeded in the way of construction costs. In essence the varition of the agreement on 10 April 1991 in fact converted the agreement to a fixed price contract - the costs of construction being fixed at no more than $2 million. This being the case I do not find Mr Morris's contention to be justified. The onus to prove that the payment was due was on the defendant. It failed on the evidence to discharge that onus.

On the other hand, by establishing on a balance that the parties had agreed to limit the cost of construction to $2 million and that the defendant had undertaken to do so the plaintiff clearly discharged the onus, even assuming for the moment, that the onus lay on it.

Mr Morris further argued that even if the defendant failed to discharge the onus on him that the money paid in protest was due, the plaintiff's claim would still fall on another ground namely the failure by the plaintiff to place the defendant in mora. He argued that where there has been a delay in performance the person who is required to perform should be placed in mora and a failure to do so would be fatal to the claim. "The general rule is that where no time for performance has been agreed upon, performance is due immediately on conclusion of the

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contract or as soon thereafter as is reasonably possible under the circumstances. Mora however does not arise if performance is not made forthwith or within a reasonable time, it arises only if a debtor, after a demand has been made is still in default. The same rule applies when a time for performance has been stipulated but where it is too vague to lead to mora ex re" (Wouter de Vos "Mora debitoris and Rescission" 1970 SalJ p 311). Mr Morris's argument was therfore that the delay to which the plaintiff consented does not give rise to a right to damages unless the defendant is placed in mora.

The parties to this dispute agreed specifically that the complex would be completed within 12 months. Although the agreement fixes the time of commencement and completion of the contract i.e. March 1989 to March 1990, it does not appear that these dates were crucial. What was crucial was the period of 12 months. A period of performance may, no doubt, be fixed by

CHINHENGO J

reference to actual dates. It may, as in this case, be fixed by reference to the length of time within which performance is to take place. In either case, I do not think, it is necessary for the party demanding performance to place the other party in mora. The parties having agreed that performance was to be within a period of 12 months and the defendant having failed to perform within that period, mora arose ex re. The plaintiff was not required to take any action or notify the defendant about the fact that the defendant was in mora. The plaintiff however gave an extension of the completion date without agreeing to the extension of the period of 12 mnths. The agreement to extend the completion date arose initially from the need to complete demolition work on site before construction could commence. Lately, the completion date was extended on the erroneous belief that defendant was faced with delay factors beyond its control. The relationship between the parties, their constant contact, the exigencies of the intercourse between them and the stipulation in their agreement that the works should be completed within 12 months, lead me to the conclusion that it was not necessary for the plaintiff to place the defendant in mora. I therefore cannot agree with Mr Morris that in this case it was necessary for the plaintiff to place the defendant in mora. If one looks at all the circumstances of this case it appears that the plaintiff awaited the completion of the complex for more than a reasonable period and it was difficult and unnecessary to place the defendant in mora.

I am satisfied that on a balance the plaintiff has made out a case for the grant to him of the relief which he seeks. It was my understanding that when Mr Pentony disposed of his interest in the defendant to the present owner of the company he undertook that he will be personally be responsible for the past contracts of the defendant. He is adjudged to be so responsible. The following order is accordingly made.

That judgement with costs be and is hereby entered against the defendant in favour of the plaintiff for $828 313,87 together with interest at 25% *per* annum from date of the summons to the date of payment.

Winterton, Holmes & Hill, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

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GUMBO v MIN OF LOCAL GOVERNMENTT, RURAL & URBAN DEVELOPMENT & ANOR 1996 (2) ZLR 372 (HC)

Court **High Court, Harare**

Smith J

Civil application

1 & 9 October 1996 Judgment No. HH-139-96

Flynote

Local authority - elections - candidate - eligibility - candidate for election as executive mayor - whether disqualified for standing for election if he is a full-time employee of the State

Headnote

The Town Clerk of Masvingo (the second respondent) refused to accept the applicant's nomination paper as a candidate for the office of executive mayor in Masvingo on the grounds that the applicant was a full-time employee of the State and he had not produced a declaration from his Minister in terms of s 41(5) of the Urban Councils Act [Chapter 29:15] that his duties, if he were to be elected, would not conflict with his duties as an employee of the State.

Held, that s 41(5) does not apply to a candidate for the full-time position of executive mayor. The provision that applies is s 50(2), which provides that a person is disqualified from taking office as mayor if he is in the full-time employment of the State. In terms of s 50(2), a person is entitled to stand for election as mayor even if he is employed by the State, but if he is successful in the election he must resign before he can take office as mayor.

The court referred to the following statutory provisions:

Urban Councils Act [Chapter 29:15], ss 25, 41, 45(7)(a), 50(2) & 56

Case Information

A P de Bourbon SC, for the applicant

Mrs J Zindi, for the first respondent

J Sayce, for the second respondent

SMITH J

Judgment

Smith J: The applicant (hereinafter referred to as "Gumbo") is a lecturer at the Masvingo Teacher Training College. He was a candidate for election to the office of executive mayor of

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Masvingo at the election that was to be held on 29 and 30 June l996. He claims that he has the necessary qualifications for nomination and is not disqualified in terms of s 25 or 41 of the Urban Councils Act [Chapter 29:15] (hereinafter referred to as "Chapter 29:15").

On 14 June l996, Gumbo and his election agent entered the office of the second respondent (hereinafter referred to as "the Town Clerk") and submitted his nomination paper as a candidate for the office of mayor. The Town Clerk refused to accept his nomination paper on the grounds that Gumbo was in the full-time employment of the State and that he could not produce a declaration by the lst respondent in terms of subs (5) of s 41 of Chapter 29:15 certifying that any duties of his, should he be elected, would not conflict with his duties as an employee of the State. Gumbo argued that his nomination paper should be accepted because, if duly elected, he would resign from the Public Service. Shortly thereafter the Town Clerk declared that Francis Aphiri was duly elected as mayor without the necessity of a poll because he was the only duly nominated candidate.

Gumbo has applied for an order setting aside the declaration that Francis Aphiri was duly elected as mayor of Masvingo and ordering that a poll be taken. The Town Clerk opposes the application on the grounds that Gumbo was disqualified from being nominated. He also claims that, although he rejected Gumbo's nomination for the reason set out above, the nomination paper was defective and would have been rejected. There are l0 wards in the Masvingo council area. In terms of s 56(l)(a) of Chapter 29:15 a nomination paper must be signed by at least five persons who are enrolled on the voters' roll for each ward. Gumbo's nomination paper was signed by 46 alleged voters, not 50 as required, and only one of those voters was enrolled on the voter's roll for ward 6. Therefore Gumbo's nomination paper did not comply with the provisions of s 56(l)(a) of Chapter 29:15.

Section 56 of Chapter 29:15 deals with the nomination of candidates for election to the office of mayor. Subsections (l) to (3) refer to the nomination paper and subs (4) reads as follows:

> "(4) Subject to this section and section fifty-eight, section forty-five shall apply, mutatis mutandis, in relation to the nomination of candidates for election to the office of mayor."

SMITH J

Section 58 is not relevant in this case. When one looks at s 45 the relevant provision is contained in subs (7)(a) which provides that the returning officer shall reject the nomination of any person if he is satisfied that that person is not qualified in terms of s 40 to be elected as a councillor or is disqualified in terms of s 41 from being nominated as a councillor. It is provided in s 42(l)(g) that a person is disqualified from being nominated as a candidate for, or from election as, a councillor if he holds an office of profit under the State unless the Minister has declared, in terms of subs (5), that para (g) of subs (l) shall not apply to him.

Section 50(2) of Chapter 29:15 provides as follows:

> "(2) A person shall be disqualified from taking office as a mayor or from continuing in office as a mayor if he is in the full-time employment of the State, a local authority, a statutory body, a company, a partnership or any other body, organization or association of persons."

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Mr *Sayce* argued that since the provisions of ss 41 and 45 referred to above apply, mutatis mutandis, in relation to the nomination of candidates for election as mayor, therefore the Town Clerk was correct in rejecting Gumbo's nomination paper. Mr de Bourbon, on the other hand, argued that this could not be the position because if it were, then s 50 would not be necessary.

In my opinion, the argument put forward by Mr *de Bourbon* must prevail. Section 50 of Chapter 29:15 sets out very clearly the intention of the legislature in relation to disqualifications for mayors. It states, in no uncertain terms, that a person shall be disqualified from taking office as mayor, or from continuing in office as mayor, if he is in the full-time employment of the State, a local authority, a statutory body, a company, a partnership or any other body or association. This disqualification is much wider than the disqualifications relating to councillors because it embraces full-time employment by persons other than the State and that is because the post of mayor contemplates full-time employment whereas that of a councillor does not. It is not anomalous to provide that the disqualification contained in s 50 applies at the time the candidate is about to take office and not when he submits his nomination paper. If he is in full-time employment and wants to contest the election for mayor he would have to resign therefrom. It would be hard on a candidate, such as Gumbo, if he resigned from his employment in order to stand for election and then lost the election. On the other hand, if he were to be able to contest the

election and remain in employment, if he lost the election he would not have to resign.

In his opposing affidavit, the Town Clerk said that he had pointed out to Gumbo that he was obliged to reject his nomination because Gumbo was a full-time employee of the State, unless he could produce a written declaration by the Minister in terms of s 41(5) of Chapter 29:15 that, notwithstanding that Gumbo was a member of the Public Service, he was eligible for nomination. Such a declaration would be inconsistent with the provisions of s 50 of Chapter 29:15 and in my view would not override the clear prohibition contained therein. As I have said earlier, since the post of mayor is a full-time occupation, s 50 of Chapter 29:15 provides that no person can take office as, or continue in office as, mayor if he is in the full-time employment of any other person or body. The Minister cannot circumvent this provision by issuing a declaration in terms of s 41(5) of Chapter 29:15. Since s 41(5) of Chapter 29:15 does not apply in relation to the post of mayor because it is inconsistent with the provisions of s 50, i follows that s 41(l)(g) should likewise not apply for the same reason.

The Town Clerk pointed out that a person elected as mayor becomes the mayor immediately he is declared by the returning officer to have been elected as mayor. In terms of s 50 (2) of Chapter 29:15, however, a person is disqualified from taking office as mayor if he is in full-time employment. Does this mean that a candidate would have to resign from his employment before the results of the election are announced? That is not clear from the provisions of the Act. However s 50 (2) does use the terminology "taking office". It is clear that the mayor does not take office only when he is installed at the mayoral ceremony. It seems to me, however, that in order to give effect to the intention of the legislature, a candidate who is in full-time employment and who is successful may be declared mayor but he will not be able to take office until he has

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resigned from his employment.

For the reasons set out above, I consider that the Town Clerk was wrong when he rejected Gumbo's nomination on the grounds that Gumbo held an office of profit under the State. Mr *Sayce* argued that one of the reasons why the Town Clerk rejected Gumbo's nomination paper was because it did not comply with s 56(l)(a) of Chapter 29:15. That is not true. The Town Clerk did not even look at the nomination paper before rejecting the nomination. It is only in his opposing affidavit that he points out that the nomination papers "are in any event defective and would have been rejected" because of non-compliance with s 56(l)(a) of Chapter 29:15. In my view, it is not for the court

to determine, at this stage, whether or not Gumbo's nomination paper complies with the requirements of Chapter 29:15. That is the function of the Town Clerk. Since the nomination paper does not, according to the Town Clerk, comply with the requirements of Chapter 29:15 and that allegation has not been dealt with by Gumbo in the papers, it seemsto me that it would be wrong for me simply to set aside the declaration of Francis Aphiri as duly elected mayor and to declare that a vacancy exists and a poll be taken. If Gumbo's nomination paper is defective then there would be no necessity for an election because there would be only one duly nominated candidate, namely Francis Aphiri. What I will do, therefore, is to order that the declaration of Francis Aphiri as mayor be set aside and that the Town Clerk accept the nomination paper of Gumbo as set out in Annexure G to the papers. If the nomination paper is in order, the Town Clerk shall then set in train the procedures necessary for taking a poll in terms of Chapter 29:15. If the nomination paper is not in order, the Town Clerk shall declare Francis Aphiri duly elected as mayor with effect from l4 June l996.

Since Gumbo has been successful in having the rejection of his nomination set aside, he is entitled to his costs. He wanted costs to be awarded on the legal practitioner and client scale de bonis propriis against the Town Clerk. On the other hand, the Town Clerk wanted the application dismissed also with costs on the higher scale. In my view, there is no basis for awarding costs on the higher scale. Although Mrs Zindi appeared on behalf of the first respondent, she said that the first respondent would abide by the decision of the court. Accordingly, costs will not be awarded against the first respondent.

It is ordered that:

1. The declaration that Francis Aphiri was duly elected as mayor of Masvingo is set aside.
2. The Town Clerk shall accept the nomination paper from Gumbo, as set out in Annexure G to the papers, and shall scrutinize it to ascertain whether or not it complies with the requirements of the Urban Councils Act [Chapter 29:15].
3. If the Town Clerk finds that the nomination paper -
    (a) complies with the requirements of the Act, he shall follow the procedure set out in Part V of the Act for an election, with Gumbo and Francis Aphiri as the two

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candidates;

(b) does not comply with the requirements of the Act, he shall declare Francis Aphiri to be duly elected as mayor of Masvingo with effect from 14 June l996.

4. The Town Clerk shall pay the costs of this application.

Scanlen & Holderness, applicant's legal practitioners

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

Winterton Holmes & Hill, second respondent's legal practitioners

MASIMIREMBWA NO v CHIPEMBERE 1996 (2) ZLR 378 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

26 September & 10 October 1996 Judgment No. S-175-96

Flynote

Administration of estates - estate property - claim for share of matrimonial property - claim made before death of party - whether claim passes to estate of deceased

Headnote

The appellant was executor of the late wife of the respondent. The marriage had been dissolved in 1989 but it was not until 1990 that the deceased instituted an action in terms of s 7 of the Matrimonial Causes Act [Chapter 5:13] for a share in the former matrimonial home. After the respondent had entered an appearance to defend and pleadings had been closed, the deceased died. The appellant, as executor of her estate, obtained leave to be substituted as plaintiff. The High Court (Chatikobo J) held that the claim had passed to her estate but it would not be an equitable exercise of his discretion to make an order in terms of the section. On appeal:

Held, that the purpose of s 7 of the Act is to place the spouses and children in the position they would have been had a normal marriage continued. In making an order, the court must consider, among other things, the income of each spouse and child, their financial needs and obligations, their standard of living and their age and physical condition. These factors clearly indicated that the claimant spouse must be alive at the time of the making of the order. Any duty to maintain, for example, ceases on the death of the party claiming support and is not transmissible. For the same reason, a claim for the division, apportionment or distribution of the assets of the spouses under s 7 is not transmissible either, though this finding would not

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preclude a common law action to recover whatever

GUBBAY CJ

financial contribution had been made by the deceased towards the purchase of the property.

Cases cited:

Jankowiak & Anor v Parity Ins Co (Pty) Ltd 1963 (2) SA 286 (W)

Kassim v Kassim 1989 (3) ZLR 234 (H)

Ex p Masimirembwa NO 1995 (1) ZLR 144 (H)

Milne NO v Shield Ins Co Ltd 1969 (3) SA 352 (A)

Ncube v Ncube S-6-93

Potgieter v Rondalia Assurance Corp of SA Ltd 1970 (1) SA 705 (N)

Potgieter v Sustein (Edms) Bpk 1990 (2) SA 15 (T)

Takafuma v Takafuma 1994 (2) ZLR 103 (S)

The court referred to the following statutory provisions:

Matrimonial Causes Act [Chapter 5:13], s 7(1) and (4)

Case Information

G Musariri, for the appellant

C T Mantsebo, for the respondent

Judgment

Gubbay CJ: On 12 October 1992, the appellant was appointed executor dative of the estate of the late Georgina Sibanda Chipembere, who died at Harare on 29 April 1992.

The deceased was the erstwhile wife of the respondent. Their marriage, entered into on 20 July 1973 in terms of the Customary Marriages Act (now Chapter 5:07), was dissolved by the Community Court on 20 October 1989. That court, however, was not ordered to and, consequently, did not, deal with the proprietary rights of the parties.

On 3 May 1990, the deceased instituted an action against the respondent in the High Court. She claimed, in terms of s 7 of the Matrimonial Causes Act (presently Chapter 5:13), an entitlement to be awarded a share in the former matrimonial home of the parties, namely, Stand 4183, Tafara, Harare ("the property"), which had been purchased in the name of the respondent from the City of Harare for $695. At the date of trial its value had escalated to $40 000.

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The respondent entered appearance to defend the action and filed a plea in which he alleged he was the sole and rightful owner of the property. It was after the pleadings had been closed and discovery sought that the deceased passed away. The appellant then obtained the leave of the High Court to be substituted as the plaintiff in the action.

GUBBAY CJ

The trial, which commenced on 21 November 1995, was presided over by Chatikobo J. His Lordship held that litis contestatio or joinder of issue having taken place prior to death, the claim made for a share in the property was transmitted to the estate of the deceased; but that it would not be an equitable exercise of the discretion vested in him to make an order in terms of s 7(1)(a) of the Matrimonial Causes Act. The judgment is reported under the name *Ex p Masimbiremwa NO* 1995 (1) ZLR 144 (H).

The first issue to be considered in this appeal is whether, notwithstanding that death ensued after *litis contestatio* had been reached, the learned judge was correct in the view he expressed that the claim passed to the estate of the deceased. If in law it survived her death, then the next issue that falls to be decided is whether the discretion exercised by the learned judge in deciding to grant a share in the property to the estate warrants interference by this Court.

It is not, I think, open to doubt that rights in *personam* rooted in the common law, of a nature which are transferable, will pass to the executor of the claimant's estate if the stage of *litis contestatio* had been reached in the action brought to enforce them. See, for instance, Jankowiak & Anor v Parity Insurance Co (Pty) Ltd 1963 (2) SA 296 (W) at 288G-H and 290E; Milne NO v Shield Insurance Co Ltd 1969 (3) SA 352 (A) at 358C-E and 359G-H; Potgieter v Rondalia Assurance Corporation of SA Ltd 1970 (1) SA 705 (N) at 712D-713A; Potgieter v Sustein (Edms) Bpk 1990 (2) SA 15 (T) at 21I-22D.

In this matter, of course, the claim was based on an Act of Parliament and not the common law. It is essential to resolve therefore whether the right to a division of the assets of the spouses in terms of s 7(1)(a) of the Matrimonial Causes Act is so personal an entitlement, that the reaching of *litis contestatio* notwithstanding, it abates upon the death of the spouse or divorced spouse and so is not transmissible to his or her heirs.

Section 7(1) reads:

> "Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to-
>
> (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;

GUBBAY CJ

> (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments in favour of one or other of the spouses or of any child of the marriage."

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The purpose of this provision emerges plainly from s 7(4) of the Act. In making an order the appropriate court must endeavour, as far as is reasonable and practicable to do so:

> "... to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses."

Section 7(1)(a) does not pertain to the enforcement of strict legal rights. It is concerned rather with the exercise of a judicial power directed at achieving a result or settlement that is deemed just and equitable in all the circumstances. See *Kassim v Kassim* 1989 (3) ZLR 234 (H) at 238B; *Ncube v Ncube* S-6-93 (not reported) at p 2; *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 106E-F.

Section 7(4) of the Act enumerates some of the factors an appropriate court is enjoined to take account of in making an order under s 7(1) for the division, apportionment or distribution of the assets of the spouses or the payment of maintenance. They include:

> "(a) the income-earning capacity, assets, and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
>
> (c) the standard of living of the family, including the manner in which any child was being educated or trained to expected to be educated or trained;
>
> (d) the age and physical and mental condition of each spouse and child."

These factors clearly indicate, to my mind, an intention on the part of the legislature that the claimant spouse, whether divorced or not, be alive at the time of the making of the order. As the learned judge so aptly put it *supra* at 153E-F:

GUBBAY CJ

> "Once one of the spouses has died, it is no longer possible to carry out the complex balancing act contemplated by the Act. The deceased spouse is no longer faced with the needs which face the surviving spouse. In particular, apart from any assets which may vest in the estate of the deceased spouse, he or she no longer has any income or earning capacity. Whatever assets vest in the estate of the deceased spouse are no longer available to be put into the common pool if need be, because after the death of the owner they become subject to the complex rules of succession."

Furthermore, it is significant that s 7(4) specifically refers to an order in terms of s 7(1), without distinguishing between an entitlement to division, apportionment or distribution of assets and an order for the payment of maintenance in favour of one or other of the spouses or of any child of the marriage. Obviously, the duty to maintain ceases upon the death of the dependent. By parity of reasoning, an entitlement to the division, apportionment or distribution of assets under para (a) is no more transmissible than an entitlement to the payment of maintenance under para (b).

Albeit with some measure of regret, I am compelled to hold that the executor dative of the estate of the late Georgina Sibanda Chipembere was not entitled to claim a share of Stand 4183 in terms of s 7(1)(a) of the Matrimonial Causes Act. This conclusion is not to be taken to imply, however, that an action brought under the common law to recover whatever financial

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contribution may have been made by the deceased towards the purchase price of the property, is not available to the estate.

The appeal is accordingly dismissed with costs.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Musariri & Company, appellant's legal practitioners

Surgey, Pittman & Kerswell, respondent's legal practitioners

WALENN HOLDINGS (PVT) LTD v LLOYD & ANOR 1996 (2) ZLR 383 (HC)

Court **High Court, Harare**

Chinhengo J

Civil application

30 September & 14 October 1996 Judgment No. HH-162-96

Flynote

Arbitration - proceedings - arbitrator's power to determine procedure - arbitration agreement setting out procedure - not within arbitrator's power to vary procedure - award - setting aside - grounds in which award may be set aside - "public policy" - whether extends grounds previously recognised - arbitrator - misconduct - what is - reaching unreasonable decision - not *per* se misconduct - arbitration clause - agreement not to seek review of interim award or interlocutory rulings - binding nature of such agreement

Headnote

The first respondent was arbitrator in a dispute between the applicant and the second respondent. The dispute arose out of a contract under which the applicant was to carry out construction and refurbishment work at the Leopard Rock Hotel, Vumba. The applicant terminated the agreement and left the works site before the work was completed, requiring other contractors to be engaged to complete the work. The agreement between the parties contained an arbitration clause, in terms of which arbitration proceedings would be held in two stages. The first stage involved the trial and adjudication of the following issues:

(a) whether the applicant was entitled to determine its employment under the contract; and

(b) the question of the interim order.

The second stage involved the trial and adjudication of other issues, including whether the applicant had been paid what it was entitled to be paid; and the damages if the determination of the contract was invalid.

The arbitrator handed down his decision on the first stage of the arbitration

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GUBBAY J

in September 1996, holding that the second respondent was not in fundamental breach of the contract entitling the applicant to determine the contract. At a meeting held to prepare for the second stage, the applicant informed the respondents that it intended to apply to the High Court for an order setting aside the arbitrator's interim award. Such an application was duly made, together with an application for a stay of further proceedings. A similar application was made to the arbitrator himself. He declined to grant an order staying the proceedings, holding that he was not legally empowered to do so, but that even if he had a discretion he would have refused the application on its merits. He accordingly issued directions in respect of the second stage, in particular dealing with further particulars, discovery and the witnesses each party proposed to call.

The applicant argued in the High Court that the proceedings should be stayed because the time given by the arbitrator to prepare its case was inadequate; that the application to set aside the interim award on the grounds of misconduct by the arbitrator still had to be determined; that there would be prejudice to the applicant but none to the second respondent if the proceedings were not stayed; and that the arbitrator was wrong in holding that he had no power to order a stay. The second respondent opposed the application, arguing that the application was not based on grounds recognised in the Arbitration Act 6 of 1996; that the applicant was bound by the arbitration agreement, in terms of which it was agreed that no interim order would be sought by either party; and that the applicant had had plenty of time to prepare its case.

Held, that the relationship between the parties and the arbitrator is sui generis and involves elements of both status and contract. By the contract between the parties, the arbitrator is contractually bound to follow the terms of the submission to arbitration. Where the agreement sets out the procedure for the arbitration, the arbitrator is not free to decide the procedure. He may not, without the parties' agreement, depart from the procedure that was agreed. The arbitrator was thus correct in holding that he could not order a stay of proceedings.

Held, further, that this award was governed by the Arbitration Act 1996, in terms of which the UNCITRAL Model Law has been adopted. Under article 34, as modified by the Act, an award may be set aside on the grounds that it conflicts with the public policy of Zimbabwe. This includes an award induced or effected by fraud or corruption. Misconduct by an arbitrator would be a ground for setting aside an award, but an allegation of misconduct has to meet very stringent tests. A *bona fide* mistake, whether of fact or law, and whether admitted or not, would not

GUBBAY J

constitute misconduct. The mistake would have to be so gross or manifest that it could not have been made without some degree of misconduct or partiality. It would have to demonstrate a total want of the judicial capacity that is required even of an ordinary fair-minded layman. Even if the arbitrator made a finding that was erroneous or unreasonable, the court would not

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interfere. It would only do so if there had been gross irregularity or a failure of justice

Held, further, that the 1996 Act had not extended the grounds on which an arbitral award may be challenged on public policy considerations. The grounds had merely been restated in the new Act.

Held, further, that the parties had both agreed not to seek an interim review of the arbitration proceedings and they were bound by that agreement. There were no grounds on which the court could interfere with it.

Application dismissed.

Cases cited:

Botha v AA Mutual Ins Assn Ltd & Anor 1968 (4) SA 485 (A)

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Corp Ltd [1982] AC 909

Clark v African Guarantee & Indemnity Co Ltd 1915 CPD 68

Cone Textiles (Pvt) Ltd v Redgment & Ors 1983 (1) ZLR 88 (S)

Dickenson & Brown v Fisher's Exors 1915 AD 166

Farmers' Co-op Ltd v Borden Synd (Pvt) Ltd 1961 R & N 28 (FS)

McKelvey v Abrahams \& Anor 1989 (2) ZLR 251 (S)

Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd & Anor 1978 (4) SA 379 (T)

The court referred to the following statutory provisions:

Arbitration Act 6 of 1996, s 6(4); First Schedule, art 34

Case Information

E W W Morris, for the applicant

J C Andersen SC, for the second respondent

Judgment

Chinhengo J: The applicant (Walenn Holdings (Pvt) Ltd) sought an order against the first respondent (Peter Carnegie Lloyd) and the second respondent (Leopard Rock Hotel Company (Pvt) Ltd) in the following terms:

1. That the proceedings in the arbitration between applicant and the second respondent be stayed until the application by the applicant under case No. HC-8142-96, and any appeal therefrom, have been determined.

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2. That the second respondent should pay the costs of the application or should the first respondent oppose the application, that the costs be paid by the respondents jointly and severally.

The arbitrator correctly declined to be a party to these proceedings. He advised the court that he was prepared to abide by its decision. He maintained his position of impartiality and neutrality.

I directed the applicant to serve copies of its application on the respondents. This was done and the parties appeared before me in chambers on 30 September 1996, and argued the matter. Although the applicant had initially applied for a provisional order in which it sought interim relief only the parties agreed that I should deal with the application conclusively. I agreed to do so because all the issues involved were canvassed in detail.

At the conclusion of the hearing, I reserved my decision. The applicant then filed a further application seeking leave to file a supplementary answering affidavit. Again I directed that the papers in the second application should be served on the respondents. The parties appeared before me in chambers to make submissions in respect of the second application on 14 October 1996. With the concurrence of both parties I decided that my decision on the second application would be contained in my judgment on the first application.

The history of this matter is as follows. In April or May 1991, the applicant and the second respondent signed an agreement in terms of which the applicant was employed by the second respondent to carry out certain construction and refurbishment works at Leopard Rock Hotel in the Vumba Mountains, near Mutare. In July 1992, the applicant terminated the agreement and relinquished possession of the works site. Thereupon, the second respondent employed other contractors to carry out further works leading to the opening of the hotel in June 1993.

The agreement between the applicant and the second respondent contained an arbitration clause in terms of which various disputes between the parties were to be referred to arbitration. By agreement, the first respondent was appointed as arbitrator. In terms of an Addendum to Submission to Arbitration the parties agreed that the arbitration proceedings would be held in two stages. The first stage involved the trial and adjudication of the following issues:

(a) whether the claimant (applicant) was entitled to determine its employment under the contract; and

(b) the question of the interim order.

The second stage involved the trial and adjudication of a second set of issues, namely:

(a) irrespective of whether or not the claimant was entitled to determine its employment under the contract, whether the claimant (applicant) has been paid that which is due

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for work done to the date of determination;

(b) the question of the amount to which the applicant is entitled if it has validly determined its employment under the contract; and

(c) the question of damages suffered by the respondent in the event that the applicant did not act validly in determining the contract.

The second stage also involved the trial and adjudication of any other issues which remained outstanding for determination.

The first stage of the arbitration proceedings commenced in October 1995 and was concluded in July 1996. The arbitrator's decision on the first issue of the first stage of the proceeding was made on 26 July 1996 and his judgment handed down on 5 September 1996. The arbitrator's decision was that the second respondent was not "in fundamental breach" of its contract with the applicant and "did not conduct itself in a way so as to repudiate the contract and entitle (the applicant) to determine the contract".

On 4 October 1996, the arbitrator convened a pre-hearing meeting for the purpose of preparing for the second stage of the arbitration proceedings. At that meeting, the applicant informed the respondents that it intended to make an application to the High Court for an order setting aside the arbitrator's interim award. This application has since been filed in case No. HC-8142-96. At the same meeting, the applicant also applied to the arbitrator for a stay of further proceedings in the arbitration pending the determination of case No. HC-8142-96. The second respondent opposed this application. The arbitrator considered the matter and ruled against the applicant. He stated his reasons as follows:

> "I do not believe that it would be proper for me to give an order staying the arbitration proceedings. Indeed, I am not persuaded that I have power to grant such an order. It is not a power specifically granted to me either by the Arbitration Act [Chapter 7:02] or by the submission to arbitration.

CHINHENGO J

> Whilst I clearly have the authority to fix the date of the resumption of the hearing and to grant a postponement of the hearing on good cause, I think these powers must be viewed in the overall context of my obligation, as arbitrator, to fulfil the mandate bestowed upon me by the parties, namely, to conduct the arbitration and hand down a final award without undue delay. The position might be different if respondent were agreeable to the stay but, as I have already mentioned, that is not the case. In short, I incline to the view that any power to order a stay rests in the court, not in myself.
>
> Even if I have a discretion in the matter, however, I would nevertheless refuse the application for a stay on its merits. It seems to me that the competing arguments as to convenience, prejudice and legal costs put forward by the parties are very finely balanced, leaving me unable to conclude that claimant's (applicant's) arguments in that connection ought to clearly prevail."

It is against this decision of the arbitrator that the applicant has lodged the present application.

On 9 September 1996, the arbitrator issued directions in respect of the second stage of the proceedings. He directed that the arbitration hearings should resume on 25 November 1996, and, in advance of the resumption the parties were required to take certain steps, namely that

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by 27 September 1996 the applicant was to notify the arbitrator of those of its claims which he persisted in having regard to the interim award relating to liability; by 4 October 1996, any request for further particulars by any of the parties should be filed; by 11 October 1996 any response to the request for further particulars should be filed; by 18 October 1996 each party should make discovery in terms of the High Court Rules and permit the other party unconditional and unfettered access to the documents so discovered; by 8 November 1996 the applicant should produce a bundle of documents on which it would rely at the resumed hearing and thereafter the second respondent would supplement that bundle of documents with those documents onwhich it will rely at the resumed hearing; by 15 November 1996 the respondent should deliver a copy of the complete bundle of documents to the arbitrator and each party should deliver a complete list of the witnesses whose evidence it intends to rely on at the hearing.

The applicants' legal practitioner had, in opposition to a resumption on 25 November 1996 of the arbitration proceedings, written a letter in which it stated that -

CHINHENGO J

> "As for the best dates for a resumed hearing my further thoughts lead me to the view that a resumption this year would be too early. Before the resumption the following preliminary steps must take place and take place for the most part in sequence. They are: amendments to the remaining claims and the counterclaims, pleas and replies thereto; discovery and inspection of documents (a potentially lengthy process); preparing and agreeing bundles of documents; formulation of affidavits/statements in place of evidence in chief.
>
> I appreciate the desire to bring these proceedings to an early conclusion but against that must be weighed the imperative need for the work of preparation to be done fully and properly."

It is needless to mention that despite these protestations the arbitrator, after careful consideration of the matter, issued the directions referred to above.

The applicant's grounds for seeking the order in the present application are the following:

(a) it had not had adequate time to prepare for the resumption of the proceedings. After the arbitrator's interim award, the applicant and its legal practitioner carried out a lengthy exercise of analysing the interim award and came to the decision, on 3 September 1996, that the applicant had grounds to apply to the High Court to have the interim award set aside. The work involved in drafting the application papers took some two weeks because of its complexity. The applicant's managing director travelled to South Africa during the two week period to seek the advice of a senior counsel in that country. The applicant did not therefore have adequate time to prepare for the resumption of the arbitration hearings. In particular it has not had the time to determine which claims it persists in and what amendments it wishes to make to its pleadings. The time constraint was worsened by the preparation for the present application. The applicant was therefore not in a position to meet the deadlines contained in the arbitratr's direction. If the proceedings are not stayed, it is to be subject to sanctions resulting from the failure to meet the deadlines.

(b) the application (HC-8142-96) to set aside the interim award, which the applicant lodged

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on 20 September 1996 and in which it alleges that the arbitrator has misconducted himself in the arbitration proceedings, has still to be determined. If that application is determined in favour of the

CHINHENGO J

applicant then a lot of time and money will have been expended in vain in preparing for the resumption. The second stage proceedings which depend on the findings as to liability contained in the interim award would thus have been conducted in vain.

(c) the second respondent does not suffer prejudice if a stay of the second stage proceedings is granted. In this connection the applicant argues that very little difference will be made if the second part of the hearing begins in 1997.

(d) the arbitrator, in the applicant's view, refused to grant a stay because he wrongly considered that in the absence of the second respondent's consent he had no power to order a stay and that that power only reposed in the court.

(e) if the second stage is proceeded with the applicant would suffer prejudice because the arbitrator's interim award has already set the ground for an unfavourable finding against the applicant. The irregularity which forms the basis of the application to set aside the interim award affects all future proceedings, that is to say, the steps to be taken in preparation of such hearing and the hearing itself. It is also crucial to the subject matter of the second hearing that those of the applicant's claims arising from second respondent's alleged unlawful repudiation and the applicant's consequent determination of its employment are no longer alive and will not be heard. The same would apply to the applicant's other claims based on the alleged breach of contract by the second respondent.

The second respondent opposed the application. It argued that the application to set aside the arbitrator's interim award is not based on grounds which are recognizable under s 6(4) of the Arbitration Act 6 of 1996 and accordingly the applicant is not entitled to make such an application. In any case, so argued the second respondent, it is improper for the applicant to seek an order setting aside the interim award before the arbitration proceedings are completed. First, the parties agreed on 28 October 1992 that no interim review would be sought by any of them. Second, even in the absence of such an agreement, there was no agreement that the unsuccessful party at the first stage of the arbitration hearing would be entitled to take the interim award on review before the arbitration was completed.

The second respondent also argued that the application to set aside the interim award cannot be determined without a full record of the arbitration

CHINHENGO J

proceedings so far. The need for such a record will cause substantial delay which is prejudicial

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to the second respondent. Further, the arbitrator was required by the submission to arbitration to proceed without undue delay to a final determination of the dispute between the parties. An application to stay the proceedings, as indeed the application to set aside the interim award, is contrary to the stated intention of the parties as contained in the submission to arbitration.

In regard to the applicant's contention that it has not been able to devote time to the preparation for the second stage proceedings, the second respondent avers that the applicant has had ample time to do so. The second stage was initially to be held simultaneously with the first stage before the split. As such the applicant had ample time to prepare for all the stages. Additionally the interim award was handed down on 26 July 1996 and the applicant has since that date had all the time to prepare for the second stage. The second respondent was of the view that any difficulties in complying with the arbitrator's time limits are entirely due to the applicant's own default.

I can quickly dispose of the contention that the arbitrator was wrong in holding that he did not have the power, failing agreement between the parties to the arbitration proceedings, to order a stay of the proceedings. The law on this point is stated by Butler and Finsen Arbitration in South Africa: Law and Practice. The law rests on the relationship between the arbitrator and the parties. At p 93 the authors say:

> "There are three possible theories to explain the relationship between the arbitrator and the parties. The first is that the relationship is contractual, the second is that it is based on status and the third is that the relationship combines elements of status and contract."

In a discussion of these theories and the qualifications to them, the authors state at p 94:

> "One situation from the arbitrator's point of view which is admirably dealt with by the contractual theory is the question whether the parties can vary the arbitration agreement after his appointment to alter his procedural powers without his consent, as the arbitrator's powers are subject to the arbitration agreement. If there is a tripartite agreement between the arbitrator and the parties once he accepts appointment, incorporating the terms of the existing arbitration agreement, the answer is clearly in the negative."

CHINHENGO J

In terms of the status theory, the arbitrator becomes a holder of an office whose duties are analogous to those of a company director and the courts will acknowledge certain rights and duties as reposing in the arbitrator. The authors conclude that the relationship between the arbitrator and the parties is sui generis and involves elements of status and contract. In this particular case, the contractual basis of the relationship between the arbitrator and the parties seems to me to be the determining factor. By contract between the parties which is expressed in the submission to arbitration, the arbitrator is contractually bound to follow the submission. In the absence of an agreement between the parties, the arbitrator's powers in regard to procedure have been spelt out in Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1982] AC 909 at 985, quoted by Butler and Finsen op cit at p 97, where Lord Diplock said:

> "By appointing a sole arbitrator pursuant to a private arbitration agreement which does not specify expressly or by reference any particular procedural rates, the parties make the arbitrator a master of the procedure to be followed in the arbitration. Apart from a few statutory requirements ... he has complete discretion to determine how the

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arbitration is to be conducted ... so long as the procedure he adopts does not offend the rules of natural justice."

Where, therefore, an arbitration agreement exists and that agreement lays down the procedure according to which the proceedings will be conducted, it is not within the power of the arbitrator to depart from that procedure save with the consent of the parties. In casu, the parties agreed on a two-stage approach to the arbitration proceedings. They agreed that after the first stage was complete, the second stage would be embarked upon. The also agree that the proceedings should be conducted without undue delay. The arbitrator's hands were tied. He could not, in the absence of concurrence by the parties, order a stay of proceedings, ie order that the second stage should not be embarked upon. He had not such power. he was contractually bound to proceed to the second stage of the proceedings. I am therefore satisfied that the arbitrator was correct in holding that he had not power in the circumstances of this case to order a stay of the proceedings. The applicant's contention that the arbitrator had the power to oder a stay could not, in any case, have taken it any further. The arbitrator stated in his ruling on this point that even if he considered that he had the power, he would nevertheless have refused the application for a stay on its merits.

The arbitration proceedings between the parties are governed by s 6(4) of the

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CHINHENGO J

Arbitration Act 1996. This section provides that the Act shall apply to every arbitral award, whether made before or after the date of commencement of the Act. Article 34 of the Model Law in the First Schedule of the Act provides as follows -

"(l) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) of this article.

(2) An arbitral award may be set aside by the High Court only if -

(a) the party making the application furnishes proof that -

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Zimbabwe; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission or arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of parties, unless such agreement was in conflict with the provisions of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law;

(b) the High Court finds that -

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CHINHENGO J

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of *Zimbabwe*; or

(ii) the award is in conflict with the public policy of *Zimbabwe*."

Paragraph (3) stipulates that an application to set aside an arbitral award may not be made after 3 months from the date on which the party making the application received the award.

Of these grounds of recourse against an arbitral award the one relevant to this application and which Mr Morris relied on is that relating to the public policy of Zimbabwe. Mr Morris argued that the invocation of public policy considerations has widened the grounds on which arbitral awards can be challenged. He referred to para 5 of article 34 which provides that -

"For the avoidance of doubt and without limiting the generality of paragraph 2(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if -

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award."

This argument was advanced in order to counter the second respondent's contention that the application to set aside the interim award is not well founded and has no prospects of success. The grounds upon which the application was made are contained in para 18 of the applicant's founding affidavit in case No. HC-8142-96. They are that -

" ... the first respondent has misconducted the proceeding s in the arbitration to date and that this award should be set aside. Applicant contends that the first respondent's misconduct takes the form of gross unreasonableness in that as regards various crucial findings no reasonable man could have come to the conclusion he did. Applicant also alleges that first respondent frequently failed to apply his mind properly or at all and/or he misdirected himself in certain respects."

A consideration of the submissions of the parties on this point and the

CHINHENGO J

contents of their affidavits brings me very close to dealing with the merits of the application to set aside the interim award. I have endeavoured to keep clear of doing that. For the purpose of determining the present application, I think that I have to make a finding whether or not the applicant has responsible prospects of success in its application in case No. HC-8142-96.

The law relating to the question of misconduct by an arbitrator was sufficiently dealt with in Cone Textiles (Pvt) Ltd v Redgment & Ors 1983 (l) ZLR 88 (S) at 92-93. At 92F-G Fieldsend CJ said:

"Although Russell [on Arbitration 20 ed] indicates that the term 'misconduct' in the section would appear to be used in its widest sense, the discussion which follows shows that, with limited exceptions peculiar to English law such as an admitted mistake of law or fact by the arbitrator and an error of law on the fact of the award, the courts in England do not follow a very different line to the courts in South Africa. For example, finding a fact without

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adequate evidence is not misconduct in any event: Russell p 421. And as Lord Denning MR said in GKN v Matbro [1976] 2 Lloyd's Rep 555-575:

> 'The weight of evidence and the inferences from it are essentially matters for the arbitrator. I do not think that the awards of arbitrators would be challenged or upset on the ground that their was not sufficient evidence or that it was too tenuous or the like.'"

The learned Chief Justice continued at 92H and quoted with approval Solomon JA's words in Dickenson & Brown v Fisher's Executors 1915 AD 166 at p 176:

> "Now if the word 'misconduct' is to be construed in its ordinary sense it seems to me impossible to hold that a *bona fide* mistake either in law or of fact made by an arbitrator can be characterised as misconduct, any more than that a judge can be said to have misconducted himself if he has given an erroneous decision on a point of law. Nor can I conceive of a court removing an arbitrator for misconduct merely because he has made a mistake whether of law or of fact. Cases may no doubt arise where, as was said by the late Chief Justice in the case of Landeshut v Koenig (1903) 20 SC 33 at 34, 'the mistake is so gross or manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator'. But in such cases the mistake would merely be evidence to show that there had been misconduct and if an award were

CHINHENGO J

> set aside in such circumstances it would really be on the ground of misconduct and not of mistake. It may also be that an arbitrator has been guilty of the grosset carelessness and that in consequence he had come to a wrong conclusion on a question of fact or of law, and in such a case I am not prepared to say that a court might not properly find that there had been misconduct on his part. But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a *bona fide* mistake either of law or of fact."

He also quoted with approval the words of Gardner J in Clark v African Guarantee and Indemnity Co Ltd 1915 CPD 68 at p 78 where it is said:

> "No case in our courts was quoted in argument in which an award was actually set aside on the ground that there was no evidence to support the arbitrator's finding, and I am satisfied that, before the court would interfere, it would be necessary to show that the lack of evidence established a total want of that judicial capacity which is required even of an ordinary fair-minded layman appointed to adjudicate by the parties to a dispute. If the arbitrator has taken evidence and has fairly considered it, the court will not set aside the conclusion he has come to upon that evidence, because he has drawn inferences which, though possible, are not acceptable to the court."

Referring to the judgment in Dickenson & Brown v Fisher's Executors *supra*, Gubbay JA (as he then was) stated in *McKelvey v Abrahams \& Anor* 1989 (2) ZLR 251 (S) at 262:

> "I consider this judgment to be express authority for the proposition that a *bona fide* mistake made by an arbitrator, whether of fact or law, and whether he admits it or not, affords no ground for a court to set aside his award. Such a mistake cannot be construed as 'misconduct'. But if the mistake is so gross or obvious that it could not have been made without some degree of misconduct the award may be set aside, not on the ground of mistake, but on the ground of misconduct. See Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk 1968 (1) SA 7 (C) at 16H."

I have perused the papers filed of record in case No. HC-8142-96, which papers have been incorporated into the affidavits in the present application

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CHINHENGO J

and, on the strength of the authorities to which I have referred, it is unlikely that a court would upset the arbitrator's interim award on the grounds out forward by the applicant. An allegation that an arbitrator has misconducted the proceedings must meet the very stringent test outlined in the cases to which I have referred. It would be a mockery of arbitration proceedings if an arbitrator's award were to be challenged on the general ground that the arbitrator misconducted the proceedings without establishing that he has been guilty of the "grossest carelessness", as to lead to a conclusion that the arbitrator was partial in his decision. If "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 ... [A] courtwill always be most reluctant to interfere with the award of an arbitrator": Cone Textiles (Pvt) Ltd v Redgment & Others *supra* at p 92A. Melamet J in Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd &Anor 1978 (4) SA 379 (T) at p 383F-H said:

> "Mr Slomowitz ... has summarised the principles enunciated in the decided cases in his heads of argument submitted on behalf of first respondent as follows:
>
> (i) if the discretion has been exercised and there was some evidence on which it was exercised, a court will not interfere if the finding was erroneous or unreasonable.
>
> (ii) once the arbitrator has exercised his discretion the court has no jurisdiction to enquire into the correctness of the conclusion.
>
> (iii) the court will only do so where there has been gross irregularity or a failure of natural justice.
>
> (iv) gross unreasonableness will not amount to either of those unless there was no evidence whatsoever to support the finding ...
>
> If regard is had to the record of the proceedings and the affidavit, it is clear that the arbitrator listened to argument for three hours, in connection with the postponement, in which he gave both parties full opportunity to state their case ..."

The force of these words is of equal relevance to the instant case. The arbitrator listened to argument from both parties and stated his reasons for directing that the arbitration proceedings should resume on 25 November

CHINHENGO J

1996. His refusal to grant a stay of the proceedings cannot be impugned, whether one was to question it on the basis of the finding that he had no power to order a stay or one the merits of the applicant's case. I am therefore satisfied that the applicant has no reasonable prospects of success in its application to set aside the interim award. I am also satisfied that there are no grounds on which I could interfere with the arbitrator's decision on the presumption of the arbitration proceedings.

Mr *Morris* argued that the Arbitration Act has extended the grounds upon which an arbitral award can be challenged by including public policy as a consideration. I must confess that I do

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not see how the Act so extended or increased the grounds upon which an arbitral award can be challenged beyond the grounds already recognised in our law.

> "Article 34(5) has been introduced to put beyond doubt that public policy is contravened if the award is tainted by fraud or corruption or involves a breach of the rules of natural justice eg if the parties were not treated equally or if the arbitrator was biased"

(para 5:39 in *Sourcebook of Arbitration Materials*, ed I A Donovan, A R McMillan SC and M A Masunda). I do not think therefore that the grounds upon which arbitration awards may be challenged have been extended. They have merely been restated to put the matter beyond any doubt. The applicant has not challenged the interim award on any grounds which are recognisable under the Arbitration Act.

Whilst I have disposed of the issues raised in the application on the ground that the applicant's prospects of success in the application to set aside the interim award are not good, I feel I must deal with another ground on which the application could equally fail.

A party is in a proper case entitled to bring to this court an application in which an arbitrator's interim award is challenged and the court has the jurisdiction to entertain and determine the application. An interim award is final and binding in respect of those matters referred to the arbitrator and which are agreed shall be the subject of such an award (see Butler & Finsen op cit p 262). This position may however be altered by the parties if they agree that neither of them may institute review proceedings before the arbitration proceedings were completed. At the pre-hearing conference held on 28 October 1992 which was attended by legal practitioners for both the applicant and second respondent, it was agreed, inter alia, that no interim review will

be sought (see para 3 of the minutes). The second respondent argued that the agreement not to seek an interim review is binding on the parties. The applicant disputes it. It argued that this issue was not raised when the first respondent was appointed as an arbtrator and according to the applicant, the addendum to the submission to arbitration should have contained a clause dealing specifically with the question whether or not an interim award may be subjected to a review by the courts if that was the intention of the parties.

Paragraph 2:1 of the addendum provides that the submission to arbitration is amended by the substitution of the name of Mr P C Lloyd for that of Mr W R Whaley. Paragraph 2:3 provides further that -

> "Save as aforesaid and save for the deletion therefrom of Clause 7 as ordered by the High Court of Zimbabwe, the terms of the said Deed shall remain binding on the parties."

In view of the evidently clear provision of the addendum, the applicant must have felt that the basis of its application had slipped away and decided to make a second application in which it sought leave to file a supplementary answering affidavit. This is the application which I heard in chambers on 14 October 1996.

In the second application the applicant deposed to the fact that when it filed its answering

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affidavit it had not had the opportunity to search through its records of correspondence between the legal practitioners of the applicant and the second respondent. Having undertaken the search it found an exchange of letters which, in its view, were highly material to the issue whether or not the parties are bound by the agreement not to bring review proceedings until the arbitration proceedings were completed. The second application was therefore concerned with seeking leave to file further papers which, it was believed, would assist the court in reaching its decision on the first application.

It appears from the correspondence that in a letter dated 28 June 1995 the second respondent's legal practitioners suggested the insertion in the addendum of a paragraph dealing with this point. It was to the following effect:

> "The parties are agreed that pending the final award of the arbitrator no proceedings of any nature shall be instituted in the High Court which shall include any matters in respect of which an interlocutory application

CHINHENGO J

> may be made in terms of section 16 of the Act, or in which directions are sought from the arbitrator or any review of any decision, or any directions made by the arbitrator, or any application for the removal of the arbitrator for any cause or reason whatsoever."

By letter dated 29 June 1996 the applicant flatly rejected this proposal whereupon, the second respondent replied to the following effect:

> "If your client is not prepared to add in the additional paragraph which we requested we will not press this matter any further."

It will be noted that the proposal by the second respondent was much wider than the original provision which simply stated that -

> "No interim review will be sought."

In making the proposal it would appear that the second respondent intended that this provision should be further clarified. This is evident from its letter of 28 June 1995 where in the third paragraph and in reference to this very point it is stated that -

> "... on discussion with Advocate Andersen SC he was of the view that certain further clarification should be sought from you and dealt with in the Addendum."

If the suggested amendment had been accepted it would have widened the scope of the clause dealing with applications for interim review. Its rejection by the applicant, read in the context of the addendum, especially para 2.3 thereof, leaves me in no doubt that the agreement not to seek interim review of the arbitration proceedings remained intact. Any efforts to alter, or add to or elaborate on it, were unsuccessful. I do not understand the correspondence between the parties as jettisoning the original agreement. I am therefore satisfied that the parties are bound by their agreement not to seek an interim review of any decision of the arbitrator.

The second application was intended to shed more light on this point. I considered that the correspondence between the parties' legal practitioners might be material to my determination of the first application. The mere fact however that the application for leave to file a further

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answering affidavit was entertained did not mean that the affidavit itself necessarily tilted the balance in favour of the applicant. I had to peruse it in the light of earlier submissions

CHINHENGO J

of the parties. The second respondent's opposition to the second application was, in my view, properly made. The purpose of the application was merely to put before the court further information which would, in the applicant's opinion, assist the court in reaching its decision. I am satisfied that the information was available to the applicant at the time when he filed his founding affidavit and answering affidavit. The applicant makes the point that it undertook a search into the correspondence between its legal practitioner and those of the seond respondent and found the letters which it annexed to its supplementary answering affidavit. If anything, the search and findings confirm that these letters were available to the applicant and the information therein was known to its legal practitioners before making the first application. I am therefore satisfied that the applicant had the information before making its first application and because of inadvertence on its part it did not include that information in its founding or answering affidavit. It has itself to blame. In my view, the second applicant failed to meet the requirements set out in Farmers Co-op Ltd v Borden Syndicate (Pvt) Ltd 1961 R & N 28 (FS). Those requirements mutatis mutandis should be complied with in an application such as this one.

My order in respect of the costs of the second application will reflect this conclusion.

I think I must make further observations in respect of this application. Arbitration has a consensual basis. The parties agree to refer a dispute between them to a third party. Even though their agreement does not exclude the jurisdiction of the courts in respect of all matters which may arise from that reference, the courts are generally reluctant to interfere in arbitration proceedings. The courts should be seen to encourage the resolution of disputes, especially commercial disputes of some or great complexity, by resort to arbitration. Such encouragement may take the form, and is buttressed by the policy, already firmly established in our law, of interfering in such proceedings only on very limited and very narrow grounds. In casu the parties agreed to a two-stage approach to the proceedings. They intended that the proceedings were to be conducted through to completion before any review could be brought against the decision of the arbitrator either in regard to a procedural matter or in regard to any interm award. The splitting of the proceedings arose out of a need to isolate issues and have them determined in stages in a logical sequence. The parties, in my view, did not intend to lay the ground for a piecemeal approach to those proceedings. The application before me seeks to override the agreement between the parties. While I am in agreement with the submission of counsel for the applicant that the

CHINHENGO J

situation in respect of the proceedings between the parties can be likened to the situation that arose in Botha v AA Mutual Insurance Association Ltd & Anor 1968 (4) SA 485 (A) and that

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because the interim award is final in respect of liability a review application can be made, I must say that it is not generally appropriate to compare the splitting of proceedings in an ordinary civil trial, such as was the case in *Botha's* case *supra* to the splitting of proceedings in an arbitration process as in the present case. In arbitration proceedings the court is guided to a very great extent by the provisions of the submision to arbitration, if one is in place, and will assess, in the light of those provisions, whether or not it was the intention of the parties that interlocutory review applications can be made. In this case, the second stage proceedings are concerned with the trial and adjudication of questions some of which do not depend for their determination on the findings at the first stage of the proceedings. In all the circumstances therefore the proceedings should continue in the manner directed by the arbitrator without interruption. This is in keeping with the parties' agreement.

In regard to the questions of the convenience of the parties and the likely prejudice which either of them may suffer, I am in total agreement with the arbitrator's finding that they are evenly balanced, such that it is not possible to make a finding that the one or other party should clearly prevail.

Accordingly, the application is dismissed with costs. The applicant shall pay the second respondent's costs in respect of both the first and second applications.

Honey & Blanckenberg applicant's legal practitioners

Winterton Holmes & Hill, second respondent's legal practitioners

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NCUBE v HAMADZIRIPI 1996 (2) ZLR 403 (HC)

Court **High Court, Bulawayo**

Chatikobo J

Civil application

4 & 18 October 1996 Judgment No. HB-75-96

Flynote

Administrative law - review - tribunals and officials - small claims court - decision of - failure to give reasons at time - whether an irregularity allowing interference on review

Court - small claims court - proceedings in - purpose of - informal nature of proceedings

Depositum - contract - when formed - depository's liability for negligence

Practice and procedure - small claims court - irregularity - informal nature of procedures - failure to give reasons at time decision made - whether constitutes irregularity - failure to invite cross-examination

Headnote

The applicant, who was the defendant in the court below, applied to the High Court for a

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review of the proceedings of the small claims court. The grounds of review were that:

- the presiding officer did not carry out a proper inquiry into the facts;
- the presiding officer made an order in favour of the respondent (plaintiff) without giving reasons;
- the applicant was not given a proper opportunity to cross-examine;
- there was insufficient evidence on which to find in favour of the respondent.

Held, that the proceedings in the small claims court are meant to achieve speed, flexibility and the kind of simplicity which would not confound

an unrepresented litigant. This court is not bound by the rules of procedure and evidence that apply in ordinary court proceedings.

Held, further, that it is not a reviewable irregularity for the presiding officer to fail to give reasons for his decision when he hands down his decision; it suffices for him to provide reasons when an interested party asks for reasons.

Held, further, that it is not a reviewable irregularity for the presiding officer to fail to advise a litigant that he has a right to cross-examine witnesses; although it would undoubtedly be helpful for the presiding officer to advise the litigant of this right, it is not mandatory for him to do so.

Held, further, however, that the proceedings were fatally flawed and must be set aside and be referred for re-hearing before another presiding officer because the presiding officer had acted on a mistaken view of the legal principles applicable to the facts and had not applied the correct legal criteria.

Held, obiter, that because of the considerable expense involved in having to employ a lawyer to bring the case to the High Court on review, the legislature should consider changing the provision disallowing any appeal from the decision of a small claims court and instead allowing some limited right of appeal to a district court.

Cases cited:

Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S)

Cassem en 'n Ander v Oos-Kaapse Komittee van die Groepgebiederaad en Andere 1959 (3) SA 651 (A)

Challinger v Speedy Motors 1951 (1) SA 340 (C)

Ex p Sellars 1958 (4) SA 54 (C)

Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor 1980 (3) SA 476 (T)

Min of Posts & Telegraphs v Daddy Bros & Anor 1965 (3) SA 394 (E)

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Munhuwa v Mhukahuru Bus Svc (Pvt) Ltd 1994 (2) ZLR 382 (H)

Sec for Tpt & Anor v Makwavarara 1991 (1) ZLR 18 (S)

S v Levers (Pty) Ltd & Anor 1970 (1) SA 527 (N)

The court referred to the following statutory provisions:

High Court Act [Chapter 7:05], s 27

Small Claims Court Act [Chapter 7:12], ss 19 & 30

Case Information

D Mazibuko, for the applicant

G Sibanda, for the respondent

CHATIKOBO J

Judgment

Chatikobo J: This application has been brought in terms of s 30 of the Small Claims Court Act [Chapter 7:12] (the Act) which gives the High Court power to review the proceedings of a small claims court on any grounds on which the High Court may review proceedings of judicial tribunals. Those grounds are to be found in s 27 of the High Court Act [Chapter 7:05]. I need not repeat them here.

The respondent sued the applicant in the small claims court for the return of his radio or alternatively for the payment of its value which was stated to be the modest sum of $1 600. The presiding officer granted judgment to the respondent for the full sum of $1 600 together with interest and costs.

The grounds upon which the proceedings are challenged are:

(1) That the presiding officer did not carry out a proper inquiry so as to ascertain the true facts. He is accused of having accepted the version of the respondent at face value without testing its veracity.

(2) That the presiding officer simply made an order in favour of the respondent without giving reasons.

(3) The applicant was not given an opportunity to cross-examine the respondent.

(4) That in the absence of proof that applicant was negligent there was no legal basis upon which to hold him liable for the loss of the radio.

The facts are that on 3 September 1996, the applicant and the respondent were both passengers on a long distance bus bound for the rural areas. The respondent was accompanied by his wife. The parties knew each other. Before the bus left Renkin bus terminus

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in Bulawayo, the respondent asked the applicant to look after his radio while he went to buy something which the latter agreed to do. The respondent says he returned within five minutes and found to his horror that the radio had gone missing. He says by then the applicant was sitting outside. The applicant told the respondent to look for the radio in the bus where he had left it. This the respondent did, but still he did not find the radio. On the other hand, the applicant told the presiding officer that the respondent only asked for his radio long after he had returned from his errand. This, however, is at variance with what the applicant now alleges in his founding affidavit. He says in his founding affidavit that the respondent returned within five minues and thanked him for looking after his radio. I

have no hesitation in accepting the respondent's version in preference to that of the applicant.

The presiding officer, in his reasons for judgment, which were made available after the review proceedings were launched, he made the following statement:

> "Whether plaintiff (respondent) returned to find defendant (applicant) already outside the bus, as deposed to by plaintiff, or still inside the bus, as deposed to by defendant, defendant's duty was to redeliver the radio to plaintiff the parties having concluded a contract of depositum in respect of the radio. This the defendant failed to do and the conclusion is unavoidable that he failed to exercise adequate care for plaintiff's radio while it was in his custody, and as a consequence, the radio was stolen."

This in essence was the basis upon which the presiding officer held that applicant was liable. With this in mind, I proceed to deal with each ground of review advanced by the applicant.

The first such ground is that the presiding officer failed to carry out a proper inquiry to ascertain the facts and test the veracity of the allegations made by the parties. The Act provides in s 19(1) that the presiding officer shall not be bound by strict rules of evidence and that the court may ascertain any relevant fact by means which he thinks fit as long as the means used is fair and just to both parties. Section 19(2) provides that the evidence may be adduced either orally or in writing. The presiding officer has a discretion. In this case, the presiding officer asked each party to state his case which both parties did. Thereafter, he made a ruling. Bearing in mind the informal nature of the proceedings of a small claims court, I cannot accept that the presiding officer acted irregularly as suggested. Proceedings in small claims courts are meant to achieve speed, flexibility and the kind of simplicity which would not confound an unrepresented litigant.

The second ground advanced is that the presiding officer made a ruling without giving reasons. As I have already stated, the reasons were only supplied after these proceedings had been launched. One has some sympathy for the presiding officer. While the proceedings of a small claims court are judicial, there is a danger that resort to formalities such as giving reasons for judgment might have the effect of over-judicialising the proceedings. If that happened, the object sought to be achieved by the Act might be defeated. The

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presiding officer must keep the proceedings as informal as possible without of course acting unfairly towards either party.

In the recent case of Affretair (Pvt) Ltd & Anor v M K Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S), McNally JA said that a decision must be "justifiable in that the administrative body will give its decision, *at least when the decision is challenged*, *with reasons*. The purpose of requiring reasons is that the court can then more readily determine the propriety and reviewability of the decision" (my emphasis).

I understand this to mean that a decision is not fatally flawed by a failure to give reasons at the time the decision is made. In Baxter, Administrative Law, one finds this statement:

> "It is often argued that the principles of natural justice imply a duty to give reasons for decisions. 'Being told why' we know from childhood, is an important element in the fairness of a decision and it helps to inspire confidence in the decision. The courts have not yet fully accepted this argument."

In my view, it is one thing to make a decision without telling the person affected by the decision "why". It is another thing to decline to give reasons when an interested party asks for the reasons. If a person asks for the reasons, then in the absence of a statutory prohibition, the decision maker should furnish reasons for the decision. It is often said that reasons which are furnished after the decision has been made may be tainted by an ex post facto attempt by the decision maker to justify a decision which is indefensible. The answer, I think, lies in the fact that any decision must be consistent with the evidence upon which it is based. If it does not, it is irrational.

I hold on this score as well that the failure to give reasons at the time the decision was made is not fatal.

The third ground of review is that the presiding officer acted irregularly in not giving the applicant an opportunity to cross-examine the respondent. This criticism is equally unjustified. The Act provides in s 19(3) that the parties to any proceedings shall be entitled to cross-examine each other or any witness but the presiding officer may terminate such cross-examination if he considers it to be "unfair, oppressive, unduly prolonged or unnecessary." This provision confers on the litigant an entitlement, subject to the curtailment quoted in the previous sentence, to cross-examine. It does not in

my view, cast a duty on the presiding officer to cajole a litigant to cross-examine his opponent. Compare S v Levers (Pty) Ltd & Anor 1970 (1) SA 527 (N); Ex p Sellars 1958 (4) SA 54 (C). The right is given to the litigant. It is for him to make use of it. It would undoubtedly be helpful for the presiding officer to advise the litigants that they have the right to cross-examine but it is not mandatory because in apropriate situations he can terminate cross examination if he thinks it is unnecessary. At common law, there is no absolute right to cross-examination. As Baxter *supra* observes at p 554.

> "Even where an oral hearing is granted and although an opportunity to lead and challenge evidence is always

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required natural justice does not, so South African courts have often held, entail a right of cross examination."

See also Cassem en 'n Ander v Oos-Kaapse Komittee van die Groepsgebiederaad en Andere 1959 (3) SA 651 (A). In the case of Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor 1980 (3) SA 476 (T) 486D, which was referred to with approval by Korsah JA in Secretary for Transport & Anor v Makwavarara 1991 (1) ZLR 18 (S), Colman J said:

> "It is clear on the authorities that a person who is entitled to the benefit of the audi alteram partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing; or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents."

I am mindful of the fact that a small claims court is not an administrative tribunal; it is a court of law. Be that as it may, it is also a creature of statute whose procedures have been deliberately curtailed by the legislature so as to whittle down significantly all the procedural rules of other courts of law in this country. I am confident that it is not an overstatement to say that it has been placed on the same level as non-judicial tribunals. Its decisions are final. There is no appeal against them. The prescribed procedures are highly informal. No rules of evidence apply.

There was thus no irregularity committed by the presiding officer in this regard as well.

The fourth and last ground of review relied upon was that there was no legal basis upon which to proof that applicant had been negligent. The presiding

CHATIKOBO J

officer held, correctly in my view, that the contract was one of depositum which cast upon the applicant a duty to restore the radio to the respondent upon demand. We also held that the applicant did not take adequate care of the respondent's radio. This was a clear finding that the applicant was negligent.

In a contract of depositum, one person delivers to another a thing for safe keeping on the understanding that is it to be returned on demand. Safe keeping denotes and undertaking to retain and have charge of something, not merely a passive acquiescence that something may be left somewhere. See Min of Posts & Telegraphs v Daddy Bros & Anor 1965 (3) SA 394 (E); Munhuwa v Mhukahuru Bus Service (Pvt) Ltd 1994 (2) ZLR 382 (H). I am prepared to accept that the presiding officer was satisfied that applicant undertook to ensure the safety of respondent's radio. However, the matter does not end there.

The liability of the depository to compensate the depositor for loss or damage occasioned by the depository's negligence depends on whether the deposit was gratuitous or for reward. Because a gratuitous deposit is entirely for the benefit of the depositor, the depository is only bound to take the same care of the property as he would of his own property. So if the property is destroyed, damaged, lost or stolen, he is liable only for gross negligence or for fraud. Before the court can hold a depository liable, it must determine the presence or absence of gross negligence.

See Challinger v Speedy Motors 1951 (1) SA 340 (C). In casu the presiding officer did not

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determine the degree of negligence. His finding that the applicant failed to take adequate care of respondent's radio is consistent with a finding of ordinary negligence rather than a finding of gross negligence. In the absence of gross negligence the applicant should not have been found liable. In holding the applicant liable, the presiding officer acted on a mistaken view of the legal principles applicable. A decision which is not made within the framework of the law and without the application of the proper legal criteria is fatally flawed. It should be set aside.

Before concluding this judgment, I must express a personal feeling of dissatisfaction with the review procedure provided for in s 30 of the Act. A party who is aggrieved by a decision of a presiding officer is forced to apply to the High Court on notice to the other party for a review of the decision. As has happened in this case, the parties end up engaging legal practitioners to assist them in comprehending and applying the complex rules of procedure

CHATIKOBO J

involved. Acting on their own, the parties would hardly appreciate the grounds upon which the matter can be reviewed. The result is that a petty dispute will in the end cost the parties far more than the amount in dispute. There can be no doubt that the cost of bringing this application far exceeds the $1 600 which is in dispute. The parties have not achieved justice; they have been prejudiced by the rules of procedure. It might be a good idea to consider granting such litigants a limited right of appeal to a district court which would deal with the matter on te same informal basis which obtains in the small claims court.

In the premises, the application succeeds and it is ordered as follows:

(1) The proceedings of the small claims court in case No. SCC-198-96 be and are hereby set aside.

(2) The respondent can reset the matter down for a fresh hearing before a different presiding officer if he so wishes.

(3) The respondent is to pay the costs.

James Moyo-Majwabu & Nyoni, applicant's legal practitioners

Sansole & Senda, respondent's legal practitioners

CHOTO v COLLEGE PRESS (PVT) LTD 1996 (2) ZLR 411 (HC)

Court **High Court, Harare**

Smith J

Civil application

26 March & 23 October 1996 Judgment No. HH-146-96

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Flynote

Intellectual property - copyright - infringement - action for infringement - in whom right of action vests - author having retained copyright but ceded other rights to publisher, including right to cede or grant secondary rights - publisher thereafter publishing another book with extracts from author's work - whether author entitled to account of profits

Headnote

The applicant was the author of a number of books. The respondent publishing house agreed to publish one of them, in terms of an agreement whereby copyright vested in the author but the publisher obtained the sole and exclusive right to publish, sell, reproduce and otherwise deal with the work or any abridgement of it. The agreement also gave the publishers the right to grant subsidiary and secondary rights in the work by selling, licensing or otherwise dealing with the copyright. The applicant later became aware that the respondent had published a work containing two pages from his book. He complained and was offered a "clearance fee", which he declined. He claimed damages and a pro rata share of the gross profits of the later book, on the grounds that his copyright had been infringed.

Held, that the applicant, as holder of the copyright, was entitled under s 22 of the Copyright Act [Chapter 26:01] to bring an action for infringement. However, such an action would only lie if there had in fact been an infringement. Under the agreement with the respondent, the applicant had given the respondent the sole right, among other things, to reproduce the work. The reproduction of part of it by the respondent was not an

SMITH J

infringement of the applicant's rights and he was thus not entitled to an account of profits.

The court referred to the following statutes:

Consumer Contracts Act [Chapter 8:03]

Copyright Act [Chapter 26:01], ss 5(2), 7(1), 21, 22 and 24

Case Information

E W W Morris for the applicant

A P de Bourbon SC, for the respondent

Judgment

Smith J: The applicant (hereinafter referred to as "Choto") is the author of a number of literary works, one of which is entitled "Ndakazviita". The respondent (hereinafter referred to as "College Press") published that work in accordance with an agreement which the parties entered into (hereinafter referred to as "the Agreement"). In terms of clause 1 of the Agreement, copyright in that work remains vested in Choto but College Press obtained "the sole and exclusive right to publish, sell, reproduce and otherwise deal with the work or any abridgement

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of the work or any substantive part of the work in volume or sheet form", throughout the world. Clause 2 of the Agreement, which deals with "subsidiary and second (*sic*) rights", provides that College Press shall have the sole and exclusive right to grant subsidiary and secondary rights in the work by selling, licensing or otherwise dealing with the copyright upon payment of 50 *per* cent of all net monies received or to be received. The subsidiary and secondary rigts include "translation, anthology, digest and quotation, serial, broadcast, television, film, microphotographic reproduction, braille, reproduction by gramophone records or other mechanical or electronic means, whether by sight, sound or a combination of both, reprint rights licensed to another publisher."

Choto later became aware that College Press had published a work entitled "Ventures - Gore Rechitanhatu" which contained two pages that consisted of an extract from "Ndakazviita". He wrote to College Press complaining that his copyright had been infringed. College Press replied with an apology for its oversight in failing to obtain Choto's permission to include the extract. It asked for "a belated clearance" and offered to pay a clearance fee of 50 cents for every word used.

Choto was not prepared to accept the clearance fee. He wanted to claim damages and therefore sought an "account of profits" and payment of his "pro rata share of all the gross profit" on that book. College Press denied that there had been any infringement of Choto's copyright in "Ndakazviita". It claimed that in terms of clause ll of the Agreement, it was entitled to publish

SMITH J

the extract from that work in "Ventures - Gore Rechitanhatu". It conceded that it failed to seek the prior consent of Choto but said that it was not legally obliged to do so, although it usually did seek such consent as a matter of courtesy. College Press contended that the "clearance fee" which it offered to pay Choto relates to permission fees payable as between publishers in respect of extracts taken from any material, copyright in which vests in one publisher, for inclusion in material in which the substantive rights of copyright will vest in another publisher. When it offered to pay Choto a clearance fee the term was used out of contxt because the substantive rights in "Ndakazviita" were vested in College Press and so no "permission" fee was payable to Choto. However, as a gesture of goodwill, it was prepared to pay Choto what it would have paid to another publisher had copyright in that work vested in that publisher. A rate of approximately 50 cents a word was the common rate payable at that time in the publishing industry for permission fees for extracts.

Choto claimed that "such conduct" on the part of College Press violated the provisions of the Consumer Contracts Act [Chapter 8:03] and should not be condoned by the court. College Press replied that that Act was not applicable as Choto was the "seller" and clearly did not act outside the normal course of his business as he is an author by profession and has had a number of his works published.

Mr *Morris* argued that even though Choto had granted College Press an exclusive licence in relation to "Ndakazviita", that did not mean that his rights and remedies were pro tanto vested in College Press. Choto retained his rights in the work. He was therefore entitled to be

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compensated for the use of extracts from his work. To determine the compensation due to him he was entitled to an account of profits from College Press so that he could determine his "pro rata share". Mr de Bourbon submitted that Choto had misconceived his rights and the remedy to which he might be entitled. He conceded that the copyright in "Ndakazviita" was vested in Choto by virtue of s 7(l), as read with s 5(2), of the Copyright Act [Chapter 26:01] (hereinafter referred to as "Chapter 26:01"). However, Choto had given College Press the sole and exclusive right to reproduce the work. Therefore Choto had no claim for infringement under s 22 of Chapter 26:01. As College Press had an exclusive licence, as defined in s 24(9) of Chapter 26:0, only it could bring an action for infringement.

In terms of s 22 of Chapter 26:01, infringements of copyright are actionable at the suit of the owner of the copyright. By virtue of s 24 thereof an exclusive

SMITH J

licensee has the same rights of action as the owner but I do not agree with Mr de Bourbon's submission that it is only the exclusive licensee that can bring an action for infringement. The owner retains his rights of action. However the remedies provided for in Part IV of Chapter 26:01 are applicable only in cases of infringment of copyright. An infringing copy of a literary work, as defined in s 21 of Chapter 26:01, is a reproduction of the work the making of which constituted an infringement of the copyright in the work. In terms of clause 2 of the Agreement, College Press is given very wide rights in relation to "Ndakazviita". The initial statement in clause 1 of that Agreement - that the copyright therein remains the property of Choto - is illusory because the clause goes on to provide that College Press will have the sole and exclusive right to pubish, sell, produce or reproduce and otherwise deal with the work or any abridgement or substantial part thereof, in volume or sheet form, throughout the world. By virtue of clause 2 of the Agreement, College Press also has the sole and exclusive right to grant subsidary and secondary rights in the work. Clearly, therefore, the later publication, "*Ventures - Gore Rechitanhatu*", is not an infringing copy because the reproduction of the pages from "Ndakazviita" did not infringe Choto's rights. He has sold his rights to reproduce the work, or any part thereof, to College Press. Therefore Choto is not entitled to an account of profits in terms of s 22 of Chapter 26:01.

Mr Morris suggested that, if Choto was not entitled to an account of profits, he was at least entitled to an order requiring College Press to account to him for the net profits resulting from the publication of "*Ventures - Gore Rechitanhatu*" so that he can assess his damages and institute an action for recovery thereof. In my view, such an order cannot be granted on the basis of the application made by Choto for an account of profits.

Neither Mr de Bourbon nor Mr Morris dealt with the claim by Choto that the agreement he entered into with College Press violated the provisions of the Consumer Contracts Act [Chapter 8:03]. That is because it clearly did not violate the provisions of that Act. There may well be grounds for holding that the Agreement is unfair as far as Choto is concerned, because he appears to have sold all the valuable, or potentially valuable, rights in his work, for a mess of pottage but that Act does not extend to contracts such as that which he entered into with

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College Press.

The application is dismissed with costs.

Kantor & Immerman, applicant's legal practitioners

Coghlan Welsh & Guest, respondent's legal practitioners

WILMOT v ZIMBABWE OWNER DRIVER ORGANISATION (PVT) LTD 1996 (2) ZLR 415 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Ebrahim JA & Muchechetere JA

Civil appeal

28 October 1996 Judgment No. S-211-96

Flynote

Practice and procedure - summary judgment - multiple causes of action in one summons - application for summary judgment in respect of same, but not all, of the causes of action - whether summary judgment may be granted

Headnote

The respondent instituted proceedings against the appellant in the High Court in respect of three distinct causes of action. Two were in respect of cheques which were dishonoured, the sums involved totalling $84 183.16. The third was in respect of transport charges, in the sum of $5 709.94. The appellant's legal practitioners, in correspondence, had admitted liability in respect of the dishonoured cheques and, on entry of appearance to defend, the respondent applied for summary judgment in relation to the first two causes of action. Summary judgment was granted. The appellant appealed, arguing that under r 64 of the High Court Rules the remedy of summary judgment may only be granted where application is made in relation to all that is claimed in the summons.

Held, that if the court may, under r 73(b)(ii), give leave to a defendant to defend part of the claim and enter judgment against him in respect of the rest, it must a fortiori be able to grant judgment in favour of the plaintiff on some, but not all of the claims, to which liability is admitted. In any event, the court was permitted to depart from the Rules wherever it considered that the departure was required in the interests of justice.

Held, further, that there was no prejudice to the appellant by having summary judgment granted. He had no defence to the claims. The appellant's

GUBBAY CJ

purpose in opposing the application was simply to buy time; his action was abuse of the process

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of the courts.

Cases cited:

Abdurahman's Est v Abdurahman 1956 (3) SA 295 (C)

Garlick's Wholesale v Davis 1927 CPD 185

Hugo Franco (Pvt) Ltd v Gordon 1956 R & N 448; 1956 (4) SA 482 (SR)

Jno G Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd 1968 (4) SA 371 (O)

Makaruse v Hide \& Skin Collectors \(Pvt\) Ltd 1996 (2) ZLR 60 (S)

Moller v D Gestetner (SA) (Pty) Ltd 1939 OPD 195

Spilhaus & Co Ltd v Coreejees 1966 (1) SA 525 (C)

Sumbereru v Chirunda 1992 (1) ZLR 240 (H)

The court referred to the following rules of court:

High Court Rules 1971 (RGN 1047 of 1971), rr 64 and 73(b)(ii)

Judgment

Gubbay CJ: The short point in this appeal is whether a plaintiff, who in a summons makes three entirely separate claims, each in respect of a debt or liquidated demand, and then applies for summary judgment on one or two of such claims in an amount less than the total of the three, must be denied the relief sought by virtue of the provisions of Order 10 Rule 64(1) of the High Court Rules 1971.

What happened was that the respondent instituted proceedings in the High Court against the appellant in respect of three distinct causes of action. The first was founded on a cheque in the sum of $18 562,10 drawn by the appellant, of which the respondent was the legal holder as payee, which cheque was dishonoured by the bank on being presented for payment. The second arose, similarly, on a dishonoured cheque drawn by the appellant in favour of the respondent in the sum of $65 621,96. And the third was for payment of the sum of $5 709,94, being the balance alleged to be due and owing for transport charges incurred by the appellant during the period September to December 1993. The total amount claimed in the summons was $89 893,10, with interest and costs of suit.

Upon entry of appearance to defend, the respondent applied for summary judgment only in relation to the first and second causes of action, in an amount of $84 183,16. In terms of r 64(3), the deponent attached to his affidavit a letter written by the appellant's legal practitioners in which liability for payment under the two dishonoured cheques was specifically

GUBBAY CJ

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admitted. It was stated, however, that the appellant did not have the means with which to settle his indebtedness at that time.

The appellant's opposition to the application did not find favour with the learned judge who entered summary judgment as prayed.

Rule 64 subrules (1), (2) and (3) read:

> "(1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
>
> (2) A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action.
>
> (3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify the plaintiff's cause of action or his belief that there is no *bona fide* defence to the action" (emphasis added).

Relying on the cases of Garlicks Wholesale v Davis 1927 CPD 185, Abdurahman's Estate v Abdurahman 1956 (3) SA 295 (C) and Spilhaus & Co Ltd v Coreejees 1966 (1) SA 525 (C), counsel for the appellant submitted that the remedy of summary judgment may only be granted where application is made in relation to all that is claimed in the summons; and that since the respondent had asked for summary judgment in the sum of $84 183,16, being $5 709,94 less than the total amount claimed in the summons, it ought to have been refused. This notwithstanding that the appellant admitted owing $84 183,16.

In the Garlicks Wholesale case the summons claimed payment of a liquidated amount of £52, another sum as damages and a third for moneys disbursed. Summary judgment was sought only in respect of the claim for £52. The magistrate's grant thereof was reversed on appeal. The judgment of Gardiner JP (with whom Benjamin J concurred) proceeded on the basis that the plaintiff's supporting affidavit must allege the absence of a defence to the whole action, not merely to a single claim therein; that summary judgment could only be granted in respect of all the plaintiff's claims in the summons, for it was not permissible to select one of the several claims as the separate subject of summary judgment (see at 186).

GUBBAY CJ

This judgment was followed in Abdurahman's Estate v Abdurahman *supra* where van Winsen J refused the plaintiff summary judgment as to the liquidated portion of the whole of his claim, despite his willingness to restrict the application to that portion. It was said that summary judgment embodies an extraordinary remedy and that a litigant must therefore bring himself squarely within the ambit of the rule (see at 297H).

Subsequent to the decisions in those two cases, both the particular Magistrate's Court Rule (Order XIV, Rule 1) and the Supreme Court Rule (then r 22) in South Africa were amended to allow a plaintiff to apply for summary judgment in respect of claims for a debt on liquidated demand even though the summons contained other claims as well. This was the situation in

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Spilhaus & Co Ltd v Coreejees *supra*.

I would add to the authorities cited by counsel, Moller v D Gestetner (SA) Ltd 1939 OPD 195 and Hugo Franco (Pvt) Ltd v Gordon 1956 R & N 448; 1956 (4) SA 482 (SR).

I am prepared to assume the correctness of these decisions for the purpose of determining this matter. I consider, however, that a fairly persuasive argument could be advanced that rule 64 subrules (2) and (3) do not debar the special remedy where it is sought in respect of less than all the causes of action, with individual debts or liquidated demands particularised in the summons.

Be this as it may, I consider that regard must be had to r 73(b)(ii) which provides:

> "If on the hearing of an application made under this Order it appears -
>
> (a) ...
>
> (b) that a defendant is entitled to leave to defend as part of the claim the court may -
>
> (i) ...
>
> (ii) grant leave to defend to the defendant as to such part of the claim, and enter judgment against the defendant as to the balance of the claim."

If the court, in its discretion, may give leave to the defendant to defend part of the claim and enter judgment against the defendant as to the balance of the claim, a fortiori it must be able to grant judgment in favour of the plaintiff on some but not all of the claims, to which liability is admitted. This is exactly what the learned judge did.

GUBBAY CJ

There was no material prejudice to the appellant by having summary judgment granted in terms of r 73(b)(ii) in the amount claimed. The appellant was not being deprived of an opportunity to defend. He knew all along that he had no defence to offer to these two claims.

I am fortified in the view I take by the approach of Erasmus J in Jno G Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd 1968 (4) SA 371 (O). In that case the defendant had admitted being indebted to the plaintiff in a lesser sum than that claimed. The learned judge held that the plaintiff was entitled to summary judgment for the amount admitted and the defendant was given leave to defend the balance of the claim (at 375D). See also Skead v Swanepoel 1949 (4) SA 763 (T) at 768-769.

Of course, it was open to the court *a quo* to have had recourse to r 4C(a). This permits a departure from any provision of the Rules where the court or judge is satisfied that the departure is required in the interests of justice. None of the provisions of the Rules are strictly peremptory. See *Sumbereru v Chirunda* 1992 (1) ZLR 240 (H) at 243B; *Makaruse v Hide \& Skin Collectors \(Pvt\) Ltd* S-140-96.*(133)

It is clear to my mind, that the appellant's purpose in opposing the application for summary judgment and, then, when it went against him, pursuing the appeal in this court, was solely to

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gain time. He was unable to pay what he owed the respondent and in order to keep his creditor at bay gravely abused the process of our courts. Such conduct deserves to be censured as totally amoral. It suprises me that his legal advisers did not discourage him from its adoption. Were it not for the fact that the respondent did not deem it necessary to support the judgment of the lower court, and so was in default, I would have given serious consideration to making a special order as to costs.

It was essentially for these reasons that the appeal was dismissed at the hearing.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Ben Baron & Partners, appellant's legal practitioners

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(1) COMMERCIAL BANK OF ZIMBABWE LTD v MM BUILDERS & SUPPLIERS (PVT) LTD & ORS
(2) ZIMBABWE BANKING CORP LTD v FERNS ENGINEERING (PVT) LTD & ORS
(3) ZIMBABWE BANKING CORP LTD & ORS v MAROODZA
(4) COMMERCIAL BANK OF ZIMBABWE LTD v MACHIRORI & ORS 1996 (2) ZLR 420 (HC)

Court **High Court, Harare**

Smith J, Blackie J & Gillespie J

Applications for summary judgment

26 July & 30 October 1996 Judgment No. HH-140-96

Flynote

Bank - overdraft - interest charged thereon - "capitalisation" of interest - meaning - whether interest charges added to total indebtedness can be regarded as part of capital sum due - repayments - should be appropriated to interest first, then to capital

Interest - amount - interest claimable in a summons not to exceed the capital sum due

Interest - *in duplum* rule - interest to stop running when it equals the unpaid capital - scope of rule - applies to all debts where capital sum is repaid together with interest - effect on piecemeal payments of interest to service a loan - such repayments not contrary to *in duplum* rule, even if total exceeds the capital

Interest - *in duplum* rule - agreement to waive rule - whether valid

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Interest - from what date allowed - litigation - effect of - interest to run from date of judgment

Interest - computation - judgment debt - debt consisting of capital plus accrued interest - interest may be calculated on whole of judgment debt

Practice and procedure - pleadings - contents - claims for payment of a debt which includes interest on a

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capital sum or for arising out of overdraft - what must be shown in papers supporting claim

Headnote

Four actions, each dealing with the identical legal point, were combined for the purposes of arguing the legal point. The plaintiffs were commercial banks which had instituted proceedings against the various defendants, claiming the repayment of monies alleged to have been advanced on overdraft, together with interest. When the applications for summary judgment were made, the particulars of claim did not specify the capital sum advanced. They did not show, as a separate figure, the interest that had accrued, or whether there had been any repayments, or, if there had, how the repayments had been apportioned as between capital and interest. The judges before whom the applications came directed that argument be presented as to the recoverability of interest and as to the principle of accrual of interest in an amount exceeding the capital.

The principle on which argument was directed was the rule of Roman law known as the "*in duplum* rule", which in essence was that interest and interest upon interest may never exceed the capital sum.

The court initially (*per* Gillespie J) gave an overview of the development of the law.

Under the Roman law, the *in duplum* rule only applied when all the interest was claimed at once. If a loan was repaid piecemeal, the payments were excluded from the computation of the double. This rule was modified by Justinian to include all repayments in the reckoning, but the old rule was reintroduced in Holland in the 17th century, so that if interest was paid piecemeal, there was nothing to prevent the total repaid exceeding the capital advanced. The rule as reintroduced in Holland became part of the law of South Africa and was applied by the courts there. It was applied in Zimbabwe in van Diggelen v Triggs 1911 SR 154, where the court restricted the application of the *in duplum* principle to the interest claimed in the summons. Subsequent cases have confirmed that approach: if a payment is made which reduces the interest below the level of the capital, interest begins to run again, but stops accruing when it is equal to the outstanding capital.

The court formulated the "*in duplum*" rule as follows: interest, whether it accrues as simple or compound interest, ceases to accumulate upon any amount of capital owing once the accrued interest equals the amount of the capital outstanding, whethe the debt arises out of a financial loan or out of any contract whereby a capital sum is payable together with interest thereon at a determined rate. Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it reaches the amount of the judgment debt, being the capital sum and interest thereon for which cause action was instituted.

On the question of bank overdrafts, it was argued for the banks that the *in duplum* rule did not apply to overdrafts. The basis of the argument was that each cheque drawn against the overdraft facility was in effect a separate loan, as is every debit arising out of charges, ledger fees, commission and the like. Each such "loan" was totalled daily and interest accrues on the outstanding amount. At the end of each month, the interest itself was added to the total

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indebtedness. The interest was itself thus a loan and thus effectively capital. Alternatively, because interest is capitalised monthly, it loses its identity as interest and becomes capital.

This argument was rejected on the grounds that debits from interest cannot be regarded as loans to customers and are jurisprudentially quite distinct from debits for advances or charges.

It was also argued that even if the *in duplum* rule applies to bank overdrafts, Zimbabwean banking practice is not the same as in South Africa and capitalisation of interest brings about a transformation of interest to capital. Finally, argument was presented as to whether the *in duplum* rule could be waived, the banks arguing that it could.

This argument too was rejected, approving Standard Bank of SA v *Oneanate* Invstms (Pty) Ltd 1995 (4) SA 510 (C), where it was held that interest being added to capital does not lose its character as interest. Capitalization of interest, where that term is used in connection with debiting unpaid interest, means no more than the charging of compound interest, and does not signify that interest has lost its character as interest and has to be excluded from reckoning for the purposes of the *in duplum* rule.

The court then considered the issue of appropriation of payments and held that in the absence of appropriation of a credit, by either the debtor or the creditor, or of the application of any other rule of appropriation, then in a proper case it will be presumed that the credit is to be appropriated to the earliest of the competing capital debts. In the case of interest accrued and debited to the overdrawn current account, however, then in accordance

with the common law the credit is to be appropriated to interest first and then to capital.

As to whether the *in duplum* rule can be waived, it was held that an agreement in advance to waive the *in duplum* rule would be one contrary to a policy to protect a debtor who has not serviced his loan from facing an unconscionable claim for accumulated interest and to enforce sound fiscal discipline on a creditor. A loan that is properly serviced does not fall foul of the *in duplum* rule. A creditor who does not extend credit to a bad risk or who calls up his debt timeously when the debt is not being serviced does not suffer from an application of the rule. To allow a waiver in advance would leave these abuses unchecked. This finding would not preclude the parties from agreeing to a novation of the debt and, for example, agreeing to contract a new loan in terms of which money is advanced by the creditor in an amount of the outstanding capital plus the accrued interest thereon, up to the double.

Finally, Smith J gave direction with regard to papers supporting a claim for payment of a debt which includes interest on a capital sum. These should clearly indicate the amount of capital due; the total amount of interest thereon as at a specified date; whether or not interest on the total amount is claimed and if not, the amount in respect of which the interest is claimed and the date from which the interest will run. In the case of a claim relating to a bank overdraft, the papers should show; (a) the total amount of the debt claimed and, separately, the total capital amount loaned by the bank to the client; and (b) the total amount of interest due thereon as at a specified date and, if appropriate, the total amount due in respect of bank charges etc and the interest, if any, due thereon as at a specified date. If the client has made any payments in

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respect of the overdraft account, the papers should specify the total amount paid and how the payments have been appropriated.

Cases cited:

Administrasie van Tvl v Oosthuizen en 'n Ander 1990 (3) SA 387 (W)

Barclay's Bank International Ltd v Smallman 1976 (2) RLR 163 (G); 1977 (1) SA 401 (R)

Boland Bank Ltd v The Master & Anor 1991 (3) SA 387 (A)

Clayton's case: Devaynes v Noble (1816) 1 Mer 527; 35 ER 781

Davehill (Pty) Ltd & Ors v Community Development Bd 1988 (1) SA 290 (A)

Deeley v Lloyd's Bank Ltd [1912] AC 756 (HL)

Devaynes v Noble: Clayton's case (1816) 1 Mer 527; 35 ER 781

Re Diplock's Est [1948] 2 All ER 318 (CA)

GILLESPIE J

Eastwood v Shepstone 1902 TS 294

IRC v Oswald [1945] 1 All ER 641 (HL)

LTA Construction Bpk v Administrateur, Tvl 1992 (1) SA 473 (A)

Re Morris; Mayhew v Halton [1922] 1 Ch 126 (CA)

National Bank of Greece SA v Pinios Shipping Co No 1 & Anor: The Maira [1990] 1 All ER 78 (HL)

Niekerk v Niekerk (1830) 1 Menz 452

Olsen v Standaloft 1983 (1) ZLR 67 (S)

Oosthuizen & Ors v SAR&H 1928 WLD 52

Paton (Fenton's Trustee) v IRC [1938] 1 All ER 786 (HL)

Rooth & Wessels v Benjamins' Trustee & Anor 1905 TS 624

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)

Senekal v Trust Bank of Africa Ltd 1978 (3) SA 375 (A)

Re Sherry (1884) 25 ChD 692

Standard Bank of SA v *Oneanate* Invstms (Pty) Ltd 1995 (4) SA 510 (C)

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Stroebel v Stroebel 1973 (2) SA 137 (T)

Swadif (Pty) Ltd v Dyke NO 1978 (1) SA 928 (A)

Taylor v Hollard (1886) 2 SAR 78

Trust Bank of Africa Ltd v Senekal 1977 (2) SA 587 (W)

Union Govt v Jordaan's Exor 1916 TPD 411

van Coppenhagen v van Coppenhagen 1947 (1) SA 576 (T)

van Diggelen v Triggs 1911 SR 154

Volkskas Bpk v Meyer 1966 (2) SA 379 (T)

The court also referred to the following statute:

Prescribed Rate of Interest Act [Chapter 8:10], ss 4 & 5

Case Information

A P de Bourbon SC, for the plaintiffs

B W Burman SC and E W W Morris, as amici curiae

Judgment

Gillespie J: In each of these four matters, the plaintiffs, commercial banks, instituted action by summons claiming the repayment of monies alleged to have been advanced on overdraft to the various defendants, all customers, or their sureties, of one or other of the banks, together with interest alleged to have accrued on the amounts outstanding in accordance with the banks' conditions of business. In case No. HC-5559-94, the MM Builders case, there was claimed of the principal debtor and of three sureties the amount of $3 020 779,43 together with interest at the rate of 43 *per* centum *per* annum from 27 August 1994 together with costs. All failed to enter appearance to defend and were automatically barred. In case No. HC-5016-95, the Fern's Engineering case, suit was for the sum

of $1 945 300,08 together with interest at the rate of 43 *per* centum *per* annum from 1 April 1995 and costs. Appearance to defend was entered by the principal debtor and two sureties and further particulars to the summons were sought and supplied. Thereafter, the defendants were barred for default of plea. In case number HC-2694-96, the Maroodza case, the amount of $49 347,53 together with interest at the rate of 43 *per* centum *per* annum from 1 February 1996 and costs was claimed. The defendant, cited as sole debtor, suffered automatic bar for failure to enter appearance to defend. In case No. HC-3146-96, the Machirori case, two amounts were claimed. The sum of $1 004 900,82 together with interest and costs, and the sum of $424 664 together with interest and costs. The rate of interest is unintelligibly pleaded as a rate "*per*

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annum *per* mensem". I have not even tried to determine what this means. The defect does not, however, stand in the way of te main issue to be determined. The defendants, both sued as sureties for a debtor not joined in the cause, similarly failed to enter appearance to defend and were barred.

The matters all came before either Bartlett J or me in Chambers as applications for judgment in default in terms of the rules of court. It appeared to me that those applications for my adjudication showed *prima facie* a disregard of that rule concerning the accrual of interest beyond the amount of the capital debt. This perception arose from the fact that the summons and particulars of claim did not specify the capital sum advanced; they did not show as a separate figure interest that had accrued; there was nothing to show whether any repayments had been made nor, if they had, the manner in which they had been apportioned as between interest and capital. This lack of particularity, coupled with the high rate of interest claimed and the period over which the amounts were alleged to have been outstanding, raised the very real likelihood that interest equal to the amount of the loans had accrued some time before and that more than that amount was being claimed. Bartlett J formed the same view in respect of the maters coming before him.

In collaboration, therefore, we considered it desirable in terms of r 246(1)(b) of the High Court Rules to issue a direction coming jointly from both of us requiring the plaintiff in each case to file a further affidavit particularising its claim so as to show the principal sum advanced and the manner in which the amount outstanding was apportioned as between capital and interest. In the event that the affidavit should show that the interest claimed exceeded the capital, we permitted the plaintiff to file a claim for the amount of any capital proven to be outstanding but directed that argument be advanced as to the

recoverability of interest and as to the principle of accrual of interest in an amount exceeding the capital. Although the direction did not specify it, it was in addition the clear intendment that in the absence of any such affidavit then argument would in any event have to be advanced in respect of the applicability of the legal principle under consideration. Our direction in addition ordered thereferral of the anticipated argument to a full bench, which is to say to a bench of three judges, for determination of the issue. This was considered by ourselves to be desirable for a number of reasons, including the potential complexity of the issue; the fact that two of us were already engaged in the matters and a third would be desirable should there be divergence of opinion between us; and the importance and topicality of the principle under consideration, both legally and in the banking and business community, where the issue has been under debate for some time. Having given this direction, Bartlett J suffered a regrettable indisposition at the time of the hearing and was unable to sit.

Since all the matters were undefended it became necessary to appoint counsel to act as amicus curiae. We are very grateful to Mr Morris for having undertaken that responsibility. Unexpected bounty came our way when our direction became more widely known. A local businessman, interested in the issue if not in the particular causes, instructed his attorneys to brief Mr Burman and to tender his services as amicus. This unlooked for assistance was very welcome to us and

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we permitted that intervention. Hence there appeared before us two amici, together with counsel for the plaintiffs, to each of whom we are indebted for their very able and valuable assistance.

Prior to argument, the papers were supplemented by the filing of three affidavits, together with annexures, deposed by a Mr Lusiwi, a Mr Mabaudi and a Mr Mullin. Mr Lusiwi is an officer of the Commercial Bank of Zimbabwe; his affidavit explains the lengthy delays which have occurred in the MM Builders case and refers to various offers by the defendants in that matter to discharge the indebtedness, including the subsequent execution of a mortgage bond over immovable property in order to secure that indebtedness. In addition, documents are attached which summarise transactions on the account. Mr Mabaudi is an officer of the same bank. He has filed an affidavit purporting to testify as to the terms according to which the bank, and other commercial banks, operate. Mr Mullin is an officer of the Zimbabwe Banking Corporation; his affidavit is to the same effect as that of Mr Mabaudi. I shall examine the contents of these two affidavits in more detail in due course.

GILLESPIE J

In support of his argument, Mr de Bourbon handed in from the Bar certain documents which he tendered as exhibits. These consist of three sets of calculations. Exhibits 1 and 2 relate to the two separate amounts claimed in the Machirori case. Exhibit 3 is relevant to the MM Builders case. Each calculation has been done by counsel using figures - in some instances extracted from the various documents filed of record, but in others from bank documents not placed before the court - and is intended to show the breakdown of capital and interest outstanding in each case, together with amounts credited to the respective accounts and a suggested method of approriation of payments. There is no calculation in respect of the Ferns Engineering case, where (most unacceptably, as a general practice of pleading) the further particulars consist of the copies of the full set of ledger sheets for the account in question; nor is there one for the Maroodza case, where no factual information at all has been supplied. These documens too will receive closer examination at the appropriate time in the treatment of the issues.

The principle upon which argument has been directed seems to be known as the *in duplum* rule. This nomenclature derives from the formulation:

> "*Supra* duplum autem usurae, et usurarum usurae, nec in stipulatum deduci nec exigi possunt: et solutae repetuntur ..." 1(134)

The use of the expression duplum, in the context of the title as a whole (*De condictione indebiti*), and of this section in particular, which deals with various situations concerning payment, or recovery of overpayment, of sors (capital) and usurae (interest) shows that what is being referred to as prohibited is recovery of ultra duplum sortis (beyond twice the amount of the capital). Hence the rule should more properly be referred to as the ultra duplum rule.2(135)

The *duplum* rule is regarded as a particular instance in the Roman law where public policy required an invasion into the autonomy of the contracting parties to regulate their own affairs; an invasion which, even once the law permitted the recovery of interest by way of stipulation, 3(136) required regulation both as to interest rates,4(137) and as to limitation on the amount of

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accrued interest

GILLESPIE J

that could be recovered.5(138) Dependent upon prevailing views of public policy as it was, the precise content of the rule underwent various changes.

Thus the classical rule set out in the extract from Ulpian above in fact prevented only the recovery at any one time of interest in an amount exceeding the capital. Also dating from the early Empire is the following:

> *"Usurae per* tempore solutae non proficiunt reo ad dupli computationem. Tunc enim, ultra sortis summam usurae non exiguntur, quoties tempore solutionis summa usurarum excedit eam computationem." 6(139)

The effect of excluding from computation of the double all payments of interest previously made from time to time is to limit the rule against recovery of interest *supra* duplum to arrears of interest claimed all at once. Such a limitation is sensible in that while it permits the lender to insist upon regular servicing of the loan without affecting his right to recovery of interest, nevertheless should he tolerate fiscal indiscipline then he will not be permitted to allow the loan to remain outstanding and recover after a period of undue delay burdensome amounts of interest.

This rule had, by the time of Justinian, been made stricter so as to forbid not simply the recovery of arrear interest *supra* duplum but to prevent the recovery at all of interest in excess of the capital.

> *"Cum igitur leges nostrae nihil ultra duplum solvi velint: et nos in hoc tantum differentiam habeamus cum prioribus, quod illae quidem debita constituant usque ad duplum, si* nulla particularis facta fuisset solutio: nos vero recipiamus, ut particulares etiam solutiones debita dissolvant, *si* usque ad duplum pertingant ..." 7(140)

GILLESPIE J

This rule attracts the following comment:

> "In post-classical times the accrual of interest also ceased, rather strangely, when the amount of interest paid had reached the amount of the capital sum." 8(141)

The Roman rule against recovery of interest *supra* duplum was received into the Roman-Dutch law. Groenewegen made the following observation concerning the passage of the Code set out above.

> *"Usurae non currunt ultra duplum. Idque etiam in usuris pretii non soluti obtinet Frisiae Senatus censuit ... Sed fallit primo in annuis reditibus ... II fallit in usuris per* tempora solutis, quae non proficiunt reo ad dupli computationem: tunc enim ultra sortis summam usurae non exiguntur quoties tempore solutionis summa usurarum excedit eam computationem, l.10 usurae hoc. tit. quae lex abrogata sit Novell 122 et 138 tamen moribus nostris in usum revocata est, ... quia hodiernae usurae non mere lucratoriae sunt sed in compensationem damni et ejus quod interest *pecunia caruisse creditori persolvuntur ..."* 9(142)

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Van Leeuwen, citing Groenwegen as authority, records the same rule as follows:

GILLESPIE J

> "Interest ceases to run when it has increased beyond the amount of the principal, both the interest which is due on account of an agreement or pact, and that which is due on default, because interest cannot be claimed and demanded beyond the double amount ... and this is the case both as regards what is past, and has been paid, and as regards that which has still to be paid; and that which has been paid can be reclaimed by condictio indebiti or considered as principal ..." 10(143)

As to Justinian's modification concerning the inclusion of piecemeal past payments in the calculation of the double, the existence of the rule is noted as follows:

> "Nor does it matter whether interest equal to the principal has been paid in portions from time to time or not" 11(144)

but is immediately qualified, if not rendered completely nugatory, by what comes after:

> "But since, by custom, no lucrative interest has remained, but all of every kind has become compensatory, and has begun to be demanded, not as interest, but as compensation, this also has ceased to be applied to interest which is past and paid; and by this very fact the rule, by which interest beyond the double does not run, is limited, so that it does not apply in annual returns ... and in interest paid from time to time, which does not amount to double the amount as regards the debtor, but interest exceeding the amount of the principal cannot by our customs be demanded when, at the time of demand or payment, the sum of the interest exceeds that amount." 12(145)

The learned author expressly concludes by remarking that the original text of the Code, altered by Justinian's Novel, has accordingly once again been called into use.

Huber records the law as applied in Holland and Friesland as follows:

> "38. Fourthly, the running of interest stops when it has become equal to the capital, in order that debtors may not be endlessly consumed by the charges, provided that unpaid interest alone is reckoned in this sum

GILLESPIE J

> according to the old Roman law; but the Emperor Justinianus enacted a new law, that interest, reckoning paid and unpaid together without distinction, should stop running when it was equal to the capital.
>
> 39. The States of Friesland, however, reintroduced the old Roman law by resolution of the year 1613, and that with good reason; for in curtailing interest the legislators have in view that debtors whose affairs are declining should not be entirely drained dry, while persons who contrive to look after their interest have no need of such relief; and, therefore, so long as the same is paid, it is not necessary to come to their rescue at the expense of the creditors, but it is enough that this should happen after the cessation to pay interest has begun to reveal the distress of the debtors."13(146)

Hence Voet has no difficulty in recording:

> "Interest must not exceed principal - Roman law. - Interest besides could not mount above the principal sum, whether paid piecemeal or in one sum at one time.[citing Cod IV.32.27, Novell. 121 and 138 and noting Cod IV.32.10 has been repealed]

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> But by modern custom may do so if paid piecemeal. - But Justinian himself decided that these ordinances did not at all extend to annual returns due to cities [citing Novell 160]. It was therefore regarded in our customs as unfair for the obligation for interest to last until the principal sum had been repaid, even though the interest should overtop three times or four times the amount of the principal sum, provided that it were paid piecemeal." 14(147)

The rule against recovery of interest *supra* duplum as received into Holland was in due course received into South Africa. Nathan writes as follows:

> "It is clear that, by Roman Dutch law, although there is no rule prescribing the legal rate of interest, the interest which is legally demandable (however the rate *per* cent.) may not exceed the principal sum on which the interest is due. But in this computation will not be reckoned what has already been paid by way of interest." 15(148)

GILLESPIE J

The case law shows this statement to be correct. Of the many early cases helpfully drawn to my attention by counsel, I mention but a few. Niekerk v Niekerk was an action, by the beneficiaries of the estate of the late Niekerk, against an executor of that estate and guardian of the children, for the payment of their inheritance together with interest. Reliance was placed by the executor, who consented to execution in the sum of the capital amount together with interest equivalent to that sum, upon the duplum rule. There was no other cause of action advanced wherein an executor might be held liable to account to an heir for the administration of an estate. The *ratio decidendi* is reported in the following terms:

> "The Court held the rule of the Dutch law to be clear, that interest could not be claimed, even from a guardian, to a greater amount than that of the capital on which the judgment arose." 16(149)

The case merits mention, quite apart from being the earliest reported instance of the application of the duplum rule in Southern Africa. It shows in addition that the rule was applied to debts other than debts arising out of loans. Further, although one must guard against reading too much into a wording which may not be the ipsissima verba of the judge, and may in any case have been formulated *per* incuriam, the application of the rule to a "greater amount than the capital upon which the judgment arose" (my italics) suggests that the rule against recovery of interest *supra* duplum applies not only to interest in excess of the capital amount of the original debt, but, where that debt is partially discharged, prevents the accrual of interest beyond the double of the reduced outstanding capital amount.

The case of van Diggelen v Triggs is of particular interest in this country because it is such an early reported application of the principle in this jurisdiction, appearing as it does in the very first of the continuous series of annual law reports published since 1911.17(150) Of greater importance in principle are these two consequences of the judgment. First, is the holding that a payment could properly be appropriated by the creditor to interest rather than capital. As will be seen below, the question of appropriation of payments is inextricably bound up with a proper application of the rule. Second, is the fact that the decision constitutes an application of the rule in such a way as to exclude from computation of the double previous part payments of accrued interest. As Watermeyer J said:

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GILLESPIE J

> "In the absence of any declared intention by the parties the plaintiff was entitled to appropriate the £2000 paid towards meeting the interest at the date due. The cases of Niekerk v Niekerk & Roberts v Booy, etc., are not applicable here as these cases refer to the interest claimable in the summons. In the present case the amount of interest does not exceed the amount of the capital sum." 18(151)

In restricting the application of the principle to interest claimed in the summons the learned judge was applying the law as it was known in classical Roman law and as received in Holland; that is, without the alteration of Justinian concerning piecemeal payments.

The decision in Union Government v Jordaan's Executors is of great persuasive authority, bearing in mind the identity of the Bench from which it comes. It is also one of interest, not only as an example of the application of the rule to debts other than loans, (recovery of survey fees due and unpaid) but more importantly because it affirms the proposition that the duplum rule does not simply render interest irrecoverable but operates so as to prevent it from accruing at all.

> "Mr *Roos*, on behalf of the appellant ... argues that ... interest did not cease to run; it remained running but could not be claimed. I do not think that is the correct way of looking at it. The Roman law is quite clear, and our law is based upon the Roman law in this respect. This is what is said by the Code (4.32.27.1). 'Cursum insuper usurarum ultra duplum minime procedere concedimus.' Many of the authorities are to the same effect. Groenewegen says: 'Usurae non currunt ultra duplum'; Voet: 'Sortem excedere non putuerunt usurae'. No interest runs after the amount is equivalent to the amount of the capital." 19(152)

This principle will be seen to be of importance in the subsequent examination of the manner of application of the rule. Oosthuizen & Ors v South African Railways & Harbours is of note as another instance where the rule is applied to debts other than loans. This was a suit for payment of monies due as compensation for expropriated property. Interest on the amount of compensation was held to cease accruing once the double had been reached.20(153)

GILLESPIE J

I come now to those more recent precedents which I wish to mention concerning the rule and aspects of its application. Of great persuasive authority is the decision in van Coppenhagen v van Coppenhagen. 21(154)

> "It is clear law, as laid down by the Full Court in this Division, that when an amount of arrear interest reaches the amount of the capital, interest ceases to run. It is not merely that the excess of interest over an amount equal to the amount of the capital is irrecoverable. There can never be more interest accumulated than an amount equal to the capital sum. (Union Government v Jordaan's Executor 1916 TPD 411, and see also, in addition to the authorities there cited, Voet 22.1.19; van der Linden Koopman's Handboek 1.15.3.3; van Leeuwen *Commentaries* 4.7.5 and Censura Forensis 1.4.4.35). The interest amounted (as already pointed out) to £300, at the end of the year 1942. No more interest accumulated after that; and therefore, the sum paid between 1 November 1943 and 1 February 1945, which in the absence of express appropriation to capital was rightly appropriated to interest, fell to be deducted from the £300 of accumulated interest. But the rule that interest may not be accumulated beyond the amount of the cpital, does not mean that if, by payment, the accumulated interest is reduced to an amount less than the amount of the capital, interest does not again begin to run. Interest always runs until the amount of the capital sum is reached and may again be accumulated up to the amount of the capital." 22(155)

This decision not only confirms Jordaan's Executors, but it also makes valuable contribution to

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the point of appropriation. In the absence of any agreement, appropriation is properly to interest first. Importantly, it also shows how interest commences to accrue afresh where a payment is made, and thus affirms the principle that piecemeal payments are not included in computing the double.

In Stroebel v Stroebel, 23(156) the rule was applied and two important further points were debated. It was held that after judgment interest commences to run afresh but that it accrues only on that portion of the judgment debt which constitutes the capital outstanding and not upon the interest. 24(157) I shall debate

these two findings in more detail at the appropriate part of this judgment. The principle of interest commencing to accrue afresh upon judgment was approved in Administrasie van Transvaal v Oosthuizen en 'n Ander 25(158) but held not to apply to the award of an arbitrator. In addition, in that case, it was reaffirmed that the duplum rule prevents accumulation of interest beyond the double even where specific provision is made in the contract for interest on interest.

Compelling authority concerning the rule is to be found in LTA Construction Bpk v Administrateur, Transvaal.26(159) The historical examination by Joubert JA of the origins of the rule and of its place in the law has been of immense value to me in preparing this judgment. In addition to holding that the rule as applied in Holland had been accepted into South Africa, the learned Judge of Appeal also held the rule never to have been abrogated by disuse and to apply not only to financial loans but in principle to all contracts whereby a capital sum is payable together with interest thereon at a determined rate.27(160)

To complete this survey of southern African cases I mention finally the judgment of Selikowitz J in Standard Bank of South Africa v *Oneanate* Investments (Pty) Ltd. 28(161) In this judgment to which I owe a considerable debt, and which I will examine in greater depth below, the manner of application of the duplum rule to overdrafts was explained in detail and findings were made as to the questions of appropriation of payments and capitalisation of interest.

Before I can pronounce the duplum rule as I have discovered it to be, I must investigate one or two further aspects of the rule that have only been touched upon thus far. The first relates to the question whether the interest accrues until it reaches the amount of the capital originally advanced or whether, in the event of reduction of the capital by partial payments, it accrues only to the amount of the capital outstanding. The all-embracing manner of formulation of the rule from Roman times, usurae non currunt ultra duplum and ultra sortis summam usurae non exiguntur, is not such as to suggest that where payment of part of the capital has been made nevertheless there remains a notional principal sum to which interest may accrue no matter what the true capital outstanding. Such a result would be somewhat anomalous where interest is only accruing on the capital amount outstanding. Where both

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GILLESPIE J

Nathan and Niekerk's case have formulated the rule on the basis that the limit beyond which interest ceases to accrue is the unpaid capital, or the amount of capital upon which judgment is obtained, that formulation seems correct. It is, in addition, the only formulation of the rule which allows for consistency of application of the rule in both those cases where there is an advance of a single lump sum, and in other cases, such as bank overdrafts, where the amount of capital outstanding may be susceptible of constant variation, whether upwards or downwards. In such a case the only rule that can apply is that interest ceases to accrue when it equals the amount of capital currently outstanding.

The second ancillary point to consider is whether interest runs anew at any stage after the institution of proceedings or the obtaining of judgment. Both Mr Burman and Mr Morris submitted that interest commences to run afresh after judgment. Mr de Bourbon advanced the proposition that *litis contestatio* marks the moment from which interest which has already reached the double starts to run anew. Huber writes as follows:

> "40. After the debtor has been condemned by judgment to pay capital and interest, the interest again runs afresh until it shall again have equalled the capital, but this does not happen at *litis contestatio*, unless the debtor had delayed the suit a long time by evil devices, and that were proved."29(162)

In Stroebel v Stroebel 30(163) the authority of this passage was accepted, in preference to other authority 31(164) suggesting that interest might run anew after *litis contestatio*. This preference was followed in Administrasie van Transvaal v Oosthuizen en 'n Ander. 32(165) I consider that there is sound theoretical reason supporting this decision. The reason for the rule mentioned by Huber is, or so I apprehend, a view of the effect of a judgment as novatio necessaria of the original debt sued upon. In the ancient law, *litis contestatio* itself brought about a novation of the debt, in the sense of extinguishing the original debt and replacing it with a new. 33(166) Even writers on the law in South Africa have perpetuated the notion of *litis contestatio* as bringing about a compulsory novation of the debt sued for. Thus Wessels writes:

GILLESPIE J

> "When one party institutes an action against another, the judgment always, and sometimes the *litis contestatio*, brings about a novatio necessaria." 34(167)

In the modern law, it is recognised that even the novatio necessaria brought about by a judgment does not necessarily bring about a novation in the sense of an extinction of the antecedent cause and the creation of a new obligation. In many cases the effect of a judgment is to reinforce the original obligation. It provides not a new debt but a new right of execution. 35(168) Even where it may be said to bring about a compulsory novation, this is a concept closer to the principle of *res judicata* than that of an extinction of a previously existing obligation. Christie, dealing with the passage from Wessels above, remarks, as though the observation were trite:

> "As has been seen, it is now clear that a judgment does not always have this result. Whether or not a *litis contestatio* did in Roman law, it does not have this result in modern law." 36(169)

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If this is so, and I think that it is, then there is even less cause in the present day than there was in Huber's time to regard interest as commencing afresh from the time of *litis contestatio* despite the fact that interest equating to the double had already accrued. The view that interest commences anew from the time of judgment is to be preferred. I have noted that Joubert 37(170) writes:

> "Interest runs only until the sum of the interest unpaid is equal to the sum of the capital, with the result that the lender can never claim interest in an amount exceeding the sum of the loan. After *litis contestatio* interest will commence to run again so that the court may award interest from that time in addition to the permitted interest." 38(171)

The learned author does not cite Huber nor the preference for Huber expressed in Stroebel. The decision of CilliŽ JP on this point was in addition supported by Selikowitz J in *Oneanate*. 39(172) In the circumstances perhaps I

might be forgiven for suggesting that the statement appears somewhat unconsidered. I regret that I remain unpersuaded by it. I do not feel that I am in a position to determine whether, in the event of the "evil devices" of the debtor, interest might commence to run afresh from *litis contestatio*. I ask myself: "What sort of evil devices? When would they have to be perpetrated? If before joinder of issue, why would interest only run from joinder of issue? If after joinder of issue, why should interest run retroactively from the earlier date? Most importantly - what is it about *litis contestatio*, as that expression is understood in our law, which would provide a theoretical basis for it to be the date from which interest should run?" I do not favour the notion that interest could run from it in th event of improper machinations by the debtor, but I prefer to leave the question open.

A third point to be examined, is whether the interest, which commences to accrue upon a judgment debt for an amount of capital together with interest which has attained the double, itself is subject to the duplum rule, and if so whether interest on the judgment debt ceases to accrue when it amounts to the original principal sum or only when it reaches the amount of that principal together with the accrued interest also awarded as part of the judgment. The answer in Stroebel is that the interest which commences afresh on judgment ceases to accrue when it reaches the amount of the capital upon which judgment was given. That this interest too is subject to the duplum rule admits, I think, of no doubt. The rule is expressed in the old writings in so definitive a way as to leave no room for doubt that it applies to interest accruing after judgment. It seems to me, however, that the rationalisation for interest running afresh on the judgment debt must relate to the view of a judgment as bringing about novatio necesaria of the original debt. In the event of a novation of this type I can see no warrant for a distinction to remain as between capital and interest in the judgment debt.

In reaching the decision in Stroebel, Cilliè JP relied upon a note by Horwood to his translation of Voet:

> "It is further submitted that the court would not grant a prayer for future interest, whether due ex mora or ex conventione, upon the whole amount of a judgment debt, made up of principal and interest. Future interest will run only upon that part of the judgment debt which consists of the principal sum due. If conventional interest runs

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only upon the principal after judgment, in spite of the necessary novation of the whole debt, it is

GILLESPIE J

difficult to see why conventional or mora interest should ever run upon the whole amount of the judgment debt." 40(173)

The opinion expressed here is that of the translator and not that of Voet. It is a view advanced in regard to the question of interest accruing on a judgment debt, and is not one given in the context of a discussion of the *duplum rule*.41(174) It is an opinion which may be regarded as justifiable if premised upon a principle of compound interest as being unlawful, in which event interest could not accrue on the interest. To the extent to which the decision in Stroebel seems to perpetuate any such principle, it has, as Mr Burman pointed out, been disapproved by the South African Appellate Division in Davehill (Pty) Ltd v Community Development Board, 42(175) which noted that the old common law proscription of compound interest has long been abrogated by disuse and that in principle there is no reason why the right to claim interest on interest should be confined to instances regulated by agreement. 43(176) All the more should interest run after judgment on the entire amount of the judgment debt, that is the components of both caital and interest, where the original debt arises from a contract stipulating compound interest.

Even if Horwood's note as to whether interest could accrue upon the interest component of a judgment debt was correct when it was written, this was altered, as was pointed out in Davehill, by the relevant legislation as to interest on judgments. 44(177) The Zimbabwean legislation on the point is virtually identical in layout and wording to the South African legislation and is indistinguishable in effect. This Act provides that where interest accrues on a debt but there is no law or agreement as to the rate of interest then it shall accrue at a prescribed rate.

"4. **Interest on certain debts to be calculated at prescribed rate**

If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise."45(178)

GILLESPIE J

Further, where interest would not otherwise accrue on the debt then it shall nevertheless accrue on the judgment debt from the day upon which the judgment debt becomes payable.

"5. **Interest on judgment debt**

(1) Every judgment debt which would not otherwise bear any interest after the date of the judgment or order by virtue of which it is due shall, from the day on which such judgment debt is payable, bear interest at the prescribed rate, unless that judgment or order provides otherwise."46(179)

The expression "judgment debt" is defined in these terms:

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> "'judgment debt' means any sum of money or part thereof due in terms of any judgment or order of a court of law, including an order as to costs, but does not include any interest that does not form part of the principal sum of the judgment debt." 47(180)

I apprehend this to mean that a judgment debt includes interest which, by virtue of some other law or agreement, has accrued or will accrue upon the principal sum of money in respect of which judgment has been given, but does not include interest which has been ordered, solely by virtue of the provisions of the Act, upon the amount of any judgment debt which would not otherwise have borne any interest. The reason for such an arrangement seems plain to me. It is to prevent interest from compounding on a judgment debt unless the sum originally sued for was one which attracted interest.

The enactment shows that interest accrues on a judgment debt, including the interest component of the principal sum of a judgment debt, but excluding interest where so ordered by the court in terms of s 5 of the Act. The section shows that Horwood's note cannot be regarded as material to the point at issue but it does not provide an exact answer to the problem. Section 5 and the definition of "judgment debt" are irrelevant since they deal with a judgment debt where the antecedent causa does not accrue interest prior to judgment and with a judgment where no interest would otherwise accrue; 48(181) whereas any case involving the issue of interest *in duplum* is one pertaining

GILLESPIE J

to an antecedent causa where interest accrues prior to and after the judgment. Section 4 is irrelevant since it only operates so as to stipulate the rate of interest where agreement or other law has not provided for it. Nevertheless the enactment provides some direction.

The only interest which is excluded from inclusion in the concept of a "judgment debt" is interest which accrues solely by virtue of s 5 of the Act. Only in such a case will interest on a judgment debt be excluded from accruing as compound interest. Any other interest accruing may accrue on the full amount as compound interest, and particularly in the case where an underlying agreement provides for compounding of interest. In my judgment there is an absurd inconsistency in holding that, although a judgment debt includes an amount of interest accrued on the antecedent causa, and that interest may accrue on the full amount of the judgment debt, even to the extent of permitting compounding of interest, nevertheless there must always remain, despite the novatio necessaria involved in the pronouncing of judgment, a notional capital excluding the interest accrued on that capital prior to judgment, beyond which the interest after judgment may not accrue. I hold the better view to be that interest accrues after judgment on the whole judgment debt to the amount of the judgment debt.

In conclusion, the result of this investigation is such as to persuade me that it is a principle firmly entrenched in our law that interest, whether it accrues as simple or as compound interest, ceases to accumulate upon any amount of capital owing, whether the debt arises as a result of a financial loan or out of any contract whereby a capital sum is payable together with interest thereon at a determined rate, once the accrued interest attains the amount of capital outstanding. Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of

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the judgment debt, being the capital and interest thereon for which cause action was instituted.

Mr *de Bourbon*, for all that he declined to argue that the duplum rule is no part of our law, nevertheless submitted that it did not apply to the case of bank overdrafts. His submission depends upon acceptance of the following points. An overdraft differs from any other loan in that it is the provision of a facility against which money is drawn rather than an advance of money. Monies that are drawn against the facility are advanced not at once but from time to time up to the limit of the facility. Each debit against the facility is a separate loan. Thus far there is no difficulty with the argument: the first and second propositions are factually correct; the third has the respectable and persuasive

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GILLESPIE J

authority of Selikowitz J, in the *Oneanate* case 49(182) to support it. Mr de Bourbon then makes bold to depart from the reasoning of Selikowitz J. He submits that inasmuch as each cheque drawn against the overdraft facility is a separate loan, so too is every debit arising out of charges, ledger fees, commissions and the ike. That every such "loan" is totalled at the end of each day and the resulting figure is the amount owed by the customer to the bank. At the end of each day, counsel contends, the amount owing is not a number of separate loans but one outstanding debit. On that outstanding amount, interest accrues and at the end of the month is itself debited. Just as at the end of each day, the amount outstanding is a single total, not a series of separate debits, so at the end of the month the amount outstanding is a single total, including the monthly debit of interest. He draws the conclusion that just as the charges mentioned are loans by the bank to the customer, so too is the interest debited a loan by the bank to the customer. Mr de Bourbon submits -

> "that the interest, so-called, is in fact itself a loan by the bank to the customer, and as such a capital sum."

He is therefore inviting me to hold (as a matter of logic?) that the duplum rule cannot apply to overdrafts since overdrafts attract no interest but only augment by successive capital debits.

This argument requires me to find that interest is capital. There may exist those silver-tongued orators who prove that black is white, but I am unable to hold that the argument advanced on this point is valid. There is fallacy in the submission that the charges are loans - they do not constitute advances to the customer, they are debits in respect of charges for services. 50(183) The fallacy is repeated in the suggestion that debits for interest are loans to the customer. There is incoherence in the assumption that a debit as to interest accruing on amounts outstanding is jurisprudentially indistinguishable from a debit arising out of monies advanced or a debit constituting charges for services. The snake swallows its tail when the conclusion is reached that interest is capital.

Mr *de Bourbon's* alternate submission is that interest, being capitalised monthly, changes its identity as interest and having lost that identity can nevermore be included in any computation of an amount of interest outstanding. Interest can never accumulate beyond the individual figures debited each

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GILLESPIE J

month, since being debited as interest they are transformed immediately into capital. The duplum rule can never apply for the simple reason that interest never accumulates. By this submission, counsel moves me to reject a most learned and persuasive examination of the subject of capitalisation by Selikowitz J in *Oneanate*. 51(184) In this judgment, the learned judge identifies two possible meanings of the term capitalisation of interest:

> "In a broad sense it is used to describe a process whereby interest due by a borrower in respect of a prior period is added to an existing balance owing by the borrower for the purpose of computing interest in a subsequent period. In this sense it connotes nothing more than the charging of compound interest - interest on interest. The adding of the debited interest to the outstanding balance is here simply an accounting convenience to avoid a more cumbersome process of recording unpaid interest and unpaid capital in separate columns.
>
> In a narrow or literal sense, capitalisation connotes the process whereby a debt for unpaid interest is substituted by a new debt for capital. Here the interest liability ceases to exist and only the substituted capital is owing. It is this narrow meaning which plaintiff relies upon in answer to defendant's invocation of the *in duplum* rule. Juridically, narrow or literal capitalisation can only occur if the creditor, instead of pursuing his claim for unpaid interest, agrees to advance to his debtor - albeit only notionally - an amount of capital sufficient to enable the debtor to discharge his interest debt. When this occurs the debit which is added to the balance represents a fresh advance of capital rather than unpaid interest." 52(185)

He studies first certain English decisions relating to the question of capitalisation of interest. He concludes:

> "In summary, I find that the present state of the English law is that 'capitalisation' of interest has been recognised as merely connoting charging of compound interest, whether the transaction is one governed by the practice of banks or by an express stipulation for the capitalisation of interest. The traditional form in which banks account to their customers is merely the convenient and businesslike manner of reflecting the charging of compound interest; that capitalised interest does not lose its character as interest by being capitalised; and that capitalisation in its

GILLESPIE J

> narrow literal sense involves a fiction which lost its significance and utility after 1854 and to which the Courts have never since been willing to give substantial effect." 53(186)

I respectfully agree with this conclusion.

The learned judge drew attention to the following dicta from the relevant English cases:

> "'I think that the word 'capitalisation' used in many of the books quoted is a convenient word, but for the purposes for which it has been used in the argument before us it is a fallacious word, because it is taken as referring to capitalisation for all purposes. I do not think that is the meaning of the word. In my opinion - not to beg the question - when these sums of interest come to be paid at the end of the time when payment is made, although interest has been charged on them, and although, as a matter of bookkeeping they have from time to time been added to capital, they do not cease to be interest of money - that is to say, they are overdue interest upon which interest has been paid." 54(187)

And also:

> "The unpaid interest never ceases to retain its character as interest, although it has from time to time been added

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> to the capital indebtedness and has carried interest in turn. All this seems to me, I confess, reasonably clear and is in exact consonance with the view of Lord Sterndale MR as expounded in Re Morris." 55(188)

echoed to the same effect thus:

> "Capitalisation means no more than that interest which continues to be interest shall be treated together with the capital sum due as itself interest-bearing but does not alter the quality of the interest." 56(189)

Mr de Bourbon felt constrained to concede the force of these passages, acknowledging in particular the last, but said of them this (I quote from his heads of argument):

GILLESPIE J

> "It is true that ... Lord Porter expressed the view that compounding, and using the terminology of capitalization, does not alter the quality of a debit as interest. It is respectfully submitted that this statement must be read in the light of the various comments in the earlier decision in Paton (Fenton's Trustee) v Internal Revenue Commissioners [1938] 1 All ER 786 (HL). Attention is particularly drawn to the speeches of Lord Atkin at pp 790-791 and of Lord MacMillan at pp 795-797."

Study of the decision in *Paton* shows that far from supporting counsel's dissent, that judgment is cogent authority for the decision of Selikowitz J (and was indeed relied upon by the learned judge). *Paton's* case involved the question, raised for the purposes of an income tax objection by the taxpayer, a customer of a bank, whether interest accruing on an overdrawn current account was paid when debited to the customer's account. The proposition for the taxpayer was, inasmuch as the interest had been capitalised in terms of the arrangement with the bank, the act of debiting the interest to the account had the effect of causing it to cease to be owed to the bank qua interest but to take on the character of a capital debt. In other words, capitalisation had to be understood juridically in a strict sense, and not simply as a term interchangeable with compounding of interest. The speech of Lord Atkin upon which counsel relies contains, in the passage referred to, the following:

> "The simple fact is that the amount of interest accruing during the half-year is ascertained at the end of the half-year, and is added to the account as a debt in precisely the same position as the other debit items, whether for money lent, the price of securities bought, commission or other source of debt. It takes its position as part of the whole debt due to the bank, and, as part of the whole debt, is in the next half-year chargeable with interest. It is no more paid than are other items of the total debt." 57(190)

This rejection of the argument for the taxpayer reflects a rejection of any principle of law that capitalization of interest, as that term is to be understood, involves any change in the nature or identity of interest. 58(191) Lord MacMillan is scarcely of any greater assistance to the plaintiffs. The learned Law Lord reached the same decision that the interest had not been paid, but he did so without attempting to solve the question whether as between banker and customer the interest so capitalised had changed in nature. 59(192) The passage

GILLESPIE J

cited therefore is neutral as far as the plaintiff's submission is concerned and cannot stand against the firm decision of Lord Atkin or the later decisions of both Lord MacMillan himself and

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Lord Porter in Oswald.

Counsel also prayed in aid a passage in the speech of Lord Goff in National Bank of Greece SA v Pinios Shipping Co No 1 & Anor: The Maira. 60(193) He submits in heads of argument that:

> "In particular at p 88, Lord Goff recognised not only the right to compound interest, but too the fact that through the custom of bankers, such interest was treated as capital for all purposes, and was accordingly capitalized in the narrow sense."

This submission is inaccurate and serves to mislead. At the passage cited, Lord Goff does indeed survey precedents on the subject of capitalisation of interest and acknowledge the usage among bankers of capitalising interest, and refers to a rationale of acquiesence in such capitalisation by customers. He even refers to the contract under which capitalisation takes place as being a contract constituted by the custom of bankers. In all this, however, he is not addressing any issue as to the difference between capitalisation in a narrow sense and capitalisation as another expression signifying compounding of interest. A study of the context can leave one in no doubt that the learned Law Lord is using the expression capitalisation as interchangeable with compounding. He is addressing an issue whether a bank is entitled to "capitalise interest", id est: charge compound interest, on the outstanding amount of an account after the account has been closed. He refers to the practice of capitalisation, in order to show as he subsequently finds, that a banker is entitled to charge compound interest notwithstanding the closure of the account. In one passage he demonstrably uses the words interchangeably. Dealing with the failure of the respondent to raise the point at issue until late in the course of the trial for the debt, he said:

> "It was obvious from an up-to-date statement sent by the bank's solicitors to the respondent's solicitors that the sum outstanding was calculated on the basis of continuing to capitalise interest with quarterly rests; indeed the respondents conceded the bank's entitlement so to capitalise interest. The respondents did not challenge the bank's entitlement to compound interest after the date of demand until after the bank closed its case at the trial." 61(194)

GILLESPIE J

I reject Mr de Bourbon's submission that Lord Goff acknowledged, or that his speech is authority for, the proposition that the term capitalisation of interest is, in English banking law, to be understood in the narrow sense. I respectfully adopt the finding of Selikowitz J on the point.

Having examined the English law, Selikowitz J continued in *Oneanate* 62(195) to examine the South African banking law concerning capitalisation of interest. In this connection Mr de Bourbon submitted, contrary to the finding of Selikowitz J, that the cases relied upon by the learned Judge do not establish that under South African banking law interest always retains its character as interest. I do not agree with this submission. I consider that the cases examined by Selikowitz J amply support his finding. Rooth & Wessels v Benjamin's Trustee & Anor 63(196) is a case in which at issue was whether a mortgage bond securing interest as well as capital gave the creditor a preference in respect of the interest in the event of insolvency of the debtor. In particular, it was submitted that an amount realised from the sale of mortgaged property and declared preferent ought not to have been so declared because the excess could only be jsutified as preferent in the event it were interest, whereas it could not be regarded as interest n

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the grounds that interest, being capitalised in terms of the bond, ceased to be interest and automatically became an accretion to capital. In the Transvaal High Court, Bristowe J said:

> "I doubt very much whether this contention is sound as a matter of construction. It seems to me that the provision for the capitalisation of interest is merely a provision to the main clause 'together with interest, &c' and I am much disposed to think that both of them (the capitalised interest as well as the original interest) are governed by the words 'together with' and are consequently additional to the [capital sum]. After all, it is merely a provision for compound interest, and if instead of the words, 'Such interest shall be calculated and capitalised monthly,' the bond had said 'together with compound interesst calculated at 8 *per* cent. *per* annum with monthly rests,' the point would hardly have been arguable, and yet the meaning would have been precisely the same." 64(197)

On appeal, Innes CJ said, concerning the same issue:

> "It follows that such interest must be allowed a preference at the rate

GILLESPIE J

> provided for in the bond. But it is urged that this rule should not apply in the present case, because the bond contains a special clause that interest shall be capitalised every month, from which it follows, it is said, that not more than one month's interest can be preferent. In other words, that during the first month after insolvency interest up to the 30th of the month is preferent, but after that date it is not preferent, but becomes capital, and so on during the second month. I do not follow that contention. That clause is merely a provision for compound interest, which is none the less interest because it is compound." 65(198)

This decision upholds the proposition that interest, said to be capitalised, nevertheless remains interest. The term capitalisation of interest is interchangeble with the expression compounding of interest.

The case of Volkskas Bank Bpk v Meyer 66(199) was one in which it was submitted that a surety, who had undertaken liability for a principal debt in an amount not exceeding R10 000 together with interest thereon and other charges, was not liable for interest which had been capitalised and shown in a single account disclosing an overall indebtedness. It was held that the surety is not relieved from liability for the amount of interest exceeding the guaranteed debt of R10 000 -

> "merely because the creditor, in drawing his account against the principal debtor, has not reflected the capital debit separately from the interest debit, but has consolidated these two debits." 67(200)

This decision necessarily involves a perception that interest so capitalised does not lose its identity as interest.

In Trust Bank of Africa Ltd v Senekal, 68(201) a point at issue was whether a banker had charged interest in excess of the maximum permissible rate of interest where it had charged compound interest, at the maximum permissible rate, on an overdraft. The argument for the banker was precisely that it had capitalised the interest and that therefore the principal debt, as defined in the legislation under consideration, upon which interest was permitted to be levied at the maximum was the amount outstanding included capitalised interest from time to time; and that since the enactment did not prohibit the

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charging of compound interest, the bank's practice was within the law. Nestadt J (as he then was) held:

> "It seems to me that interest does not fall within [the definition of 'principal debt'] (not being money actually received by the borrower) and must therefore be excluded from the amount (being the principal debt) on which finance charges are calculated. In saying this I do not overlook Burger's evidence that arrear interest is capitalized, i.e. that the interest having been added to the capital amount of the overdraft is regarded as part of the amount advanced to the customer and therefore as part of such capital. Burger's evidence on this point was the following:
>
> > 'In bankpraktyk word rente gekapitaliseer, en dit is 'n eeu-oue bankpraktyk, word rente maandelik bygevoeg by die kapitale som waar die kliënt nie spesifiek uit eie fondse daarvoor voorsiening maak nie. Dit moet nie gesien word as rente op rente, die daaropvolgende renteberekenings nie. Want waar rente gekapitaliseer word, is dit in der waarheid 'n addisionele voorskot aan die kliënt.' 69(202)
>
> Judicial recognition for this 'capitalization' approach is to be found in certain of the English authorities referred to in Volkskas Bpk v Meyer 1966 (2) SA 379 (T). (See too Butterworths The Law of South Africa Vol 1 para 790.) It cannot, however, prevail against the clear wording of the Act. Giving full effect (as must be done) to the definition of 'principal debt', I am of the opinion that whilst the Act does not *per* se prohibit the charging of compound interest where the amount thereof, calculated on the principal debt only (i.e. excluding any interest which has been added thereto) results in a rate of interest in excess of the maximum permitted, then s 5 operates to exclude the recovery of such excess. If money-lenders, such as banks, are to avoid the consequences of this conclusion, then either an appropriate rate (of compound) interest less than the maximum permitted must be charged (so that the total interest payable calculated on the principal debt only does not result in a rate of interest in excessof the maximum permitted) ... " 70(203)

The effect of this finding is that interest that is capitalised cannot be regarded as having lost its identity as interest to the extent that it becomes the "principal debt"; that it cannot be regarded as an advance to the customer in a manner that causes it to cease to be interest on the principal sum advanced. This decision went on appeal. 71(204) The judgment of Nestadt J was upheld by the Appellate Division; Miller JA expressly approved the reasoning of Nestadt J in the dictum cited above and observed that the practice described by the bank involved interest being charged to some extent on interest. 72(205) This decision too, therefore, involves a perception that interest, being capitalised, nevertheless retains its character as interest. As Selikowitz J remarked, analysing the effect of these judgments:

> "The court *a quo* also found that charges for cheque books, commissions and other bank charges are not part of the 'money lending transaction' for the purposes of the Act, nor did they constitute 'finance charges' as they were not charged 'in connection with a money lending transaction' as required by the definition 'finance charges'. Again, the reasoning depends upon the items retaining their identity despite being debits which increased the balance owing on the overdrawn current account.
>
> Also significant is that both in the court *a quo* and in the appeal court it was held that the interest was due and payable as soon as it is debited (the court *a quo* at 601F; on appeal at 384D-H). In neither court was it suggested that the interest so debited was, in fact, paid or that it lost its character as interest. The judgments in both courts are inconsistent with such an analysis." 73(206)

This reasoning, with which I respectfully agree, spells doom for Mr de Bourbon's submissions

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that each monthly capitalisation of interest on overdraft is a separate capital loan to the customer and that interest being capitalised loses its identity as interest.

It can be of no assistance to the plaintiffs that in Boland Bank Ltd v The Master & Anor, 74(207) the Appellate Division found it unnecessary to determine whether capitalised interest loses its identity as interest. That matter concerned an issue as to whether compound interest may be charged against the debtor's insolvent estate on a debt arising prior to insolvency. Jones J in the court a

GILLESPIE J

quo had expressed the view that the capitalisation of interest involves a process whereby interest becomes capital after a specified period of time. Moreover, it appeared to the learned judge to be contrary to the intention of the relevant legislation, and the notion of a concursus creditorum, that the capital amount of a claim should increase after sequestration. For the appellant it was submitted that this approach was incorrect, inasmuch as the agreement to calculate interest on accrued interest does not have the effect of converting interest into capital. Reference was made to the dictum of Innes CJ in the case of Rooth & Wesels v Benjamin's Trustee & Anor. where the learned Chief Justice rejected the contention that interest becomes capital once it is capitalised, and to the case of Volkskas Bank v Meyer. 75(208) In upholding the decision of the learned Judge and dismissing the appeal, the Appellate Division significantly avoided upholding this particular reason for his finding.

It appears to me then, that Selikowitz J is entirely correct in holding as follows concerning the question of capitalisation of interest in South African banking practice:

> "After considering the evidence and weighing the views of the many eminent judges referred to above, I conclude that there is no basis for saying that the interest debited by a bank to an overdrawn current account and added to the total amount outstanding loses its character as interest and becomes capital or anything else. The debit balance shown in a customer's bank statement is made up of separate debits, each one of which has its own identity and origin. Some arise from moneys lent and advanced, others from the bank's service charges or commissions, still others from taxes or even from the sale to the customer of stationery such as cheque or deposit books. The lumping together of all the amounts which are owed to the bank and which remain unpaid does not change their origin or their nature. Words like 'capitalisation' are used to describe the method of accounting used in banking practice. However, neither the description nor the practice itself affects the nature of the debit. Interest remains interest andno methods of accounting can change that." 76(209)

Support exists for this conclusion which although it was not cited by the learned judge neverthless serves to add weight to the finding. It is to be found in the case of Taylor v Hollard: 77(210)

GILLESPIE J

> "In like manner, the provisions of the Roman-Dutch law, that the interest may not exceed the capital or be turned into capital, are still observed in practice."

There is perhaps a further reason for reaching this conclusion, and one not advanced by

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Selikowitz J.

I myself suggest this reason somewhat tentatively since the sources which it seems would establish its correctness are not available to me. In *Oneanate* 78(211) the learned judge remarked that since our law never suffered the burden of a prohibition on compound interest there was even less reason to apply a strict meaning of the expression "capitalisation of interest" which meaning has evolved in England only out of a need to circumvent usury laws prohibiting compounding of interest. I am not sure that this is a correct proposition.

The old Roman law certainly did outlaw compound interest (usurae usurarum). There was accordingly developed the method of evading this restriction which involved a transaction (versura) apparently consisting of an express agreement, constituting a novation of the debt, to capitalise the interest such that it attracted interest as capital (anatocismus). An agreement for interest on interest made in advance, however, was void. 79(212) This being so, it is instructive that what was required in order to effect capitalisation was not some fictional acquiescence (as in the older English law) but a specific agreement ex post facto novating the original loan. I have come across no helpful reference in point in the Roman-Dutch writers, who stress the unacceptability of compound interest rather than any means devised to avoid the prohibition.

What strikes me concerning this approach is this. The absence of resort to a fictional device to avoid compound interest when it was forbidden, suggests that the fictional device preferred by English bankers and relying upon an effective capitalisation of interest is not in keeping with our traditions. So much the more is it out of tune with what has been handed down when the Roman law forbade an agreement for interest on interest in advance. What might be in keeping would be a new agreement, entered after the event, novating the obligation between the parties. This persuades me all the more in favour of the decisions which I have reviewed above. Below, I examine a little further the possibility of novation of obligations.

GILLESPIE J

It now becomes necessary to consider Mr de Bourbon's final submission as to whether the duplum rule applies to bank overdrafts in Zimbabwe. It is this. Even if it be that it applies to overdrafts, and that the South African law regarding capitalised interest is as stated by Selikowitz J, nevertheless in Zimbabwe the banking practice is to the opposite effect and capitalisation of interest brings about a transformation of interest to capital.

In advancing this submission, Mr de Bourbon relies upon the affidavits filed on behalf of the plaintiffs. My judgment is that these affidavits are to precisely the same effect as the evidence summarised in *Oneanate* by Selikowitz J and in Trust Bank of Africa by Nestadt J. The thrust of the affidavits is precisely to that conclusion rejected by the learned judges in all of the cases I have reviewed. Mr Burman, in a careful analysis of their contents, submitted that on a proper understanding of their contents they do no more than recount a convenient accounting system. To the extent that they purport to state law, and in particular where those statements are contradictory to the law as I find it to be, they cannot be regarded as acceptable. I agree with this submission. I can see no good reason to accord to these depositions any greater effect or

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significance than that given the similar testimony in the other cases.

In particular, the affidavit of Mr Mabaudi contains the following.

> "It is customary banking practice in Zimbabwe to charge interest on monies lent and advanced to clients on a daily basis and to debit such interest at the end of each month. It is a term, sometimes expressed but otherwise implied, of the agreement between a bank and its customer that interest, when debited, shall be paid. If the customer pays the interest, the interest is not included in the balance carried forward to the next period. However, if the total amount of interest is not paid, the interest which remains outstanding is capitalised in which event it is included in the balance carried forward to the next period. Thereafter, the bank regards the amount carried forward as the capital amount outstanding and does not apportion such amount between capital and interest."

All this is entirely unexceptionable. Of significance, however, is the observation that interest that is not paid is "capitalised". This must put paid to any suggestion that in being capitalised, the interest is, by some fiction, deemed to be paid and readvanced. Even more telling is the statement that the bank "regards the amount carried forward as the capital amount outstanding". The deponent stops short of saying that the interest in fact becomes capital and speaks only of a convenient accounting measure to the bank.

GILLESPIE J

Later in the same affidavit appears this:

> "As a result of the failure by a customer to pay interest to the bank on a loan, the borrower effectively agrees to the process of capitalisation. The effect of this process of capitalisation is that the bank is making a further advance to the borrower to cover interest thereby increasing the capital figure which is carried forward to the next period."

Where the previous excerpt contented itself with factual and correct statements, this advances a purported theoretical rationalisation of those facts which is entirely unconvincing. Common sense recoils at the notion that outstanding interest debited to a customer's account has been paid by the customer. What has happened is that the total amount outstanding has been increased by a particular debit, not that a further amount has been advanced. The statement that a customer effectively agrees to the process of capitalisation begs the question as to the effect of that process of capitalisation. The very use throughout of the word "effectively" or the expression "in effect" betrays the perception that the ordinary and properly understood appearance of the transaction (as correctly recounted in the first extract) is very different from the alleged effect.

A third passage is as follows:

> "The charging of compound interest by a bank is different to the charging of compound interest by any other lender. In the case of an ordinary lender, the charging of compound interest simply means that the lender is earning interest on interest. However, in the case of a bank, the bank is required to borrow further funds to cover unpaid interest. Accordingly, in effect, the bank is lending money to the borrower to cover the unpaid interest. In the circumstances, in the case of banks, interest is not simply compounded but is actually capitalised. As it is one of the functions of banks to borrow money in order to lend it, the process of borrowing money to cover unpaid interest which is capitalised is clear evidence of the proposition that interest which is capitalised is in effect a further advance by the bank to its customer."

Again the words "in effect". The reasoning that since a bank must borrow in order to lend,

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therefore its compounding of interest is real capitalisation, is entirely unconvincing. First, there is no reason to suppose that other lenders who suffer non-payment of interest are in any different position. They may need to borrow in order to cover the lack of interest income, even if that need

GILLESPIE J

stems from a different cause than a statutory requirement of liquidity. Second, it just does not follow that because a banker has to borrow in order to lend therefore unpaid interest is capitalised in a strict sense rather than merely compounded. In either event, interest is earned on the interest unpaid and accrues in precisely the same way. The bank has the same return, the same exposure and the same protection. The final sentence is merely an affront to logic. The circularity of reasoning appals. On the one hand the deponent has stated that the effect of debiting unpaid interest to the total outstanding, so that interest cotinues to accrue on the enhanced amount, is that of a further loan to the customer. This is used to justify the proposition that the interest has become capital. On the other hand the statement is now made that since the unpaid interest so debited does become capital, this proves that it is in fact a re-advance of monies to the customer.

Finally the deponent avers that -

> "It is the practice of banks to have regard to interest only for a particular month. Once interest has been capitalised, the bank no longer draws any distinction between interest and capital in the amount carried forward, such amount being regarded as the outstanding capital balance. Any payment made by a borrower to the bank is allocated towards the reduction of the balance outstanding at the time. There is no consideration given to whether the payment is being allocated to capital or interest because it is the practice of banks to have regard only to the balance (which balance includes interest which has been capitalised). Having regard to this aforesaid practice, the theoretical position, if one were to consider the balance in terms of interest and capital, is that payments are allocated firstly to interest which has been debited and thereafter to the reduction of the actual advances made."

Aside from the proposition concerning appropriation of payments, which I consider in greater detail below, this is unremarkable. I echo the sentiments of many of the learned judges whose decisions I have followed when I remark that a manner of accounting which is convenient to the bank is no indication as to the jurisprudential nature of the amounts dealt with. The bank may choose to account for interest and capital in one column rather than two; it may choose to treat the accumulated interest as if it were capital; that, however, cannot cause it to change its nature and to become capital

The affidavit of Mr Mullin advances the banks' cause no further. On the contrary, he makes a statement which renders it impossible for me, even were

GILLESPIE J

I otherwise inclined to do so, to depart from that which I have thought to be the law in England and South Africa on the point. He says:

> "In keeping with long-standing custom arising out of banking practice in Zimbabwe and also both in South Africa

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> and in the United Kingdom, from which countries Zimbabwe's banking practices have been inherited, banks in Zimbabwe apply interest to their lending almost exclusively on a monthly basis, calculated at the quoted *per* annum rate on the daily outstanding balance in each case. Therefore interest is generally quoted at a rate *per* annum, compounded monthly."

This is surely a statement which is entirely correct and which shows that the manner of treating the interest is to compound it. It shows too that were I to reach a conclusion on the question of capitalisation of interest and banking practice divergent from those in the English and South African authorities I would be wrong.

The deponent avoids the tortuous logic and unfounded assertions made in the previous affidavit. A sampling follows of some of his remarks, all of which strike me as fair and proper and conducive to the conclusion that capitalised interest, though for convenience regarded in a different light by the bank, remains interest.

> "Where the borrowing is taken by the borrowing client on current account it is almost invariably the practice that the monthly interest charge is passed to the account on which the borrowing is taken. Where the borrowing is taken on ... a 'loan acount' ... interest, while raised directly on the loan account is usually, but not necessarily, transferred to the debit of the client's current account. The purpose of this transfer is to attempt to ensure that interest charges raised in a loan are met by way of periodic credit funding made to the current account ... 80(213)
>
> An overdraft arrangement thus gives rise to, in a somewhat academic sense, an ongoing series of loans; each individual drawing in that same sense amounting to a separate individual loan until discharged by periodic deposits to the account. 81(214)

GILLESPIE J

> But for all practical purposes in the administration of current account lending the Bank does not look upon the individual drawings as being individual loans, each with a separate 'loan' identity. In the perception of the Bank and its borrowing client the individual drawings, or loans as they might more correctly be in their original nature, soon largely lose their individual recognition and become absorbed into the total indebtedness ...
>
> When interest is raised on current account overdraft it is raised as one amount on the single overall indebtedness reflected from day to day. No attempt is made to attribute to the individual drawings and separate apportionment of the single overall interest charge raised each month ...
>
> It is in the nature of all bank lending that it is generally understood between a bank and its borrower that, once interest is raised, it is at least initially expected of the borrower that immediate or early provision is to be made therefor, possibly by means of specific payment, or if not by specific payment, that interest should be covered as a first charge against any deposits made.
>
> It is thus generally correct to say that interest is due on bank lending *as and when it is raised*. 82(215)
>
> But such is the variable nature of bank lending, particularly where interest is raised on, or debited to, a current account that a bank will in a greater majority of cases and in varying degrees be generally tolerant of the failure of the borrower to pay the interest immediately as and when it is raised. It is thus generally a feature of a bank's lending on current account that, notwithstanding the bank's clear preference always that interest be paid as and when it is raised, the borrower, if he does not pay the same, effectively agrees to instead have the amount, albeit raised as interest, included in the overall indebtedness."

The fact that Mr Mullin refrains from stating in this last passage that the customer effectively agrees to the interest becoming capital speaks well of his objectivity and professionalism. It also accords completely with the view of the law which I have found expressed in the case

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authorities and which I repeat here.

GILLESPIE J

I therefore reject Mr de Bourbon's submission, that banking practice in Zimbabwe is such that interest on a current account overdraft is, when debited at the monthly rests, transformed into capital. To summarise thus far, the duplum rule, as defined above, applies to all debts where a capital sum is owing together with interest thereon at an agreed rate, including bank overdrafts. The term "capitalisation", where it is used in connection with the debiting of unpaid interest, means no more than the charging of compound interest, and does not signify that interest so capitalised has lost its character as interest and is to be excluded from reckoning for the purposes of the duplum rule.

Finally, it is necessary to determine the manner in which payments made, or credits accruing, in respect of the indebtedness are to be appropriated. On this issue, all three learned advocates appearing before us submitted that the proper principle of Roman-Dutch law is that in the absence of agreement by the parties, payment is to be appropriated first to interest and then to capital. This submission is contrary to the decision of Selikowitz J in *Oneanate*. In that case the learned judge held that he should apply a principle of English law known as the rule in Clayton's case, which rule he modified to taking into account the application of the duplum principle, which is unknown to the English law. He held:

> "In my judgment, therefore, in the absence of effective appropriation by the customer or the bank, the rule in Clayton's case applies in our law to current accounts with banks for so long as the account is not affected by the *in duplum* rule. As soon as - and for as long as - the *in duplum* rule suspends the further running of interest, all credits to the account should be appropriated to pay the interest before they are applied to pay the capital." 83(216)

Clayton's case 84(217) was one of a number of claims against the partners, or their estates, in the insolvent banking partnership of Devaynes, Dawes, Noble & Co. At the time of the insolvency Devaynes, and his estate and heirs, had been long deceased and had ceased all connection with the partnership which was using his name contrary to the wishes of those who bore it. Clayton was one of a number of creditors of the erstwhile partnership who, at all material times unaware of the dissociation between Devaynes and the partnership, sought to recover portion of his indebtedness from the estate of Devaynes. His claim was determined so as to settle the claims of all in a similar position to his

GILLESPIE J

own. 85(218) The relevant issue for the purposes of the famous rule in Clayton's case was whether a balance standing to the credit of Clayton at the time, or some time after the death of Devaynes, could be claimed by Clayton after the insolvency, when the balance in his favour was considerably greater than the amount claimed, or whethertransactions on the account, in particular payments to Clayton, by the partnership succeeding, subsequent to Devaynes' demise, were to be taken as having extinguished the debt. This was perceived as a problem of

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appropriation of payments. The learned judge set out his views as to the general principles of appropriation of payments, recognised the debtor's right to make an allocation, and the absence of any such allocation acknowledged that right to the creditor, and found a conflict of principle as to whether the creditor was entitled to exercise any such right ex post facto. 86(219) He found it unnecessary to resolve any such conflict in the circumstances, holding:

> "But this is the case of a banking account, where all sums paid in form one blended fund, the parts of which no longer have any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on Monday and this other to the account of the £500 paid in on Tuesday. There is a fund of £1000 to draw upon, and that is enough. In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into account. *Presumably, it is the sum first paid in that is first drawn out*. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. Upon that principle, all accounts current are settled, and particularly cash accounts ... If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished." 87(220)

It is important to note about this decision: first, that the facts showed a system of accounting involving a pass book issued to the customer, showing the bank as debtor, the customer as creditor and ruled in two columns for debtor and creditor with chronological entries on each side as the transactions were effected; second, that the competing debits in the issue were all capital debits;

GILLESPIE J

third, the words which I have emphasised in the preceding passage from the judgment. The significance of these words is demonstrated in the next case I examine.

It is the case of Deeley v Lloyd's Bank Ltd. 88(221) This concerned a claim by the holder of a second mortgage over immovable property against the holder of the first mortgage, the bank. The first mortgage secured the current account of the debtor with the bank. The bank had received notice of the registration of the second mortgage and had continued to transact business on the same account without breaking it. The relief sought included a declaration that the bank was not entitled to hold the mortgage as security for indebtedness arising after notice had been given of the second mortgage. This issue turned upon whether the debtor's first mortgage had been discharged by the operation of the rule in Clayton's case. At first instance, judgment was given for the bank and this decision was upheld in the Court of Appeal; the basis was that the rule in Clayton's case involves merely a presumption as to the intention of the parties' concerning appropriation, which presumption was displaced by the conduct of the parties. I the House of Lords, the following was said concerning the rule in Clayton's case:

> "It is no doubt quite true that the rule laid down in Clayton's case is not a rule of law to be applied in every case, but rather a presumption of fact, and that this presumption may be rebutted in any case, by evidence going to shew that it was not the intention of the parties that it should be applied." 89(222)

On an examination of the facts, it was held that the presumption had not been displaced and that payments made to the debtor's account after the notification of the second mortgage ought to be taken as having been appropriated to the earlier indebtedness, that under the first mortgage. I need not stress the significance of the treatment of this rule as a presumption

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rather than a principle of law. In addition, I point out that, once again, the facts involved competition between capital debts not the capital and interest components of the same debt.

Another speech delivered in the same case approved the following statement of principle concerning appropriations and *Clayton's* rule:

> '"The principle of *Clayton's* case and of the other cases which deal with

GILLESPIE J

> the same subject is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *prima facie* appropriates them to the account, and the effect of that is, that the payments are de facto appropriated according to the priority of order of the entries on the one side and on the other of that account.' I understand that to mean this: According to the law of England, the person paying the money has the primary right to say to what account it shall be appropriated; the creditor, if the debtor makes no appropriation, has the right to appropriate; and if neither of them exercises the right, then one can look on the matter as a matter of account and see how the creditor has dealt with the payment, in order to ascertain how he did in fact appropriate it. And if there is nothing more than this, that thee is a current account kept by the creditor, or a particular account kept by the creditor, and he carries the money to that particular account, then the court concludes that the appropriation has been made; and having been made, it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation." 90(223)

The important principle once again is that the so-called rule in Clayton's case is no more than a factual presumption arising from the general circumstances pertaining to the keeping of a current account by a banker in the absence of any express appropriation by either party. 91(224)

Properly examined, it seems to me that the rule in Clayton's case cannot possibly apply to our law and practice of banking so as to justify the appropriation of credits in an overdrawn current account first to capital and then to interest accrued. As regards law, this is because a distinction must be drawn between the situation of competing principal debts and debits relating to capital and interest accrued on the same debt. Our law of appropriation 92(225) does indeed allow first the debtor and then the creditor to make an express appropriation where the underlying agreement provides none. Thereafter, as Selikowitz J correctly stated:

> "Failing appropriation by the debtor and the creditor, the common law has developed a set of residual rules which guide the courts unless it is found

GILLESPIE J

> that the parties or the circumstances have either expressly or tacitly excluded one or more of them. (See Wessels The Law of Contract in South Africa 2 ed vol 2 paras 2306-2313; Ebrahim (Pty) Ltd v Mahomed & Ors 1962 (1) SA 90 (D) at 97-100).
>
> The common-law rules seek to appropriate the payment on the principle of appropriating first to the debt which is most onerous to the debtor - the one which he has the most interest in discharging (see Wolhuter v J Zeederberg (1885) 3 HCG 437 at 441). Where capital and interest are owing as part of the same debt, as is the case where the interest accrues as an accessory to the capital, the principle manifests itself in a rule that payments are credited first to discharge interest and then only to pay the capital. (See Bank of Africa v Craven NO (1888) 5

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> HCG 112 at 118; Brink's case *supra* at 420; van Coppenhagen v van Coppenhagen 1947 (1) SA 576 (T) at 582; Western Bank Ltd v Adams 1975 (4) SA 648 (C) at 655E; Western Bank Ltd v Lester & McLean & Ors 1976 (3) SA 457 (S) at 466D-E; Western Bank Ltd v Woodroffe & Ors 1976 (1) SA 482 (N) at 488D-F)." 93(226)

If I might be permitted to venture respectful comment upon this dictum, I suggest that it might be better put were the rule as to appropriation to interest first and then to capital to be seen not as an application of the rule that the appropriation is to the most burdensome debt first, but rather as a rule in its own right. The rule is to be found expressed in Roman times; 94(227) in Voet; 95(228) and in van der Linden 96(229) in a context which treats of the rule as one in its own right and not to be confused with an application of the rule in favour of appropriation to the most burdensome of two principal debts. The same rule of appropriation is reflected in Wessels: 97(230)

> "Where a debt produces interest, the money paid must be applied in the first instance to the payment of the interest and then to capital ... Even

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GILLESPIE J

> if the payment is made on account of principal and interest, it will by law be appropriated first to the interest and then to the capital ... If no mention is made of the principal, but only of the interest, the surplus after paying the interest will nevertheless be appropriated to the capital ... provided the capital is then due."

In *van Coppenhagen* 98(231) the rule as to appropriation of interest first is mentioned by Millin J but not as an application of the rule in favour of allocation to the most burdensome debt. Indeed the most burdensome debt, if one is attempting to distinguish between capital and interest, is undoubtedly capital, since upon it the interest accrues. This rule therefore is to be seen as a substantive rule in its own right. My meaning is perhaps exemplified by the paragraph structure by which the residual rules of appropriation are treated by Lee and Honorè, 99(232) a structure which in my opinion properly reflects the relationship of the various rules.

Once this is acknowledged, then one can see no justification whatsoever for importing the rule in Clayton's case to regulate a legal issue so unequivocally provided for in our own law. More, when one realises that the Clayton rule is no more than a presumption said to arise from the facts 100(233), there is even less room for its application to banking practice in South Africa or Zimbabwe. The effect of the evidence given by affidavit in this case (and also that which was led in other matters referred to in this judgment, to the extent that I can understand that evidence where reproduced in the judgments) is that the uniform banking practice is to debit the interest accrued on the daily balance after monthly rests so as to show a single amount of indebtedness. All credits towards this indebtedness are reflected without conscious appropriation against the total amount thereof. No possible presumption of appropriation to capital can arise since the banks invariably regard the interest as due and payable immediately i is debited. 101(234)

It is true that the rule in Clayton's case was cited by Wessels in these terms:

GILLESPIE J

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> "In some cases of partial payments, these rules 102(235) of appropriation do not apply. Thus if there is an account current between debtor and creditor, then, so long as the account continues the first item on the debit side of the account is discharged or reduced by the first item on the credit side ... The reason is because the parties intend that the current account should be kept alive, and this the creditor would not allow if the debtor could appropriate the payments to the later items and so cause the earlier ones to be prescribed." 103(236)

It seems to me that the very reason given by Wessels for this rule shows that it is only of application where the competing debts for appropriation are both principal debts and not the principal and interest components of the same indebtedness. If one appropriates a credit to interest rather than to the capital upon which that interest accrues, it can scarcely be said that the claim for the unpaid capital will prescribe. Far from it, since payment of the interest accruing will interrupt prescription on the capital. I must point out, in addition, that the learned author did not advert to the fact that the vaunted rule is no more than a presumption considered to arise from a particular set of facts and to be displaced by the appropriate proof. I do no violence to the authority of Wessels if I hold that presumption to be applicable in the appropriate case where an issue of appropriation arises between separate capital debts on a current account, but decline to hold it to apply to the case where in dispute is an ppropriation to interest rather than tocapital in respect of the same indebtedness.

The incompatibility of Clayton's rule, as applied to an issue of appropriation as between capital and interest on the same indebtedness, with the duplum rule was noted by Selikowitz J in *Oneanate* and the learned judge was considerably exercised in an attempt to harmonise the two. It is my most respectful view that this exercise was unnecessary and misplaced. For reasons which I have advanced in the preceding paragraphs, and which were apparently not considered by the learned judge, I find that the rule in Clayton's case is of no assistance in determining whether a credit is to be appropriated to interest or capital on the same debt. Although this leaves me in the unfortunate position of differing, with the greatest of respect, from the decision of the learned judge, it does not place me in unbearable conflict, so far as I can gather, with certain South African decisions upon which he relied. Thus I regard Trust Bank of Africa v Senekal, 104(237) where Nestadt J in fact

GILLESPIE J

declined to apply in the case before him the pssage from Wessels citing the rule in Clayton's case, as more in support of my own decision than that of Selikowitz J. In Volkskas Bank Ltd v Meyer 105(238) de Wet JP approved the relevant passage from Wessels but in circumstances where there was no clear indication of the circumstances in which it was applied and no discussion of the various considerations which I have adumbrated at some length now. Even if the effect of his decision, applied to the facts of that case, is contrary to that which I now hold, I feel justified to depart from his decision as well as from that of Selikowitz J on this particular point, as I respectfully do.

I hold that the rule in Clayton's case is no more than a presumption arising as a matter of inference from the manner of conducting a current account with a bank, and is not an invariable rule of law. In the absence of appropriation of a credit, by either the debtor or the creditor, or of the application of any other rule of appropriation, then in a proper case it will be presumed that the credit is to be appropriated to the earliest of competing capital debits. In the case of interest

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accrued and debited to the overdrawn current account, however, then in accordance with the common law the credit is to be appropriated to interest first and then to capital.

I have had the benefit of some argument on the question whether or not the duplum rule can be waived. There is no question of an issue of waiver arising in this matter and a determination of the point is not necessary. Nevertheless, since guidance is sought and since I am reinforced by my learned brethren, I feel it proper to express a view on the subject. Mr de Bourbon submits that there is nothing to prevent a waiver in advance of the application of the rule. Mr Morris and Mr Burman both advance the proposition that a such waiver would be an agreement contrary to good morals. I consider that this argument has merit.

The ancient Roman and Roman-Dutch law applied the duplum rule rigorously, to the extent that interest could not accrue after the amount of the double was reached. The rule was one conceived in public policy and in order to supply a protection perceived to be necessary. It is my view that an agreement that sought to waive the duplum rule in advance would be one contrary to a policy to protect a debtor who has not serviced his loan from facing an unconscionable claim for accumulated interest and to enforce sound fiscal discipline upon a creditor. A loan that is properly serviced does not fall foul of the duplum rule. A creditor who does not extend credit to a bad risk or who calls up his debt

GILLESPIE J

at a proper time, when the loan is not being serviced, does not suffer from an application of the rule. To allow an agreement in advance waiving the rule would leave these abuses unchecked. That the courts may refuse to enforce a contract considered to be contrary to policy is undoubted. 106(239) There is, in addition, very respctable authority that a waiver of the duplum rule in advance would be contrary to public policy:

> "In like manner, the provisions of the Roman-Dutch law, that the interest may not exceed the capital or be turned into capital, are still observed in practice ... This court will refuse to enforce, to its full extent, a contract made by our citizens, in which double the amount advanced, with interest, is stipulated for, not so much in the protection of the promissor, but because to countenance such proceedings would be contrary to good morals, the interests of our citizens, and the policy of our law." 107(240)

This is not necessarily to say that the parties are unable, ex post facto, that is once the debt is called up, to agree a novation of the debt. That is, for instance, to contract a new loan in terms of which money is advanced by the creditor in an amount of the outstanding capital and accrued interest up to the double in order to permit of the repayment of the outstanding indebtedness. This new debt would then be repayable on agreed terms. This would be a true capitalisation of the interest on the previous debt. It is the practice of merchant banks. It is in conformity with the old Roman agreement as to anoticismus. If concluded knowingly by freely contracting parties when the existing debt is called up, I can see no objection to it. Whereas an agreement in advance to waive the rule leaves the debtor exposed to precisely those perceived evils which the rule is formulated to combat, a novation after the event permits the debtor the informed choice of increasing his possible indebtedness or of taking advantage f the cessation of accrual of interest.

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I now turn to apply these rules, to the extent I am able, to the four cases before me. In the MM Builders case No. HC-5559-94, the figures appearing on exhibit 3, Mr de Bourbon's presentation of a computation of interest accrued and appropriated on the account, are derived from a breakdown of transactions

GILLESPIE J

recorded in the account and filed under cover of the affidavit of Mr Lusuwi of the plaintiff bank. The computation is in columns, headed month, interest, credits and unpaid interest, and reflecting respectively every month during the currency of the account since it was last in credit before interest first commenced to accrue, the interest debited in each month so recorded, any credits to the account in that period and the amount of accumulated unpaid interest after an appropriation of any credit to interest outstanding. The schedule therefore shows graphically that for the first year of the relevant period the account was regularly serviced, interest accruing monthly was completely paid by monthly credits, ith the balance of the credit after appropriation to interest going to reduce the capital debt. Thereafter, however, credits reduced drastically in amount and in frequency and arrears of interest rapidly accumulated. The totals at the foot of the columns show that at the time the overdraft was called up, interest in an amount of $2 250 518,58 had accrued, credits of $596 284,29 had been passed and the arrears of interest had accumulated to an amount of $2 042 490,83. That the difference between the total interest and arrears of interest is less than the amount of total credits reflects the fact that as the credits were paid monthly in the early stages, they served largely to reduce the capital debt rather then being absorbed in interest.

A moment's thought shows that the effect of the schedule has not been to determine the interest as it accrued on the daily balance but to assume that the daily accrual of interest was historically correct and to assume that the credits for the month were made on the last day of the month. This undoubtedly leads to certain discrepancies in the calculations which I think one might be able to overlook. Also shown on the working is a total amount, taken from the annexure to the affidavit, of the capital debits, that is advances, charges and like debits, in an amount of $1 367 343,33. From this figure has been deducted an amount of repayments, that is $388 256,54, which is the remaining portion of the total credits after appropriation of part of that amount to interest. The resultant figure of $979 096,79 is the capital debt outstanding according to this calculation. The calculation thus demonstrates that the duplum rule has been breached. An amount of $3 020 779,33 is claimed which by this schedule is demonstrate to consist of no more than $979 086,79 in respect of capital and at least $2 042 490,83 in respect of interest. (The discrepancy between the total of these figures and the amount claimed is in fact a small amount of $798,29 standing to the credit of the defendant at the commencement of the accounting period). I say "at least" and "no more than" because the discrepancies referred to might possibly have the effect of showing that the capital could have been somewhat more reduced if the credits had been

GILLESPIE J

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accounted for at the beginning of the month. It may be thought that the figures given are unsafe since the double must have been reached, and interest might have stopped accruing some time previously and before later credits were paid. However, any such later credits would have been absorbed entirely in interest repayments. It is therefore proper to accept the figure given for outstanding capital.

I can therefore give judgment for the plaintiff calculated as follows:

Outstanding capital as shown on Exhibit 3	$ 979 086,50
less adjustment for capital balance at opening of accounts	$ 798,29
	$ 978 288,21
plus interest to the double	$ 978 288,21
Total	$ 1 956 576,42

Costs are due to the plaintiff but not, I consider, in an amount including the costs of the argument. The defendant was content not to oppose and is not responsible for the costs incurred in respect of the argument directed by the court. In any event that argument showed that fully a third of the plaintiff's claim was unfounded.

The *Ferns Engineering* case No. HC-5916-95 has no calculation made by Mr de Bourbon. Some sixty pages of ledger sheets are attached to the further particulars supplied by the plaintiff. This is most unsatisfactory as general pleading practice. Pleadings ought not to advance evidence. Facts should be averred without undue prolixity. More, the ledger sheets establish nothing other than details of hundreds, nay thousands,of individual transactions over a period of some three years. They commence from a balance brought forward of an indebtedness of over $350 000. That itself shows no distinction between capital and interest. How it can be thought that any conclusions can be drawn when one does not commence from a properly established opening balance is beyond me. The ledger sheets show an initial debit balance of $350 000 increasing to one in excess of $1.9 million. There are undoubtedly many capital debits over that period, so too are there many interest debits, and precious few credits. I do not consider it to b my function to attempt to analyse a considerable set of poorly photocopied ledger pages, all unidentitfed, unauthenticated and unsupported by evidence or explanation. I would decline to undertake this accounting task, even if it were possible to determine the capital and interest components of a properly supportable opening balance. In the absence of that necessity time spent attempting to make relevant factual findings on these documents would be time wasted.

GILLESPIE J

I think it appropriate in the circumstances to dismiss the plaintiff's claim. This order does not constitute judgment for the defendant and the plaintiff will be able to pursue its claim afresh. Its failure to support its claim properly on these proceedings, despite the opportunity given by me to amplify its claim, is reprehensible. That default, however, has caused it to waste its costs.

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Ordinarily, I would order costs for a defendant in such circumstances. Since, however, the defendant has played no part in the affair, being willing to let the whole matter go by default, and has itself only incurred the insignificant costs of an entry of appearance and a request for further particulars, I will not do so. It would not be right to award costs to a non-combatant.

In the Maroodza case No. HC-2694-96, there is simply no information as to the capital and interest components of the claim. Once again I am obliged to deplore the fact that the bank should have failed to take the opportunity to satisfy me as to the facts. There remains that same possibility of a breach of the duplum rule that caused me to refer the matter for argument and to give leave to supplement the papers. The plaintiff has squandered that advantage and must pay the price in the dismissal of its claim and the wastage of its costs.

Finally, the Machirori case No. HC-3146-96. This is the matter where two amounts are claimed. Mr de Bourbon's exhibit 1 satisfies me that the amount of $424 664 claimed in the summons consists of a capital advance of $410 000 together with interest of $14 664,11 accrued between 1 April 1995 and 29 February 1996. Although the figures on his exhibit are not supported in the papers, I am in this instance prepared to accept the schedule as a statement of fact from the Bar on Mr de Bourbon's assurance that he has taken the figures direct from the relevant banking documents. I do so because the matter has proceeded on an uncontested basis and the interest rate on this particular portion of the claim is sufficiently low as to suggest to me that it is unlikely that the double has been attained. I will give judgment in the amount claimed I have already mentioned that interest at the rate of "5% *per* annum *per* mensem" is purportedly claimed. I said that I had not even attempted to decide what that formulation might mean Since this plaintiff is obliged to return to court in respect of the second part of its claim, I will allow it the opportunity to amend its papers in the manner it may be best advised to do an to move judgment in such amount of interest as it might be able to prove is due.

The second part of the claim, for $1 004 900,82, is much more complicated. The schedule, exhibit 3, prepared by Mr de Bourbon shows that controlled in this current account are many different items of business. There is a

standard overdraft upon which interest accrues at an agreed rate. There are stop-order payments in respect of certain obligations to third parties. There are transfers from this account to another in the same bank in respect of indebtedness on another account for which the defendant, or rather his co-principal debtor, appears to be responsible. There are transfers in respect of interest repayments on another account for which the principal debtor appears to be responsible. There are certain credits described as "interest paid", being payments from another account in respect of interest accruing on this account. While I do not intend to cast any sort of discredit upon counsel by not accepting his attempts to explain these transactions from the Bar, I nevertheless do not feel that I can act upo those explanations. The complicated interplay and interrelationships between this account, and a number of other accounts, all of which seem to me to involve separate agreements, are not disclosed. In fact they are rather completely concealed by the averments in the summons that the amounts are due and owing in respect of monies loaned and advanced. I would expect in this case a proper pleading setting out the

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various agreements involved and the particulars in which transactions have been effected in terms of the agreements. This part of the claim I feel I must dismiss with the same criticism that was attracted by the plaintiffs in the second and third cases.

Mr *de Bourbon* submitted with some vehemence that a direction as to the acceptible practice in matters such as the present is desirable. The need for some guidance to practitioners has become apparent and I respectfully agree with the directions given by my brother Smith.

In the result I make the following order:

1. In case No. HC-5559-94, there will judgment for the plaintiff in the sum of $1 956 576,42 together with interest thereon at the agreed rate of 43 *per* centum *per* annum from the date of judgment and costs of suit; such costs, however are not to include any costs incurred after 8 February 1996, being the date upon which application was made for default judgment.

2. In case No. HC-5016-95, the plaintiff's claim is dismissed.

3. In case No. HC-2694-96, the plaintiff's claim is dismissed.

4. In case No. HC-3146-96, there will be judgment for the plaintiff in the sum of $424 664. The plaintiff is given leave, subject to due service upon

GILLESPIE J

the defendant of any amendment, to amend the summons in respect of the claim for interest on the amount of $424 664 and to apply, on the same papers amended as may be necessary, for interest on the said amount. The defendant is to pay the costs of suit; such costs, however are not to include any costs incurred after 7 May 1996, being the date upon which application was made for default judgment. The claim for judgment in the sum of $1 004 900,82 and other relief is dismissed.

Smith J: I agree with the views so ably expressed by Gillespie J. In my opinion, papers supporting a claim for payment of a debt which includes interest on a capital sum should clearly indicate the following. The amount of the capital due; the total amount of interest due; whether or not interest thereon is claimed and, if so, the amount in respect of which the interest is claimed and the date with effect from which the interest will run. In the case of a claim relating to a bank overdraft, the papers should show the total amount of the debt claimed and, separately, the total capital amount loaned by the bank to the client, the total amount of interest due thereon as at a specified date and, if appropriate, the total amount due in respect of bank charges, cheque books, etc. and the interest, if any, due thereon as at a specified date. If the client has made any payments in respect of the overdraft account, the papers should specify the total amount paid and also indicate how the payments have been appropriate.

Blackie J: I respectfully agree with the principal judgment of Gillespie J and with the directions contained in the judgment of Smith J.

Messrs Gollop & Blank, legal practitioners for the plaintiffs in cases HC-5559-94 and

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HC-3146-96

Messrs Gill Godlonton & Gerrans, legal practitioners for the plaintiffs in cases HC-5016-95 and HC-2694-96

S v MASAWI & ANOR 1996 (2) ZLR 472 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Criminal appeal

27 May & 31 October 1996 Judgment No. S-205-96

Flynote

Evidence - inference - circumstantial evidence - murder - body of victim not found - whether enough evidence to convict of murder - identification evidence - circumspection required in assessing evidence - conviction for kidnapping on basis of circumstantial evidence - whether justified

Headnote

A woman had disappeared after she was kidnapped. The appellants were jointly charged with the murder of the woman, although no dead body had been found. They were charged in the alternative with kidnapping. The trial court decided that it must be presumed that the woman was dead. The trial court convicted both appellants of murder and sentenced them to death. On appeal:

As regards the first appellant:

Held (*per* Gubbay CJ and Korsah JA), that the evidence did not support a conviction for murder and the conviction should be set aside. However, the evidence established that she was guilty of the alternative charge of kidnapping.

Held, further, as regards the charge of murder, that although there was a legitimate finding that the victim was dead and that she died after she had been kidnapped, there was no evidence as to the cause of death and the time of death. The absence of a dead body made it impossible to determine whether the kidnappers had murdered her or whether she had died from some other cause, such as a heart attack. The evidence did not prove that the first appellant had physically participated in the kidnapping. She was, however, an accomplice to the kidnapping as she had supplied

the car that was used in the kidnapping, knowing that it was to be used for this purpose. The fact that she was guilty of kidnapping as a socius criminis was not enough to make her guilty of murder. The socius to a kidnapping is only guilty of murder if the State can prove that she at least foresaw the real possibility that the kidnapping would lead to the death of the victim and

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nonetheless went ahead and supplied the actual perpetrators with te vehicle to be used for the kidnapping reckless as to whether or not death would result from the enterprise. On the facts it had not been proved that the first appellant had foreseen that death would result. This case was different from one where the accomplice supplies a lethal weapon for use in connection with a kidnapping and that weapon is used to kill the victim. In that latter type of case the inference that the accomplice foresaw that the kidnap victim might be killed could easily be drawn. The first appellant was guilty only of kidnapping.

Held (*per* Ebrahim JA, dissenting), that the first appellant was guilty of murder. Although there was no direct evidence of murder and there was no dead body, the murder could be proved by circumstantial evidence if that evidence leads to the only conclusion that the murder has been committed by the person charged. The only conclusion that could be drawn from the proven facts was that the first appellant, acting in concert with another, had used her vehicle to kidnap the victim and that the kidnappers had killed the victim and had disposed of the body in a remote place.

As regards the second appellant:

Held, (*per* Gubbay CJ and Ebrahim JA), that there was insufficient evidence to convict the second appellant of either murder or the alternative charge of kidnapping. As regards the murder charge there was absolutely no evidence to place the second appellant at the scene of the crime when the kidnapping occurred. Caution had to be exercised in respect of identification evidence and the evidence that the second appellant had been identified as being present at the scene was not reliable. The State had also failed to prove that his alibi for the time when the kidnapping had occurred was false. The fact that the second appellant may have visited the home of the deceased before the kidnapping did not link him to the kidnapping.

Held (*per* Korsah JA, dissenting), that the second appellant was guilty of kidnapping. There was sufficient evidence that the kidnapping had taken place in consequence of a plan hatched by the second appellant with the first appellant, even if the second appellant had not physically participated in the actual kidnapping. He was therefore guilty of kidnapping as an accomplice.

EBRAHIM JA

Cases cited:

In re Grove, Vaucher v Treasury Solicitor (1888) 14 ChD 216

Hyam v DPP (1974) 59 Cr App R 91

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

People v Cronin 34 Cal 191

People v Morrow 60 Cal 142

R v Difford 1937 AD 370

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R v Hodges (1838) 2 Lewin CC 227; 167 ER 1136

R v Long (1973) 57 Cr App R 871

R v Sibanda & Ors 1965 RLR 363 (A)

R v Turnbull & Ors (1976) 13 Cr App R 132

S v Kazi 1963 (4) SA 742 (W)

S v Madlala 1969 (2) SA 637 (A)

S v Mthetwa 1972 (3) SA 766 (A)

S v Nyachito HH-42-83

S v Safatsa & Ors 1988 (1) SA 868 (A)

S v Shoniwa 1987 (1) ZLR 215 (S)

Case Information

D P Carter, for the first appellant

J C Andersen SC, for the second appellant

T Chitapi, for the respondent

Judgment

Ebrahim JA: In a case that was characterised by inefficient police investigation, improper behaviour on the part of the CID investigating team and findings of unreliability on one aspect or another of the evidence of most of the material witnesses, the appellants were jointly convicted of the murder of Marceline Dzumbira and sentenced to death.

It is common cause that Marceline disappeared without trace on 15 December 1992 after her mother and daughter saw her being bundled into a pick-up truck at gunpoint near their home in Bluff Hill, Harare. The court *a quo*, in a carefully considered and detailed judgment, accepted that the truck used was that of the first appellant and that the first appellant had, about two weeks earlier, threatened to "fix" Marceline, whom she had accused of having an affair with Cephas Chiparura, her customary law husband. The court also accepted that the person who bundled Marceline into the truck was the second appellant, the first appellant's brother.

The only direct evidence linking the two appellants was totally unreliable. The rest was circumstantial. The approach adopted by the court *a quo* was to analyse the evidence in detail, to examine the credibility of each material witness, to make findings of fact against each of the appellants individually

EBRAHIM JA

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and to find that the only reasonable inference to be drawn from the facts found to have been proven against each was that of guilt. In doing so, the court was following the principles enunciated in Hoffmann and Zeffertt South African Law of Evidence 4 ed pp 591-2 and there can be no criticism of such approach. However, although the court dealt with the appellants individually in making its findings of fact, the evidence as a whole was considered in chronological order. As already stated, there is a missing link and the danger in looking at the evidence as a whole in the instant case is that:

> "The mind was apt to take pleasure in adapting circumstances to one another, and even straining them a little, if need be, to force them to form part of one connected whole; and the more ingenious the mind of the individual, the more likely was it, in considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some facts consistent with its previous theories and reasoning to render them complete."

Per Alderson B in R v Hodges (1838) 2 Lewin CC 227; 168 ER 1136. *(241) Mindful of this danger, it is proposed to deal with the case against each of the appellants separately.

REBECCA MASAWI

1. THE STATE CASE

A fairly lengthy summary of the evidence led is given in the judgment of the court *a quo*. The evidence against the first appellant is briefly set out hereunder:

1.1 The first appellant, in the belief that Marceline Dzumbira was having an affair with Cephas Chiparura (with whom the first appellant also operated a transport business), confronted Marceline outside her place of employment, the Reserve Bank, at lunch time on 1 or 2 December 1992. Marceline's customary law husband, Wellington Hakata, was present and gave evidence of a threat by the first appellant to assault Marceline, resulting in a struggle between the two women, followed by another threat made by the first appellant, this being to "fix" Marceline. Also present was another employee of the Reserve Bank, Mary Kapito, who deposed to the arrival of the first appellant in a beautiful brown

EBRAHIM JA

BMW motor car and an altercation between the two women, the details of which she did not hear. She saw the two of them moving towards a sanitary lane as she left the scene.

1.2 Marceline Dzumbira lived with her mother, Isabel, and daughter, Michelle, in Northwold Drive, Bluff Hill. It was the evidence of the mother and daughter that they all left home at about 7 am on 15 December 1992. The witnesses, who were about 30-40 paces ahead of Marceline, looked back when they heard a vehicle stop and saw Marceline talking to a person who had emerged from the vehicle, then heard her shouting for help and saw her being bundled into the vehicle at gunpoint. They ran back to try and assist. Michelle managed to reach the vehicle and strike it with her umbrella as it drove off at speed. The evidence of both witnesses was that Isabel shouted out the

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registration number of the vehicle to Michelle several times and, when they reached the bus stop to which they had been heading, the former handed the latter a piece of newspaper on which the latter recorded the number. Michelle also testified that she had seen the number with her own eyes. Further evidence of the kidnapping was given by Caroline Mutiniriki who lived in the vicinity. Her evidence was that she was standing at a bus stop, witnessed the kidnapping as described above, and noticed the final three digits of the vehicle's number and the letter, these being 099R. She did not consider it necessary to come forward of her own accord but, when approached by the police a number of days later, gave them those details. The vehicle was described by the witnesses as a cream (or white) pick-up with a white canopy and stripes along the side.

1.3 Isabel and Michelle then proceeded to Mabelreign Police station where a report was made to Constable Nkomo, who recorded the number which had been written on the newspaper, that number being 534-099R. Their evidence as to the recording of the number was confirmed by Constable Nkomo who produced the report form on which he had written it. Constable Nkomo (who certainly cannot be accused of being over-zealous) handed the piece of newspaper back to Isabel, then between one-and-a-half to two-and-a-half hours later, telephoned the Central Vehicle Registry. It was from that source that the vehicle was traced to the first appellant.

1.4 The evidence given by the investigating officers was that later that day they visited the first appellant's residence in Glen Lorne but she was not present when they arrived. They left a message with her son for her to

contact CID Homicide section. She arrived at Harare Central Police station late the following morning in the company of her sister Edah, taking her Izuzu pick-up truck registered in the aforementioned number, the number plates having been removed and placed inside the vehicle.

1.5 The first appellant was arrested and the following day made a warned and cautioned statement in the presence of her lawyer, Mr Fitzpatrick, the make and number of her vehicle being given in the preamble. Her statement was a denial of any involvement in the abduction of Marceline Dzumbira, together with a statement that she realised the registration number of the vehicle had been given to the police as the number of the vehicle used in the kidnapping but that her vehicle was not used and that an error had been made or somebody had noted the number of the vehicle on an earlier occasion and given it to the police to get her into trouble.

1.6 The first appellant, on 16 December and at the request of the police, had already written out a statement as to her whereabouts on 15 December, claiming to have been at her home in Glen Lorne at the time of the kidnapping but admitting to having left in the Izuzu pick-up truck. She stated that she left home at 7.25 am to go to Waddilove School. After a brief, abortive attempt to see the headmaster, she had taken the

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Wedza road where she was stranded until about 5 pm. The vehicle had suffered a puncture and she had given the wheel in question to a passing stranger who brought it to Harare for repair and did not return it until that time. On her way back to Harare, she stopped to enquire about schools in the area and visited her sister in Chiota to tell her that their mother was ill. On arrival at her home, she was told that the police were looking for her and she wanted to go to the police station but, because her husband preferred to visit the mother of Marceline Dzumbira, did not do so. She did not want to acompany her husband. The following day she removed the number plates from her vehicle "fearing they could take the numbers of my vehicle, not knowing they had already taken the numbers".

1.7 One Phillipa Ndemera, who was serving a seven year sentence for fraud, gave evidence to the effect that she had first met the first appellant at remand prison and later at the police station. The first appellant had made a full confession to her of the kidnapping and the murder of Marceline Dzumbira. As a result, the witness had offered to arrange for her brother to take the blame for the crime in return for a substantial sum of money. As a prison wardress had overheard the discussions, Phillipa Ndemera had then decided to assist the State in its investigations.

EBRAHIM JA

2. FACTS WHICH ARE COMMON CAUSE

The facts which are common cause in respect of the first appellant are as follows:

(a) during the months of August to October 1992, or thereabouts, she received various anonymous telephone calls wherein the caller advised her that her husband was having an affair with a certain woman;

(b) she ascertained at the very least the first name of Marceline Dzumbira and her telephone number;

(c) early in December 1992, she confronted Marceline outside the Reserve Bank and Wellington Hakata was present when discussions took place;

(d) she left the country on the evening of 3 December to join her husband and returned on 9 December;

(e) she is the registered owner of an Izuzu pick-up truck of the colour described by the court *a quo*, after an inspection and much discussion, as buttery yellow; the vehicle is fitted with a white canopy and bears the registration number 534-099R; the vehicle has a prominent red, black and metallic grey striped design running its length and various other features such as a bullbar;

(f) she left home in the vehicle on 15 December 1992 and did not return until about 8 pm;

(g) having gone to collect her sister, Edah, she removed the number plates from the vehicle on the morning of 16 December 1992 prior to reporting to the police at Harare

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Central;

(h) she was taken to Goromonzi Police station for a number of days some time after her arrest.

3. THE FIRST APPELLANT'S DEFENCE

The defence, briefly, to the extent that it differed from the facts that were common cause, was:

(a) that there was no violence or threats used against Marceline Dzumbira

EBRAHIM JA

outside the Reserve Bank, and, that having questioned Marceline about the alleged affair, the first appellant believed her when she denied it;

(b) the alibi given in her statement relating to events on 15 December and an elaboration thereof;

(c) with regard to her statement relating to the recording of her registration number, an allegation that the police had altered the details that had been given to them to those relating to her vehicle.

4. ISSUES

A. IDENTIFICATION OF THE VEHICLE

As was acknowledged by the court *a quo*, the crucial issue to be determined in respect of the first appellant is whether her truck was that used in the kidnapping of Marceline Dzumbira. If it was, she was in considerable difficulty, as she had admitted being in possession of the truck on that date. There are a number of factors to be considered in relation to this aspect of the matter and these are dealt with separately hereunder:

A.1 THE RELIABILITY OF THE IDENTIFICATION OF THE FEATURES OF THE VEHICLE BY THE EYE-WITNESSES

Much criticism was made by counsel of the fact that the colour of the vehicle was described as white or cream, that the witnesses described the colour of the stripes differently and that they did not mention features such as the bullbars. As the court *a quo* correctly found, the incident was traumatic for the mother and daughter of the kidnapped woman and it happened so quickly that it would have been surprising had any of the three witnesses taken careful note of all the vehicle's features. In this regard, reference was made to the observations of McNally J, as he then was, in S v Nyachito HH-42-83 as to the inability of people generally to give accurate descriptions of unexpected occurrences which happen before their very eyes.

With regard to the colour of the vehicle, even Mr Drury, who appeared for both

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appellants at the trial, apparently described the colour originally as "buttery yellow" and later as "beige", and this after a close inspection of the vehicle for far longer than the witnesses had to observe it. If the colour was given as white by one

witness, that would not be surprising in view of the fact that it was of a light colour and had a white canopy. The only difference between buttery yellow and cream is that one is a whitish yellow and the other a yellowish white. In short, the one is merely a deeper shade of the other. Isabel described the stripes as blue or light blue. Metallic grey could easily be mistaken for blue. Michelle described the vehicle as having a dark blue stripe. Black and dark blue are often difficult to distinguish. Caroline Mutindiriki described the vehicle as having red or maroon lines. It is common cause that it has a red stripe. Between them, the witnesses seem to have come fairly close to describng all the colours of the stripes on the first appellant's vehicle.

The witnesses have also come under attack for not noticing features other than the number plate. This is hardly surprising, as their attention initially was concentrated on what was happening to Marceline Dzumbira. Her mother and daughter tried to reach her and, having failed in that regard, they took the action which the court *a quo* rightly found to be the most sensible, namely, they took note of the registration number. In addition, the evidence of Caroline Mutindiriki was criticised in that she did not come forward of her own accord. Her explanation was that she did not consider it necessary to do so. This is a perfectly credible explanation, since it would have been obvious that the two other persons at the scene were related to the kidnapped woman and that they had taken the number of the vehicle in question. She could not identify anybody and had only noted part of the registration number. It is also typical of people not to want to get involved, even in the case of offences causing traffic accidents - ere was an armed kidnapping.

A.2 THE IDENTIFICATION OF THE MAKE OF THE VEHICLE

Constable Nkomo had recorded the make of vehicle as a Toyota and Michelle Dzumbira confirmed that her grandmother had said it was a Toyota. The first appellant testified that she had been told by her son that the vehicle the police were looking for was a Toyota Hilux. The word "Hilux" does not appear on the report form. The first appellant's husband had been to visit Isabel Dzumbira and may well have been told by her that she thought the vehicle to be a Toyota. Given the numerous pick-up trucks of various Japanese makes in this city (Toyota, Mazda, Nissan, Mitsubishi), it would not be surprising for an elderly woman apparently unaccustomed to

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travelling in private motor vehicles to make a mistake in this regard, particularly in the circumstances in which the identification had to be made. It is noted that the tailgate of the vehicle had been damaged; it is on the tailgate that reference to the make of such vehicles usually appears.

A.3 THE RECORDING OF THE NUMBER

Although the court had difficulty in accepting certain aspects of Isabel Dzumbira's evidence, she was believed in her evidence that the number she recorded was that of the first appellant's vehicle and that it had been recorded correctly. In this, she was corroborated by her granddaughter (one of the few witnesses who was found, properly, to be totally reliable), to some extent by Caroline Mutindiriki (another witness who was found, properly, to be reliable) and, insofar as the recording of the number was concerned, by Constable Nkomo. In addition, as already indicated, the first appellant accepted in her warned and cautioned statement that the number given to the police was that of her vehicle.

It was not put to Isabel Dzumbira in cross-examination that although she recorded the number of the first appellant's pick-up truck, she might have made a mistake in doing so. What was put to her was in keeping with what the first appellant alleged in her evidence, namely, that she had given to the police a number different from that written on the piece of newspaper, recorded by Constable Nkomo and appearing in the preamble to the warned and cautioned statement. As no suggestion had been made by any of the eye-witnesses that they saw the first appellant in the vehicle, why they should have been prepared to lie in this regard is inexplicable. Although Constable Nkomo cannot be said to be the most efficient of policemen, he was thorough in the manner in which he completed the report form. Unlike the principal members of the investigating team, he was not found to be untruthful on any aspect of his evidence, although possibly confused on details of what had transpired after the arrival of two of the eye-witnesss because of his apparent failure to appreciate the urgency of the matter or take any great interest therein. As the court *a quo* observed, his role was simply that of recording the initial report and he took no part in the subsequent investigations. Furthermore, the police appear to have had no difficulty in tracing the vehicle to the first appellant on the very

morning of the kidnapping, the obvious reason being that the number had been checked with the Central Vehicle Registry, as stated by Constable Nkomo.

A.4 THE FIRST APPELLANT'S EVIDENCE AS TO EVENTS OF THE EVENING OF 15 DECEMBER AND THE FOLLOWING MORNING

On the first appellant's evidence, she had been met with the news that the police were looking for her and with accusations from her husband after her return home

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on the evening of 15 December, and because he did not wish to accompany her to the police station she did not go. He, having been called as a witness by the court with the consent of the first appellant, testified that fear of being arrested along with his wife was his reason for not wanting to accompany the first appellant to the police station. This is not surprising because he owned a Toyota Hilux and that make, if not model, of vehicle was the one originally notified to the police. Had the first appellant been entirely innocent and had no reason to believe that the vehicle the police were looking for could be linked with her, the obvious thing to have done was to take her pick-up truck to the police station at the earliest opportunity and sort the matter out then and there. She was a very successful businesswoman and the court *a quo* found that se had the clarity, confidence and self-assertiveness that one would expect to go hand in hand with a woman in that position. In short, she was not the type of person one would expect to be afraid to go and protest her innocence to the police without needing someone to accompany her. In any event, the most appropriate person to take would have been a lawyer. She certainly would have had no reason, at that stage, to believe that the police were bent on implicating her and, furthermore, there were on the premises three people who, according to her alibi evidence, would have been able to testify as to her movements that morning. There were also, on that evidence, other people who could have testified to her movements later on that day and the sooner they were traced the better if the need arose. It is noteworthy that her husband went to visit Isabel Dzumbira. On the first appellant's evidence, whatever information Isabel Dzumbira had imparted to her husband could not have been sufficient to implicate her (yet thee he was making accusations against her). Even accepting that it was rather late to contact her lawyer and go to the police station that evening, she could have done

EBRAHIM JA

so first thing the following morning. What the first appellant in fact did was to leave home "very, very early" in the morning to travel to the area where she claimed to have been on the previous day, to tell her sister what had happened. Thereafter, she returned with her sister to her own home, had the number plates removed from the Izuzu truck, placed them inside the vehicle and then went to the police station.

A.5 EVENTS AT THE POLICE STATION

What the first appellant alleged in evidence was that:

(a) shortly after her arrival at the police station, she was taken to the vehicle (which she had left with her sister in the car park), for it to be driven into the yard where the number plates were removed from inside (it is here noted that she was not, in fact, afraid to confront the police alone);

(b) she did not tell the police about the discrepancies in the numbers and

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devoted herself to answering the questions that had been put to her;

(c) the police then prepared a preamble for the recording of a warned and cautioned statement which contained different details from those of her truck; she pointed out the discrepancies and the police changed the number accordingly. She stated that she had complained about this to her lawyer (but he was not called to give evidence even though available to do so).

In support of the first appellant's version of events, her son Malcolm was called and gave evidence that he was at home when the police called and that the number of the vehicle they were looking for was not that of his mother's truck. Unfortunately for the first appellant, he appears to have given three different versions of the number he claimed was mentioned by the police. In court, all he professed to remember was that the letter "M" was mentioned. It is also worthy of note that the first appellant and her husband had a number of vehicles at their disposal, including three BMW motor cars. In the circumstances it would be surprising, if the number of the pick-up truck was mentioned to Malcolm Masawi, that he would have been able to say whether or not it was that of his mother's truck.

EBRAHIM JA

It has been argued that the only reason why the first appellant would have removed the number plates was, as she had stated, to point out the discrepancies between the registration number of her vehicle and that given to the police. This line of argument is difficult to follow as the first appellant did not take the registration plates into the police station with her and, in any event, did not need to remove them from the truck to point out the discrepancies. Furthermore, on her own evidence, she did not point out the discrepancies even when the police took possession of the number plates. Her sister deposed to the contrary, apparently having discussed with the first appellant her explanation for removing the plates.

The most likely explanation of the first appellant's behaviour is that, having been told that the vehicle in which the police were interested had initially been said to be a Toyota, she wanted to ascertain whether that was indeed the case. If it turned out to be a Toyota, she could then show the police her vehicle without its number plates and, hopefully, that would be the end of the matter. (In addition, had the police asked where the number plates were, she could have given out that they had been removed by someone else). Having ascertained that the police were indeed looking for a vehicle of the same make and registration number as hers, her plan could not be brought to fruition and the story had to be changed, a fact which she obviously omitted to tell her sister.

A.6 THE FIRST APPELLANT'S ALIBI

It follows from the findings of the court *a quo* on credibility, which for reasons

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already indicated cannot be faulted, that a vehicle resembling that of the first appellant and bearing the same registration number was used in the kidnapping. The only argument advanced as to how that could have been the case, if the vehicle was not in fact the first appellant's, is that someone could have been trying to falsely implicate her by using a different vehicle bearing the same number. Although the first appellant did suggest in her warned and cautioned statement that someone might have been trying to implicate her falsely, she came up with no name until, belatedly and only in her evidence in court, she accused Wellington Hakata and Mary Kapito of conspiring against her. The suggestion that the vehicle used was a different vehicle but with the same number plates not only presupposes that the persons in question acquired a truck similar to

EBRAHIM JA

that of the first appellant and had number plates made specially for the purpose but also that they knew that someone would record the number and make a report to the police. It follows that Isabel and Michelle Dzumbira, Caroline Mutindiriki and Marceline herself must all have been involved in the conspiracy. Apart from the fact that this was never put to the witnesses, how much more damning their evidence would have been had even one of them testified to seeing the first appellant, or somebody resembling her, in the vehicle. Moreover, Constable Nkomo confirmed that Isabel Dzumbira was totally distraught on her arrival at the police station.

Nevertheless, it is necessary to consider whether the court *a quo* was correct in rejecting the first appellant's alibi evidence. As the court correctly observed, the most important aspect of the first appellant's alibi in relation to her whereabouts on the day in question was her assertion that she had left home at 7.25 am, ie, after the kidnapping had taken place. She could hardly deny that she was using the truck on the day in question, as she had taken possession of it on 14 December, had told various people that she would be travelling to Wedza/Waddilove the following day and had left and returned home in the vehicle. In addition, the police had come searching for it on the very morning of the kidnapping, would have been aware that the truck was not at the first appellant's home and would in all probability have been told by her son that she had left home in the truck.

In support of this aspect of her alibi, the first appellant called three witnesses who all stated that she had left home at about 7.30 am. They were her son, and two domestic workers. They appear to have had no particular reason to take note of the time of the first appellant's departure on that day and it is accordingly surprising that they all deposed to being able to pin-point it to coincide with her own evidence. That was not the only suspicious feature of the evidence. The son stated that the day was a Monday, rather than a Tuesday, and overall was found to be an unreliable witness. The other two witnesses had previously made statements to the police giving the time of departure as 6 am and 7 am respectively. It was conceded by counsel that the one, a male, was so confused as to dates and times that his evidence could not be regarded as reliable. The other, a female, alleged that the police recorded a time different from that which

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she had given to them. As the court *a quo* observed, the time given by themale would in fact have gone some way to supporting the first appellant's alibi for it was at about 7 am that the kidnapping is said to have occurred. As it would have taken the first appellant some time to make the journey from Glen Lorne to Bluff Hill, she could not

EBRAHIM JA

have left home at 7 am and been at Bluff Hill within a few minutes. In answer to this, counsel has pointed out that the two statements were recorded by different police officers. Nevertheless, had the investigating team been intent on manufacturing evidence in this regard, the least it could have been expected to do was ensure that the times recorded in the two statements were not so wildly different. The first appellant's alibi in this particular regard was correctly rejected and the fact that she went to the extent of calling false evidence to support it is yet another indication that she had no innocent explanation to give as to her whereabouts at the time of the kidnapping.

The court a *quo* considered that the rest of the first appellant's alibi was irrelevant to the question whether she had participated in the kidnapping but that it was relevant to the matter of her credibility as a whole. If the alibi was indeed false, then the absence of the first appellant from her home and business for more than twelve hours on the day of the kidnapping remains unexplained. Were the first appellant involved in the kidnapping, such absence would have a direct bearing on the question of what became of Marceline Dzumbira thereafter.

The first appellant, a successful businesswoman, would have the court believe that she went to Waddilove School to find a place for a niece, without making an appointment and on the off-chance that the headmaster would be there (in school holidays). Having gone to this trouble, she merely enquired of a passer-by (whom she took to be connected with the school and whom she was unable to identify) as to whether the headmaster was there. Having received a negative response, she made no attempt to make enquiries of anybody else. Her explanation was that the person she wanted to speak to was the headmaster. The logical thing to do in such circumstances would have been to find out when he was returning and, if it was not on that day (according to the rest of her alibi the prospect of sitting doing nothing all day did not concern her), to try and make an appointment for another day. The first appellant then allegedly drove off along the Wedza road and, having taken no spare wheel (very convenient and somewhat surprisng for a person running a transport business), was stranded on a dirt road after one of her tyres was punctured. Two vehicles having passed without the occupants even stopping to enquire whether they could assist, about an hour later a third vehicle came along driven by a white man she took to be a farmer and who offered assistance. The driver said he was coming to Harare and would take her tyre for repair but might be a considerable time as he had business to attend to. Having accepted this offer, she took his name and vehicle number

EBRAHIM JA

and wrote it on a tissue (a difficult exercise - she obviously had a writing instrument but no

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other paper, a most unlikely story for a businesswoman). The name allegedly was a long Afrikaans name and the vehicle a Landrover with only two other occupants. It was suggested that the logical thing to have done was to walk or get a lift to a business centre five kilometres away. The answer to this appears to have been that she did not know the area and where the business centre was one can but wonder why she had taken that road if that was the case and where she was heading). This is surprising as her sister lived in that general direction. It is also surprising that a businesswoman bent on seeing the headmaster of a school would have been dressed in clothes that did not preclude the possibility of a trek through the bush. In any event, why did she not make enquiries of the Good Samaritan or even ask him for a lift to Harare to get help, she ran a transport business after all? She seems to have displayed a considerable lack of enterprise, which was obviously out of character. If she considered that her vehicle was not safe left in the bush even with a puncture, she could not have been sure of her own safety knowing that she was going to be there for some hours. She had even considered the possibility that the Good Samaritan might not return, hence the recording of his name and the number of his vehicle. What then, was she going to remain guarding her vehicle indefinitely?

After receiving the tyre, having held on to this piece of tissue paper all day, she then made a point of discarding it in the bush rather than keeping it until her return home (she apparently did not want to retain the name in order to be able to express her gratitude in some way). At the end of what must have been a very trying day, when she (presumably) had not eaten, instead of going straight home she then stopped to make enquiries of more strangers about schools in the area. She also went to visit her sister at Chiota.

When the first appellant arrived home, she mentioned that she had been delayed by a puncture. She learnt about the visit of the police, was met with accusations from her husband, yet apparently made no attempt to write down the name of the Good Samaritan, the one person who could confirm her whereabouts for the greater part of that day. Even if it was a difficult name to remember, as claimed, she had managed to write it on a tissue (there are very few Afrikaans names in the Wedza telephone directory, her understanding being that the farmer came from Wedza). The next morning she returned to the same general area yet made no attempt to retrieve the tissue.

The first appellant's counsel made much of the fact that the first appellant told various people where she was going beforehand and told them about the

puncture on her return. As the first appellant obviously had to explain why she needed the truck, why she would not be at home or at work and where she had been all day, the giving out of that information is no more consistent with innocence than with guilt. Admittedly, she went with the police on indications and managed to locate some tissue paper in the area where she claimed to have been stranded but she had some difficulty in finding the spot, even after allegedly having been there for hours with not so much as a scrap of writing material, let alone any reading matter. Having sat, presumably guarding her truck, with nothing better to do than gaze at her surroundings all day, she ought to have been able to recognise every physical feature in sight. (Others were expected to be able to identify every feature of a vehicle they had seen only

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briefly). The diffiulty in locating the spot is more likely to have been attributable to the fact that she had gone to the area on the following morning, where she might well have seen or even discarded some tissue, although no finding is made in this regard.

The police have been criticised for not attempting to do anything more to establish whether the alibi was true or false even though the first appellant offered to go with them to Waddilove school. However, it was conceded by counsel that she had told the police she could not identify the person she met near the school. In addition, she could not remember the name of the Good Samaritan. Although she was obviously not short of money to employ an investigator, and even had a sister living in the area, no attempt was made by the first appellant to locate either person, save that her then lawyer put an advertisement in a newspaper asking for the Good Samaritan to come forward. Notwithstanding this and the publicity the case received, he has not done so.

It should also be mentioned that the police took soil samples at the scene of the alleged puncture and sent these with the tyre alleged to have suffered the puncture for forensic tests but the results of those tests took the matter no further.

The first appellant's sister obligingly corroborated the first appellant's alibi to the extent that she deposed to a visit by the first appellant on the day in question. However, it is common cause that the first appellant had gone rushing off the following morning to tell her what had happened; in addition, the witness showed herself to be a person who would say whatever she thought would be of assistance to her sister, even to the extent of contradicting the sister's own evidence. It is accordingly accepted that the court *a quo* was correct in rejecting the alibi as false.

EBRAHIM JA

CONCLUSION

It follows from the above that the court was correct in finding as a fact that the vehicle used in the kidnapping of Marceline Dzumbira was that of the first appellant. From the sequence of events as deposed to by the three eye-witnesses, there had to be a person other than the person who accosted Marceline driving the vehicle. The vehicle was travelling in the same direction as Isabel and Michelle Dzumbira because it passed them as it left the scene; as Marceline had also been walking in that direction, presumably she was bundled into the truck on the passenger side, in which event her assailant would have been behind her on that side of the vehicle; Isabel and Michelle were not far ahead of the truck and they started running back to help as soon as they realised what was happening. Michelle even managed to reach the truck as it drove off at speed. The assailant simply could not have managed to effect the kidnapping and drive the vehicle off at speed in the matter of seconds it would have taken Michelle to rach the truck. As soon as the driver saw the two of them start running she/he must have prepared to drive off. Since the first appellant has admitted to having the vehicle in her possession for the whole of that day, the only inference that can be drawn from this finding of fact is that the first appellant was in the vehicle at the time of the kidnapping.

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It has been suggested that the first appellant may be trying to protect somebody else. That is speculation and, in any event, the only person a woman of the first appellant's disposition is likely to want to protect by risking the sentence of death is a conspirator. She could not convincingly implicate such a person without admitting her own participation in the affair.

B. THE INCIDENT AT THE RESERVE BANK

As already stated, it is common cause that the first appellant confronted Marceline Dzumbira outside the Reserve Bank on a day early in December 1992, having suspected that her husband was having an affair with Marceline. The issue to be determined is how she comported herself thereafter.

B.1 THE FIRST APPELLANT'S VERSION

The first appellant testified that, after she had received the anonymous telephone calls (which appear to have ceased in October), she spotted Marceline's name and telephone number in her husband's diary, rang the number and discovered that it was the number of the Reserve Bank,

hence the visit. She drove to the Reserve Bank in her Izuzu pick-up truck and confronted Marceline about the allegations. Marceline hotly denied the affair and was believed because of her apparent sincerity. Marceline's husband came up to them and intervened in the discussion, indicating that Marceline was indeed a woman who had affairs with other men and was very probably involved with Cephas Chiparura whom he had seen at the house where he and Marceline stayed. Because she then realised she was attacking somebody's wife, the first appellant profusely apologised and was entirely satisfied that there was no affair between her husband and Marceline! A more improbable story is difficult to imagine. The first appellant later stated that here was no possibility of an affair between Marceline and her husband because she and her husband were always together. At the very time of the confrontation, he was in South Africa and he was not at home on the night prior to the kidnapping.

Quite apart from that piece of fantasy, there is another aspect of the matter which is totally inconsistent with the first appellant's story. It is that the first appellant, knowing only Marceline's name and place of employment, would arrive at the Reserve Bank just as Marceline happened to be leaving and immediately be able to pick her out as the alleged adulteress. It is quite evident that she had conducted, or caused to be conducted, investigations into the identity and movements of the person concerned. Moreover, had she merely harboured suspicions about an affair, it is also entirely improbable that she would have confronted the person she suspected in a public place in the centre of town at lunchtime. If she merely wanted to question her, why not use the telephone? This behaviour is far more consistent with that of a woman who knew her husband was

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having an affair, knew with whom he was having the affair and whose mission was to put an end to that affair. The denial by Marceline of the affair, even withut her husband's confirmation of the affair, would have served to add fuel to the fire. That same day, according to the first appellant, she went to South Africa to join her husband, where, undoubtedly, he would have come under attack in respect of the alleged affair and this would have been the subject of much dissension between them.

B.2 WELLINGTON HAKATA'S EVIDENCE

The court *a quo* was severely critical of the demeanour of this witness, who seemed indifferent to the fate of his wife and mother of his children

EBRAHIM JA

and who gave the impression of enjoying the experience of being in court. Given that his evidence was to the effect that the affair between his wife and Cephas Chiparura was breaking up his own marriage, the court found that the attitude of indifference must have been affected. Notwithstanding this, he was believed in his testimony as to the events at the Reserve Bank.

After he had intervened to prevent the assault on his wife, the witness's evidence was that the first appellant asked him if "this bitch and prostitute" was his wife. The threat then alleged to have been uttered by the first appellant was substantially that "you are used to taking other people's husbands - this is the last time you do it and this will not end until I have fixed you". Marceline denied being in love with Cephas Chiparura and the first appellant calmed down. The witness then went and spoke to a friend he had spotted. The first appellant later approached him and asked for his telephone number.

On the evidence of both Hakata and the first appellant, Hakata did intervene at some stage. The probability is that the first appellant would have been forced to calm down once she realised that Marceline's husband was present. Hakata's evidence is certainly more probable than that of the first appellant. However, even if no threat was made, it is unlikely, for reasons already stated, that the first appellant would have been content to let the matter rest there.

Certain of this witness's evidence has been attacked as being unreliable, for example, that various reports were made of the incident to the police by Marceline Dzumbira and himself.

Apart from the inherent improbability of the conspiracy theory, which has been dealt with above, one can but wonder why this witness chose the wife of Cephas Chiparura to implicate rather than Cephas himself. It would certainly be a most complicated and risky way of taking revenge on his rival, involving a great deal of preparation and a number of other people. If the witness was seeking revenge, on his own evidence he had found an ally in the first appellant, as she was also

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obviously seeking revenge and had asked him for his telephone number. In short, the witness was more likely to have been involved in a conspiracy with her than against her. His attitude suggests that, at the very least, he had appreciated that he might be treated as a conspirator. This would explain his stories of reports to the police and his feigned indifference to the

breakdown of his marriage as a result of the affair with Cephas Chiparura. (If he was involved in a conspiracy with the first appellant, this could be the reason for hisapparent enjoyment of the experience of being in court; he could tell the truth about her, but she could not do the same about him without implicating herself).

B.3 MARY KAPITO'S EVIDENCE

Apart from the fact that she confirmed that the first appellant pushed Marceline, the evidence of this witness really took the matter no further. However, she testified that the incident happened prior to 3 December and that the first appellant arrived in a BMW motor car, not a pick-up truck. From what appeared in the State outline, it seems that she was expected to corroborate the evidence of Wellington Hakata to a greater degree than she in fact did. If she had changed her story, this worked to the advantage of the first appellant not against her. Why she would then lie on the matter of the identity of the vehicle in which the first appellant arrived is a mystery. Evidence was led to support the contention of the first appellant that her BMW was out of action at the time and that her husband's BMW was in South Africa being serviced at the time and that they owned a third BMW. Two of the vehicles were maroon, one of them being that of the first appellant. One of the others was maroon and the third vehicle wa green. If the vehicle that was available was maroon, that is a colour that could be mistaken for brown. In any event, these two seemed to have so many vehicles at their disposal that they probably would have had access to a brown BMW as well as all the others, as the court found.

The obvious reason why the first appellant claimed to have arrived in the Izuzu pick-up is that she wanted to find some way of supporting her conspiracy theory. As she had to explain away the evidence that she arrived in a BMW, she had no alternative but to suggest that Mary Kapito was involved in the conspiracy. One thing is certain in this regard - if Mary Kapito had been involved in the conspiracy alleged, she would have given evidence that was far more incriminatory of the first appellant than she in fact gave.

B.4 THE EVIDENCE OF CEPHAS CHIPARURA

This witness was no more credible than his wife. He denied having an affair with Marceline Dzumbira, saying that she was merely somebody

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he had met at the gym where he trained. Nevertheless, he testified that Marceline had telephoned him at the hotel where he was staying in Johannesburg to tell him of the incident at the Reserve Bank and that he had visited Isabel Dzumbira on the day of the kidnapping after hearing about the event at a party at the gym. These events indicate a degree of familiarity with Marceline's mother, as well as considerable familiarity with Marceline herself. The court *a quo* was undoubtedly correct in finding that Cephas Chiparura was involved in an affair with Marceline Dzumbira.

CONCLUSION

That Marceline Dzumbira and Cephas Chiparura were involved in an affair, that the first appellant knew of this and went to confront Marceline in a vindictive and violent mood. The denial of the affair by Marceline did not assuage her anger but the intervention of Wellington Hakata frustrated her mission. She left still vengeful and intent on "fixing" Marceline.

C. THE ALLEGED CONFESSION TO PHILLIPA NDEMERA

This evidence was rightly rejected by the court *a quo*, which found it quite unworthy of belief. Having persisted in her protestation of innocence to the police, it is indeed improbable that the first appellant would make a confession to a total stranger. In fact, the court also found that the police had taken the first appellant to Goromonzi Police Station after this alleged confession with the sole purpose of extracting a confession from her by threats and by violence, yet failed in their endeavours. While it is now a notorious fact that cases are "bought" by fellow prisoners, one can but wonder what would motivate a person to admit to a capital crime in exchange for any sum of money. Of what possible benefit could money be to him if he were going to be hanged?

The most significant feature of this witness's evidence was that her brother would confess to the crime once the whereabouts of Marceline's body was disclosed. The police, of course, were investigating what they believed to be a murder case but had been unable to locate the body of the victim. The two women were placed together in a cell at the police station on an occasion when the first appellant was taken there from prison and questioned somewhat inconsequentially. Coupled with the improbable evidence that the witness afterwards decided to assist the police with their investigation, the logical conclusion is that the witness was being used by the police in an attempt to

implicate the first appellant. However, this kind of suspect behaviour on the part of the police only appears to have commenced after the arrest of other persons they believed to be implicated in the offence, including the second appellant, and will be dealt with in more detail later. It is interesting to note that the first appellant, suspecting the witness to be an informer and having been placed with her to set a trap, asked that they should not be placed together at Chikurubi Prison. If she was not involved in the disappearance of Marceline Dzumbira, what had

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she to fear?

5. THE VERDICT

It is implicit in the conclusion drawn on the most crucial issue, namely that the first appellant's vehicle was used in the kidnapping and that she was in possession of it at the time, that she is guilty at least of the alternative charge of kidnapping. There being no corpus delicti, the final issue to be determined is whether the court *a quo* was correct in its verdict of murder with actual intent. As the court properly found, the fact that a person has been murdered can be proved by circumstantial evidence if the evidence leads to that one conclusion of fact, even if no corpse has been found. See *S v Shoniwa* 1987 (1) ZLR 215 (S) 218.

In this regard, the facts set out hereunder are apposite:

5.1 Marceline Dzumbira has now been missing for a period of over three-and-a-half years, having last been seen by her mother and daughter being bundled into a vehicle at gunpoint.

5.2 The first appellant had, about two weeks prior to the kidnapping, confronted Marceline in a vindictive and violent mood, accusing her of having an affair with Cephas Chiparura and had probably made the threat alleged. Shortly thereafter, the first appellant went to join Cephas Chiparura in South Africa, where he had received a telephone call from Marceline advising him of the incident at the Reserve Bank and where the subject of the affair would undoubtedly have been discussed.

5.3 The first appellant, who was obviously used to driving BMW motor cars, made a point of telling people that she would be using the truck on 15 December and why she needed to do so, namely, that she would be going to the Wedza area (where she would be travelling on dirt roads).

5.4 The first appellant, who was in possession of the vehicle in question, was missing for more than twelve hours on the day of the kidnapping.

EBRAHIM JA

5.5 The first appellant lied on every critical aspect of the matter and has persistently denied any involvement in the kidnapping, thus indicating that she would rather risk the death penalty than admit to a less serious charge. If she admitted that charge, she would obviously have to explain what happened to Marceline after she had been kidnapped but does not want to do so. No reasonable explanation has been advanced as to the possible whereabouts of Marceline. It has been suggested that she might have left the country and that the police should have checked all border posts. Given that:

(a) the conspiracy theory has been rejected as totally improbable;

(b) it is improbable that she would have been carrying her passport on the off-chance of leaving the country that day;

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(c) had she been forced to leave the country, she would undoubtedly have contacted her family;

such a check would have been an exercise in futility.

5.6 The first appellant, having called a number of witnesses who gave false evidence, did not call her husband as a defence witness, which is not surprising in view of her evidence as to his conduct on the evening of 15 December and the following morning. Although, when he was called by the court, he professed to be a caring husband who believed in his wife's innocence, he would not accompany her to the police station because he was afraid that he might be arrested along with her. The evidence is also inconsistent with his admission that he was selling the joint assets. His whole attitude, after the kidnapping, was one of total lack of concern for his wife and a selfish concern that he might be implicated along with her. He has given her no assistance and now wishes to be dissociated from her completely. As found by the court *a quo*, he knows far more than he was prepared to tell the court; what he knows must be very damning.

5.7 The police have also been criticised for not conducting a search for the body anywhere other than on properties owned by the first appellant in the Mutoko area and in certain mineshafts in that area. The first appellant's absence for more than twelve hours would mean, if she indeed killed Marceline Dzumbira, that the body could be anywhere within a very wide radius of Harare, including the bottom of Lake Kariba. It would hardly have been a practical proposition for the police

EBRAHIM JA

to search every possible place within that radius and drag Lake Kariba etcetera in an attempt to locate the body.

CONCLUSION

The only conclusion that can be drawn from the aforementioned facts is that the first appellant needed the truck that day because she intended to travel into a remote area. She needed a gun because she intended to "fix" Marceline Dzumbira once and for all. She needed an accomplice because she could not effect the exercise alone. She was missing for more than twelve hours because she wanted to dispose of the body as far away from Harare as she could and in a place where it was unlikely to be found.

Accordingly, the only verdict which is appropriate is that of murder with actual intent and the only possible penalty that can be imposed is that of death.

KENNETH MASAWI

1. THE STATE CASE

The evidence led against the second appellant is summarised hereunder:

1.1 On the morning of 2 December 1992, the second appellant visited the home of

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Marceline Dzumbira in the company of persons collectively referred to as the "Chivaku group" whose stated mission was to drop off or pick up certain property, variously described as telephone cords, television sets, computers or crankshafts. There were three visits that morning. The second appellant, the spokesman for the group, spoke to Isabel Dzumbira who, on the second visit, became suspicious and recorded the registration number of the vehicle in which they arrived. There was also evidence of a further visit on 4 December when nobody was present at the house. The number of the vehicle recorded was, at some stage after the kidnapping, given to the police.

1.2 The person who accosted Marceline Dzumbira on 15 December was tall and of slight build, wearing a navy blue hat pulled down over the face, fairly substantial dark glasses and a dark suit. This person was identified by Isabel Dzumbira as the second appellant.

1.3 On 22 December, Detective Sergeant Moyo, who was a member of the investigating team, made checks through the Central Vehicle Registry and established that the vehicle that had been at Marceline's home on 2

EBRAHIM JA

December was registered in the name of Allen Chivaku. Allen Chivaku was arrested in December, as were his brothers, Christopher and Brian, Munetsi Mudziviri, a police reservist Richard Makichi, Regis Chikosha and Godwin Dangarambizi.

1.4 All of these persons admitted to one or more of the visits to Marceline Dzumbira's home and implicated the second appellant, saying that he was the driving force behind the visits.

1.5 Late at night on 28 December, and acting on the information received, the police visited the family farm of the second appellant in the Muda Purchase area, searched for the second appellant, spoke to his wife and took possession of a navy blue pin-striped suit, a grey hat and a pair of sun-glasses. In court, Isabel Dzumbira purported to be able to identify these items of clothing as those worn by her daughter's kidnapper.

1.6 Early in the morning of 29 December, the police, who were in two cars, took the second appellant's wife and child back to Harare with them, each in a different car; the car carrying the child happened to pass the second appellant's town residence, 15B Beatrice Cottages. The house was pointed out as such by the child and the police surrounded the house, knocked on the front door and identified themselves as police officers. The second appellant went to the back door, tried to make good his escape and was arrested after a struggle. Detective Sergeant Moyo then searched the house and found a pistol under the mattress of a cot. The second appellant ascribed the ownership of the pistol to one Elliot who lived in Glen Norah and an unsuccessful attempt was made on the way to Harare Central Police Station to locate Elliot.

1.7 After being moved from one police station to another, the second appellant was taken

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to Harare Central Police Station on 4 January, where he was asked to participate in an identification parade and, having declined to do so, was seen by Isabel Dzumbira in one of the offices in which she had been asked to look by the police. On seeing the second appellant, she stated "he is the one".

1.8 In January, a warned and cautioned statement was recorded by Detective Sergeant Moyo, in the presence of the second appellant's then legal practitioner, Mr Munyani. The allegation was one of kidnapping and in response the second appellant, after consulting with his legal practitioner, denied the allegation, said that he was innocent and would give his defence outline in court.

EBRAHIM JA

1.9 In January, the second appellant was placed on remand where it was alleged that he had been arrested after brandishing a gun and attempting to fire at the police and that a round was found in the chamber of the pistol.

1.10 It was part of Phillipa Ndemera's evidence that the first appellant implicated the second appellant in her confession and that notes were written that purportedly emanated from the second appellant. As a result, both appellants were taken to Goromonzi Police Station.

2. FACTS WHICH ARE COMMON CAUSE

The following facts are common cause in relation to the case against the second appellant -

(a) the person who had bundled Marceline Dzumbira into the pick-up truck was described as tall and slightly built and wearing a dark suit, sun-glasses and a dark hat;

(b) the said person was armed with a firearm;

(c) the second appellant knew Christopher Chivaku well before the kidnapping;

(d) the police arrested the second appellant at his home at Beatrice Cottages after paying a visit to the family farm and picking up his wife and child;

(e) the clothes of which the police had taken possession belonged to the second appellant;

(f) on the way to Harare Central Police Station, a visit was paid to Glen Norah to look for one Elliot;

(g) the second appellant was moved from one police station to another after his arrest;

(h) when the identification of the second appellant by Isabel Dzumbira took place, the second appellant was in a dirty, dishevelled state, he was handcuffed and, at least on the evidence of one police officer, leg-ironed; there were no other persons except witnesses in the office at the time;

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EBRAHIM JA

(i) the second appellant was taken with the first appellant to Goromonzi Police Station;

(j) a number of the "Chivaku group" remained on remand in custody on the same charges as the appellants for six months or more.

3. THE SECOND APPELLANT'S DEFENCE

Basically, this was a denial of the alleged visits to Marceline Dzumbira's home on the dates in question, a denial of any involvement in the kidnapping, or of having been in possession of a pistol, a denial of writing the letters to which Phillipa Ndemera had referred, and alibi evidence relating to his whereabouts on the relevant dates. The second appellant maintained that the witnesses who gave evidence against him were falsely implicating him in the offence at the instance of the investigating officers.

At this juncture, it is appropriate to mention that the court *a quo* had little hesitation in rejecting the contention that the witnesses were falsely implicating the second appellant in the commission of the offence, notwithstanding the findings on credibility that are referred to hereunder.

3.1 Isabel Dzumbira was a dogmatic witness who gave the impression that had she given up any ground at all then all would be lost, and that her evidence as to her ability to identify the second appellant as being the person who bundled her daughter into the pick-up truck was totally unreliable.

3.2 The evidence of the "Chivaku group" as to the purposes of their visits to Marceline Dzumbira's home was contradictory and difficult to understand and they had not taken the court fully into their confidence. In addition, the statements of the "Chivaku group" had been altered by the police in certain respects.

3.3 The investigating officers lied in -

(a) their denial of an assault on the second appellant at the time of his arrest;

(b) the explanation they gave as to their reasons for the movement of the second appellant from one police station to another after his arrest;

(c) the details they gave to the remand court as to the circumstances surrounding the arrest;

EBRAHIM JA

(d) their reasons for taking the two appellants to Goromonzi Police Station, the finding being that they had been taken there for the purpose stated by both appellants, namely that of attempting to extract confessions from them by force.

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3.4 The evidence of Phillipa Ndemera was completely untruthful. As was established by a handwriting expert, at the instance of the defence, the second appellant did not write the letters that the witness and the police accused him of having written. It has already been indicated that this witness was being used by the police.

In the light of the above, it is small wonder that the second appellant should allege a conspiracy. It has already been observed that the suspicious behaviour on the part of the police commenced only after the arrest of the "Chivaku group". It is necessary to stress that it has no bearing on the case of the first appellant, whose evidence in court was different in certain material respects from the statements made at the time of her arrest. That was an obvious attempt by her to climb on the bandwagon and claim that the police were falsely implicating her as well.

4. THE ISSUES

A common thread running throughout the judgment of the court *a quo* wherever both the second appellant and the State witnesses were found to be lying is that of straining to find which was the more credible on material issues. Accordingly, it is necessary to exercise extreme caution in determining whether the court *a quo* made correct findings as to credibility on those issues.

4.1 THE IDENTIFICATION OF THE SECOND APPELLANT BY ISABEL DZUMBIRA

It is on this identification that the case against the second appellant stands or falls. When the witness identified the second appellant at the police station, was she pointing him out as the person who had kidnapped her daughter, as the person she had spoken to at her house on 2 December, or as the person who had been arrested by the police?

4.1.1 The witness would have it that it was the first of these alternatives, claiming that the reason she had been able to recognise the second appellant was that she had seen him at her house on 2 December.

EBRAHIM JA

This evidence is in direct conflict with that given by Constable Nkomo and the contents of his report form which indicated that there was no suspect and gave no description of the person concerned. Isabel's answer to this was that she was not asked the relevant questions. This explanation was properly rejected by the court *a quo*. Whatever Constable Nkomo's shortcomings, he had completed the report form thoroughly and, in any event, as the court observed, if the witness had recognised the person in question this information would have been volunteered immediately. Moreover, in the circumstances in which the kidnapping took place, it would have been impossible to recognise someone to whom she had previously spoken very briefly, more particularly as that person was some distance away, had a hat pulled quite far don over the face and was wearing dark glasses.

4.1.2 The court appeared to prefer the second of the three alternatives. Having rejected the attempt on the part of the witness to identify the second appellant as the

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kidnapper, it then attempted to explain away the obvious lie. It did so by finding that identification to be an ex post facto rationalisation after the witness had sat down and thought about the matter and later that day connected the person who had been at her house on 2 December with the person who had kidnapped her daughter. This dawning came, according to the court, probably after the witness had spoken to Detective Sergeant Moyo and others, including Wellington Hakata. She may at some stage have connected the two incidents but it does not follow that she connected the two persons. Furthermore, it is not clear when this connection took place. There is no evidence that she at any stage prior to the arrest of the second appellant told the police that one and the same person was involved in both incidents. The registration number of the vehicle she ad seen at her house on 2 December was not checked until a week after the kidnapping. She was not able to point to a single distinguishing feature when asked how she was able to identify the second appellant as the person who had visited her house on 2 December. All she was able to say was that the person was tall and dark in complexion. She even went so far as to try to identify the clothing produced in court as that worn by the kidnapper, testimony which the court said it would deal with later in its judgment but omitted to do, presumably not having considered it reliable.

EBRAHIM JA

4.1.3 The result is a strong suspicion that the witness made no connection between the kidnapper and the person who had visited her house on 2 December until after the arrest of the "Chivaku group" and its implication of the second appellant. Having regard to the suspect behaviour of the police, it may well be that they made the connection rather than the witness. It is at least a reasonable possibility that they told the witness they had arrested the person who had been at her house on 2 December and that the person was the brother of the first appellant. Be that as it may, it was accepted by the court *a quo* that the identification at the police station did not assist in increasing the credibility of the witness. How true - the circumstances were such that this was not an informal identification parade properly so called but an invitation to the witness to identify the second appellant. As counsel so aptly put it, the second appellant stood out like a beacon in the night. In short, the third alternative is a distict possibility, if not a probability.

The finding of the court *a quo* with regard to the identification was, in effect, that because the second appellant was the person who had been at the witness's house on 2 December and because of the supposed ex post facto rationalisation, the best that could be said was that the kidnapper substantially resembled the second appellant. In the light of the above criticism of the approach of the court, the fact that the witness could point to no distinguishing features and the fact that she would not have been able to recognise any facial feature of the person who kidnapped her daughter, the court misdirected itself in this regard. The only resemblance that can be said to exist is that the kidnapper and the second

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appellant can both be described as tall and slightly built (but how tall and how slightly built was the kidnapper remains a mystery). If this amounts to a substantial resemblance, there must be thousands if not millions of other residents of this country who could be prime suspects. It is not even certan that the person concerned was a man. Whoever it was had hidden the hair and attempted to hide the facial features and it is reasonably possible that it was a female in male clothing.

It should be added that the witness contradicted herself on the details of the visits by the "Chivaku group" to her home, a fact which she explained away by virtue of her inability to read and, therefore, check her statement before she came into court. This is

surprising in view of her undoubted ability to read registration plates.

4.2 THE IDENTIFICATION OF THE SECOND APPELLANT BY THE "CHIVAKU GROUP"

In essence, the court's reason for accepting the identification of the second appellant as having been the driving force behind the visits to the Dzumbira residence and having been present thereat was that Isabel Dzumbira had identified the second appellant and that the second appellant had not given a convincing reason why the "Chivaku group" should implicate him. The numerous discrepancies in their evidence were said to be a sign of honesty on their part as they had no particular reason to remember the events (being essentially a group of layabouts who had nothing better to do to than while away their time visiting the home of somebody unknown to them for inexplicable reasons). Given that three to four weeks had elapsed between the time of those events and their arrest, they could not be expected to recall the details of the visits or the reasons therefor. It was found that there was nothing inherently suspicious in the changing of their statements by the police, it being perfectly in order to clear up incosistencies in this manner. It was found that there was no likelihood of the police having put them up to the giving of false evidence because they had been treated as principal offenders and kept in custody for months and because they did not attempt to implicate the first appellant. The possibility does not appear to have been considered that, had they been involved in the kidnapping of Marceline Dzumbira, the last person they would want to associate themselves with would be the first appellant. The second appellant was known to them (through a prior criminal association?), he would have been known to be the brother of the first appellant and a more likely suspect than any of them. If they wanted to let themselves off the hook, the obvious person to incriminate would be the second appellant. The same could be true even if their presence at the Dzumbira residence was connected with some unrelated illegal activity about which they did not want the police to learn.

It is also a point of some concern, that the court regarded the totally unreliable evidence of Isabel Dzumbira on the question of the identification of the second

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appellant as corroborative of that of this group of obvious ne'er-do-wells and liars. The conclusion is that the evidence implicating the second appellant as having been present at the Dzumbira residence on 2 December was, to say the least, suspect.

EBRAHIM JA

4.3 THE LINK BETWEEN THE ALLEGED VISITS AND THE KIDNAPPING

For the sake of argument, it is proposed to assume that the second appellant was present during these visits to the Dzumbira residence. This does not in itself provide the missing link between him and the first appellant which, in the absence of any better identification than that given by Isabel Dzumbira, is needed to implicate him in the kidnapping of Marceline. Admittedly, the first appellant appears to have tried to dissociate herself from these activities by saying that the incident outside the Reserve Bank took place on 3 December. Even if she had nothing to do with the visits, that could have been attributable to the fact that the evidence thereof was obviously being used as another link in the chain of evidence against her in an attempt to show that her brother had been guilty of suspicious conduct in relation to Marceline Dzumbira. She might, if she knew that her brother was innocent of the kidnapping, have been trying to protect him. It certainly cannot be said that the visits were clearly associate with the kidnapping, nor did the court *a quo* reach such a conclusion. In fact, it could find no rational or logical explanation for the visits. Possibilities with regard to the reason for these visits are set out hereunder:

4.3.1 One piece of evidence which is significant in this regard is that Isabel Dzumbira herself testified to having said, when told the purpose of the visits was to deliver property that had been left behind in Zambia by Marceline, that Marceline had told her about the issue and had said that no property was to be left at or taken from the house without her say so. There were suggestions made by members of the "Chivaku group" that Marceline was involved in drug and currency smuggling. Given that she worked at the Reserve Bank and had a lover who ran a transport business, this possibility cannot be excluded. The second appellant claimed that the reason why Cephas Chiparura had become involved in the conspiracy against him was that he was interfering in the latter's transport business. The court dismissed this possibility because there was no evidence that the second appellant had been involved to any great extent in the business. It does not appear to have considered the possibility that the second appellant was notgoing to admit to being involved in any illegal activities with regard to that business. Having taken the number of the BMW motor car in which the second appellant is said to have arrived at her home,

EBRAHIM JA

Isabel Dzumbira did not report these suspicious occurrences to the police, merely

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writing them off as annoying. What then was the point of taking the number? She must have told Marceline of the incidents. Did Marceline recognise the description of the vehicle and allay her fears?

4.3.2 If the "Chivaku group" was known to Marceline, it would undoubtedly have been known to Wellington Hakata who could have enlisted its services to try and plant incriminating evidence on Marceline if he too wanted to "fix" her. It is noted that there was a police reservist in the group and that Marceline's mother had said she was expected home at lunchtime, it being a Wednesday. They appeared to be anxious to complete their objective before Marceline's return. Had that objective been to plant incriminating evidence, the police reservist could have effected an arrest on her return. Wellington Hakata certainly had as much of a motive to "fix" Marceline as did the first appellant and there was evidence from the police to the effect that he owed Marceline money. One of the reports he allegedly made to the police was a report to a member of the Commercial Crime Unit which, as observed by counsel, was not the appropriate department to which to report the incident at the Reserve Bank.

4.3.3 It could, of course, be that a similar scheme was devised by the first appellant in an initial attempt to "fix" Marceline. If her brother was associated with the "Chivaku group", she almost certainly would have known about the association. Alternatively, she might simply have been trying to confuse matters as much as possible in order to set the police chasing red herrings when she eventually carried out her plan to "fix" Marceline once and for all. If that was her idea, she certainly would have succeeded had it not been for the fact that Isabel Dzumbira noted the numbers of the two vehicles concerned. In either event, it is most improbable that she would then have taken the risk of using her brother in the kidnapping. She went to the trouble of making sure the person who accosted Marceline could not be identified, of working out an alibi in advance, went rushing off to the general area where she was supposed to have been stranded and collected an alibi witness when she realised she was in difficulty, removedthe number plates from her vehicle before going to the police station and generally showed herself to be a most enterprising person and one who would not take the risk

EBRAHIM JA

of establishing a link between herself and her accomplice (particularly if he were known to the police). The one factor she would not have considered was a false identification of the second appellant by Isabel Dzumbira. In fact, it was never put to either appellant that they had seen one another between November, when they had returned from a trip to Malawi, and 15 December.

In short, the events of 2 and 4 December take the matter no further, even if the second appellant was present and the driving force behind the visits.

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4.4 THE ARREST OF THE SECOND APPELLANT

The events prior to and at the time of the arrest of the second appellant, on the second appellant's version, were as set out hereunder:

4.4.1 On 18 December, he went into Marondera and read the news of his sister's arrest in The Daily Gazette. He came into Harare and consulted a lawyer with a view to having an application made for bail. He stated that he did not go to see his sister in prison because remand prisoners are allowed only one visitor a week (true) and he heard that she had had a visitor. The court *a quo* found this to be an improbable story and that the most reasonable action to have taken would have been to go to the police or at least try to see his sister. This line of reasoning is very difficult to follow. The natural reaction of many, if not most, people in such circumstances would be to go to a lawyer. Of what possible help could the police be?

4.4.2 He was at the family farm at Muda when he received a visit from Cephas Chiparura telling him the police were looking for him and that he should leave the country. He told his wife where he was going and set off for his Harare residence intending to report to the police the following day. His wife confirmed that she had told the police where the second appellant had gone. This was not put to the police in cross-examination, but it is common cause that the police brought the wife and child to Harare with them. One can but wonder why if they had not been given any reason to believe that the second appellant was in Harare unless, of course, they were going to torture these two as well.

Cephas Chiparura gave evidence to the effect that he went to Muda

to tell the second appellant that the police were looking for him. When told of his right not to answer any questions relating to the suggestion that the second appellant should leave the country (on the grounds that he might incriminate himself in the offence of attempting to obstruct or defeat the course of justice), he availed himself of that right. This seemed to surprise the court. What is more surprising is that Cephas Chiparura, who had showed no concern for his wife, should be so concerned about the fate of her brother. Did Cephas Chiparura have something to hide regarding his association with Marceline Dzumbira (such as her involvement in the smuggling activities mentioned by the "Chivaku group") that he was afraid the second appellant might reveal to the police? The second appellant's evidence that he was told to leave the country was certainly a damning and unnecessary piece of evidence to have given if he was involved in the kidnappng. He was not attempting to pre-empt any evidence that Cephas Chiparura might give, as he could not have foreseen that the latter would be called as a witness by the court. The second appellant's allegation that Cephas Chiparura was trying to incriminate him was accepted by the court *a quo* as a

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possibility but one too remote to take seriously even though it was also accepted that the latter knew more than he had disclosed to the court. The evidence that the first appellant was told to leave the country was seen as another indication of his guilt, yet Chiparura's explanation for going to Muda that day was that he understood the failure to apprehend the second appellant was preventing the first appellant from being released on bail. Why then go and warn the second appellant that the police were looking for him?

Were it not for the evidence of the first appellant of accusations made against her by Cephas Chiparura, his apparent indifference to his wife's fate and his obvious desire to dissociate himself completely from her, the temptation would be to draw the inference that he was involved in the kidnapping. Although at the time of the visits to Marceline Dzumbira's home, Cephas Chiparura was in South Africa, he could have been the person who arranged for the delivery of property to Marceline. One might ask how he knew the police were looking for the second appellant as this incident seems to have occurred before, or on the same day that, the police started to arrest members of the "Chivaku group". Did he obtain the information from the police or from a member of that group? Did

he tell the members of that group to implicate the second appellant? Was he being used by the police to try and incriminate the second appellant? These questions remain unanswered but it is clear that, for some reason, Cephas Chiparura wantedthe second appellant to leave the country and it was not out of concern for his wife or the second appellant himself.

4.4.3 The second appellant left the Muda farm, having been told the police were looking for him, yet leaving behind the clothes he was alleged to have been wearing at the time of the kidnapping, and which he did not suggest the police had planted. He headed for his Harare residence, which he must have known the police would be able to locate eventually even if they did not already know the address. The police say that it was pointed out by the second appellant's child, yet some of the "Chivaku group" must surely have known where it was if it was indeed they who had implicated the second appellant. That residence would have been the most obvious place for the police to commence their search.

4.4.4 The police claimed that the second appellant tried to escape when they announced their presence. The second appellant denied this. Even if he did try to escape, his action could have been out of fear that somebody was trying to implicate him in the kidnapping (particularly if he was known to the police). Not being disposed to understatement, the police would also have it that the second appellant tried to make good his escape even though they had surrounded the house and were apparently armed. That would have been the height of folly on his part. The second appellant's version was that when he saw them, he obeyed their instructions to sit down and was then beaten until he was unconscious. While the

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court *a quo* accepted that the second appellant had been assaulted, despite the assertion by the police that they had used only such force as was necessary to effect the arrest, it refused to accept the second appellant's version of the assault on the basis that, had he been rendered unconscious, it is improbable tht he would have been able to remember the events in detail. Unconsciousness does not invariably lead to amnesia.

The cold, hard facts of the matter are that the second appellant was assaulted by the police, shunted from one police station to another, refused medical treatment, denied access to a lawyer for days,

EBRAHIM JA

made the subject of a suspect "informal identification parade" and, to crown it all, placed on remand on facts which included blatant lies on the part of the police. These lies to the remand court were dismissed by the court *a quo* as being of no significance because the police did not persist in them at the trial, yet the court went on to find that the police had lied in denying any assault on the second appellant at that very trial. This was excused on the basis that they would have been afraid to admit the assaults because they would have been admitting to having acted unlawfully. Was their lying to the remand court not unlawful? That lie, furthermore, was repeated to the second appellant's lawyer. The police were nevertheless believed when they changed their story and deposed to having found a pistol in the second appellant's Harare residence, on the basis that it was improbable that they would have planted evidence to strengthen their case! They were certainly not trying to weaken that case when they initially alleged that the second appellant had tried to fire at one of them. Another unanswered question is whether they had the pistol checked for fingerprints. If they had indeed found it under a mattress in the second appellant's residence, it is unlikely they would have been stupid enough to put their fingerprints all over it. This was Homicide Section. Was the lack of fingerprint evidence perhaps why they initially decided to say that they had to overpower the second appellant because he came out of his home brandishing a pistol? It certainly was not to excuse the assault on him because they persisted in denying that to the end.

The only other piece of evidence in favour of the version of events deposed to by the police related to the purpose of the visit to Glen Norah but if it is accepted that the pistol could have been planted by the police, the story given by the second appellant does not become improbable. He also alleged that the police had told him that even if he were not found guilty of the kidnapping, he would be charged with the possession of an unlicensed firearm.

In any event, the pistol was not identifiable as that used in the kidnapping and the second appellant might well have had it in his possession for some other purpose. He certainly seems to have been involved with some unsavoury characters and it sounds very much as though he was not a stranger to crime. He appears to have

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had no personal motive for wanting Marceline Dzumbira out of the way and it does not follow that, simply because he might have been

engaged in some criminal activity, he would have been prepared to assist his sister commit murder.

4.5 EVENTS AT THE HARARE CENTRAL POLICE STATION

The second appellant having been assaulted, shunted from one police station to another, again assaulted (reported when he was placed on remand), denied medical treatment and access to a lawyer, and brought to the police station in a dirty, dishevelled state, refused to participate in a formal identification parade and stated that he wanted to engage the services of a lawyer to avoid having to make a statement. In addition to all this, his wife and child had been picked up by the police at Muda and brought to Harare. In the circumstances, the second appellant had good reason to fear what the police might do if a formal parade were held and if he gave out his defence at the time. Significance was attached to the fact that he had given two different versions of what had happened regarding the so-called informal identification parade and that his lawyer's version was different again. Unlike the State witnesses, he was not suggested by the court *a quo* to have been confused by reason of the passage of time yet, whie he may have had better reason to remember the event, far more than a few weeks had elapsed at the time he made these statements. He had also been subjected to further ill-treatment at the hands of the police. In addition, his lawyer's file could not be located and, not surprisingly, the lawyer only had a vague recollection of events.

The court *a quo* drew an adverse inference from the fact that the second appellant had refused to make a statement to the police even though he had consulted his lawyer, albeit briefly. It was wrong to do so in view of the appalling conduct of the police. Furthermore, even if the second appellant had good reason to be concerned about being identified by Isabel Dzumbira, the concern would have related to the visits to her home and those have not been proven to have been connected with the events of 15 December.

4.6 THE EVIDENCE OF PHILLIPA NDEMERA

The significance of this false evidence to the second appellant's case is that letters allegedly written by him were produced and were found not to have been in his handwriting. Once again, there is a strong suspicion that the police were doing their best to incriminate him.

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CONCLUSION

The case against the second appellant, therefore, is based on -

(a) the possibility that he had visited Marceline Dzumbira's home on 2 December in circumstances that do not on the face of it link him to the kidnapping;

(b) the fact that both he and the kidnapper can be described as tall and slightly built;

(c) the fact that it was his sister's vehicle that was used in the kidnapping;

(d) the possibility that he attempted to evade arrest and that an unlicensed pistol was found at his Harare residence, coupled with the fact that a firearm was used in the kidnapping of Marceline Dzumbira;

(e) the fact that the second appellant gave two different versions of what had happened at the so-called informal identification parade.

Unlike the case against his co-appellant, there is absolutely nothing to place the second appellant at the scene of the crime. There is nothing to link the visits to the Dzumbira home with the kidnapping which took place almost two weeks later and after an undoubted confrontation between the first appellant and her husband. Accordingly, there is no evidence on which to convict the second appellant, even in the absence of a convincing alibi. It is not even necessary to consider the reliability of his alibi relating to 2 and 4 December as, even if he did visit the Dzumbira residence, he may not have wanted to disclose that fact. The visits were obviously being connected with the kidnapping by the police and he was the brother of the principal suspect. His alibi for 15 December was that he was at Muda ploughing. That was not disproved by the State and was in fact confirmed by his wife (as was his alibi of the earlier dates). The wife was found to be an unreliable witness simply because she was his wife and becaue she had, in the view of the court *a quo*, lied about telling the police that the second appellant had gone to Harare. Compared with the unreliable evidence of Isabel Dzumbira and the "Chivaku group", such a lie would pale into insignificance. Admittedly, the second appellant called another witness who confirmed that he had been ploughing for the second appellant at the time in question and produced apparently false documentation to bolster his story.

Nevertheless, the fact remains that the State did not prove that alibi to be false

EBRAHIM JA

and, even had it done so, that would not have made up for the deficiencies in its case. The second appellant may have had reasons to lie about his movements on the days in question that had nothing whatsoever to do with the disappearance of Marceline Dzumbira. The approach and reasoning adopted by the court *a quo* in relation to the second appellant suggests that it did not heed the danger referred to at the outset of this judgment and was determined to find the missing link.

Accordingly, although there is a possibility that the second appellant was involved in some way with an attempt to "fix" Marceline Dzumbira, there is a glaring doubt that he was involved in the

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actual kidnapping and he has to be acquitted.

Accordingly, it is my view that the appeal of the second appellant must succeed and that he should be acquitted. As regards the appeal of the first appellant, I would dismiss it in its entirety.

KORSAH JA: I have had the privilege of reading the judgment prepared by my brother Ebrahim, with much of which I most respectfully agree. The questions on which I venture to differ, however, are of crucial importance, both to the issue in this case and to the general statement of the law regarding identification, circumstantial evidence, and common purpose.

Before turning my full attention to the issue of circumstantial evidence, it seems to me that it would be convenient, first, to express my views on the ancillary matter of identification, which is closely associated with circumstantial evidence.

Testimonial evidence of identity may consist of the witness's answers to questions on the stand, or in a statement of recognition made prior to the trial. Either process is fraught with pitfalls and are both demanding, not only of caution, but also of precaution. As Wigmore cautions at para 55 786a of the third edition of his work on Evidence:

> "(1) Testimonial assertions to identity must be accepted after the most careful consideration. On the one hand, the process of recognition being more or less subconscious, it may be quite correct, even though no specification of marks are given as reasons for recognition. On the other hand, the risk of injustice being so serious, the great possibilities of lurking error should cause hesitation; and the investigator should seek to

> establish as many marks as possible that may serve circumstantially to check the testimonial assertions.
>
> (2) The process calls for precaution, in taking measures beforehand objectively to reduce the chances of testimonial error:
>
> (a) At the time of original observation, the investigator (the police) should obtain from the observer a note of any marks of the personality observed, so that there will be less need to depend on the observer's memory.
>
> (b) At the time of presenting for recognition, whether upon arrest or trial in the court-room, measures should be taken to increase the stimulus of association and to decrease the risk of false suggestion."

Generally speaking, when a witness is asked to identify a thief or other person, the subject of his testimony, the witness's act of pointing out the accused, or other person, in the court-room is of little evidential value. Such evidence is obviously suspect where there has been no previous identification of the accused or other person, the subject of the testimony; for if there is any resemblance between the accused and the person previously seen by the witness, subconsciously the witness may think that the police have arrested the right person and may be inclined to swear positively to a fact of which he is really uncertain.

The procedure advocated by the courts as being almost without reproach is the holding of an identification parade. But what if the suspect exercises his right not to participate in any identification parade, as occurred in the instant case?

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In *R v Long* (1973) 57 Cr App Rep 871, the English Court of Appeal expressed the view that where the issue is identification, and guilt depends on visual identification by witnesses who did not know the defendant, the Court must have regard to the following circumstances: (i) the length of time the witness has for seeing who was doing what is alleged; (ii) the position in which he was; (iii) his distance from the person he seeks to identify; and (iv) the quality of the light. These parameters seem to me to take adequate cognisance of the fact that most witnesses are not artists and, though they cannot express in words the peculiar features which make identification of a suspect certain to them, given that most people do not have prominent features which set them apart from others and which may be alluded to, but,

EBRAHIM JA

having seen the face once - in the special circumstances prevailing - one cannot forget that face and one can recognise it again on other occasions.

It is well to remember that all forms of identification, inclusive of identification parades, of persons prior to the offence unknown to the witness, are dependent on a subconscious recollection of an image of the suspect. Identification parades, insofar as they are dependent on subconscious recollection, do not eliminate the chance of error; they only reduce the errors of mistaken identity. Therefore, any other form of identification which is candid in its spontaneity, consideration being had to the circumstances enumerated in *R v Long supra* should not be dismissed out of hand. But see Glanville Williams Evidence of Identification [1976] Crim LR 407; where the learned author at 410 succinctly states that -

> "... the special difficulty with identification evidence is that its reliability is exceptionally difficult to assess. Ordinarily, a witness can be tested by considering whether his story is probable and coherent, and by observing his demeanour. But the evidence of identification rests on a single piece of observation; there is no story. And the witness may be wholly convinced of the correctness of his identification and yet be wrong."

In the instant case, if the testimony of Isabel Dzumbira, corroborated to that extent by the "Chivaku group", is believed, then the identification of the second appellant by Isabel does not rest on a single piece of observation, but on more than a single observation buttressed by corroborative evidence. This then leads me to the factual evidence accepted by the trial court.

The second appellant, Kenneth Masawi, it was common cause, is brother to the first appellant. Either on 1 or 2 December 1992, an altercation occurred between the first appellant and the deceased outside the Reserve Bank. It was witnessed by Wellington Hakata, the common law husband of the deceased, and one Mary Kapito. While Hakata alleged that the confrontation was over an alleged love affair between the deceased and one Cephas Chiparura, the husband of the first appellant, Mary Kapito said that, although she witnessed the confrontation, she was not within earshot of the combatants and could not confirm Hakata's statement of what the combatants said to each other. The first appellant does not deny this episode. It is, therefore, safe to accept that the confrontation occurred as attested to, but no more.

The deceased lived with her mother, Isabel, and her daughter, Michelle, at a house in Bluff Hill. On the morning of 2 December 1992 a group of people

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EBRAHIM JA

in a BMW motor vehicle visited the house at Bluff Hill no less than three times, giving spurious reasons connected with the deceased for their visit. On each of those visits, Isabel spoke to the most assertive member, who appeared to be the leader of the group. On the second visit by the group, Isabel's suspicions were aroused and she recorded the registration number of the vehicle in which they arrived. On 4 December 1992, the group of persons in the same vehicle again visited Isabel's residence, but Isabel again denied them entry into her home.

There was evidence from a policeman, one Richard Makichi, that his assistance was solicited by a group of persons who visited the house at Bluff Hill. He said the second appellant was a member of the group, and he gave such assistance because he originally thought that the purpose of the visit, as stated by the second appellant, was to enable the second appellant to collect goods which his girlfriend had brought from Zambia. He, however, later gained the impression that the group were up to no good and withdrew his assistance without making a report of the suspicions he harboured to any department of the police. The second appellant admitted that he was well acquainted with Christopher Chivaku.

On the morning of 15 December 1992, the deceased left the house at Bluff Hill at about 7 am in the company of her mother, Isabel, and her daughter, Michelle. Isabel and Michelle were about thirty paces or more ahead of the deceased and looked back when they heard a vehicle screech to a halt. They observed the deceased talking to a man who had alighted from the vehicle. They heard the deceased shout for help and witnessed her being bundled at gunpoint into the vehicle. They ran back to assist the deceased and Michelle managed to reach the vehicle and strike it with her umbrella as it sped away with her mother, never to be seen again.

Isabel, probably because of her prior experience of visits by strange men at her home in a BMW, read the registration number of the vehicle which sped off with the deceased and shouted it several times to Michelle. Michelle made an instantaneous record of the registration number on a piece of newspaper, which was later handed over to Constable Nkomo at Mabelreign Police Station. Constable Nkomo recorded the number 534-099R and handed the original evidence back to Isabel. Constable Nkomo later relayed that number by telephone to the Central Vehicle Registry and the vehicle was traced to the first appellant the same day.

A few days after the kidnapping of the deceased on 15 December 1992, it

EBRAHIM JA

occurred to Isabel that the visits to her home on 2 and 4 December 1992 might be connected with the kidnapping of her daughter. Acting on that belief, she handed over to the police the registration number of the BMW motor vehicle in which those visitors had arrived at her home. On 22 December 1992, Detective Sergeant Moyo discovered from the Central Vehicle Registry that the said BMW motor vehicle was registered in the name of Allen Chivaku. This led to the apprehension of Allen and his brothers Christopher and Brian, together with Munetsi Mudziviri, Richard Makichi, Regis Chikosha and Godwin Dangarambizi, all of whom admitted to one or

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more visits to the house at Bluff Hill in the company of the second appellant. Whatever criticisms may be levelled at their testimonies, the golden thread that ran through them was that they visited the house at Bluff Hill at the behest of the second appellant on divers occasions on 2 and 4 December 1992. his was the lynchpin that initiated the search for the second appellant.

On or about 23 December 1992, after the remand hearing of the first appellant, Cephas Chiparura, the common law husband of the first appellant, travelled to farm no. 30 at Muda to inform his brother-in-law of the first appellant's arrest and the fact that the police were looking for the second appellant in connection with the case of kidnapping. It is common cause that he promised the second appellant $600 on this occasion. Cephas denied the allegation that he told the second appellant that it was Detective Sergeant Moyo who was looking for him because, as he explained, he was at the time unaware of the names of the police details who were investigating the matter. He said he did not suspect his brother-in-law's participation in the kidnapping of the deceased, in spite of the mention of the name Kenny by the police, but rather thought the police were looking for one Kenny Sisiva in whose company he had met the deceased. It seems clear that before the remand hearing on 23 December 1992 Cephas could not have kown that the police were looking for the second appellant.

On the evening of 28 December 1992, an investigating team visited the second appellant's family farm at Muda. The second appellant's wife was present at the farm with their child, but the second appellant was not. The second appellant's wife made no revelation to the team regarding his whereabouts. The police retrieved from the farm items of clothing which, in their opinion, matched a description given by Isabel and Michelle of the clothing worn by the kidnapper who bundled the deceased into the vehicle which sped away from them and whose registration number they recorded.

EBRAHIM JA

Early in the morning of 29 December 1992, the investigating team, after a fruitless search for the second appellant, conveyed the second appellant's wife and child to Harare in different vehicles. As the vehicle in which the child was riding approached Beatrice Cottages, the child pointed out that they were passing the town house of the second appellant. The vehicle stopped and the police surrounded 15B Beatrice Cottage, which the child had pointed out to them. A police officer knocked on the front door, announced police presence to whoever was within, and invited the occupant(s) to come out. The police evidence was that despite the police warning the second appellant did not come out of the front door as he was invited to do, but tried to make good his escape through the back door. The second appellant was, however, apprehended by police details at the rear of the house. The house was searched and a pistol found under the mattress of a cot. The second appellant ascribed ownership of the pistol to one Elliot ho lived at Glen Norah. Despite police endeavours, Elliot could not be traced. The trial court, on the evidence presented, rightly found as a fact that the second appellant endeavoured to make good his escape through the back door and was apprehended.

On 4 January 1993, the second appellant refused to participate in an identification parade, but was nevertheless identified by Isabel. The circumstances surrounding that identification are

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succinctly summed up in the judgment of the trial court as follows:

> "The identification of the second accused at the police station by Isabel Dzumbira, as given by the second accused in evidence, is as we have indicated - that Isabel Dzumbira was present and dressed in Zambian cloth and that despite the endeavours of the police to secure an identification of him that there was no such identification. Although she looked at him she did not identify him ...
>
> The version given by the second accused in this regard, however, differs from the version given in the second accused's defence outline and differs from the evidence given by the second accused's defence counsel at the time. The second accused's defence outline in regard to the identification of Isabel Dzumbira was to the effect that she was an elderly lady dressed in green Zambian cloth. That this woman was called back into the room where he was and pointed him out. His defence outline goes further and suggests that when his lawyer, Munyanyi, arrived at the police station he was asked whether his client was willing to participate in an identification parade and that Munyanyi refused to allow the

> second accused to participate because the exercise had not been correctly carried out. That is the version in the second accused's defence outline. In evidence in regard to the identification parade, the second accused abandoned his defence outline's suggestion that the responsibility for not taking part in the identfication parade related to Munyanyi. Instead he said that he himself decided not to take part in the identification parade because of the improper presence of Isabel Dzumbira and because he felt that he looked dirty, dishevelled and had been assaulted and that would affect his identification. The second accused in evidence dealt specifically with the question of Munyanyi's presence. He said that Munyanyi had already been and gone and that he asked the police for him to be brought back but was told that that could not be done. Accordingly he, the second accused, made the decision not to partake in an identification parade.
>
> The third version on this aspect was that given by Munyanyi. His evidence was that the question of a formal identification parade never arose at all. It was never suggested by the police that there be an identification parade and there was a good reason for that - in that it was Munyanyi's evidence that in his presence Isabel Dzumbira had come into the room where the second accused was, identified the second accused, and shouted abuse at him. It is accordingly the effect of Munyanyi's evidence that no question of an identification parade would have arisen because of that very reason.
>
> So there are three versions as to the holding of an identification parade: The version in the second accused's defence outline, the version in the second accused's evidence, and the version of second accused's defence lawyer, Munyanyi.
>
> There are also three versions on the related matter of the actual identification of the second accused by Isabel Dzumbira in the police station that day. There is the version in the accused's defence outline which suggests Isabel Dzumbira did point him out. There is his version in evidence which suggests that despite the efforts of the police by sign language to get Isabel Dzumbira to point him out she did not. There is then the defence lawyer, Munyanyi's, evidence that not only did Isabel Dzumbira point the second accused out, that she pointed him out very specifically and shouted abuse at him.
>
> As against versions forming part of the second accused's defence, there is the evidence of the police officers that the second accused did not wish

> to partake in an identification parade and that they accordingly on his refusal, although they had been hoping to have an identification parade, decided to hold an informal identification parade. This informal identification parade, according to the police evidence, was held by suggesting to Isabel Dzumbira that she look around the offices in

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> question to see if she could find the person who might be the accused in question. The police evidence and Munyanyi's evidence are similar as to the circumstances in which Isabel Dzumbira made an identification ...
>
> We have no hesitation at all in finding that the truth of the matter in regard to what happened in regard to the identification has been told by the police officers and not by the accused."

This was a finding of fact by the trial court in relation to the circumstances surrounding the identification of the second appellant by Isabel. I have no reservation about its fairness, having regard to previous observations of him by Isabel, corroborated by the "Chivaku group".

In *R v Turnbull & Ors* (1976) 13 Cr App Rep 132 at 137 a full court of five judges recommended that whenever the case against an accused turns wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the court should:

> "... examine closely the circumstances in which the identification by each witness came to be made; How long the witness had the accused under observation; At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? ...
>
> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality the greater the danger."

In the instant case, Isabel had seen the second appellant on no less than three occasions on the same day in broad daylight. She had spoken to him on those occasions and again on another day. So suspicious was she of him and his companions that she had recorded the registration number of the car they had

arrived in at her house. Was that not reason enough to remember the second appellant? The second appellant admitted that he was well acquainted with Christopher Chivaku. It was, therefore, not necessary for Christopher to identify him. Christopher corroborated Isabel's testimony that the second appellant visited the Dzumbira home at Bluff Hill on 2 December 1992, in Allen Chivaku's BMW motor vehicle. The fact that the registration number of that car was recorded by Isabel on 2 December 1992, and that she recognised the second appellant, ties her testimony in with that of Christopher and the remainder of the "Chivaku group", despite other imperfections in the testimonies of members of that group. The quality o Isabel's testimony regarding her identification of the second appellant as a visitor to her house on 2 December 1992 is enhanced in quality by the second appellant's fabrication of evidence in relation to the circumstances of his identification by Isabel. See also the observation by Holmes JA in S v Mthetwa 1972 (3) SA 766 at 768A-C.

While the exercise by the second appellant of his legal right not to participate in an identification parade cannot be the subject of adverse comment, the same privilege cannot be extended to the several versions he gave respecting the circumstances surrounding his identification by Isabel and how his versions were in collision with the account of the same episode given by his

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then legal practitioner. Why did the second appellant find it necessary to fabricate evidence about the circumstances surrounding his identification by Isabel, except to distance himself from any involvement in the kidnapping of the deceased?

On 6 January 1993, a warned and cautioned statement was recorded from the second appellant in the presence of his then legal practitioner, Mr Munyanyi. The charge was one of kidnapping. He proclaimed his innocence and reserved his defence for when he appeared in court. The following day, 7 January 1993, the second appellant was taken before a magistrate and remanded in custody on a warrant which alleged that he had brandished a gun and attempted to fire at the police. This allegation on the indictment was false in every material particular and it was iniquitous of the prosecution to deceive the court by laying what was known to the prosecution to be a false charge against the second appellant. I hope no investigating team in this jurisdiction will ever again resort to such perfidy. It may be that the time is ripe for the rules regulating remand procedures to be tightened to obviate such abuse of the process by the police.

However, the fact that the investigating officers lied about the degree of force

EBRAHIM JA

they used in effecting the arrest of the second appellant does not detract from the fact of his arrest; that the team lied about moving him from station to station is irrelevant to his capture at 15B Beatrice Cottage; that the team lied to the court on the ground for remanding him, reprehensible though such conduct is, does not affect the charges against him. No confessions were extracted from him at Goromonzi; and so if the investigating team lied about their reasons for taking the appellants there it had no adverse effect on their defences. No evidence was illegally obtained from the appellants in respect of either charge. I can find no evidence against the appellants, based on a contaminated source, in this case so as to render the evidence against them unacceptable in law.

However, it is apt to remind the police of the sanguine advice to be found in the second edition of Swift's Law of Criminal Procedure at p 452, that:

> "Any unfair treatment of a person suspected of an offence which may be prejudicial to his civil rights, or to the protection afforded him before or during trial, is wholly alien to the principles of our law, and it is well for police officers to realise that as much as it may result in the creation of prejudice against an innocent man it may permit a guilty person to evade punishment if an Appeal Court is afterwards satisfied that his trial has been prejudiced as a result of such treatment ..."

As I earlier observed, in the instant case there is no evidence of such prejudice, especially as the second appellant was accorded access to a legal practitioner of his choice before a statement was recorded from him.

The United States Supreme Court in People v Cronin 34 Cal 191 and in People v Morrow 60 Cal 142, expressing the value of circumstantial evidence, said:

> "The eye of Omniscience can alone see the truth in all cases; circumstantial evidence is there out of the question; but clothed as we are with the infirmities of human nature, how are we to get to the truth without a concatenation

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of circumstances."

Was there established any concatenation of circumstances which led to the second appellant's involvement in the kidnapping of the deceased?

Before embarking on the process of piecing together the evidence which, in my opinion, links the second appellant to the charge of kidnapping, I must stress that my understanding of the law is as stated by Lopes LJ in Re Grove; Vaucher v Treasury Solicitor (1888) 14 ChD 216:

EBRAHIM JA

"... that in order to determine a person's intention at a given time, you may regard not only conduct and acts before and at the time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight and cogency."

There was no direct or reliable evidence that prior to 2 December 1992 the deceased and the second appellant knew each other, and there is no warrant for accepting that they did.

There was evidence that either on the day of the confrontation between the first appellant and the deceased at the Reserve Bank on 2 December 1992, or the day after, the second appellant visited the house at Bluff Hill and informed Isabel that the deceased could not come herself, from her place of work at the Reserve Bank, but had sent him to deposit or collect certain items from the house. It is worthy of note that the first appellant had tracked the deceased to her workplace through an address which she tore from the diary of Cephas - the writing in Cephas's diary had the home address of the deceased and her office telephone number - and the second appellant commenced his visits to the home in Bluff Hill a day after the confrontation between the deceased and the first appellant, and not before. Was this sheer uncompounded coincidence?

There was evidence from the lips of the second appellant himself that he learnt of the arrest of his sister, the first appellant, from a report in The Daily Gazette when he visited Marondera on 18 December 1992. Yet he did not rush to his sister's side to enquire into the veracity of the allegations levelled against her by the State. Instead he visited Harare to instruct a legal practitioner to attend to the application for bail for her. Did he already know the truth of the matter? He said he did not pay his sister a visit then because arrested persons were only allowed one visitor and his sister had already had a visitor. Where did he get this information when he only read of his sister's arrest in The Daily Gazette on 18 December 1992? Is this act of declining to visit his sister, who was in the hands of the police, also not an act of putting space between him and the police? Is this the act of an innocent mind, wholly unassociated with the offence under investigation?

On or about 23 December 1992, Cephas Chiparura visited the farm at Muda - this is confirmed by Edah Masawi who accompanied him - purportedly to inform the second appellant that the first appellant had been arrested in connection with the kidnapping of the deceased and had been remanded in custody, and that he, the second appellant, was wanted by the police for questioning. There is nothing on record that the second appellant told Cephas

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EBRAHIM JA

that he was already aware of his sister's arrest and had arranged for legal representation without seeking to find out what the truth of the matter was. In any event, if Cephas's wife had a legal problem, one would expect Cephas, who by all accounts was financially better placed than the second appellant, to arrange legal representation for his wife. To illustrate the indigence of the second appellant, he called at Cephas's office in Harare a day or so after the visit by Cephas and Edah to Muda to collect the sum of $600 from Cephas, as the second appellant alleged, as an induement by Cephas for him (the second appellant) to leave the country. Why would the second appellant come to Harare to collect that amount, without reporting to the police, if he did not intend to leave the country to avoid arrest in connection with the kidnapping? Is the omission to inform Cephas on 23 December 1992 that he was already aware of the arrest of the first appellant as of 18 December 1992 and had arranged for legal representation further selective amnesia or the act of a person who had a guilty mind and wished to distance himself from the alleged offence?

When the investigating team visited the farm at Muda on 28 December 1992, five days after the visit by Cephas, they were not informed by the second appellant's wife that her husband had left for Harare to report to the police. The police, most probably, would not have stayed at the farm until the early hours of 29 December 1992 if such information had been imparted to them.

It was purely fortuitous that the second appellant's child pointed out to the investigating team house No. 15B Beatrice Cottage. When the police surrounded that cottage, announced their presence and invited the occupant(s) to come out of the front door, the second appellant attempted to effect his escape through the back door and was apprehended. This is inconsistent with an innocent mind of a man who had left home with the avowed intent to hand himself over to the police.

The case against the second appellant is compounded by his false testimony of the antipathy existing between him and Cephas. If Cephas bore ill-will against the second appellant, with the knowledge that the second appellant was at Muda and that the police were looking for him, why did Cephas just not give the information of the second appellant's possible whereabouts to the police instead of travelling with Edah to Muda to warn the second appellant that he was being sought by the police and to furnish him with funds, if and when the second appellant decided to leave the country? The untruths which the second appellant told regarding the circumstances surrounding the all important matter of his identification strengthen the prosecution's case and weaken his own. The alibi proffered by the second

EBRAHIM JA

appellant, even if it had been believed, would have accounted for his whereabouts on 15 December 1992, when the kidnapping was executed and not the second appellant's non-participation in the planning thereof - just asthe first appellant made available her vehicle for the purpose of the kidnapping.

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I am prepared to concede that when Isabel took down the registration number of the vehicle used for the kidnapping of the deceased, she had in mind the kidnapper and not the man who had visited her house at Bluff Hill on several occasions and to whom she had spoken. It was later, when she thought there might be a connection between the persons who visited her home and the kidnapping, that she handed in the registration number of the vehicle that those persons travelled in to visit her home. She recognised the second appellant as the man who had visited her home on 2 and 4 December 1992 and, the mind being what it is, suspecting that the visits were connected with the kidnapping, took a quantum leap to link the second appellant with the man she saw with a revolver at the scene of the kidnap. The fact that a pistol was found under the mattress of a cot at 15B Beatrice Cottage and the alleged owner of that weapon, Elliot, could not be traced, although suspicious, does not indicate that the second appellant was pesent at the scene of the kidnap as alleged by Isabel.

I am mindful of the oft-quoted words of Greenberg J by Watermeyer AJA in R v Difford 1937 AD 372 at 373 that:

> "... no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

In the instant case, the second appellant offered no explanation for his visits to Isabel's house at Bluff Hill. His defence was a bare denial of such visits, which was proved to be absolutely false.

The conduct of the second appellant from 2 December 1992 through to the day of his arrest on 29 December 1992, in relation to the kidnapping, has been outlined above. As Beadle CJ observed in *R v Sibanda* & Ors 1965 RLR 363 (A) at 370A-C:

> "Generally speaking when a large number of facts, taken together, point

> to the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt; it is sufficient if there are reasonable grounds for taking those facts into consideration, and all the facts, taken together, prove the guilt of the accused beyond reasonable doubt."

See especially *R v de Villiers* 1944 AD 493 at 508 *per* Davis AJA. The intention of the second appellant falls to be decided on all the possible inferences which might reasonably be drawn from his acts and no competing explanation can be found.

In my view, the defence of alibi, aptly rejected by the trial court, even if it were accepted, is innocuous to the second appellant's defence, because there was no probative evidence confirmatory of his presence at the scene of the kidnapping. But, regard being had to the weight of the circumstantial evidence which points inexorably to his guilt in his participation of the kidnapping because there is no competing explanation for their occurrence, like the first appellant, who was only linked to that offence by the use of her vehicle in the perpetration of that offence, the want of evidence placing the second appellant at the scene does not necessarily exculpate him from involvement in the kidnapping.

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In my analysis of the evidence, I have endeavoured to find a reasonable theory of the second appellant's innocence. If I had reached the conclusion that such a theory exists, it would only have been incidental to the further question whether it was the only reasonable theory. This is not a question of throwing any onus on the second appellant, but a conclusion of guilt that a court is entitled to draw from the weight of the circumstantial evidence adduced, if no explanation of such evidence is forthcoming from the second appellant - R v Difford *supra* at 373. Where circumstantial evidence leads inexorably to a definite conclusion no direct evidence is necessary for their probative value, save that things do not happen that way without reason or explanation.

The court of first instance has determined that the evidence admits of no tenable theory of innocence other than that the first and second appellants planned the kidnapping of the deceased. That determination is based upon evidentiary findings of fact which the verdict implies, subject to the reservations hereinafter expressed. If those findings have support in facts established, and in reasonable inferences, they are conclusive on appeal. After conviction a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it.

EBRAHIM JA

If it is concluded that the implied factual decisions reached have substantial support in the evidence and that the inferences which led to the verdict were reasonably drawn, it is not the function of this court to speculate and determine whether the ultimate findings were established beyond a reasonable doubt. This lies within the exclusive jurisdiction of the trial judge and assessors. Proof of guilt beyond a reasonable doubt does not necessitate the proof of guilt beyond all doubt. When the facts are staring you in the face, to indulge in extravagant speculation for their occurrence is to indulge in futile mental exercise. In this regard, it is well to remind ourselves of the following statement by Denning J (as he then was) in Miller v Min of Pensions [1947] 2 All ER 372 (KBD) at 373H:

> "(Proof beyond a reasonable doubt) need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would be failing to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence: 'Of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."

In my opinion, this court cannot declare the evidence adduced before the trial court legally insufficient, except by holding that the trial court had furnished no good reason for believing that the victim was kidnapped in consequence of a plan hatched by the second appellant with the first appellant and that the totality of the evidence was insufficient to establish guilt or consistent only with the second appellant's innocence. But the evidence on record precludes such a finding by this court.

I, therefore, conclude that both the first and the second appellants are guilty of the alternative charge of kidnapping.

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Turning then to the conviction of the appellants on the charge of murder, there was no evidence that the first appellant was at the scene of the kidnapping although her vehicle was used in the perpetration of that offence. The testimony of Isabel linking the second appellant with the man who was brandishing a gun and who bundled the deceased into the vehicle used in the kidnap was tenuous and unreliable, and should have been rejected by the trial court. But the cogency of the circumstantial evidence, arising from the number of independent circumstances above recounted, all pointing to the

EBRAHIM JA

same conclusion - the second appellant's involvement in the kidnapping - together with the untruthful evidence by him, leaves me in no doubt as to his involvement in the kidnapping.

It is safe to say that, in consequence of a plan hatched by the appellants, the deceased was kidnapped. There was no evidence linking them with the actual act of bundling the deceased into the vehicle and driving away with her. Who executed the plan was not revealed in the evidence on record.

There was a legitimate finding that the deceased was dead and that her death occurred after she had been kidnapped. What is missing is evidence as to the cause of death and the time of her death; whether the appellants were present at the time of her death; or whether they had even agreed with the actual perpetrators of the kidnap to kill her was not established. There was no evidence as to whether murder was their design when the appellants hatched the plan to have the deceased kidnapped and arranged for the execution of that plan. There is no doubt that, on my view of the matter, the appellants were acting in common purpose with the actual perpetrators of the kidnapping.

I ask the same question put by Botha JA in S v Safatsa & Ors 1988 (1) SA 868 (A) at 894:

> "Thus the question that must be faced squarely is this: in cases of the kind commonly referred to in our practice as cases of 'common purpose', in relation to murder, is it competent for a participant in the common purpose to be found guilty of murder in the absence of proof that his conduct individually caused or contributed causally to the death of the deceased?"

The learned Judge of Appeal cited at 896H-J of his judgment the following passage by Holmes JA in S v Madlala 1969 (2) SA 637 (A) at 640F-H as an accurate statement of the law:

> "It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof -
>
> (a) that he individually killed the deceased, with the required *dolus*, e.g. by shooting him; or

EBRAHIM JA

> (b) that he was a party to a common purpose to murder, and one or both of them did the deed; or
>
> (c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of

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one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see S v Malinga & Ors 1963 (1) SA 692 (A) at 694F-H and 695; or

(d) that the accused must fall within (a) or (b) or (c) - it does not matter which, for in each event he would be guilty of murder."

There is no need for a reminder that kidnapping is an offence involving violence and in the commission of which death is foreseeable and may readily occur.

It would appear to be settled, therefore, that in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants. No causal connection need be established between the acts of every party to the common purpose and the death of the deceased before a conviction of murder can ensue in respect of each of the participants. The act of one becomes the act of the other if that act is done in pursuit or furtherance of a common design, albeit not murder, but the parties to the common purpose were reckless as to whether their design would end in the death of the victim.

My attention has been drawn by the Chief Justice to the fact, and I readily concede the point, that in all the cases in which the principles expressed by Holmes JA with singular clarity in the Madlala case *supra* have been applied, these were cases where, not only was there a body, but the cause of death was established beyond a reasonable doubt. In the instant case, however, there is no corpus delicti and the cause of death cannot be ascertained, since Marceline was presumed dead because she has never been seen again after being kidnapped on 15 December 1992. In these circumstances, it is not possible to say whether Marceline died as a direct result of a murderous attack perpetrated by one of her kidnappers, or of a relatively trivial assault, or of natural causes, such as a heart attack or of a failure of any of the vital organs in the body, or even as a result of jumping off a speeding vehicle to escape her kidnappers which would make her kidnappers, inclusive of the appellants, guilty of culpable homicide nd not murder.

The clear and irrefutable evidence before the trial court was that the vehicle which was used to kidnap the deceased was occupied by two men. One of the

men, brandishing a pistol, got out and bundled the deceased into the vehicle and the vehicle sped away. There is no mention of a woman being seen in the vehicle into which the deceased was unceremoniously bundled. I have already given reasons why I discount the testimony of Isabel that the man toting a gun during the kidnapping was the second appellant. We are therefore faced with a situation where the proved and acceptable evidence does not place either of the appellants at the scene of the kidnapping or establish their physical participation in that deed.

I base the first appellant's guilt, not on an inference that she must have been in the vehicle at the time of the kidnapping because that vehicle did not return to her house after the kidnapping. I accept that such a finding may receive support from an inference that, if as was established, the first appellant's vehicle was that which was used in the perpetration of the kidnapping and

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she does not admit lending it to anyone that day, then she must have been driving it at the time of the kidnap. But in the face of the proved and acceptable evidence that the kidnapping was perpetrated by two men it seems to me highly speculative, and cuts against the grain of eye-witness testimony, to infer from the evidence that the first appellant, a woman, was present in the vehicle when the kidnapping actually took place.

It seems to me to be in accord with the law to find the basis for the first appellant's guilt rooted in the well-founded legal principle that a person who supplies an instrument for a crime or anything essential to its commission (in this case, her vehicle) aids in the commission of it; and if he does so knowingly or with intent to aid, he abets it as well and is therefore guilty of making common purpose with the perpetrators of the offence of kidnapping Marceline. Actual knowledge or intention, although often present, is not necessary, it being sufficient if the socius had constructive knowledge or legal intention in the sense that he foresaw the possibility that the principal offender's crime was being or was about to be committed and yet lent his assistance, reckless as to whether it was or not: S v Kazi 1963 (4) SA 742 (W) at 749. On the above, reasoning there is evidence that the first and second appellants were parties to the common purpose to kidnap Marceline.

Furthermore, "Kidnapping", as defined in South African Criminal Law and Procedure by Hunt in Vol II at p 509, "consists in unlawfully and intentionally depriving a person of liberty of movement and/or his custodians of control". The *mens rea* required in law to establish this offence has nothing whatsoever to do with the intention of killing the victim or causing him very serious injury. On the other hand, the mental element in murder requires proof of an intention to kill or cause really serious injury with foresight that death may

result from such injury; see Hunt op cit p 341. These are crimes with differing specific intents.

Starting from the proposition that murder requires proof of an intention to kill or cause really serious injury which might result in death, can it be said that persons who had entered into common purpose with others to commit the crime of kidnapping, which has a specific intent quite different from that of murder, may be convicted for murder if they were not present at the kidnapping and there is no evidence that they were aware that a dangerous weapon was being carried to facilitate the kidnapping of the victim? As far as I am able to perceive the legal position, in all cases where those who are parties to a common purpose, though absent from the scene of the crime, have justifiably been convicted of murder, those were cases where such parties to the common purpose knew that a deadly weapon was being carried to facilitate the consummation of the common design and neither raised an objection to the introduction of such a weapon, nor dissociated themselves from the manner in which the common purpose was to beaccomplished. Here there was no evidence that the appellants knew that a lethal weapon was to be used. In the inimitable words of Lord Hailsham in Hyam v Director of Public Prosecutions (1974) 59 Cr App R 91 at 102:

> "I do not consider that the fact that a state of affairs is correctly foreseen as a highly probable consequence of what is done (in crimes of specific intent) is the same thing as the fact that the state of affairs was intended."

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In Hyam's case *supra* it was decided that where a crime of specific intent was under consideration the probability of the consequence resulting in death taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent.

The evidence in this case falls far short of establishing that the appellants herein, even if they were mindful of the dangers inherent in kidnapping, were reckless as to whether their common purpose, for the reasons above given, would result in the death of the deceased. In my view, on the available evidence before the trial court, it would be unsafe to uphold a verdict of murder and both appellants should have been acquitted of the main count of murder and convicted of the alternate count of kidnapping.

By virtue of s 14(2) of the Supreme Court Act [Chapter 7:13], I would substitute for the verdict of the trial court a verdict of not guilty on the main count for both appellants, and a verdict of guilty of the alternative count of kidnapping for both.

KORSAH JA & GUBBAY CJ

As regards sentence, kidnapping is by any account a very serious offence, the gravity of which depends on the violence used to commit the offence. It is all the more so when the person kidnapped is not seen or heard of again and her body cannot be found. This must cause untold anguish to her relatives and friends. It must also post the most anxious concern for all law-abiding citizens who desire to enjoy life without the threat of being kidnapped by unknown assailants at the behest of others.

It seems to me that it would be in the interest of society as a whole to impose a sentence of general deterrence. In doing so, I have taken the special circumstances of the appellants into consideration. The appellants have been in custody for almost four years, two years of which have been spent on death row. Nevertheless, so serious is this particular case that the court must mark its disapprobation with a lengthy custodial term. I would, but for the period of their incarceration, have sentenced them to a period of imprisonment in excess of twenty years, but taking into account the period of two years spent on death row, each appellant is sentenced to fifteen years' imprisonment with labour.

GUBBAY CJ: I have read the judgments prepared by my learned brothers Korsah and Ebrahim. I agree with Korsah JA for the reasons enunciated by him that the first appellant ought to have been convicted of kidnapping and not of murder. I also approve of the sentence of fifteen years' imprisonment with labour which my learned brother considers appropriate.

With regard to the second appellant, I share the view of Ebrahim JA, that the evidence against him fell below that required to justify his conviction on either the main or alternative charge.

In the result, the orders of the majority of this court are as follows:

As to the first appellant:

1. The appeal against conviction is allowed to the extent that the verdict of the trial court is altered to one of guilty of kidnapping.

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2. The sentence of death is set aside and is substituted by one of fifteen years' imprisonment with labour.

As to the second appellant:

The appeal against conviction is upheld and the sentence is quashed.

Gollop & Blank, first appellant's legal practitioners

Winterton, Holmes & Hill, second appellant's legal practitioners

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PHILLIPS NO v NATIONAL FOODS LTD & ANOR 1996 (2) ZLR 532 (HC)

Court **High Court, Bulawayo**

Chatikobo J

Civil application

25 October & 1 November 1996 Judgment No. HB-88-96

Flynote

Practice and procedure - attachment - execution - judgment debtor's goods attached - third party claiming that attached goods belonged to her - onus on third party to prove her ownership of goods

Headnote

A woman claimed that goods taken from her relatives under a writ of execution in respect of a debt owed by her relatives to the creditor in fact belonged to her.

Held, that in inter pleader proceedings, where a person is found in possession of movable goods, that person is presumed to be the owner of that property unless the presumption is rebutted. Where a person other than the possessor claims to be owner of the goods that person has the onus of proving on a balance of probabilities that she is the owner of the goods. A bald assertion that she is the owner is not enough.

In the present case it was not possible to determine this issue on the basis of what the woman said in the papers and there was a need for oral evidence in order to decide whether she was telling the truth or was fraudulently colluding with the judgment creditors.

The court ordered that this issue between the parties be stated by way of special case in terms of r 210(2)(c) of the High Court Rules and that the woman claiming to be the owner of the attached property would be the plaintiff and the judgment debtor would be the defendant.

Cases cited:

Bruce NO v Josiah Parkes & Sons (Rhod) (Pvt) Ltd & Anor 1971 (1) RLR 154 (G); 1972 (1) SA 68 (R)

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Zandberg v van Zyl 1910 AD 258

CHATIKOBO J

Case Information

R Moyo, for the applicant

S Takundwa, for the judgment creditor

Claimant in person

Judgment

Chatikobo J: On 19 January 1996, the applicant, in his capacity as Deputy Sheriff for Bulawayo, served a writ of execution and seized and attached various household goods which were in the joint possession and custody of Norman Maliba Sibanda and Joyce Sibanda (the judgment debtors). He did so on behalf of National Foods Ltd (the judgment creditor) who had obtained judgment against the judgment debtors for the some of $20 040,59 together with interest and costs of suit. The goods which were seized and attached are valued at $25 000.

On or about 2 February 1996, Janice Sibanda (the claimant) claimed, in an affidavit which she gave to the applicant, that the goods which were attached belonged to her. Joyce Sibanda is the claimant's sister and Norman Sibanda, her husband, is claimant's brother-in-law. The claimant says that she inherited a total of 12 head of cattle from her late grandmother's and her late father's estates. She later sold these cattle and with the proceeds she purchased the goods which were later attached by the applicant.

She explains that the judgment debtor's property was burnt during the civil disturbances in Lupane, leaving them with no property to use. As she was staying with the judgment debtors at the time she gave them her household goods to use. When she got married, she left the property in the custody of the judgment debtors whom she allowed to continue using the property. She left the property in their custody because in terms of the customs of her people she was not allowed to take the property with her to her husband.

In her opposing affidavit, the claimant says she bought the goods in question second hand from various persons whom she cannot now trace. When she bought the property, she did not obtain receipts as she did not contemplate that one day, in the distant future, she would be called upon to prove that she is the owner of the property. In some cases, she has named the place and/or the persons from whom she bought the property but she is unable to trace these people now. She has annexed to her affidavit a brief sworn statement by her brother-in-law, one of the judgment debtors, confirming her allegations.

The affidavit deposed on behalf of the judgment creditor's representative simply highlights the improbabilities in the claimant's account.

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CHATIKOBO J

In interpleader proceedings, "the claimant must set out such facts and allegations which constitute proof of ownership so that the question whether or nor to refer the matter to trial would arise only in the event of there being a conflict of fact which cannot be decided without hearing oral evidence": *per* Goldin J in Bruce NO v Josiah Parkes & Sons Ltd & Anor 1972 (1) SA 68 (R) at 69H; 1971 (1) RLR 154 (G).

In this case, the need to hear oral evidence arises not because of the existence of a dispute of fact as the judgment creditor did not set out any facts to counter the claimant's overments. Such a need stems from the difficult of determining the credibility of the claimant on the strength of what she says on the papers. The close relationship between the claimant and the judgment debtors makes it likely that she may be colluding with the judgment debtors. At the same time, she may be telling the truth. What she has deposed to however, falls short of proof of ownership. As de Villiers CJ stated in Zandberg v van Zyl 1910 AD 258 at 272:

> "... possession of a movable raises a presumption of ownership; and that therefore a claimant in her inter pleader suit claiming the ownership on the ground that he has bought such movable from a person whom he has allowed to retain possession of it must rebut that presumption by clear and satisfactory evidence.
>
> The fact that he has bought a thing which he does not require himself, but allows the seller to use, require full explanation, and in the absence of such explanation a court is justified in drawing its own reasonable inferences."

This means that there is an onus on the claimant to prove on a balance of probabilities that she is the owner of the goods. The mere ipse dixit of the claimant, before it is tested by cross-examination, cannot discharge the onus which she bears.

Rule 210(2)(c) of the High Court Rules gives the court power to order, in appropriate circumstances, that any issue between the claimants be stated by way of a special case or otherwise and be tried and for that purpose the court can order which party shall be plaintiff and which shall be defendant. As the onus clearly lies on the claimant in this case, it is only proper that she be ordered to be the plaintiff and the judgment creditor be the defendant. The issue which I order to be tried is "whether Janice Sibanda is the owner of any of the goods which were attached by the Deputy Sheriff for

CHATIKOBO J

the benefit of National Foods Ltd in terms of a writ of execution on 19 January 1996."

The applicant has no interest in this matter except in respect of his costs. As the claimant has not proved her claim to ownership in these proceedings, it is only fair that she bears the costs of these proceedings.

In the event of her succeeding at the trial, she should be entitled to be indemnified by the judgment creditor for those costs.

Accordingly, I made the following order:

(a) The issue to be tried in terms of order 30 r 210(2)(c) is "whether Janice Sibanda is the

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owner of any of the goods which were attached by the applicant for the benefit of the judgment creditor in terms of a writ of execution on 19 January 1996."

(b) The claimant shall be the plaintiff and her claim, apart from a prayer for costs, shall be an order declaring that she is the owner of any of the goods attached by the applicant. The judgment creditor is to be the defendant.

(c) The claimant's affidavit shall stand as the summons and the claimant must file her declaration within 21 days of the date of this order. The judgment creditor is ordered to file its plea within the time provided by the High Court Rules.

(d) The costs of the applicant in these proceedings shall be borne by the claimant who shall be entitled to claim those costs in the action to be instituted by her if she succeeds in such action.

Coghlan and Welsh, applicant's legal practitioners

Lazarus and Sarif, judgment creditor's legal practitioners

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(1) S v MATYENYIKA & ANOR
(2) S v MABIKA & ANOR 1996 (2) ZLR 536 (HC)

Court **High Court, Bulawayo**

Malaba J

Criminal review

1 November 1996 Judgment No. HB-85-96

Flynote

Criminal law - common law offences - incest - prohibited degrees of consanguinity - what are - first cousins - not within prohibited degrees - customary law prohibition against marriage of first cousins - irrelevant in determining criminal liability

Headnote

The accused in these two cases were convicted before a magistrates court on charges of incest. In both cases, the accused were first cousins, their parents being siblings.

Held, that the common law does not prohibit either marriage or sexual relations between first cousins. Incest consists of intercourse between persons who may not marry because they are too close in blood or in affinity. In this regard, the rule is that marriage between first cousins is not prohibited because neither is related to the common ancestor, their grandfather, in the first degree; they are more than one degree removed from the common ancestor.

Held, further, that the customary law prohibition against the marriage of first cousins is irrelevant in determining criminal liability. If this were otherwise, the common law would be different for different people in Zimbabwe. Cousins who married under customary law would commit incest

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but if they married under the general law they would not.

Cases cited:

R v Chavendera & Anor 1939 SR 218

MALABA J

R v Delport (1901) 18 SC 355

R v Tshipa 1957 R & N 751; 1958 (2) SA 384 (SR)

Judgment

Malaba J: With the concurrence of my brother Cheda, I set aside the convictions and sentences in the two cases and issued warrants of liberation for the accused. These are the reasons for the orders. I have dealt with the two cases together in this judgment because they raise the same question of law.

The accused in each case were charged with incest when they appeared before different magistrates on different dates at Mberengwa magistrates court. The charge in the first case alleged that -

> "On a number of occasions during the period between August 1994 and January 1996 and at village Vhima Chief Mataruse Mberengwa both Pritchard Matyenyika and Ndaiziveyi Rugara or one or more of them unlawfully and intentionally had sexual intercourse together well knowing that they were not supposed to as they are cousins."

The charge in the second case alleged that:

> "On a date to the Prosecutor unknown but during the period extending from 7 January 1996 to 5 March 1996 and at Village Mabika Maghedi Chief Mataruse, Mberengwa Communal Lands Yananiso Mabika and Innocent Dhewha being natural cousins unlawfully and intentionally had sexual intercourse with one another on a number of occasions."

The facts in the first case showed that the accused were aged 23 and 19 years respectively. The accused in the second case were aged 20 and 25 years respectively. They were all above the age of sexual consent. The statement of agreed facts in the first case further revealed that the accused's parents are blood brothers. The accused's parents in the second case are brother and sister. The relationship between the accused in each case is that of first cousins.

The accused admitted that they had had sexual intercourse on divers occasions. They were convicted of incest on their pleas of guilty. The sentence passed in each case was 12 months' imprisonment with labour, of which 3 months' imprisonment with labour was suspended for 5 years on the usual conditions of good behaviour.

On perusing the records of proceedings on review, I was not satisfied that the

MALABA J

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accused had been correctly convicted of incest. I sought the views of the Attorney-General on the first case. He replied through a representative saying the conviction was not being supported. What the Attorney-General said in respect of the conviction in the first case applied mutatis mutandis to the conviction in the second case. I am grateful to the Attorney-General's representative for the helpful views, with which I agree.

Common law, which is the law of the crime of incest in Zimbabwe, does not prohibit sexual intercourse or marriage between first cousins. In R v Chavendera & Anor 1939 SR 218 at 221 Russell CJ said:

> "Incest is defined by van Leeuwen Roman-Dutch Law 4.37.9, as the intercourse of two persons who may not marry one another owing to being too close in blood or in affinity, and by van der Linden 2.7.8 as the marriage or intercourse of persons whose marriage is forbidden by law on the ground of relationship. Voet 48.5.19 defines incest as the union of man and woman which is unlawful by reason of blood or affinity."

See also *R v Tshipa* 1957 R & N 751; 1958 (2) SA 384 (SR) at 386E; Hunt SA Criminal Law & Procedure Vol II 2 ed p 258; Snyman Criminal Law 2 ed p 373.

Before sexual intercourse or marriage between the accused can give rise to the charge of incest their relationship must fall within the prohibited degrees of the direct and collateral lines of consanguinity (blood relationship).

Manfred Nathan Common Law of South Africa Vol 1 p 214 states:

> "In order to tell by how many degrees of relationship persons are separated from each other the rule of the Roman Law is that there are as many degrees as there are generations or persons counted, not including the stem or person from whom the enumeration proceeds. A father is related to his son in the first degree; a grandfather to his grandson in the second degree. In the collateral line the descent is first traced back to the nearest common ancestor. Thus two brothers are related to each other in the second degree. First cousins, the sons of two brothers are related to each other in the fourth degree."

After stating that Roman-Dutch law forbids sexual intercourse or marriage within the direct line of ascendancy and descendancy (for example a father marrying his daughter, a mother her son or grandfather his grand-daughter *ad*

MALABA J

infinitum), the learned author goes on to say it also forbids sexual intercourse or marriages in the collateral lines as well (for example, a brother cannot marry his sister; an uncle his niece or an aunt her nephew).

On first cousins the learned author states the law at p 215 as being that -

> "The prohibition in the collateral line extends to relationships in the fourth degree, but excludes that degree. Thus marriages between first cousins, being the children of brothers or sisters, and so related in the fourth degree, are permitted by Roman-Dutch law."

Voet 23.2.32 (Gane's translation) states that marriages in the collateral line between people who were not understood to be mutually to each in the position of parents and children are forbidden in the second degree only; for example between brothers and sisters; uncles and

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nieces; aunts and nephews.

The learned author then declares that -

> "For the rest marriage between paternal and maternal cousins that is to say, the children of brothers or sisters who stand in the fourth degree has been discountenanced neither by Divine Law nor by the Law of Holland, and the Civil Law of Rome obviously permitted it."

Modern writers on Roman-Dutch law are agreed that Roman-Dutch law, on which our common law is based, does not forbid sexual intercourse or marriage between first cousins, because neither of them is related to the common ancestor (the grandfather) in the first degree. They are more than one degree removed from a common ancestor. Marriages between first cousins are also permitted under English law.

See Hunt op cit p 261; Snyman op cit p 375; H R Hahlo The South African Law of Husband and Wife 4 ed p 69; W Ncube Family Law in Zimbabwe (1989) p 140; Joubert Law of South Africa Vol 6 p 208.

It appears that the decisions by the prosecutors to charge the accused with the crime of incest and of the magistrates convicting them of the same were influenced by their considerations of customary law which prohibits marriages between first cousins (Ncube op cit p 140). Customary law brings the blood relationship between the first cousins within the prohibited degrees of consanguinity for the purposes of customary marriage, but not within the ambit of the law of the crime of incest. In establishing the crime of incest

MALABA J

against the accused, the State does not have to prove the existence of customary law.

Customary law is therefore not the appropriate test to apply in deciding whether the crime of incest has been committed or not. In R v Delport (1901) 18 SC 355 Buchanan ACJ said at p 360:

> "Nor is it the true test to apply whether or not the persons are prohibited from intermarrying, unless such prohibition is founded on the degree of kinship of the parties.
>
> The Roman-Dutch law recognised a number of relationships which prevented marriage between the parties, but in which there was no question of consanguinity or affinity."

The consideration of customary law in deciding to charge the accused would lead to the breach of the fundamental principle that the common law is the same for all persons in Zimbabwe. As customary law does not apply to all persons in Zimbabwe, it would mean that only first cousins who had sexual intercourse and chose to marry under customary law would be charged with the crime of incest. Those first cousins who had sexual intercourse and chose to marry under the Marriage Act [Chapter 5:11] would not be prosecuted. Courts would end up administering one law of incest in respect of one section of society and another law of incest in respect of the other section of the society: *R v Tshipa supra* at 38F-G.

Customary law should therefore not have influenced the prosecution in deciding whether to

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charge the accused with the crime of incest, nor should it have influenced the magistrates in deciding that the crime of incest had been committed by the accused.

For these reasons the convictions and sentences in each case were set aside.

Cheda J agrees.

S v DZARO 1996 (2) ZLR 541 (HC)

Court **High Court, Harare**

Mubako J and Assessors

Criminal trial

4 November 1996 Judgment No. HH-157-96

Flynote

Criminal law - common law offences - murder - intent - provocation - effect of provocation and intoxication - test for existence of provocation - whether two stage inquiry is justified

Headnote

The accused, a young woman, stabbed the deceased, her boyfriend, 26 times in the chest. They had been indulging in sexual relations, which involved her tying him to the bed. He had taunted her, claiming that she had not satisfied him. In a rage, she had gone to the kitchen of the flat and taken a carving knife from there and used it to stab him. Although she had been drinking, the court did not accept that she had indulged in any other drug. Her defence was threefold: she did not intend to kill; she acted under provocation; and she was under the influence of alcohol.

Held, that the actions of the accused in fetching a knife and stabbing the deceased 26 times showed an intent to kill. No other intention could be deduced from the facts.

Held, further, that although the accused had consumed alcohol, she was not so drunk as to be unable to know or control what she was doing or to form the special intent required to constitute the crime of murder. While drunkenness can render an accused person incapable of forming that intent, the fact that the accused took several steps before she disposed of her victim showed that she clearly intended the consequences of her actions.

Held, further, that when provocation is raised as a defence, the court will first apply a subjective test, by inquiring into the actual state of mind of the

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accused at the time of committing the offence. The question to be decided is whether the accused had an intent to kill in spite of all the factors, such as alcohol and provocation. If the answer is yes, the court must then go on and consider whether a reasonable person, placed in

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those circumstances, would have lost his self-control and acted as the accused did. If the answer to the second question is yes, then the defence of provocation applies.

Held, further, that the extravagant nature of the accused's conduct could not be regarded as conclusive proof of extreme provocation or loss of self-control. If that were so, it would be a strange justice which punished moderate killers and provided a defence for the more brutal butcher. The extravagance of the accused's behaviour may well, rather, indicate that the accused yielded to a passion which aroused an actual desire to kill. On the facts, this was the situation here.

Held, further, that a reasonable person in the accused's position, however much he or she was offended by the taunts received, would not have formed an intent to kill, and accordingly the defence of provocation could not be relied on.

Quaere, whether the two-stage approach to provocation is justifiable. The application of an objective test to measure a person's mental state is artificial, since a person is provoked subjectively, not objectively. The two-stage approach seems to be an attempt to give the accused a second chance to save his defence, having found that he did form the intent to kill. To talk of an objective justification for an unlawful killing is a contradiction in terms, the proverbial reasonable man being a paragon of virtue. The least one would expect of a reasonable man is that he would in all circumstances exercise a degree of self-control sufficient to avoid committing any unlawful act intentionally. The two-stage approach is theoretically unsound and adds little to the basic common-law approach followed in South Africa.

Cases cited:

S v Chamunorwa & Ors S-137-86 (not reported)

S v Chretien 1981 (1) SA 1097 (A)

S v Dlodlo 1966 (2) SA 401 (A)

S v Grove-Mitchell 1975 (3) SA 417 (A)

S v Howard 1972 RLR 247 (G)

S v Johnson 1969 (1) SA 201 (A)

R v Majhaye 1965 RLR 106 (G)

R v Molako 1954 (3) SA 777 (O)

S v Nangani 1982 (1) ZLR 150 (S)

MUBAKO J

S v Ncube S-14-87

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R v Tenganyika 1958 R & N 228 (FS)

Case Information

Mrs M Zimba, for the State

S Muzenda, for the accused

Judgment

Mubako J: On 6 August 1995, a young lady by name of Fexinah Nyati returned to her flat, No. 411 Rembrandt Flat, Harare after a six day absence in Bulawayo and the Midlands province. She discovered evidence of a bizarre and gruesome crime. As she entered her bedroom she saw her boyfriend, Raymond Aaron Ndlovu, lying dead in her bed and covered with a puma blanket up to his nose. Next to his head was a separate pillow on top of which lay her big kitchen knife covered in blood. She ran out in shock to call the police. In her presence the police removed the blanket and they observed that the deceased body was stark naked, lying on its back and facing the ceiling. The mouth was tied up with Fexinah's red petticoat, and his hands were tied to either side of the head board legs (one hand tied using the deceased's neck tie and the other using his shirt). The petticoat, the neck tie and shirt were all blood stained. The bed had shifted a little as evidence of a struggle by the deceased. Other than that, the flat looke intact.

For four months, the death of Raymond Aaron Ndlovu remained shrouded in mystery and both his real wife, for there was a Mrs Ndlovu, and his now exposed mistress walked in shock and suspicion. On 4 December 1995, a third woman, Thelma Dzaro, the accused, emerged. Thelma was arrested in connection with the Rembrandt Flat murder. A cheque traceable to her had been found in the jacket which Raymond Ndlovu wore on the night he met his death. Confronted with this evidence, the accused decided to unburden her chest and to reveal her involvement in the death of Raymond Aaron Ndlovu. The material events are that late on the night of 4 August 1995, Raymond took Thelma to the Circus Night Club where the two drank and danced until about 3.00 hours in the morning of 5 August. From the club they drove to No. 411 Rembrandt Flat for which Raymond had the keys. The two lovers undressed and had one session of sex. There upon the man requested the woman to tie him up to the bed while he was facing the ceiling and to repeat the sex act with him spread out in that posture. In her own words, the accused told the police that her lover spoke to her in ChiShona saying *"Ndanakirwa maningi! Ndisunge mbira dzakondo!"* The woman complied and performed the sex act again. However, this time she left her lover unfulfilled. There upon the man complained and cursed, and, she alleged,

called her names. She sat on the bed in the nude while he lay naked on the bed cursing and taunting her. She in turn became angry and so incensed that she refused either to have more sexual intercourse or to untie him. Then suddenly she picked up a carving knife from the kitchen and stabbed him about 26 times mostly in the chest. She pulled up the blanket over him and left for her own home in Mabelreign. She maintained her silence until it was broken by the progress

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of police investigation.

That much of the account is common cause for the State as well as the defence. They differed in some minor details preceding the central events given above.

[The learned judge analysed the evidence and continued:]

In any event, the court came to the conclusion that the accused was not given any drug other than alcoholic potions. Accordingly we concluded that the accused's shocking behaviour must be explained differently.

At the time she committed the offence, Thelma Dzaro was still a teenager. She had just reached nineteen years of age. She knew her way about town. By then she had become a mother out of wedlock and between then and now she has had a second child by another man. Her attitude to sex as shown by the manner in which she related her actions leading to the tragic events was further evidence that the accused was no stranger to men. She was also capable of forging her own father's cheque for $600 which she eventually left in her lover's pocket. The accused was therefore involved in a petty theft, and a life of sexual licence which led to the death of the deceased on the fateful night. She concealed most of this from her father and the rest of the world for some four months until she realised that her misdeeds had been discovered. She was then prepared to confess to committing the actions, but as we have seen the confession to the killing of the deceased is interlaced with a web of lies which it was necessary for us t disentangle.

The statement were made freely and voluntarily. The accused admits killing the deceased in circumstances which we described above. Her explanation is that the sex orgy which she and her boyfriend had made elaborate preparations for suddenly turned sour when she failed to carry it out to his satisfaction, and he then cursed her and taunted her. She claims that she became so provoked that she stabbed him several times while he was helplessly tied to the bed. She therefore readily accepts causing the death of the deceased and pleads guilty to the offence of culpable homicide. She

denies the charge of murder on the basis that she did not possess the requisite mental element for that offence. She deposes that -

(a) she did not intend to kill;

(b) she acted under provocation; and

(c) she was hopelessly drunk from the influence of alcohol.

Dealing with the legal issues:

(a) ***The Mens Rea***

The offence of murder is committed when a person kills another person unlawfully with

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intent to kill. The intent to kill may be actual and direct or it may be a constrictive intention.

In the present case, the accused changed from lover to killer of the deceased while in the Rembrandt Flat, demonstrating most graphically that between love and hate the dividing line is very thin indeed. She became so angry with him that she went into the kitchen and picked up a knife large enough to slaughter an ox, went back into the bedroom and stabbed him in the chest area 26 times. This chain of activity was not accidental or fortuitous. It was purposeful and directed to achieve only one goal - the death of the deceased. It would be nonsensical to suppose that the accused stabbed the deceased in the chest with the lethal weapon in a most brutal manner, in order only to frighten or to hurt him. Furthermore, the depth of the wounds which she inflicted shows that great force was used. That and the repeated number of stabs indicate an intention to kill not slowly but at once. Thus if the assailant was capable of forming an intention at all it could only be the intention to bring about the death of the victim In these circumstances the conclusion is inescapable that the accused did act with a direct intention to kill the deceased. She herself identified some of the lies she had told but none of these affects the central questions that she killed the deceased or the degree of mental and emotional stress under which she acted. There is a certain amount of consistency about her confession to the act of killing the deceased.

(b) **The defence of intoxication**

The accused has claimed the defence of drunkenness. She said that she had lost control of her senses and her power to form an intention by reason of having taken alcohol and drugs. For the reasons given above we have excluded the influence of drugs. There was no evidence that she had taken any drug like mandrax or LSD. However, it is common cause that both the

deceased and the accused had drunk alcohol at the Circus Night Club. He drank whisky while she drank gin and tonic. She was unable to say exactly how many drinks she took that night but she counted more than six tots. She said she drank more than she could normally take. Her own phrase was "I drank until I was motherless with drink". We understood this phrase to mean that she was totally drunk. However, that is not to say she was totally knocked out. Her recollections and her actions clearly show that she had not reached the stage where she lost control of her faculties. The state of drunkenness is a question of degree which may stretch like a rubber bad before it snaps. The accused was aware that she and the deceased left the Circus Club at about 20.00 hours, that the two went to a flat for the purpose of having sexual intercourse. She remembered and recounted how they both undressed and made love once. She recounted how the deceased requested her to tie him down to the bed, how she repeated the sex act from a more active position, how she got off, how the deceased cursed and insulted her and how she got the knife and stabbed him to death. This amount of detail cannot possibly be the recollection of a hopelessly drunken

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woman. The accused had travelled some distance along the elastic path to drunkenness but she had not reached the snapping stage. We cannot say that she was so intoxicated or drunk that she was unable to know or control what she was doing or to form the special intent necessary to constitute the crime of murder. We are however, prepared to give her the benefit of the doubt to the extent that alcohol may have made her more irascible, more vioent, and given her more Dutch courage than she would have been or had in her sober state.

Drunkenness is not a defence in itself but it may render the accused incapable of forming the special intent which is necessary to constitute a particular crime. If the intent is not formed then of course the crime is not committed. In the case of the charge of murder the accused could be found guilty of culpable homicide or other lesser offence. *S v Johnson* 1961 (1) SA 201 (A); S v Chretien 1981 (1) SA 1097 (A); *S v Chamunorwa* & Ors S-137-86; S v Grove-Mitchell 1975 (3) SA 417 (A); *R v Tenganyika* 1958 R & N 228 (FS).

In the instant case, for the reasons stated above, we do not believe that the accused's state of intoxication disenabled her to form the intention to kill. Our conclusions are based on the proposition once stated as follows:

> "When a man draws a pistol from its holster, jerks a cartridge from the magazine into the chamber, points it at another and pulls the trigger, it would be artificial, to say the least of it, to hold that he had no intention to kill": *per* Tredgold CJ in *R v Tenganyika supra* at 237

MUBAKO J

In the case before us, the accused took several steps before she disposed of her victim. In our opinion she clearly intended the natural consequences of her actions. Intoxication by itself affords her no defence.

(c) The Defence of Provocation

The accused offers another line of defence - provocation cum intoxication. The general rule of Roman-Dutch Law is that a person may be so provoked or made mad by another person's behaviour that he loses control over his faculties and becomes incapable of forming the specific intent in relation to a particular offence. It is recognised that anger may be so strong as to destroy a person's "voluntarium" in a similar way as intoxication. If the accused lacked the intention necessary for the particular crime then again he/she is not guilty of that offence but may be guilty of a lesser crime. This is the rule which is followed in South Africa for all offences. It is perfectly logical.

In Zimbabwe, this general rule applies in respect of all crimes except homicides. The courts have developed a peculiar approach which adopts a two-stage inquiry as to whether an accused who claims provocation can escape criminal liability. The approach was first expounded by Tredgold CJ in *R v Tenganyika* 1958 R & N 228 - a case in which, incidentally, Advocate Herbert Chitepo argued for the appellant. The

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learned Chief Justice laid down the rule that whenever provocation is raised as a defence in a murder case the court will first apply the subjective test by inquiring into the actual state of mind of the individual concerned at the time of committing the offence. The court will take into account all relevant circumstances which may have affected the mind of the accused eg the effect of alcohol followed by provocation. The question to be asked is whether the accused had the intention to kill in spite of all these factors. If the answer is "No" then it means that the defence of provocation applies and the accued must be acquitted of the murder charge although he/she may be found guilty of a lesser offence such as culpable homicide. If the answer is "Yes" the accused did form an intention to kill his/her victim" then the court must go on to a second rung and apply the objective test: would a reasonable man placed in the circumstances of the accused have lost his self control and acted in this way? In other words, would a reasonable man have killed intentionally? If the answer is still "yes", then the defence applies and the accused is acquitted of murder but found guilty of a lesser offence. At this stage, the accused's actions are looked at only objectively without regard to his personal eccentricities eg that he was sober or drunk.

It has been suggested that the fact that the accused stabbed her victim an

MUBAKO J

extravagant number of times - 26 stab wounds were found - that is proof that she had been grossly provoked subjectively and was unable to form an intention to kill. We agree that such extravagance is a factor to be taken into account. However, it must not be regarded as conclusive evidence of extreme provocation or loss of self control. Some people react disproportionately to slight provocation, some have a hot temper, others want to beat their victims to pulp, and still others take pleasure in inflicting pain on their antagonists. Smit J pointed out in R v Molako 1954 (3) SA 777 (O) at 781 that it is a fallacy to conclude that -

> "the more brutal the murder, the greater the indication that the perpetrator had lost control of himself."

It would be strange justice that punishes moderate killers while it provides a defence for the more brutal butchers. However, we know that such a proposition does not conform with human experience. An hour spent watching a wrestling match will demonstrate that one wrestler can habitually inflict more punishment on his opponents than others, but all can at the same time maintain their self control. Beck J (as he then was) cautioned as follows:

> "One must be careful, however, not to infer too readily from the very extravagance of the accused's behaviour the reasonable possibility of a complete loss of self control sufficient to deprive him of the capacity to form an intention to kill, when such extreme behaviour may be the result of the accused having yielded to a passion which aroused in him an actual desire to bring about the death of his victim": *S v Howard* 1972 RLR 247 (G) at p 253.

That the accused in this case chose to stab a man lying helplessly before her and then to repeat the act several times is to us no proof that she no longer knew what she was doing but more a mark of depravity and determination to accomplish the act of killing which she had decided to achieve, when she looked for a knife. The deceased was

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found gagged with a petticoat probably to prevent him from screaming. This may have been done before the stabbing commenced, or at any time thereafter. In any case the gagging shows that the perpetrator of the act was acting purposefully towards the killing, or covering it up immediately after the killing.

In these circumstances, the act of killing as retaliation to provocation can hardly be said to be "instinctive or little more than a reflex action in response

MUBAKO J

to the provocation". Having decided to kill the deceased she left the bedroom and went into the kitchen in search of a weapon that could achieve that purpose. She went back to the bedroom to her captive victim and stabbed him in the chest deep and repeatedly, until he died. We are therefore of the view that the State has proved beyond reasonable doubt that taking all the circumstances into account, in spite of her state of intoxication and provocation the accused was capable of forming the intention and did form the intention to kill the deceased at the time she killed him. In our view, any other conclusion would be artificial and untenable.

Having reached that decision we were then expected to consider the second rung of the Zimbabwean approach propounded by Tredgold CJ in Tenganyika.

The two-rung approach was followed in a number of cases including R v Majhaye 1965 RLR 106 (G); *S v Nangani* 1982 (1) ZLR 150 (S); *S v Ncube* S-14-87.

On jurisprudential grounds, the two-rung approach appears to involve contradictions.

(a) The application of an objective test to measure a person's mental state seems artificial from the start. A person is not provoked objectively, but only subjectively. There is no objective standard about it.

(b) The two-rung theory seems to be an attempt to give the accused a second chance to save his defence, having found that he did form the criminal intention to kill unlawfully. To talk of an objective justification for an unlawful killing is a contradiction in terms. The proverbial reasonable man is a paragon of virtue. The least one would expect of the reasonable man is that he would in all circumstances exercise a sufficient degree of self control to avoid committing any unlawful killing intentionally. Once it is conceded that a killing is unlawful and intentional, then a reasonable man cannot be heard to say that he still did it because he was overcome by anger or passion. I fully concur with the observation by Beck J that "it would indeed be a rare case in which it would be proper to hold that even a reasonable man would have reacted, not just impulsively and instinctively without being capable of forming any intention to kill, nor even recklessly, without caring whether death ensued or not, but purposefully,with an actual desire to kill": *S v Howard supra* at 254.

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MUBAKO J

In my respectful view, the two-rung approach is theoretically unsound and in any case adds little to the basic Roman Dutch law approach followed in South Africa. Nevertheless, I recognise that the Zimbabwean approach rests on high authority deriving from a respectable pedigree of case law. It requires that after a finding that the accused had, subjectively considered, the intention to kill, the court must consider the further question: whether, objectively considered, the provocation which the accused was subjected to was such that the hypothetical reasonable man placed in the same circumstances as the accused, would have lost his self control and killed the deceased. In the instant case we did pose the question whether the reasonable woman who was similarly provoked would have been so angered that even she would have succumbed to a purposeful desire to kill the provoker. We are firmly of the view that on the facts the reasonable man or the reasonable woman, however much he or she may have been offended by th taunts, sneers, and jeers of a boyfriend who was lying harmlessly on his back, would not have gone to the kitchen in search of a knife, come back to the bedroom and proceed to plunge the carving knife into the naked chest of the man and to repeat the stabbing act several times until he died and to do so with the intention of killing him. The reasonable woman might have slapped him or scratched him, she might have hit him with her shoe or the nearest chair she could grab, but would not have searched for a clearly murderous weapon and proceeded to employ it murderously as the accused who is here before this court did that fateful morning. The situation here resembles that in *S v Howard supra* rather than in S v Dlodlo 1966 (2) SA 401 (A).

Accordingly, the defence of provocation in these circumstances does not apply, except perhaps as an extenuating circumstance. The combination of excessive consumption of alcohol and some provocation must have diminished her sense of responsibility but it did not, in our judgment, remove her ability to form an intention to kill the deceased.

We find the accused guilty as charged of the crime of murder, with direct intent but with extenuating circumstances.

SENTENCE

Before passing sentence, I must consider the submissions in mitigation submitted by counsel for defence as well as submissions in aggravation which were submitted by the State.

On the mitigation side, I will of course take into account what has already been accepted as extenuating circumstances, the fact that the accused was

MUBAKO J

intoxicated as the court has found and that there was also some provocation. I will also take into account that the accused is a relatively youthful person, only just climbed out of her teens when she committed the offence. She was 19 years 1 months old to be exact.

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I will take into account also the sorry background from which she comes, which must have had an effect on her character and therefore on the eventual commission of an offence such as this one. I also take into account the fact that the accused is a first offender and that whatever objection there might have been to her behaviour before this case in terms of morality, that behaviour had not transgressed the law.

I am aware that the accused is a mother of two young children, one of which is still a baby. A punishment of a long term of imprisonment would be bound to affect both herself as well as the children as they grow up. I am aware and I take into account also the fact that the accused has spent a relatively long period in prison waiting for this trial and that she is contrite and sorry for what she did.

However, as Mrs *Zimba* has pointed out, one must take into account, not just the conditions of the offender but the offence that has been committed. The punishment, as the saying goes, must suit both the offender as well as the offence. The offence of murder is very serious indeed, the most serious offence in the book. The courts have no other way of showing their aversion to murder and their determination to stamp out this king of crime than by punishing severely the perpetrators of the offence. The punishment is aimed at correcting the offence as well as deterring others from committing similar crimes.

In this particular case, the accused committed a bizarre offence surrounded as it is by matters of love, sex and blood. The accused killed him in most brutal and callous manner. There could have been many ways of showing her anger and her annoyance with the provocation, taunts and jibes which he made at her. But let it be remembered that these were just verbal taunts by a man tied to a bed. It is not as if he was assaulting her in any other way. There was no attack on her except by word of mouth. Why she should then have retaliated with actions aimed at finishing his life, would beat any normal thinking person. One would have thought that merely walking out and leaving him like that would have taught him a lesson. Any other act short of killing him might be excusable. But the accused decided to finish not just their love affair but to finish his life as well. This seems to me to heighten her blameworthiness.

MUBAKO J

She was not killing a stranger she met on the way or someone who had attacked her, but someone who wasclearly lying defenceless and helpless, someone who had been her lover just a few minutes before.

In all these circumstances, there is no question of a sentence other than a custodial sentence. There is no question of community service or anything like that because, as I have said, murder is the most serious crime in the book because it involves the taking away of human life and the court's first duty is to safeguard the sanctity of life. Because of this, the law provides the ultimate penalty of death for the offence of murder.

In the case before us, the court has found extenuation in that the accused acted under the influence of alcohol coupled with a degree of provocation. The court may impose a term of imprisonment and not the death penalty. The accused would have deserved a very stiff

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sentence indeed, many more years than I am going to sentence her to. However, because of all the mitigating factors which I have considered the sentence will be somewhat reduced.

The accused is sentenced to 12 years' imprisonment with labour.

S v MODUS PUBLICATIONS (PVT) LTD & ANOR 1996 (2) ZLR 553 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Criminal appeal

14 October & 7 November 1996 Judgment No. S-208-96

Flynote

Criminal law - common law offences - criminal defamation - essential ingredients - whether necessary for defamation to be of serious nature - defences - *animus* injuriandi - when may be inferred

Headnote

A weekly newspaper had published stories in which it alleged that the President of Zimbabwe had married a woman at a ceremony that had been conducted in secret. The stories further alleged that a named judge of the High Court had conducted this secret ceremony and that a named Minister had been a witness at the ceremony. The President denied that there had been any such secret ceremony; the judge publicly stated that he had conducted no such ceremony and that as a judge he had no legal power to solemnize marriages; the Minister denied being present at any such ceremony. Despite these denials the newspaper published a further story stating that it stood by its story.

This series of articles led to two charges of criminal defamation being laid jointly against the company that owned the newspaper, the editor of the newspaper and the reporter who was responsible for the story. On the morning that the trial commenced, the newspaper published an apology to the two complainants. All three accused were convicted in the trial court. The owner and editor appealed against their convictions.

Held, that criminal defamation consists of the unlawful and intentional publication of matter concerning another which injures his reputation. The defamation is not unlawful if the story is true and is for the public interest, if it amounts to fair comment or if it is privileged. In Zimbabwe the defamation has to be serious in order to be unlawful and constitute

a crime (but this requirement may have to be reconsidered if the South African Appellate Division were to hold that the defamation does not have to be serious before this crime is committed.) In order to determine whether the defamation satisfies the requirement of seriousness the court will consider conjunctively these factors: the extravagance of the allegation; the extent of publication; and whether the words are likely to have results that may

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detrimentally affect the interests of the State or the community.

Held, further, that in the present case the statements were extravagant as they conveyed the impression that the judge and the Minister had indeed participated in a secret ceremony as alleged and that the reason for their denial was that they had realised that they had acted contrary to the law. There was extensive publication of the stories as the newspaper was widely circulated. Finally, to imply that a High Court judge and a minister were liars is inherently likely to affect detrimentally the interests of the State and the community. The reputations of judges and ministers extend beyond the borders of Zimbabwe. Foreign powers and potential investors, donor agencies and non-governmental organisations may well lose confidence in, and hesitate to deal with, a country whose top officials are portrayed as untruthful persons. The belated apology was too late to right the harm or its likely consequences.

Held, further, that in a case of criminal defamation the State must prove that the accused had the necessary intention to defame. Unlike in a civil defamation action, there is no presumption of *animus* injuriandi. In the light of the surrounding circumstances in the present case, the only reasonable inference was that the editor must have foreseen the real possibility that the allegation being made against the complainants was false and proceeded to publish it recklessly. He therefore had the necessary *mens rea*. The owner of the newspaper entertained in law the same *mens rea* as the editor.

Cases cited:

Herbert v Isaacs & Anor 1973 (1) RLR 316 (A)

R v Chikerema 1958 R & N 779; 1959 (1) SA 721 (FS)

R v Chipo & Ors 1953 SR 53; 1953 (3) SA 602 (SR)

R v Chipo & Ors 1953 (4) SA 573 (A)

R v Dewberry 1935 EDL 97

R v Dziva 1971 (1) RLR 202 (G)

R v Ginsberg 1934 CPD 166

R v Joseph 1960 (1) SA 819 (SR)

R v Shaw and Fennell (1884) 3 EDC 323

GUBBAY CJ

R v Fuleza 1951 (1) SA 519 (A)

R v Japel 1906 TS 108

R v Masoja & Mtelo 1930 SR 167

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R v Myers 1948 (1) SA 375 (A)

S v Gibson NO & Ors 1979 (4) SA 115 (D)

S v Marangarire 1977 (2) RLR 73 (G); 1977 (4) SA 237 (R)

Case Information

E W W Morris, for the appellant

M Majuru, for the respondent

Judgment

Gubbay CJ: Modus Publications (Private) Limited publishes and distributes extensively throughout the country a weekly newspaper known as the Financial Gazette. Its chief executive is Mr Elias Rusike. At all material times his function was to determine the policy of the newspaper, to ensure that it was financially viable and to recommend the appointment of editors to the members of the board. He did not concern himself with the editorial content or articles appearing in each individual issue of this newspaper. For, in accordance with tradition in newspaper publishing, the editor is to be allowed complete latitude in deciding, on a day to day basis, what is worthy of print.

The editor of the *Financial Gazette* is Mr Trevor Ncube. During the relevant period it was he who exercised control over what was to be published. His function was to receive stories from reporters and to satisfy himself as to their accuracy. This he did by questioning the reporter concerned as to the source of the information tendered. If in any doubt as to the authenticity of the story, he would direct the reporter to undertake further investigation and research.

Published on the front page of the Financial Gazette of 21 April 1995 was an article by the then deputy editor, Mr Simba Makunike, headed "Mugabe ties the knot". It read in part as follows:

> "President Mugabe exchanged marriage vows with the mother of his two children, Grace Marufu, at a private ceremony at State House during the Easter weekend.
>
> The ceremony, according to sources, was conducted by High Court Judge, Paddington Garwe, under a shroud of secrecy. Justice Garwe could not be reached for comment as he was said to be out of the country. However, another source at the High Court who declined to be named confirmed the marriage ...

GUBBAY CJ

> The ceremony is said to have been witnessed by the Minister of Public Construction and National Housing, Enos Chikowore, and his wife.
>
> The new First Lady's brothers were also said to have been present at the marriage ceremony.
>
> 'It was a family thing and not many people were invited', the source said ...
>
> The source also disclosed the President opted not to wed in the Roman Catholic Church to which he belongs

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because his affair with the new First Lady began before his late wife Sally Mugabe died.

The source said a church wedding would have been a violation of Catholic doctrine which placed a great deal of emphasis on fidelity."

On 23 April 1995, the Sunday Mail carried on its front page an article under the heading "Secret marriage ceremony? Never, says President". It stated that, interviewed the previous day, the President denied that he had entered into a secret marriage ceremony over the Easter weekend. It reported the President as saying that he would be taking necessary steps with respect to marriage but not in accordance with the story put out by the weekly paper.

In its next weekly edition of 27 April 1995 the Financial Gazette published an article "Fingaz stands by its marriage report". It reaffirmed that notwithstanding the President's denial in the Sunday Mail:

"The *Financial Gazette* stands by its story that a recent wedding took place in the circumstances we described in our report."

The *Sunday Mail* of 30 April 1996 again disputed the fact of the President's marriage. It disclosed that Mr Justice Garwe had dismissed the allegation that he had conducted a secret marriage for President Mugabe and Miss Grace Marufu as "completely untrue and baseless ... nothing more than the product of fertile imagination". It mentioned that in a statement made to it Mr Justice Garwe said that at no time was he a party or witness to such a ceremony, being away from Harare during the Easter weekend and almost immediately thereafter out of the country; that as a judge he was not empowered by law to solemnize marriages. The article went on to record that Minister Chikowore:

" ... denied any knowledge about such a ceremony and that he was

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GUBBAY CJ

annoyed and shocked to read in the *Financial Gazette* that he and his wife witnessed the alleged marriage ceremony."

On 4 May 1995 the *Financial Gazette* yet again entered the controversy with the publication of this article:

"Despite denials by Public Construction and National Housing Minister Enos Chikowore and High Court Judge Paddington Garwe that President Mugabe tied the knot with Grace Marufu over the Easter weekend, the Financial Gazette stands by its story that the ceremony did take place in the circumstances described. However, the Financial Gazette has since learnt that due to procedural omissions the validity of the marriage may now be in doubt."

This series of articles gave rise to two charges of criminal defamation being laid jointly against Modus Publications (Pvt) Ltd, represented by Mr Rusike ("the first appellant"), Mr Ncube ("the second appellant") and Mr Makunike, then the third accused. Although framed in an over-elaborate and rather confusing manner, the real gravamen of the charges was the imputation that Mr Justice Garwe and Minister Chikowore had lied in denying their involvement with the marriage ceremony.

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The trial was set down to commence in the regional court on 6 July 1995. On that very morning the Financial Gazette published an apology to Mr Justice Garwe and Minister Chikowore. It proffered regret at having called into issue the truth of their statements and for any embarrassment caused to them.

Despite their denials of the charges, the appellants and Makunike were convicted after a lengthy trial. It was found by the regional magistrate that in each count the defamation of Mr Justice Garwe and of Minister Chikowore was sufficiently serious to constitute a crime and that the State had proved the necessary element of *mens rea*. The payment of fines was ordered.

In this court, the propriety of the convictions was challenged by the first and second appellants, it being conceded that if the second appellant, as editor of the Financial Gazette, was guilty of the charges, the first appellant must be taken to have entertained the same state of mind. See s 352(2)(a) of the Criminal Procedure and Evidence Act [Chapter 9:07].

Counsel were agreed that the trial court had correctly identified the two issues as unlawfulness and intention; and that it would only become necessary for

this court to determine whether the appellants had the requisite *mens rea*, if the defamations charged fulfilled the criteria for criminality.

Criminal defamation consists in the unlawful and intentional publication of matter concerning another which tends to injure his reputation (fama). See Snyman *Criminal Law* 2 ed at 457; Burchell and Milton *Principles of Criminal Law* at 450. It is a form of injuria. It covers the publication of defamatory statements, whether verbal or in writing. See R v Japel 1906 TS 108 at 110 in fine - 111; R v Masoja & Mtelo 1930 SR 167 at 171; R v Fuleza 1951 (1) SA 519 (A) at 528F-H and 532C-D; *R v Chikerema* 1958 R & N 779; 1959 (1) SA 721 (FS) at 722B-C.

The publication of defamatory matter to some person other than the complainant is not unlawful if it was the truth and the publication was for the public interest. See R v Shaw & Fennell (1884) 3 EDC 323 at 324; R v Dewberry 1935 EDL 97 at 101. It is not unlawful if it constitutes "fair comment". See R v Shaw & Fennell *supra* at 325; or if privileged. See R v Masoja & Mtelo *supra* at 171 in fine; R v Ginsberg 1934 CPD 166 at 178.

The courts of this country favour the view that the "seriousness" of the defamation is an essential element of the offence. See R v Chipo & Ors 1953 (3) SA 602 (SR) at 604C-D (the reasoning of the majority was not criticised or dissented from on appeal - 1953 (4) SA 573 (A)); R v Walton 1958 (3) SA 693 (SR) at 695B-C; *R v Chikerema supra* at 723 B-G; *R v Joseph* 1960 (1) SA 819 (SR) at 820C; *S v Dziva* 1971 (1) RLR 202 (G) at 205H-206A, 1971 (4) SA 185 (R) at 187H-188A; *S v Marangarire* 1977 (2) RLR 73 (G) at 77H, 1977 (4) SA 237 (R) at 239B.

In South Africa, there is no conclusive judicial pronouncement on the question. In R v Fuleza *supra*, the judgments of Hoexter and Fagan JJA are equivocal. The point was left open in S v Gibson NO & Ors 1979 (4) SA 115 (D) at 150D-E. Nor do the Roman-Dutch authorities provide a clear answer. They appear to be in conflict. See Burchell The Law of Defamation in South

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Africa at 325-226. Academic opinion is likewise divided. Hunt *South African Criminal Law and Procedure* Vol II 2 ed at 563-564 advances five reasons for requiring defamation to be serious before it is punishable. Each is criticised by Burchell op cit at 328-330. In this the learned author is supported by the views of van Oosten in 1978 SALJ 505 at 512 and van den Berg in 1988 THR-HR 54 at 70. On the other side, Snyman op cit at 458 and in LAWSA Vol 6 at para 294 leans towards Hunt's opinion.

GUBBAY CJ

If the South African Appellate Division were to hold that it is not necessary for the defamation to be serious in order to be unlawful and constitute a crime, then our decisions, none of which emanate directly from this court, may have to be reconsidered. As presently advised I am not satisfied that they are wrong. Certainly no argument to the contrary was addressed by counsel for the State. Quite possibly this was due to a perception that the defamations with which this appeal is concerned were indeed serious.

In *S v Marangarire supra* at 76F-G or 239H I suggested that in determining the seriousness of the defamation, that is, the *actus reus*, a court should have regard to (a) the extravagance of the allegation; (b) the extent of the publication; and (c) whether the words are likely to have results that may detrimentally affect the interests of the State or the community. These factors must be considered conjunctively. The totality of the circumstances in which the defamatory matter was published is to be looked at. Each case has to be decided on its own particular facts and an objective assessment made on whether the defamation is serious enough to constitute a crime. See *S v Marangarire supra* at 77A or 240B. It is to this enquiry that I now turn.

(A) THE EXTRAVAGANCE OF THE ALLEGATION

In considering this factor, it is necessary to take account of the three articles published by The Financial Gazette, as well as the two by The Sunday Mail on 23 and 30 April 1995.

Two days after the article of 21 April 1995 the President denied having "tied the knot". This meant that Mr Justice Garwe had not presided over the marriage and that Minister Chikowore had not witnessed it. By standing by its marriage report in its issue of 27 April 1995, the Financial Gazette clearly and unequivocally imputed that the President was being untruthful in denying the existence of the marriage. On 30 April 1995 the Sunday Mail reported that Mr Justice Garwe and Minister Chikowore had been interviewed and both denied knowledge of any such marriage. Against this background the article of 4 May 1995 was published. It conveyed in unmistakable terms that Mr Justice Garwe and Minister Chikowore, having conducted themselves as revealed in its article of 23 April 1995, were now denying it. It went further to state that the reason for their denials was a realisation that they had acted contrary to law - Mr Justice Garwe in solemnizing a marriage that he was not empowered to do and Minister Chikowore by beng a party to a ceremony he knew was unlawful.

GUBBAY CJ

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Viewed in this way, the publication of 4 May 1995 cannot be regarded as anything other than extravagant.

(B) THE EXTENT OF THE PUBLICATION

Sales each week of about 22 500 copies of the Financial Gazette are considerable. Publication is widespread throughout the country. This factor weighs heavily on the issue of seriousness. In *S v Marangarire supra*, the fact that the publication had been restricted to the magistrate, the prosecutor and those concerned with the investigation of the offence for which the accused had been arrested, influenced the court in holding that the words uttered by the accused were not of such degree of seriousness as to be criminal. By contrast, in *R v Chikerema supra* the defamatory utterances were found to be sufficiently serious because they had been published at a political meeting in a language understood by the appellant's large audience.

(C) WHETHER THE WORDS ARE LIKELY TO HAVE RESULTS THAT MAY DETRIMENTALLY AFFECT THE INTERESTS OF THE STATE OR THE COUNTRY

This factor of necessity embraces the identity, status and character, of the person defamed. In *S v Marangarire supra* the complainant held the inferior rank of a constable, while in *R v Chikerema supra* it was a Minister of the Crown who was defamed. The status and position in society of Mr Justice Garwe and Minister Chikowore are very high. They are important public figures in the service of the country, both of whose characters, the defence accepted, are impeccable.

Hunt *op cit* at 564 makes the obvious point that:

> "Imputations upon the integrity and impartiality of public and quasi-judicial public officials and bodies and perhaps also public figures are likely to be serious."

See also the remarks of Tredgold FCJ in *R v Chikerema supra* at 723H.

The office of judge of the High Court is one demanding the highest degree of honesty, integrity, impartiality, complete independence from the Executive and strict adherence to the laws of the land. The public are entitled to, and do, expect no less.

As a long-standing elected member of Parliament who, in addition, has been

a member of the Cabinet since 1980, Minister Chikowore's position in public life similarly requires of him absolute integrity, credibility and total observance of the law.

Without these essential attributes neither a judge nor a minister would last long in his calling, and deservedly so.

To impute falsehoods to Mr Justice Garwe and Minister Chikowore - to term them liars - cannot be taken lightly. Such a defamatory utterance is inherently likely to affect detrimentally the interests of the State and the community. The reputations of judges and ministers extend beyond the borders of Zimbabwe. Foreign powers and potential investors, donor agencies and

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non-governmental organisations, may well lose confidence in, and hesitate to deal with, a country whose top officials are portrayed as untruthful persons.

To suggest, as did counsel for the appellants, that the publication of the apology in *The Financial Gazette* of 6 July 1995 would have extinguished or, in large part, neutralised, any adverse reaction the defamations may have had on the Government and its people, seems to me to be fanciful. The apology came two months after the publications were made. It was by then too late to right the harm or its likely consequences.

For these reasons, I am satisfied that the regional magistrate was correct in concluding that the statements concerning Mr Justice Garwe and Minister Chikowore were sufficiently serious to constitute criminal defamation. They were, therefore, unlawful.

The alternative argument advanced on behalf of the appellants was that the State had failed to prove the requisite *mens rea* or *animus* iniuriandi, as it is sometimes termed in cases of criminal defamation. The onus, of course, rested on the State to establish that the second appellant, and through him the first appellant, subjectively harboured an intention to defame. Unlike in a civil defamation action, there is no presumption of *animus* iniuriandi. See *S v Marangarire supra* at 75F or 239A.

Understandably, it was not the State's position at the trial that the second appellant was guilty of an actual intention to defame Mr Justice Garwe and Minister Chikowore - only that he must have foreseen the real possibility of the statements concerning them being unlawfully defamatory, yet nonetheless sanctioned the publications reckless of the result flowing from such action.

GUBBAY CJ

The sequence of events with regard to which the determination had to be made by the trial court as to whether the second appellant had the requisite *mens rea* (*dolus* eventualis) in publishing in its context the article of 4 May 1995, were as follows:

(1) The second appellant had been warned by Mr Rusike about accepting information leaked from operatives of the Central Intelligence Organisation without independent and reliable verification. It had also been pointed out to him, as far back as October 1992, that there was a need for balanced reporting, especially as he seemed obsessed with the negative aspects of President Mugabe, ZANU-PF and the Government.

(2) In about March 1995, an account appeared in a magazine known as Horizon of President Mugabe's marriage under African culture and his intention to formalise the marriage after the forthcoming general election. The same prediction was made in the Sunday Gazette.

(3) At the stage when Makunike was writing the article that, subsequently, was published on 21 April 1995, the second appellant asked if he had evidence to substantiate its accuracy. Makunike replied that he was about to obtain the marriage certificate from his source. When next questioned as to whether he had procured the certificate,

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Makunike informed the second appellant that as his source had been summoned to State House he had not succeeded in doing so. He named the source as Dr Mashingaidze, the Director-General of the Central Intelligence Organisation and added that the latter was a relative. Instructed to confirm the wedding with Mr Justice Garwe and Minister Chikowore, Makunike reported to the second appellant that the one was out of the country and the other not available. He said, however, that he had confirmed the occurrence of the wedding with a Mr Clive Broe, a British expatriate who was working at the High Court.

On this information, the second appellant authorised publication of the article. In doing so, was it not somewhat odd that the Director-General of the Central Intelligence Organisation would be in possession of the marriage certificate of Robert Mugabe and Grace Marufu? What would he be doing with it and for what purpose? And who was Clive Broe? Why should he have been present at a ceremony conducted "under a shroud of secrecy"? Surely the most reliable confirmation would have been from Miss Marufu's brothers or from Mrs Chikowore! Yet Makunike was not asked to contact any of these persons.

GUBBAY CJ

(4) After the President had denied the story in the Sunday Mail, the second appellant again questioned Makunike. Although assured by Makunike that his relative would not lie, the second appellant wisely instructed him to obtain the marriage certificate. Makunike later reported that Dr Mashingaidze had given his word that the wedding had taken place but could not let him have the marriage certificate because "he was one of the few, if not the only one, who had the certificate; and if he gave it away this could reveal his identity".

All this the second appellant swallowed. Did it not cross his mind that if the President was falsely denying the marriage over the Easter weekend it was inevitable that ultimately he would be shown to have lied? It was not the sort of untruth that could possibly be maintained against immutable proof in the form of a public document such as a marriage certificate. Were not new doubts as to the authenticity of the story created, both by the President's denial and the attitude of the source? More than ever it had become imperative to procure independent and trustworthy confirmation.

Again nothing was done. Without contacting Mr Justice Garwe, Minister Chikowore or his wife, Miss Marufu or her relatives, or any other person, and in the clear knowledge and appreciation that conclusive evidence in the form of the marriage certificate remained wanting, the article "Fingaz stands by its marriage report" was published on 27 April 1995.

(5) Then three days later came the emphatic denials from Mr Justice Garwe and Minister Chikowore, the former denying the allegation as "completely untrue and baseless", the latter stating that he was "amazed and shocked to read in the Financial Gazette that

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he and his wife witnessed the alleged wedding ceremony".

The second appellant summoned Makunike and expressed to him his impression that the source had lied. He instructed Makunike to approach Dr Mashingaidze and demand the evidence, that is, the production of the marriage certificate. Makunike later informed the second appellant that:

> "It had now become difficult for him to see the source or even to talk to him. He could not get him at his workplace. He could not get him at his house and contact was more or less impossible. He (the source) had told somebody that his job was on the line because of disclosing the information to us and therefore there should not be contact between the two of them."

GUBBAY CJ

Despite Dr Mashingaidze's obvious evasiveness as spoken to by Makunike, the continuing absence of the marriage certificate, the denials of the President, Mr Justice Garwe and Minister Chikowore (none of whom had any apparent ulterior motive to mislead), the second appellant made no effort to seek reliable confirmation of the marriage.

There was available to him a dearth of evidence that the marriage had taken place. In fact, the situation had worsened since 21 April 1995, for now the veracity of the source was gravely suspect. Even Mr Rusike gained the impression that the second appellant "was beginning to realise that maybe he had been deceived by his deputy" (Makunike). Nonetheless, the publication of the second "the *Financial Gazette* stands by its story" went ahead on 4 May 1995.

Against this background, I am firmly of the view that the regional magistrate was correct in rejecting the word of the second appellant that to the very end he honestly believed the wedding story, and that the denials by the three public figures were nothing but a deliberate attempt to embarrass *The Financial Gazette*.

To contend that the second appellant lacked subjective foresight of the real possibility that the imputation of untruthfulness cast upon Mr Justice Garwe and Minister Chikowore, might not be justified on the facts and, thus, he was not reckless, but simply negligent, in publishing the article of 4 May 1995, seems to me to border on naivety. At the very least, the second appellant sedulously avoided all avenues of truth for the purpose of not having any doubt thrown on what he desired to believe. See R v Myers 1948 (1) SA 375 (A) at 382; Herbert v Isaacs & Anor 1973 (1) RLR 316 (A) at 321E-H.

Finally, I must dispel any conception that either Dr Mashingaidze or Mr Broe may have misled Makunike into believing that the wedding had taken place. The truth was that neither had anything to do with Makunike. The whole story of the existence of the wedding was one deliberately fabricated by Makunike.

As the first appellant entertained in law the same *mens rea* as the second appellant, it necessarily follows that in the case of each of them the appeal against conviction is dismissed.

KORSAH JA: I agree.

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MUCHECHETERE JA: I agree.

Atherstone & Cook, appellants' legal practitioners

STEWART SCOTT KENNEDY v MAZONGORORO SYRINGES (PVT) LTD 1996 (2) ZLR 565 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Ebrahim JA & Muchechetere JA

Civil appeal

28 October & 12 November 1996 Judgment No. S-215-96

Flynote

Practice and procedure - parties - citation - partnership - correct method of citing a partnership

Practice and procedure - parties - substitution of - action instituted in name of partnership - original partnership had been dissolved but some former members practised under old partnership name - effect of substitution would be to introduce new persona

Practice and procedure - summons - defective - action instituted in name of dissolved partnership - summons a nullity and incapable of amendment

Headnote

A summons was issued against the respondent in August 1993. The plaintiff's name was given as Stewart Scott Kennedy. The partnership of Stewart Scott Kennedy was established in October 1989. The partners consisted of a company incorporated in England, represented in the partnership by two individuals; six individuals practising in Zimbabwe as consulting engineers under the name of Stewart Scott NCL Zimbabwe, and represented in Stewart Scott Kennedy by two individuals; and a single individual. In 1992, the firm entered into an agreement with the respondent to construct a factory in Marondera. In March 1992, the partnership was dissolved. Stewart Scott NCL Zimbabwe was also dissolved and the partners formed a new partnership under the same name, but with a change of membership. This partnership was itself dissolved in 1994, when two partners withdrew. The remaining partners joined together under the name Stewart Scott Zimbabwe.

In February 1996, when the matter was set down for trial, an application was made to delete the names Stewart Scott Kennedy and substitute those of a number of the former partners, "practising in the name and style of Stewart Scott Kennedy". The trial judge (Sandura JP) dismissed the application, on the grounds that the amendment would introduce a new legal person.

Held, that as a partnership does not have a separate legal personality from that of the partners, the correct method of citing a partnership was to cite the names of the individual members,

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"trading or carrying on business in partnership under the style or firm of ..."

Held, further, that where a partnership is dissolved the partners may, but are not obliged to, transfer their rights and liabilities to the incoming partners. Consequently, it could not be assumed that the claim against the respondent had been ceded to Stewart Scott Zimbabwe.

Held, further, that the institution of an action in the name of Stewart Scott Kennedy was void *ab initio*, because without a plaintiff there can be no claim. The partnership of Stewart Scott Kennedy had been dissolved and did not exist at the time the summons was issued. The summons, being invalid, could not be rectified by amendment.

Cases cited:

Blumberg v Buys & Malkin & Margolis 1908 TS 1175

Curtis-Setchell & McKie v Koeppen 1948 (3) SA 1017 (W)

de Jager v Bethlehem Trading Co 1916 OPD 3

Devonia Shipping Ltd v M V Luis (Yeoman Shipping Co Ltd intervening) 1994 (2) SA 363 (C)

Divine Gates & Co v African Clothing Factory 1930 CPD 238

Friends of the Sick Assn v Commercial Properties (Pty) Ltd & Anor 1996 (4) SA 154 (D)

Goldberg v Tomaselli & Sons Ltd 1940 TPD 409

Goldberg & Anor v di Meo 1960 (3) SA 136 (N)

Kelly v Petersen 1948 (4) SA 958 (A)

L & G Cantamessa v Reef Plumbers; L & G Cantamessa (Pty) Ltd v Reef Plumbers 1935 TPD 56

Lamin v Duly \& Co Ltd 1983 (2) ZLR 35 (H)

Min of Defence, Namibia v Mwandinghi 1992 (2) SA 355 (NmS)

Muller en 'n Ander v Pienaar 1968 (3) SA 195 (A)

O'Sullivan v Heads Model Agency CC 1995 (4) SA 253 (W)

Paterson's Exors v Webster, Steel & Co & Ors (1882) 1 SC 350

Pillay v South British Ins Co Ltd 1959 (4) SA 248 (W)

GUBBAY CJ

Que Que Bakery (Pvt) Ltd v Model Entpr t/a Model Bakery 1973 (2) RLR 292 (G)

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Rhodesia Rlys & Ors v CoT 1925 AD 438

Samente v Min of Police & Anor 1978 (4) SA 632 (E)

SA Leather Co (Pty) Ltd v Main Clothing Mfrs (Pty) Ltd & Anor 1958 (2) SA 118 (O)

Tedder & Anor v Greig & Anor 1912 AD 73

Thompson v Manning & Hayes (1888) 9 NLR 67

van Heerden v du Plessis 1969 (3) SA 298 (O)

Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd & Anor 1978 (1) SA 671 (A)

The court referred to the following rules of court:

High Court Rules 1971 (RGN 1047 of 1971), r 132

Case Information

G S Wernberg, for the appellant

A J Dyke, for the respondent

Judgment

Gubbay CJ: On 25 August 1993 a summons was issued out of the High Court in the name of Stewart Scott Kennedy against the respondent.

On the summons appeared the signature of the legal practitioner who issued it. The claim was for (i) payment of the sum of $174 967,85 alleged to be due and owing in respect of professional services rendered to the respondent during the period September 1992 to May 1993; (ii) interest a *tempore morae*; and (iii) costs of suit. Upon entry of appearance by the respondent, a court application for the grant of summary judgment was made on 21 September 1993. The supporting affidavit was deposed to by "F M E Wibberley for and on behalf of Stewart Scott Kennedy". The application was opposed by the respondent. On 31 August 1994 it was dismissed by the learned judge with leave given to the respondent to defend. Costs of the application were ordered to be costs in the cause of the action.

Thereafter the respondent formally denied liability by way of plea and in its claim-in-reconvention sought damages for breach of contract in an amount of $300 000. The pleadings closed with the filing of a replication and plea to the claim-in-reconvention.

The trial was set down for 6 February 1996. At its inception an application was moved by counsel to delete the name of the plaintiff as Stewart Scott Kennedy and to substitute for it:

GUBBAY CJ

"M F Norman, R R Lock, H F Rapson, R M Emmerton, C E Hazeldon and F M E Wibberley, practising in the name

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and style of Stewart Scott Zimbabwe";

or alternatively:

"F M E Wibberley, G D L Longley, M F Norman, A J Kennedy and N Stead, practising in the name and style of Stewart Scott Kennedy."

The application for substitution was opposed by the respondent. It was submitted that Stewart Scott Kennedy was not a persona known to law, being merely a trading name under which, prior to the institution of the action, certain parties had operated in partnership.

Sandura JP, who presided, agreed that the effect of either amendment would be to introduce a new persona in law as the plaintiff, and so refused the application. Consistently with that decision, he dismissed both the claim-in-convention and that in-reconvention. This appeal lies against that order.

At common law a partnership does not have a separate juristic personality of its own. It is not a legal entity, capable of owning property or of incurring obligations. See Divine Gates & Co v African Clothing Factory 1930 CPD 238 at 240. Nor do the Rules of the High Court (unlike r 14(2) of the South African Uniform Rules) contain any special provisions governing proceedings instituted by or against partnerships. Thus, when an action is sought to be instituted by or against a partnership the partners, that is, the persons as constituting the firm, must sue or be sued. The ordinary form of citation is A, B and C, trading or carrying on business in partnership under the style or firm of so-and-so. See Muller en 'n Ander v Pienaar 1968 (3) SA 195 (A) at 202 *in fine* - 203A.

The partners of Stewart Scott Kennedy were:

(1) a company incorporated in the United Kingdom with limited liability by the name of Kennedy and Donkin. It was represented in the partnership by Mr Kennedy and Mr Stead;

(2) six individuals practising in partnership as consulting engineers under the name of Stewart Scott NCL Zimbabwe. Mr Longley and Mr Norman were the representatives; and

(3) Mr Wibberley, who was the managing partner.

GUBBAY CJ

Both a limited liability company and a partnership firm have the capacity to enter into a partnership. See Rhodesia Railways & Ors v Commissioner of Taxes 1925 AD 438 at 465; S A Leather Co (Pty) Ltd v Main Clothing Manufacturers (Pty) Ltd & Anor 1958 (2) SA 118 (O); Thompson v Manning & Hayes (1888) 9 NLR 67; Tedder & Anor v Greig & Anor 1912 AD 73.

The partnership agreement was entered into on 31 October 1989. Clause 11 thereof provided that upon notice of termination the remaining parties had the right to purchase the withdrawing party's share of the partnership. If they decided to do so then the terms of the partnership

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between the remaining parties with any other person were to be the same as those contained in the former agreement. But there was no right to continue to use the name Stewart Scott Kennedy unless such right had been agreed to prior to the withdrawal.

On 12 February 1992, the partners of Stewart Scott Kennedy as the consulting engineers entered into a written contract with the respondent for the construction of a syringe manufacturing plant at Marondera. Clauses 7 and 9:3 read:

> "7. NON ASSIGNMENT
>
> Neither the Consulting Engineer nor the Client shall have the right to assign or transfer the benefit or obligation of the Agreement or any part thereof without the written approval of the other party. The parties to this Agreement shall, however, be entitled at any time to make changes in their Partnerships, Directorates or Managements and such changed Partnerships, Directorates or Managements shall thereafter be deemed to be included in the expressions 'the Consulting Engineer' or 'the Client'."

And:

> "9:3 Should the Consulting Engineer be a Partnership or corporate body the Agreement shall not be dissolved by the death or retirement of a member of the Partnership or a director of the body corporate."

It is clear to me that clause 7 did not permit the partners of Stewart Scott Kennedy, except with the written approval of the respondent, to cede or transfer either the rights or obligations under the agreement to another partnership composed of different individuals. The partners of Stewart Scott Kennedy were entitled to make internal administrative or managerial changes - they could, for instance, replace one of the partners assigned to supervise the project with another partner. And clause 9:3 was designed to ensure that

the death or retirement of one of the partners of Stewart Scott Kennedy would not give the right of termination to either contracting party. The obligation to fulfil the terms of the agreement would remain with the former partners in their individual capacities.

In March 1992, the partnership of Stewart Scott Kennedy was dissolved. The company Kennedy and Donkin withdrew from the partnership. It would seem that the partnership Stewart Scott NCL Zimbabwe was also dissolved because when Messrs Longley, Norman, Adamson, Lock, Rapson and Wibberley, proceeded to practise in partnership under the name Stewart Scott NCL Zimbabwe, there were six and not seven partners. It was not simply the situation of Mr Wibberley joining the six former partners of Stewart Scott NCL Zimbabwe. One of the members had left the partnership. A new partnership, still under the name Stewart Scott NCL Zimbabwe, was created. See Goldberg & Anor v di Meo 1960 (3) SA 136 (N) at 142G. It was these partners who rendered the professional services under the written agreement of 12 February 1992. Yet notwithstanding its dissolution, statements in respect of outstanding fees and disbursements were rendered to the respondent by Stewart Scott Kennedy over the months October 1992 to June 1993.

At some time in 1994, the partnership of Stewart Scott NCL Zimbabwe was dissolved. Messrs Longley and Adamson withdrew. Thereupon Messrs Hazeldon, Norman, Emmerton, Lock,

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Rapson and Wibberley joined together as partners under the name Stewart Scott Zimbabwe.

Even accepting Mr Wibberley's testimony that upon the dissolution of Stewart Scott Kennedy, all the rights and liabilities were assumed by Stewart Scott NCL Zimbabwe pursuant to clause 11 of the agreement (this, notwithstanding the specific non-assignment clause in the respondent's contract of 12 February 1992), that partnership was later dissolved. And there was no evidence in any form that the claim for payment in relation to the professional services performed was ceded by Stewart Scott NCL Zimbabwe to Stewart Scott Zimbabwe.

The cases of Executors of Paterson v Webster, Steel & Co & Ors (1882) 1 SC 350 and Blumberg v Buys & Malkin & Margolis 1908 TS 1175 are no authority for the proposition advanced by the appellant's counsel that upon dissolution of a partnership the outgoing partners are obliged to transfer their rights and liabilities to the incoming partners. They are under no such legal obligation, but may do so as a matter of choice. This much was made plain by de Villiers CJ in the first cited case at 355, where it was said:

GUBBAY CJ

> "There can be no doubt that, as a general principle, the court can only recognise the members of which the firm consists, and that any change among them destroys the identity of the firm. But it is equally clear that the outgoing partners may transfer all the rights and liabilities of the partnership concern to the incoming partners, and that such transfer will be binding as between themselves. As regards the transfer of liabilities the creditors are not bound to accept the incoming partners as debtors in substitution for the members of the old firm with whom they had contracted. But the debtors cannot, as a general principle, object to the transfer by the old firm to the new of the claims which the old firm had against them. No rule is more clearly established in our law than that rights of action may be ceded to third parties without the consent of the party liable."

Similarly, what was laid down in Blumberg v Buys & Anor *supra* was no more than that a right granted to a partnership may be ceded to any of the partners upon the dissolution of the firm. In that case there was nothing to show that it was ever intended that the right given to the partnership "Blumberg Bros" was to be exercised solely by it. On the contrary, the long duration of the lease was strongly inferential of permission to cede that right.

The judgment in de Jager v Bethlehem Trading Co 1916 OPD 3 at 5 in fine - 6 emphasises that a cession of rights upon the dissolution of a partnership does not take place automatically. It must be established by the party (the former partner or partners) claiming the acquisition of the right.

Rule 132 of the High Court Rules stipulates that:

> "... failing consent by all parties, the court or judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The general principle which guides the court in allowing an amendment is stated in Beck's Theory and Principles of Pleading in Civil Actions 5 ed para 83. It is that:

> "an amendment will be granted unless the application to amend is mala fide or would cause prejudice to the other side which cannot be compensated by a postponement or by an order for costs or both."

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GUBBAY CJ

See *Lamin v Duly \& Co Ltd* 1983 (2) ZLR 35 (H) at 38H-39B.

There are very many cases in which the court has granted applications for substitution involving the introduction of a new persona upon being satisfied that no prejudice would be caused to the other side. See, for instance, Curtis-Setchell & McKie v Koeppen 1948 (3) SA 1017 (W) at 1021; Pillay v South British Insurance Co Ltd 1959 (4) SA 248 (W) at 250A; Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd & Anor 1978 (1) SA 671 (A) at 678G; Samente v Min of Police & Anor 1978 (4) SA 632 (E) at 634H; Min of Defence, Namibia v Mwandinghi 1992 (2) SA 355 (NmS) at 368G-H; Devonia Shipping Ltd v M V Luis (Yeoman Shipping Co Ltd intervening) 1994 (2) SA 363 (C) at 369G-370B; O'Sullivan v Heads Model Agency CC 1995 (4) SA 253 (W) at 255A-F.

But the crucial distinguishing feature is that the institution of the action in the name of Stewart Scott Kennedy was void *ab initio*. Without a plaintiff there can be no claim. A document which purports to be a summons requiring the defendant to comply with a claim of a non-existent person, is null and void as far as the institution of the claim is concerned. The plaintiff is the one who issues the challenge to litigation (see Voet 5.1.9) and must be a persona. If authority is needed for such an axiomatic statement it is to be found in Kelly v Petersen 1948 (4) SA 958 (A).

The substitution sought from the court *a quo* related, then, not only to a plaintiff but the persona described in the summons neither exists now, nor did it exist at the date of issue of the summons. The partnership firm had been dissolved eighteen months before.

In L & G Cantamessa v Reef Plumbers; L & G Cantamessa (Pty) Ltd v Reef Plumbers 1935 TPD 56 the court held that a magistrate had acted irregularly in allowing an amendment of a summons directed against L and G as partners by altering the defendant to L & G (Pty) Ltd, notwithstanding that L and G were the only shareholders and directors of the company. However, as observed by Murray J in Goldberg v Tomaselli & Sons Ltd 1940 TPD 408 at 413:

> "the basis of the decision was that the gross irregularity consisted in giving judgment against a persona which had not been cited and was not before the court, but which had without its knowledge been introduced as a defendant."

Nonetheless the situation in the Cantamessa case is in point.

GUBBAY CJ

More analogous is van Heerden v du Plessis 1969 (3) SA 298 (O). A summons had been issued in the name of a person who died eight months previously. An application was made to substitute the executor in the deceased estate as the plaintiff. It was opposed. In refusing the amendment on the ground that the original summons was wholly invalid as the named plaintiff was no longer alive at the time the summons was issued, Smuts J (with whom van den Heever

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AJ concurred) said at 304C-G:

> "The present case is not one where an unauthorised or defective summons is confirmed or supplemented by an amendment, but an appropriation of a document thus to transform it retrospectively into a summons - which, in my opinion, cannot be done. Support for this view, is, in my opinion, to be found in the judgment of Wessels J in van Vuuren v Braun & Summers 1910 TPD 950 at p 955, where the following is said:
>
> > 'Now in order to bring a defendant legally into court a summons is required. In order that a summons may be valid it must comply with the requirements of r 6. It must purport to be a summons; a mere request or letter to the effect that the defendant is kindly requested to appear in court on a certain day is an invalid citation. Next, the summons must specify the defendant. It is true that it will not be a flaw in the summons if the defendant is not described as accurately as he should be; if a man is baptised "George Smith" it is no defect in the summons to call him "John Smith", because the individual is pointed out with sufficient accuracy. But if there were no mention of the defendant at all, the summons would be a wholly worthless document, and could not be amended by inserting the defendant's name in court.'
>
> If the omission of a defendant's name in a 'summons' causes the document to be considered as 'a wholly worthless document', then a 'summons' issued in the name of a non-existent person must have the same result. There is no difference between such a case and a case where no plaintiff is named in the summons."

This decision is referred to, seemingly with approval, in Herbstein and van Winsen The Civil Practice of the Superior Courts of South Africa 3 ed at 195, in Erasmus Superior Court Practice at B 1-119, and in Jones and Buckle, The Civil Practice of the Magistrates' Courts in South Africa 8 ed Vol 1 at 387.

The principle expressed by Smuts J, that where an action has been instituted in the name of a person already deceased, the summons is wholly invalid and cannot be rectified by amendment, was accepted as correct and applied in the

GUBBAY CJ

recent case of Friends of the Sick Association v Commercial Properties (Pty) Ltd & Anor 1996 (4) SA 154 (D). The situation there considered is even closer to the present than that in van Heerden v du Plessis *supra*. The plaintiff was cited in the summons as a voluntary association, although in May 1948 it had ceased to exist upon becoming registered as a corporate body. At the trial, application was made for an amendment to the summons and particulars of claim by the deletion of the plaintiff as a voluntary association and the substitution therefor of the description "an association for gain duly incorporated as a company limited by guarantee in terms of s 21 of the Companies Act". Niles-Duner AJ refused the application and dismissed the action with costs. In doing so, he said at 157J158B:

> "There is, in my opinion, no difference in principle between the situation in van Heerden v du Plessis *supra* and the present one. I accordingly take the view that the summons is a nullity and that I cannot by the process of substitution revive it to the date of its issue ...
>
> In the light of the view that I take of the matter, questions of prejudice or otherwise do not arise and it is not necessary for me to consider that aspect of the matter."

These three cases commend themselves to me. I can perceive of no basis upon which to dissent from them. Their *ratio decidendi* is not in conflict with Que Que Bakery (Pvt) Ltd v Model Enterprise trading as Model Bakery 1973 (2) RLR 292 (G). In that matter, the real defendant, C

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P Proghoulis, existed and was trading as Model Bakery. An amendment to the summons to substitute his name for Model Enterprise was, therefore, rightly granted by Greenfield J.

It necessarily follows that in my judgment the court *a quo* had no option but to refuse, as it did, the application to amend the summons. Accordingly, the appeal must be dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Gollop & Blank, respondent's legal practitioners

S v SITHOLE 1996 (2) ZLR 575 (HC)

Court **High Court, Harare**

Devittie J

Criminal trial

15 November 1996 Judgment No. HH-160-96

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to fair hearing - whether accused person has a right of access to statements of witnesses in police docket - s 24(2) - when trial court obliged to refer constitutional question to Supreme Court

Evidence - witness - prosecution witness - whether State obliged to provide defence with copies of statements of witnesses contained in police docket

Headnote

In a criminal case counsel for the accused applied to the court for a ruling that the accused was entitled to copies of the witness statements contained in the police docket. He argued that unless the accused was allowed access to the witnesses' statements, his right to a fair hearing guaranteed in s 18(2) of the Constitution would be violated.

Held, that the court could rule on this application and was not obliged to refer this matter for determination by the Supreme Court. In terms of s 24(2) the court was only obliged to refer the matter to the Supreme Court if the court was requested to do so by a party to the proceedings. State counsel had suggested such a referral but had not made a formal request for such a referral and thus the court was entitled to rule on the matter.

Held, further, it was a well established practice of the common law that the State has an unqualified and absolute privilege in respect of witness statements contained in a police docket and that an accused has no right of access to such statements. This practice, however, was established at

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GUBBAY CJ

a time before such a practice had to conform to the fundamental rights in the Constitution. Such a rule must now be reconsidered in the light of the fundamental rights guaranteed in the Constitution.

Held, further, that in terms of s 18(2) of the Constitution a person has a right to a fair trial. However, in terms of s 18(13)(a), a law is not inconsistent with this right to the extent to which it makes reasonable provision for non-disclosure of evidence on the grounds of privilege or public policy.

Held, further, that a blanket privilege for State witness statements is contrary to the practice in other democratic countries and violates s 18(2) of the Constitution, as in some cases an accused cannot have a fair trial unless he has access to State witnesses' statements. The unqualified privilege goes further than is required to protect legitimate State interests. There is no justification in logic or public policy for a rule that protects witnesses' statements solely on the ground that they are contained in the police docket. The correct approach is that in each case the court should balance the need for a fair hearing against the legitimate interests of the State in protecting the ends of justice. If the State wishes to prevent access, it must be advance reasons and the court must decide where the balance of interests lies.

Held, further, that it would be wrong to lay down precise guidelines relating to this right except the following:

(1) In High Court proceedings, an accused ought ordinarily to be entitled, if he so requests, to copies of statements of witnesses whom the State proposes to call.

(2) The State may decline the request on public interest grounds and it will be for the court to determine whether the State has discharged the onus of establishing that disclosure would not be in the public interest. In reaching that decision it may be necessary for the court to have sight of the statements of the witnesses.

(3) To obviate the need for postponement, it is desirable that an application for disclosure be made well in advance of the trial date.

Held, further, that in the present case the State had not advanced valid grounds of public policy to justify non-disclosure of the witnesses' statements and it was clear that the accused had a well-founded apprehension that he would not have a fair trial unless he had access to the statements.

The court therefore ordered the State forthwith to provide copies of the witnesses' statements contained in the police docket.

Cases cited:

Khala v Min of Safety and Security 1994 (2) BCLR 89 (W)

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DEVITTIE J

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

R v Brown [1994] 1 WLR 1599

S v Chogugudza 1996 (1) ZLR 28 (S); 1996 (1) SACR 417 (ZS)

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

S v Sefadi 1994 (2) BCLR 23 (D)

R v Steyn 1953 SR 76

R v Steyn 1954 (1) SA 324 (A)

R v Tapera 1964 RLR 197 (A); 1964 (3) SA 771 (RA)

Shabalala & Ors v A-G of the Transvaal & Anor 1995 (12) BCLR 1593; 1996 (1) SA 725 (CC)

The court referred to the following statutory provisions:

Constitution of Zimbabwe 1980, s 18(2) & (13), 24(2)

Criminal Procedure & Evidence Act [Chapter 9:07], s 78(3)

Case Information

A Gotora, for the State

L T Biti, with him T Masendeke, for the accused

Judgment

Devittie J: The trial of the accused was due to commence on 4 November 1996. He faced three counts. Firstly, contravening s 51(2) of the Law and (Maintenance) Act [Chapter 11:07], in that during the period extending from 1983 to October 1985 he unlawfully and with intent to endanger the maintenance of law and order in Zimbabwe, -did commit or attempt to commit an act of terrorism or sabotage that is to say, the accused to further or encourage the interest of ZANU (Ndonga), a political party under the accused's leadership and with the aim to remove the Zimbabwean Government by means of violence or force, recruited or facilitated or encouraged military training for ZANU (Chimwenje) cadres to fight the lawfully elected Government of Zimbabwe.'

Secondly, contravening s 37(2) of the Law & Order (Maintenance) Act [Chapter 11:07], in that between July 1995 and 18 August 1995 and at Harare, he -unlawfully and intentionally had in his possession arms of war, that is to say he was in possession of 2 claymore mines, 1 AK 47 rifle, 6 AK 47 magazines, 2251 x 7.6mm AK ammunition, 670 x 7.6 Tokarev ammunition, 1 detonator and 2 claymore mine caps.'

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Thirdly, contravening s 360(2) of the Criminal Procedure & Evidence Act [Chapter 9:07], in that between 4 August 1995 and 18 August 1995 and at Harare the accused unlawfully and intentionally conspired with Phillimon Ferenado or some other ZANU (Chimwenje) member or some other person to assassinate or murder President Robert Mugabe.

DEVITTIE J

Before the charges were put to the accused, his counsel made several applications on his behalf. The first application was for an order directing the delivery of particulars of the indictment to the accused. The second application was for a ruling that the accused is entitled to copies of witnesses' statements or affidavits contained in the police docket. In the third application, it was contended that the summary of the State case is set out in a form that prejudices the accused in the preparation of his defence as it does not inform him of the particulars which apply to each count. In the fourth application, the submission was that the second count ought to be quashed as it constitutes an improper splitting of counts one and three. Mr Biti also requested that the court refer to the Supreme Court the question of whether s 51(3) of the Law and Order Maintenance Act [Chapter 11:07] infringes the Declaration of Rights. That subsection provides:

> "If, in any proceedings under this section, it is found that the person accused of an offence in terms of subsection (2) has committed an act of terrorism or sabotage, it shall be presumed that he committed that act with intent to endanger the maintenance of law and order in Zimbabwe or any part of Zimbabwe or in a neighbouring territory, as alleged in the indictment or charge unless he proves beyond reasonable doubt that he did not intend any of the results referred to in the definition of an 'act of terrorism or sabotage' in subsection (1).'

Mr *Biti* did not quarrel with the reversal of the onus, the Supreme Court having ruled upon this question in *S v Chogugudza* 1996 (1) ZLR 28 (S); l996(l) SACR 417 (ZS). He submitted that the requirement that the accused discharge the onus beyond reasonable doubt (instead of on a balance of probabilities) was inconsistent with the presumption of innocence contained in s l8(3)(a) of the Constitution.

Finally, Mr *Biti* applied for a variation of the accused's conditions of bail.

The application for particulars of the indictment was brought in terms of s 177(l) of the Criminal Procedure & Evidence Act [Chapter 9:07], which provides -

> "The court may before or at the trial, in any case if it thinks fit, direct that particulars be delivered to the accused of any matter alleged in the indictment, summons or charge, and may, if necessary, adjourn the trial for the purpose of the delivery of such particulars.'

Section 110(6) of that Act provides:

DEVITTIE J

> "Where an accused has been committed for trial in terms of subsection (2), there shall be served upon him in addition to the indictment and notice of trial -
>
> (a) a document containing a list of witnesses it is proposed to call at the trial and a summary of the evidence

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each witness will give, sufficient to inform the accused of all the material facts upon which the State relies.'

It was said, on the accused's behalf, that, in relation to each witness the State proposes to call, the facts in the summary of the State case are insufficient to enable him to prepare for his defence. The list of further particulars requested by accused's counsel is extensive. In all, no less than 100 particulars are requested. They relate to details of the evidence proposed to be led from the witnesses. They fall into the following broad categories:

(a) the identity, citizenship status and other personal details concerning persons named by the State witnesses in the summary of the State case as persons who recruited the witnesses to undergo miltary training under Renamo or persons they came into contact with in Mozambique;

(b) the location of the Renamo bases mentioned in the evidence of the State witnesses;

(c) the exact dates on which certain events took place;

(d) in relation to the State witnesses who are presently serving members of the Zimbabwe National Army, details as to when they joined the Army, the identity of the persons who recruited them to undergo military training, the dates they escaped from the Renamo bases to return to this country, the Police stations at which they made a report upon their return and, whether they had been granted leave of absence to go to Mocambique;

(e) the factual basis on which the averment is made that certain named persons are members of ZANU (Ndonga);

(f) requests for copies of documents referred to in the summary of evidence.

I do not propose to deal with each request - but I entertain little doubt that the application is not without merit. A significant portion of the particulars requested are necessary in order for the accused to prepare his defence. I did not understand Mr Gotora to oppose the application other than on the

grounds that the particulars requested could be elicited in cross- examination. That, to my mind, would expose the accused to the unnecessary risk of having surprises sprung on him. I do not, however, propose at present to make a ruling on the request for particulars, since the decision I will make on the question of the delivery of statements will render such a decision unnecessary. I understand that the request for copies of documents referred to in the summary of the State case has been complied with.

I turn now to deal with the application for a ruling that the accused is entitled to copies of witnesses' statements.

Mr *Biti* submitted that the accused was entitled as of right to copies of witnesses statements. He

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relied on s 18(2) of the Constitution which provides:

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

This provision constitutes a particular application of the protection given by s l8(l) which provides -subject to the provisions of this Constitution, every person is entitled to the protection of the law'.

Section ll of the Constitution, which is directly in point, provides:

> "Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say the right whatever his race, tribe, place of origin, political origins, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation;
>
> and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are

> contained therein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.'

Gubbay CJ in Re Munhumeso & Ors l994 (l) ZLR 49 (S) at p 54 commented on this provision, saying:

> "Similar wording, but in the form of a preamble to the Declaration of Rights, was contained in the Constitution of Southern Rhodesia l96l, the constitution of Rhodesia l965, the Constitution of Rhodesia l969, and the Constitution of Zimbabwe Rhodesia 1979 - *The upgraded status of s 11 in the present Constitution signifies that it is to be regarded as a substantive provision conferring rights on the individual*. Although commencing with the word 'whereas', it underscores that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual', and stipulates in positive terminology that the provisions of Chapter III shall have effect for the purpose of affording protection to those rights and freedoms itemized in (a), (b) and (c), subject to such limitations as are contained in the whole of Chapter III being designed to ensure that the enjoyment of the said rights and individual freedoms does not prejudice the rights of others in the public interest'(my own emphasis).

Mr *Biti* submitted that only in exceptional circumstances should an accused be denied the right to have access to the statements of witnesses. In essence, Mr Biti's submission was that the right to a fair trial included the right to have access to copies of witnesses' statements.

Section 18(13) of the Constitution qualifies the right entrenched in subs (2) of s 18. It provides in para (a):

> "Nothing contained in or done under the authority of any law shall be held to be in contravention of -
>
> (a) subsection (2), ' to the extent that the law in question makes reasonable provision relating to the grounds

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> of privilege or public policy on which evidence shall not be disclosed or witnesses are not competent or cannot be compelled to give evidence in any proceedings.'

Although the law relating to privilege of witnesses' statements may be the common law, it is nevertheless subject to the protection of the Constitution.

DEVITTIE J

There can be no doubt that our common law protects statements contained in the police docket from disclosure. The common law position is that the contents of the docket, including witnesses' statements, are privileged. In *R v Steyn* 1953 SR 76 at 79 Tredgold CJ, with the concurrence of Beadle J, (as he then was), stated the position as follows:

> "the defence cannot as of right demand to see the statements of the crown witnesses. Disclosure must be left to the discretion of the Attorney-General or his Deputy. The prosecutor stands in a special relation to the court, and where there is a serious discrepancy between the proof (statement) of a Crown witness and what he says on oath at the trial, the court has the right to expect that the prosecutor will, of his own motion, direct attention to the fact, and unless there are special and cogent reasons to the contrary, make a statement available for cross examination ' But, on the other hand a prosecutor is amply justified in refusing disclosure of such a statement where there is no foundation for the suggestion that the witness has materially altered his story. There is no obligation on him, without adequate reason, to open the door to the captious and hairsplitting form of cross examination, which all too often, is based upon previous statements made by a witness.'

On appeal, the South African Appellate Division, in *R v Steyn* 1954 (1) SA 324 (A), upheld Tredgold CJ's decision. It imposed what is now referred to as a blanket docket privilege in ruling that the State enjoyed a special privilege in respect of all that is contained in a police docket, including statements made to the police by witnesses. Three basic grounds were advanced in support of the privilege. Firstly, that disclosure would lead to delays and postponements. Secondly, that it would lead to protracted cross-examination on appparent inconsistencies between the witness's oral testimony and his previous statement. Thirdly, that disclosure gave rise to the danger that a litigant would tailor his evidence to meet the contents of the information disclosed.

Now, although the State did not in express terms ground its objection to production of the witnesses' statements on the basis of privilege, Mr Gotora did nevertheless submit that the State opposed the application because most of the witnesses came from accused's home area, that is Chipinge, and that consequently there was a risk that production of the statements would compromise those witnesses. There can be no merit in this submisssion because the identity of the witnesses is revealed in the summary of the State case. As I understand Steyn's case *supra* however, the special privilege exists independently of the reasons for its existence.

DEVITTIE J

The question that arises, therefore, is whether the special privilege relating to witnesses' statements is inconsistent with the Constitutional right to a fair trial. In answering this question regard must be had to s 18(13)(a), which provides that a law shall not be held to be inconsistent with the Constitution to the extent that it makes -reasonable provision relating to the grounds of

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privilege or public policy on which evidence shall not be disclosed "

Before I deal with the merits of the application, there is a preliminary matter I have to decide. It is whether I am enjoined to refer to the Supreme Court the constitutionality of the rule in Steyn's case in so far as it relates to witnesses' statements.

Mr Gotora suggested that I should make such a reference. I did not, however, understand his submission to be a formal request for referral.

In s 24 of the Constitution subs (2) provides as follows:

> "If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.'

A question relating to the Declaration of Rights clearly arises in this case. The accused invoked the protection of the Constitution and the State relied on an exception relating to privilege expressed in the Declaration of Rights. Counsel for the defence did not, as I understood him, invoke the mandatory provision in s 24(2).

I therefore consider that I am not enjoined to refer the matter to the Supreme Court, but may, in my discretion, resolve the issue myself. However, I do consider that I am enjoined to refer to the Supreme Court the question whether the requirement in s 51(3) of the Law and Order Maintenance Act, [Chapter 11:07] that an accused should discharge the presumption -beyond reasonable doubt' is inconsistent with the presumption of innocence conferred by s l8(3)(a) of the Constitution.

In considering whether the rule in *Steyn's* case *supra* is inconsistent with the provisions of the Constitution, it is proper to have regard to the historical context in which the rule was made and survived under pre-Independence constitutions. A brief survey of our constitutional history provides some insight into how, in pre-Independence

times, those who wielded political power stifled the undoubted potential of the judiciary of the time to place the courts at the forefront of the struggle for the attainment of the rights of the individual.

Prior to 1923, the country now called Zimbabwe was administered by the British South Africa Company. On 1 September 1923, by Letters Patent, Southern Rhodesia was granted responsible government. The l923 Constitution came into force on 1 October 1923. The Constitution did not grant full autonomy to Southern Rhodesia. The preamble provided that the establishment of a -responsible government' was subject to certain limitations. As with other colonial constitutions, the 1923 Constitution did not contain a Bill of Rights. It did make some provision to safeguard the interests of the indigenous peoples.

On 14 July 1953 the Rhodesia and Nyasaland (Federation) Act 1953 came into force. It

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provided for a justiciable Bill of Rights. But the justiciability of the pre-Independence constitutions was of little practical consequence, for reasons which will become apparent.

On 23 November l961, the Southern Rhodesia (Constitution) Act 1961 revoked the Southern Rhodesia Constitution Letters Patent 1923 and made provision for a new Constitution in its place. The 1961 Constitution provided for a justiciable Declaration of Rights. It was in that period that the Legislative Assembly of Southern Rhodesia, prior to the new Constitution coming into force, passed radical security laws which, the Federal Chief Justice at the time, Sir Robert Tredgold, described as -provisions more appropriate to a police state'.

On 11 November 1965, the Rhodesian Cabinet issued a proclamation declaring the need to attain sovereign independence and giving to the people of Rhodesia the Constitution of Rhodesia Act 1965. It too provided for a justiciable Bill of Rights. The 1969 Constitution, which was in force in the period immediately preceding Independence, broke from the pretences of the past. It provided that a law was not open to challenge on the grounds that it was inconsistent with the Declaration of Rights.

Even in those periods in our constitutional past when we had a justiciable Declaration of Rights, the courts were powerless (quite apart from the savings provisions) to act as guardians of individual rights. Mr Justice Jackson, writing in the Harvard University Press, 1955, pp 80-81 says:

DEVITTIE J

> "I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation and tyranny which have threatened liberty and fair institutions. I doubt that any court, whatever its powers, could have saved Louis XVI or Marie Antoinette. None could have avoided the French Revolution, none could have stopped its excesses, and none could have prevented its culmination in the dictatorship of Napoleon. It is not idle speculation to enquire which comes first, an independent and enlightened judiciary or a free and tolerant society - it is my belief that the attitude of society and of its organised political forces, rather than its legal machinery, is a controlling force in the character of free institutions.'

Claire Palley Constitutional History of Southern Rhodesia at p 588, makes the following observation on the Declaration of Rights in the 1961 Constitution:

> "It is submitted that the preservation of existing laws in a carefully qualified fashion in which the fundamental rights have been drafted, in practice leaves little room for the operation of the Declaration. It is submitted that even if new legislation infringing freedoms were to be invalidated, existing legislation gives the administration so much power that it is going to achieve nearly all its objects in other ways.'

In the *Bulletin of the International Commission of Jurists* 18 March 1964, the following comment is made in relation to the l961 Constitution:

> "The Constitution of Southern Rhodesia is a striking example of the futility of laying down human rights in the Constitution and thereafter subjecting those same human rights to the sway of a legislature which does not adequately represent the people of the country; an examination of Southern Rhodesian legislation in relation to the human rights proclaimed in the Constitution makes one wonder why the trouble was ever taken to put those human rights in the Constitution.'

What emerges from this brief historical survey of this country's constitutional history is that the

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present Constitution, upon which the accused in this case places reliance, is a radical departure from an authoritarian past in which scant regard was paid to the rights of the individual and the role of the courts as guardians of the rights of the individual was marginalised. Our constitutional history enlightens us to the values on which the present Constitution is premised - but more important, it should alert us to the dangers of retaining the authoritarian traditions of the past.

DEVITTIE J

In Shabalala & Ors v Attorney-General of the Transvaal & Anor 1996 (1) SA 725; 1995 (12) BCLR 1593 (CC), the South African Constitutional Court found cause to consider the values upon which the new Constitution of South Africa was premised in determining whether the rule in Steyn's case should survive -the discipline of the Constitution'. At p 1605 the following is said:

> "What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution viewed historically and teleologically, is that the Constitution is not simply some kind of statutory codification of an acceptable or a legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and oppression. The aspiration of the future is based on what is justifiable in an open and democratic society based on freedom and equality. It is premised on a legal culture of accountability and transparency.The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment.'

In Zimbabwe there has developed since Independence a healthy body of human rights jurisprudence, albeit that in many instances Constitutional amendments have been passed to take away rights enshrined in the Constitution and pronounced upon by the Supreme Court. In interpreting the provisions of the Constitution that impact on human rights and fundamental freedoms, the Supreme Court has adopted a broad and purposive approach. In Munhumeso's case *supra* at p 59 Gubbay CJ stated:

> "All provisions bearing upon a particular subject are to be considered together and construed as a whole in order to give effect to the true objective. Derogations from rights and freedoms which have been conferred should be given a strict and narrow rather than a wide construction. Rights and freedoms are not to be diluted or diminished unless necessity or the intractability of language dictates otherwise.'

In determining the question before me it is useful to have regard to the practice in other democratic societies.

DEVITTIE J

In *S v A* Juvenile l989 (2) ZLR 61 (S) Dumbutshena CJ stated that -

> "It is now possible for an accused person sentenced to a whipping to challenge the constitutionality of the punishment in terms of s 15(1). An added advantage is that the courts of this country are free to import into the interpretation of s 15(1) interpretations of similar provisions in international and regional human rights instruments such as, among others, the International Bill of Human Rights, the European Convention for the Protection of

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> Human Rights and Fundamental Freedoms, and the Inter American Convention on Human Rights. In the end, international human rights norms will become part of our domestic human rights law. In this way our domestic human rights jurisprudence is enriched. See *S v Ncube* (1988) LRC (Const) 442 for a practical implementation of this policy.'

I propose therefore to examine briefly the practice in other jurisdictions in regard to the right of an accused to have access to copies of witnesses' statements. Happily, I am able to benefit from the extensive review of the practice in other democratic societies which was conducted in Khala v Min of Safety & Security 1994 (2) BCLR 89 (W). See also S v Sefadi 1994 (2) BCLR 23 (D). In Khala's case *supra* the parties by agreement placed before the court a memorandum by Professor T Geldenhuys of the Department of Law of the University of South Africa , setting out the position in Australia, England, New Zealand, United States of America and Canada. Myburgh J concluded at p 120:

> "In conclusion, in comparing the South African common law docket privilege to the rules of practice in the above countries, it appears, in general, that while the South African Courts were progressively imposing greater restrictions on an accused's right of access to information in a police docket,the practice in those democratic societies was to expand an accused's rights of access to information in the possession of the prosecution. In my view, our law should fall in line with the international trend. The policy considerations of disclosing relevant unprivileged information in the police docket to the accused before trial should outweigh those in favour of not making disclosure. Any doubt that that should be the position is removed by taking into account the fundamental right enshrined in the constitution to 'equality before the law and to equal protection of the law."

In England the prosecutor has a duty to disclose witnesses' statements and

other information in Crown Court cases where an accused is charged with an indictable offence. The duty of disclosure does not depend on whether a request is made - it exists from the pre-trial stage and continues throughout the proceedings. The duty does not apply to matters in respect of which public interest immunity is claimed. However, it is for the court and not the prosecution to decide whether to withold disclosure on the grounds of public interest immunity. In so deciding, the court is enjoined to examine the material in respect of which immunity is claimed. Failure to do so constitutes an irregularity. Failure by the prosecution to disclose information which ought to have been disclosed constitutes a fatal irregularity. See *Archbold's Criminal Pleading & Practice* 1995 Re-Issue Vol 1, para 4-265. In 1982 the Attorney-General issued guidelines on the disclosure of information to the defence in cases to be tried on indictment. Tese are reproduced in *Sefadi*'s case *supra*. These guidelines no longer govern the present practice. The present state of English law on disclosure is summarised in the Appeal Court decision of R v Brown [1994] l WLR 1599 (CA).

Steyn LJ (as he then was) at p 1606 stated the broad principle as follows:

> "The first question is to determine the extent of the Crown's duty of disclosure. In R v Keane [l994] 1 WLR 746, 752 Lord Taylor of Gosforth CJ adopted the test suggested by Jowitt J in R v Melvin (Graham) unreported, 20 December l993. Jowitt J said:
>
> > 'I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution : (l) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to

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hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (l) to (2).'

That is a test which we would also adopt.'

In Shabalala & Ors v Attorney-General, Transvaal & Anor *supra* the South African Constitutional Court held that -

"The blanket docket privilege expressed by the rule in *R v Steyn* 1954 (1) SA 324 (A) is inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure is justified

DEVITTIE J

for the purposes of enabling an accused properly to exercise his or her right to a fair trial in terms of s 25(3).'

I find it convenient to reproduce in extenso an extract from Shabalala's case *supra* which sets out the reasoning which moved the Constitutional Court to reject the blanket rule in Steyn's case *supra*:

"The effect of the entrenchment of the right to a fair trial was precisely that such right was not breached only in cases where the specific rules and formalities of criminal procedure were not satisfied but also where the trial could be described as unfair in a broader sense. The real question accordingly is whether a denial of access to the contents of the police docket would render the trial unfair. This was not a question which could be answered in the abstract, but one which had to be answered having regard to the particular circumstances of each case. What a fair trial might require in a particular case would depend on its own circumstances. The complexity of the case and the degree of particularity already furnished were important factors. However, even in relatively simply cases where sufficient particularity had been furnished to enable the accused to understand the charge against him or her, there might be special circumstances necessitating access to some of the contents of the police docket to enabe the defence to prepare its own case sufficiently or to properly exercise its right to adduce and challenge evidence. In other cases it might be sufficient merely to give the defence an opportunity of reading the statements rather than being furnished with copies of them. It was undesirable to lay down rigid rules. What was required was that trial courts exercise a proper discretion having regard to the circumstances of each case. Once it was accepted that accused persons would in some cases require access to some of the contents of the police docket, the question arose as to whether the blanket exclusion drawn in Steyn's case was permissible limitation of the right. The reasonableness, justifiability and necessity of the limitation had to be examined. The interests of the accused had to be balanced against other legitimate considerations that might support the limitation. A number of general objections to the disclosure of the entire contents of the docket had been raised. It was said the written statementsof witnesses were frequently inaccurate because of administrative and language difficulties. The disclosure of such statements might lead to cross examination which might impact unfairly on the credibility of such witnesses when deposing to fuller and more carefully considered evidence in court. Disclosure might enable accused persons to 'tailor' evidence. Disclosure might

DEVITTIE J

deprive the prosecution of the tactical advantage of surprise. The obligation to disclose witnesses statements might also place an onerous burden on the prosecution and cause delay in bringing an accused to trial. Trials might become side tracked into extraneous issues as to what a witness might or might not have said on a previous occasion. Disclosure might also lead to intimidation of witnesses and be prejudicial to the ends of justice or to State interests. The court considered each of these contentions and concluded that, where there was no reasonable risk that disclosure might lead to intimidation, the obstruction of the proper ends ofjustice, or the compromising of the identity of informers or State secrets, there was overwhelming balance in favour of an accused person's right to disclosure. The blanket docket privilege of Steyn was accordingly unreasonable,

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unjustifiable in an open and democratic society and unnecessary. In cases where disclosure might defeat the proper ends of justice and lead to an intimidation of witnesses, society was of course entitled to protect itself against such consequences. In those circumstances the State might establish in the particular circumstances of the case that a restriction was reasonable. The court would in each case have to exercise a proper discretion, balancing the accused's need for a fair trial against the legitimate interest of the State in protecting the ends of justice. In balancing these interests, the problem lay not with the principle itself but with its application. How the practical problems were to be overcome was an issue best left to be determined by the Supreme Court. The court laid down certain guide lines which should be taken into consideration by trial courts when exercising a discretion in each case where the State sought to justify a refusal to allow access on the grounds that disclosure of the information carried the risk of impeding the proper ends of justice. The details as to how trial courts should exercise the discretion would have to be developed by the Supreme Court from case to case.'

It is evident that the South African Constitutional Court leans towards a non-rigid approach in which the application of the principle is to be developed on a case by case approach. It is evident, too, that the Constitutional Court recognised that an accused's right to information contained in a police docket must be qualified and that it will depend on the facts of each case whether the State has justified non-disclosure. This is the position that the Court of Appeal seems to have taken in Brown's case *supra*.

In my view, there are compelling reasons why our law should keep abreast with developments in other democratic countries. We ought to adopt a

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DEVITTIE J

position that entitles an accused who is indicted to stand trial to receive copies of witnesses' statements subject to certain limitations. To do so would not be to introduce a change as radical as it may first seem. In terms of our Criminal Procedure and Evidence Act [Chapter 9:07], provision is made in respect of High Court trials for a preparatory examination to be held before an accused is indicted for trial for the purposes of determining whether there is a *prima facie* case against him. At the hearing the accused is entitled to cross-examine the witnesses. In terms of s 78(3) of that Act, the prosecutor may, with the consent of the accused, produce affidavits of witnesses as part of the record. An accused person committed for trial is entitled to receive a copy of the record of a preparatory examination. It is apparent, therefore, although preparatory examinations ave now fallen into disuse, that the Act gives full recognition to the need of an accused to know the whole of the case that he will meet, including the right to statements of witnesses. In effect, the decision to indict summarily an accused person, as in this case, can deprive him of the right to full disclosure for which adequate provision is made in the Act.

The cases of *R v Tapera* 1964 RLR 197 (A); l964 (3) SA 771 (RA) and *R v Steyn supra* may have been decided on the narrow basis that where an accused person departs materially from his statement the prosecutor has a duty to disclose the contents of the statement - but they give tacit recognition to the principle that there are cases where the interests of justice require diclosure. If it is accepted that there are cases where justice demands disclosure, then there seems to be no justification in logic or public policy for a rule that protects witnesses' statements solely on the ground that they are contained in the police docket, without any need to advance reasons for non-disclosure.

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The provisions in our criminal code which entitle an accused to receive a summary of the evidence upon which the State will rely and to apply to the court an order directing the delivery of particulars of the indictment, observe the principle that a fair trial cannot take place unless the accused is fully informed of the case that will be made against him. There is a heavy burden on the State to disclose sufficient information so as to ensure a fair trial. Our criminal justice system therefore recognises that fair disclosure is necessary for an accused to have a fair trial. As Steyn LJ put it in R v Brown *supra*:

> "The objective of the criminal justice system is the control of crime, but in a civilized society that objective cannot be pursuant in disregard of other value. That everybody who comes before our courts is entitled to

> a fair trial is axiomatic. Lord Wilberforce stated in Raymond v Honey [l983] 1 AC 1 at 13 that the right of every citizen to unimpeded access to a court is a basic right. Similarly, the right of every accused to a fair trial is a fundamental right. That means that under our unwritten constitution these rights are deserving of special protection by the courts. However, in our adversarial system, in which the police and prosecution control the investigating process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial. That is the framework in which the development of common law rules about disclosure must be seen.'

In my experience, the practice is that a prosecutor, in preparing a summary of the State case, does no more than traverse the facts as they appear from the witnesses' statements. It is seldom that he will see a need to omit certain facts contained in the witnesses' statements from the summary of the State case. I can see no reason for him to do so, except in cases where he seeks some improper advantage in taking the accused by surprise.

I have given anxious consideration as to whether it is desirable that I, sitting as a single judge, should depart from a well established practice of the common law. I add that I have not had the benefit of full argument. The matter is not free from difficulty. The rule in Steyn's case was laid down without consideration of the constitutional aspect. On that basis, it is distinguishable from the present case. I am emboldened by the remarks of Innes CJ in Blower v van Noorden l909 TS 890 at p 904:

> "There comes a time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And, it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature. And it seems to me that this is an instance where we shall be fully justified in initiating a change of procedure which is not conflict with any fundamental principle of the Roman-Dutch law, and which will assist in keeping to that law as we desire to see it, a living and effective instrument for the administration of justice.'

I am driven to the conclusion that the unqualified privilege accorded to statements of witnesses in Steyn's case offends an accused's right to a fair trial entrenched in s 18(2) of the Constitution. I now have to decide whether,

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on the facts of this case, the State has advanced valid reasons to justify non-disclosure.

The accused was indicted on 10 October. I have ruled that the particulars requested are in the main necessary for the accused to prepare properly for his defence. It is clear to me that the request for copies of the witnesses' statements is not unrelated to the lack of particularity in the summary of the State case. In other words, there would seem to be a suspicion in the accused's mind that the facts which are relevant to his defence are not being disclosed.

It is manifestly clear that he does entertain an apprehension of unfairness in the pre-trial procedure when regard is had to the related application that there has been improper splitting.

I have found the prosecutor's opposition to production of copies of the witnesses statements to be without merit. His submission was that as the accused originates from the Chipinge area and the witnesses in respect of whom the statements are requested are also from the Chipinge area there was a possibility that their safety would be compromised. In the summary of the State case, the witnesses in question are named and in most cases their personal details are given. In these circumstances I can see no merit in the objection raised. I see no advantage to be gained by examining the statements.

I consider, therefore, that unless the State is able to justify non- disclosure of the witnesses' statements on grounds of public interest or some other legitimate basis, the accused ought to be provided with copies of the statements he has requested.

I do not propose to debate further the concerns expressed in the authorities I have cited regarding disclosure of witness' statements. Of real concern in the Zimbabwean context is the language difficulty - it is said that difficulties may arise when a witness contends that what is recorded in his statement in English is not what he told the police officer who recorded the statement. I do not think that considerations of fairness to an accused in the conduct of a trial ought to be outweighed by difficulties that may arise in this regard. In any event, I do not see how this difficulty is overcome by informing the accused (as is the present practice) in detail of the evidence which each witness will give, bearing in mind that the summary of the State case is extracted from statements recorded by the police.

I have to emphasise that I do not propose to lay down the scope and extent

of an accused's right to have access to information contained in a police docket nor do I make any ruling as to the range of circumstances in which docket privilege may be successfully invoked and whether disclosure by the prosecutor ought to be voluntary or at the request of the accused. I restrict my finding to the facts of this case. I do not propose to set any precise guidelines save to state that:

(a) in High Court proceedings, an accused ought ordinarily to be entitled to copies of statements of witnesses whom the State proposes to call if he so requests;

(b) the State may decline the request on grounds of public policy grounds, and it will be for

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the court to determine whether the State has discharged the onus of establishing that disclosure would not be in the public interest-in reaching that decision it may, be necessary for the court to have sight of the witnesses' statements;

(c) it is desirable that, to obviate the need for postponement, an application for disclosure be made well in advance of the trial date.

As I have indicated, on the facts of this case I am satisfied that no reasons have been advanced which dictate the conclusion that disclosure ought to be withheld on grounds of public policy. As to the future, I suggest that the Law Development Commission gives consideration to the observations made by Steyn LJ in Brown's case *supra* at p 1609:

> "Finally, we would make a few observations about the way in which the disclosure system works and a possible way forward. The first relates to the undoubted fact that defence lawyers sometimes bombard the prosecution with requests for thousands of documents with little regard to their relevance. That particularly happens in large cases. Such concerns have been explained in an important article by Charles Pollard, Chief Constable, Thames Valley Police, 'A Case for Disclosure' (l994) Crim LR 4. The only answer is to be found in a proper application of the criterion of relevance. The extent of discovery permitted in a particular case, in the light of the issues in that case, must be left to the good sense of the trial judge, who must, of course, firmly discourage unnecessary and oppresssive requests for discovery.
>
> That leaves the question of how the void left by the erosion of the value of the Attorney-General's guidelines should be tackled. The ideal

DEVITTIE J

> solution might be a statutory statement of the duties of the Crown regarding disclosure of relevant information. On the other hand, we recognise how difficult it would be to prepare such legislation at a time when the scope for public interest immunities has not been settled by the courts. In advance of such legislation it would be valuable if the Law Commission could undertake the complex task of preparing a paper on discovery in criminal cases. Essentially, such a paerps hould aim to state the law as it is but, in order to be comprehensive, it would have to fill the spaces, particularly on public interest immunities, where there is no binding precedent. We believe that if such a paper is prepared aftr discussion with the police, the Crown Prosecution Service, the Bar of England and Wales, the Law Society and the judge, it will gain a legitimacy greater than the Attorney-General's guidelines ever enjoyed. After all, as the Chief Constable of the Thames Valley Police remarked in his paper, at p 45:
>
> > 'Until all of the component bodies of the criminal justice system learn to adopt a shared vision based on conviction of the guilty and protection of the innocent, all will continue to dispute the rules of the game.'
> >
> > The preparation of such a paper on discovery in criminal cases might play a useful role in preparing ground for Parliament to legislate on this topic.'

With regard to the request for futher particulars, I do not propose to make a ruling thereon. The accused's request will in all likelihood be easily accommodated by providing him with copies of the witnesses' statements. Should it transpire, after production of the statements, that the accused considers that he requires further particulars to prepare for his defence, then it will be open to him, if so advised, to make the appropriate application.

Mr *Biti* submitted that the summary of the State case ought to state, separately, the facts relied on in each count so that the accused would know the case he has to meet on each count. The ruling I have made in regard to disclosure of the witnesses' statements makes it unnecessary to

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decide on this application. Disclosure of the witnesses' statements will enable the accused to know the case he has to meet on each count. It is desirable, though, that the summary of the State case should be so framed as to enable an accused to know the case he has to meet on each count. In a related application, Mr Biti submitted that there was an improper splitting of charges. To the extent that

DEVITTIE J

the summary of the State case is wanting in particularity, it is difficult to rule on this application. A determination of whether there has been an improper splitting will turn largely on whether the evidence relied on in count two is the same as that relied on in counts one and three. Mr Biti will be able to reconsider his position wen he has had sight of the witnesses' statements. If the cause of complaint still exists, then he may make the appropriate application. My tentative view is that there has been improper splitting and that count two should be couched in the alternative.

With regard to the application for a variation of the accused's conditions of bail, I accede to the request that the condition requiring him to deposit $50 000 be deleted. I would also order that the accused's passport be returned. It has not been demonstrated that there is any reasonable likelihood that the accused will not stand trial if the conditions of bail are so varied.

I accordingly order as follows -

1. That the State shall forthwith provide the accused with copies of the statements of witnesses named in the summary of the State case;
2. That the following question is referred to the Supreme Court in terms of s 24(2) of the Constitution - whether s 51(3) of the Law and Order Maintenance Act [Chapter 11:07] is inconsistent with s 18(3)(a) of the Constitution of Zimbabwe, in that it requires an accused to discharge the presumption beyond reasonable doubt;
3. That the accused's conditions of bail are varied to the extent that the conditions requiring him to deposit $50 000 with the Criminal Registrar and to surrender his passport are deleted.
4. That the trial shall proceed on 27 March l997.

DE VILLIERS v JAMES 1996 (2) ZLR 597 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

14 October & 18 November 1996 Judgment No. S-221-96

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Flynote

Agency - agent - duty towards principal - agent holding money for principal, to be paid to a third party contingent on a certain event - duty to ensure that event has occurred before paying the money

Trust - administration - duties of trustee - obligation to exercise due care and diligence

Headnote

The respondent was invited to acquire a truck from a company called Zimtruck. He agreed to do so, and also agreed to pay a deposit of 30% of the purchase price with the appellant, the proprietor of a service station. The money would only be handed over to Zimtruck when it was required in order to pay customs duty on the vehicle. The respondent was assured that the vehicle would be delivered within 60 days. It was not delivered at all and eventually the respondent cancelled the agreement. It turned out that Zimtruck was a bogus company. When the respondent demanded the return of the money from the appellant, the appellant took the stance that he acted as an agent for Zimtruck and that it was to Zimtruck that the respondent must look for payment.

Held, that whatever name one gave to the legal relationships created between the respondent and the appellant, the money paid was to be released to Zimtruck conditional on Zimtruck requiring it for the discharge of customs duty on the respondent's vehicle. The appellant was thus not holding the money for Zimtruck. The appellant was thus an agent for both parties, a trustee of the funds, or a stakeholder with no interest in the amount in question.

1996 (2) ZLR p598

KORSAH JA

Held, further, that as an agent the appellant was bound to exercise such skill and care as persons ordinarily exercise in their own affairs. The only reasonable means of ascertaining that the funds were required to pay the duty would have been to see the papers from Customs raising the duty. Failure to ensure that the money was being released for the intended purpose would amount to gross negligence.

Held, further, that where property is handed to an agent for investment, sale, safe custody or otherwise, he is a trustee of that property. Having urged the respondent to deposit the money with him for a particular purpose, the appellant could not now say that he was not the agent of the respondent for the employment of the money.

Held, further, that as a trustee, the appellant had to

(1) give effect to the trust instrument, so far as it was lawful and effective;

(2) act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another; and

(3) exercise an independent discretion.

The appellant could not take refuge in his reckless disinclination to ascertain whether customs

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duty had been raised before parting with the respondent's money.

Held, further, that if the appellant was, as urged, a stakeholder or sequester, he had to comply strictly with his mandate and act within the scope of his authority, namely, to pay over the funds to another person on the occurrence of an event, the event in this case being the importation of the vehicle and the need to pay customs duty.

Held, accordingly, that the appellant was in breach of his contractual obligations to the respondent, who was thus entitled to recover the amount lost as a result of the breach.

Cases cited:

Anns v Merton LBC [1978] AC 729

Boyce NO v Bloem & Ors 1960 (3) SA 855 (T)

Kelly v Lombard 1927 AD 182

Nel v SAR&H 1924 AD 30

Sackville-West v Nourse & Anor 1925 AD 516

Thornton v Priest's Trustee 1932 CPD 296

Re Tidd: Tidd v Overrel [1893] 3 Ch 154

Case Information

E W W Morris, for the appellant

H L Thompson, for the respondent

Judgment

Korsah JA: The appellant appeals against the decision of the High Court,

KORSAH JA

Harare, handed down on 17 November 1995, wherein the trial court held that the appellant was in breach of his contractual obligation in releasing the sum of $46 500 the property of the respondent, to a company styled Zimtruck & Car Hire (Pvt) Ltd, resulting in loss to the respondent. Wherefore the trial court entered judgment for the plaintiff against the appellant:

(1) in the sum of $46 500;

(2) interest at the prescribed rate from the date of summons to the date of payment; and

(3) costs of suit.

It all began in August 1991. The respondent was invited by Mrs Irene Coghlan to acquire a motor vehicle from Zimtruck & Car Hire (Pvt) Ltd (hereinafter referred to as -Zimtruck'), of which

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she was an agent.

Mrs Coghlan represented to the respondent that Zimtruck had a scheme whereby it imported vehicles from South Africa for local customers. The customer was required to deposit 30% of the price of the vehicle with Messrs Coghlan, Welsh & Guest, legal practitioners, which would act as bankers and pay it over to Zimtruck when it required the funds in order to pay the customs duty on the vehicle.

Mrs Coghlan further explained to the respondent that Zimtruck also had an arrangement with Newlands Garage which would conduct pre-delivery inspections of the vehicles, stock spares, and maintain the vehicles. All that the interested customer needed to do was to sign a lease agreement which contained an option to purchase.

These representations proved attractive to the respondent, who desired to acquire a Mazda 626 through the scheme. Subsequently an agreement of lease was executed between Zimtruck and the respondent on 20 August 1991, and the respondent, in reliance on the representations made by Mrs Coghlan, made out a cheque for the sum of $46 500 in favour of Coghlan, Welsh & Guest and handed it over to Mrs Coghlan.

However, Mrs Coghlan told the respondent that the legal practitioners were no longer accepting such deposits because they were not prepared to hold the money in trust and that the cheque should now be made payable to Mr de Villiers, the appellant, who was the proprietor of Newlands Garage, styled as

KORSAH JA

Enterprise Road Service Station, and who had stepped into the shoes of the legal practitioners as the deposit holder. Mrs Coghlan testified that she told the respondent that the appellant was, in this respect, donning the full mantle of Coghlan, Welsh & Guest. Upon that understanding, the name of Coghlan, Welsh & Guest was deleted, the cancellation duly signed, and the cheque made out to Enterprise Road Service Station. The appellant was present when the lease agreements were signed and it was the appellant who executed the agreements on behalf of Zimtruck.

According to the respondent, without actually recalling the exact details of what the appellant said at the time these agreements were subscribed to, the appellant assured him that he, the appellant, was in a better position to make sure that the vehicle was in the possession of Zimtruck and that if he released the money it would be for the explicit purpose of paying customs duty on the vehicle. Both the appellant and Mrs Coghlan told the respondent that the vehicle would be delivered within sixty days.

After the lapse of more than sixty days, the respondent made several enquiries with Mrs Coghlan as well as with the directors of Zimtruck - Mrs Brosnihan and Mr MacDonald - but received conflicting explanations as to the delay in delivery of the vehicle. He finally wrote to Mrs Coghlan on 30 March 1992, cancelling the agreement and demanding the return of his deposit from the appellant.

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It is common cause that Zimtruck was a fraudulent company. One of its directors fled the country, another had his estate sequestrated and many other customers were defrauded.

The appellant's plea to the respondent's claim was that he acted as an agent for Zimtruck: (a) in signing the lease agreement; (b) in holding the monies paid by the respondent until it was demanded by Zimtruck; and (c) in that he handed the money over to Zimtruck and informed the respondent by letter dated 24 October 1991. It was his contention, then and now, that he had no obligation towards the respondent who must deal with Zimtruck.

The question is: If the appellant was simply an agent, for whom was he an agent? Or was he acting in the wide sense as a trustee or stakeholder so as to be dominus of the subject matter?

The learned authors of *Honoré's South African Law of Trusts* 4 ed state at p 60 that:

KORSAH JA

> "When a principal entrusts money or goods to an agent the ownership normally remains in the principal. The agent though not himself owner may have the right to alienate the money or goods on the principal's behalf, for agency is one of the cases in which a non-owner can sometimes give a good title. As regards money an agent may like any non-owner acquire title to it by confusio, that is, by mixing it with his own money. But when the founder entrusts money to a trustee the normal rule is that ownership passes to the trustee at once.'

It seems to me that, in the instant case, it is immaterial to determine whether the legal relationship between the parties was one of settlor and trustee for the benefit of Zimtruck (the beneficiary) upon the occurrence of a given event; or that of principal and agent for the agent to pass over to Zimtruck the monies upon a contingent event. Whatever legal epithet one ascribes to the relationship, the fact remains that the cheque issued by the respondent was deposited in the account of Enterprise Road Service Station and thus became mixed up with the money of Enterprise Road Service Station.

What is of greater moment is that, whichever name one assigns to the legal relationships created, the money paid by the respondent to the appellant was to be released by the appellant to Zimtruck conditional on, or dependent upon, Zimtruck requiring or needing it for the discharge of customs duty, not on any vehicle, but the one for which the respondent had paid over the deposit to the appellant. This much was admitted in para 4 of the appellant's plea to the declaration when he said it was agreed between him and the respondent that the respondent would pay $46 500 to the appellant, to be held by the appellant until Zimtruck required the funds in order to pay the duty on the vehicle.

It defies logic to infer that in such circumstances the appellant was holding such monies as an agent for Zimtruck, to be released at the whim of Zimtruck, without any protection for the respondent. Were it so, the deposit of $46 500 might just as well have been paid directly to Zimtruck for the purpose of paying the customs duty on the vehicle. To pay that sum to a third party and make its release to Zimtruck conditional upon Zimtruck requiring the funds in order to pay the duty on the vehicle, makes the appellant an agent for both parties (for both of them signed the agreement), a trustee of the funds for Zimtruck, or a stakeholder. The legal position becomes even clearer if it is perceived that the sum of $46 500 was by the agreement of the parties deposited as security for the purpose of enabling Zimtruck to pay customs duty on the

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vehicle, and for no other purpose. The appellant then was in the

KORSAH JA

position of a trustee to pay the funds out to Zimtruck upon a specified contingency, or a stakeholder with no iterest in the amount in question.

What then was the duty placed on the appellant? Firstly, as an agent - as is stated in The Law of Agency in South Africa 3 ed at p 144: -His duty is to act in a reasonable manner, having implied authority to do whatever is normally incidental to the conduct of such transaction or business'. In support of this statement the learned author refers to the decision in Nel v South African Railways & Harbours 1924 AD 30, wherein the Appellate Division accepted at p 36 the following statement by Domat:

> "If the order or power given marks precisely what is to be done, he who accepts and executes it ought to keep close to words prescribed in it. And if the order or power be indefinite he may set such bounds to it or give it such extent as may reasonably be presumed to be agreeable to the intention of the person who gives it; whether it be regard to the thing itself that is to be done or the way of doing it.'

"An agent has the authority to do, in the usual way, any act which is necessary for, or ordinarily incidental to, the effective execution of his express authority": Powell *The Law of Agency* 2 ed at p 41. -Every agent has implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of his express authority in the usual way': Bowstead on Agency Art 27 p 104. Ergo, if the agent has acted in a manner which is neither necessary nor ordinary, then his act was not within the mandate given by the law. Furthermore, every gratuitous agent is bound in law to exercise such skill and care as persons ordinarily exercise in their own affairs or, where the agent has expressly or impliedly held himself out to his principal as possessing skill adequate to the performance of a particular undertaking, such skill and care as would normally be shown by a person possessing that skill: Anns v Merton LBC [1978] AC 729. Moreover, every agent has implied authority to use all the various means hich are justified or allowed by customs and usages of the trade, market, business or place in which the mandate is to be executed: Nel v South African Railways & Harbours *supra* at 37.

The appellant was the proprietor of a garage and therefore in the motor trade. But even if he were not in the motor trade, it is a notorious fact that when goods, especially motor vehicles, are imported into this country, a duty is raised by the Customs Department which is dependent on the value of the vehicle imported. Such duty is invariably in written form. Now it was

KORSAH JA

common cause that the appellant was mandated to hold the deposit of $46 500 and pay the same over to Zimtruck when Zimtruck -required the funds in order to pay the duty on the vehicle'. Surely, the only reasonable means of ascertaining that the funds were required in order to pay the duty on the vehicle, as stipulated in the agreement between the parties, was to have sight of the papers from Customs raising the duty to be paid before releasing the funds to Zimtruck. Failure to exercise such caution to ensure that the money was being released for the

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intended purpose would amount to gross negligence even in a person who is not acquainted with he customs and usages of the motor trade, but in the appellant it is unpardonable and he is liable to the respondent for the loss that his negligence occasioned the respondent.

Clearly, it is not every agent who is a fiduiciary, but where property is handed to an agent for investment, sale, safe custody or otherwise, then he is a trustee of that property. See Re Tidd, Tidd v Overrel [1893] 3 Ch 154 at 156. Having urged the respondent to deposit his money with him for a particular purpose, it is impossible for the rappellant to now say that he was not the agent of the respondent for the employment of the money paid to him by the respondent for the purpose which he had endorsed by subscribing to the agreement, and in furtherance of which he accepted the monies paid by the respondent. I am convinced, on the evidence in this case, that the appellant became, on the receipt of the funds from the respondent, a trustee of the funds.

If the terms of the agreement did create a trust in favour of the respondent, with the appellant as the trustee to pay over the funds to Zimtruck upon the happening of an event, then three main principles which govern the administration of a trust must be invoked:

(a) the trustee must give effect to the trust instrument so far as it is lawful and effective;

(b) the trustee must in the performance of duties and the exercise of powers as a trustee act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another; and

(c) except as regards questions of law, the trustee is bound to exercise an independent discretion.

See *Honorè* op cit at p 214.

Nothing can be more precise than the language of Kotzè JA in *Sackville*-

KORSAH JA

West v Nourse & Anor 1925 AD 515 at 535, which language must be held to govern the liability of the appellant in this case. He said:

> "We may accordingly conclude that the rule of our law is that a person in a fiduciary position, like a trustee, is obliged, in dealing with and investing the money of his beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks ' It is the duty of a trustee to avoid all investments which a man of prudence would regard as attended with hazard.'

Surely, for the appellant to divest himself of the funds held by him for the respondent without having sight of the duty raised by Customs on the vehicle is an act attended with the utmost hazard. The mere fact that a trustee acted under the advice of his legal practitioner would not necessarily relieve him of liability even from paying the costs of the action where a breach of trust has been committed: Sackville-West v Nourse & Anor *supra*.

It was contended on behalf of the appellant that, on a best case scenario for the respondent, the appellant may very well not have been in breach of the duty that the respondent attempted to

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place upon him. And it could well be that when Zimtruck asked for the money in question the purpose was to pay duty on a vehicle that was being imported for the respondent's benefit.

The short answer to this contention is that the agreement between the parties was explicit that the appellant was to hold the funds until Zimtruck required them in order to pay the duty on the vehicle. The evidence by the appellant himself was that he paid the deposit over to Zimtruck, at the request of Zimtruck, without carrying out any checks to establish that the vehicle had been imported and that Customs had raised the duty to be paid thereon. At the risk of sounding repetitive, the appellant was in the motor trade and the proprietor of a garage. As was remarked by Roberts AJ in Boyce NO v Bloem & Ors 1960 (3) SA 855 (T) at 865F:

> "It is no excuse for a person who by virtue of his office is required to make enquiry, to allege ignorance (Schomaker Consultation 2c 58 n 217) and he who ought to know is just as much in *culpa* as he who knows, and he who neglects to know that which he ought to know is not to be excused (Schrassert Consultation, 1c 21 n 35 and 2c 77 n 346).'

The appellant cannot take refuge in his reckless disinclination to ascertain whether customs duty had been raised on the vehicle before parting

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KORSAH JA

with monies deposited with him by the respondent for the payment of such duty.

Whereas the respondent maintained all along that the appellant breached his contractual obligation as his agent, it is alleged in the appellant's heads of argument that: -It is common cause that the appellant was a stakeholder'. -By the Roman law', said Wessels JA in Kelly v Lombard 1927 AD 182 at 187:

> "two people who disputed about the ownership of a thing could voluntarily agree to deposit such thing with a third person called a sequester, pending the settlement of the dispute. The sequester then held the thing on behalf of the successful litigant ' In certain cases the civil law allowed sequestratio even where the parties did not consent to it, as where there was reason to fear that the parties might come to blows, or that (the) thing in dispute might be destroyed or be carried out of the jurisdiction of the court."

In Thornton v Priest's Trustee 1932 CPD 296 at 299 reference was made to the following statement in Voet 16.3.12-17 (Searle and Joubert's translation p 44):

> "The *depositum* called *sequestrarium,* where, according to Paulus' definition, something is handed over by more than one acting in concert to be taken care of and restored on a certain condition; or where property the subject of litigation is entrusted to the custody of a third person by the litigants or the judge and usually with the consent of the parties, in order that after the issue of the action or the fulfilment of that which they wished fulfilled, it may be restored ' There is a similarity between the position of a trustee and that of a simple depository in that the true possession no more passes to the latter than to the former, but there is only bare detention of the property, so that the trustee is taken as possessing under the title of him who will be successful in the action, and the possession during the intervening time is for his advantage, unless it be agreed upon otherwise.'

I venture to say that there is a factor common to agents, trustees and stakeholders: they must all comply strictly with their mandate and act within the scope of their authority, namely, to hand over property, or pay funds over, to some person upon the occurrence of an event. They are all liable to the person who has an interest in the property or funds if they act without reasonable

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care and outside the scope of their authority.

KORSAH JA

It is clear to me that the sum of $46 500 was placed by the respondent with the appellant to abide the event of the vehicle being imported into this country and the necessity arising of having to pay customs duty to secure its release to Zimtruck on behalf of the respondent. Any other interpretation of the clause -required the funds in order to pay the duty on the vehicle' renders the agreement to deposit the funds with a stakeholder meaningless. There was no ambiguity patent or latent in the words used, and the words used must bear their ordinary meaning.

The appellant was clearly in breach of his contractual obligation to release the respondent's money, held by him for the sole purpose of enabling Zimtruck to pay import duties on the respondent's vehicle. The respondent was, therefore, entitled, to recover the amount he had lost as a result of such breach.

Accordingly the appeal is dismissed with costs.

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

CHIKOSA v WRIGHT 1996 (2) ZLR 607 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

7 & 18 November 1996 Judgment No. S-220-96

Flynote

Roads and road traffic - negligence - sudden emergency - test - person put in danger by negligence of another - not to be blamed if does not do quite the right thing

Headnote

The respondent's vehicle was hit in the rear by a vehicle whose driver had negligently failed to obey a give way sign. As a result of this collision the respondent's vehicle was propelled to her left. In trying to correct the direction of her vehicle she lost control of her vehicle. The vehicle veered to the right and collided with the appellant's vehicle which was some twenty paces from

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the orginal accident.

Held, that in the circumstances the respondent had not been negligent. She had been placed in a sudden emergency situation by the negligence of the driver who collided with her and her action in the agony of the moment did not amount to negligent conduct.

Case cited:

S v Mauwa 1990 (1) ZLR 235 (S)

Case Information

P C Paul, for the appellant

F Girach, for the respondent

Judgment

Korsah JA: In the afternoon of 16 May 1993, Mrs Wright, a lady somewhat advanced in age, was driving her Renault 12 motor vehicle in a southerly direction along Mazoe Street. At the intersection of Fife Avenue and Mazoe Street a Mazda 323 driven by one Amen Chirongoma along Fife Avenue in an easterly direction without heed to the Give Way sign on Fife

KORSAH JA

Avenue, entered Mazoe Street and drove into the rear of Mrs Wright's vehicle. As a result of this impact, the back of Mrs Wright's vehicle was pushed to her left. She lost control of her vehicle and the vehicle veered to the right and came into collision with the appellant's vehicle, the driver of which, upon witnessing the accident between the two vehicles, had brought his vehicle, travelling in a northerly direction along Mazoe Street, to a halt about twenty paces (less then twenty metres) from the intersection of Mazoe Street and Fife Avenue - the scene of the accident.

The appellant brought an action against both Mrs Wright, as first defendant, and Amen Chirongoma, as second defendant, for damage occasioned to her vehicle as a result of their negligence. Amen Chirongoma did not contest the action and a judgment in default was obtained against him. Mrs Wright successfully resisted the action for negligence against her on the ground that the collision between her vehicle and that of Amen Chirongoma was due to the sole negligence of Amen Chirongoma, who, without regard to a Give Way sign, entered Mazoe Street and drove into her vehicle. The impact made her car veer off course to the right and created a sudden emergency which led to her colliding with the appellant's vehicle.

Mr Paul for the appellant conceded that the impact, though not particularly severe, was sufficient to deflect the respondent's direction of travel so that her vehicle travelled across the incorrect side of the road and coming into collision with the appellant's vehicle.

Mr Paul contended that the respondent in her evidence stated that she was endeavouring to control her vehicle, but it appears she did very little in this regard to avoid colliding with the

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appellant's vehicle since she neither decelerated, braked nor turned the steering wheel. Mr Paul surmised that the respondent probably just froze and submitted that her failure to act reasonably was the proximate cause of the collision between her vehicle and that of the appellant.

The doctrine of sudden emergency has been formulated thus:

> "A man who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger.'

See Cooper Motor Law (Principles of Liability) (Vol 2) at p 90. See also *S v Mauwa* 1990 (1) ZLR 235 (S) at 241B where this court expressed the view that:

KORSAH JA

> "Where a person ' is placed in danger by the wrongful act of another, that person is not negligent, if in the agony of the moment, he exercised such care as may be reasonably expected of him in the reasonable apprehension of the danger in which he is placed. He is not to blame if he does not do quite the right thing in the circumstances ' But each case must depend on its own facts.'

I am in absolute agreement with Mr Paul that whilst one is mindful of the fact that one should be sympathetic towards a person who is placed in a sudden emergency, there is a requirement -that those engaged in many activities shall have such natural aptitude or special training as to give them the ability to cope with those dangerous situations which are likely to arise in the course of such activities': American Restatement of the Law of Torts, Negligence.

Mr *Girach* submitted on behalf of the respondent that there was evidence before the trial court that the respondent attempted to control her motor vehicle and that if Mr Chikosa's version of events was to be accepted the respondent avoided collision with two motor vehicles before the impact with the appellant's vehicle.

The respondent was placed in a position of sudden emergency by being unexpectedly jolted from the rear. Although she was travelling between 20 and 30 km/h, the effect of the impact was to propel her vehicle in a direction other than she was travelling. In such circumstances it is not unreasonable for her to try and correct the direction of travel of her vehicle. She testified that she tried desperately to control her vehicle. The fact that her vehicle collided with the appellant's vehicle which was twenty paces from the first accident rather than some other vehicle does not, in my opinion, in the agony of the moment, support a finding of negligence on the part of the respondent. I cannot envisage any natural aptitude or special training which would give an ordinary driver the ability to cope with such a dangerous situation, other than luck.

The appeal is accordingly dismissed with costs.

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

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Atherstone & Cook, respondent's legal practitioners

MARAIS & ANOR v KENNEDY & ANOR 1996 (2) ZLR 610 (HC)

Court **High Court, Harare**

Bartlett J

Civil trial

30 & 31 January, 1 & 2 February, 7-10 May,

19 July; & 20 November 1996 Judgment No. HH-149-96

Flynote

Partnership - fiduciary relationship - good faith - duty of uberrima fides between partners - duty to disclose transaction by which one partner will benefit at expense of partnership - extension of duty to persons who have wound up partnership but have not completely settled partnership's affairs

Practice and procedure - pleadings - precision in - imprecise and incorrect pleadings - whether party bound thereby - basis of claim becoming apparent after commencement of trial

Headnote

The first plaintiff (Marais) and the first defendant (Kennedy) were partners in a greyhound racing venture, which was unsuccessful. On 23 June 1992, Marais offered to sell his share of the land to the first defendant for $3 million. It was understood that this represented half the price being offered for the land by a developer. It was agreed that Kennedy would establish whether that was the highest price the developer would offer. On 29 June Kennedy told the developer that Marais "wanted out" and confirmed that the price would be $6 million. Between 3 and 9 July, Kennedy told Marais that the developer would not budge from the offer of $6 million and an agreement in principle was reached whereby Marais' share would be sold to Kennedy for $3 million, the payment to be made in instalments. It was an implied term of the agreement that the agreement would not be binding until it was reduced to writing and signed by the parties.

On 9 July, the developer told Kennedy that they would be prepared to offer $7.5 million. On 13 July a written agreement was signed between Marais and Kennedy, in terms of which Marais would receive $3 million (with some small adjustments in respect of interest). Later the same day, Kennedy met with the developer's representative and offered the property for $12.5 million, this offer being accepted on 16 July. Because of the windfall he had realised, Kennedy was able to pay Marais outright and negotiated a reduction in the payment.

The plaintiffs claimed the sum of $3.21 million, being the difference between half the selling price to the developer and the sum received by the plaintiffs. The claim rested on two bases: (1) that Kennedy had been fraudulent, in that he had falsely represented that the developer was not prepared to offer more than $6 million and that at the time the agreement of sale between

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the plaintiffs and defendants was entered into the final selling price to the developer had not been settled; (2) that Kennedy, as a partner of Marais, had a duty to disclose all the communications between himself and the developer before the agreement of sale between the parties was concluded. The latter claim was made in a belated amendment to the plaintiff's declaration, filed by consent on the third morning of the trial.

The plaintiffs' pleadings were imprecise and incorrect. They proved the existence of an implied term, as alleged in their amended declaration, but they did not prove the oral agreement as particularised, but a different one. The question arose whether they were bound by their pleadings.

Held, that though the object of pleadings is to ascertain precisely what is in issue between the parties, where a party has every opportunity to place all the facts before the court and the investigation is thorough, the court should not place undue emphasis on the pleadings, but should rather decide the case on the real issues canvassed during the trial. This does not mean that the trial should become a free for all, with a complete disregard for the issues raised in the pleadings. In this case, despite the problems with the plaintiffs' pleadings, the defendants must have been aware, if not from the outset, then very soon after the trial began what the plaintiffs were relying on.

Held, further, that Kennedy made a misrepresentation to Marais when he said that the developers would not budge from the offer of $6 million. He did not know that they would not go above that price, as he had not asked them. In particular, at the time of the written agreement between the parties, Kennedy knew that the developers were offering more and represented that they were not.

BARTLETT J

Held, further, that between partners there is a duty of uberrima fides, involving the highest standard of honour. If a dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will have to show, not only that what he did was legal, but that his conduct accorded with the highest standards of honour. This obligation extends to persons who have dissolved their partnership but who have not completely wound up the partnership's affairs. Good faith is required especially where one partner is trying to get rid of another or to buy him out.

Held, further, that Kennedy should have advised Marais of the increased offer from the developers before the written agreement was signed.

Judgment for the plaintiff.

Cases cited:

Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A)

Commercial Bank of Zimbabwe Ltd v M M Builders & Suppliers (Pvt) Ltd 1996 (2) ZLR 420 (H)

Elite Electrical Contractors v The Covered Wagon Restaurant 1972 (2) RLR 221 (A); 1973 (1)

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SA 195 (RA)

Ford v Abercrombie 1904 TS 878

Goldblatt v Fremantle 1920 AD 123

Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A)

Love v Hobson 1913 EDL 400

Matambanadzo Bus Svc (Pvt) Ltd v Magner 1971 (1) RLR 54 (A)

Nash v Muirhead (1909) 26 SC 26; 19 CTR 64

Purdon v Muller 1961 (2) SA 211 (A)

Sempff v Neubauer 1903 TH 202

Sentrachem Bpk v Wenhold 1995 (4) SA 312 (A)

Standard Bank of SA Ltd v Coetzee 1981 (1) SA 1131 (A)

Case Information

J C Andersen SC, for the plaintiffs

R R Horn SC, for the defendants

Bartlett J:

INTRODUCTION

The first plaintiff ("Marais") and the first defendant ("Kennedy") were partners in a greyhound racing venture in the Prospect area of Harare. The

racing venture sadly (at least for Marais and Kennedy) fell on stony ground and failed. The land over which the greyhounds had raced turned out, however, to be anything but stony. Marais decided to sell Kennedy his half share of the land for just over $3 million and reaped a profit ten fold the cost of acquisition. Kennedy then (a mere three days later) sold the land to the Old Mutual for more than $12 million (or more than double what he had paid to Marais), reaping an even more massive return than Marais had. But this harvest - like many riches not earned by hard work - became a bitter one. Marais made allegations of fraud against Kennedy, embroiling the erstwhile partners into a protracted battle over a fair share of the spoils.

PLEADINGS

I have somewhat simplified the matter in the introduction and must now get down to the more complicated task of summarising the pleadings, before specifying the issues, summarising and

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analysing the evidence - and then making findings of fact and law.

In his declaration Marais alleged that himself and the second plaintiff, Chester Holdings (Pvt) Ltd ("Chester") were equal partners with Kennedy and the second defendant, Murgan Holdings (Pvt) Ltd, ("Murgan") in regard to the acquisition and sale at profit of certain stands in Prospect. Chester and Murgan owned in equal amounts the shares in Mukuvusi Industrial Development (Pvt) Ltd ("Mukuvusi") which owned the stands.

Marais alleged that on 13 July l992, pursuant to an oral agreement between him and Chester on the one hand and Kennedy and Murgan on the other hand, Chester and Murgan entered into a written agreement for the sale of Chester's shares in Mukuvusi to Murgan for $3.04M. On the third morning of the trial, when the plaintiffs were already deeply into their evidence, the declaration was amended (by consent) to allege that the "oral agreement was in principle and subject to the implied term that no agreement would be binding unless and until it was reduced to writing and signed by the parties."

It was then alleged in para 9 of the declaration that:

> "The said agreements were induced by first defendant fraudulently representing to First Plaintiff acting for and on behalf of himself and Second Plaintiff that the Old Mutual (to which the said stands had been offered for sale) was not prepared to purchase the said Stands for more than $6m and that Defendants no longer wished to sell them and wished

> to develop them as a long term investment, whereas in truth and in fact on 29 June, l992 the Old Mutual had offered first defendant, acting on behalf of Plaintiffs and Defendants $7,5m for the said Stands, which amount first defendant had not accepted as he wished to negotiate for a higher price of $12,5M."

Also on the third morning of the trial an amendment to para 9 of the declaration was filed. This very belated amendment was not objected to by the defendants and added the following to the end of para 9:

> "From 26 June l992 to 13 July l992, first defendant was still negotiating with the Old Mutual for the sale of the property; on 9 July l992 the Old Mutual had advised first defendant that it could increase its offer to $7,5M plus a negotiated contract with Ploughboy for the road constructions, which first defendant undertook to consider; and that on 9 July l992 a further meeting had been arranged between first defendant and the Old Mutual, which meeting was to be held after the agreement had been signed."

(Ploughboy was a construction company owned by the first defendant).

The amendment filed by the plaintiffs on the third morning of the trial - in an endeavour to resurrect the plaintiffs' case - also added as para 9A, what amounted to an alternative cause of action. The inclusion of this paragraph was also consented to by the defendants. This paragraph alleged as follows:

"9A (a) Alternatively and in any event first defendant as his partner had a duty to disclose to First Plaintiff all the communications which had taken place with the Old Mutual as set out above before the agreement was signed on 13 July l992.

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(b) First defendant failed to fulfil his duty.

(c) Plaintiffs would not have entered into the agreement if first defendant had disclosed the communication which had taken place."

Paragraphs l0 and ll (also after amendment) then alleged as follows:

"10. Immediately after the said agreements had been concluded

BARTLETT J

first defendant acting on his own behalf and on behalf of second defendant offered the said Stands to the Old Mutual for $12,5M which offer was accepted shortly thereafter, and the said amount paid on l0 August l992.

11. But for the said fraudulent representations or alternatively first defendant's failure to disclose the communications held with the Old Mutual, Plaintiffs would not have entered into the agreements referred to above, and would have received one half of the purchase price of $12,5M which sum would have been invested at best advantage at the prevailing interest rates thereafter."

The plaintiffs accordingly alleged that they had suffered damages in the sum of $3.210M (the difference between half of $l2,5M and the amount paid to them), together with interest thereon.

The defendants obtained the plaintiffs' assurance in their reply to further particulars that the oral agreement alleged was reached on 8 July and was an agreement to sell the relevant shares for $3.04M. The defendants then pleaded as follows in para 5 of their plea:

"5.1 The defendants deny that the date of the sale was 13 July l992.

5.2 The defendants aver that the parties agreed to the sale on 23 June l992 and accordingly terminated their partnership on that day.

5.3 The terms of the said sale were set out in a Memorandum of Agreement signed by the parties on 13 July l992 which specified 9 July l992 as the effective date of the agreement."

Kennedy denied the fraud alleged against him and denied the alleged offer made by Old Mutual in para 9 of the plaintiff's declaration. He admitted that the stands were sold to the Old Mutual for $12,5M on l6 July (three days after they had been purchased from the plaintiffs), but maintained that since the agreement to purchase from the plaintiffs had been made on 23 June and the partnership terminated on that date, that his actions were entirely lawful.

In an amendment to the defendants' plea filed after the detailed amendments to the plaintiffs declaration, the defendants denied that the oral agreement pleaded by the plaintiffs was an agreement "in principle", subject to the applied term pleaded by the plaintiffs. The defendants reiterated that the

BARTLETT J

agreement was entered into on 23 June l992 adding that it was confirmed on or about 3 July

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l992.

In regard to the addition to para 9 of the declaration the defendants pleaded as follows:

> "Save for admitting on 9 July l992 a meeting had been arranged by first defendant and the Old Mutual, which meeting was to be held at 2.30 p.m. on 13 July l992, the allegations in the amendment to para 9 of the plaintiffs' declaration are denied."

In regard to the amended para 9A of the declaration, raising the question of the duties of partners the amended plea averred as follows:

> "Defendants admit that first defendant did not disclose to the first plaintiff his discussion on 9 July with Mr Frost of the Old Mutual but denies that he was under any obligation to do so in as much as the partnership had been terminated on or about 23 June l992 and confirmed on or about 3 July l992."

The critical issue between the parties on the pleadings is the question of when the agreement of the sale of the shares giving title to the land in question was concluded. Was it concluded on 23 June l992 and confirmed on 3 July l992 as alleged by the defendants? Or was it only a final agreement when signed on 13 July l992 as alleged by the plaintiffs?

The trial lasted more than 8 days and virtually all the evidence was directed as to when the sale of shares agreement between Marais and Kennedy and their respective companies had become legally binding. There is accordingly a formidable (indeed forbidding) volume of evidence to sift through and assess.

[The learned judge then proceeded to do so and continued:]

BASIC FINDINGS OF FACT

Having summarised the evidence led by the plaintiffs and defendants and having analysed the credibility of the various witnesses I must now turn to make basic findings of fact. These findings of fact (and my subsequent detailed findings of fact) will be based on my assessment of the credibility of the witnesses. Where necessary in making the findings of fact I will refer

to the relevant aspects of credibility relating to those findings of fact - though without delving again into the detailed reasons for those findings.

Once the basic findings of fact have been made it will be necessary to make detailed findings of fact and law in relation to the pleadings to establish whether the plaintiffs have proved the claims they have made.

I would emphasise that the basis of the findings of fact are that Marais, Dudhia, Turner and Frost were credible and reliable witnesses - and that Thompson was a credible and reliable witness on aspects relating to the preparation of the draft documents. The findings of fact are also based on my assessments of Kennedy and Hulland as lacking in credibility and reliability - and their evidence has generally only been accepted when corroborated by witnesses I have found to be credible.

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I make the following findings of fact on a balance of probabilities:

(l) On about 23 June l992 Marais offered to sell Kennedy his share in the land (as represented by the shares) for $3M on the understanding that that was half the price being offered by the Old Mutual. It was agreed that Kennedy would establish whether that was the highest price that the Old Mutual were prepared to offer. It was also agreed that Marais would be prepared to accept payment in instalments and that the amount of the instalments and the period over which they would be paid would be subject to agreement once Hulland had prepared a cash flow forecast for Kennedy. Marais would in the meantime carry out investigations for Kennedy to ascertain the cost of developing the property and the industrial uses which the City of Harare would permit on the land.

(2) On 29 June l992, Kennedy phoned Frost of the Old Mutual and told him that Marais "wanted out", and confirmed that the price the Old Mutual was offering for the land was $6M. Kennedy did not seek to establish whether the Old Mutual would be prepared to offer a price higher than $6M.

(3) Between 3 and 9 July l992 (but no later than shortly after 8.15 am on 9 July) there was a meeting between Kennedy, Marais and Hulland. At this meeting Kennedy informed Marais that the Old Mutual would not budge from its price of $6M. In consequence the price of $3M for Marais' shares was agreed. The amount of the instalments by which the amount of $3M would be paid and the dates of payment of those instalments was

agreed. Marais raised the question of an interest factor in view of the payment by instalments but this suggestion was discounted by Kennedy. It was agreed that the question of capital gains tax liability in regard to the sale would be referred to professional accountants for advice. The agreement of the price at $3M was conditional on the accountants' advice being that there would be no capital gains tax liability. Turner of Ernst and Young was approached to prepare documents and schedules in regard to the capital gains tax question question. It was agreed that Marais would arrange for a draft agrement to be prepared by his legal practitioner (Thompson). After the meeting and before going to give instructions to Thompson, Marais went and saw Reece at Bard Discount house and obtained from him a figure of $l43 094 as representing the interest Marais was losing by agreeing to payment in instalments. Marais then gave instructions to Thompson to prepare a draft agreement. These instructions included incorporation of the interest factor at the figure obtained from Reece. Later the same day Marais again saw Kennedy and the question of the interest factor was negotiated. It was agreed that a figure of $50 000 (and not $l43 094) would be added to the purchase price to reflect the interest factor because of instalment payments. Marais then phoned Thompson advising him to alter the final instalment to $l,05M (from $1 143 094).

(4) On 9 July l992 at some time after the meeting between Marais, Kennedy and Hulland

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at which the $3M price, the instalments and the approach to capital gains liability had been agreed (if indeed that meeting had taken place on 9 July), Frost phoned Kennedy. Frost informed Kennedy that the Old Mutual would now be prepared to offer $7,5M for the three properties and would in addition negotiate a contract with Kennedy's company to service the stands. Kennedy made an appointment to see Frost at 2.30 pm on 13 July to discuss the possibility of such a sale. The Old Mutual's sudden (and unexpected) re-entry to the picture was due to the fact that since Frost's conversation with Kennedy on 29 June a major commercial concern had expressed a serious interest in funding a major development on the properties in question.

(5) By 10 July, Thompson prepared draft copies of an agreement and Marais and Kennedy considered the draft over the weekend of 11 and 12 July. Marais, armed with the capital gains tax calculations and documents prepared by Turner, consulted his accountant (Dudhia) on 11 July.

(6) On the morning of 13 July Kennedy and Marais discussed Thompson's

draft and alterations were agreed. These alterations reflected that the shares had been sold and reduced the price from $3.05M to $3.04M with $40 000 being paid on signature of the agreement. The altered pages were probably prepared in Kennedy's office.

(7) Thompson received the altered agreement also on the morning of 13 July and made certain suggestions in ink on that document. Thompson then immediately prepared a document to reflect the final agreement between the parties. A meeting then took place also on the morning of 13 July between the respective accountants (Dudhia and Turner) to agree the capital gains tax avoidance formula. Marais and Hulland also attended the meeting.

(8) At about l pm on 13 July, the final draft was discussed. Kennedy made alterations on the final document and the agreement as altered was signed.

(9) At 2.30 pm on 13 July, Kennedy met with Frost of the Old Mutual and offered the properties for $12.5M. This offer was accepted on 16 July.

(10) On 23 April l993, Marais and Thompson had an interview with Frost and he mistakenly informed them that the Old Mutual had offered Kennedy $7.5M on 29 June l992 - when in fact that offer had not been made by the Old Mutual until 9 July l992.

[His Lordship then made some observations in respect of the findings just set out, and continued:]

DETAILED FINDINGS OF FACT

It is now necessary to make detailed findings of fact in respect of the various allegations made in the pleadings in order to establish whether the plaintiffs have proved their main or alternative

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claims on a balance of probabilities. In making such findings of fact, it will of course be necessary to take account of the basic findings of fact already made and of the appropriate legal principles in regard to the law of contract - in particular those referred to by Mr Horn for the defendants in his heads of argument - Christie The Law of Contract in South Africa 2 ed pp 122-123, p 184 and pp l94- 202 and Christie Business Law in Zimbabwe pp 144-146 and the various authorities referred to by the learned author. I also in making

BARTLETT J

these detailed findings take careful account of the submissions made by learned senior counsel in argument.

Was there a binding agreement concluded on 23 June?

The defendants' contention in their plea is that the agreement of Sale was concluded on 23 June and that the partnership accordingly also met its demise on that date. This contention was maintained by Kennedy in evidence for the defendants. This aspect has been dealt with in regard to my basic findings of facts. There clearly was no final agreement on 23 June. I have found Marais' evidence to be the probable evidence in this regard. Indeed Kennedy - despite his other evidence - and Frost provide substantial support for this position from their identical recollection of their conversation of 29 June. Kennedy told Frost that Marais "wants out" - not that Marais is out. I accordingly reiterate that it is my finding on a balance of probabilites that there was no agreement on 23 June.

Was the oral agreement of 3 to 9 July binding?

Was the oral agreement of somewhere between 3 and 9 July one reached "in principle and subject to the implied term that no agreement would be binding and until reduced to writing and signed by the parties?" Or was it a binding agreement?

There certainly was an oral agreement reached between 3 to 9 July for the sale of the shares for $3m with payment in three instalments of $lm on agreed dates.

As Mr Horn submitted, the burden of proof is certainly on the plaintiff to establish that the oral contract was not intended to be binding until reduced to writing and signed. As stated by Innes CJ in Goldblatt v Fremantle l920 AD 123 at 128-9:

> " ... And if during negotiations mention is made of a written document, the court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (Grotius 3.14.26, etc). At the same time, it is always open to parties to agree that their contract shall be a written one (see Voet 5.1.73; van Leeuwen 4.2, sec. 2, Decker's note); and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction."

BARTLETT J

If the matter had remained as simple and cut and dried as the oral agreement of 3 to 9 July, I

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have no doubt that the plaintiff would have found discharging the burden of proof a very uphill struggle. But neither Kennedy nor Marais seemed to regard the oral agreement as a final binding agreement.

And here I need to emphasise what I consider to be an important aspect in this regard. Kennedy very strongly impressed from his evidence as a very hard nosed businessman who did not and would not allow any alteration at all from an agreement reached which he regarded as binding - at least not any alteration against his own interests (and Kennedy impressed as a person who always had a very marked appreciation of his own interests). Yet Kennedy (on my findings on the basic probabilities) almost immediately after the conclusion of the oral agreement, which he says he regarded as completely binding, allowed a condition precedent to be introduced. This condition precedent not only suspended the operation of the deal he says he regarded as already done - but created the possibility, if it was not met, of requiring Kennedy to pay substantially more to acquire Marais' shares.

If the Kennedy whom I observed in the witness box for the better part of two days believed that a binding agreement had already been concluded, he would have said so in no uncertain terms when the suggestion of a condition precedent relating to ensuring safety from any capital gains tax liability was raised. He would, in my view, have clearly told Marais that agreement had already been reached and that any capital gains tax liability incurred by Marais was not his concern. This would, in my view, be particularly so since the possibility of having to pay all or some of Marais' capital gains tax to secure the deal, thereby making him have to pay more than half the Old Mutual price for Marais' share (when the price had already been agreed), would have been totally unacceptable to Kennedy - and indeed to anyone at all.

The scenario which actually occurred (on my findings on the basic probabilities) could only in my view have occurred if Kennedy did not regard a binding agreement as having already been reached. Kennedy who described himself as "only a farmer", certainly did not suggest that he had any knowledge of the intricacies of income tax law. But as a layman he surely could not but perceive that Marais had made a huge capital gain - in fact he said so himself "He (Marais) was laughing having put in nothing and having got out $3M". Whatever assurances Hulland might have uttered about being sure that the accountants would create a scheme to avoid tax liability, Kennedy was, from his own stated position, being asked to let go of

something he already had and to create uncertainty where previously there had been certainty. I again reiterate that Kennedy from the clear impression he made in the witness box would not have done that if he regarded the agreement as already finalised. If Kennedy was trying to make sure that Maras did not swim away and was worried that if he did not placate him he may renege from an oral agreement which had been reached, but which might be difficult to prove, he should have said so.

The same day as the condition precedent was introduced the previously agreed price was also renegotiated. Marais asked for it to be increased by $143 094 to take account of his lost interest. The Kennedy who gave evidence, if he believed a binding agreement had already been

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reached, would have told Marais in no uncertain terms that the price had already been agreed.

Lest I thought to be over-emphasizing the no nonsense (some might say ruthless, though Mr Andersen was much less polite than that in one exchange when cross- examining Kennedy) approach of Kennedy to business matters, I quote the example of the payments made to Marais in consequence of the contract. Kennedy after selling the shares to the Old Mutual, three days after the signing of the deal with Marais, made a profit of $9M (even if he was right that Marais had put in nothing because the initial purchase cost of the land was so low). Kennedy, from his perspective, must have realised that he had had an enormously lucky break - with the Old Mutual suddenly coming back into the picture and agreeing to double their price a very short time after the agreement with Marais (which I might add does not give much credence to Kennedy's expressed view in evidence that he had been taking a great risk and that prices had been falling rapidly). At any rate, Kennedy having just pocketed $12.5M decided to pay Marais in full i August l992. The agreement had required $lM in instalments on l September l992, l December l992 and 28 February l993. For this act of magnanimity Kennedy extracted a reduction of the purchase price due to Marais by $335 000 to $2.665M - in view of the interest Marais could earn by early payment. This was definitely sound business sense on the part of Kennedy, but where you have just made $9M (instead of your partner's or ex-partner's $3M), due to an enormous slice of luck where your partner or ex-partner has missed out on that extra bounty by a corresponding slice of bad luck, it certainly takes a "no nonsense" approach to negotiate your partner's share down and extract a further $335 000.

Going back to Marais' request for the price to be increased by $143 094 to

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BARTLETT J

take account of interest, Kennedy, instead of telling Marais that there was already a binding agreement and that accordingly there could be no further discussions on price, agreed (on my findings on the basic probabilities) to adjust the price upwards by $50 000 by adding that amount to the final instalment. That there was such an alteration is supported by the alteration of the instructions given to Thompson and the draft agreement he prepared giving a price of $3.05M. It was not suggested that the draft agreements were anything other than completely genuine - and they reflect the price going up to $3.05M and then down to $3.04M.

Therefore Kennedy who insists that there was a binding agreement in force - be it the agreement of 23 June or 3-9 July - did not give any indication that this was the position but allowed a new price to be negotiated. Here again I emphasise the vagueness and unsatisfactory nature of Kennedy's evidence on this aspect of the matter.

There was also a third occasion when the final binding oral agreement of the defendants' case was renegotiated. This was, accordingly to my basic findings of fact, on the morning of 13 July. The price was reduced to $3.04M, but $40 000 was to be paid in cash against signature (making provision for an instalment payment some 7 weeks earlier than previously agreed). On my findings on the basic probabilities the written document recording this alteration was probably produced by Kennedy's office. And once again Kennedy's and Hulland's evidence on this alteration was vague and unconvincing - and Marais, supported by Thompson, probable

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and convincing.

Also on the morning of 13 July, there were rushed discussions involving Marais and Kennedy's accountants, Marais' lawyer and Kennedy's financial director, as to the acceptability of the capital gains tax avoidance scheme - which also necessitated the accountants being satisfied that the draft agreement did not inhibit or embarrass the avoidance scheme being put into place.

The surrounding circumstances, considered collectively - the capital gains tax condition precedent, the negotiated increase in price to $3.05M, the drop to $3.04M with altered payment arrangements, the preparation and discussion of altered drafts, the detailed schedules prepared and the discussions between the accountants - all in my view, clearly indicate an emerging final agreement which would become binding only upon signature. The surrounding circumstances, do not, in my view, provide a picture resembling a final binding agreement simply being put in writing. In short, the detailed

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BARTLETT J

surrounding circumstances, in my view, clearly indicate on a balance of probabilities, that the agreement in principle of 3 and 9 July was not regarded as a binding agreement and that the clear intention of the parties was that the agreement would only be binding when reduced to writing and signed.

I am aware of the constraints in incorporating tacit or implied terms into a contract. Although I would consider those constraints are markedly less constricting when concerned with a brief verbal agreement as opposed to a detailed written agreement.

In regard to tacit terms or terms implied from the facts, I would refer to the observations of Corbett AJA (as he then was) in Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration l974 (3) SA 506 (A) at 531-2 where the learned Acting Judge of Appeal (as he then was) described such terms as -

> "... an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the court, in truth, declares the whole contract entered into by the parties."

Christie op cit, as referred to by Mr Horn, deals in detail at pp 194-202 with terms implied from the facts and refers to the relevant authorities. I am in respectful agreement with the following observations by the learned author in respect of his analysis of the approach in applying the long established tests, where at p 198 he states as follows:

> "... it is suggested that in order to establish a tacit term it is necessary to prove, by the preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied beyond reasonable doubt that they were in agreement on the tacit term. If the court is satisfied on the preponderance of probabilities that the parties reached agreement in that manner it may find the tacit term established."

And at p 200:

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"Because the court is concerned with the states of mind of the parties (subject to what has been said above about the objective nature of the officious bystander test) at the time they entered into their contract, the

BARTLETT J

relevant facts to investigate are the express terms of the contract (Goedhals v Graaff-Reinet Municipality l955 (3) SA 482 (C) at 489-90; Ornelas v Andrew's CafŽ l980 (l) SA 378 (W) at 387C-F) and the surrounding circumstances at the time when the contract was entered into (van der Merwe v Viljoen 1953 (1) SA 60 (A) at 65; George Municipality v Freysen l976 (2) SA 945 (A) at 955H). Subsequent circumstances, which could not have been present in the minds of the parties, will obviously not be relevant, but in cases of doubt the subsequent actions of the parties under the contract may be relevant in drawing an inference about their intentions at the time it was entered into (van Boeschoten & Lorentz v Min of Mines l933 TPD 169 at 179; Bowmaker (CA) (Pvt) Ltd v Wood l959 (1) SA 766 (SR) at 771)."

I would also refer to the warning in *Elite Electrical Contractors v The Covered Wagon Restaurant* 1972 (2) RLR 221 (A); l973 (l) SA 195 (RA) at l96H that the terms to be implied in any particular contract will depend on the circumstances surrounding that contract and is not a matter to be decided by reference to other cases.

I am satisfied that analysing the above criteria that the express terms and all the surrounding circumstances, as I have endeavoured to carefully describe them, indicate that it was an implied term that the contract would only become binding when reduced to writing and signed by the parties.

But have the plaintiffs pleaded the case they have proved? They have pleaded that the agreement of 13 July l992 was "pursuant to an oral agreement in principle and subject to the implied term that no agreement would be binding unless until it was reduced to writing and signed by the parties." They have, however, further particularised that the oral agreement was reached on 8 July and that the terms of that agreement were that Marais "agreed on behalf of himself and the second plaintiff to sell the second defendant's shares in Mukuvusi International Development (Pvt) Ltd to the defendants for $3,04M".

There is clearly a typographical error in the further particulars - when it refers to the "second defendant's shares" it means the second plaintiff's shares. But this typographical error, obvious as it is, has not been corrected. Without the correction the further particulars are nonsensical - and it is clear from the pleadings as a whole (in para 8 of the declaration specifically) that the error is typographical. I accordingly propose to read the further particulars as if they had been correctly typed, though expressing my concern at the carelessness of their preparation and the failure to have the typing error

BARTLETT J

formally corrected. I did not understand Mr Horn to suggest that I should dismiss the further particulars as nonsensical - indeed the contents of the further particulars as corrected are basic to his argument of the plaintiffs proving (or endeavouring to prove) the case different from that pleaded.

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It was not Marais' evidence that an oral agreement was reached on 8 July for the sale of shares for $3.04M to the defendants. It was his evidence that the price of $3.04M was only reached on 13 July.

What the plaintiffs have proved, according to my findings on the probabilities, is that there was agreement in principle somewhere between 3-9 July to sell the shares for $3M. But that there was an implied term (from the surrounding circumstances as I have analysed them) that the agreement would not be binding until it was reduced to writing and signed by the parties - and that the final price of $3.04M was only agreed on 13 July the date the written agreement was signed. However, the plaintiffs have not proved (as they have particularised) that the oral agreement of 8 July was for the sale of the shares for $3.04M.

The failure of the plaintiffs to seek to amend the further particulars is extremely careless. At the time the plaintiffs filed the substantial amendment to their pleadings, Marais had already said in evidence that the price of $3.04M was only reached on 13 July - and had been through the draft agreements explaining how that price had been reached. I have indicated that Marais' credibility on these aspects, despite the contradiction with the pleadings, was saved by the fact of Thompson's unchallenged concessions in regard to his lack of proper preparation of the matter (and proper consultation with Marais).

To not get pleadings correct after two full days of a trial (or at least have tried to get them correct on this aspect) is a serious flaw in the plaintiffs' case. Does the fact that the oral agreement in principle the plaintiffs have proved was for $3M and not $3.04M leave them with a lost cause, because of the difference between what has been proved and what has been pleaded? It must be remembered that the route from $3M to $3.04M between 3 and 9 July and 13 July with its further negotiations, discussions and agreements is the detailed basis on which the court has found that there was an implied term that no agreement would be binding unless reduced to writing. If all the evidence led explaining how the price went from $3M to $3.04M had not been led there would have been little basis for the implied term. Yet the plaintiffs have

blandly pleaded that the oral agreement was reached on 8 July and that it was for $3.04M - whereas the evidence they have led (which evidence I find to be credible and probable) has een of a different picture.

Can the plaintiffs be saved by the amendment to para 8 of the declaration saying that the oral agreement was in principle and subject to the implied term that no agreement would be binding unless and until it had been reduced to writing? The wide wording of "no agreement" helps, but I am of the view that the amendment must be read together with the unamended allegation that the oral agreement referred to was for $3.04M. Accordingly, a great deal of evidence has been led establishing the road from $3M to $3.04M and establishing the implied term pleaded - but the pleadings suggest that the $3.04M had been reached before any of the further discussions referred to in evidence took place.

When I am dealing with pleadings for which senior counsel has specifically taken responsibility

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and which have already been very substantially amended by consent deep into the plaintiffs' case - then those pleadings, in my view, should in general be strictly adhered to.

The difficulties the plaintiffs accordingly face is that, though they have proved on a balance of probabilities the implied term alleged in the amendment of para 8 of the declaration, they have not proved the oral agreement as further particularised, but a different oral agreement.

The point is a technical one and had the plaintiff applied for an amendment, using Thompson's carelessness in preparing the pleadings without looking at his file relating to the preparation of the agreement, I might have been disposed to considering granting it. No such application was made.

Are the plaintiffs accordingly bound by their imprecise and incorrect pleadings?

I would refer to the following observations by Kumleben JA and Nienaber JA (with which the three other Appellate Divison judges concurred) in Imprefed (Pty) Ltd v National Transport Commission l993 (3) SA 94 at 107C-F:

> "At the outset it need hardly be stressed that:
>
> > 'The whole purpose of pleadings is to bring clearly to the notice of the

BARTLETT J

> > court and the parties to an action the issues upon which reliance is to be placed.'"
>
> (Durbach v Fairway Hotel Ltd l949 (3) SA 1081 (SR) at 1082.) This fundamental principle is similarly stressed in Odgers' Principles of Pleadings and Practice in Civil Actions in the High Court of Justice 22 ed at 113:
>
> > 'The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.' The degree of precision obviously depends on the circumstances of each case. More is required when claims are based upon the provisions of a detailed and complex contract.'"

Imprefed's case *supra* was concerned with the situation where the pleadings relied on General Conditions 49 and 50 of a contract, but the evidence indicated a reliance on General Condition 41. Dealing with this aspect Kumleben JA and Nienaber JA stated as follows at p l08C-F:

> "Nevertheless, it was the appellant's submission on appeal that 'it was abundantly clear from the evidence that the plaintiff relied upon clause 41 in support of its claim'; 'that the issue was fully canvassed at the trial'; and that the respondent was therefore not prejudiced by the subsequent reliance upon its terms. In support of this contention counsel referred to, inter alia, Shill v Milner l937 AD 101 at 105 and Marine & Trade Insurance Co Ltd v van der Schyff l972 (l) SA 26 (A) at 44D-45E. Both these decisions cite an earlier one of this court, Robinson v Randfontein Estates GM Co Ltd 1925 AD 173, in which at l98 it was said:
>
> > 'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleadings of the opponent has not been as explicit as it might have been.'

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This principle, though stated with reference to the approach of the court

BARTLETT J

of Appeal, is to be applied in deciding whether the conclusion of the court *a quo* was correct."

Furthermore, in Sentrachem Bpk v Wenhold l995 (4) SA 312 (A) it was held that despite the fact that the plaintiffs' particulars of claim did not set out his cause of action with sufficient clarity, it was clear that the defendant must have been aware, if not from the outset, then from very soon after the commencement of the trial, what the plaintiff was relying on. It was accordingly held that where the court had all the relevant evidence before it, it should not place undue emphasis on the pleadings, but should rather decide the case on the real issues canvassed during the course of the trial.

Also in *Matambanadzo Bus Service \(Pvt\) Ltd v Magner* l971 (l) RLR 54 at 55H-I, Lewis JA emphasised that courts tended to take a broad view of pleadings as long as the real dispute between the parties is properly investigated and adjudicated upon. He did also emphasise that a trial should not become a free for all with a complete disregard of issues as raised in the pleadings.

I would also refer to the observations in Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3 ed at p 361 where the learned authors state:

> "Thus in Collen v Rietfontein Engineering Works l948 (l) SA at 433, where the court of appeal found a contract, which had not been relied upon in the pleadings, established, Centlivres JA, after remarking that the position should have been regularized by an appropriate amendment, went on to say: 'the court therefore has before it all the materials on which it is able to form an opinion and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial.'"

Applying the criteria laid down in these authorities, I am satisfied that despite the problem with the plaintiffs' pleadings that the defendants must have been aware "if not from the outset, then from very soon after the commencement of the trial", what the plaintiffs were relying on. I am accordingly satisfied that I should not place undue emphasis on the pleadings, "but rather decide the case on the real issues canvassed during the course of the trial". I am also satisfied that the defendant "has had every facility to place all the facts before the trial court and the investigations into all the circumstances have been thorough and patient". Furthermore, it is appropriate to take a broad view as the real dispute has been properly investigated and adjudicated upon - and

BARTLETT J

I do not consider that the trial, echoing the warning of Lewis JA, has become a free for all.

Accordingly, I am satisfied that the plaintiffs have discharged the necessary onus on a balance of probabilities. The declaration and particulars could certainly have been more clearly drafted and that is a serious indictment of the declaration - in view of the major amendment over two days into the trial. But in the overall circumstances my view is that the plaintiffs have

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established from a detailed analysis of the surrounding circumstances the implied term alleged.

Indeed, the rush by Kennedy to have the agreement signed on 13 July before his meeting with the Old Mutual provides substantial indication of what Kennedy really thought was necessary to have a binding agreement. Kennedy's suggestion that it was just coincidence that the agreement was signed about an hour before the meeting with Frost to discuss the possible sale is completely improbable - stretching coincidence way beyond breaking point. If Kennedy felt that there was a binding oral agreement, the frantic rush of the morning of 13 July - the draft agreements being altered and retyped, and meetings with accountants to resolve the capital gains question before the lunchtime meeting - would not have been necessary. I am quite satisfied on the probabilities that the rush was orchestrated by Kennedy, who had much more reason for wanting matters to be brought to finality than Marais. The delay of a few more days or even a few weeks would not on the probabilities have been a matter of great concern to Marais.

Was there a fraudulent misrepresentation by Kennedy as alleged?

The fraudulent misrepresentation alleged in para 9 of the declaration is as follows:

> "9. The said agreements were induced by first defendant fraudulently representing to First Plaintiff acting for and on behalf of himself and Second plaintiff that the Old Mutual (to which the said stands had been offered for sale) was not prepared to purchase the said Stands for more than $6M and that Defendants no longer wished to sell them and wished to develop them as a long term investment, whereas in truth and in fact on 29 June l992 the Old Mutual had offered first defendant, acting on behalf of Plaintiffs and Defendants $7.5M for the said Stands, which amount first defendant had not accepted as he wished to negotiate for a higher price of $12.5M."

BARTLETT J

Then added to the end of para 9 by the amendment two days into the trial was -

> "from 26 June l992 to 13 July l992 first defendant was still negotiating with the Old Mutual for the sale of the property; on 9 July l992 the Old Mutual had advised First defendant that it could increase its offer to $7.5M plus a negotiated contract with Ploughboy for the road constructions, which first defendant undertook to consider; and that on 9 July l992 a further meeting had been arranged between first defendant and the Old Mutual, which meeting was to be held after the agreement had been signed."

Paragraph 9 is poorly drafted. The words added to the amendment two days into the trial do not integrate with the previous wording. The plaintiffs drafted the amendment largely because it had become apparent that Frost had mistakenly told Marais and Thompson that the Old Mutual had increased its offer to $7.5M on 29 June. Commonsense would (in my view) have dictated that the amendment should have deleted the last four lines of the original paragraph 9 - that is with the words commencing "on 29 June l992" - and replaced it with the amended words detailed above. By leaving both in the extended para 9, the paragraph became difficult to comprehend.

I have found on the probabilities that Kennedy agreed about 23 June to establish what the best price was that the Old Mutual was prepared to offer for the property - but that all he asked them was to confirm that the price they were still offering was still $6M. He then told Marais at the meeting of 3-9 July that the Old Mutual would not budge. This (on my findings of the basic

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probabilities) was a clear misrepresentation. Applying the approach laid down in Standard Bank of SA Ltd v Coetzee l98l (l) SA 1131 (A) at ll45E (as Mr Horn has asked me to) I am satisfied that Kennedy knew the representation was false when he made it. At the time he made it, he did not know whether the Old Mutual would go above $6M, as he had not asked them, but he told Marais that he had and that they "wouldn't budge". Kennedy clearly intended Marais to act on the representation and Marais did so act suffering damage.

But at the time, the representation was made to Marais at the meeting on 3 and 9 July, Kennedy was not still negotiating with the Old Mutual for the sale of the property. It was only later on 9 July, after agreement in principle was reached (if that meeting was on 9 July), that Frost phoned Kennedy and the negotiations began. So although a misrepresentation has been proved on a balance of probabilities, the truth of the situation as averred in para 9 is improven and indeed inaccurate.

BARTLETT J

The plaintiffs, are, however, saved by the first few words of para 9 of the declaration which alleges that "the said agreements were induced by (Kennedy) fraudulently representing ..." The second agreement referred to is the one of 13 July which I have found on the probabilities to be at the stage at which the agreement between Marais and Kennedy and their companies became binding. Kennedy at that stage was clearly making the representation alleged, which he knew to be false, and intended Marais to act upon, and which induced Marais to so act, resulting in his suffering damage. In simple terms I have found that there was no binding agreement until it was signed on 13 July and Kennedy certainly obtained Marais' signature to that agreement by the misrepresentation as alleged - Kennedy certainly at that stage knew that the Old Mutual were offering more and just as clearly represented to Marais that they were not, thereby inducing agreement on the basis of the misrepresentation alleged.

Even if my findings as regard to the implied term were found to be incorrect and there was a binding agreement as between 3 and 9 July before the Old Mutual re-entered the picture, I am of the view that the plaintiff would still have established the misrepresentation as alleged. This because if the agreement was in fact binding on 3 and 9 July, before the Old Mutual's re-emergence it was clearly varied on 13 July when the price was reduced to $3.04M and the initial payment of $40 000 on signature was agreed. At the time the defendants allowed the binding agreement to be re-opened and varied, the representation as to the Old Mutual price would have effectively been repeated i.e. the tinkering with the price from the price of $3.05M down to $3.04M with $40 000 paid on signature, would be against the background of the representation that $6M was the most the Old Mutual were offering - when in fact Kennedy well knew that more was now being offered.

The alternative claim based on partnership

There is clearly a duty of uberrima fides between partners. The duty of utmost good faith, as Mr Andersen pointed out, involves the highest standard of honour. See Lindley on Partnership 15 ed pp 480-1 where the learned author states as follows:

> "... if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the

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expense of the firm, he will be required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour ... This obligation to perfect fairness and good faith ... also extends to persons

BARTLETT J

who have dissolved partnership but who have not completely wound up and settled the partnership affairs; and most especially is good faith required to be observed when one partner is endeavouring to get rid of another, or to buy him out."

I am quite satisfied that these expressions of a partner's duty are equally applicable to the Roman Dutch Law. See Sempff v Neubauer l903 TH 202 at 216 (where Solomon J quoted with approval the last quoted observations from Lindley); Ford v Abercrombie l904 TS 878 at 884; Nash v Muirhead (1909) l9 CTR 64 at 69; Love v Hobson l913 EDL 400 at 402 and Purdon v Muller l961 (2) SA 211 (A) at 231E.

The only basis on which Kennedy could not have disclosed to Marais all the communications which had taken place with the Old Mutual as set out in the amended para 9 of the Declaration was if a final and binding agreement had been concluded when Kennedy had alleged. I have found on the probabilities that there was no such final and binding agreement and accordingly Kennedy should have disclosed the communications to Marais. If he had, Marais would have clearly not entered into the agreement (something with which even Kennedy agrees).

But what if Kennedy honestly believed there was such a binding agreement? I have made a very detailed analysis of Kennedy's credibility. My finding was that his evidence was not credible and not reliable. Accordingly I have no doubt that the plaintiff has proved at the very least on a balance of probabilities that not only was there not a binding agreement before 13 July - but that Kennedy also probably knew there was not. But if I am wrong I am of the view that Kennedy, judged against the duty of uberrima fides and the highest standard of honour, would have been expected to say something to the following effect to Marais before he signed the agreement on 13 July - "as you know we terminated our partnership by an oral agreement before 9 July, but I should point out that on 9 July the Old Mutual contacted me and upped the offer to $7.5M - and I am seeing them in an hour to negotiate a possible sale." Kennedy certainly, according to his evidence, aspired to meet this necessary standard - wanting to be seen as a honourable man and to be entirely transparent in his dealings with Marais. But the gap between how Kennedy wanted himself to be seen and how he acted is unbridgeable - when viewed against the standard of integrity and honour required of a partner.

Even if I am wrong about the agreement only becoming final and binding

BARTLETT J

when reduced to writing on 13 July, Kennedy would in my view would have been required as a partner to disclose all the communications which had taken place with the Old Mutual before the agreement was signed on 13 July. This is because even if there had been a final agreement by between 3 and 9 July it was varied by a suspensive condition which was only fulfilled on 13

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July and by an agreement of variation of price only made on 13 July (I am assuming as I must that the first variation to $3.05M was made before the Old Mutual's re-entry onto the playing field).

I am of the view that as the circumstances relating to the suspensive condition were negotiated and as the price was re-negotiated with the transaction now open to at least a limited degree, a partner applying the standard of uberrima fides and the necessary highest standard of honour would say - "Look, I should point out that the Old Mutual are offering at least $7,5M and I am seeing them later today". See also Lindley's comments *supra* quoted in Sempff *supra* in relation to the continuing duty of perfect fairness extending to persons who have dissolved a partnership but not completely wound up and settled the partnership affairs. Furthermore, Kennedy's misrepresentation, that he had raised the matter with the Old Mutual but they would not budge from $6M, pre-dates the reaching of the agreement of 3 and 9 July and is a breach of Kennedy's duty of the utmost good faith.

Unless my findings of fact on the implied terms and all the other aspects regarding the suspensive condition and the renegotiation of the price are wrong, Marais must succeed on the alternative claim. I am accordingly satisfied that Marais has also proved the alternative claim on a balance of probabilities.

[His Lordship then considered the question of capital gains tax and continued:]

ORDER

On the basis of my findings of fact and findings of the applicability of the law, the plaintiffs have established both their main claim based on fraudulent misrepresentation and the alternative claim based on the breach of duty owed by a partner. On either basis they are entitled to an award of damages. The amount of damages in the sum of $3.210M is not in issue. The plaintiffs, however, claimed interest on that amount at money market rates as described by Reece in his evidence.

I am of the view that it is appropriate to order that interest runs at the

BARTLETT J

prescribed rate from the date the plaintiffs could have expected payment of their proper half share. Although Marais initially invested the proceeds he received from the sale of the shares in the money market, at a later stage he withdrew a substantial amount to invest in the property market and also in the share market.

The return Marais would have received over the years if he had received his share of the ultimate sale price to Old Mutual would have depended on whether the money was left in the money market or whether it was invested in property or the share market. If he had so invested, the return would also have depended on the variations in the property market, in respect of which we have no evidence, and on the success or otherwise of any investments in the share market.

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I have been told that the share market, though generally volatile, has been on an upward trend. It would, however, have depended on what shares Marais invested in - with the possibility of course that his ventures into the share market may have been less lucky than his property deals. Overall, all these aspects are entirely speculative. In view of the manner in which the money Marais did receive was invested it cannot be stated that the greater amount - if Marais had received it - would have uniformly remained in the money market. If that money did not remain in the money market it is sheer speculation as to what might have happened to it in terms of the percentage returns.

In all the circumstances, judgment with costs is entered for the plaintiffs against the defendants, jointly and severally, the one paying the other to be absolved, in the amount of $3 2l0 000 with interest thereon at the prescribed rate from l0 August l992 to the date of payment. In assessing any application of the *in duplum* rule to the running of interest in this matter, the parties are referred to the judgment by my learned brother Gillespie in Commercial Bank of Zimbabwe Limited v M M Builders & Suppliers (Pvt) Ltd & Ors HH-140-96.*(242)

Winterton Holmes & Hill, plaintiffs legal practitioners

Honey & Blanckenberg, defendants legal practitioners

DURMA (PVT) LTD v SIZIBA 1996 (2) ZLR 636 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Ebrahim JA & Muchechetere JA

Appeal against grant of interdict

28 October & 21 November 1996 Judgment No. S-223-96

Flynote

Mines and minerals - tribute agreement - what is - agreement whereby surface rights only granted for nominal rental - whether a tribute agreement

Headnote

A tribute agreement is a contract sui generis, being neither a lease nor a sale at common law. It is an agreement whereby the right to mine for minerals is let by one person (the grantor) to another (the tributor). It is not a lease of the land or of the minerals. It is a concession by the grantor to the tributor of a portion of his own incorporeal right in respect of the minerals, namely, to win precious metals or other minerals, if he can find them, and to dispose of them for profit. A condition is attached that the tributor will pay to the grantor a certain proportion of the minerals won or a royalty based on the value of the minerals so won.

Where what was described as a tribute agreement provided only for a nominal monthly rental and gave the tributor "surface rights only",

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Quaere, whether the agreement actually was a tribute agreement at all.

Cases cited:

Boadi v Boadi \& Anor 1992 (2) ZLR 22 (H)

Edwards (Waaikraal) GM Co Ltd v Mamogale NO & Bakwena Mines Ltd 1927 TPD 288

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

Flanagan v Wheeler 1976 (1) RLR 360 (G)

Gowan v Christie (1873) LR 2 HL Sc 273

EBRAHIM JA

Graham &Roof Mine Tribute v Rixom NO 1941 SR 51

Ex p Lanham's Exors 1908 TS 330

Naested v Kia Ora Synd 1935 SR 117

New York Mutual v Ingle 1910 TPD 540

Spearman & Magden v Snodgrass 1912 SR 161

Webster v Randfontein Ests GM Co (Wits) Ltd 1911 WLD 115

X & Y v CoT 1939 SR 81

The court referred to the following statutes:

Mines and Minerals Act [Chapter 21:05], ss 5, 178, 280, 283, 284 & 285

Case Information

A P de Bourbon SC, for the appellant

E W W Morris, for the respondent

Judgment

Ebrahim JA: The respondent (applicant in the court *a quo*) was the holder of certain mining claims in the Mberengwa area. She entered into what is known as a tribute agreement with the appellant (respondent) in respect of a mine known as "B" Mine. A tribute agreement is defined in s 283 of the Mines and Minerals Act [Chapter 21:05] as:

> "an agreement ... whereunder any person has given a tribute, licence, concession, authority or other rights to mine a mining location to a tributor."

Such an agreement has to be submitted to the mining commissioner for the mining district within which the land is situated for examination and approval by the Mining Affairs Board or the

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mining commissioner (s 284). Standard tribute agreements may be approved by the mining commissioner (s 285), but non-standard agreements must be submitted to the Board, who must be satisfied as to a number of factors, such as the development work that is required under the agreement (s 286). The Board may refuse approval or require amendments to the agreement.

The statutory definition tells us little about the nature of a tribute agreement and it is necessary to look at the common law.

A tribute agreement is one whereby mineral rights are let by one person (the grantor) to another (the tributor). It is not a lease of land, or even of minerals. It is a concession by the mine owner to the tributor of a portion his own incorporeal right in respect of the minerals, namely, to win precious metals (or other minerals) if he can find them. A condition is attached that the

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EBRAHIM JA

tributor will pay a certain proportion of the minerals won to the mine owner: Spearman & Magden v Snodgrass 1912 SR 161. It is a contract sui generis, being neither a lease nor a sale at common law, though the principles to be applied are not very different: Naested v Kia Ora Syndicate 1935 SR 117 at 124; Graham & Roof Mine Tribute v Rixom NO 1941 SR 51 at 62. The tributor is given the right to mine the land and to win from it as much of the mineral sought as he can during the period of the tribute and to dispose of the mineral so won for his own profit. What the tributor pays the grantor for is, in effect, the minerals, the winnig and disposal of which constitutes the business of the tributor: X & *Y v Commissioner of Taxes* 1939 SR 81 at 87. The tributor enjoys the same rights and benefits as if he had bought the minerals: Gowan v Christie (1873) LR 2 HL Sc 273; Ex p Lanham's Executors 1908 TS 330; Edwards (Waaikraal) GM Co Ltd v Mamogale NO & Bakwena Mines Ltd 1927 TPD 288. See also *Flanagan v Wheeler* 1976 (1) RLR 360 (G).

The agreement in the present case was unusual for a tribute agreement. A standard tribute agreement form was used, but instead of a royalty, based on a percentage of the value of the ore recovered, the tributor (the appellant) agreed to pay the grantor (the respondent) the nominal sum of $500 a month. Under "other conditions", at the end of the agreement, it was handwritten and signed by both parties that:

> "Tributors will have surface rights only."

This condition was quite inconsistent with - in fact it was in contradiction to - the general right, granted by clause 2 (a) of the agreement, that the tributor had the right to work the location, and to develop, to extract, mill and treat ore from it. Indeed, I would have thought that there was some doubt, in view of the definition of "tribute agreement" in the Act, whether the agreement in this case, in spite of its name, in fact remained a tribute agreement at all. A tribute agreement is one in which the right to mine is given. The verb "mine" is not defined in the Act, though there are authorities which imply that mining necessarily involves excavations into the surface: New York Mutual v Ingle 1910 TPD 540; Webster v Randfontein Estates GM Co (Witwatersrand) Ltd 1911 WLD 115; Bell's SA Legal Dictionary 2 ed p 256. This agreement gave "surface rights" only, which would appear to preclude mining.

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It is not surprising, then, that a dispute arose between the parties about the nature and extent of the rights given by the agreement. The grantor contended that it was envisaged that the tributor would set up a five mill stamp on her mine in order to carry out custom milling for small scale miners in the district,

EBRAHIM JA

while she carried on with underground mining. It was, she says, intended that the tributor would be able to treat the sands generated from the custom milling. On the other hand, the tributor contended that the agreement gave it the right to treat the rubble from the grantor's mine dump, contending that the phrase "surface rights" covered that dump.

The meaning of this phrase caused the dispute. The Mining Affairs Board supported the interpretation given by the tributor, but the local mining commissioner, who was party to the discussions between the parties which led to the drawing up of the agreement, supported the grantor. The Board apparently relied on the meaning given in the Mines and Minerals Act to the phrase "surface rights". The surface rights of miners are set out in s 178 of the Act. It is far from clear to me how, if this is what the Board relied on, it could be said that the phrase could be said to give the tributor the right to treat the rubble from the grantor's mine dump. Subs (2) reads:

> "Every miner of a registered mining location shall have and possess the following respective surface rights:
>
> (a) ...
>
> (b) ...
>
> (c) the right to sell or otherwise dispose of waste rock recovered by him from his location in the course of a *bona fide* mining operations ..." (my emphasis).

"Miner" means the person actually carrying on the work of mining on any mining location, whether he is the holder or the lessee or assignee of the rights of such holder (s 5). The tributor would, I think, be the miner. As the rubble the tributor proposed to treat was recovered by the grantor and not by the tributor, I would not have thought that the tributor had any right to dispose of it under s 178(2).

The grantor (respondent) sought in the High Court an order in the following terms (I am paraphrasing the effect of the draft order):

(1) that the endorsement on the tribute agreement by the Mining Affairs Board be declared null and void *ab initio*;

(2) that the tribute agreement be declared null and void *ab initio* for uncertainty or vagueness or both;

EBRAHIM JA

(3) that the tributor be ordered to vacate the mine;

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(4) that the tributor be interdicted from working, treating sands and dumps or milling rubble belonging to or emanating from the mine;

(5) that the tributor be interdicted from attempting to evict the grantor or her workers or agents from the mine;

(6) that the tributor be temporarily interdicted from implementing the tribute agreement, pending a final order being made; and

(7) that the tributor cease operations on the mine pending the determination of the case.

The nature of the relief sought under (1) and (2) was such that during argument in the court *a quo*, counsel for the grantor sought both to approbate and to reprobate the agreement at the same time, but eventually he abandoned the claim for an order that the agreement be declared null and void. The issue was then whether the interdicts and the other interim relief should be allowed to stand pending the final resolution of the matter at a full trial. The learned judge *a quo* stated the following in his judgment:

> "I prefer to treat this application as one for an interdict *pendente lite*. If I find that applicant is possessed of rights which are being infringed then a temporary interdict will be issued. If not the application will be dismissed. Both counsel agreed that this is a course which I could take."

Mr *de Bourbon*, who represented the appellant before the court *a quo*, and in this court, has however submitted that the learned judge *a quo* was wrong to issue the interdict pendente lite as the papers did not seek such an interdict. This submission is in conflict with what the learned judge has indicated in his judgment where he intimated that counsel were in agreement on what course he should take. I do not consider it necessary to resolve this dispute but do hold the view that on the facts of this case the approach of the learned judge *a quo* was an eminently sensible one.

It was argued for the tributor in the court *a quo* that the interpretation given to the contract by the parties was irrelevant; that the document constituted the sole memorial between the parties; and that as the phrase "surface rights" was unambiguous it was not open to the grantor to evoke the parole evidence rule. The learned judge found that the question was not one of ambiguity which

could be resolved by linguistic construction, but it was rather a question of whether what was recorded was what the parties agreed. If it was not, he said, the grantor was entitled to have the agreement rectified. He found that the probabilities supported the grantor's contention and that the grantor thus had a *prima facie* case. He granted a temporary interdict pending the outcome of an action to be instituted by the grantor. I can find no fault with the learned judge's reasoning. In addition, as indicated previously, I am of the view that there is considerable ambiguity in the phrase "surface rights". For that reason, too, it would be appropriate for the matter to go to trial to establish what the parties intended by the phrase.

The grounds on which a temporary, as opposed to a final, interdict may be granted are

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well-established. It is an extraordinary remedy within the discretion of the court. There must be at least a *prima facie* right and a well-grounded apprehension of irreparable damage. In exercising its discretion, the court weighs, inter alia, the prejudice to the applicant if the interdict is withheld, against the prejudice to the respondent if it is granted: Eriksen Motors (Welkom) Ltd v Protea Motors & Anor 1973 (3) SA 685 (A) at 691, cited in *Boadi v Boadi \& Anor* 1992 (2) ZLR 22 (H) at 24G. In the present case, it does not seem to me that the tributor would suffer any great prejudice if a temporary interdict is granted. The dumps will remain on the site. If the final decision is in its favour, the tributor will have lost nothing. On the one hand, if the tributor continues to work the dumps pending the trial, the grantor could lose a great deal. The tribute agreement does not give her any specific royalty in respect of wha the tributor might win from the dumps. The balance is thus, in my view, in favour of granting the temporary interdict.

For these reasons I would dismiss the appeal with costs.

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

K A Esat, appellant's legal practitioner

James, Moyo-Majwabu & Nyoni, respondent's legal practitioners

MUJURU v MOYSE & ORS 1996 (2) ZLR 642 (HC)

Court **High Court, Harare**

Chidyausiku J

Civil action

13 February & 27 November 1996 Judgment No. HH-164-96

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 20 - freedom of expression - whether guarantee infringed by making publisher of a magazine liable for defamatory article about public figure

Delict - actio injuriarum - defamation - defamatory nature - test to be applied - how ordinary readers would view words - fair comment - facts on which comment were based not stated - defence not available - publication - liability for - onus on printer or distributor to establish that took reasonable steps to ensure that defamatory material not included in publication

Damages - amount - actio injuriarum - defamation - public figure - controversial figure viewed differently by different groups within society - how viewed by generality of society

Headnote

A story was published in a monthly magazine querying how a certain newspaper would report on the -goings-on' in the Bindura and Shamva areas of the plaintiff, then the commander of the National Army, given the fact that the paper was partly owned by a company in which the

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plaintiff had large scale interests.

The plaintiff sued the editor, the owner, the printer and two distributors of the magazine for defamation. He pleaded that the words were defamatory as they would be understood by reasonable readers to mean that the newspaper, in which the plaintiff had a substantial interest, would not

EBRAHIM JA

report on dishonourable, disreputable or dishonest activities being undertaken by the plaintiff in the district. The editor and owner admitted publishing the words in question but denied that the words were defamatory. In the alternative, they pleaded the defence of fair comment. The printer and distributors also denied that the words in question were defamatory and in the alternative pleaded that they were not aware that the magazine contained material that was defamatory of the plaintiff.

Held, that in regard to whether the words were defamatory, the court had to decide how reasonable readers would have understood the words complained of. Those words had to be considered in the context of the other items on the same page of the magazine which painted a negative picture of the army and suggested that there was rampant corruption within the army. In deciding this issue the court first had to determine whether the words were reasonably capable of bearing the meaning ascribed to them by the plaintiff. The next stage was to decide whether reasonable readers would have understood them in this way. The final stage was to decide whether if the words would be understood in the ascribed sense, this would have lowered the plaintiff in the estimation of reasonable readers. The judge found that the words were reasonably capable of the meaning that the plaintiff ascribed to them, namely that the plaintiff was carrying out some dishonourable, disreputable or dishonest activities in the specified district. Asthe so-called -goings on' were not specified, reasonable readers, who are prone to draw derogatory inferences from a vague and sensational article such as this one, would have read the words to mean that the plaintiff was engaged in dishonourable, disreputable or dishonest activities. There was no doubt that if the words were so understood they would adversely affect the plaintiff's reputation.

Held, further, that in regard to the defence of fair comment, that this defence could not succeed as the facts upon which the comment was based were left unstated. This defence may have succeeded if the magazine, before making the comment, had stated the facts that they had in mind, namely that the plaintiff had acquired large-scale business interests in violation of the leadership code.

Held, further, that in regard to the defence of the printer or distributor of a publication that it was unaware of the defamatory article, a printer or distributor has a duty to take reasonable steps not to print or distribute a publication that contains defamatory material. In order to escape liability for a defamatory statement published in a publication the printer or distributor of the publication must discharge the onus of satisfying the court that reasonable measures were taken to ensure that the publication did not contain a defamatory statement. It had not

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discharged this onus.

CHIDYAUSIKU J

Held, further, that as regards the damages, that substantial damages should be awarded as a very serious defamation had been perpetrated on a person who in the eyes of ordinary Zimbabweans had an extremely high reputation.

Held, further, that as regards the argument that to make the magazine liable for this article about the plaintiff who was a public figure would violate that freedom of expression guarantee in the Consitututution, the constitional guarantee of freedom of expression is only infringed if a law to protect reputation is not reasonably justifiable in a democratic society. Although public figures are obliged to submit to themselves to public scrutiny and accept a certain amount of criticism without resorting to actions for defamation, this does not mean that they are not entitled to any protection of their reputations when they are maligned. The words complained were highly defamatory in the sense that they would have been understood by ordinary readers and the plaintiff was entitled to seek legal redress for the harm to his reputation.

Cases cited:

Basner v Trigger 1945 AD 22

Chinamasa v Jongwe P & P Co (Pvt) Ltd HH-23-94 1994 (1) ZLR 133 (H)

Column Width (Pvt) Ltd v Mujuru HH-269-92

Demmers v Wyllie & Ors 1978 (4) SA 619 (D)

Demmers v Wyllie & Ors 1980 (1) SA 835 (A)

HRH King Zwelitini of Kwazulu v Mervis & Anor 1978 (2) SA 521 (W)

Madhimba v Zimbabwe Newspapers \(1980\) Ltd 1995 (1) ZLR 391 (H)

Morgan v Odhams Press Ltd [1971] 2 All ER 1156 (HL)

National Union of Distributive Workers v Cleghorn and Harris Ltd 1946 (2) AD 984

SA Associated Newspapers Ltd v Schoeman 1962 (2) SA 613 (A)

SA Associated Newspapers Ltd en 'n ander v Samuels 1980 (1) SA 24 (A)

Sim v Stretch [1936] 2 All ER 1237 (HL)

Smith v Elmore 1938 TPD 18

Viviers v Kilian 1927 AD 449

Case Information

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P Nherere, for the plaintiff

A P de Bourbon SC, for the defendant

Judgment

Chidyausiku J: The plaintiff in this case is suing the defendants for defamation. He is claiming $250 000 as damages for the defamation. The plaintiff's cause of action is set out in paras 7 and 8 of the declaration. These paragraphs read as follows:

CHIDYAUSIKU J

> "7. In the issue of the aforesaid News Magazine dated October l99l, the first defendant caused to be printed and published, the second defendant published, the third defendant printed and the fourth and fifth Defendants distributed the following false, malicious and defamatory words of and concerning the Plaintiff:
>
> > 'The Times is owned by Herbert Munangatire of Lonrho, independent shareholders and Kestrel Holdings, an organisation in which army commander Gen. Mujuru has large interests. One wonders how the Times will report on the general's going-on in his beloved Bindura Shamva area.'
>
> 8. Thus by the said words the Defendant was understood to mean that the Times if partly owned by Kestrel Holdings a Company which the Plaintiff has interest in, it would not report on dishonourable, disreputable or dishonest activities being undertaken by the Plaintiff in Shamva and Bindura.'

The first and the second defendants admit publishing of the plaintiff in a newspaper article the words complained of but deny that the article or the words complained of are defamatory of the plaintiff. In the alternative the same defendants allege that the second sentence in the passage from the article set out in para 7 of the plaintiff's declaration constitutes a fair comment on matters stated in the article and known to the readers of the article. The third, fourth and fifth defendants' stance is that the article was not defamatory of the plaintiff alternatively they did not know that the magazine they printed and distributed contained material that was defamatory of the plaintiff. There is no evidence of any measures taken by these three defendants to familiarize themselves with the contents of the magazine to enable them to become aware of the existence or otherwise of the defamatory statements in the magazine they printed and distributed.

In my view, a printer or a distributor of a magazine has a duty of care towards other people. In particular he has a duty of care not to print or distribute magaziners containing defamatory material. A reasonable publisher or distributor of a magazine ought to foresee that people might be defamed by what he prints and publishes and to avoid liability he ought to take reasonable measures to avoid the printing or distribution of such defamatory matter. The court cannot prescribe such measures. The onus is on the printer or distributor to satisfy the court that the measures it took were reasonable to avoid the printing and distribution of defamatory matter. In the present case the third,

CHIDYAUSIKU J

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fourth and fifth defendants did nothing. They are virtually saying - the doing of nothing is the reasonable action they took to avoid the distribution of defamatory material. I am not impresssed by this defence. In the event of my finding that the article is defamatory of the plaintiff the third, fourth and the fifth defendants hould not escape liability because they did nothing.

I will now deal with the question of whether the plaintiff has proved a case for defamation. The defendants admit publishing of the plaintiff the words complained of but deny that these word are defamatory of the plaintiff. In view of the fact that defendants admit the publication of the words complained of the question of liability does not turn on the evidence led in this case. The evidence led is only relevant to the issue of the quantum of damages. Whether or not the words complained of are defamatory is not a matter to be determined on the basis of the evidence led. It is a matter of interpretation and it is for the court to decide. Evidence of what the readers understood the words, to mean or what the writer intended to convey is irrelevant. It is for the judge to decide what a reasonable man understands the words complained of to mean. The case of Demmers v Wylie & Ors l978 (4) SA 619 (D) is authority for the above proposition.

Having said that I will now consider the question of whether the words complained of are capable of conveying the defamatory meaning and whether they were understood by the reasonable reader in their defamatory sense. The first and second defendants excepted to the plaintiff's declaration on the ground that it did not disclose a cause of action. In particular the defendants averred that no innuendo had been pleaded and that the ordinary meaning of the words complained of taken with or without the alleged sting pleaded in para 8 of the declaration could not possibly have the defamatory meaning ascribed to them by the plaintiff. Adam J dealt with the exception. He dismissed the exception. In his judgment in the case of Column Width (Pvt) Ltd v Mujuru HH-269-92 Adam J after a thorough review of authorities on this matter came to the conclusion that the article complained of was reasonably capable of conveying to the ordinary reader the defamatory connotation pleaded by the respondent or plaintiff in this case. Iagree with the conclusion reached by the learned judge and his reasoning in coming to that conclusion.

The case of Basner v Trigger l945 AD 22 sets out the approach to be taken by a court at the exception stage and at the trial stage of a defamatory case. It is authority for the propositon that at the exception stage all that the court is required to determine is whether a reasonable reader of normal intelligence

CHIDYAUSIKU J

could or might regard the statement complained of as defamatory. This is what Adam J had to decide. He decided the issue in favour of the plaintiff. At the trial stage, the test which I have to apply is whether the same reasonable reader would as opposed to could regard the words complained of as defamatory. Put differently, at the exception stage the court is only concerned with whether the words complained of are capable of bearing the meaning ascribed to them by the plaintiff and whether that ascribed meaning could be defamatory. At the actual trial the issue is whether the meaning ascribed to the words is defamatory and whether the reasonable

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reader understood them in that sense.

I will now turn to deal with the issue of whether or not the words complained of are defamatory of the plaintiff. In determining this issue I will adopt the approach of the three stage enquiry. This is the approach adopted in the recent cases of Chinamasa v Jongwe Printing & Publishing Company (Pvt) Ltd 1994 (1) ZLR 133 (H) at 149 and Madimba v Zimbabwe Newspapers (1980) Ltd 1995 (1) ZLR 391 (H) at 400. In this case, the three stage enquiry involves firstly, determining whether the words complained of are capable of conveying the meaning ascribed to them, secondly, whether the ascribed meaning is the meaning according to which the article would probably be understood by the ordinary or average reader and, thirdly, whether the ascribed meaning of the words complained of lowers the plaintiff in the estimation of the ordinary right thinking person generally. I will deal with the three stages seriatim.

I have already stated, that, in the case of Column Width (Pvt) Ltd *supra*, Adam J came to the conclusion that the statement contained in para 7 of the plaintiff's declaration is capable of meaning that the plaintiff was undertaking or was involved in some dishonourable, disreputable or dishonest activities in the Shamva/Bindura area. At p 12 of the cyclostyled judgment the learned judge had this to say:

> "Since I have found that the article is reasonably capable of conveying to the ordinary reader the defamatory connotation pleaded by the respondent, the exception is dismissed with costs.'

I agree entirely with this conclusion. In the article, it is alleged that Kestrel Holdings in which the plaintiff has a substantial stake has acquired an interest in The Times. The article then proceeds to state one wonders how The Times will report on the General's -goings on' in his beloved Bindura-Shamva area. The most obvious and patent suggestion is that The Times will be in a difficult situation when it comes to reporting the -goings on' of the General,

the plaintiff in this matter. The inescapable inference is that there will be a conflict of interest when it comes to reporting on the goings on of the General. Why should there be such a conflict or difficulty if the goings on referred to were ordinary activities that were normal, lawful, honourable and honest? Why should anybody wonder how The Times would report on any -goings-on' of the General that were lawful, honourable, honest and reputable? If anything one would expect The Times to be delighted to report on lawful, honest and reputable actitivitis of the General. The obvious inference or meaning the words are capable of conveying is that alleged in para 8 of the plaintiff's declaration, namely that the plaintif was involved or was undertaking some, dishonourable, disreputable or dishonest activities in the Bindura area.

Having concluded, like Adam J, that the words complained of are capable of conveying the meaning pleaded in para 8 I now turn to consider whether that meaning namely that the plaintiff is involved in some dishonest, dishonourable and disreputable activities, is the meaning according to which the article would probably be understood or reasonably understood by the ordinary or average reader. In determining this issue, the two most important considerations are firstly who constitutes the ordinary reader and the context of the article complained of. I will first deal with who constitutes the ordinary reader. Over the years, the courts in various jurisdictions

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have issued guidelines on who or what constitutes the average reader. What are his characteristics? The following are some of the identified characteristics of the imaginary average reader:

1. he does not concentrate when reading a newpaper. He merely skims through the newspaper.

2. he has a capacity for implication and is prone to draw derogatory inferences.

3. he is guilty of loose thinking and will jump to conclusions more readily than the man trained in the caution of law: Demmers v Wyllie & Ors l980 (l) SA 835 (A) at 848G-H.

4. he reads in an implication much more freely and is especially prone to do so when it is is derogatory.

5. he does not formulate reasons in his own mind.

6. he gets a general impression and does look again before coming to a conclusion and acting on it.

CHIDYAUSIKU J

7. he does not read a sensational article with cautious, critical and analytical care: Morgan v Odhams Press Ltd [l971] 2 All ER (HL) 1156 at pp 1162f, 1163b and ll70f-g.

The above are some of the tendencies or characteristics of the average reader. Journalists and publishers are assumed to be familiar with the above tendencies or habits of the ordinary reader. Because journalists and publishers are assumed to know the characteristics of the ordinary reader, they are also held responsible if readers reach a conclusion, because of the above tendencies, different from that intended by the author of the article. In the present case, the evidence of the author of the article was to the effect that all he intended to convey was that the General was a public figure with a larger than life image. I have some difficulty in understanding how this could possibly have been conveyed by the article in question. I have no doubt in my mind that the ordinary reader with the above characteristics will not have understood the article that way.

The court has to look at the article through the eyes of the ordinary reader with the attributes above. But perhaps before doing that it might serve some useful purpose to set out the context of the article. The ordinary reader will read the article not in isolation but in the context of the magazine and in particular the page of the magazine where the article appears. In this regard, Mr de Bourbon has argued that I should only look at the words complained of and nothing else in the magazine. He submitted that the pleadings are such that nothing other than the words complained of should be looked at. Mr Nherere, on the other hand, argued that the whole page where the article appeared constitutes the context and should be considered. I am persuaded by Mr Nherere's argument that the whole page constitutes the context of the article and should be considered. In my view, a reader of the magazine does not buy the magazine, open the magazine and read only the offending article. The reader buys the magazine, skims trough it

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and comes across the offending article in the process. He does not just focus on the offending article. He comes across the offending article while going through the magazine. In my view, all that he reads, certainly before and possibly after the offending article helps or goes towards the creation of the general impression of and his conclusion on the article. Indeed, *Demmer's* case *supra* is authority for the proposition that where the alleged defamatory statement is contained in a book then the statement must be read in the context of the book as a whole. By parity of reasoning, a magazine is the context of alleged defamatory material contained in that magazine. In the present case, I have been provided with only the page where the alleged defamatory article appears. I shall

therefore only confine the context of the article to this page. In my view, what appears on this page does influence the ordinary reader in his appreciation or understanding of the offending article. I will now proceed to considr this context and also of course the nature and construction of the offending article itself.

The most prominent feature on the page where the alleged defamatory statement appears is a caricature or cartoon of a senior army officer. The probabilities are that after reading the whole page the ordinary reader will assume or associate the senior officer with the General. The senior army officer or the General is talking to the Corporal. The Corporal is identified by his rank, the General is not. In the caption of the cartoon the General asks the Corporal, -So where are the land-rovers corporal?' The Corporal replies, -Don't you remember, we sold them to that safari company last year'. Immediately below the cartoon is the continuation of the Andrew Saxon column from some previous page discussing the high rate of accidents by the police and their efforts in covering up the occurence of such accidents. Then following that there is a snippet referring to the army. The snippet suggests the army is asking for 20 000 vehicles, a figure considered too high for their requirements by experts. The ordinary reader i likely to react - -Why ask for so many vehicles when they do not need them?' Because such a reader is prone to draw derogatory inferences and jump to conclusions he will shrug his shoulders and think the excess requirement will be abused, or stolen and sold to safari companies. The article then continues in the following vein:

> "The existing fleet of all kinds of vehicles stands at 12 500. Of these about 3 000 are permanently off the road because of accidents, spares, shortage. About another thousand vehicles have simply vanished. Yes l000 vehicles on the books over the past five years cannot be accounted for. They have disappeared without trace.
>
> Obviously the missing vehicles are not tanks, armoured cars or Pumas but most other types, from trucks to motor bikes are presumed stolen, borrowed without authority or just plain lost.'

The clear impression created in this snippet is that the army is reeking with dishonest, dishonourable and disreputable activity.

Then there is an intervening snippet on Geoff Nyarota and Chikerema's papers.

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CHIDYAUSIKU J

Immediately following this is the article complained of in this case and as Adam J correctly observed at p 11 in Column Width (Pvt) Ltd v Mujuru *supra* the article concerns the new Sunday Times and its ownership with specific attention on the -Army Commander General Mujuru's large interests' in Kestrell Holdings which is now the co-owner of the Sunday Times. The snippet concludes -one wonders how The Times will report on the General's 'goings-on' in his beloved Bindura-Shamva area'. The focus is on the plaintiff although another individual, Munangatire is mentioned. The article focuses on the General, the plaintiff. The reader's attention is drawn and directed to focus on the plaintiff. Then the question is posed -one wonders how The Times will report on the General's 'goings-on'?'

Why would anybody wonder about the -goings-on' of the General? As I have already stated if the -goings-on' referred to were honest, reputable and honourable activities The Times would obviously have no difficulty in reporting them. This would be the immediate reaction of the average reader. The articles and the snippets on this page, the context of the alleged defamation paint a negative picture of the army. The articles suggest that there is rampant corruption within the army in that army vehicles are being stolen or simply disappearing without trace. Then close to these snippets the General, the Commander of that army is accused of undertaking activities that the new newspaper, in which the General -has a stake', will find difficulty in reporting. The articles on the same page, the context, clearly paints a picture of army personnel deeply involved in unlawful activities concerning army property.

Apart from the context, the manner and construction of the article complained of is very relevant to the issue of how the article will be understood by the ordinary reader. The article complained of in this case and in particular the words complained of is far from being factual or informative. If anything it is allusive, vague and sensational. The article accuses the plaintiff of -goings-on' which the new newspaper dares not report given the fact that the plaintiff has an interest in the newspaper. There is no attempt to give some idea of what those -goings on' might be. That is left to the imagination of the reader, with the least charitable assuming the worst. The ordinary reader is given the impresssion that even *Horizon* itself dare not mention the alleged -goings on'. It was revealed in evidence and in cross-examination that the goings on that the defendants had in mind and/or intended to convey were that the plaintiff was or had purchased certain businesses and farms in the Bindura and Shamva area contrry to the provisions of or the spirit of the leadership code to which the plaintiff subscribed.

CHIDYAUSIKU J

If the author of the article had indicated in some way that the -goings on' referred to in his article are the acquisition of the property referred to above and admitted by the plaintiff, the defences of fair comment and justification would, in my view, more than likely have succeeded. Put differently, if the article had read something like -

> "*The Times* is owned by Herbert Munangatire of Lonrho, independent shareholders and Kastrel Holdings, an organisation in which army commander General Mujuru has a large interest. The General is known to have acquired business interests in the Bindura/Shamva area contrary to the leadership code. One wonders how The

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Times will report on these goings-on of the General in his beloved Bindura-Shamva area.'

Had the article complained of been constructed along the above lines it would have been informative of what plaintiff was up to and one wonders on how the newspaper was going to report on the activities of the General. No successful action for defamation is likely to have arisen. As it stands, the article specifically avoids giving a clue as to what the general's alleged -goings-on' might be. This is left to the fertile imagination of the reader and as I said with the least charitable assuming the worst. This is particularly so given the fact of the negative image given of the army personnel in the articles immediately preceding and that the plaintiff is the commander of that army.

I have already stated that the average reader is guilty of lack of concentration when reading a newspaper; he merely skims through and is given to easily reading implications into and drawing derogatory inferences from what he reads. He is guilty of loose thinking and will jump to conclusions especially of a derogatory or defamatory nature. He is not cautious when reading a sensational article. Given these characteristics of the average reader, the contents and the construction of the article I am satisfied that the reasonable reader would understand the article complained of in the defamatory sense alleged in the plaintiff's declaration. The plaintiff has therefore satisfied the second leg of the three stage inquiry.

This leads me to the third and final stage of the inquiry. I have found that article complained of is not only capable of but would be understood to mean that the plaintiff was undertaking or involved in some dishonourable, disreputable or dishonest activities in the Bindura-Shamva area. Is that defamatory of the plaintiff? The test for what constitutes defamation has been laid down in a long line of cases. The test is, -Do the words complained of, lower the plaintiff in the estimation of the ordinary right thinking people?'

CHIDYAUSIKU J

The following cases are authorities for this proposition: Sim v Stretch [l936] 2 All ER 1237 (HL); Smith v Elmore l939 TPD l8 at 21; National Union of Distributive Workers v Cleghorn & Harris Ltd l946 AD 984; SA Associated Newspapers Ltd v Schoeman l962 (2) SA 613 (A); HRH King Zwelitini of Kwazulu v Mervis & Anor l978 (2) SA 521 (W) at 813; Demmers v Wyllie & Ors l978 (4) 619 (D); and SA Associated Newspapers Ltd en 'n ander v Samuels l980 (l) SA 24 (A).

There can be no doubt that what the defendants published of the plaintiff lowers the plaintiff in the estimation of the ordinary right thinking people. To allege that the plaintiff was involved in activities that are dishonourable, disreputable and dishonest is defamatory of the plaintiff. It lowered him in the eyes of the ordinary right thinking person. It was therefore defamatory of the plaintiff.

There remains for me to deal with the question of the amount of damages I consider, appropriate in this case. Translating into monetary terms what a plaintiff has lost as a result of defamation is always a difficult process. It is largely a question of impression. The main object of the exercise is to vindicate the plaintiff's damaged reputation and to console him for the wrong done to him. For some reason or other, the higher or greater the damages awarded, the greater the chance of reinstating a defamed person's name. In the present case I have come to

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the conclusion that an award of $40 000 would go a long way in meeting the above objective. In arriving at this award, I have taken into account the following factors, the nature of the imputation and the extent of the publication. I have also considered the reputation and the standing of the plaintiff in the community. I also considered the retraction or the public apology and any possible justification of the defendants' conduct.

I have already stated that the words complained of are capable of and were understood by the reasonable reader to mean what is alleged in the declaration. That the words complained of were understood to mean that The Times, which was partly owned by the plaintiff would not report on the dishonourable, disreputable or dishonest activities of the plaintiff in the Bindura-Shamva area. To allege that a person of the plaintiff's standing is involved in dishonourable, dishonest or disreputable activities is a very serious allegation, which is highly defamatory. As I said no indication is given of the nature of the dishonest activity. That is left to the imagination of the reader.

The publication of the defamatory material was through a monthly magazine with a circulation of about 13 000 copies pubished. About two to three people

CHIDYAUSIKU J

would probably share or read one copy. On this basis, I am satisfied that the publication was fairly wide. The evidence establishes therefore that this was a very serious defamatory statement that received a fairly wide publication.

The plaintiff's standing in the community was a very important factor in influencing me as to the level of the award of damages.

In this regard, Mr de Bourbon was quick to concede the plaintiff's credentials. At the time of the publication of the defamation the plaintiff was an army general and the Commander of the Zimbabwe National Army. He was No. 3 in command of the ZANLA forces, a liberation movement, that played a decisive role in the liberation of this country. At the time of these proceedings, he had retired from the army but has since been elected to Parliament. I agree with Mr Shaw, a witness for the defendant and author of the article who said in evidence that the General is a controversial figure. The General means different things to different people. On the one hand, you have the -Rhodesians never die' brigade. To these, the General has no reputation to talk of and therefore cannot be defamed. To them the General is merely coming to court to look for money. To the patronising liberal and his friend the -good' African, the General has some reputation. After all, he can speak some English. To these, the General probably deseves nominal damages. On the other hand, you have the ex-combatant who forms the bulk of the army the General commanded. To the ex-combatant, the General is a legend in his life time. Then you have the ordinary man, the one to be found on the Chawasarira Commuter Omnibus to Chitungwiza. To this ordinary man, the General is a hero. It is this ordinary person who forms the generality of the population. In my view, the eminence and reputation of the plaintiff among the generality of the people is simply unsurpassed. The level of damages in this case has to be arrived at bearing this in mind.

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It was argued that there was retraction or a public apology in this case. In my view, very little turns on this for a number of reasons. Firstly, the apology was not prompt. It was published several months after the defamation. The retraction was qualified. There was no retraction in regard to the sting of the defamation. The only allegation that was retracted related to ownership of equity in Kestrel Holding. There was no retraction of the allegation that the plaintiff was involved in dishonourable activities.

In arriving at the amount of the award, I have taken into account recent awards of damages in defamation cases. These cases reveal an upward creeping in the awards for damages. In particular I have considered awards

made in the following cases. In Chinengundu v Modus Publications HH-135-92 an award of $23 000 was made. The plaintiff in that case was a deputy minister at the time of the defamation and a judge of this court at the time of the proceedings. The defamatory article in that case was to the effect that the plaintiff had paid people to vote for him during a party primary election for nominations. This was some six years ago. Inflation has gone a long way since then. In Chinamasa v Jongwe Publishing Company (Pvt) Ltd & Anor *supra* an award of $30 000 was made. In that case, the essence of the defamation was that the plaintiff who was and is the Attorney-General of Zimbabwe was under investigation for a fraud committed prior to his appointment while working for a firm of legal practitioners. In that case while it was true that a police docket was in existence, it was the twisting of facts to create a defamatory impression that gave rise to the proceedings and the award of damages. In Zimbabwe Banking Corporation Ltd v Mashamanda S-231-95 the Supreme Court upheld an award of $45 000 as damages for defamation. In that case, the bank in question had alleged in a newspaper advertisement that its branch manager, a Mr Mashamanda had been dismissed for incompetence. It was factually established that Mr Mashamanda was dismissed for insubordination. This award was considered by the Supreme Court to be on the high side but the Supreme Court did not interfere with the award. The award was considered to be within the discretion of the court *a quo*. In my view the award in the Mashamanda's case *supra* appears to be in keeping with the expectations of the generality of litigants who consider present awards for damages as disgustingly low. The award I have made in this case while perhaps on the high side is within the range f awards of this court in particular Mashamanda's case *supra*. In Mashamanda's case the defamation was more serious than in this case and received wider publication. However Mashamanda was a bank manager. He did not have the national stature which the plaintiff in this case has. I have also made allowance for the distinguishing features by scaling down the damages in this case.

Finally, Mr *de Bourbon* raised what he described as a constitutional point which as he submitted is more suited for debate in the Supreme Court. He submitted that the Constitution guarantees freedom of speech. The United States Constitution has a similar provision protecting freedom of speech. In that jurisdiction, it was submitted, a line of law has been developed to the effect that a public figure can only succeed in a claim for defamation if he can prove that what was published about him was false. In the present case the plaintiff on his own admission has

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acquired business interests in Bindura. It was contended by the defendants that such acquisition is contrary to the provisions of the leadership code. It was argued therefore that what was

CHIDYAUSIKU J

published of the plaintiff was true. Using the American approach, therefore the defendants should escape liability. To hold the defendants liable in defamation would on the American approach amount to an infringement of the defendant's entitlement to freedom of expressin protected under s 20 of the Constitution of Zimbabwe.

Mr *Nherere,* on the other hand, has contended that the American constitutional provision guaranteeing freedom of expression is different from s 20 of the Zimbabwean constitution. The difference lies in that the first amendment to the American Constitution is couched in absolute terms, in that it provides that the American Congress shall make no law abridging freedom of speech. The Zimbabwean Constitution exempts any law or enactment from falling foul of the Constitution if it provides for the protection of reputations, rights and freedoms of other persons. Thus clearly the law of defamation in as far as it seeks to protect the reputations of other people would be intra vires the provisions of the Constitution unless it can be shown that such law of defamation is not reasonably justifiable in a democratic society. I agree with Mr Nherere's submission that the American Constitution provides more latitude to freedom of expression than the Zimbabwean Constitution. The other point that Mr de Bourbon seeks to make s that a public figure should be given less protection than a private individual. I do not think anybody can quarrel with that. Public figures should expect a certain amount of criticism and closer scrutiny of their affairs. It comes with the turf. If one is a public figure one should be able to take certain criticism. A public figure should develop a thick skin and be able to deal with criticism without crying out defamation every time there is criticism. Anybody who cannot take criticism has no business in public life. -If you cannot take the heat don't go into the kitchen' is sound advice. Scrutiny and criticism of public figures enhances transparency and accountability but this does not mean that a public figure is fair game when it comes to defamation. It is a question of striking the right balance between competing interests.

Be that as it may, even if the court were to adopt the American approach this would not assist the defendant in this case for the following reasons.

It was the defendant's case that at the time of the publication of the article there were strong rumours that the plaintiff had acquired business interests in the Bindura-Shamva area contrary to the provisions of the leadership code. There were also rumours that the plaintiff had large interest in Kestrel Holdings which had recently acquired equity in *The Sunday Times*. It was the contention of the author of the article that this was what he intended to

CHIDYAUSIKU J

convey. With the greatest of respect to the author the article does not convey anything like that at all. The article merely accuses the plaintiff by implication that he was involved in some

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dishonourable, dishonest and disreputable activity. There is nothing to indicate the nature of the alleged negative activity. This is a typical case of a journalist twisting, not facts, but rumours for the spice it gives readers. I have no doubt in my mind that the author of the article was pandering to the readers' insatiable appetite for scandal. That is not the function f responsible journalism. This article had nothing to do with enhancing transparency and accountability. It was neither factual nor informative.

In the result, the plaintiff is awarded damages in the amount of $40 000 plus costs against the defendants jointly and severally, the one paying the other to be absolved.

Masimirembwa, Gula-Ndebele & Manase, plaintiff's legal practitioners

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S v BURDETT 1996 (2) ZLR 658 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Criminal appeal

24 September & 28 November 1996 Judgment No. S-227-96

Flynote

Criminal law - culpable homicide - *actus reus* - landowner shooting fleeing poacher - whether action lawful or whether excessive and unlawful

Headnote

A landowner has the right in terms of the Criminal Procedure and Evidence Act [Chapter 9:07] to arrest a person who has illegally poached animals on his land and has the right to use reasonably justifiable force to effect this arrest. In a situation where the poacher is running away and has ignored a shouted command to stop or be fired on, the further step must be taken of firing a warning shot. Unless such a warning shot is fired first, the shooting of the fleeing poacher will not be reasonably justifiable. As no warning shot had been fired by the appellant, the trial court was justified in finding that excessive force had been used and convicting the accused of culpable homicide.

Cases cited:

Matlou v Makhubedu 1978 (1) SA 946 (A)

Minister van Wet en Orde en 'n ander v Ntsane 1993 (1) SA 560 (A)

R v Detsera 1958 R & N 51; 1958 (1) SA 762 (FS)

S v Chikukutu 1996 (1) ZLR 702 (S)

S v Gumbi 1994 (2) ZLR 323 (S)

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S v Henderson S-17-84

S v Kware S-85-93

S v Mlambo 1994 (2) ZLR 410 (S)

S v Sanyanga S-106-86

McNALLY JA

Case Information

F Girach, for the appellant

R H Goba, for the respondent

Judgment

McNally JA: This is an appeal against conviction and sentence in a culpable homicide case, arising out of the shooting of a poacher by a farmer on 26 September 1992.

The facts are briefly these. The farmer received a report that a number of poachers with dogs were on his farm. He set out in pursuit in his truck with his wife driving. He and his security guard were standing in the back. He had a .22 rifle with him.

They came upon the poachers, a group of six, who ran away. After a chase the poachers climbed through a fence and ran on. One of them was briefly delayed by the barbed wire, so that when the truck arrived at the fence he was about thirty metres away. One other was near him, the rest were well ahead, about to move in among trees.

The farmer called out a number of times at the fence for the poachers to stop, as did the security guard. The latter called, in Shona "you young men stop, you will be shot" three times. He said he did not think the fleeing men heard him, but they should have heard the farmer who shouted louder. He shouted "Stop; Mhira". He shouted three times. Then he shot at the legs of the nearest poacher, who, he said, must have heard his call, but ignored it.

The bullet struck him high up on the back of the right thigh, at the top of his leg, and went right through the thigh, tearing the femoral artery as it did so. This wound bled excessively, as one might expect from an arterial wound, and the man died of haemorrhage and shock just under two hours later, at Hwedza Hospital/Clinic.

The defence case was based on justification on two grounds: defence of property and the right to arrest. I do not think defence of property arises, because the men were running away at the time. There was no longer a danger to property. But the defence based on the right to arrest needs careful consideration.

The right is based on the provisions of s 27(1), 30 and 42(1) of the Criminal Procedure and Evidence Act [Chapter 9:07]. There is no doubt, nor was it disputed in this case, that the farmer

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had a right to arrest the poachers and to use reasonably justifiable force in so doing.

McNALLY JA

The question of what is reasonably justifiable force is always a difficult one, and I propose here to deal only with the situation where the offender is running away and the pursuer, seeking to arrest him has a gun. What does the pursuer have to do before he shoots? And what procedure should he follow when he shoots?

The general principle that killing by excessive use of lawful force may be culpable homicide is well settled. See R v Detsera 1958 R & N 51 at 54H-58C; 1958 (1) SA 762 (FS) at 765E-767D; S v Sanyanga S-106-86; *S v Mlambo* 1994 (2) ZLR 410 (S).

In S v Kware S-85-93 the use of a shot gun loaded with bird shot gave rise to a charge of common assault. The fleeing thief was first called upon to stop; then a warning shot was fired; than a shot was fired at him. It was held in the circumstances that that was not an excessive use of lawful force. The appeal succeeded.

It will be noted that there are two features strikingly different from the present case -

1. The use of bird shot.
2. The firing of a warning shot.

S v Gumbi 1994 (2) ZLR 323 (S) is a case involving a warning shot that went wrong. It struck and disabled a third unseen poacher when it was intended to be a warning to the two visible poachers.

S v Henderson S-17-84 is a case which is of interest because it shows how a warning shot was enough to stop nine fish poachers from running away. It is often argued that a warning shot is pointless because it simply makes the run-away run faster. It did not do so in Henderson's case, and in the present case one of the other poachers stopped and surrendered. It is argued that he may have stopped because of seeing his comrade injured. But he might have surrendered anyway.

The real point about a warning shot is this. A shout may be seen as something safely ignored. The person may not have a gun. If he has it may not be loaded. Or the person may not have the nerve to use it.

A warning shot takes the matter one important step further. It says "I have a gun. I am prepared to use it. You continue to flee at your peril."

McNALLY JA

As long ago as 1978 the Appellate Division in South Africa ruled on the matter. The then Chief Justice, in the (civil) case of Matlou v Makhubedu 1978 (1) SA 946 (A) was dealing with a claim

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against a police constable who was being sued for damages by a fugitive whom he had shot in the back while attempting lawfully to arrest him. Rumpff CJ said, in the words of the official translation of the Afrikaans judgment, and after an extensive analysis of the Roman Dutch and English authorities:

> "If circumstances permit, an oral warning should be given. Then, if that does not help, a warning shot should be fired into the ground or in the air, depending on the circumstances, and after that the arrester should try to shoot the suspect in the legs."

He stressed, of course, that this did not apply in the case of those suspected of committing minor offences.

It may be noted that one of the five judges of appeal sitting in that matter, Jansen JA, dissented. He thought a warning shot unnecessary. But the Matlou approach has found favour in South Africa, most recently, in Minister van Wet en Orde en 'n ander v Ntsane 1993 (1) SA 560 (A) at 568H-J.

It has also been approved recently in this Court - *S v Chikukutu* 1996 (1) ZLR 702 (S). I note that the Legal Resources Foundation made a statement about public arrests of civilians which is to be found in the Legal Forum, Vol 7 No. 1 of March 1995 at p 47. It is in virtually identical terms to the statement of Rumpff CJ already referred to.

It is therefore settled law, as I see it, that in cases such as this one, a warning shot must be fired when a shouted command to stop or be fired at is ignored, if the arrester is to bring himself within the protection of the term "reasonably justifiable force" in s 42 of Chapter 9:07.

It is common cause that no warning shot was fired and accordingly the magistrate was justified in finding that excessive force was used. The conviction was proper.

As to sentence, I am satisfied that an effective prison sentence was not merited because the evidence showed that the appellant had been advised that if a shouted warning was ignored he was entitled to shoot at the legs of the fleeing offender. I am not sure why the magistrate disbelieved Mrs Kay in this regard. The evidence showed her to be a public spirited citizen - Farmers

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McNALLY JA

Association Secretary, Chairperson of the Neighbourhood Watch, National Aids Co-ordinator for Education for the CFU and Chairperson of the Crime Prevention and Liaison Committee for five police areas. He did not approve of an opinion she expressed, and therefore, found her unworthy of belief. This was a non sequitur. There was no reason to reject her statement as to the advice given to the appellant.

Equally, however, I am disinclined to reduce the sentence. A fine of $1 500 or three months' imprisonment with labour, plus two months' imprisonment with labour wholly suspended is not lenient, but the appellant, although he took the fatally wounded man to the Hwedza Hospital, did not seem to be particularly concerned to stop the bleeding which it must have been apparent, was life-threatening. It may well be that nothing could have been done, except by an expert, to

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stop arterial bleeding so high in the leg. And no doubt, there is a danger of Aids in such circumstances. Nonetheless, the impression gained from the record is not such as to incline this court to consider a lighter sentence.

A complication in the case arose after the hearing of the appeal. Both counsel and the court had proceeded on the assumption that the suspended sentence was two months' imprisonment with labour as stated in the typed version of the magistrate's judgment at p 34. It was only while preparing the judgment that I noticed that on the back of the charge sheet the magistrate had written "12 months' imprisonment with labour."

Both counsel were approached and advised of this confusion. They were invited first to ascertain which sentence the magistrate intended, and if it was indeed twelve months, to make further submissions.

Two months later, the court has heard nothing. We will take the matter into our own hands. Twelve months is too high. Two months may be a little low. We might have reduced the twelve months to three months, but given the present choice we prefer to settle for two.

The legal practitioner involved in the trial (not Mr Girach, who appeared before us) would do well to re-read the record and reconsider his attitude. The magistrate was commendably patient with him.

Finally, the phrasing of the conditions upon which the prison sentence was suspended needs amendment. A court should never suspend a sentence on condition that the offender "is not convicted of an offence involving culpable homicide" because culpable

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McNALLY JA

homicide, by definition, does not involve an exercise of the will. The appellant, for instance, might be involved in a motor accident and be found guilty of culpable homicide. It would be quite wrong in such a case to bring into effect the suspended sentence.

In the result the appeal is dismissed in its entirety, save for the following:

1. The suspended sentence of imprisonment with labour is either reduced to or confirmed at two months, depending upon which version of the magistrate's judgment correctly reflects his intention;

2. The condition of suspension is deleted and replaced as follows:

"On condition that accused is not convicted of an offence committed within that period involving the unlawful use of a firearm against the person of another, and for which he is sentenced to a period of imprisonment without the option of a fine."

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

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Winterton, Holmes & Hill, appellant's legal practitioners

CHINAMORA v ANGWA FURNISHERS (PVT) LTD & ORS 1996 (2) ZLR 664 (SC)

Court **Supreme Court, Harare**

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

Constitutional application

18 October & 28 November 1996 Judgment No. S-228-96

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 13(1) - right to personal liberty - s 15(1) - protection from inhuman or degrading punishment or other such treatment - s 18(1) - right to protection of the law - whether civil imprisonment of a wilfully defaulting debtor violates such rights and protections

Civil imprisonment - means - whether Magistrates Court Act [Chapter 7:10] as read with the Magistrates Court (Civil) Rules contains sufficient safeguards to ensure that person who lacks the means to pay his debt is not imprisoned

Headnote

The constitutionality of the provisions of the Magistrates Court Act [Chapter 7:10] providing for the imprisonment of wilfully defaulting debtors was challenged on the grounds that they violate the following provisions in the Constitution:

(1) s 13(1), in that imprisonment for debt amounts to impermissible deprivation of liberty;

(2) s 15(1), in that imprisonment for debt amounted to impermissible degrading treatment; and

(3) s 18(1), in that imprisonment for debt violates the right to protection of the law.

Held, that the provisions of the Magistrates Court Act are constitutional, for the reasons set out below.

As regards the argument on deprivation of liberty

Held, that under s 13 it is permissible to deprive a person of his liberty if this

McNALLY JA

is authorised by law in execution of a court order made in order to secure the fulfilment of an obligation imposed on him by law. The provisions of the Magistrates Court Act fall within this ground of permissible deprivation of liberty. Parliament has legislated to sanction imprisonment for debt in execution of an order of court. A contractual debt is an obligation imposed by law. A

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contract gives rise to legally binding obligations that can be enforced through court process. Additionally, once a competent court directs that a contractual debt be paid, liability arises under the court judgment which is enforceable by law.

Held, further, that had the Magistrates Court Act allowed the imprisonment of persons not only who were wilfully refusing to pay debts when they had the means to pay, but also who were unable to pay their debts, it could then have been maintained that the provisions were unfair and over-broad and were not saved by the provision allowing for deprivation of liberty when authorised by law in execution of a court order to enforce a legal obligation. If the provisions cast the onus on the debtor to prove that he is unable to pay the debt, then it could also have been argued that the provisions were unfair because debtors whose poverty prevents them from hiring lawyers to represent them may end up being unable to discharge this onus, even though they are genuinely unable to pay the debt in question. However, when the relevant provisions of the Magistrates Court Act authorising civil imprisonment are read together with the relevant orders in the Magistrates Court (Civil) Rules, it is clear that only persons who are ble to pay and who refuse to do so may be imprisoned. The procedures that have to be followed before persons are imprisoned are manifestly fair. The safeguards are such that persons who do not have the means to pay their debts will not be imprisoned. Read as a whole, the provisions do not cast the onus on the debtor to prove that he lacks the means to pay the debt. The court may only order civil imprisonment if it has been established positively that the debtor can but will not pay. The onus is on the creditor to establish the judgment debtor's means or ability to pay, but it is also provided that the court may not imprison if the debtor proves inability.

As regards the argument on degrading treatment

Held, that degrading treatment in s 15(1) means interference with the dignity of a person of a particularly serious nature. In order to determine if the treatment has reached the requisite degree of severity to fall foul of s 15(1), the facts of each individual case need to be examined. Much will depend on such circumstances as the duration of the treatment, its physical and mental effects and, perhaps, the sex, age and state of health of the victim. As regards imprisonment, every time a person is imprisoned

McNALLY JA

for a crime he may well suffer humiliation or degradation. Imprisonment only amounts to unconstitutionally degrading treatment if it is blatantly disproportionate to the nature and quality of the offence.

Held, further, that imprisonment for up to three months of a recalcitrant debt-dodger who defiantly refuses to pay his debt does not subject him to a level of severity of treatment such as to constitute degrading treatment in terms of s 15(1) of the Constitution. After all, the choice whether to undergo or avoid the indignity and humiliation of incarceration rests with him. It is his decision. He has the viable alternative to pay the debt and by doing so at any time within the period of incarceration he will gain his immediate release.

As regards the argument on protection of law

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Held, that in terms of s 18(1) a person is entitled to protection of the law subject to the provisions of the Constitution. As s 13(2)(c) of the Constitution permits imprisonment of a recalcitrant judgment debtor, the protection of the law provision must be read in conformity with the derogation sanctioned by s 13(2)(c).

Cases cited:

Bux v Officer Commanding, Pietermaritzburg Prison & Ors 1994 (4) BCLR 10 (N)

Coetzee v Government of the Republic of South Africa; Matiso & Ors v Commanding Officer, Port Elizabeth Prison & Ors 1995 (10) BCLR 1382; 1995 (4) SA 631 (CC)

Denmark et al v Greece 12 Year Book 186

E A Gani (Pty) Ltd v Francis 1984 (1) SA 462 (T)

Elliott v Denyssen; Elliott & Stander v Denyssen (1910) 20 CTR 259

Hicks v Feiock 485 US 624 (1988)

Hofmeyer v Fourie 1975 (2) SA 590 (C)

Jolly George Verghese & Anor v Bank of Cochin [1980] 2 SCR 913

Joosab v Taylor 1910 TPD 486

Kinsey v Preeson 749 P.2d 542 (1987)

Krueger v Hoge 1954 (4) SA 248 (SWA)

Marris v Ingram (1879) 13 ChD 338

Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S); 1995 (9) BCLR 1221 (ZS); 1996 (1) SA 636 (ZS)

Patel et al v United Kingdom (1981) 3 EHRR 76

Quentin's v Komane 1983 (2) SA 775 (T)

Rabie v Schutte 1930 TPD 29

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

S v Tcoeib 1996 (7) BCLR 996 (NmS)

GUBBAY CJ

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

Tödt v Ipser 1993 (3) SA 577 (A)

The court referred to the following statutory provisions, rules of court and international

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covenants:

Abolition of Civil Imprisonment Act 2 of 1972 (South Africa), ss 1, 2 and 3

Administration of Justice Act 1970 (England), s 11

African Charter on Human and People's Rights 1981

American Convention on Human Rights 1969, art 7(7)

American Declaration of Rights and Duties of Man 1948, art XXV

Civil Imprisonment Restriction Act 21 of 1942 (South Africa)

Civil Procedure Code (India), s 51(b)

Constitution of Zimbabwe 1980, ss 13(1), 13(2), 15(1), 18(1) and 113(1)

District Court Act 1947 (New Zealand)

European Convention on Human Rights and Fundamental Freedoms 1950, art 1

General Law Amendment Act 8 of 1879 (Cape), s 6

High Commissioner's Proclamation 10 June 1891

High Court Rules 1971 (SI 1047 of 1971), r 368

International Covenant on Civil and Political Rights 1966, art 11

Judgment Debt Recovery Act 1986 (Victoria)

Local Courts Act 1904 (Western Australia), s 130

Magistrates Court Act 18 of 1931, s 19

Magistrates Court Act 32 of 1944 (South Africa), ss 65A to 65M

Magistrates Court Act [Chapter 7:10], ss 27 and 28

Magistrates Court Ordinance 7 of 1911, ss 13 to 18

Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 28

Matabeleland Order in Council 1894, s 26

Resident Magistrates Court Act 20 of 1956 (Cape), ss 16 to 27

Southern Rhodesia Order in Council 1898

Case Information

P Nherere, for the applicant

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A P de Bourbon SC, for the first respondent

L Hove, for the second respondent and the Attorney-General

Judgment

Gubbay CJ:

INTRODUCTION

Civil imprisonment is a method of execution in respect of civil debts and is

GUBBAY CJ

employed to obtain satisfaction of a judgment sounding in money. It is a procedure that has been available and operating in this country since just before the turn of the century. It involves the imprisonment of the debtor, at the instance of the creditor, in a public gaol for a fixed period or until, before the expiration of such period, he has paid the debt owing by him, or until he is otherwise legally discharged. It is intended as a means of compelling a debtor, who is able to do so, to satisfy a judgment. It is not a measure for punishing a debtor who cannot pay. The cost of maintaining the debtor in prison is borne by the creditor and not by the State. In the High Court the creditor who applies for a decree of civil imprisonment must be able to produce a nulla bona return (see Order 41 r 368 of the Rules of the High Court 1971). In the magistrates court it is sufficient that the judgment has remained unsatisfied for seven days,or there is a formal admission by the debtor, or it appears from the messenger's return that there is insufficient available property to meet the judgment (see s 28 of the Magistrates Court Act [Chapter 7:10]).

The pervasive issue to be determined by this court is one of considerable constitutional significance. It is whether imprisonment of wilfully defaulting debtors, under the provisions of the Magistrates Court Act, can be tolerated within the framework of the Constitution of Zimbabwe.

THE FACTS

On 22 March 1993, Angwa Furnishers (Pvt) Ltd ("the creditor") obtained a default judgment in the magistrates court against Webster Nicholas Chinamora ("the debtor") in an amount of $2 839,31. The debt was incurred through the purchase of goods over the period November 1989 to January 1990. A warrant of execution against property was issued the day judgment was granted. As, by that stage, the debtor had divested himself of all his property, the messenger of court was unable to effect an attachment to satisfy the judgment debt and costs. The creditor then took out a summons in the magistrates court calling upon the debtor to show cause on 5 October 1993 why a decree of civil imprisonment should not be made against him.

Although served with the summons, the debtor failed to appear before the magistrate on the day of hearing. Consequent upon his default, an order of civil imprisonment for the maximum permissible term of ninety days was made and a warrant for the debtor's arrest and detention issued. Despite being in gainful employment, the debtor assiduously avoided all attempts by the

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messenger to serve the warrant upon him. In early 1994, he departed for

GUBBAY CJ

South Africa to undertake further tertiary education, returning to Zimbabwe on 28 February 1995.

On 10 April 1995, the debtor lodged an application in the magistrates court in which he sought the suspension of the warrant of arrest until such time as he was able to secure employment. On the following day he instituted an application in this court pursuant to s 24(1) of the Constitution, for an order declaring the procedure of civil imprisonment under the Magistrates Court Act as read with the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), in contravention of ss 13(1), 15(1) and 18(1) of the Declaration of Rights contained in Chapter III of the Constitution. It was opposed by the creditor, and in unison by the Minister of Justice, Legal and Parliamentary Affairs and the Attorney-General.

On 5 October 1995, the magistrate dismissed the application before him with costs, but suspended the ninety days' imprisonment order of 5 October 1993 on condition that the debtor, who was then employed, paid $1 000 on or before the end of that month and $1 000 each month thereafter, until his total liability to the creditor was extinguished.

The debtor, though not indigent, is unwilling to pay the creditor. He adopts a position of recalcitrance. Yet no matter the lack of morality in the stance assumed, this court is obliged to consider the constitutional validity of the legislation now brought under attack.

A HISTORICAL PERSPECTIVE OF CIVIL IMPRISONMENT

The origin of the procedure of civil imprisonment or "siviele gyseling" can be traced to legal systems of antiquity. It is found in Mosaic law (circa 1 600 BC) and the Twelve Tables of early Roman law (450-448 BC). Van Zyl, in his acclaimed work, The Judicial Practice of South Africa 2 ed (1902), in dealing with this history, stated at 226:

> "From the earliest period of the world's history the creditor seemed to say to his debtor what he still, subject to certain conditions, says to him today, 'your money or your body'; and therefore the rule, from the old, came to be established that 'whoever has no money or goods must suffer in his body' as 'otherwise' say some later writers 'those who had not would freely commit all kinds of roguery'."

With reference to the doctrine of the Roman law, the respected author at 227 pointed out that:

GUBBAY CJ

> "The debtor was adjudged to his creditor, whose slave he became, and who had the right of life and death over him."

Under old Dutch law a creditor was entitled to imprison his debtor in a private dwelling selected by him until the latter discharged the debt he owed. However, the law was altered by a Placaat of 17 July 1510. It decreed the debtors were to be detained in the castle or at the prison of the

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court (which in later times was called "the debtors' prison") until payment of the total debt, inclusive of legal and maintenance costs, was rendered. There was no limitation to the period of imprisonment, however small the judgment debt. See van Zyl op cit at 230.

Sir John Wessels in his History of Roman Dutch Law (1908) wrote at 588:

> "The contract by which a free man pledged his person was also called geisel, gijsel or ghijsel. Gijsel was thus a form of pledge, and if the person who entered into this kind of suretyship could not perform the terms he could be locked up until the contract was performed. It is from this word gijsel that the Dutch word gyzelaar, a hostage, and gijzeling are derived; the latter came to mean civil imprisonment."

This procedural device came to the Colony of the Cape of Good Hope through Roman Dutch law. Since in England the law relating to judgment debtors was to similar effect, it was retained, with modification, after the English succeeded the Dutch in the Cape in the early eighteenth century.

The higher courts in the Colony of the Cape of Good Hope had no power to refuse the grant of a decree of civil imprisonment against a judgment debtor until the passing of the General Law Amendment Act 8 of 1879. It provided in s 6 that:

> "No writ of civil imprisonment for non-payment or non-satisfaction of any judgment or decree shall be granted or issued by the Supreme Court or any other court of this Colony in cases in which the defendant, or other party against whom such writ of civil imprisonment is sought to be issued, shall prove to the satisfaction of the court to which such application is made, that such defendant or other party as aforesaid has not property or means sufficient to satisfy in whole or in part the said judgment or decree."

In Elliott v Denyssen; Elliott and Stander v Denyssen (1910) 20 CTR 259 Maasdorp J spoke of the change in the law in these words:

GUBBAY CJ

> "There was a time when civil imprisonment was regarded as a mode of punishing a man who had incurred debts and failed to pay at such time as they fell due, and that punishment was inflicted whether the defendant was in a position or not to satisfy the debt, even in cases where it was utterly hopeless to expect that any benefit would accrue to the plaintiff by imprisonment, if such imprisonment were inflicted. But later, it was regarded more as a means of compelling a refractory debtor to satisfy his debts, and it was taken that a debtor who did not obey an order of court when he was in a position to do so should be regarded as guilty of contempt of court, and that punishment should issue against him as a penalty for his conduct. Then the legislature made this special enactment, (Act No. 8 of 1879) which, I take it, was with the object of preventing people who were in a hopelessly insolvent position from being harassed with civil imprisonment when it would effect no good purpose" (emphasis added).

See also Rabie v Schutte 1930 TPD 29 at 31 *per* Krause J; and Krueger v Hoge 1954 (4) SA 248 (SWA) at 249E-G.

It was the Cape Act of 1879 which became the precursor of similar legislation in the then other territories of South Africa.

THE DEVELOPMENT IN ZIMBABWE OF THE LAW OF CIVIL IMPRISONMENT

The Cape General Law Amendment Act 1879, became part of the law applicable to the Colony

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of Southern Rhodesia (see s 19 of the High Commissioner's Proclamation of 10 June 1891). Adopted as well was the Resident Magistrates' Courts Act 20 of 1856, in which ss 16 to 27 dealt with civil imprisonment. Section 19 empowered the court to withhold a decree if it appeared that the debtor was incapable of paying or settling the amount of the debt. Then by s 26 of the Matabeleland Order in Council 1894, it was decreed that the law to be administered by the High Court of Matabeleland and the magistrates courts was to be the same as the law found in the Cape Colony as at 5 October 1894, as nearly as the circumstances of the country permitted. Another constitutional dispensation was passed under Southern Rhodesia Order in Council 1898. This provided for the law to be administered in terms similar to that of the High Commissioner's Proclamation of 10 June 1891.

The Magistrates Court Ordinance 7 of 1911 came into operation on 2 January 1912. It repealed the Cape Act of 1856. The civil imprisonment provisions

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GUBBAY CJ

were ss 13 to 18. Section 16 had a new proviso which had not appeared in the Cape Act of 1856, but which repeated almost word for word s 6 of the General Law Amendment Act of 1879.

A new Magistrates Court Act 18 of 1931 came into operation on 1 January 1932, replacing the 1911 Ordinance. The "inability to pay" proviso appeared as proviso (ii) to s 19.

The Magistrates Court Act 1931, as amended, is still in force as the Magistrates Court Act [Chapter 7:10 of the Revised Edition 1996]. The "inability to pay" proviso is present, now as proviso (ii) to s 27. In the intervening years, the proviso was to be found in: proviso (ii) to s 23 of the Magistrates Court Act [Chapter 11 of the Revised Edition 1939]; proviso (ii) to s 23 of the Magistrates Court Act [Chapter 15 of the Revised Edition 1963]; and proviso (ii) to s 28 of the Magistrates Court Act [Chapter 18 of the Revised Edition 1974].

Proviso (ii) to the current s 27 reads:

> "The court may, upon the return of the summons and whether the judgment debtor appears or not, make a decree of civil imprisonment against such judgment debtor and authorise the issue of a warrant for his arrest and detention in any prison named in the warrant:
>
> Provided that -
>
> (i) ...
>
> (ii) no such decree shall be pronounced and no such warrant shall be issued if the judgment debtor proves to the satisfaction of the court that he has no means of satisfying the judgment debt either wholly or in part and either out of his present means or out of future earnings or income, unless it appears that the judgment debtor -
>
> (a) has wilfully made away with any property in order to defeat or delay payment of the judgment debt; or
>
> (b) is able to earn sufficient to satisfy the judgment debt by instalments or otherwise to settle the same, but in order to defeat or delay payment of the judgment debt wilfully refuses to do so; or

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(c) is squandering his money or is apparently living beyond his means" (emphasis added).

GUBBAY CJ

Order 28 of the Magistrates Court (Civil) Rules, as amended by SI 248 of 1993 and promulgated by the Minister of Justice, Legal and Parliamentary Affairs in terms of s 73 of the Act, now sets out in detail the procedure to be followed before a decree of civil imprisonment will be issued.

CIVIL IMPRISONMENT IN OTHER JURISDICTIONS

In order to gauge the international approach to civil imprisonment it is helpful to have regard to the situations prevailing in several other countries:

1. COMMONWEALTH COUNTRIES

(a) **South Africa**

Civil imprisonment was abolished on 1 July 1977 by the Abolition of Civil Imprisonment Act 2 of 1972. All courts were deprived of the power to order civil imprisonment of a debtor for his failure to pay a sum of money in terms of a judgment (s 1). Any decree of civil imprisonment in operation at the date of commencement of the Act was rendered of no force and effect (s 2). The power of a court to commit a person for contempt of court or a judgment debtor under any provision of the Magistrates Court Act 32 of 1944, for failure to satisfy a judgment, was saved (s 3).

Even before its abolition, the application of civil imprisonment was very limited. With the passing of the Civil Imprisonment Restriction Act 21 of 1942, civil imprisonment in the magistrates court in respect of debts arising from contract was abolished. Civil imprisonment was available only in respect of judgment debts arising from a delict committed by a debtor, or from an obligation to maintain a wife, parent or child, or in respect of seduction of a woman or girl. In 1944 the Magistrates Court Act 32 of 1917 was replaced by the Magistrates Court Act 32 of 1944. Under the new Act, which abolished civil imprisonment as a means of enforcing judgments, a judgment debtor could still incur committal to prison but only if he failed to comply with an order to pay the judgment debt in instalments. Such an instalment order was made by the court after the institution of an enquiry into the judgment debtor's financial position. If the judgment debtor did not comply with this order, he was sentenced for contempt of cort. This procedure did not apply to judgments given in a superior court where the ultimate sanction was imprisonment for contempt of court. It was finally decided in Hofmeyer v Fourie 1975 (2) SA 590 (C), after a comprehensive review of the authorities, that the power to commit a debtor for contempt for

GUBBAY CJ

failing to obey an order to pay money was confined to orders to pay in the field of

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matrimonial disputes and possibly to orders to pay costs de bonis propriis.

On 1 January 1979, ss 65A to 65M were added by Act 63 of 1976 to the Magistrates Court Act 1944. Provision was made for two types of contempt of court: contempt by non-compliance with an instalment order, and contempt by non-compliance with a judgment for the payment of a sum of money. In contrast to the position that obtained before, a judgment debtor could be committed without an enquiry into his financial position or his ability to pay. Where he failed to comply with a judgment for the payment of a sum of money, he could be called upon to show cause why he should not be committed, and could be committed even where he did not appear.

Serious misgivings were expressed over the introduction of ss 65A to 65M. It was considered that to all intents and purposes the position of the judgment debtor had reverted to what it was between 1917 and 1944, except that his committal was termed civil imprisonment in that period rather than contempt of court since 1979. As van Dijkhorst J put it in Quentin's v Komane 1983 (2) SA 775 (T) at 778E, civil imprisonment was returned under the cloak of contempt of court. See also Tšdt v Ipser 1993 (3) SA 577 (A) at 588F.

In the cases of Coetzee v Government of the Republic of South Africa; Matiso v The Commanding Officer, Port Elizabeth Prison & Ors 1995 (10) BCLR 1382 (CC), 1995 (4) SA 631 (CC) the constitutional validity of ss 65A to 65M fell to be decided. The applicants argued that the statutory authority for the orders committing them to prison had been vitiated by the provisions of ss 11(1) and 25(3) of the Interim Constitution. It was held by Kriegler J (with whom the majority of the court concurred) that the provisions under challenge were over-broad and inconsistent with the Constitution (see para 19). The gravamen of the decision was that the existing law did not adequately distinguish between the fundamentally different categories of judgment debtors: those unwilling to pay even though having the means to do so, and those who simply cannot pay but who failed to prove their inability to pay (see para 8).

(b) **England**

In early times, prisoners for civil debt were sometimes allowed to rot in gaol for lack of proper food, clothing and sanitary arrangements. It was not until such novelists as Dickens and Reade roused the indignation of the public to such deplorable conditions that the originally wide powers of the courts to

imprison a person for debt were limited, first by the Debtors Act 1869, and later by the Debtors Act 1878. The intention and effect of the change to the law was that a fraudulent debtor should be punished but that an honest debtor should not. See Marris v Ingram (1879) 13 ChD 338 at 343; Halsbury's Laws of England 3 ed Vol 2, at para 1267.

Since 1970 under s 11 of the Administration of Justice Act 1970 the power to commit to

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prison a debtor who makes default in payment of a debt or instalment of a debt in pursuance of an order or judgment is exercisable only -

(a) by the High Court in respect of a High Court maintenance order; and

(b) by a county court in respect of -

(i) a High Court or county court maintenance order; or

(ii) a judgment or order which is for the payment of any certain specified statutory taxes, contributions or liabilities.

The present position is that a judgment for an ordinary commercial debt, or one for damages, can no longer be executed by means of a decree of civil imprisonment.

(c) **Australia**

The situation in the different states varies. In Western Australia, s 130 of the Local Courts Act 1904 is designed to deal with those judgment debtors who wilfully or through neglect fail to pay debts which they are able to pay. It empowers the magistrate to make an order committing the debtor to prison for up to six weeks.

There is no equivalent provision to s 130 and no other sanction in New South Wales, South Australia, Queensland and the Northern Territory. The similar provision in Victoria has been repealed, although an analogous but much more restricted ground of imprisonment has been enacted in the Victoria Judgment Debt Recovery Act 1986. This change has had the effect of almost abolishing imprisonment in practice.

Viewed overall, in Australia there has been a slow drift away from imprisonment as a method of enforcing payment of a judgment debt.

GUBBAY CJ

(d) **New Zealand**

Upon the application of a creditor, made under the District Court Act 1947, the court may order the judgment debtor to undergo periodic detention for such period, not exceeding six months, if satisfied beyond reasonable doubt that:

"(i) the judgment debtor has sufficient means to pay the judgment debt but refuses to do so; and

(ii) all other methods of enforcing the judgment have been considered or tried and are inappropriate or unsuccessful."

Detention does not operate to extinguish or affect the liability of the judgment debtor to pay the debt.

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(e) India

Proviso (b) to s 51 of the Indian Civil Procedure Code stipulates that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless the court is satisfied, inter alia:

> "... that the judgment debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same."

The ambit and implication of the proviso was considered by the Supreme Court of India in Jolly George Verghese & Anor v The Bank of Cochin [1980] 2 SCR 913 at 922B-G where it was said:

> " ... to cast a person in prison because of his poverty and consequent inability to meet the contractual liability is appalling. To be poor, in this land ... is no crime and to 'recover' debts by the procedure of putting one in prison is too flagrantly violative of Art 21 (of the Constitution which provides: 'No person shall be deprived of his life and liberty except according to procedure established by law') unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness ... There must be some element of bad faith beyond mere indifference to pay, some

GUBBAY CJ

> deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial portion of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree."

See also Pandey Constitutional Law of India at 160-161.

2. COUNTRIES OF THE EUROPEAN UNION

In an address entitled "Civil Imprisonment: The Impact of the New Constitution", published later in 1994 (2) *Stellenbosch Law Review* 133, Professor Wouter de Vos mentioned three countries of the Union. He is reported as having said:

> "In France, judgments for the payment of money are executed by means of various forms of attachment of the debtor's assets. No provision is made for imprisonment to enforce such a judgment. Besides, there is not even a 'procedure whereby a debtor can be examined as to his assets or their whereabouts'. Even non-money judgments are apparently not enforced by means of imprisonment, but normally by the imposition of a penalty (astreinte).
>
> In Germany, money orders are also executed mainly by means of attachment of assets of the judgment debtor. However, in contrast to French procedure, German law does provide for a financial inquiry to be held if there is insufficient property at the debtor's premises to satisfy the judgment. Furthermore, to one's surprise, since it is against the general trend, German procedure provides for a mechanism called *persönlicher Arrest* whereby 'a defendant may be committed to prison until he has deposited the sum claimed'. Fortunately, this drastic measure is apparently rarely used. It could be applied, for example, where a foreign defendant, in default of payment, visits Germany. I should mention, in passing, that a non-money judgment in German law can be enforced by either the imposition of a fine (*Zwangsgeld*) or imprisonment (*Zwangshaft*).
>
> The position in the Netherlands conforms substantially to that in France. The execution machinery in the

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case of money orders consists of various forms of attachment of assets and no provision is made for an inquiry as to the debtor's means or the whereabouts of his assets. Non-money judgments are executed mainly by means of the imposition of a fine

GUBBAY CJ

(dwangsom), but in limited circumstances, imprisonment (lijfsdwang or gijzeling) can also serve as a means of enforcement." (See at 139-140).

3. THE UNITED STATES OF AMERICA

The position in the different states is exemplified in the decision of the Supreme Court of Colorado in Kinsey v Preeson 746 P.2d 542 (Colo 1987). It was pointed out that the Constitution of the United States provides no express sanction against imprisonment for debt, but Federal judges are required to follow the law of the state in which they sit. Vollack J at 546 observed:

"Body execution statutes are not uniform, but most authorize a body execution whenever a defendant is found guilty of some kind of wrongdoing, such as committing a fraud, or tort, or misconduct in public office or professional employment, or embezzlement or conversion of the plaintiff's property, or where the defendant is about to abscond. A Freeman, 3 Law of Executions 451, at 2393 (3d ed 1900). The intent of prohibitions against imprisonment for debt is to exempt from imprisonment the honest debtor who is poor, and unable to pay his or her debts."

In striking down Colorado's body execution statute as invidiously discriminatory and unconstitutional, the learned judge remarked at 549:

"In the case of the indigent judgment debtor, there is no provision in the statute to prevent an indigent debtor from suffering a 'punishment' not visited upon the debtor of means. Under prior case law, it is clear that imprisonment as a result of a body judgment does not discharge the debt. In re Thompson, 104 Colo 171, 89 P.2d 538 (1939). Thus, an indigent judgment debtor will suffer imprisonment based solely on an involuntary inability to pay the judgment and still owe the entire amount of the judgment after serving time in jail. Imprisoning an indigent debtor will not serve the coercive purpose of the body execution statute. In fact, jailing the indigent debtor defeats the purpose of obtaining payment for the judgment creditor by precluding gainful employment during the period of incarceration.

In Williams v Illinois 399 US 235 (1970) and Tate v Short 401 US 395 (1971) the United States Supreme Court struck down statutes which subjected indigents to incarceration solely because of their inability to

GUBBAY CJ

pay a fine. These cases are analogous to the case before us where an indigent judgment debtor is incarcerated while those of greater means have the keys to the jail."

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

(a) Article 11 of the International Covenant on Civil and Political Rights 1966 (ICPR) provides:

"No-one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."

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Zimbabwe is a signatory to this Covenant.

(b) The European Convention on Human Rights and Fundamental Freedoms (ECHR) was adopted by the member States of the European Council in 1950. This Convention must be read with the Fourth Protocol concluded in 1968. Article 1 also provides that:

"No-one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation."

(c) Article XXV of the American Declaration of Rights and Duties of Man (ADRD), adopted by the Organisation of American States in 1948, mandates that:

"No person may be deprived of liberty for non-fulfilment of obligations of a purely civil character."

(d) Article 7(7) of the American Convention on Human Rights (ACHR), adopted by the Organisation of American States in 1969, reads:

"No-one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for non-fulfilment of duties of support."

(e) The African Charter on Human and People's Rights (AFHR), adopted by the Organisation of African Unity in 1981, contains within its terms no provision for freedom from civil imprisonment.

Both Article 11 of the ICPR and Article 1 of the Fourth Protocol to the ECHR

GUBBAY CJ

are confined to judgments for contractual liability only; the obligation must arise from a "contract" - the numerous other ways in which a debt may be incurred are omitted. Under each the implication is that only the impecunious judgment debtor is protected; not the debtor who has the means to pay the debt but obdurately declines to do so. The purpose of these instruments is to protect the individual against imprisonment for debt in circumstances where there is a genuine inability to pay. They are not concerned with the debtor who refuses to pay.

THE CONCLUSION TO BE DRAWN FROM THE LAWS OF THE COUNTRIES CONSIDERED

It is, in my opinion, difficult to discern a modern trend towards imprisonment for civil debt. Some countries have abolished the remedy entirely while others, like Zimbabwe, have prohibited it only with respect to the indigent debtor. These latter countries recognise that to commit a debtor to prison who through poverty is unable to satisfy the judgment debt is contrary to the purpose of civil incarceration, which is to coerce payment. Thus the only real effect of imprisonment of an impoverished debtor is that of punishment. It is a punishment that can be avoided by a debtor who is able but unwilling to pay; for satisfaction of the judgment remains within his power. But it becomes mandatory against one without the means to pay. It discriminates between the one and the other.

THE ISSUES

(1) WHETHER THE LEGISLATION PROVIDING FOR CIVIL IMPRISONMENT IS VIOLATIVE

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OF SECTION 13(1) OF THE DECLARATION OF RIGHTS

Section 13(1) reads:

> "No person shall be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2)."

The only relevant case specified in subs (2) is contained in para (c) thereto, namely:

> "in execution of the order of a court made in order to secure the fulfilment of an obligation imposed on him by law."

Sections 26 and 27 of the Magistrates Court Act and Order 28 of the

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GUBBAY CJ

Magistrates Court (Civil) Rules provide for civil imprisonment for any judgment debt, regardless of how the debt arose. Thus a person may be imprisoned for a contractual debt (as was sought by the creditor in casu), for a debt founded in damages consequential upon the commission of a delict, or for a debt arising under legislation.

The pertinent phrase in s 13(2)(c) is "obligation imposed on him by law". The word "law" is defined in s 113(1) of the Constitution to mean:

> "(a) any provision of this Constitution or of an Act of Parliament;
>
> (b) any provision of a statutory instrument;
>
> (c) any unwritten law in force in Zimbabwe, including African Customary law."

The thrust of the main argument of counsel for the debtor may be recast thus: A contractual debt is not an "obligation imposed on him by law" in terms of s 13(2)(c). It arises from the parties' own contract. To adopt any other interpretation - always acknowledging that an inroad to the substantive protection afforded by s 13(1) should be construed restrictively in favorem libertatis - would be to render superfluous the last five words "imposed on him by law". If the framers of the Constitution intended to equate contractual debts with other debts, the obligation would not have been qualified by "imposed on him by law" - a qualification that pertains to the antecedent obligation. What s 13(2)(c) contemplates is the dichotomy between obligations imposed "ex lege", the payment of maintenance, taxes, customs duties and delictual liability on the one hand, in respect of which civil imprisonment is permissible; and on the other, obligations arising "ex contractu", for which a person may not be deprived of his persoal liberty. Accordingly, since ss 26 and 27 of the Magistrates Court Act and Order 28 of the Rules fail to make any distinction between contractual and other debts, their provisions are too broad and for that reason do not conform with s 13(2)(c) of the Declaration of Rights.

Although ingenious I think the argument is demonstrably fallacious.

Under s 13(2)(c) two basic requirements must be met in order to justify the deprivation of personal liberty:

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First, the deprivation may only be sanctioned "in execution of the order of a

GUBBAY CJ

court". It follows that an Act of Parliament must provide for it. A term in an agreement of loan which makes civil imprisonment consequential upon non-payment by the debtor is, of course, of no validity whatsoever. Section 27 of the Magistrates Court Act authorises and empowers magistrates to issue a decree of civil imprisonment against a judgment debtor. It is not the creditor but the court that makes the order. In execution thereof the judgment debtor is arrested and detained in prison.

Second, the decree can only be made to secure the fulfilment of "an obligation imposed on him by law". This means, in my view, an obligation placed upon a person by the law as distinct from any other type of obligation, such as social, moral, ethical or religious, which may be imposed upon him.

The law imposes obligations in several ways: unilaterally by means of legislation; by order of court; or the imposition may arise by virtue of the common law. These obligations are ties whereby one person is bound to perform for the benefit of another. In every instance, it is the law that fastens the knot. Thus, under the common law - which, as the unwritten law in force in Zimbabwe, falls within para (c) of the definition of "law" - there is an obligation to observe a duty of care towards others; an obligation to abide by the terms of a contract entered into with another party; and an obligation arising from a family relationship, such as the reciprocal duty of support between husband and wife, and a duty upon parents to maintain their minor or dependant children.

A contract gives rise to personal rights and obligations. It creates, or is intended to create, a legal obligation between the parties to perform their respective undertakings. It is legally binding upon them. From the side of the debtor, the obligation involves the making of payment on due date or within a reasonable time. If payment is not forthcoming, compliance with the contract may be enforced by the creditor utilising the process of the courts. Just as legislative obligations may be compelled by criminal sanction, so too recourse to the powers of the court is open upon the breach of a contractual obligation. A contractual obligation is therefore one imposed by law.

The issue may be seen in another way: Once a competent court directs that a debt is to be paid, its judgment, if final, has the effect of being *res judicata*. It novates the rights and obligations of the parties. See Joosab v Taylor 1910 TPD 486 at 488 and 490; E A Gani (Pty) Ltd v Francis 1984 (1) SA 462 (T) at 466C-G. The debtor is enjoined to honour the judgment and to abide by its terms. Liability now arises under the judgment, which creates an independent

GUBBAY CJ

debt enforceable as such in a court of law. It is an obligation imposed on the judgment debtor by law.

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Whether the focus is directed at the antecedent obligation (the contractual one) or at the novated obligation (the judgment of the court) the end result is an obligation imposed by law on the debtor to pay the creditor the amount owed.

The alternative argument advanced on behalf of the debtor under this head was that the relevant provisions of the Magistrates Court Act are framed in a manner that judgment debtors who are unable to pay are just as likely to be sent to prison as those who are simply unwilling to pay. The provisions are therefore over-broad. They do not distinguish adequately between the two categories of judgment debtor and so are not saved by s 13(2)(c) of the Constitution. Stated otherwise, the procedure of civil imprisonment is so tainted that the possibility exists of a judgment debtor being deprived of personal liberty on account of total inability to pay his creditor.

In the *Coetzee and Matiso* cases *supra* Kriegler J at para 14 listed various features which made the South African mechanism indefensible, one of which was that the onus was placed on the debtor to satisfy the court as to his inability. He said that:

> "... the burden cast on the debtor with regard to inability to pay, although possibly defensible in principle as pertaining to matters peculiarly within his knowledge, is so widely couched that persons genuinely unable to pay are nevertheless struck."

Didcott J took up the same theme and elaborated upon it at para 25, in these words:

> "The fourth ugly feature of the legislation that will confront the debtor if he does not appear before the magistrate, on the other hand, is the onus then resting on him to prove that he cannot pay the judgment debt and bears no blame for his impecuniosity on various grounds that are listed. He may not manage to establish that, although it is the truth, especially when his very poverty has prevented him from hiring a lawyer and he has to fend for himself in an unfamiliar environment, bewildered by procedures and a forensic methodology to which he is a stranger. The result may well be, the result may often be, that someone who really cannot pay, through no fault of his own, goes to gaol for his failure to do so."

GUBBAY CJ

It is true that s 27 of the Magistrates Court Act, in authorising civil imprisonment, stipulates in proviso (ii) that "no such decree shall be pronounced if the judgment debtor proves to the satisfaction of the court that he has no means of satisfying the judgment debt either wholly or in part ..." (emphasis added). Since this appears to place the onus on the debtor, does it not taint the procedure with one of the defects listed as objectionable in the Coetzee and Matiso cases? I think not.

Rule 1B(1) of Order 28 of the Magistrates Court (Civil) Rules - which as a provision in a statutory instrument comes within the already cited definition of "law" - throws up the complete picture. Paragraph (a) thereof makes it clear that the court may issue a decree of civil imprisonment if satisfied that:

> "the judgment debtor has the means to pay or the ability to earn the amount of the judgment debt and that his failure or refusal to satisfy the judgment debt is wilful."

This places the onus upon the creditor to establish the judgment debtor's means or ability. And

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under para (b), if the court is not satisfied with the judgment debtor's wilfulness, or if the judgment debtor proves inability, in terms of proviso (ii) to s 27 of the Act, an order of imprisonment may not be made.

Viewed from this perspective, s 27 of the Act contains a prohibition. The court shall not order civil imprisonment if the debtor proves inability. The section does not, however, specify when the court can order civil imprisonment. Rule 1B of Order 28 fills in the detail. It indicates that the court may only order civil imprisonment if satisfied - when it has been established positively - that the debtor can but will not pay.

Accordingly the effect of the procedure is not to place the onus of proving inability on the debtor, though he can assume the burden if he so wishes; and if he does establish the requirements he will be protected. Nonetheless there is no onus on him to do so.

The second potential shortcoming, though not one articulated on behalf of the debtor, is that s 28 of the Magistrates Court Act permits the grant of a decree of civil imprisonment if the judgment debt remained unsatisfied for seven days and before the creditor had exhausted all other lawful methods of enforcing the judgment. This was a right that attracted the condemnation of Didcott J in the Coetzee and Matiso cases *supra* at paras 20 and 22.

GUBBAY CJ

I have no doubt that it would have been preferable if the legislator had omitted this option from s 28. Be that as it may, what has to be determined is whether its existence could result in a poverty-stricken judgment debtor being consigned to gaol. The answer is dependent upon whether the safeguards afforded under Order 28 of the Rules are sufficiently protective to deny such an occurrence.

In my view, the procedure laid down in Order 28, regarded in its entirety, ensures that the critical issue of ability or otherwise to pay is properly addressed and examined.

In the first place, the form the summons should take, which is Form Civ. 35 appended to the Rules, advises the judgment debtor both to produce at the hearing documents which bear upon his or her financial position, and to give viva voce evidence of earnings and other income as well as expenses. It informs of the nature of the enquiry to be held by the court. It warns the judgment debtor, unless the debt is paid or the creditor accepts an offer in settlement, of the necessity to attend the hearing, and that failure to do so may result in the issue of a decree of civil imprisonment.

Second, Rule 1B(2) enjoins the court to conduct a most meticulous enquiry in determining the ability of the judgment debtor to pay the amount due. It is obliged to take account of the following matters:

"(a) the nature and extent of his income and assets; and

(b) the amounts needed by him for his necessary expenses and those of his dependants; and

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(c) any amounts needed by him to make payments in terms of any court order or agreement; and

(d) if he is unemployed, the reason therefor; and

(e) if he is employed, whether a garnishee order would be appropriate, in which event the court may adjourn the inquiry to enable proceedings for such an order to be instituted in terms of Order 29."

Third, where the judgment debtor is in default at the hearing the court will not make a decree of civil imprisonment against him unless satisfied that the summons was served upon him personally.

GUBBAY CJ

Lastly, in practice, albeit not obliged by law to do so, the court will only entertain the application where other methods of enforcing the judgment have been considered or tried and were inappropriate or unsuccessful.

These features lead me to conclude that the procedure adopted under Order 28, as a whole, is manifestly fair in all the circumstances. It does not suffer from the deficiencies highlighted in the Coetzee and Matiso cases *supra* at para 14. It distinguishes adequately between the two categories of defaulting debtors and, to borrow the graphic language of Kriegler J, does not "sweep up those who cannot pay with those who can but simply will not".

(2) WHETHER THE PROCEDURE OF CIVIL IMPRISONMENT CONTRAVENES SECTION 15(1) OF THE DECLARATION OF RIGHTS

The argument advanced on behalf of the debtor was that imprisonment for debt where decreed against a recalcitrant judgment debtor offends the protection afforded by s 15(1) of the Declaration of Rights against "degrading treatment".

In Denmark et al v Greece 12 Year Book 186, the European Commission of Human Rights defined "degrading treatment" in Article 3 of the European Convention of Human Rights, as treatment of an individual that grossly humiliates him before others or drives him to act against his will or conscience. And in Patel et al v United Kingdom (1981) 3 EHRR 76 (East African Asians case) the Commission rejected a submission that the expression should be interpreted as referring to physical acts only. It held, at para 189, that the general purpose of the prohibition against degrading treatment was to prevent interference with the dignity of man of a particular serious nature. Accordingly, it expressed the view that any act which lowers a person in rank, position, reputation or character, can be regarded as "degrading treatment" if it reaches a certain level of severity.

A determination of whether the minimum level of severity of the treatment falls foul of s 15(1) is, in the nature of things, a relative one, to be determined in accordance with the facts of each individual case. Much will depend on such circumstances as the duration of the treatment, its physical and mental effects and, perhaps, the sex, age and state of health of the victim.

A sentence of imprisonment cannot be adjudged unconstitutional unless it is blatantly disproportionate to the quality of the offence. A person convicted

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GUBBAY CJ

of a crime, and punished by being ordered to serve a term of imprisonment, may well be humiliated and degraded. Yet that resultant mental state does not allow of a claim that s 15(1) has been violated. For otherwise nobody would ever be sent to gaol. Even a sentence of life imprisonment, provided it does not compel the offender to spend the remainder of his natural life incarcerated without any hope of release, has been held not to be unconstitutional *per* se. See S v Tcoeib 1996 (7) BCLR 996 (NmS) at 1005G-H and 1009C, 1996 (1) SACR 390 (NmS) at 399b and 402d-e. It is not therefore the concept of imprisonment that is open to attack. It is only the conditions under which the imprisonment is endured that may be, for example, overcrowded detention quarters or inadequate access to ablution facilities.

Is it valid to contend, however, that imprisonment, imposed solely as a means to secure the payment of monies owed by a judgment debtor who is able but unwilling to satisfy it, is offensive to contemporary concepts of decency and human dignity, good conscience and fundamental fairness? See *S v Ncube* & Ors 1987 (2) ZLR 246 (S) at 267A-D; 1988 (2) SA 702 (ZS) at 717A-D.

What must not be overlooked is that imprisonment of a judgment debtor is remedial in nature. It is ordered not as a punishment but for the wilful refusal to fulfil an obligation. In Hicks v Feiock 485 US 624 (1988) at 633 the United States Supreme Court reaffirmed the long-standing distinction between imprisonment as a punishment for a limited period and purgable imprisonment for remedial purposes to compel performance of an obligation where the persons concerned "carried the keys of the prison in their own pockets".

Perhaps some slight support for the argument that civil imprisonment is a degrading relic from a bygone era and that a creditor should be left to pursue other effective methods of enforcing the judgment, such as attachment of goods or the garnishee of emoluments, may be gleaned from the remarks of Sachs J in the Coetzee and Matiso cases *supra*. Although the learned judge did not directly address the institution of civil imprisonment as violative of the prohibition against degrading treatment in s 11(2) of the Interim Constitution, the following passages at para 66 of his minority judgment seem to lean a little way in that direction. Certainly, they indicate the dislike he felt of the procedure:

> "Over the centuries and decades, its ambit has been progressively restricted so that now all that is left of it is its attenuated existence in relation to debtors hauled before the magistrate's court; like the Cheshire cat, it has disappeared bit by bit leaving only, not a smile, but a frown."

GUBBAY CJ

And later:

> "There is thus support for Mr Navsa's claim that the object of the system would be to send to gaol those who could not pay in order to get money out of those who could pay. The borderline between ability to pay and refusal to pay would be a shadowy one; resigned and bewildered debtors, confused by complicated and technical notices, would inevitably get caught up with the truly recalcitrant debt-dodgers who defiantly refused to pay even when they

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could."

Nonetheless, Sachs J was careful to indicate at para 72 that:

> "This is not to say that there could never be circumstances which could justify the use of the back-up of prison to ensure that court orders for payment of judgment debts were obeyed in the same way as other orders."

The majority judgments, on the other hand, imply that there is nothing in principle constitutionally objectionable in sending persons to prison who deliberately refuse to pay their debts. See also Bux v Officer Commanding, Pietermaritzburg Prison & Ors 1994 (4) BCLR 10 (N) at 13D-E, 1994 (4) SA 562 (N) at 564F-G. But, as mentioned earlier, the reasoning was confined to whether the provisions under siege were over-broad in that they could be used to imprison the debtor who was unwilling to pay his debt even though he had the means to do so as well as to imprison the debtor who simply was unable to pay the debt.

I should mention that in his penetrating address Professor de Vos remarked en passant, and without a close examination of the question, that civil imprisonment simpliciter could be regarded as degrading treatment. See Stellenbosch Law Journal op cit at 143. And the learned author Paul Sieghart, in The International Law of Human Rights at 83, considers the prohibition on imprisonment for debt to be one of the most absolute of human rights and not subject to derogation of any kind.

I remain unconvinced, however, that to imprison a recalcitrant debt-dodger who defiantly refuses to pay even though able to do so for a maximum permissible period of three months, would be to subject him to a level of severity of treatment falling within the concept of degrading. After all, the choice whether to undergo or avoid the indignity and humiliation of incarceration rests with him. The sufferance of imprisonment is not

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compulsory. It is his decision. He has a viable alternative - to pay the debt; and by doing so at any time within the period of incarceration he will gain his immediate release.

(3) WHETHER THE INSTITUTION OF CIVIL IMPRISONMENT CONTRAVENES SECTION 18(1) OF THE DECLARATION OF RIGHTS

This contention, though made in the papers, was not pressed in argument. And rightly so.

Section 18(1) reads:

> *"Subject to the provisions of this Constitution*, every person is entitled to the protection of the law" (emphasis added).

The material provision of the Constitution to which this section is subject is, of course, s 13(2)(c).

The phrase "subject to" is a simple expedient which subjects the provisions of the subject section to the provisions of the master section. Where there is a clash, the concept shows which of the two takes effect. This much emerges clearly from the judgment of Miller JA in S v

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Murwane 1982 (3) SA 717 (A) at 747H:

> "The purpose of the phrase 'subject to' ... is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation."

Having expressed the view that, properly construed, s 13(2)(c) permits imprisonment of a judgment debtor who is unwilling to pay the debt even though able to do so, the "protection of the law" to which he is entitled under s 18(1) undoubtedly must be read in conformity with the derogation sanctioned by s 13(2)(c).

COSTS

Although this application was in the nature of a test case concerning, as it did, an important constitutional issue, it nonetheless involved a private *persona*

GUBBAY CJ

as the first respondent. The creditor had to be made a party to the application. It had a practical and not merely an academic interest in the outcome and had the right to appear and oppose the relief sought. The argument it presented has found favour with this court. In the circumstances, I can perceive of no justification to deprive the creditor of an order for costs.

With regard to the costs of the Minister, as the second respondent, and the Attorney-General, I find that by his argument the debtor has contributed to the public benefit by assisting to clarify the law. He should not be penalised insofar as they are concerned because an adverse answer to his contentions has been given. See Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S) at 16; 1995 (9) BCLR 1221 (ZS) at 1233H-I; 1996 (1) SA 636 (ZS) at 649C-D.

THE ORDER

Accordingly, the application is dismissed. The applicant is to pay the first respondent's costs, including those incurred by the postponement of 30 September 1996.

McNALLY JA: I agree.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Chirunda & Partners, applicant's legal practitioners

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

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

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MUCHABAIWA v GRAB ENTERPRISES (PVT) LTD 1996 (2) ZLR 691 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

18 November & 3 December 1996 Judgment No. S-230-96

Flynote

Suretyship - surety - liability of - agreement signed in blank and thereafter completed - whether signatory liable

Headnote

A person who subscribes to an act of suretyship "in solidum and [as] co-principal debtor" is, as far as the creditor is concerned, a surety who has undertaken the obligations of a co-debtor. His obligations are co-equal in extent with those of the principal debtor and thus of the same scope and nature. He is liable jointly and severally with the principal debtor, but does not undertake a separate and independent liability as a principal debtor. He is a surety and so if the principal obligation is non-existent or illegal, the surety is not bound to the creditor. If he signs an act of suretyship, he binds himself to satisfy the obligations of the principal debtor, even if those obligations are not specifically spelt out in the suretyship document.

There is a divergence between our law and that of South Africa as regards the liability of a surety who signs a deed of suretyship in blank, leaving the details to be completed later. In South Africa, a document which omits essential details of a suretyship contract by leaving blank spaces cannot embody such a contract and the signature is ineffective to bind the subscriber. In Zimbabwe, though, the ordinary rules governing the signing of a document without reading it apply. The general principle, commonly referred to as caveat subscriptor, is that a party to a contract is, in general, bound by his signature, whether or not he read and understood the document, or if the contract was signed with blank spaces to be filled in later. It might be possible to repudiate the document in

KORSAH JA

limited circumstances, such as where there had been fraud or coercion, or where the document was in a language that the signer did not understand.

Cases cited:

Burger v Central SA Rlys 1903 TS 571

Choonora v Rahim 1960 (2) SA 504 (W)

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Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A)

Mahomed v Lockhat Bros & Co Ltd 1944 AD 230

National & Grindlays Bank v Yelverton 1972 (1) RLR 365 (G); 1972 (4) SA 114 (R)

National Industrial Credit Corp (Rhod) Ltd v Gumede & Anor (2) 1964 (4) SA 258 (SR)

Neon & Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A)

Sapirstein & Ors v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 (A)

Wiehahn NO v Wouda 1957 (4) SA 724 (W)

The court referred to the following statutes:

General Laws Amendment Act 50 of 1956 (South Africa), s 6

Case Information

The appellant in person

A J Dyke, for the respondent

Judgment

Korsah JA: This is an appeal against a decision of the Magistrate's Court Harare dated 10 October 1995, refusing to rescind a default judgment entered against the appellant.

So appealing is the lucidity of Mr Dyke's heads of argument in this appeal that I have unashamedly followed it almost verbatim.

The respondent sued Pace Electrical (Pvt) Ltd and others, inclusive of the appellant, in the Magistrate's Court claiming the sum of $24 427,43 and $40, together with interest at the prescribed rate from the date of summons to the date of payment and collection commission, together with costs on a legal practitioner and client scale arising out of an agreement of lease entered into between the respondent and Pace Electrical (Pvt) Ltd in terms of which agreement of Lease Pace Electrical (Pvt) Ltd failed to pay rentals.

The respondent's action against the appellant and others was in respect of

certain guarantees executed by them in favour of the respondent as "sureties in solidum and co-principal debtors" for Pace Electrical's due performance of its obligations in terms of the agreement of lease.

The writ of summons was served on 11 April 1995 at Factory No. 2, Stand 16834 Graniteside, Harare, which Pace Electrical and others inclusive of the appellant had furnished under the act of suretyship as his domicilium citandi et executandi. All those served, inclusive of the appellant,

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failed to enter appearance to defend the action and judgment in default of appearance was duly entered against them on 7 July 1995.

On 25 August 1995, an application was instituted by all those adversely affected by the judgment for a rescission of the judgment entered against them. The affidavit relied upon in support of the application was deposed to by the appellant.

The appellant maintained in his supporting affidavit for that application for rescission of judgment that he did not receive the summons. He was made to understand that the summons was served on 11 April 1995, at the offices of Pace Electrical (Pvt) Ltd at 16834 Graniteside, Harare, which he had chosen as his domicile for the purpose of serving summons and levying execution, by fixing the summons to the outer principal door of that company's premises.

The appellant contended that he was no longer a part of Pace Electrical (Pvt) Ltd and that he had severed his association with the company and had no business links with Pace Electrical at that company's registered office.

It was the appellant's further contention that he was, therefore, not in wilful default and that he had a *bona fide* defence to the respondent's claim. In attempted substantiation of his defence of good faith the appellant alleged that he signed the act of suretyship in blank form without sight of the relevant agreement of lease and that had he been aware that the suretyship related to an agreement of lease in the form that the agreement of lease was couched, he certainly would not have signed it.

Finally, the appellant contended that the magistrate's court did not have jurisdiction to entertain the claim and that it was not proper to claim collection commission, and costs on the higher scale from him in view of the fact that the act of suretyship which he signed did not provide therefor.

KORSAH JA

The issue of wilful default was not seriously contended in the court of first instance and Mr Dyke declined to make any submissions in that regard.

As earlier stated, the appellant, by subscribing to the act of suretyship bound himself, not only as surety, but, as expressly stated in the said Act, also as co-principal debtor. Mr Dyke rightly submitted that, one who has bound himself as surety and co-principal debtor is, so far as the creditor is concerned, a surety who has undertaken the obligations of a co-debtor; his obligations in the latter respect are co-equal in extent with those of the principal debtor and thus of the same scope and nature: Caney's Law of Suretyship 4 ed p 50.

Mr Dyke, relying heavily on Caney *supra*, submitted that a person who binds himself as surety and co-principal debtor is liable both jointly and severally with the principal debtor: Mahomed v Lockhat Brothers & Co Ltd 1944 AD 230 at 238; Neon & Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A) at 472B. But even though a surety binding himself as a co-principal debtor places himself in the same position as a principal debtor, he does not undertake a separate and independent liability as a principal debtor. He is a surety and so if the principal

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obligation is non-existent or illegal, the surety is not bound to the creditor: Wiehahn NO v Wouda 1957 (4) SA 724 (W) at 726; Choonora v Rahim 1960 (2) SA 504 (W); National Industrial Credit Corporation (Rhodesia) Limited v Gumede & Anor (2) 1964 (4) SA 258 (SR) at 262-3.

In Neon v Cold Cathode Illuminations (Pty) Ltd v Ephron, *supra*, the South African Appellate Division made it abundantly clear that, in general, the only consequence that flows from the surety also undertaking liability as a co-principal debtor is that *vis-à-vis* the creditor he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and he becomes liable jointly and severally with the principal debtor. Therefore, on the face of the act of suretyship signed by the appellant in the instant case, he bound himself to satisfy the obligations of the principal debtor - Pace Electrical (Pvt) Ltd - even though those obligations were not specifically spelt out in the suretyship document. It does not lie in his mouth to assert, as he contended in his affidavit in support of the application for rescission of judgment, that he is not liable for the obligations set out in the agreement of lease.

The main defence raised by the appellant, and persisted with before us, in spite of Valerie Joan Skeates, deposition to the contrary, was that he signed the act of suretyship which had a number of blank spaces when presented to

him without the agreement of lease and that the blank spaces were later filled in to create the obligations which form the foundation of this Act; that had he been aware that the suretyship act related to the company's obligation under a lease agreement he would never have subscribed to it. He does not divulge to what other transaction he imagined, at that time he appended his signature to the deed, the act of suretyship could possibly relate.

Even if the events as averred by the appellant are accepted (which they are not), two questions arise for determination:

(a) Is a suretyship agreement signed in blank and thereafter completed a valid one? and

(b) Do the facts in this matter indicate the truthfulness of the appellant's assertions in this regard?

The divergence, in this regard, between our law and that of South Africa, which is encapsulated in s 6 of their General Laws Amendment Act 50 of 1956 (as amended by s 34 of Act 80 of 1964) must immediately be brought to the fore. Section 6 of the above mentioned South African legislation provides that:

> "No contract of suretyship entered into after the commencement of this Act (22 June 1956) shall be valid unless the terms thereof are embodied in a written document signed by or on behalf of the surety; provided that nothing in this section contained shall affect the liability of the signer of an aval*(243) under the laws relating to negotiable instruments."

In Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A) it was held that, in terms of s 6 of the General Laws Amendment Act, a surety must sign a written document embodying the contract

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of suretyship and, since a document which omitted essentials of a suretyship contract by leaving blank spaces could not embody such a contract, the signature thereon was ineffective to bind the subscriber. In other words, failure to include any of the relevant terms in the body of the suretyship agreement meant that there was no compliance with s 6, and the contract was void. See Sapirstein & Ors v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 (A) at 12B-D. The result of these decisions is that in South Africa the signatory is effectively bound if he subscribed to the contract of suretyship only after the essentials had been inserted.

KORSAH JA

Mr *Dyke* submitted, rightly in my view, that in the absence of a provision in our law similar to s 6 of the General Laws Amendment Act of South Africa, the ordinary rules governing the signing of a document without reading the contents thereof ought to apply to subscribing to a suretyship document in blank.

The general principle which applies to contracts, and commonly designated as caveat subscriptor, is that a party to the contract is bound by his signature, whether or not he has read or understood the contract, or the contract was signed with blank spaces later to be filled in. Expatiating on this principle in National and Grindlays Bank v Yelverton 1972 (1) RLR 365 (G) at 367; 1972 (4) SA 114 (R) at 116G-H, Davies J cited with approval the following statement by Innes CJ in Burger v Central South Africa Railways 1903 TS 571 and 578 (decided before the promulgation of s 6 of the General Laws Amendment Act):

> "It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effects of the words which appear over his signature. There are, of course, grounds upon which he may repudiate a document to which he has put his hand. But no such grounds have been shown to exist in the present case. Consider the circumstances under which this note was signed. Neither fraud nor misrepresentation has been alleged; nothing was said by any railways official which misled the signatory; the language of the document was one which the consignor understood, no pressure of any sort was exercised. All that can be said is that the consignor did not choose to read what he was signing, and after he had signed did not know the particulars of the regulations by which he had agreed to abide. For the court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching consequences, and would be a principle unsupported y any principle of our law. The mistake or error of the signatory in the present case was not such justus error as would entitle him to claim a restitutio in integrum, or as could be successfully pleaded as a defence to an action founded upon the written contract, and therefore it cannot be used for the purpose of attacking that contract when the railway seeks to rely upon it."

Davies J at p 369 (117H of the South African report) in the National Grindlays Bank Ltd case *supra*, observed that:

> "There is authority dealing with the position which arises in the case of

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KORSAH JA

> negotiable instruments. Cowen on the *Law of Negotiable Instruments in South Africa* deals with the matter at p 186, where he says:
>
> > 'A lucid summary of the governing principles of the English Common Law, which as we shall see accords

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> with South African law on the subject, was given by Brett LJ in Baxendale v Bennett. The law as to the liability of a person who accepts a bill in blank is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorise him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorised the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable.
>
> Similarly, in Smith v Prosser, Fletcher Moulton LJ explained the law as follows: "If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of the agent in a way not obvious on the face of the instrument".'
>
> It seems to me that, while one must be careful in extending the principles relating to negotiable instruments to contracts generally, what is there said has general application."

On these authorities, the appellant herein cannot be permitted to resile from the act of suretyship to which he subscribed.

The above submissions were made on the assumption that the appellant's assertion that the act of suretyship was signed in blank was true. This, however, was not a fact admitted by the respondent. The respondent's stance at all times, as declared in the opposing affidavits filed on its behalf, has been that the lease agreement and act of suretyship were forwarded to the appellant together at the same time, there being no blank spaces left on either document, and they were returned together at the same time with the act of suretyship duly subscribed to by the appellant. It is of considerable significance that, in this regard, the appellant did not see it fit to traverse the assertions made by Valerie Joan Skeates as to the delivery of the documents for signature.

KORSAH JA

It was accordingly submitted by Mr Dyke that even if the appellant were not in wilful default he had no *bona fide* defence to the respondent's claim and in the result his application for rescission of judgment deserved the fate meted out to it.

Finally, the appellant put in issue the jurisdiction of the Magistrate's Court to deal with the matter, because of the amount claimed. In response thereto Mr Dyke submitted that in terms of s 11(j) of the Magistrates Court Act [Chapter 7:10] in the light of the fact that the respondent's cause of action was in respect of arrear rental payable over a period of time, each non-payment of rental gave rise to a fresh cause of action and that there is no bar to a plaintiff instituting a cumulative action based on separate causes of action arising from the failure of a tenant to pay rentals to his landlord on due date.

Furthermore, the appellant is estopped from challenging the jurisdiction of the magistrate's court to entertain the matter because clause 19(b) of the agreement of lease specifically stipulates that the tenant, to whom the appellant bound himself to be surety and co-principal debtor and so can have no superior rights, consents to the jurisdiction of the magistrate's court in respect of any legal action that may arise as a result of the breach or any of the terms and conditions of this lease. The challenge to the jurisdiction of the magistrate's court in this matter was therefore

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still-born.

The appeal is accordingly dismissed with costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Lofty & Fraser, respondent's legal practitioners

HUNYANI PAPER & PACKING LTD & ANOR v KADHANI 1996 (2) ZLR 699 (HC)

Court **High Court, Harare**

Devittie J

Application for confirmation of provisional order of sequestration

25 July & 4 December 1996 Judgment No. HH-165-96

Flynote

Insolvency - compulsory sequestration - advantage of creditors - proof - onus - act of insolvency as *prima facie* evidence that sequestration would be to advantage of creditors - allegation by respondent that he is actually solvent - unresolved claim brought against petitioner - insufficient to discharge onus

Headnote

The applicants, both creditors of the respondent, obtained judgments against him. Writs of execution secured nulla bona returns. The forced sale of the respondent's house brought no benefit to the creditors, as the sum realised was far less than the amount secured by the mortgage bond. Accordingly, the respondent's estate was provisionally sequestrated and on the return day they sought confirmation of the provisional order. The respondent opposed the application on the grounds that (1) he was not insolvent; (2) the applicants had not discharged the onus of proving that there was reason to believe that sequestration would be to the advantage of the respondent's creditors; and (3) there were in any event grounds on which the court should exercise its discretion in his favour. It was accepted that the respondent had committed an act of insolvency. In asserting that he was nonetheless solvent, the respondent said that his assets exceeded his liabilities because he had instituted proceedings against the second appicant for unpaid wages and other benefits.

Held, that ordinarily the onus is on the judgment creditor to show that it will be to the advantage of the creditors if the respondent's estate is sequestrated. The commission of an act of insolvency increases the probability that it will be to the advantage of the creditors if the estate is

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DEVITTIE J

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sequestrated. If no evidence is led by the debtor to controvert the *prima facie* case against him, the creditor would succeed; but that is not to say that the onus shifts.

Held, further, that the respondent's assertion that he was in fact solvent depended on a civil dispute which had yet to be decided. There were strong indications that the claim was not *bona fide* and had been brought to frustrate the sequestration proceedings, such as the fact that the claim was only instituted in the very week that the present case was heard.

Held, further, that there were no grounds on which the court could rely to exercise its discretion in favour of the respondent.

Cases cited:

Coch v Lichtenstein NO 1910 AD 178

Dal's Svc Station (Pvt) Ltd v Labuschagne 1962 (3) SA 723 (SR)

de Waard v Andrew & Thienhous Ltd 1907 TS 727

Hanan v Turner 1967 RLR 293 (G); 1967 (4) SA 368 (R)

Ex p Meaker NO, in re Heyns Bros 1965 RLR 237 (G)

National Milling Co Ltd v Learmont t/a Scotia Bakery 1954 SR 18; 1954 (2) SA 90 (SR)

Scottish Rhodesia Finance Ltd v Ridgeway 1978 RLR 452 (G); 1979 (2) SA 251 (R)

Swellendam Municipality v Kennedy 1934 CPD 448

Wilkins v Pieterse 1937 CPD 165

The court referred to the following statutes:

Insolvency Act [Chapter 6:04], s 15

Case Information

A J Dyke, for the applicants

P Nherere, for the respondent

Judgment

Devittie J: On ll October l994 the first applicant obtained judgment in this court against the respondent in the sum of $740 000. Upon a writ of execution being issued there was a return of nulla bona. On 7 March 1995, the second applicant obtained judgment against the respondent for the sums of $343708, $469218 and $135277,70.

On l6 December l994 the respondent's immovable property, namely, 113 Gaydon Road, Greystone Park, Harare, was offered for sale under a writ of execution, at the instance of Central Africa Building Society, and in respect of arrears under two mortgage bonds in the region of $210 236. It is understood that the property has been sold for a sum far below the

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amount

DEVITTIE J

secured by the mortage bond. There is a third bond in respect of the immovable property, in favour of Stanbic Bank of Zimbabwe, in the sum of two million dollars.

In consequence, the estate of the respondent was provisionally sequestrated. The applicants now seek confirmation of the provisional order. The respondent opposes it upon three grounds. Firstly, the respondent contends that he is not insolvent. Secondly, it is said that the applicants have not discharged the onus of establishing that there is reason to believe that the sequestration would be to the advantage of the respondent's creditors. Thirdly, it is contended that even if this court were to be satisfied that an order of sequestration would be to the advantage of the creditors, there exist grounds upon which this court should exercise a discretion in the respondent's favour.

Section 15 of the Insolvency Act [Chapter 6:04] provides that on the return day of a rule nisi, if the court is satisfied that -

> "(a) the debtor has committed an act of insolvency or is insolvent; and
>
> (b) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated; and
>
> (c) the petitioner has a claim against the debtor referred to in subsection (l) of section 12; and
>
> (d) subsection (2) of section 14 has been complied with;
>
> the High Court may grant an order placing the estate of the debtor under sequestration.'

The requirement in para 1(a) of s 15 is either that the debtor has committed an act of insolvency, or that he is insolvent. As it is accepted that the respondent has committed an act of insolvency, it does not avail him to rely upon the ground that he is solvent, and I did not understand Mr Nherere to so argue. He submitted that in determining whether there was reason to believe that sequestration will be to the advantage of respondents creditors regard should be had to the fact that the respondent is solvent.

Upon whom does the onus lie to astablish that there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated? There are decisions of this court which held that ordinarily the

DEVITTIE J

onus is on the judgment creditor, but that where a debtor has committed an act of insolvency, the onus is on him to show that it will not be to the advantage of creditors if his estate is sequestrated: Ex p Meaker NO: In re Heyns Brothers 1965 RLR 237 (G); *Hanan v Turner* 1967 RLR 293 (G); 1967 (4) SA 368 (R).

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In Ex p Meaker *supra* Goldin J (as he then was) said:

> "It has been held in McGillivray v Edmundson 1958 R & N 317; 1958 (3) SA 348 (SR) that where a provisional order had been given on the allegation of the commission of an act of insolvency, and the debtor does not oppose on the return day,the question of advantage to creditors does not arise and the court would presumably confirm the rule. If the decision in McGillivray's case is correct, and I respectfully am of this opinion, then it would be illogical and wrong in law to hold that simply because there is opposition to the confirmation of the rule (even it be opposed on the ground of abscence of advantage to the creditors) an onus should be placed upon the petitioner to prove something which in the first place he did not allege. In other words, an applicant is entitled to a provisional order of sequestration based on an act of insolvency without without having to allege or prove that sequestration is to the advantage of the debtor's creditors. In the absence of opposition upon the return day the question of adantage to credit would not normally arise. Accordingly, if the debtor or any intervening creditor opposes the confirmation of the rule then the onus should be upon such a respondent to prove absence of advantage to creditors. I have mentioned earlier some of the authorities which favour the view that in a case such as this the onus of proving absence of advantage to creditors is upon the debtor or any party raising the matter as a ground for opposing the confirmation of the rule."

I prefer the view expressed by Hathorn J in National Milling Co Ltd v Learmont t/a Scotia Bakery 1954 SR 18; 1954 (2) SA 90 (SR):

> "The onus is undoubtedly on the petitioner to establish the insolvency of the respondent and that sequestration will be to the advantage of creditors. I have already indicated that *prima facie* these two facts have been established. If, however, the respondent should fail to lay sufficient information before the court to escape the consequences of the facts *prima facie* established, the petitioner would, in my judgment, succeed".

This approach commends itself to good sense.The commission of an act of

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insolvency will ordinarily increase the probability that it is to the advantage of creditors that his estate be sequestrated. If no evidence is adduced by the debtor to controvert the *prima facie* case against him then the creditor would succeed, but that is not to say the onus shifts.

The South African approach is clearly that the onus does not shift. In Wilkins v Pieterse 1937 CPD 165 at 167 Davis J said:

> "In my view today, still, very strong grounds will have to be adduced to cause a court even to doubt whether, an act of insolvency having occurred, sequestration shall be to the advantage of creditors. Of this I am certain: Parliament is not intending to make it progressively more difficult for a creditor to obtain his just rights against a debtor "
>
> > 'Once the onus in a matter such as this, where there is only one issue namely whether there is or is not reason to believe that sequestration will be to the advantage of creditors is placed upon one of the parties there it remains throughout: it can never be shifted."

Davis J cited the following excerpt by Innes CJ in Coch v Lichenstein NO 1910 AD 178 at 192:

> "It frequently happens, however, that in seeking to discharge the burden of proof which the law casts upon him a party to an action produces evidence from which the court would presume the existence of facts upon which such discharge depends in the absence of any other evidece on the other side sufficient to rebut the presumption. The position thus created, however, does not amount to a shifting of the legal onus, but to a question of the value and effect of the evidence by the parties respectively. In other words the court has under such circumstances to

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decide, upon a consideration of all the facts placed before it, whether the onus has been finally satisfied or not.'

In de Waard v Andrew & Thienhous Ltd l907 TS 727 at 733 Innes CJ said:

"Now, when a man commits an act of insolvency he must expect to be sequestrated. It is not sprung upon him; first, a judgment is obtained against him, then a writ is taken out, and he must expect that if he does not satisfy the claim, that his estate will sequestrated. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says

DEVITTIE J

'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.'

To my mind, the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.'

Whitaker J in Scottish Rhodesia Finance Ltd v Ridgeway 1978 RLR 452 (G); l979 (2) SA 251 (R) held that our courts should adopt the position in South Africa.

I yield to the view that the onus remains on the creditor and that proof that the debtor has committed an act of insolvency does not shift the onus - it creates strong *prima facie* evidence that he is insolvent and that it would be to the advantage of creditors that his estate be sequestrated.

I proceed therefore to examine the respondent's assertion that he is solvent and that it would not be to the advantage of creditors that his estate be sequestrated. The respondent says that his assets exceed his liabilities on the basis that he has instituted proceedings against the second applicant in payment for the amount in the region of five million dollars. The respondent had, by the time this matter was heard, instituted proceedings on 9 July l996 against the second applicant. His declaration reads as follows:

" 3. On or about l8 September l990 plaintiff and defendant entered into contract in terms of which defendant employed plaintiff as its Group Managing Director and Chief Executive Officer.

4. The said contract was for a period of 5 years from l October l990 to 30 September 1995.

5. On or about 31 August l992 plaintiff and defendant purported to enter into an agreement terminating plaintiff's employment with defendant on certain conditions.

6. The said purported agreement of 31 August l992 was null and void. Accordingly the plaintiff's employment contract was not terminated thereby.

7. In the circumstances plaintiff's contract for employment with the defendant ran its full course to 30 September 1995.

DEVITTIE J

8. In terms of its contract for employment with the plaintiff, defendant was obliged to pay plaintiff his salary and other entitlements upto to 30 September l995.

9. Defendant failed to pay plaintiff his salary and other entitlements for a period from l September l992 to 30

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September l995.

10. Plaintiff's unpaid salary and other entitlements totalled $5 289 064.

11. At all material times plaintiff was really able and willing to render his services to defendant.'

It is clear therefore that respondent's assertion that he is in fact solvent depends upon a civil dispute which is yet to be decided.

The applicant's counsel submitted that the respondent's civil claim against applicant is not *bona fide* for the following reasons: firstly, that as the respondent's resignation was voluntary he cannot claim to be still employed by applicant. Secondly, that respondent's claim for unpaid salary was only instituted in July l996, long after the events giving rise to his cause of action had arisen. It does seem to me that the respondent's claim for unpaid salary is not *bona fide* and has been instituted in order to defeat the sequestration of respondent's estate. I shall refrain from any detailed comment on the merits of the respondent's claim save to emphasise that the claim was instituted in the week that this matter was heard and has been relied on to oppose the order sought. I also take into consideration that the respondent's claim for unpaid salary is in respect of a period when he performed no services on his employers' behalf and that there has been no suggestion that the respondent at any time tendered his ervices during the period in question.

In Swellendam Municipality v Kennedy l934 CPD 448 the court found that the creditor had used sequestration proceedings as a means of stifling the action which the debtor proposed to bring and accordingly declined to confirm the rule. In National Milling Co Ltd v Learmont *supra*, a final order of sequestration was made in circumstances where the debtor had not placed sufficient information regarding his claim for damages against the creditor. In Dal's Service Station (Pvt) Ltd v Labuschagne l962 (3) SA 725 (SR), the debtor failed to prove on a balance of probabilities that his assets exceeded his liabilities but the court exercised its discretion in favour of the respondent. It found that there was substance in the submission that the sequestration proceedings had been brought to embarass the debtor and to compromise his

claim in the arbitration proceedings. In my view, the respondent has failed, in the words of Hathorn J, to escape the consequences of the facts established by the applicants. I am not satisfiedthat the respondent's claim is genuine. In my view, the claim has been brought to frustrate the sequestration proceedings. Finally, Mr Nherere urged the court to find that even if the applicants have discharged the onus of establishing the requirements of s 15, there exist good grounds upon which the court ought to exercise a discretion in the respondent's favour and not order sequestration. The grounds upon which he relied were that the respondents claim was against the applicants and not any other creditors and that the respondent's claim has good prospects of success. I have already expressed my view on the merits of the respondent's claim and I abstain from any further comment on the merits. I am bound to take into account that other creditors have not opposed the order sought. I can therefore see no basis upon which this court should exercise its discretion against sequestration.

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In regard to costs, I do not think that the respondent was justified in his opposition. I have already found that his claim against the applicants which was instituted in the week that this matter was heard is not *bona fide* and was brought in an attempt to frustrate the sequestration proceedings. No circumstances exist therefore to justify an order that the costs of these proceedings should be the costs of sequestration. I would accordingly confirm the provisional order with costs.

Coghlan, Welsh & Guest, applicant's legal practitioners

Gula-Ndebele & Partners, respondent's legal practitioners

POSTS AND TELECOMMUNICATIONS CORPORATION v MODUS PUBLICATIONS (PVT) LTD 1996 (2) ZLR 707 (HC)

Court **High Court, Harare**

Devittie J

Civil action

6 August & 4 December 1996 Judgment No. HH-166-96

Flynote

Delict - actio injuriarum - defamation - plaintiff - statutory corporation - whether statutory corporation entitled to sue for defamation - factors to be taken into account - public policy considerations involved

Headnote

Whether or not a statutory corporation can sue for defamation depends on the extent to which the corporation is under State control. The court will examine particularly the nature and functions of the corporation to determine the extent of State control. If the corporation has sufficient autonomy from the Government in carrying out its functions to be regarded as having a separate existence, it will be entitled to sue for defamation. If, on the other hand, it is so closely associated with and linked to the Government that it must be regarded as part of the State, it will not be entitled to sue for defamation. This is a matter of degree and it is often not easy to determine this issue because the corporation may have some attributes pointing towards autonomy and other attributes pointing towards Government control.

The emerging consensus is that economic progress in developing nations cannot be achieved without the observance of democratic values. One of the important democratic values is freedom of individuals to criticise the conduct of the affairs of government; governments should not be permitted to seek to stifle such criticism by using public funds to sue critics for defamation.

By adopting a policy-based approach the courts are able to develop the law on a case by case basis and to respond to the changing character of

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statutory corporations, including the increasing trend towards privatisation of these corporations. The need to allow statutory corporations equal protection in a competitive economy must be balanced against the need to restrict actions for defamation by statutory corporations in cases where policy considerations dictate a denial of the right to sue. It may be that the way forward is that once it is accepted that a statutory corporation is under State control the right to sue for defamation should be denied, regardless of the degree of State control, unless there are compelling policy considerations to the contrary.

The court decided that the Posts and Telecommunications Corporation is not entitled to sue because it is under such a degree of Government control that it is, in effect, part of the State apparatus. Additionally, policy considerations justified the denial of the Corporation's right to sue. Firstly, as the Corporation enjoys a monopoly, the citizen has no other recourse when the service provided does not meet his approval save to voice his criticism. His right of criticism should not in these circumstances be inhibited by the threat of a civil action. Secondly, as the Corporation is entitled to receive a Government subsidy, it would not be proper to allow the funds of the Corporation derived from the citizens to fetter the right of citizens to criticise it.

Cases cited:

Baccus SRL v Servicio Nacional Del Trigo [1956] 3 All ER 715 (CA)

Banco de Mozambique v Inter-Science Research & Development Svcs (Pvt) Ltd 1982 (3) SA 330 (T)

Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Properties [1954] AC 584; [1954] 1 All ER 969 (HL)

City of Chicago v Tribune Co 307 Il 595 (1923)

Die Spoorbond & Anor v SA Rlys; van Heerden & Ors v SA Rlys 1946 AD 999

Dhlomo NO v Natal Newspapers (Pvt) Ltd & Anor 1989 (1) SA 945 (A)

GA Fichardt Ltd v The Friend Newspapers Ltd 1916 AD 1

Lerros Motors (Pvt) Ltd v Min of Labour 1990 (1) ZLR 349 (S)

Superannuation Fund Invstm Trust v Comr of Stamps (SA) (1979) 53 ALJR 614

Trendtex Trading Corp Ltd v Central Bank of Nigeria [1977] 1 All ER 881 (CA)

ZESA v Modus Publications 1996 (2) ZLR 256 (H)

Case Information

J C Andersen SC, for the plaintiff

E W W Morris, for the defendant

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DEVITTIE J

Judgment

Devittie J: The plaintiff is a statutory corporation. It claims that it has been defamed. In its declaration the plaintiff claimed that it suffered injury to its reputation by reason of the publication in the Financial Gazette, a weekly newspaper, of three articles.

The first article of 30 March l was entitled - "Cellphone Scandal Deepens". The plaintiff alleged that this was defamatory in that the article "clearly states or imputes that which it is intended to impute and was so understood by the persons to whom the newspaper was distributed, namely that the plaintiff was embroiled, involved in or was party to a 'scandal' 'scam' and/or scheme to circumvent Tender Board procedures in an irregular and wrongful manner." The second article of 13 April was entitled - "PTC Conspiracy to rig Cellular Tender". The plaintiff's allegation is that this article imputed unlawful and irregular conduct by it.

A brief background will place these articles in proper perspective. They concern the introduction of cellular phones into this country. In order to launch a cellular service the plaintiff, which enjoys a monopoly in the field of telecommunications, put out tenders through the Government Tender Board inviting tenders from the private sector. The Tender Board is appointed by Government and its function is to consider and adjudicate on tenders for Government contracts. In its decision making processes it should be seen to be transparent and fair - it must not be influenced by extraneous considerations.

The third article of l8 May l995 was entitled - "PTC phone bugging causing concern". This article also stated that "there is concern in both Government and PTC circles over the illegal wire tapping of both private and internal PTC telephone lines by senior management in the Corporation raising the spectre of espionage activities". The allegation in respect of this article is that it imputed that the plaintiff was guilty of spying or of having engaged in criminal conduct warranting the intervention of the Central Intelligence Organisation. Damages in the sum of $60 000 are claimed.

To this claim the defendant took exception on the grounds that the plaintiff is an alter ego of the State and as such has no fama and no locus standi in judicio to sue for defamation.

The defendant's counsel submitted that the plaintiff was the servant or agent of the State, and accordingly was not entitled to bring an action for defamation. The plaintiff's counsel contended that the plaintiff is not a department, organ,

DEVITTIE J

emanation or part and parcel of the State, and has locus standi to sue for defamation. He further submitted that there were no reasons of public policy which would justify a denial of the right to sue. The question therefore whether a department or organ of the State can sue for defamation does not arise for consideration - clearly, the exception was argued on the clear

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ground that an organ of the state cannot sue for defamation. Accordingly, if I find that plaintiff is an organ of the state, I must grant the exception.

A central feature of the British economy in the post second world war period was the proliferation of statutory corporations. One of the reasons was to facilitate the provision of services or goods to the public by an independent body with the state retaining a measure of control. In many cases, corporations were granted an exclusive monopoly in the services they provided. They were entitled to a government subsidy if they did not realize a trading profit. The advantages to the state were obvious. It divested itself of an administrative burden whilst retaining a measure of control.

The dual character of statutory corporations is illustrated in the Australian case of Superannuation Fund Investment Trust v Commissioner of Stamps (l979) 53 ALJR 614 (SA). Stephen J said:

> "No doubt in practise a statutory corporation will seldom be either a mere passive instrument or wholly autonomous. If the former its creation would scarcely be worthwhile: departmental officers could serve the purpose just as well. If the latter it would savour of Frankenstein's monster, hence the usual retention of some control, even if it be no more than some power of appointment and renewal of the members of its governing body, perhaps the existence of an obligation to make periodic reports to Parliament or in particular, if public funds are in question, the imposition of audit and financial reporting procedures."

A statutory corporation is often not merely an organ of the State, but to a degree autonomous, and, not wholly autonomous but under a degree of State control.

As the leaders of the 1916 uprising wrote of the Irish Republic to which they were dedicated:

> "not merely free but Gaelic as well, not merely Gaelic but free as well."

It is the dual nature of statutory corporations that presents no little difficulty

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DEVITTIE J

in determining whether a statutory corporation is an organ of the state or has sufficient autonomy. This exception therefore trembles on the fine edge of the status of the plaintiff.

Mr Morris submitted that as plaintiff is an organ of the state it has no fama. I cannot accede to the submission that a statutory corporation has no fama on the sole ground that it is an organ of the State. I am prepared to accept that the plaintiff is a trading corporation and as such has a reputation to protect. The South African Appelate Division in G A Fichardt Ltd v The Friend Newspapers Ltd 1916 AD 1 held that a trading corporation had title to sue for defamation. Innes CJ stated the position as follows:

> " That the remedy by way of action for libel is open to a trading company admits of no doubt. Such a body is a juridical persona, a distinct and separate legal entity duly constituted for trading. It has a business status and reputation to maintain.
>
> And if defamatory statements are made reflecting upon that status or reputation, an action for the injuria will lie (see de Villiers' Law of Injuries at p 59). In the present case no special damages were proved; but that circumstance does not really affect the positon. Where words are defamatory of the business status and

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reputation of a trading company, I am not aware of any principle of our law which would make the right of action depend on proof of special damage."

More recently, in Dhlomo NO v Natal Newspapers (Pvt) Ltd & Anor 1989 (1) SA 945 (A) it was held that a trading corporation has a right to sue for damages in respect of a defamatory statement which is calculated to injure its business reputation. Rabie ACJ extended the right to a non-trading corporation. He reasoned that a non-trading corporation could, like a trading corporation, have a fama which deserves the protection of the law and that it would be illogical and unfair to deny such a corporation the right to sue for an injury to its reputation, but to grant it to a trading corporaton when it suffers injury to its reputation. The right of trading corporation to sue for defamation was however made subject to the condition that certain corporations may be denied the right to sue for defamation on the ground of public or legal policy.

Blackwell J, in a decision that was the subject of an appeal in Die Spoorbond & Anor v South African Railways; van Heerden & Ors v South African Railways 1946 AD 999, used a similar line of reasoning in upholding the right of the Railway Administration (which he accepted was an organ of

the State), to sue for defamation. He reasoned that as private corporations had the right to sue for defamation, the State was entitled to sue for defamation to protect its reputation as a trader, where it was involved in trade.

He also based his decision on considerations of fairness. When the State is engaged in competitive trade, he said, it should be allowed to sue when its trade is defamed. On appeal, the analogy that the State should be accorded the right to sue when it engages in trade because trading corporations were entitled to so sue was rejected, as was the reasoning that considerations of fairness dictated the recognition of such a right. The argument that was advanced in support of the right to sue was that the Railway Administration was a separate administrative entity that possessed special characteristics; it carried on the business of providing services to the public and was run on a commercial basis; special powers were conferred on it by the State; it had its own funds and it could sue and be sued in its own name. Some of these arguments have been advanced in support of the contention that the plaintiff as a statutory corporation is entitled to sue.

If I accept, as I have, that plaintiff has a fama, the question of its entitlement to sue is not necessarily resolved, because if it is an organ of the State then the right to sue must be denied.

Both counsel were agreed that the issue to be decided in the exception was whether the plaintiff is an organ of the State or its alter ego. In support of their respective contentions, counsel cited several case authorities. The cases cited do not concern actions for defamation. They involve questions where the right of a statutory corporation to sue or be sued in contract was dependent on its status. It is readily apparent from cases cited that a common thread emerges in the considerations that apply in determining the status of a statutory corporation.

In Bank Voor Handel en Scheepvaart NV v Administrator of Hungarian Properties [l954] AC 584

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at 616, Lord Reid said the following:

> "In my judgment, the question whether the custodian is a servant of the Crown depends on the degree of control which the Crown through its Ministers can exercise over him in the performance of his duties. The fact that a statute has authorised his appointment is, I think, immaterial, but the definition in the statute of his duties and obligations is highly important. In the ordinary way a civil servant's duties are not prescribed, though his salary may be fixed in Parliament, and I have no doubt that

DEVITTIE J

> he is a servant of the Crown. But when a statute creates an office it may give to the holder more or less independence from Ministerial control so the officer has to a greater or lesser extent a discretion which he alone can exercise, and it may be that the grant of any substantial independent discretion takes the officer out of the category of servants of the Crown for the present purposes. But I cannot find that the custodian has any such independent discretion."

In Superannuation Fund Invstm Trust v Comr of Stamps (SA) *supra*, it is stated that:

> "Of all kinds of provision that may be relevant to the determination of whether a statutory body (whether corporate or not) is the Crown the capacity of the Executive government to control its operations (whether directly by instruction or direction or indirectly by power to remove ... those in control of its operations), and the nature of its functions are the most important."

In Trendtex Trading Corporation v Central Bank of Nigeria [l977] 1 All ER 881 (CA) the court looked to the functions and control of the Bank of Nigeria in order to determine whether the Bank of Nigeria was a department of the Federation of Nigeria. The question of the Bank's status arose because the Bank, in answer to a writ, applied to set it aside on the ground that it was a department of the State of Nigeria and was therefore immune from suit under the doctrine of sovereign immunity. Lord Denning found that the Bank was not part of the State of Nigeria. He put it as follows at p 894:

> "I confess that I can think of no satisfactory test except that of looking to the functions of and control of the organisation. I do not think it should depend on the the foreign law alone. I would look to all the evidence to see whether the organisation was under govermental control and exercised governmental functions.That is the way we looked at it in Mellenger v New Brunswick."

In Baccus SRL v Servicio Nacional Del Trigo [1956] 3 All ER 715 (CA) at 732 Jenkins LJ held that the defendants were a department of the Government of Spain even though they were a corporate body:

> "On my view of the evidence, it is reasonably plain that while the defendants undoubtedly were constituted a juristic personality with powers resembling those of a natural person, they were only accorded

DEVITTIE J

> that status for the purposes for which they were formed; and the purposes for which they were formed, to put the matter very shortly, were the importing and exporting of grain for the Spanish Government in accordance with the directions of the Spanish Ministry of Agriculture and the policy from time to time laid down by the Spanish Government. Thus it seems to me that although their status was a corporate status, their functions were wholly those of a department of state."

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See also Banco De Mo ambique v Inter-Science Research and Development Services (Pvt) Ltd 1982 (3) SA 330 (T).

In Zimbabwe, too, the courts have looked to the functions and powers of statutory corporations in ruling on their status. In ZESA v Modus Publications HH-122-96*(244) Ziyambi J held that the plaintiff, a statutory corporation, was entitled to sue for defamation. In reaching that conclusion, the court examined the Act which created plaintiff and found that it was not an organ of the State. At p 4 of the judgment the learned judge stated:

> "It seems to me that plaintiff's position is analagous to that of the NSSA as was found in NSSA v Min of Defence *supra*. To quote the words of Gubbay CJ at p 170 of the report, which I respectfully adopt:
>
> > 'This analysis of the relevant sections of the Act convinces me that the appellant is not an entity completely severed from the State. The extent of Ministerial control over it renders unacceptable the argument advanced to the contrary. But I am wholly persuaded that what is revealed is a sufficient separation in identity between the appellant and that State. The requisite degree of independence is afforded the appellant by the cumulative effect of the unqualified powers which the lawmaker has bestowed upon it. I would stress especially, the right to sue in its own name, to administer every scheme and fund established under the Act, and its varied and wide ranging activities as set out in the schedule ...'
>
> I would therefore hold that plaintiff is not an organ of the State."

See also Lerros Motors (Pvt) Ltd v Min of Labour 1990 (1) ZLR 349 (S).

There is no dispute, as I understand, as to the considerations that apply in determining the status of the plaintiff. They may be summarised thus:

DEVITTIE J

(a) whether or not the entity concerned is a juristic person, possessed of a personality separate and distinct from that of government;

(b) the capacity and powers with which the entity is vested;

(c) the functions of the entity; and more particularly, whether such functions are of a governmental nature or otherwise;

(d) the degree of control exercised by the Government;

(e) the degree of financial autonomy enjoyed by the entity in question.

I now turn to examine the statute which created the Posts and Telecommunications Corporation.*(245) In terms of s 3, a body corporate is constituted which is capable of suing and being sued. The operations of the Corporation are controlled by a Board whose members are appointed by the Minister. The Minister designates the Chairman of the Board and the Deputy Chairman. He may on certain grounds require an appointed member to vacate office.

The Corporation's functions relate in the main to the provision of postal and telecommunication services as well as the provision of banking services. The Corporation is required to submit an annual report to the Minister in terms of the Audit and Exchequer Act as and such other reports

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as the Minister may require.

The Board has the power to make by-laws for the good management and conduct of postal, telecommunication and radio communication services and in relation to the general operations of the Corporation.

The Minister has the power, after consultation with the Board, to give the Corporation directions of a general character as appears to him to be in the national interest.

In terms of s 24(7), the President may give the Postmaster-General directions in relation to the services or facilities which the Corporation is capable of providing as appears to the President "to be requisite in the interest of public security of the maintenance of law and order."

The financial autonomy of the Corporation is extremely limited - the funds of the Corporation include monies appropriated by an Act of Parliament, and

the Minister has a fair measure of power in the investment of funds. The Board is obliged to comply with the directions the Minister may give in relation to the management of the General Reserve Fund. If monies in the General Reserve Fund are insufficient for the purposes of meeting a deficiency, the Minister may meet the whole or any portion of the deficiency out of monies appropriated for the purposes by an Act of Parliament and any such payment shall be regarded as a loan by the State.

It seems to me that the plaintiff is closely linked and associated with Government. It provides an essential public service in respect of which it enjoys a monopoly. It is guaranteed a government subsidy in situations where this is required to ensure its viability. Its operations are closely controlled by the Minister and its Chief Executive Officer may take directions from the President on any matter relating to the operations of the Corporation. It may be required to take certain actions in the national interest or in the interests of national security - indeed to comply with the Government's obligations to other states outside Zimbabwe.

I am driven to the conclusion that the plaintiff is so closely associated and linked to the Government as to be considered a part of, or the alter ego of, the State.

I have to say that the conclusion I have come to has presented some difficulty. A statutory corporation has attributes which can move one to the conclusion that it is an organ of the State although under some degree of State control -and it will have attributes which point to the conclusion that it has sufficient autonomy as to be regarded as having a separate existence. It is really a matter of degree and in many cases the status of a corporation will hang in an uneasy balance. My decision has turned on the degree to which the plaintiff is under State control.

That is the approach adopted in the cases I have cited, where the status of a statutory corporation had to be determined in deciding whether it could be sued in contract. I make no suggestion that the test in those cases was not appropriate, having regard to the factual context in which those cases were decided.

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But it seems to me that this case involves important policy considerations on which a decision on the plaintiff's entitlement to sue ought to be grounded. Such policy considerations include, but are not limited to, a finding on the degree to which a statutory corporation is under State control. To my mind,

DEVITTIE J

it is less than satisfactory that where the right of a corporation to sue for defamation is debated it should fall to be determined by the application of considerations which in essence turn on the degree to which the corporation is subject to government control.

In the Spoorbond case *supra* Schreiner JA based his decision on grounds of policy. He said (at 1012-1013):

> "I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State subjects, could be used to launch against those subjects actions for defamation because they have, forcefully and unfairly as it may be, criticised or condemned the management of the country."

In City of Chicago v Tribune Co 307 Il 595 (1923) Thompson CJ, in denying the City of Illinois the right to sue for defamation, stated that:

> "The fundamental right of freedom of speech is involved in this litigation and not merely the right of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to to criticize the Ministers who are temporarily conducting the affairs of his government ... If the right to criticise the government is a privilege which, with the with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions."

In Derbyshire County Council v Times Newspapers Ltd [1993] 1 All ER (HL) at 1013 Lord Keith stated that it is of the highest public importance that any governmental body "should be open to uninhibited public criticism" and that the threat of civil action inhibits free speech.

In my view, the observations made in the above cases apply to the present case, nonetheless so because of the dual character of corporations. It has to be accepted that statutory corporations are creatures of the State and are so perceived by the public, regardless of the degree of State control and a ruling by the court in that regard.

We live in a post cold-war era when the emerging consensus is that economic progress in the developing nations cannot be achieved without the observance

DEVITTIE J

of democratic values. In these circumstances it seems to me that these great issues ought not to be relegated to the background when they clearly emerge as the basis on which the substantive rights of the litigants in this case ought to be determined.

A policy based approach will allow the common law to develop on a case by case basis and in

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so doing to respond to the challenge posed by the changing character of statutory corporations. As the trend towards privatisation gathers pace, there will be less justification for determining the entitlement of a statutory corporation to sue for defamation by having regard to degree to which it is under governmental control.

The nature and character of statutory corporations continues to change as governments, driven by the *laissez-faire* philosophy, take measures to privatise and in so doing allow corporations in which the State is the sole shareholder to compete on the market on an equal footing with other competitors, without state subsidies and without the benefit of any monopoly. And yet, because of its very *raison d'être*, a statutory corporation will never be entirely free of State control. The degree to which it is or may become subject to State control will, in these circumstances, become an elusive test, with the result that defamation actions by statutory corporations may be permitted where public policy considerations clearly dictate a denial of the right to sue for defamation.

It is a question of placing in balance amongst other considerations the need to allow statutory corporations equal protection in a competitive economy where free market principles hold sway and,the need to restrict actions for defamation by corporations in cases where policy considerations dictate a denial of the right to sue.

In extending the right to sue for defamation to non-trading corporations, the South African courts have refrained from defining the criteria to be applied - preferring to leave it to the courts to decide the entitlement to sue on policy grounds and on a case by case basis. The approach, I see as the way forward, is that once it is accepted that a statutory corporation is under State control, then the right to launch a defamation action should be denied, regardless of the degree of State control, unless there are compelling policy considerations.

In my view, there are considerations of policy that justify the denial of the plaintiff's right to sue. In the first place, the plaintiff has a virtual monopoly in its field of trade. Because the plaintiff enjoys a monopoly, the citizen has

no other recourse when the service provided does not meet his approval, save to voice his criticism. His right to criticise should not in these circumstances be inhibited by the threat of a civil action. If no monopoly was enjoyed and the plaintiff was one of several competitors on the market, the citizen has a recourse: he takes his custom elsewhere.

In the Spoorbond case Schreiner JA said at 1012:

> "I am prepared to assume, for the purposes of the present argument, that the Crown may, at least in so far as it takes part in trading competition with its subjects, enjoy a reputation, damage to which could be calculated in money . On that assumption, there is certainly force in the contention that it would be unfair to deny the Crown the weapon, an action for damages for defamation, which is most feared by calumniators. Nevertheless, it seems to me that considerations of fairness and convenience are on balance distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation."

To the extent that damage to the plaintiff's business reputation may be calculated in money I am

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satisfied that it would not be fair to accord the plaintiff the right to sue.

Furthermore, the plaintiff receives or is entitled to a Government subsidy when it has a deficit. Adopting the reasoning of Schreiner JA in the Spoorbond case *supra*, it would not be proper to allow the wealth of the plaintiff derived from the citizens of this country to fetter the right of citizens to criticise it.

I would accordingly grant the exception with costs .

Coghlan, Welsh & Guest, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

JESSE v CHIEF IMMIGRATION OFFICER & ORS 1996 (2) ZLR 720 (HC)

Court **High Court, Harare**

Smith J

Civil application

7 November & 11 December 1996 Judgment No. HH-173-96

Flynote

Family law - marriage - validity - non-citizen marrying a Zimbabwean citizen - presumption in favour of validity of marriage - what would have to be shown to establish that marriage was one of convenience to evade immigration laws

Headnote

The applicant, a citizen of the United Kingdom, came to Zimbabwe in 1994 as the result of an introduction to Mr Jesse, a citizen of Zimbabwe. She stayed here some two weeks, went back to England, sold her effects and returned to Zimbabwe in late November 1994. She obtained a three month vistor's visa on arrival, and extended it while in Zimbabwe. During the time she was in Zimbabwe, the applicant lived with Mr Jesse. The extended visa expired on 8 June 1995 and the next day she was declared a prohibited person and deported. Two weeks later, Mr Jesse applied unsuccessfully for a temporary permit for the applicant to enter Zimbabwe so that he could marry her. The application was refused, but the applicant entered Zimbabwe clandestinely. She and Mr Jesse applied for a marriage licence. She left Zimbabwe again and returned in early July, using a new British passport which gave her surname as Jesse. She and Mr Jesse married in Bulawayo. She subsequently went back to the United Kingdom, where she gave birth to a chld.

In her application, the applicant sought an order (1) setting aside the order declaring her a prohibited person, (2) declaring that her marriage was genuine and (3) that she be granted citizenship of Zimbabwe. The respondents argued that the marriage was one of convenience.

Held, that the courts will not lightly assume that a marriage is one of

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convenience, especially where there is a child of the marriage and a consequence of declaring the marriage invalid would be to make the child illegitimate.

Held, further, that the two ingredients of a "marriage of convenience" (which is a popular, but not a legal, term) are that the marriage was entered into for the primary purpose of evading the immigration laws and that there was no intention of living together as man and wife. The second ingredient is as important as the first and both must be proved.

Held, further, that a marriage entered into purely for the purpose of enabling a non-citizen to continue to reside in the country is nonetheless a valid marriage. Even if the respondents had established that the applicant and Mr Jesse had entered into a marriage of convenience, the marriage was still valid and the consequences of marriage would follow. The evidence, though, established that they intended and wanted to live together as man and wife.

Held, further, that a declaration that her marriage was valid would automatically mean that the applicant would be entitled to enter and reside in Zimbabwe and that she could not be a prohibited person. The court could not, however, order that she be granted citizenship.

Cases cited:

Ex p Dow 1987 (3) SA 829 (D)

Jesse v Chief Immigration Officer & Anor S-239-95

Hambly v Chief Immigration Officer (2) 1995 (2) ZLR 431 (H)

Kelly v Kelly (1932) 148 LT 143

Martens v Martens 1952 (3) SA 771 (W)

Maseko v Maseko 1992 (3) SA 190 (W)

Puttick v A-G & Anor [1979] 3 All ER 463 (F)

R v Immigration Appeal Tribunal, ex p Khan [1983] 2 All ER 420 (CA)

Rattigan \& Ors v Chief Immigration Officer \& Ors 1994 (2) ZLR 54 (S); 1995 (2) SA 182 (ZS)

Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S); 1995 (1) BCLR 78 (ZS)

US v Rubinstein 151 F 2d 915 (1945)

The court referred to the following statute:

Immigration Act [Chapter 4:02], ss 14(1) & 15(2)(d)

Case Information

P Nherere, for applicant in first case, respondents in second case

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Mrs J Zindi, for respondents in first case, applicant in second case

SMITH J

Judgment

Smith J: The applicant in the first case (hereinafter referred to as "Julie") married David Israel Ben Jesse (hereinafter referred to as "Jesse") who is a citizen of Zimbawe, after she had been declared a prohibited person in terms of the Immigration Act [Chapter 4:02] and deported from Zimbabwe. Jesse brought an application before the Supreme Court seeking an order that Julie is entitled to live in Zimbabwe because the parties are lawfully married. The Supreme Court refused to grant the order sought on the grounds that Jesse, knowing that Julie was a prohibited person, connived with her to enable her to enter Zimbabwe in breach of the law. See Jesse v Chief Immigration Officer & Anor S-239-95. Ebrahim JA said that Jesse married Julie after she was declared a prohibited person and that the marriage, even if valid, cannot have the effect of removing the declaration that she is a prohibited person. He went on to say that the proper approach for Julie to have followed would have been for her to have brought procedings to have her declaration as a prohibited person set aside.

As a result of the judgment of the Supreme Court, Julie filed an application seeking an order setting aside the order declaring her a prohibited person and declaring that her marriage to Jesse is valid and that she be granted citizenship of Zimbabwe. The Chief Immigration Officer and the Minister of Home Affairs opposed the application and then filed an application seeking an order that Julie provide security for their costs. The application for security is based on the allegation that Julie is a peregrinus, an alien who is neither domiciled nor resident in Zimbabwe, and is also a prohibited person. Both applications hinge on the question of whether the marriage between Julie and Jesse is valid. Julie contends that it is, whereas the Chief Immigration Officer and the Minister contend that it is a marriage of convenience.

There are certain facts leading up to the marriage which are not in dispute. Jesse is a citizen of Zimbabwe and is ordinarily resident in this country. Julie is a citizen of the United Kingdom. She came to Zimbabwe for the first time on 3 November l994 as a result of an introduction to Jesse by the English Rose Introduction Agency, which apparently introduces people who are looking for marriage partners. She stayed in this country for two weeks and then returned to England. She resigned from her job, sold her house, car and other possessions and returned to Zimbabwe on 26 November. In her application for a visa she said that the reason for her visit was to have a holiday and she gave her expected length of stay as three months. On 20 February l995, she applied for an extension of her visa, saying that she wished to travel extensively. She requested a three-month extension which was granted. Her

SMITH J

visa expired on 8 June. She was declared a prohibited person on the following day, 9 June, and deported on that sameday.

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On 27 June, Jesse wrote to the Chief Immigration Officer requesting a temporary permit to enable Julie to enter Zimbabwe so that he could marry her. In that letter he said that she was pregnant and they wanted to get married. He himself could not leave the country to go and get married because he was on remand on stringent bail conditions. The request was turned down and Jesse was advised accordingly on 29 June. Apparently, however, Julie had already, clandestinely, entered this country, because on 29 June she and Jesse made an application for a marriage licence to a magistrate in Harare and the magistrate granted the licence on that date. The magistrate was satisfied that the persons who appeared before him were Julie and Jesse. On 30 June Julie was issued with a United Kingdom passport in the name of Julie Jesse. She must have returned to England because it appears that she left London on 5 July and arrived in Bulawayo on 6 July. On 7 July Bishop Siphuma performed the marriage ceremony in Bulawayo at which ulie and Jesse were married. Julie must have then returned to England, because the founding affidavit which she made was sworn to before a commissioner of oaths in England on 15 February l996. In her affidavit she said that she was eight months pregnant. She has subsequently given birth to a daughter.

A court will not lightly assume that a marriage is not *bona fide* and is a marriage of convenience, especially where there is a child of the marriage and one of the results of the declaration would be to make the child illegitimate. In these circumstances the evidence produced would have to be very cogent and compelling. The setting aside of a marriage is not lightly done. In Ex p Dow l987 (3) SA 829 (D) at 833, Broome J said that a marriage is such an important contract and relationship, and the consequences of a decree of nullity can be so far-reaching, that he did not consider that the legislature intended that non-compliance with the requirement that a marriage must be solemnized in a church, dwelling-house or other building would be visited with nullity. In Hahlo's The South African Law of Husband and Wife 5 ed at pp 86-87 the learned author deals with the legal position where the parties marry for a purpose extraneous to marriage, without the intention of establishing a true marriage relationship. He refers to the classic example of the "immigration marriage" which is entered into solely for the purpose of enabling an alien to enter or remain in the other party's country. He says that in the United States of America in the case of US v Rubenstein 151 F 2d 915 (1945), Judge Learned Hand annulled an immigration marriage and then says that the same approach has been adopted by Scottish and French courts

SMITH J

which have consistently held that "immigration marriages", being "simulated" or "sham" marriages, are liable to annulment. He goes on to say that South African, English and Canadian courts have adopted a different view. The South African case he refers to is Martens v Martens l952 (3) SA 771 (W) at 774F where Clayden J (as he then was) said:

> "I do not consider it necessary to consider the authorities which have been put before me by Mr Schreiner, because the evidence in this case indicates to me that the parties here were not intending merely to go through a form of marriage. Both of them say that they got married because they thought that they could easily be divorced afterwards. This shows, I consider, that they fully realised that there would be a binding marriage needing divorce to dissolve it. This is not a case where the parties did not intend the ceremony to have the effect of making them married. By their contemplation of a later divorce it is obvious that they intended that very thing. What might be the legal position if it was shown that despite the ceremony the parties did not really intend the ceremony to have the

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effect of making them husband and wife - the position in which a decree of nullity was pronounced in Kelly v Kelly - need not, I consider, be investigated, because the facts do not show that position."

At 775B the learned judge continued:

"In the present case, it seems to me that the facts show that the parties did intend that the defendant should become the wife of the plaintiff. That was the very object of the ceremony, so that she could remain in the country, and that object was brought about with a realisation by both contracting parties that there would be need for divorce to end the marriage. As explained later, any agreements contrary to the relationship of marriage must be disregarded. The action for a declaration of nullity of marriage must be dismissed".

In arriving at his decision in that case, the learned judge referred to the case of Kelly v Kelly (1932) l48 LT 143 at 144 where Lord Merrivale said:

"In a country like ours, where the marriage status is of very great consequence and where the enforcement of marriage laws is a matter of great public concern, it would be intolerable if the marriage law could be played with by people who thought fit to go to a registry office and subsequently, after some change of mind, to affirm that it was not a marriage because they did not so regard it. I asked for the intervention

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SMITH J

of the King's Proctor, and counsel on his behalf has pointed out that great distinction may occur and questions of dispute may arise as to the nature and effect of a ceremony. He pointed out that if people enter into a marriage contract it is not material what they think or say what is the effect of it, because the legal consequences follow."

In Maseko v Maseko l992 (3) SA l90 (W) the court considered the case of a marriage which the parties entered into to safeguard the property of one of them. The agreement was that the parties would get married, the plaintiff would transfer her property to the defendant, they would then divorce and the defendant would transfer the property back to the plaintiff after the threat of attachment was over. At p 196 Lazarus AJ said:

"Even if this is not so it seems to me that the agreement operated to undermine the institution of marriage. The agreement clearly involved a marriage of convenience because it was never the intention of the parties that the marriage should last. Indeed, it was part of the plan that it would end in divorce. It has been held on a number of occasions that a marriage of convenience is a valid marriage and a court will not set it aside on that ground but the question presently being considered is not whether the marriage was valid or the divorce was valid but whether the agreement in terms of which there was to be marriage and a divorce and a transfer of the property was a valid agreement. If it was not then any act done in pursuance of the agreement would be a nullity and capable of being set aside. Thus Christie in The Law of Contract in South Africa at 349 states:

> 'The importance of marriage as an institution is naturally recognised by the law and any contract which undermines this institution is therefore void. A contract to enter a marriage as a device to evade immigration restrictions without incurring the obligations of marriage is void, so (though?) a marriage entered into pursuant to such a void contract is valid and unaffected by it, and a contract to marry and immediately divorce is similarly void and none of the terms of such an inseverable contract can be enforced'.

The cases of Martens v Martens l952 (3) SA 771 (W) and G v F l966 (3) SA 579 (O) are quoted in support of these propositions.

In my view, the overall plan was inimical to the institution of marriage and though the marriage and divorce are valid (see the cases above

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SMITH J

quoted) the agreement itself was not and the transfer was an inseparable part of that agreement."

Thus the learned judge held that even though the agreement clearly involved a marriage of convenience, and the overall plan was inimical to the institution of marriage, the marriage itself was still valid, as was the subsequent divorce.

As mentioned earlier, in England the attitude adopted by the courts to "immigration marriages" is similar to that adopted by the courts in South Africa. In Puttick v Attorney-General & Anor [l979] 3 All ER 463 the court considered the effect of a marriage which the petitioner had entered into solely for the purpose of enabling her to continue to reside in England. At p 469 Sir George Baker P said:

"The petitioner appeared to me to be a clever witness and a persuasive woman. I am sure, and find, that the purpose of the marriage, and on her side the sole purpose, was to be able to remain in the United Kingdom and subsequently to obtain citizenship. Two of the witnesses to the ceremony, Gillian Lees and Monty Hurman, have said in evidence that they assumed it was a marriage of convenience, and some time has been devoted to that question. 'Marriage of convenience' is a popular, not a legal, description. All I need say is that this marriage lacked all the purposes and intentions of a genuine and generally accepted union, namely mutual love, support and comfort; cohabitation in the matrimonial home as a husband and wife; a union for life and the production of children. But that is immaterial to the validity of the marriage: see Silver (orse Kraft) v Silver, although I think it is relevant when considering the question of domicile."

Consequently, the learned President held that the marriage was valid but he went on to hold that the petitioner had not obtained an English domicile of choice. In this connection, it should be noted that s 1 of the Domicile and Matrimonial Proceedings Act 1973 of the United Kingdom provides that the domicile of a married woman must be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile. She does not automatically obtain the domicile of her husband. Our law does not contain such a provision. Under our law, a married woman automatically obtains the domicile of her husband.

In R v Immigration Appeal Tribunal, Ex p Khan [l983] 2 All ER 420 at 422 Lord Lane CJ set out the two ingredients of a marriage of convenience as being, firstly, that the marriage is entered into for the primary purpose of

SMITH J

evading the immigration law and rules and, secondly, that there was no intention to live together permanently as man and wife. The second ingredient is just as important as the first ingredient and both must be proved.

In Hambly v Chief Immigration Officer (2) 1995 (2) ZLR 431 (H) the court was asked to decide whether the marriage in question was a marriage of convenience. Sandura JP found, on the facts before him in that case, that the applicant and her husband had entered into a marriage of convenience in order to enable Mr Hambly to stay in Zimbabwe and work for the applicant's

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company.

Are the facts in this case sufficient to establish that Julie and Jesse entered into a marriage of convenience in order to allow her to continue to reside in this country and that they never intended to live together as man and wife? As Sandura JP said in Hambly's case, the burden of proof rests on the respondents. Mrs Zindi accepted that that was the position. She argued that Julie came to this country to work. In her application for a visa, Julie said that she wanted to stay in Zimbabwe for three months in order to have a holiday. Then, when the three months expired, she said that she wanted an extension so that she could tour the country. She made no mention of marriage. Then she started working for Jesse. It was only when she was told that her visa would not be extended for a second time and that she was to be deported that the subject of marriage was mentioned. On those grounds she submitted that the marriage was unlawful in that Julie and Jesse entered into it purely in order to circumvent the immigratin laws of this country. Mr Nherere argued that the declarations made by Julie to the immigration officials were not inconsistent with her having an intention to marry Jesse. Julie and Jesse were living together as husband and wife before she was deported, which is probative of an intention to marry.

On the facts in this case, I do not consider that the respondents have established that Julie and Jesse entered into their marriage solely in order to enable Julie to reside in Zimbabwe. Julie originally came to this country to meet Jesse after being introduced to him by an agency that introduces men and women who want to find a marriage partner. After meeting him she returned to England, packed up her job and sold her possessions and then returned to stay with him. They lived together as man and wife and she became pregnant. Probably she did do some work for one or other of his companies but she was not necessary to the operations of the company as was Mr Hambly in the Hambly case *supra*. She had no essential skills as Mr Hambly apparently had.

SMITH J

Even if the respondents had established that Julie and Jesse had entered into a marriage of convenience in order to enable Julie to live in Zimbabwe, I would still hold, on the authority of the Martens and Maseko cases *supra*, that their marriage was valid. They fully intended the consequences of marriage to follow. Furthermore, the evidence also establishes that they intended and wanted to live together as man and wife. I respectfully agree with the views expressed by Lord Lane in Khan's case *supra*. A spouse of a Zimbabwe citizen should not be precluded from living with his or her spouse in this country unless the two ingredients are established, namely that the marriage was entered into for the primary purpose of evading the immigration laws and also that the parties did not intend to live together as husband and wife.

Julie is seeking a declaration that her marriage to Jesse is valid and also an order setting aside her declaration as a prohibited person and ordering that she be granted citizenship of Zimbabwe. For the reasons set out above, I consider that she is entitled to a declaration that her marriage is valid. Such a declaration will mean that she will ipso facto be entitled to enter and reside in Zimbabwe: *Rattigan \& Ors v Chief Immigration Officer \& Ors* 1994 (2) ZLR 54 (S); l995 (2) SA 182(ZS); and Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S); l995

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(l) BCLR 78 (ZS). She is not a prohibitied person by virtue of the provisions of s 15(2)(d) of the Immigration Act [Chapter 4:02] since she is married to a Zimbabwe citizen and she is not, according to the papers, such a person as is described in para (a), (d), (f) or (g) of subs (l) of s 14 of that Act. Therefore the order declaring her to be a prohibited person will fall away. This court cannot order that she be granted citizenship. Julie will have toapply in terms of the Citizenship of Zimbabwe Act [Chapter 4:01].

It is declared that the marriage between Julie Ann Jesse (nŽe Barker) and David Israel Ben Jesse is a valid marriage according to the laws of Zimbabwe.

It is ordered that the respondents, namely the Chief Immigration Officer and the Minister, pay the costs of these two applications.

Sawyer & Mkushi, applicant's legal practitioners

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

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KANDY FARM (PVT) LTD & ANOR v EASTWOOD 1996 (2) ZLR 729 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

10 October & 12 December 1996 Judgment No. S-236-96

Flynote

Administrative law - Administrative Court - powers of - revision of water right previously granted

Prescription - unreasonable delay in seeking redress - does not in itself deprive party of right - doctrine of laches - not part of our law

Professions and trades - water engineer - conduct and ethics - conflict of interests - requirement to avoid

Water - water right - application - requirement that application must include consent of owner - whether such requirement fundamental to validity of application

Headnote

Water rights are real rights over land and require the consent of the owner of the land in respect of which they are sought. The written consent of an owner of a farm to an application for a water right is a fundamental requirement without which the application is not complete. It is not merely a minor technical requirement, non-compliance with which can be condoned. The date of lodging of such an application is therefore the date when the application is formally lodged, in the correct form, accompanied by the written consent of the owner.

There is a distinction between the ordinary courts of law and the administrative court. The administrative court is a "hands-on" court. It deals with administrative matters; it is given powers

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to investigate and to revise or cancel any existing right or order made by the water court. The statutory

McNALLY JA

powers given to the administrative court are wide enough to cover a decision, such as that in the present case, to revise a right previously granted. The court did not become functus officio after it granted the right.

The doctrine of laches is not part of our law. Accordingly, except in the context of prescription or where some time limit is laid down by law, a party opposing a claim cannot rely on an unreasonable delay in seeking redress.

A water engineer is a professional person whose conduct is governed by the Zimbabwe Institute of Engineers (Private) Act [Chapter 27:16]. A person who is both a water engineer and a farmer must be particularly careful to avoid conflict of interest situations. In the present case, even on the engineer's own version of the facts, he had accepted a commission knowing that he had a personal interest in conflict with the interest of his client.

Cases cited:

Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)

Peters v Janda NO 1980 ZLR 553 (G)

Sterling Products International Ltd v Zulu 1988 (2) ZLR 293 (S)

van Blerk v Volkskas (Ko-operatief) Bpk 1942 TPD 229

Vrystaat Ests (Pvt) Ltd v President, Administrative Court & Ors 1991 (1) ZLR 323 (S)

The court referred to the following statutory provisions:

Water Act [Chapter 20:22], ss 51, 53

Water (Water Court) Regulations 1966 (RGN 347 of 1966), ss 4, 6

Case Information

J C Andersen SC, for the appellants

A P de Bourbon SC, for the respondent

Judgment

McNally JA: This is an appeal from a decision of the Administrative Court (Kamocha P and assessors) on a question of water rights under the Water Act, No. 41 of 1976, now [Chapter 20:22].

In that decision the court allowed an application by the respondent (whom I will call "Eastwood")

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against the appellants (whom I will call "Kandy Farm" or "Hart", as the case may be). The application was for an amendment to a provisional water right granted to Hart in respect of Kandy Farm by changing its priority date from 14 November 1985 to 20 January 1986.

The effect of the granting of this amendment was to make Kandy Farm's priority date fall after, instead of before, Eastwood's priority date which was

McNALLY JA

3 December 1985. The appellants consider that their priority should rank before Eastwood's, as it originally did.

The facts are these:

Eastwood farms Watchfield Farm which is upstream on the Yellow Jacket River from Kandy Farm, owned by a company of which Hart is a director. Hart, as well as being a director of the farming company, is a registered water engineer, practising as such. In this capacity he acted on behalf of Eastwood when the latter applied for a water right.

At some stage before 20 October 1985, and possibly in early 1985, Eastwood says he commissioned Hart to advise him on the question of the location and design of a dam on the Yellow Jacket River. Hart eventually submitted an application for a water right on behalf of Eastwood on 3 December 1985. In due course Eastwood was granted a water right with the priority date 3 December 1985.

But, unknown to Eastwood (although this is disputed), Hart had submitted an application in respect of Kandy Farm on 14 November 1985. That application was defective, in that it lacked the consent of the owner in the form of a resolution of the company. That defect was put right some two months later, on 20 January 1986. But because Hart had "lodged" the application on 14 November 1985, the application was given that priority date. Strangely, however, the number allocated to his right was influenced by the date of 20 January 1986. As a result his right for Kandy Farm was given the number 13361; a much later number than Eastwood's right which was numbered 13342.

It was this priority in numbering which, according to Eastwood, lulled him into assuming that his right had priority. Only in April 1994, when he was called upon to release water, did he query the situation. He then instructed his lawyers, who approached the then President of the court. The President gave an explanation which Eastwood found unconvincing. He resolved to institute legal proceedings. He did so on 11 April 1995 and obtained a judgment in his favour. Though undated, it was apparently handed down on 6 November 1995. The losers noted an appeal.

The appellants took four points:

1. The provisional order was correct as to the date of priority;

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2. The court *a quo* was in any event functus officio and had no jurisdiction to amend the order;

3. Alternatively, if it had jurisdiction, the alteration should have been applied for within a reasonable time, which was not done;

4. There was no improper conduct on the part of Hart.

I shall deal with each of these grounds in turn:

1. THE DATE OF PRIORITY

The Water Act, s 53, provides that the holders of rights:

> "shall ... take priority ... according to the dates on which they lodged their respective applications for rights to the use of public water."

The Water (Water Court) Regulations, RGN 347 of 1966, provide in s 4 for applications to be in a specified form, and in s 6 it is provided that the water registrar "shall not accept an application unless he is satisfied that it has been duly completed in accordance with the provisions of the Act and these Regulations".

Form W.1. sets out the information required. A note at the foot of para 1 reads:

> "If you are not the owner you must include the consent or refusal of the owner to this application and forward it with this form."

It may be that the final requirement adds little to the first requirement, but it certainly emphasises the fact that the owner's consent must be annexed to the application, and must therefore be in writing. Since the owner was a company, this necessarily involved the annexing of a certified extract from the minutes of a meeting of the company recording an appropriate resolution.

All of this would be quite obvious to an experienced water engineer such as Hart. Yet on his application he filled in his own name as "owner".

It is argued that this error/omission was the veriest technicality. I do not wish to be understood as saying that in a proper case, where there is some minor error in an application, there might not be grounds for condonation. But I am satisfied that the written consent of the owner of a farm to an application for a water right in respect of that farm is a fundamental requirement without which the application is not complete. Of course, if the applicant is the owner,

that consent is self-evident. But, as the footnote makes clear, the consent is essential where the applicant is not the owner. And Hart was not the owner. He must have known, and therefore in law did know, that he had to annex a company resolution. If it was, as he claims, "an exceedingly simple matter", why did he not lodge it before 20 January 1986? Why did he not

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lodge it with his application of 14 November 1985? Why did he say he was the owner, when he was not? He speaks of the right as his son's right in his letter of 15 July 1994 to Messrs antor & Immerman. He is not therefore to be compared with the farmer who has formed a company for tax purposes but still thinks of the farm as his.

This leads to a consideration of what is meant by "lodged" in s 53 of the Water Act. The word is not defined in the Act, nor, so far as I can ascertain, in case law. But it would seem self-evident that, where a formal lodging of an application is required, that lodging must be of an application in proper form. "Duly completed" is the phrase used in s 6 of the Regulations already cited. In this assertion I draw some support, by analogy, from the remark of Millin J in van Blerk v Volkskas (Košperatief) Beperk 1942 TPD 229 at the top of p 235 that:

> "If serving or posting a notice in writing contemplates signature by the person giving the notice it may fairly be thought to follow that the lodging of a written request contemplates signature of the request by the person making it."

I accept Mr de Bourbon's submission that water rights, being of the nature of real rights over land (see s 51), require the consent of the owner of the land in respect of which they are sought. That consent was not formally a part of this particular application until 20 January 1986. Therefore, in my view, the application was not properly lodged until that date. The owner's consent, where he is not the applicant, is an essential part of the application.

The priority date, which is so important a feature of a water right, cannot be established by the mere handing of papers to a junior clerk over the counter of the administrative court. I am satisfied that lodging must involve at least substantial compliance with the rules of the court. There was not substantial compliance in this case. See generally Sterling Products International Ltd v Zulu 1988 (2) ZLR 293 (S) at 301B et seq and Vrystaat Estates (Pvt) Ltd v President, Administrative Court & Ors 1991 (1) ZLR 323 (S) at 327F.

I am fortified in this view by the numbering procedure followed, just as I am

totally unconvinced, with respect, by the reasoning of the former President of the court in his letter of 15 December 1994.

If, by reference to s 6 of the Regulations, "lodged" means both "handed in over the counter" and "duly completed in accordance with the provisions of the Act and these Regulations", then this application was not "lodged" until 20 January 1986. The allocation of the later water right number (13361) indicates that the water right was not "accepted" as properly lodged until after Eastwood's right (13342). A system in which water right number 13361 ranks higher in priority to water right number 13342 is, with respect, ridiculous.

I repeat that there will undoubtedly be cases in which the registrar will properly condone errors in the completion of water right applications and treat them as "lodged" with effect from the date they were handed in. But this is not such a case. The application was patently fundamentally incomplete on 14 November 1985.

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Accordingly, the first ground of appeal fails.

2. THE "FUNCTUS OFFICIO" ARGUMENT

> "The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio; its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased."

So said Trollip JA in Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 at 306F, citing earlier judgments of the Appellate Division. He went on to mention a number of exceptions, none of which apply here.

But we must be careful to observe the distinction between the ordinary courts of law on the one hand and the administrative court on the other. As its name implies, it is a "hands-on" court. It deals with administrative matters; it has powers to investigate (s 25(1) (b), (c), (d) and (e)); and to "revise or cancel any existing right or any award or order made by the water court" (s 25(2)).

I bear in mind also that we are not here involved in a situation in which the court is rehearing an argument which it has heard before. The original order, granting water right number 13361, was given in the exercise of the President's administrative function, after investigation of an application, by

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McNALLY JA

the President in chambers. There was no legal hearing, no opposition, no judicial decision, but rather an administrative order.

In my view, therefore, the statutory powers given to the administrative court were wide enough to cover its decision in this case to revise a right previously granted.

I leave open the question whether the fact that the right was only provisional removes it from the ambit of the functus officio rule.

It follows that the second ground of appeal fails.

3. UNREASONABLE DELAY IN SEEKING REDRESS

The question of what is a reasonable time was considered by the administrative court in the context of this case. It decided that Eastwood took action by approaching his lawyers when he realised in April 1994 that his priority was not what he thought it was. The initial action taken was to attempt to have what was seen as an administrative error corrected, by means of correspondence with the court. When this failed, legal proceedings were instituted. It may be noted in passing that no objection was made at that stage to the jurisdiction of the court. The court concluded that there had not been unreasonable delay. I find no basis for disagreeing. Save in the context of prescription, or where some time limit is laid down by law, the concept of laches has been said not to be part of our law - see *Peters v Janda NO* 1980 ZLR 553 at 558A-C.

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This ground of appeal has no merit.

4. IMPROPER OR UNPROFESSIONAL CONDUCT

It was contended by Eastwood that Hart was acting professionally for him (Eastwood) at the time when he (Hart) put in the application for Kandy Farm ahead of the application for Eastwood's farm. However, Hart categorically denies that. He claims that he was already in the process of making an application for Kandy Farm because of the publication of General Notice 628 of 1985 in the Gazette of 18 October 1985. While doing so, but before lodging the Kandy Farm application, he happened to meet Eastwood, who was not then his client. Out of the kindness of his heart, he says, he advised Eastwood to follow his example. Eastwood, knowing that he (Hart) was a water engineer, asked him to process his application. He agreed. But his own application was by then far advanced, and he submitted it before Eastwood's.

McNALLY JA

It is not possible, on the papers, to decide which of these versions is the correct one. But it must be said that even on Hart's own version he put himself in a difficult situation.

A water engineer is a professional man. His conduct is governed by the Zimbabwe Institute of Engineers (Private) Act [Chapter 27:16]. Section 4(b) of the Act sets out as one of the objects of the Act:

> "to raise the character and status of the profession of engineering and its allied sciences, to promote honourable practice and repress malpractice, and to increase and promote the confidence of the community in those persons practising and teaching the profession of engineering and its allied sciences."

A person who is both a water engineer and a farmer must be particularly careful to avoid conflict of interest situations. Even on Hart's own version, he accepted a professional commission knowing that he had a personal interest in conflict with the interest of his client. True, he says he did not think there was any real conflict. In that view, as it turns out, he was wrong. But he knew there was a possible conflict.

True also, he says it was clear to Eastwood from the very nature of the conversation that he was advising Eastwood to follow his example. So the order of priority was established, the conflict of interest revealed. But Eastwood has a different version. Common prudence would dictate that Hart should have confirmed his conflict of interest situation, and his priority, in writing to Eastwood before accepting the commission.

If Eastwood's version is correct, the situation is much more serious. But we cannot decide, without cross-examination, the conflicting veracity of pieces of paper. Accordingly, we cannot make a finding that Hart's conduct was such as to affect the outcome of this case. Nor did we understand the President to make such a finding, although he expressed the opinion that Hart should not have accepted the commission.

In the result, however, the appeal fails and is dismissed with costs against both appellants jointly and severally, the one paying the other to be absolved.

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KORSAH JA: I agree.

EBRAHIM JA: I agree.

Gill, Godlonton & Gerrans, appellants' legal practitioners

Kantor & Immerman, respondent's legal practitioners

TAKADINI v MAIMBA 1996 (2) ZLR 737 (SC)

Court **Supreme Court, Harare**

Mc Nally JA, Korsah JA & Ebrahim JA

Civil appeal

24 October & 12 December 1996 Judgment No. S-239-96

Flynote

Damages - amount - actio injuriarum - adultery - factors to be taken into account - enticement - effect of

Family law - husband and wife - adultery - requirements - parties must have been married in terms of Marriage Act

Headnote

In an action for adultery it must be proved that the alleged adulterer knew that the person with whom she had sexual intercourse was married in terms of the Marriage Act [Chapter 5:11].

Damages for adultery are recoverable on two separate and distinct grounds. In respect of the first, namely the contumelia inflicted, the court must explore how far the harm was inflicted by the defendant or was self-inflicted. In respect of the second ground, namely the causing of loss of companionship, love, affection, comfort, and services, the question here is the extent to which these had already disappeared from the marriage prior to the adultery. Where there is no separate action for enticement, the element of enticement can be an aggravating feature on both of these grounds of damages. Enticement will aggravate the damages where the spouse has been deliberately enticed away from a stable marriage by the active and deliberate intervention of the adulterer. Where a spouse of a desperately unhappy marriage finds sympathy and solace elsewhere and adultery ensues, the court will have to consider whether there was any real quality in the consortium lost, or any real contumelia suffered.

The adulterer in the present case was at least aware that the person with whom she had sexual relations might well be married in terms of the Marriage

McNALLY JA

Act. However, as regards damages, the amount of damages awarded by the trial court was far

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too high. The marriage between the plaintiff and her husband was virtually still-born right from the start and there was hardly any consortium to be lost when the adultery was committed.

Cases cited:

Bruwer v Joubert 1966 (3) SA 334 (A)

Doyle v Salgo 1957 R & N 840 (FS)

Kanjera v Muchanyuka S-226-96

Katsumbe v Buyanga 1991 (2) ZLR 256 (H)

Madziwa v Muchatuta S-48-96

Viviers v Kilian 1927 AD 449

Case Information

H Simpson, for the appellant

I J Muvingi, for the respondent

Judgment

McNally JA: This court is faced with a growing number of appeals in civil actions in which wives are suing "the other woman" for damages for adultery.

The action for damages for adultery is based on the Roman Dutch law. The damages are recoverable on two separate and distinct grounds; firstly on the ground of the injury or contumelia inflicted on the aggrieved spouse; and secondly, on the ground of the loss of companionship, love, affection, comfort, and services by the aggrieved spouse: Viviers v Kilian 1927 AD 449 at 455; Bruwer v Joubert 1966 (3) SA 334 (A) at 337D; *Katsumbe v Buyanga* 1991 (2) RLR 256 (H) at 258.

Evidence of adultery is therefore only the beginning of the enquiry. The quantum of damages is really dependent on the factual situation in relation to the two grounds mentioned. In particular, on the first ground, has there been injury or contumelia inflicted on the aggrieved spouse, and to what extent was it self-inflicted? Doyle v Salgo 1957 R & N 840 (FS).

And on the second ground, to what extent had that companionship, love, affection, comfort and service already disappeared before the adultery took place?

In addition, on both grounds, it is necessary to consider, as an aggravating feature where appropriate, the element of enticement in the contumelia or loss of consortium. Enticement is in itself a separate action, but clearly where a spouse has been deliberately enticed away from a stable marriage by the

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active and deliberate intervention of the adulterer, that feature will aggravate the damages in respect of the adultery, where damages for enticement are not separately claimed. Where, on the other hand, a spouse in a desperately unhappy marriage finds sympathy and solace elsewhere and adultery ensues, the court will have to consider whether there was any real quality in the consortium lost, or any real contumelia suffered.

It is a fact, that generally in the Western world the action for damages against a third party for adultery is becoming far less common, particularly since the advent of "no fault" divorce. For example, SchŠfer Family Law Service at paragraph D6, under the heading "Action for Damages against Third Party" has this to say:

> "There is much to be said for the view that the actions against third parties on the grounds of adultery, harbouring and enticement are archaic, particularly in the context of a law of divorce that is no longer based on the principle of fault."

But he goes on to add:

> "However the Divorce Act does not repeal them, and since there is a strong presumption against repeal by implication, it seems they would still be available."

These statements are true of the divorce law of Zimbabwe since the introduction of the new Matrimonial Causes Act in February 1986.

See also the comment of Boberg The Law of Persons and The Family p 184 note 15, that "contemporary awards tend to be small" (cited by me in *Reith v Antao* 1991 (2) ZLR 317 at 318H).

In customary law there is no action by a wife whereby she can claim damages from the woman who commits adultery with her husband. It would be the adulterous woman's father or husband who would sue the erring husband. So the action is available only to wives married under the Marriage Act [Chapter 5:11].

Finally, there is the complication in Zimbabwe referred to by Muchechetere JA in Madziwa v Muchatuta S-48-96, followed by Ebrahim JA in Kanjera v Muchanyuka S-226-96. The delict of adultery is based on an offence against the institution of marriage in terms of the Marriage Act. So before a woman can be found to have committed adultery, she must be found to have known

(on a balance of probabilities) that the person with whom she had a sexual relationship was married in terms of the Marriage Act.

I mention these factors because there seems to be a tendency for magistrates to think that, once a sexual relationship has been proved, damages - and quite heavy damages - more or less automatically follow.

There is a danger in some (though not all) cases that the unhappy wife is exacting vengeance on the husband by means of attacking the "other woman", where in fact the "other woman" may

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be only in a very small way, if at all, to blame for the collapse of an already highly unstable marriage.

With these cautionary remarks, I turn to a consideration of the facts of this case. Mrs Maimba sued Miss Takadini for $10 000 damages on the grounds of the latter's adultery with her husband Manasa Maimba.

She alleged and proved that she was married to Manasa Maimba on 15 May 1992, although they had been living together since 1985. The child of the marriage had been born in 1985.

Her allegation as pleaded was that the adultery had started in 1991. But in 1991 she was not married under the Marriage Act. In her evidence she said the sexual relationship with Miss Takadini began in May 1992 and that allegation was admitted. However, the defence put forward is that Miss Takadini was not aware of the marriage.

It is common cause that Mr Maimba issued summons for a divorce on 10 December 1992, only some seven months after they were married.

The marriage was a somewhat unusual one. As I have indicated the Maimbas' only child was born in 1985, the year they started living together. But after that they seem to have spent most of the time apart. In her evidence she said:

> "In 1987 husband went to school, returned in 1988. I then went to school (by which I think she meant Teachers Training College) in 1989, I returned end of 1990. I went back to school in 1992. There was no time to have children simply because we were attending school."

So when the marriage ceremony was performed on 15 May 1992 in Bindura, she was simply on a brief leave of absence from Belvedere Teachers College in Harare.

McNALLY JA

Thereafter she returned to her studies, and was "chased away" by her husband when she came home in December 1992.

So we have the odd situation that Mr Maimba started an affair with Miss Takadini in the very month (May 1992) when he formalised his relationship with Mrs Maimba, and at a time when he was living on a farm at Bindura while Mrs Maimba was in Harare. There is no reason to dispute Miss Takadini's assertion that at that stage she was not aware he was married. (He may not have been, depending on when, in May, the affair started).

But in July 1992, she concedes that she learned that Mrs Maimba was the mother of Ishmael, the child born in 1985. Mrs Maimba was obviously then claiming to be married to Mr Maimba. It seems to me that if Miss Takadini did not then bother to find out the true facts, she was being what the law calls "diligent in ignorance". In short, she suspected the facts but took care not to confirm her suspicions since she did not want to know. She conceived a child in November 1992, and has since conceived another.

Thus she was aware at least that Mr Maimba might well be married in terms of the Marriage

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Act by July 1992, and she nevertheless continued to have a relationship with him which persists. This is sufficient in my view, to establish that she knowingly committed adultery with him.

This situation is not as favourable for her as was the situation in Kanjera v Muchatuta *supra* where the "other woman" was already pregnant when she discovered the truth. All the same, it seems to me the marriage between Mr and Mrs Maimba was virtually still-born. One can only speculate as to the reasons why he entered into a formal marriage in the very month in which he started the liaison. Perhaps Mrs Maimba, suspecting danger, insisted on the formalisation, and he could not refuse without explaining why.

There was, on the facts, virtually no consortium to be lost. There was contumelia, but it was more on the part of Mr Maimba than on the part of Miss Takadini.

I do not think, with respect, that the magistrate really grasped the fact that the formalisation of the Maimba marriage took place virtually simultaneously with the start of the affair with Miss Takadini, who had no reason then to know that her lover was married.

Had he appreciated that, he would not have awarded the full amount claimed

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McNALLY JA

of $10 000, which even Mr Muvingi for the respondent very properly conceded was too high. In my view, it was much too high. The marriage was a marriage in name only. Nonetheless, the court should not be seen to trivialise the institution of marriage. In the circumstances, I consider an award of $1 000 is adequate compensation for contumelia.

Accordingly the appeal is allowed with costs and the award by the magistrate is reduced to $1 000, with costs of suit.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

Musunga & Associates, appellant's legal practitioners

Muvingi & Machaya, respondent's legal practitioners

CALABASH RESTAURANTS (PVT) LTD v TRADEWELL ENTERPRISES (PVT) LTD 1996 (2) ZLR 743 (S)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

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21 November & 12 December 1996 Judgment No. S-243-96

Flynote

Contract - interpretation - ambiguity - what is - provision in lease agreement that rent would increase -in proportion to' increases in interest rates - meaning

Headnote

The parties were lessor and lessee of a shop in Harare. The lease agreement in respect of the shop provided that if the interest charged by building societies on first mortgage loans was increased, the lessor would be entitled to increase the rental -in proportion to' the increase in interest rates. During the subsistence of the lease, the interest rates went up from 14.75% to 20%. The lessee argued that this was an increase of 5.25%, and the rent should go up by that amount. The lessor's contention was that the increase in the interest rate was by 35.593%. The trial judge considered that the phrase in the lease was ambiguous, and the ambiguity should be resolved *contra proferentem*, in favour of the lessee.

Held, that for the phrase to be -ambiguous', it had to be capable of more than one interpretation or explanation, or to have a double meaning or several possible meanings. The phrase -in proportion to' meant -by the same proportion as the proportion of the increase' or -by whatever proportion the mortgage rates increase'. It did not mean -by the amount of the increase'. While some confusion was caused by fact that one was dealing with a percentage of a percentage, there was no ambiguity. An increase in the interest rate from 14.75% to 20% was an increase by 35.593%, the difference (5.25%) being 35.593% of 14.75%. Accordingly, the lessor's interpretation was correct.

1996 (2) ZLR p744

McNALLY JA

Cases cited:

Kloppers v KWV Bpk 1947 (3) SA 408 (C)

Lord Advocate v Inzievar Ests Ltd [1938] AC 402; [1938] 2 All ER 424 (HL)

Case Information

A P de Bourbon SC, for the appellant

D P Carter, for the respondent

Judgment

McNally JA: This appeal raises a question of interpretation of a clause in a contract of lease which is simple to state but perplexing to resolve.

The parties were lessor and lessee respectively of Shop 2 of Lot 82 in the District of Salisbury (the word -Salisbury' apparently remains in the language of the Deeds Registry).

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The rent clause in the agreement (clause 2) read as follows:

> "The rent shall be the sum of $4 500 *per* month payable monthly in advance and without deduction and free of exchange on the first day of each and every month at the offices of the Agent (see Special Conditions).
>
> If the interest charged by Building Societies on first mortgage loans is increased, the Lessor shall be entitled to increase the rental in proportion to such increase.'

The first sentence does not create any real problem, although the special conditions provide that after the first year the rent goes up from $4 500 to $5 175 and after the second year to $5 950 *per* month. But the second sentence has led to major differences in interpretation.

The learned judge in the court *a quo* held that there were two possible interpretations. Therefore the sentence was ambiguous. Therefore it had to be interpreted contra proferentem ie in the way more favourable to the lessee.

If it is correct that there are two possible interpretations, then the rest of the decision is correct. But is that first decision right?

It is easier to look at the two interpretations placed on the sentence by looking at the facts. On 1 April 1991, the date on which the basic rent became $5 175 *per* month the interest charged by Building Societies on first mortgage loans went up from 14,75% to 20%. The contention of the lessor is that the rent then

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McNALLY JA

increased by 525 ' 14.75% = 35,593%. The lessee's contention is that the interest rate went up by 5,25%, so the rent should go up by the same percentage.

The parties, and the learned judge below referred to several decisions in which the meaning of -proportion' was considered. One was Lord Advocate v Inzievar Estates Ltd [1938] AC 402 at 408-9; [1938] 2 All ER 424 (HL) at 427C-E. The other was Kloppers v KWV Bpk 1947 (3) SA 408 (C) at 420 in fine.

I confess I have not found either decision very helpful. I know what -proportion' means. I know what -in proportion to' means. The question is, what does it mean in this context? It is a question of English grammar and mathematics. It is not a question of law.

The passage referred to in the Lord Advocate case, *supra*, does however at least make it clear that when we speak of proportions we speak of fractions. To my mind that is the end of the matter. We do not subtract 14,75 from 20 and come up with a rent increase of 5,25%. We do a calculation which I was taught to express as follows:

> "14,75 is to 20 as $5 175 is to $?"

The answer was then achieved by doing the sum $5 175 x 20 ' 14,75 = $7 016,95. This achieves the same result as calculating 135,593% of $5 175.

It is always difficult to present argument in favour of what seems to be self-evident. However I

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would suggest that both on grammatical grounds and mathematical grounds one might defend the conclusion thus:

First, on grammatical grounds. -To increase the rental in proportion to such increase' must mean -to increase the rental by the same proportion as the proportion of the increase' or -By whatever proportion (not -amount') the mortgage rates increase, the rent shall increase by the same proportion.' Had the clause meant what the lessee contended, the sentence would have ended, not -on proportion to such increase' but -by the amount of such increase'.

Speaking mathematically, and with due humility, I would reason as follows:

Suppose, the increase had been related not to interest rates, but to the price of a litre of diesel fuel. So the clause would have read:

McNALLY JA

> "If the retail price of a litre of diesel is increased, the lessor shall be entitled to increase the rental in proportion to such increase.'

Suppose, further, that the price of a litre of diesel went from $2 to $3 at the relevant time. Would the rental have increased by $1 *per* month or by 50%? It seems to me apparent that the latter answer must be correct. It underlines the fact that the confusion springs from the coincidence that interest happens to be expressed in percentages. So an increase from 14,75 to 20% is said to be an increase of 5,25%. But it is not. Mathematically, it is an increase of 5,25 units or 35,593%. Those units happen to be percentages. The increase is proportional, not incremental.

In my view, the clause may be said perhaps to be confusing, but it is not ambiguous.

"Ambiguous" in the Oxford English Dictionary is defined in the context of -words' as meaning:

> "Admitting more than one interpretation or explanation; of double meaning or of several possible meanings; equivocal."

To be ambiguous, a word must fall within those meanings on a proper and ordinarily careful reading. In this case (and I have discussed the matter anxiously with my colleagues) I am of the firm view that there is no ambiguity. The possibility of error exists only because of the unfortunate coincidence that the unit involved happens to be a unit of percentage. Thus an incremental increase in the units of percentage is seen as a percentage increase.

It certainly would have been ambiguous if the clause had ended -to increase the rental by the same percentage'. But that is not what was written.

In my view, there was no ambiguity. Accordingly, the appeal is allowed with costs. The order of the High Court is set aside and the following order is substituted:

> "There will be an order in terms of the draft."

KORSAH JA: I agree

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EBRAHIM JA: I agree

Coghlan, Welsh & Guest, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

EDGARS STORES LTD v COMMISSIONER OF TAXES 1996 (2) ZLR 747 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Income tax appeal

3 & 12 December 1996 Judgment No. S-241-96

Flynote

Revenue and public finance - income tax - recovery of tax - Commissioner of Taxes - tax due from employee - employer failing to withhold tax and pay amount of tax - appointment of employer's bank as agent for collection of tax, interest thereon and penalty - whether bank can be appointed agent

Headnote

The appellant company operated an educational trust for the benefit of nominated employees, but failed over a period of five tax years to withhold the requisite amount of employees' tax. The company thus became liable to the Commissioner for payment of the tax not withheld, together with interest and an amount equal to 15% of the tax. The company calculated that its indebtedness, including interest but not the penalty, to be $544 932.77 and tendered payment of $500 000 in full settlement. The Commissioner retained the payment, but did not accept it as extinguishing the company's liability. Instead, he demanded over $3.6 million, being made up of over $1 million in tax and nearly $3 million in interest, plus a penalty of $160 325, less the $500 000 already paid. Fearful that the Commissioner would, in terms of s 58 of the Income Tax Act [Chapter 23:06], instruct its banks to collect the sums claimed by the Commissioner, the company applied for an interdict restraining the banks from collect any monies. Cheda Jrefused the application on the grounds that there was no dispute as to the amount claimed by the Commissioner.

Held, that the interest which the Commissioner was seeking to recover was that specified in s 73(3) of the Act, which was the interest at a rate fixed

GUBBAY CJ

by the Minister on the amount of employees' tax which the appellant failed to withhold or pay. This category of interest did not fall within the definition of "tax" in s 58(2) of the Act, and therefore was not recoverable in terms of s 58.

Held, further, that the phrase "employees' tax" in s 58 included the amount of employees' tax

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which the employer was obliged, but failed, to withhold. This amount was recoverable under s 58.

Held, further, that also caught within the definition of "tax" in s 58 was any additional tax or penalty payable under the Act. The employer's liability to pay a further amount equal to 15% of the employees' tax not withheld, whether it constituted an additional tax or a penalty, was also recoverable under s 58.

Case cited:

Endeavour Foundation & Anor v CoT 1995 (1) ZLR 339 (S); (1995) 57 SATC 297 (ZS)

The court referred to the following statutory provisions:

Income Tax Act [Chapter 23:06], ss 46, 58 & 73; Thirteenth Schedule, paras 1(c), 3(1) & 10(1)

Case Information

A P de Bourbon SC, for the appellant

Mrs J Zindi, for the respondent

Judgment

Gubbay CJ: One of the issues raised in *Endeavour Foundation \& Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S); (1995) 57 SATC 297 (ZS), was whether, upon a failure by an employer to withhold or pay any amount of employees' tax, the present respondent ("the Commissioner") may apply the provisions of s 58 of the Income Tax Act [Chapter 23:06] against the employer, as opposed to proceeding under para 10 of the Thirteenth Schedule to the Act. For the reasons outlined at 361E-362F or 313-314, this court held that the Commissioner was not empowered to have recourse to s 58 in order to collect from the employer the amount of employees' tax which ought to have been withheld from the employees concerned or paid to him.

On 14 May 1996, the Finance Act 4 of 1996 amended s 58(2) of the Income Tax Act. It repealed the definition of "tax" which read:

> "'tax' includes interest payable by virtue of the provisions of subsection (2) of section seventy-one."

GUBBAY CJ

and substituted in its place:

> "'tax' includes -
>
> (a) interest payable by virtue of subsection (2) of section seventy-one; and
>
> (b) provisional tax referred to in section seventy-two; and
>
> (c) employees' tax referred to in section seventy-three; and

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(d) any additional tax or other penalty under this Act."

The appellant found itself in a position similar to that of the tax-payers in the Endeavour case. It also operated an educational trust, known as "The Edgars Foundation", for the benefit of nominated employees, but had failed for the years of assessment ending 31 March 1987 to 31 March 1992 to withhold the requisite amount in respect of employees' tax in terms of para 3(1) of the Thirteenth Schedule to the Act. Accordingly, by virtue of para 10(1) of the Thirteenth Schedule the appellant became personally liable to the Commissioner for payment of the amount of employees' tax not withheld, together with interest and a further amount equal to fifteen *per* centum of such employees' tax. See the Endeavour case *supra* at 360B-C or 312. It calculated its indebtedness, inclusive of interest but not of penalties, to be $544 932,77 and tendered payment of $500 000 in full and final settlement. The Commissioner retained the payment but declined to accept it as extinguishing the appellant's liability.

On 19 September 1996, the appellant was faced with a demand from the Commissioner for payment of $3 602 735,80. This figure comprised:

(a) $1 068 833,56, being employees' tax withheld;

(b) $2 923 577,24, being interest due to August 1996;

(c) $160 325, being penalties - less $500 000 paid.

Shortly, thereafter, the appellant became apprehensive that the Commissioner would seek to utilise the draconian provisions of s 58 of the Act against it. In order to avoid that occurrence, it applied to the High Court for a temporary interdict restraining the Commissioner from appointing the two banks at which it operated accounts, as his agents to collect the amount of $3 602 735,80.

GUBBAY CJ

The appellant's fear was real, for on the same day, and on the next, the Commissioner made such appointments. It would appear, however, that upon notice of the application and pending final determination of the dispute, the banks were instructed not to collect any monies.

The application was refused by Cheda J in a somewhat cursory manner. He held that liability in the amount claimed by the Commissioner was admitted by the appellant. That was a grave misconception. The appellant's letter of 30 September 1996 clearly revealed that it contested the Commissioner's calculations on a number of grounds. Regrettably, no consideration was given by the learned judge to the decision in the Endeavour case and to the effect upon it of the subsequent amendment to s 58(2) of the Act. Not surprisingly, an appeal was noted immediately against the judgment.

It is a fair assumption to make that what, in the main, the legislature wished to achieve by amending s 58(2) was to remedy the perceived mischief resulting from the interpretation this court placed upon that provision in the Endeavour case. Nonetheless, the critical issue to be decided is the meaning to be ascribed to the wording of the amendment set in relevant context.

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The interest the Commissioner is looking to recover from the appellant is that specified in s 73(3) of the Act, namely, the interest at a rate to be fixed by the Minister by statutory instrument on the amount of employees' tax which the appellant failed to withhold or pay within fifteen days or such further period not exceeding twenty-one days, as provided in para 3(1) of the Thirteenth Schedule. The recovery of this category of interest does not fall within para (a) of the definition of "tax" in s 58(2). Paragraph (a) is expressly confined to interest payable by virtue of s 71(2) of the Act, that is, interest arising from a failure to pay tax on or before such days and at such places as may be notified by the Commissioner in terms of s 71(1).

It follows necessarily that the Commissioner may not apply the provisions of s 58(1) to the interest he claims the appellant is liable to pay him by virtue of s 73(3) of the Act. For if it had been the intention of the legislator to include this category of interest within the definition of tax, para (a) would surely have read: "interest payable in terms of any provision of the Act".

Paragraph (c) of the definition of "tax" in s 58(2) of the Act specifically includes employees' tax referred to in s 73, which, in turn, makes such tax payable in terms of para 3(1) of the Thirteenth Schedule.

GUBBAY CJ

Counsel for the appellant contended that the amount of employees' tax that had been withheld from the Commissioner during the five years of assessment fell outside para (c), thus disabling the Commissioner from resorting to his powers under s 58(1). The argument proceeded along these lines: The tax referred to in s 73 is the tax to be paid by the employee. It is the equivalent amount the employer becomes personally liable to pay the Commissioner in the event of a failure to withhold it from the employees' remuneration. It is not a tax levied upon the employer. Paragraph 3 of the Thirteenth Schedule, in effect, constitutes the employer a collector on behalf of the Commissioner of the tax payable by the employees. And under para 10 any failure to withhold or pay to the Commissioner any amount of employees' tax as provided in para 3 may be sued for and recovered by him in any court of competent jurisdiction. It is an ordinary debt owed by the employer to the State. This is underscored by para 12(2) of the Thirtenth Schedule, which enables the employer to recover from the employee, as a debt due, any amount paid to the Commissioner under para 10(1)(a).

It was further emphasised that neither s 73 of the Act nor para 10 of the Thirteenth Schedule were amended following upon the decision in the Endeavour case *supra*.

All this is a correct scenario. But what, with respect, the argument overlooked is the necessity to read definition (c) in conjunction with the definition of "employees tax" in para 1 of the Thirteenth Schedule. It gives this meaning:

> "any amount required to be withheld by an employer in terms of para 3" (emphasis added).

The amount is that referred to in para 10(1)(a) of the Thirteenth Schedule.

Accordingly, I am compelled to conclude that the phrase "employees' tax" in para (c) of s 58(2) includes the amount of employees' tax which the appellant was required to withhold but failed to

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do so; and that by virtue of the recent amendment the Commissioner may, in his discretion, collect it by appointing the appellant's banks as his agents pursuant to s 58(1), or recover it by the institution of action in any court of competent jurisdiction.

Caught within the definition of "tax" in para (d) of s 58(2) is "any additional tax or other penalty payable under the Act".

GUBBAY CJ

It was the Commissioner's submission that under para 10(1)(b) of the Thirteenth Schedule, the liability to pay "a further amount equal to fifteen *per* centum of such employees' tax" - consequent upon a failure by the employer to withhold or to pay any amount of employees' tax as provided in para 3 of the Thirteenth Schedule - constitutes the imposition of a penalty. In this he is supported by the view expressed in the Endeavour case *supra* at 361 E-F or 313, that:

> "... the amount with the employer becomes liable to pay the Commissioner under para 10 includes a penalty element. This is made clear, not only by the heading given to the following para 11, namely, 'Remission of penalties for failure to withhold or remit employees' tax', but by the power accorded the Commissioner to waive or remit the amount of fifteen *per* centum in whole or in part."

Whether the further amount of fifteen *per* centum be regarded as "additional tax" or a "penalty" seems to me of no significance. Certainly it is something different from the other categories of "tax" described in paras (a), (b) and (c) to s 58(2).

It is also important to note that s 46 of the Act, which deals with additional tax chargeable in the event of default, or omissions, or the making of incorrect statements, with respect to the furnishing of a tax return, avoids the use of the term "penalty".

I am satisfied that not only the additional tax chargeable under s 46 but the further amount of tax to be paid under para 10(1)(b) of the Thirteenth Schedule, fall within para (d) of the definition of tax in s 58(2), and so are subject to the Commissioner's powers under s 58(1).

In the result, the appeal must be upheld to the extent that it be declared that the Commissioner is not entitled to collect from the appellant the interest payable by virtue of s 73(3) of the Income Tax Act by the appointment under s 58 of an agent to pay such interest on behalf of the appellant. For the rest the appeal fails and is dismissed.

The Commissioner's opposition has succeeded on two of the three separate issues. It is fair therefore to award him two-thirds of the costs of the appeal.

I consider it unnecessary for the Commissioner to be interdicted in respect to

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GUBBAY CJ

the *declarator* made in favour of the appellant. In the circumstances, the order of the court *a quo* is simply set aside.

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KORSAH JA: I agree.

EBRAHIM JA: I agree.

Morris-Davies & Co, appellant's legal practitioners

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

T S MASIYIWA HOLDINGS (PVT) LTD & ANOR v MIN OF INFORMATION 1996 (2) ZLR 754 (SC)

Court **Supreme Court, Harare**

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

Constitutional application

14 November & 18 December 1996 Judgment No. S-251-96

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 20(1) - protection of freedom of expression - introduction of regulations allowing parties other than the Posts and Telecommunications Corporation to establish cellular telephone services - procedures provided by Regulations and method of implementation of Regulations effectively creating indefinite moratorium in favour of the Corporation - rights of other parties thereby infringed

Headnote

The applicant company was the successor of Retrofit (Pvt) Ltd, which had previously sought relief from the Supreme Court in its quest to establish a cellular telephone service in the face of the monopoly given to the Posts and Telecommunications Corporation (PTC) by s 26 of the Posts and Telecommunication Services Act [Chapter 12:02]. The Supreme Court had held that monopoly to be an infringement of the constitutional right to freedom of expression (see Retrofit (Pvt) Ltd v PTC 1995 (2) ZLR 199 and Retrofit (Pvt) Ltd v Min of Posts & Telecommunications 1995 (2) ZLR 422) and Retrofit acted swiftly to set up the service, receiving authorisation in terms of the Zimbabwe Investment Centre Act [Chapter 24:16], importing and installing equipment, recruiting and training personnel, and registering potential customers.

On 5 February 1996, the Presidential Powers (Temporary Measures) (Cellular Telecommunication Services) Regulations were promulgated. These made it an offence for any person other than the PTC, except in accordance with a licence issued under the Regulations, to establish,

maintain or work a cellular telephone service. The Regulations brought to a standstill the applicant's preparatory work. On 12 July 1996 an amendment to the Posts and Telecommunications Services Act was promulgated, authorising the Minister to make regulations to provide for the control, regulation and licensing of cellular telephone services

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operated by persons other than the PTC, and deeming ss 1 to 14 of the Presidential Powers Regulations to have been made by the Minister in terms of the Act.

The Regulations provided two ways which led to the grant or refusal by the Minister of a licence. Before either method could be implemented, a technical committee had to be appointed by the President. The first method, under s 6, was that the Minister, acting on the advice of the committee, was required as soon as practicable to

- identify the appropriate radio frequencies on which to operate a cellular telephone service;
- prepare specifications for the service to be provided on each of the frequencies identified;
- invite tenders and set out the conditions which would have to be met by any applicant for a licence.

The second method, under s 7, was for a person wishing to provide a cellular telephone service to apply in writing to the Minister, specifying the frequencies to be used and services to be provided. Such an application had to be referred to the technical committee, which would have to prepare specifications and formulate terms and conditions to be met by the applicant. Thereafter tenders would be invited. The Regulations did not make it clear whether the details of the applicant's proposal would be revealed to other tenderers. The Tender Board was obliged to refer any tender to the technical committee, which would evaluate the tenders and make recommendations to the Minister. The final choice lay with the Minister.

Nine persons were appointed in June 1996 to the technical committee, which held its first and only meeting in July. Although the Minister had specified appropriate frequencies, nothing further was done. No specifications had been prepared by the technical committee, nor had any licensing conditions been formulated.

It was argued on behalf of the applicants that the effect of the Regulations, together with the manner of their implementation, were such as to enable the PTC to circumvent the Supreme Court's earlier decisions

Held, that the procedure under s 7 did not afford an applicant the security and even-handed competitiveness that the standard tender system would offer. It was subject to abuse and fraught with too many imponderables

to guarantee transparency and fair play. The courts would not insist on a party charting a perilous course which might well redound to his prejudice merely because it was one available to him under the law.

Held, further, that while the Regulations on their face did not give rise to a fixed monopoly, if the control mechanism provided was designed to prolong the entry of another into the field, or if it had that effect, it would violate the Constitution. The exercise of control provided was very

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strict.

Held, further, that the manner in which the Regulations were being implemented led inescapably to the inference that the PTC was being favoured with a moratorium of unfixed duration. No substantial effort was being made to accelerate the procedures under the Regulations. Any sense of urgency was totally lacking. The continuing delay, which remained unaccounted for, had to be taken to be deliberate. The cumulative impact of the structure of the Regulations and the failure to implement the relevant provisions with reasonable expedition constituted an abridgement of the applicants' constitutionally protected freedom of expression.

Held, further, on the question of whether the means used to impair the right or freedom were no more than necessary to accomplish the objective, that even if it could be assumed that the real objective of the Regulations and their manner of implementation was to regulate and control entry into the field of cellular telephone services, the means used to achieve it could not be regarded as the least restrictive. The Regulations temporarily prohibited all other persons than the PTC from operating a cellular telephone service, a monopoly that the Supreme Court had previously struck down, and a degree of urgency was therefore essential. In fact, an unexplained delay had been caused, which contained a distinct element of unfairness.

Held, further, that as under s 24(4) of the Constitution the court was allowed a wide and unfettered discretion for the purpose of enforcing fundamental human rights and freedoms, the most proper and advantageous remedy would be to direct that the outstanding administrative procedures under the Regulations be completed within fixed time limits, failing which the applicant would be deemed to be licensed for a period of three years, subject to appropriate conditions.

Cases cited:

In re Mlambo 1991 (2) ZLR 339 (S); 1992 (4) SA 144 (ZS)

NTN (Pty) Ltd & NBN Ltd v The State [1988] LRC (Const) 333

Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S); 1996 (1) SA 636 (ZS); 1995 (9) BCLR 1221 (ZS)

GUBBAY CJ

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

Retrofit (Pvt) Ltd v Min of Information 1995 (2) ZLR 422 (S); 1996 (3) BCLR 394 (ZS)

Retrofit \(Pvt\) Ltd v PTC \& Anor 1995 (2) ZLR 199 (S); 1996 (1) SA 847 (ZS); 1995 (9) BCLR 1262 (ZS)

The court referred to the following statutory provisions:

Constitution of Zimbabwe 1980, ss 20(1), 24(4)

Posts and Telecommunication Services Act [Chapter 12:02], s 26A

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Presidential Powers (Temporary Measures) (Cellular Telecommunication Services) Regulations 1996 (SI 15A of 1996), ss 3, 4, 6, 7, 8 & 9

Case Information

W H Trengove SC, *with him A P de Bourbon SC*, for the applicants

P A Chinamasa, Attorney-General, with him A Guvava, for the respondent

Judgment

Gubbay CJ:

INTRODUCTION:

T S Masiyiwa Holdings (Pvt) Ltd ("Mascom") owns the entire issued share capital in Enhanced Communications Networks (Pvt) Ltd ("Econet"), which seeks to carry on the business of establishing and providing a cellular telephone service in Zimbabwe. Mascom is the successor of Retrofit (Pvt) Ltd ("Retrofit"). That company, in July 1993, requested the Posts and Telecommunications Corporation ("the Corporation") to issue it with a licence for the purpose of establishing, maintaining and working a public mobile cellular telephone service. It was the first party ever to make such an approach. The Corporation declined to grant the licence. It did so on the ground that the service was one over which it enjoyed an exclusive monopoly by virtue of s 26 of the Postal and Telecommunication Services Act [Chapter 12:02] ("the Act") to provide telecommunication services within, into and from Zimbabwe; and so was not empowered to issue the licence. This contention succeeded on appeal. See Posts and Telecommunications Corporatio v Retrofit (Pvt) Ltd 1994 (2) ZLR 71 (S).

Thereafter, pursuant to s 24(1) of the Constitution of Zimbabwe, Retrofit laid directly before the Supreme Court the question of whether the monopoly held by the Corporation, with the consequential inability under the law to license any person to become a provider of a public mobile cellular telephone service, was contrary to the enjoyment of freedom of expression protected by s 20(1) of the Constitution. In a judgment handed down on 29 August 1995,

reported in 1995 (2) ZLR 199 (S); 1995 (9) BCLR 1262 (ZS); 1996 (1) SA 847 (ZS) under the name Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation (Attorney-General intervening), it was found that in the particular circumstances pertaining the Corporation's monopoly over public telecommunication services within, into and from Zimbabwe, which prohibited the establishment by Retrofit of a public mobile cellular telephone service, was an infringement of the fundamental right to freedom of expression. In compliance with s 24(5) of the Constitution a rule nis was issued calling upon the Minister of Information, Posts and Telecommunications, the present respondent, to show cause on 6 December 1995 why, to the extent indicated, s 26(1) of the Act should not be declared contrary to s 20(1) of the Constitution and, accordingly, ultra vires. I shall henceforth refer to this decision as "Retrofit I".

On the return day argument in opposition to the confirmation of the rule nisi was directed at

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showing that the Corporation's monopoly was reasonably justifiable in a democratic society and, therefore, ought not to be declared invalid. An alternative submission that it was appropriate to extend the rule nisi for a minimum duration of five years so as to permit the Corporation to implement to the full its avowed objective of building a pervasive telephonic infrastructure comprising, inter alia, 63 000 mobile cellular telephones by the year 2000, was also advanced. The resistance offered on both fronts was rejected and the rule was made absolute. In its judgment of 18 December 1995, reported as Retrofit (Pvt) Ltd v Min of Information, Posts & Telecommunications 1995 (2) ZLR 422 (S); 1996 (3) BCLR 394 (ZS) ("Retrofit II"), this court remarked at 428; 399G that:

> "... in terms of s 24(4) of the Constitution, the Supreme Court may only 'make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights' (emphasis added). Where the determination is made that one of the guaranteed rights has been contravened, the Supreme Court has no option but to enforce the right at the instance of the aggrieved party. No other recourse is open to it."

Following upon the confirmation of the rule nisi, Econet sought and received authorisation in terms of s 27 of the Zimbabwe Investment Centre Act [Chapter 24:16] to proceed with its project to establish a public mobile cellular telephone service. The certificate issued permitted Mascom to invest sixty *per* centum of the capital and Telecel International, a company based in the United States, the remaining forty *per* centum in an amount of

GUBBAY CJ

Z$116 224 000. Additionally, Econet was granted by the Department of Customs and Excise a certificate of exemption from import duty, sales tax and surtax on the purchase of technical equipment in the sum of US$10 052 896. All such equipment was imported to Zimbabwe before the end of January 1996.

Prior to 5 February 1996 Econet was most industrious in the fulfilment of its project. It recruited and employed thirty-five highly skilled technicians and trained others. It applied for and received approval from local authorities, as well as the Department of Civil Aviation, for the construction of antenna masts. It entered into leases on nearly thirty properties throughout the country for the siting of base stations. It installed equipment. Contractors were engaged upon electrical and mechanical constructions, the erection of fencing and the building of sub-stations. It mounted a campaign to educate the public in the new venture and had instruction brochures printed at a cost in excess of one million dollars. Agents were appointed for the supply and servicing of cellular handsets. This involved costly advertising and the engagement of sales representatives. In the result, in excess of five thousand potential customers were registered. All this activity, and more, was accomplished on the understanding that t was the intention of the Minister to close the regulatory void caused by the Retrofit judgments and put in place legislation controlling the field of cellular telephone services. Exactly how and when this would be done was not known. No criticism, however, can be levelled at Mascom and Econet for proceeding in the way they did. After all, the monopoly had been struck down, leaving it open to anyone to enter the field of mobile cellular telephony, especially as it was appreciated that only two cellular operators were able to fit the frequency range set by the Global System of Mobile

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Communications network of 890 to 960 megahertz.

The axe fell upon Mascom and Econet on 5 February 1996 with the publication of the Presidential Powers (Temporary Measures) (Cellular Telecommunication Services) Regulations 1996 (SI 15A of 1996), made by the President in terms of s 2 of the Presidential Powers (Temporary Measures) Act [Chapter 10:20]. For, other than the Corporation and except in accordance with a licence issued under the Regulations, it now became an offence, attracting severe penalties, for any person to establish, maintain or work a cellular telecommunication service within, into or from Zimbabwe. This law brought to an agonising standstill the whole of Econet's on-going operation with serious financial consequences. It was only weeks away from making the service available to its customers.

GUBBAY CJ

On 12 July 1996, the Postal and Telecommunication Services Amendment Act 9 of 1996 was promulgated. It made an appropriate amendment to s 26(1) of the principal Act and added s 26A thereto. This latter provision, in subs (2), authorises the Minister:

> "to make regulations providing for the control, regulation and licensing of persons other than the Corporation, who establish, maintain or work cellular telecommunication services within, into or from Zimbabwe."

And s 5 of the amending Act stipulates that ss 1 to 14 of the Presidential Powers (Temporary Measures) (Cellular Telecommunication Services) Regulations ("the Regulations") shall be deemed to have been made by the Minister in terms of s 26A and shall continue in force and may be amended or repealed accordingly.

THE ISSUE

The substantive relief claimed in both the main and alternative draft orders to the application is that Mascom and Econet be declared free to continue to provide a cellular telephone system to the public within, into and from Zimbabwe, without let or hindrance. In the supporting affidavits and in the supplementary heads of argument filed consequent upon the amending Act coming into force, it was sought to base the entitlement to the declarator upon violations of ss 16, 20 and 23 of the Constitution. At the hearing, however, only a breach of s 20 was relied upon. The contention was that the effect of the Regulations, together with the manner of their implementation, are such as to enable the Corporation to circumvent the decisions in the Retrofit cases *supra*, and to continue the monopoly under another guise, thereby manifestly interfering with the constitutionally protected freedom of expression.

THE RELEVANT ENACTMENTS

Subsection (1) of s 20 of the Constitution protects the freedom of expression; in particular, "the freedom to hold opinions and receive and impart ideas and information without interference". Subsection (2) allows this right to be restricted by a law which, as materially specified in para (b)(iv) thereto, makes provision for the purpose of:

> "regulating the technical administration, technical operation or general efficiency of telephony, telegraphy posts,

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wireless broadcasting or television or creating or regulating any monopoly in these fields."

GUBBAY CJ

But such a law, or anything done under the authority of it, is invalid if "shown not to be reasonably justifiable in a democratic society".

The phrase "cellular telecommunication service" is defined in s 26A(1) of the Act and similarly in the Regulations to mean, in sum, a radio communication service designed to use a limited radio frequency spectrum between cellular handsets and network transceivers for the provision of mobile services across the cellular network by allocating a limited number of frequencies within each of a number of defined geographical areas or cells. Being a form of telephony, a cellular telecommunication service falls squarely within the ambit of the qualification permitted by s 20(2)(b)(iv) of the Constitution.

THE REGULATIONS AND THEIR IMPACT

Section 4(1) places a general ban upon the establishment, maintenance and working of a cellular telecommunication service within, into or from Zimbabwe. Exempted from it are two categories of persons:

(a) the Corporation; and

(b) anyone to whom a licence has been issued in terms of the Regulations.

Since the Minister has assigned to the Corporation the 890 to 900 and 935 to 945 megahertz bands, there is room within the available 890 to 960 megahertz frequency spectrum for only one other operator to whom a licence may be granted.

Although, to my mind, the exemption accorded to the Corporation cannot be viewed as inherently objectionable, it clearly enjoins the Minister, who is empowered to grant the sole remaining licence, to do so with some alacrity. This is because the exemption recreates the monopoly, albeit temporarily. Additionally, it is the duty of the Minister under s 3(2)(b):

"to maintain and promote effective competition between persons engaged in commercial activities connected with cellular communication" (emphasis added).

It would be hardly in fulfilment of that duty if the procedures preceding the grant of the licence were such as to delay inordinately the eventual successful applicant from entering this specialised field. Competition only arises where there is more than one player. To exclude another by means of procedures which by their cumbersome, complex or unfair nature deny expedition, is to

GUBBAY CJ

maintain and prolong the existence of a monopoly in favour of the Corporation; and thus, during the currency of the monopolistic period, avoid the Corporation's involvement in rivalry, thereby

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affording it the opportunity and ability to entrench itself in the Zimbabwean cellular market by the stage a private operator obtains a licence.

It is against this perception that the procedures laid down by the Regulations warrant close scrutiny.

Sections 6 and 7 create two routes which lead to the grant or refusal of a licence by the Minister in terms of s 9. Under s 6 it is the Minister who takes the initiative, whereas the applicant triggers the process under s 7. Before either provision is capable of implementation a technical committee must have been appointed by the President in consultation with the Minister, with monies appropriated by Parliament for the remuneration, allowances and expenses of the members.

Pursuant to s 6, the Minister, acting on the advice of the technical committee, shall as soon as practicable after the date of commencement of the Regulations and thereafter whenever appropriate:

(a) identify the frequencies in which it is appropriate to operate a cellular telecommunication service;

(b) prepare specifications for the service to be provided in each of the frequencies identified;

(c) cause a notice to be published in the Gazette and in such other manner as may be appropriate -

(i) announcing that the Government Tender Board will receive tenders for a licence from anyone who wishes to provide a cellular telecommunication service for which specifications have been prepared; and

(ii) indicating the conditions which will be specified in any licence granted to a successful applicant; such conditions being those formulated by the technical committee in the interests of ensuring the provision of an efficient service.

Anyone who wishes to tender for a licence must do so in the form notified by the Minister in the *Gazette*.

GUBBAY CJ

It is apparent that s 6 does not impose any specific time limits as to when any of the above steps have to be completed.

The s 7 procedure allows a person who wishes to operate a cellular telecommunication service in a frequency for which specifications have not been prepared, to submit a written application to the Minister specifying the frequencies and giving particulars of the service it is proposed to provide. The Minister is then obliged to refer the application without delay to the technical committee for evaluation. If satisfied that it is appropriate for a cellular telecommunication service to be operated in the frequencies specified by the applicant, the technical committee

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must forthwith -

(i) prepare specifications for such a service;

(ii) formulate terms and conditions to be specified in any licence which will ensure the provision of an efficient service;

and return the application, with notification of the specifications and terms and conditions, to the Minister. Thereupon the Minister shall forthwith:

(a) refer the application to the Government Tender Board; and

(b) cause a notice to be published in the Gazette and in any other manner as may be appropriate -

(i) announcing that he has referred the application to the Tender Board and that it will receive tenders for a licence from anyone else who wishes to provide a cellular telecommunication service for which specifications have been prepared, and will consider any such tenders in conjunction with the application; and

(ii) indicating the conditions which will be specified in any licence granted to a successful applicant.

Where the technical committee is not satisfied with the application it must return it to the Minister with a recommendation that he refuse to grant the applicant a licence. The Minister must then forthwith notify the refusal of the application in writing.

Before making any recommendation or taking any action the Minister and the technical committee must ensure that the rules of natural justice have been

GUBBAY CJ

observed and, in particular, that the applicant has been given an adequate opportunity to make representations.

Section 8 provides that the Government Tender Board shall without delay refer any tender received, in response to a notice in terms of ss 6 or 7, to the technical committee. The technical committee is then to evaluate the tenders and return them to the Board. Without delay the Board is to consider the evaluations and recommend to the Minister which, if any, of the tenderers should be granted a licence.

Upon receipt of the Board's recommendation the Minister, in terms of s 9, is to grant or refuse a licence to the tenderer. It is the Minister who makes the final decision.

No time limit is placed upon the technical committee in its evaluation of the application or the other tenders; nor upon the Minister in making the decision whether to grant or refuse the tenderer a licence.

The procedure under s 7 is peculiar. In effect, it requires an applicant to give detailed

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information of the service it is proposed to provide. In other words, to submit a full scale tender. This must be done before the technical committee has prepared specifications and formulated the terms and conditions upon which the licence is to be granted. The application thus furnishes a foundation for the technical committee to prepare specifications and to formulate the terms and conditions upon which the grant of the licence is to be made subject. If the application is considered appropriate, anyone else who wishes to provide a cellular telecommunication service is then invited to tender. Their tenders are considered in conjunction with the application. It is not made clear whether, in announcing in the Gazette that the application has been referred to the Government Tender Board, the Minister will reveal the particulars of the application. Were he to do so, it would make the application an open bench mark against hich others tendered, thereby putting the applicant at a grave disadvantage.

Moreover, the applicant who elects to travel the s 7 route, and whose documents have already been examined, has no opportunity to supply fresh or additional tender documents to improve upon the initial application.

In spite of any assurances that may be given to the contrary, the possibility of information being leaked to other tenderers, as occurred in the recent case involving Siemens Telecommunications (Pty) Ltd and Ericsson Radio Systems AB, cannot be discounted.

GUBBAY CJ

Hence, even before arriving at the point where the Minister and the technical committee must ensure that the rules of natural justice have been observed, a great deal of damage, which the applicant is unaware of, may have been done.

In short, s 7 does not afford an applicant the security and even-handed competitiveness that the standard tender system would otherwise offer - where tenders, based on exactly the same specifications and conditions, are sealed, opened simultaneously and then adjudicated upon by the Government Tender Board whose decision is final. It is subject to abuse and is fraught with too many imponderables to guarantee transparency and fair play.

It is against this background that Econet, with good cause and real apprehension, has refrained from making an application to the Minister to operate a cellular communication service. It has been waiting for the Minister, on the advice of the technical committee, to prepare specifications and formulate the conditions in any licence to be granted. And it could well be that no other person has applied for precisely the same reason.

This court will not insist upon a party charting a perilous course which may redound to his prejudice merely because it was one available to him under the law. Rather, it will take account of all relevant circumstances and order the form of redress it deems the most appropriate. It will do so especially in constitutional disputes in which, by virtue of s 24(4) of the Constitution, the Supreme Court is vested with the power of selecting the most equitable method of remedying a legitimate complaint.

On the face of it, the Regulations do not give rise to a fixed monopoly, since the grant of a licence to operate a cellular telecommunication service to another is permitted. The fact that the

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Corporation has been granted preferential treatment under s 26A(2) of the Act and repeated in s 4(1) of the Regulations (although there would have been nothing inconsistent with the Posts and Telecommunications Act [Chapter 12:03] in making the Corporation comply with the Regulations - see s 19(a)), does not in itself establish a monopoly. Yet if the control mechanism under the Regulations, while not interfering with the Corporation's entitlement to commence to operate a cellular telecommunication service, is designed to prolong the entry of another into the field, or if it has that effect, it would be violative of the Constitution. See Retrofit I *supra* at 218E-F; 1276G-H or 861H-J. Accordingly, the degree of control prescribed by the Regulations is an important factor. The more restrictive the mechanism, the longer wil it take for the Corporation to be met with a competitor.

GUBBAY CJ

To my mind, the exercise of control is very strict. There is a blanket prohibition of all competition, buttressed by severe penalties, followed by rigorous conditions for the lifting of the ban over a period of time which is entirely at the Minister's discretion. There is a technical committee; there is the Government Tender Board; and there are specifications and far-reaching terms and conditions formulated by the technical committee to which a licence is to be made subject. And other onerous conditions may be specified upon issue of the licence which, when made known, could prompt the successful applicant to forego its grant; for example, the amount of the fees payable to the State; the nature of the community service duties to be undertaken; the extent of the obligations in relation to the provision of emergency services; and the level at which tariffs and fees are fixed for the provision of the service.

THE MANNER IN WHICH THE REGULATIONS ARE BEING IMPLEMENTED

The expedition with which the provisions of the Regulations are being administered is also a material factor in the determination of whether the aim or effect is to delay unreasonably the exercise of the freedom of expression in the field of public cellular telecommunication to which Retrofit (now Mascom and Econet) was declared entitled. Put differently, the question is whether evidence of the manner in which the Regulations are being implemented leads inescapably to the inference that the Corporation is being favoured with a moratorium of unfixed duration - a moratorium sought by but denied to the Minister in Retrofit II *supra* at 427D-E; 398H-I.

The procedural steps taken under the Regulations since their promulgation on 5 February 1996 are these:

(1) Nine persons were appointed to act as members of the technical committee on 7 June 1996, the appointments being retrospective to 1 May 1996.

(2) Provision was made to cover the expenses of the technical committee in respect of the financial year 1996-1997.

(3) The technical committee held its first meeting on 3 July 1996. There is no suggestion of its having met since then.

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(4) The Minister has identified the appropriate frequencies and allocated to the Corporation, within the 890 to 960 megahertz range, bands 890 to 900 and 935 to 945.

GUBBAY CJ

Nothing further has been done. Specifications have not yet been prepared by the technical committee in respect of the frequencies identified, nor have any licencing conditions been formulated. Thus, the Minister has not caused a notice to be published in the Gazette announcing that the Government Tender Board will receive tenders for a licence and identifying the conditions which will be specified in the licence to be granted. The type of form to be used in the tender for a licence has not been notified.

In a recent interview given to the news media, the Minister indicated that there is no definite time-frame for the licensing of a private cellular operator and that this is only likely to occur by the second half of 1997. The Minister also advised that new legislation is to be passed.

THE EFFECT OF THE REGULATIONS AND THE MANNER OF THEIR IMPLEMENTATION UPON THE FUNDAMENTAL RIGHT OF FREEDOM OF EXPRESSION

Certainly no substantial effort is being made to accelerate the procedures under the Regulations. Any sense of urgency is totally lacking. The continuing delay, which remains unaccounted for, must be taken to be deliberate. Twelve months after the confirmation of the rule nisi and for an indefinite period in the future, no person other than the Corporation is or will be permitted to operate a mobile cellular telephone service in Zimbabwe. All potential operators are being excluded. This is precisely the situation that obtained prior to the Corporation's monopoly being declared unconstitutional on 18 December 1995. What is the reason?

I think it is simply that the Minister is intent upon securing for the Corporation, as the first operator in the new and profitable field of cellular telecommunication service, the practical advantage of establishing itself in that market well before another rival is admitted. Although initially it was claimed by the Minister that twenty-two applications for licences had been received, it was later acknowledged that these were nothing more than enquiries from companies "expressing interest in the cellular business". As a matter of reality, it was at all times known to the Minister that the only serious contender for the remaining licence was Econet. It was Econet the Minister stopped in its tracks, on 5 February 1996, by Regulations setting severe penalties for any person establishing, maintaining or working a cellular telecommunication service without the grant of a licence.

In the result I am satisfied that the cumulative impact of the structure of the

GUBBAY CJ

Regulations and the failure to implement the relevant provisions with reasonable expedition constitutes an abridgement of the constitutionally protected freedom of expression to which

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Mascom and Econet are entitled.

WHETHER THE CONTRAVENTION OF SECTION 20(1) OF THE CONSTITUTION HAS BEEN SHOWN NOT TO BE REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY

The three criteria to be looked to in determining whether or not the limitation to the protected freedom is permissible were set out in *Nyambirai v National Social Security Authority \& Anor* 1995 (2) ZLR 1 (S) at 13; 1995 (9) BCLR 1221 (ZS) at 1231; 1996 (1) SA 636 (ZS) at 647B-C. The contravention is not saved in the event of any one of them not being met.

It is only necessary to consider the third criterion and ask whether the means used to impair the right or freedom are no more than necessary to accomplish the objective.

Even if it be assumed in favour of the Minister that the genuine objective of the Regulations and the manner of implementation of the provisions is to regulate and control entry into the field of cellular telecommunication service, I do not consider that the means used to achieve it can be regarded as the least restrictive.

Following upon the judgments in the Retrofit cases *supra*, the Minister chose to prohibit all persons, other than the Corporation, from establishing, maintaining or working a public mobile cellular telephone, except in accordance with a licence issued under the Regulations. This was to place a temporary ban upon such activity which was to be maintained until the various procedural measures laid down in the Regulations had been implemented, thereby enabling the Minister to decide whether or not to grant a licence. A degree of expedition was essential, since the effect of the ban was to recreate in favour of the Corporation the monopoly struck down by this court on 18 December 1995. Yet, far from proceeding with despatch, an unexplained delay has been occasioned. A year after the confirmation of the rule nisi an effective monopoly is still in existence with no fixed termination in sight. Administrative structures remain to be set up. After all, as counsel so aptly put it, the Minister was "living on borrowed tim".

There is a distinct element of unfairness in the delay. It is symptomatic of an absence of respect for the right of others to establish a mobile cellular

GUBBAY CJ

telephone service in Zimbabwe and of the corresponding right of the public to enjoy that facility other than through the Corporation.

For these reasons, I find that the objective of regulation and control is not being accomplished pursuant to the Regulations with the least intrusion upon the exercise of the right to freedom of expression.

Before concluding this aspect, I must deal briefly with the decision of the Supreme Court of Papua New Guinea in NTN (Pty) Ltd & NBN Ltd v The State (1988) LRC (Const) 333, upon which reliance was again placed by counsel for the Minister. The facts are summarised in Retrofit II *supra* at 427G-428B; 399A-D and do not warrant repeating. What must not be overlooked is that the majority finding that the eighteen month prohibition imposed by the

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legislature was reasonably justifiable in a democratic society, turned on the particular circumstances of the case. No principle was laid down that an enactment which makes provision for the delay in the enforcement of a fundamental human right must be accepted inevitably as reasonably justifiable. The ratio for upholding the ban was in order to afford the State, in the commencement of the new venture of commercial television, more time to formulate:

> "... a policy and set legislative controls in place so as to reduce the potentially dangerous threat to public welfare and to maximise the very significant benefits for the public welfare which are latent in this powerful mass communications media" (see at 359f-g).

That situation differs toto caelo from the present. The judgment affords the Minister no comfort.

THE REMEDY

Section 24(4) of the Constitution allows the Supreme Court a wide and unfettered discretion for the purpose of enforcing fundamental human rights and freedoms of the individual. See In re Mlambo 1991 (2) ZLR 339 (S) at 335B-C; 1992 (4) SA 144 (ZS) at 155I-J.

Even if it were appropriate to declare the Regulations to be in contravention of s 20(1) of the Constitution I do not believe that this court would be justified in declaring additionally that "without let or hindrance" Econet be permitted to implement the provision of a mobile cellular telephone service to the public. For to do so would amount in essence to the issue of an irreversible

GUBBAY CJ

licence without attaching any conditions thereto. And simply to strike down the Regulations would restore the absence of a regulatory framework that existed between 18 December 1995 and 4 February 1996. Of course, such an order would free Econet to resume its operation pending the introduction of new Regulations. But what then? Would Econet not be compelled to cease its activity once again and have to comply with the Regulations? The delay eventuating from that form of relief would prove counter-productive. It would serve to prolong the enforcement of the right.

In my opinion the proper and most advantageous remedy, and the one that will incur the least delay in reaching finality, is to direct that the outstanding administrative procedures under ss 6, 8 and 9 of the Regulations must be completed within fixed time limits.

THE COSTS

Mascom and Econet have achieved substantial success in this application and are deserving of an order for costs. However, the several affidavits deposed to on their behalf were excessively voluminous and raised issues, as did their supplementary heads of argument, which were not addressed at the hearing. In the circumstances, I propose to order that the Minister pay only four-fifths of the costs.

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THE ORDER

IT IS ORDERED:

1. That the respondent:

   (a) in terms of s 6(1)(b) of the Regulations, prepare specifications for a cellular telecommunication service to be provided in the frequencies already identified by not later than 14 January 1997;

   (b) in terms of s 6(1)(c) of the Regulations, cause a notice to be published in the Gazette and in such other manner as may be appropriate, by not later than 31 January 1997;

   (c) in terms of s 6(2) of the Regulations, notify in the Gazette the form to be used in the tender for a licence by not later than 31 January 1997;

   (d) direct the technical committee to evaluate any tenders received from the Government Tender Board by not later than 14 February 1997;

GUBBAY CJ

   (e) upon receipt of the Government Tender Board's recommendation made in terms of s 8 of the Regulations, either grant or refuse the tenderer a licence in terms of s 9(1) of the Regulations by not later than 28 February 1997.

2. That upon non-compliance with any of the time limits specified in paragraph 1, Econet shall be deemed to be licensed immediately under the Regulations for a period of three years, subject to the following:

   (a) its cellular service shall employ a range not exceeding 18 megahertz in the electromagnetic frequency between 890 and 960 megahertz;

   (b) it shall comply with the particulars provided in its application;

   (c) it shall comply with the terms of all international agreements to which Zimbabwe is a party;

   (d) it shall comply with any other conditions which the respondent may lawfully impose upon a licence in terms of the Regulations, within three months of being notified of such conditions;

   (e) the applicability of ss 13 and 14 of the Regulations.

3. That leave be and is hereby granted for either party to apply to a judge of the Supreme Court for a variation of the time limits specified in paras 1 and 2(d) above, or of the conditions referred to in paras 2 (a), (b) or (c) above, on good cause shown.

4. That the respondent pay four-fifths of the costs of this application.

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McNALLY JA: I agree.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Kantor & Immerman, applicants' legal practitioners

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

TAYLOR v MINISTER OF HIGHER EDUCATION & ANOR 1996 (2) ZLR 772 (SC)

Court **Supreme Court, Bulawayo**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

2 & 20 December 1996 Judgment No. S-252-96

Flynote

Administrative law - review - grounds for - audi alteram partem - applicability to decision to transfer public servant to another town - legitimate expectation to be accorded fair hearing - whether lecturer has legitimate expectation that he will not be transferred without being heard from first

Public service - public servant - transfer - servant's entitlement to be heard before compulsory tranfer to another town

Headnote

Section 11(2) of the Public Service (General) Regulations 1992 (SI 125 of 1992) provides that the head of a Ministry may transfer a person at any time without his consent from the post he presently occupies to any other post of the same grade. Acting in terms of this provision, the Ministry of Higher Education notified a senior lecturer in mechanical engineering at the Bulawayo Polytechnic College that in terms of the section he was to be laterally transferred from his post to a similar post at the Harare Polytechnic College. His salary conditions were to remain the same and he was to be reimbursed for reasonable relocation expenses. The lecturer unsuccessfully tried to obtain the reasons for this transfer.

The lecturer applied to have the decision to transfer him set aside by the High Court on review. One of the grounds for the application was that he had a legitimate expectation that he would not be transferred without first being given the opportunity to make representations about the transfer. The High Court judge decided that the phrase "without his consent" in the relevant provision of the Regulations was a clear indication that it

was the intention of the law-maker to deny the person being transferred any right to be heard

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before he was transferred. The lecturer appealed against this decision.

Held, that s 11(2) of the Regulations does not expressly or by necessary implication remove the right to be heard. The phrase "without his consent" does not mean "without a hearing". The first simply means that under the contract of employment the employee does not have to consent to the transfer for it to be effective. The second is a matter of procedural justice.

Held, further, that the fact that in terms of the Regulations there was provision for a person to complain about a decision after it has been taken does not affect any common law right of the person to be heard before the decision is taken. The right to make representations after the decision has been made rarely cures the procedural defect of a prior fair hearing.

Held, further, that the maxim audi alteram partem expresses a flexible tenet of natural justice that has resounded through the ages. The audi principle applies both where a person's existing rights are adversely affected and where he has a legitimate expectation that he will be heard from before a decision is taken that affects some substantive benefit, advantage or privilege that he expects to acquire or retain and which it would be unfair to deprive him of without first consulting with him. The application of the legitimate expectation doctrine is not confined to situations where the person affected can show that there is an established practice to grant a hearing or an express undertaking to grant a hearing; it applies in any circumstances where there is a legitimate expectation that the person will be consulted before the decision is taken.

Held, further, that even if the appellant had not demonstrated that his existing rights had been affected by the decision, the question remained as to whether he had a legitimate expectation that he would be consulted before a decision was taken to transfer him.

Held, further, that it is not be assumed that in every instance a person can only be transferred to a post of the same grade after he has been granted a hearing. It would be quite unworkable for a busy Ministry to have to grant a hearing to every single person it intends to transfer. This would lead to substantial delays and the extra work required would adversely affect efficiency of operations. The head of the Ministry should consider the position and circumstances of a person before deciding to transfer him. In some cases it will be necessary to hear the person in advance of the decision; in others it will not. In general, professional employees of long standing, holding senior posts, should not be transferred without account being taken of their personal situations and wishes. Where it is

necessary to hear from the person first before transferring him, it would suffice to allow him to make written representations.

Held, further, that the circumstances in relation to the appellant were such that he had a legitimate expectation that he would be consulted before being transferred. Relevant factors were his age, seniority, the responsibilities in his job, the fact that he would not occupy the same prestigious position in Harare as he had in Bulawayo and the fact that he would suffer economic loss as a result of the transfer.

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Held, therefore that the decision to transfer him must be set aside.

Cases cited:

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

Admin, Tvl & Ors v Traub & Ors 1989 (4) SA 731 (A)

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

Health Professions Council v McGown 1994 (2) ZLR 329 (S)

Hlongwa v Min of Justice, Kwazulu 1993 (2) SA 269 (D)

Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A)

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

Ngema/Chule v Min of Justice, Kwazulu & Anor 1992 (4) SA 349 (N)

Omar & Ors v Min of Law and Order & Ors 1987 (3) SA 859 (A)

Ramburan v Min of Housing (House of Delegates) & Ors 1995 (1) SA 353 (D)

Case Information

P Nherere, for the appellant

P Ncube, for the respondent

Judgment

Gubbay CJ: At all times material to this matter, the appellant was employed by the first respondent as a senior lecturer in the Department of Technical Studies, Division of Mechanical Engineering, at the Bulawayo Polytechnic College.

On 28 October 1993, the first respondent wrote to the appellant informing him that in terms of s 11(2) of the Public Service (General) Regulations 1992, SI 125 of 1992, ("the Regulations") he was to be laterally transferred from his post to a similar and vacant post at the Harare Polytechnic College, with effect from 1 February 1994. He was to retain, on transfer, his present salary, salary scale and incremental date, and was to be reimbursed reasonable relocation expenses.

Aggrieved by this unexpected notification, the appellant tried to obtain from the first respondent the reasons for the pending transfer. He was

unsuccessful. Apart from advising that the disruption complained of was met by the provisions of the Public Service (Travelling and Subsistence) Regulations 1972 (GN 605 of 1972), the first

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respondent refused to be drawn into a debate.

On 6 January 1994, the appellant brought a chamber application in the High Court for an order interdicting the first respondent from transferring him to Harare. An opposing affidavit was deposed to by the second respondent, the principal of the Bulawayo Polytechnic. In the event the interdict was refused, but the papers already lodged were permitted to stand as a court application seeking a review of the first respondent's decision. Subsequently, an affidavit from the Permanent Secretary to the Ministry, another from the second respondent and an answering affidavit from the appellant, were filed. The grounds stated for an order setting aside the decision of the first respondent were these:

(a) mala fides, especially in the sense that the transfer of the appellant was a disciplinary measure disguised as a purely administrative act;

(b) alternatively and irrespective of motive, that the decision reached was one that affected the appellant's property rights and as such ought not to have been taken without affording him a prior hearing; and/or that having regard to all pertinent circumstances the appellant had a legitimate expectation that a decision to transfer him, which was contrary to his interests, would not be taken before he was given an opportunity to make representations with regard to it.

The true reason for the transfer of the appellant was a matter of controversy before the High Court. The appellant complained bitterly that he had been victimised because of strong criticism of maladministration, misconduct, incompetence and inefficiency he had frequently levelled at the vice-principal of the Bulawayo Polytechnic. This was denied by the Permanent Secretary. He pointed to the unbearably strained relationship that had developed between the appellant on the one hand, and the vice-principal and to a lesser extent the second respondent on the other. He asserted that the situation that existed was not conducive to the proper functioning of the Polytechnic. One of the parties had to be transferred. He chose the appellant, not as a disciplinary or punitive measure, but because he was a more suitable candidate than the vice-principal. He was convinced that the appellant's continued presence rendered a harmonious working environment insupportable.

GUBBAY CJ

Counsel for the appellant made much of the fact that in the initial proceedings the second respondent had alleged in his affidavit that the necessity for the transfer of the appellant was a shortage of staff at the Harare Polytechnic, whereas no such shortage existed at the Bulawayo Polytechnic. I readily accept that was not the true reason. However, it seems that the affidavit was drafted and filed on the very day the chamber application was to be heard, without the first respondent being given an opportunity to verify its content. Moreover, the second respondent was not part of the decision-making process. And there was no evidence that either he or the vice-principal had personally influenced the first respondent into taking the decision to transfer the appellant. Nor can it be doubted that the first respondent would have been aware of the grave disharmony at the Bulawayo Polytechnic without having been apprised of it by the second respondent. One of the appellant's most critical letters addressed to the scond respondent on

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28 October 1993 was copied to the Ministry, and another, dated 14 May 1993, written directly to the Permanent Secretary. These revealed, in immoderate language, the appellant's total lack of respect for the leadership qualities of both the vice-principal and the second respondent.

Manyarara AJ, who presided at the hearing, found that it was quite impossible to come to the conclusion that the decision of the first respondent to transfer the appellant had been actuated by malice, or that it was a disguised disciplinary measure taken without recourse to the procedures under the Public Service (Disciplinary) Regulations 1992 (SI 65 of 1992).

The approach of the learned acting judge cannot be faulted. There was, after all, no application before him for the reference of the dispute to oral evidence. Accordingly, this court, as did the court *a quo*, must proceed on the assumption that there was no improper or unauthorised reason for the transfer, and that it was a *bona fide* exercise of that power by the first respondent.

Manyarara AJ went on to express the view that the audi alteram partem principle and its extension in the doctrine of legitimate expectation, were implicitly precluded by the provisions of s 11(2) of the Regulations. In this he was supported by Mr Ncube, who appeared on behalf of the respondents.

Section 11(2) reads:

> "Unless the Commission has in any case otherwise directed, a person may at any time without his consent be transferred by the head of Ministry

GUBBAY CJ

> from the post which he occupies to any other post in the Ministry which is of the same grade" (emphasis added).

It was reasoned by the learned acting judge that the presence of the phrase "without his consent" was a clear indication of the intention of the law-maker to deny the right to be heard prior to the decision to transfer being made. Reliance was placed for this construction upon proviso (i) to s 11(1) and s 11(3)(a) of the Regulations. The former provision, put affirmatively, allows a person who is to be transferred to suffer a reduction in his pensionable emoluments if he consents thereto; the latter permits a person at any time, with his consent, to be transferred or seconded by the Public Service Commission to a post in an approved service.

I do not regard either provision as offering guidance in determining the meaning to be assigned to s 11(2). Where the consent of a person is a pre-requisite the audi principle is irrelevant. Consent obviates it.

In my opinion, the phrase "without his consent" does not mean "without a hearing". The two concepts are entirely different. Under the first the person does not himself have to approve of the transfer before it is made effective; the right to transfer him without his consent arises under the terms of the contract of employment as set out in the Regulations. *Per* contra, the right to a "hearing" is a matter of procedural justice. To my mind the object of s 11(2) is simply to ensure that, unless the Public Service Commission directs otherwise, the Ministry may transfer a person from one post to another of equivalent grade without being held to be in breach of the

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Regulations.

Although the right to be heard is not expressly or by necessary implication removed by s 11(2), it is not to be assumed that in every instance the person concerned must be accorded a hearing before any decision is taken to transfer him to another post of the same grade. It would make it quite unworkable for a busy Ministry to have to circulate everyone who is under consideration for a transfer and if opposed, invite the furnishing of reasons why it should not take place. That kind of elaborate procedure would expose the system to substantial delay and strain, and impact upon the efficiency of its operation. Ministries would be inundated with hearings before transfer from all categories of persons, from the most humble to the most senior in rank. The position and circumstances of a person must, therefore, be considered by the head of Ministry before the decision is made to transfer him. In some cases, it will be necessary to hear the person in advance of the decision; in others not. In general, one thinks that professional employees of long standing, holding

senior posts, would not be transferred without account being paid to their stated personal situations and wishes.

I did not understand Mr Nherere to suggest that in this sort of case there was need for a hearing in any formal sense, that is, an oral hearing. All that was required and sought by the appellant was simply an opportunity to submit written representations; to be able to put his side of the story with regard to the transfer affecting him. See *Health Professions Council v McGown* 1994 (2) ZLR 329 (S) at 333B-C. I agree that if the appellant ought to have been heard by the first respondent, it was only to the extent indicated.

Counsel for the respondents advanced the further argument that even if the right to be heard was not excluded by s 11(2) of the Regulations, the appellant, nonetheless, was merely entitled, by virtue of s 24, to be heard after, and not before, the decision to transfer him had been taken. Put otherwise, that s 11(2), read in conjunction with s 24, evinced an intention on the part of the law-maker to restrict the right of the person affected to the making of representations subsequent to the decision.

Section 24 provides:

> "(1) A person who wishes to make representations on matters affecting him shall do so, in writing, addressed in the first place to the head of office.
>
> (2) The head of office shall deal with any representations in terms of subs (1) and if he considers it necessary or if the person so requests, shall forward the representations, through the normal channels, to the head of Ministry, together with his comments thereon.
>
> (3) The head of Ministry shall deal with any representations forwarded in terms of subs (2) and, if he considers it necessary or if the person so requests, shall forward the representations, together with all other papers and his own comments thereon, to the Commission.
>
> (4) The Commission shall deal with any representations forwarded in terms of subs (3) and shall inform the

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person of its decision."

Plainly, the right to make representations under s 24 embraces any complaint. It is not confined to those affected in consequence of a decision. If a person is subjected to poor working conditions, if he is harassed by fellow employees

GUBBAY CJ

or by his superior, if he is discriminated against by reason of sex, colour or creed, he may make representations. And at his request, it is the Public Service Commission which ultimately has to consider the representations and, heeding the comments of the head of office and head of Ministry, decide upon the validity of the complaint.

I do not consider that the right of a person to make representations under s 24 subsequent to the decision of head of Ministry to transfer him bars the right to be heard in advance of that decision. The common law right enshrined in the audi principle is not prohibited by necessary implication. Rather, s 24 is intended to cover a host of cases where there is no right under the common law to be heard in advance of the decision. I have already alluded to those where the right to be heard may be available before a decision pursuant to s 11(2) is taken.

It is well established that the ability to make representations after the decision has been made rarely cures the procedural defect of a prior fair hearing. As I ventured to remark in *Health Professions Council v McGown supra* at 373C:

> "The general rule is that once a decision has been reached in violation of natural justice, even if it has not been implemented, a subsequent hearing will be no meaningful substitute. The prejudicial decision taken will be set aside as procedurally invalid. In this way the human inclination to adhere to the decision is avoided."

See also Omar & Ors v Min of Law & Order & Ors 1987 (3) SA 859 (A) at 906E-F; Administrator, Transvaal & Ors v Traub & Ors 1989 (4) SA 731 (A) at 750B-F; Hlongwa v Min of Justice, Kwazulu 1993 (3) SA 267 (D) at 274H-I. The exceptions, which are outlined and discussed in the further passage of the judgment in McGown *supra* at 337E-338D, are not germane.

It need only be emphasised that despite an interval of three months between the dates of the letter informing the appellant of the transfer and its implementation, the first respondent did not offer to set aside the decision and grant the appellant a hearing. All he said, in effect, was that it was open to the appellant to utilise the procedure under s 24 of the Regulations. Doubtless the appellant was aware of that course. The fact that he declined to pursue it would not in any way rectify the procedural omission, if indeed his personal circumstances and wishes were such as to warrant the application of the audi principle. To that determination I shall now turn.

GUBBAY CJ

The maxim audi alteram partem expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam's defence before

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banishing him from the Garden of Eden. Yet the proper limits of the principle are not precisely defined. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before the decision is taken. See Metsola v Chairman, Public Service Commission & Anor 1989 (3) ZLR 147 (S) at 333B-F; compare on the facts, Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A) at 551F-G, *per* Schreiner JA.

In Administrator, Natal & Anor v Sibiya & Anor 1992 (4) SA 532 (A) it was said by Hoexter JA at 539A-B that:

> "The word 'property' would ordinarily tend to connote something which is the subject of ownership. In my view, however, the concept of 'property' to which the audi rule relates is wide enough to comprehend economic loss consequent upon the dismissal of a public sector employee."

See also Ramburan v Min of Housing (House of Delegates) & Ors 1995 (1) SA 353 (D) at 364B-C.

This extended meaning of property was relied upon by Mr Nherere as a basis for the submission that it had been shown by the appellant that he would suffer economic loss consequent upon a transfer to Harare. I accept that the cause of economic loss whether it results from dismissal or transfer is irrelevant. It is the loss and not the cause that has a significant impact upon existing rights. The features advanced were these:

(i) A move to Harare would necessitate the sale or lease of the matrimonial home in Bulawayo. To purchase or lease a residence of equivalent standing in Harare is much more costly than in Bulawayo.

(ii) The appellant's wife is the managing director of a family company in which she owns twenty-five *per* centum of the share capital. The income derived by her from this business assists substantially in meeting many household expenses which the appellant could not afford on his own income.

(iii) The appellant's wife would find it difficult, if not impossible, to secure employment in Harare; and it would not be easy for her to find a suitable person to assume management of the company.

GUBBAY CJ

(iv) The appellant's aged mother-in-law resides in an adjoining house. She is a bed-ridden invalid in need of constant care. Living in Harare would require her to be placed in a nursing home with an increased financial burden upon him and his wife.

In short, the contention was that the relocation of the appellant and his family to Harare, after many years of settled life in Bulawayo, would lead to him sustaining considerable economic loss.

I am not entirely receptive to this argument. But even if it be assumed in favour of the

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respondents that the appellant has not demonstrated that an existing right was impaired or injuriously prejudiced so as to bring himself within the classic formulation of the audi principle, it still remains to decide whether he had a legitimate expectation to be accorded a hearing before the decision to transfer him was reached.

The strict ambit of the audi principle had long been considered to result in unfairness in cases where without a hearing an administrative decision was taken which, although it did not abridge a person's existing rights, nevertheless involved serious consequences to him.

In Administrator, Transvaal & Ors v Traub & Ors *supra* the facts demanded a legal remedy. The main question, therefore, was whether the liberty, property and existing rights formula was exhaustive of the circumstances in which the audi principle applied; or whether the principle was also applicable to cases where the decision affected the individual concerned in his legitimate expectation. In a landmark judgment, in which the other members of the court concurred, Corbett CJ at 758D-E, aptly described the legitimate expectation doctrine as:

> "sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken ... In practice the two forms of expectation may be interrelated and even tend to merge."

The learned Chief Justice continued at 761D-G:

> "There are many cases where one can visualise in this sphere - and for reasons which I shall later elaborate I think that the present is one of them

GUBBAY CJ

> - where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintaned between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration."

The extension of the principle of natural justice as enunciated in Traub has been received with enthusiasm in this jurisdiction. See *Health Professions Council v McGown supra* at 333G-334C. But does it follow that the doctrine of legitimate expectation applies to unwilling transferees in the employ of the public service?

In Hlongwa v Min of Justice, Kwazulu *supra* Didcott J found it unnecessary to attempt to do what Corbett CJ did not venture in Traub, namely, "to define exhaustively the circumstances in which the legitimate expectation doctrine would be present and entitle a person ... to a hearing in the broad sense of the word" (see at 272A). It is clear, however, that the learned judge deemed the most compelling reason for holding that the applicant, a public prosecutor, was

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entitled to a hearing, the fact that benefits, advantages or privileges stood to be lost by transfer. He stated at 272D-G:

> "Generally speaking it seems to me, however, people such as the applicant, people on the professional staff of concerns like the respondent's organisation, would not one thinks be transferred willy-nilly and unilaterally without any consideration at all of their personal circumstances and wishes. One certainly knows of its having been said from time to time that someone or other, a magistrate let us say, has damaged his chances of promotion by not accepting a transfer from a large city where he may have been for many years, where his children may be attending school, where his wife may be in full-time employment, to some remote

> rural area. I have never heard of its having happened, however, that such a person has been transferred against his will. Perhaps that does happen, but at the very least, if it does, one would be surprised were his wishes and personal circumstances to be disregarded entirely in the matter. One would be surprised, in other words, if that were to be done without any reference to him at al. Indeed, one cannot imagine that it would be conducive to a feeling of satisfaction and well-being on the part of such officials if they were liable to summary transfer without any opportunity for being heard at all on the point."

The learned judge noted that the applicant had cited two reasons which were by no means trivial and which ought to have been taken into account by any wise bureaucracy. These were that proper medical treatment for her asthmatic condition was not available at the rural village to which she was to be transferred; and that she was engaged to be married to a man employed at the city where she was then stationed. These factors amounted to a benefit or advantage or privilege of remaining where she was and which it would have been unfair to deny her without prior consultation and the opportunity to make representations (see at 273D-E).

A very different approach was adopted in Ngema/Chule v Min of Justice, Kwazulu & Anor 1992 (4) SA 349 (N). Levinsohn J, with the agreement of Mitchell J, observed that anyone who joins the public service must realise that the possibility of transfer was an occupational hazard that may occur during his career. He added at 360E-H:

> "I am fully conscious of the inconvenience and, in some cases, hardship which a transfer can cause. The particular official may have settled down comfortably in a particular district and become firmly established there when a transfer will simply have the effect of uprooting him and his family. There may even be health considerations. The official may have become proficient in a particular field of expertise, such as Miss Ngema in the present case who specialised in personnel work. As a result of the transfer, she is now called upon to perform general administrative duties. To my mind, none of these considerations establish a legitimate expectation *in the sense that a firm practice has arisen or that an undertaking has been given to the official concerned that because of the length of his stay at a particular station or other factors, he may remain on at that station*" (emphasis added).

As neither applicant had proved that the Kwazulu Public Service, or any other public service in South Africa, was accustomed to consult its employees or

officials before transferring them, it was found that the two applicants could not claim a

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legitimate expectation to consultation prior to transfer.

With due deference to the learned judge, the Traub case *supra* did not hold that a legitimate expectation can be based only on established practice or express undertaking. It merely explained that these factors are likely to be relevant in establishing the existence of such expectation (see at 756H-J and 758I-J). The point of the doctrine is not to convert an informal practice of consultation or an express undertaking by requiring a hearing, into a legal duty of consultation. Hence, Didcott J was not wrong in the Hlongwa case to found a right to be heard on a legitimate expectation of retaining a particular posting.

In Gemi v Min of Justice, Transkei 1993 (2) SA 276 (TkG) Pickering AJ (as he then was) disagreed with the reasoning in the Ngema/Chule case. He expressed the view that the absence of an assurance to Gemi that he would not be transferred did not necessarily mean that he was not entitled to be heard before he was transferred. Nor did the lack of such an assurance have any bearing on the reasonableness of Gemi's expectation that he would be heard before a decision which adversely affected him was taken (see at 289A-B). Similarly, the claim that Gemi legitimately expected to be heard was not defeated by the fact that there was no established practice of such hearings. The learned judge continued at 288D-F:

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

Pickering AJ was at pains to stress that fairness is the true guide to the circumstances in which a public official is required to afford a hearing. It is this concept, he said, that operates as a limiting factor to ensure that the legitimate expectation doctrine does not stray beyond its proper bounds.

GUBBAY CJ

I am in respectful agreement that it is helpful to look at the situation from the stand point of fairness and reasonableness. See *Health Professions Council v McGown supra* at 334C; Maqungo v Government of the Republic of Transkei & Ors 1995 (1) SA 417 (TkA) at 419D-G.

It follows that I have no hesitation in endorsing the common approach of Didcott J and Pickering AJ and in finding that in a case such as this the views, wishes and personal circumstances of the appellant were relevant and ought to have been taken into consideration by the first respondent before the decision to transfer him was made. He was at the time fifty-seven years of age and by qualification a chartered engineer of some seniority. For the lengthy period of eleven years, he lectured in the department of mechanical engineering at the Bulawayo Polytechnic. He became the principal lecturer and, to quote him, "held the fort during frequent changes of staff". In real terms, the transfer meant that the appellant would not occupy

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the same prestigious position at the Harare Polytechnic, where a post had to be created for him. Not to be overlooked as well by the first respondent, were the factors I have mentioned concerning the issue of economic loss.

When account is taken of the whole picture the conclusion appears to me inescapable that the appellant had a legitimate expectation of being afforded a hearing. It was unfair to him to take the decision without prior consultation and the opportunity to make representations.

It is for these reasons that I would allow the appeal with costs and alter the order of the court *a quo* to read:

"1. The decision of the first respondent to transfer the applicant from the Bulawayo Polytechnic College to the Harare Polytechnic College is set aside.

2. The first respondent is to pay the costs of the application."

KORSAH JA: I agree.

EBRAHIM JA: I agree.

Calderwood, Bryce Hendrie & Partners, appellant's legal practitioners

Coghlan & Welsh, respondent's legal practitioners

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Endnotes

1 (Popup - Popup)

[*Editor's Note:* This judgment was received too late to be included in Part 1 of the 1996 Law Reports.]

2 (Popup - Popup)

[*Editor's Note:* This judgment was received too late to be included in 1996 Part 1 Law Reports.]

3 (Popup - Popup)

The conviction was set aside on appeal. See *S v Lawson* S-82-97. - *Editor*

4 (Popup - Popup)

The learned Judge gave his decision in 1994 but written reasons were requested only in 1996. - *Editor*

5 (Popup - Popup)

The Provincial Magistrate, Harare - *Editor.*

6 (Popup - Popup)

Now the Customary Marriages Act *[Chapter 5:07].*

7 (Popup - Popup)

Now s 14(1)(a) of Chapter 7:10 - *Editor.*

8 (Popup - Popup)

A portion of the judgment has been omitted. - *Editor*

9 (Popup - Popup)

Pollak on Jurisdiction 2 ed p 12.

10 (Popup - Popup)

See *McConnel v McConnel* 1981 ZLR 12 (G).

11 (Popup - Popup)

1926 WLD 179 at 181

12 (Popup - Popup)

1953 (2) SA 197 (T) at 199

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13 (Popup - Popup)

1958 R & N 500 at 503; 1958 (4) SA 268 (SR) at 269

14 (Popup - Popup)

1976 (3) SA 593 (C)

15 (Popup - Popup)

1979 (1) SA 780 (C) at 781 G - D

16 (Popup - Popup)

The Matrimonial Causes Act [*Chapter 39*], later repealed by the Matrimonial Causes Act 33 of 1985; Chapter 5:13 in the Revised Edition of the Laws.

17 (Popup - Popup)

The Matrimonial Causes Act 1985, by s 17(2)

18 (Popup - Popup)

by s 18(2); Chapter 5:09 of The Revised Edition of the laws.

19 (Popup - Popup)

by s 18(3) of Chapter 35 as read with ss 8, 19, 22 and 23

20 (Popup - Popup)

Chapter 39.

21 (Popup - Popup)

Of Chapter 39

22 (Popup - Popup)

In the 1996 Revised Edition of the Laws, s 17 has been omitted by the Law Reviser on the assumption that it is spent. This, for reasons adumbrated by BARTLETT J, is of no significance and the section remains effective. It is, in any event, the law that was in force for the purpose of this decision.

23 (Popup - Popup)

Subsections (2) and (3) of s 7 provide that certain property is immune from distribution order and set out guidelines according to which the discretion of the court is to be exercised.

24 (Popup - Popup)

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1988 (2) ZLR 202 (H) at 204G-205C.

25 (Popup - Popup)

See Devenish *Interpretation of Statutes* pp 187 et *seq.*

26 (Popup - Popup)

1974 (1) SA 161 (C) at 164-5

27 (Popup - Popup)

1966 (4) SA 345 (C) at 350G-351D. See also GOLDSTONE AJ (as he then was) in *van Lear v van Lear* 1979 (3) SA at 1162 (W) 1164E-F.

28 (Popup - Popup)

1955 (4) SA 305 (A) 312.

29 (Popup - Popup)

Supra at 206C-D

30 (Popup - Popup)

Chapter 1; in the 1996 Revised Edition of the Laws, s 17(1)(c) and (e) of Chapter 1:01.

31 (Popup - Popup)

Loc cit at 205H-206B.

32 (Popup - Popup)

[1971] 2 All ER 764 (PDA).

33 (Popup - Popup)

[1971] 3 All ER 116 (PDA).

34 (Popup - Popup)

[1970] 3 All ER 719 (CA)

35 (Popup - Popup)

At 272b.

36 (Popup - Popup)

At 772c-d.

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37 (Popup - Popup)

At 126b.

38 (Popup - Popup)

Per ORMOND LJ at 723.

39 (Popup - Popup)

[1981] 2 All ER 497 (CA).

40 (Popup - Popup)

At 28 *supra*.

41 (Popup - Popup)

At 500j.

42 (Popup - Popup)

At 501h.

43 (Popup - Popup)

[1974] 1 All ER 673 (Fam D).

44 (Popup - Popup)

[1987] 1 All ER 999 (CA).

45 (Popup - Popup)

In passing, one thing this case may perhaps suggest is the correctness of *Lewis v Beeson supra*. It involved legislation which had been enacted in England specifically allowing a person residing outside the country to prove proprietary relief within the country of the divorce.

46 (Popup - Popup)

[1985] 2 All ER 449 (HL).

47 (Popup - Popup)

S v Mupfundza 1982 (1) ZLR 271 (S) at 273E-G.

48 (Popup - Popup)

S v Chatiyo 1989 (2) ZLR 144 (S) at 146D-E.

49 (Popup - Popup)

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S v Ponder 1989 (1) ZLR 235 (S) at 239G. See also EBRAHIM JA in *S v Sibanda* 1994 (1) ZLR 394 (S) at 396G-397B.

50 (Popup - Popup)

S v Chigova 1992 (2) ZLR 206 (S) at 219E-F.

51 (Popup - Popup)

S v Ncanana 1948 (4) SA 399 (A) at 405-6; accepted in this country *inter alia* in *R v Lembikani & Anor* 1964 R & N 7 (S) at 9A.

52 (Popup - Popup)

R v W supra at 780.

53 (Popup - Popup)

S v Mupfudze supra at 276E

54 (Popup - Popup)

See generally *R v Judson* 1965 RLR 501 (A) at 5041 *et seq*

55 (Popup - Popup)

R v Ncanana supra

56 (Popup - Popup)

S v Chatiyo supra.

57 (Popup - Popup)

R v W supra at 481

58 (Popup - Popup)

Cf BARON JA in *S v Mupfudza supra* at 274H-275A.

59 (Popup - Popup)

Per Lewis JP in *S v Mubaiwa 1980* ZLR 477 (A) *at* 481B.

60 (Popup - Popup)

S v Mutandi 1996 (1) ZLR 367 (H)

61 (Popup - Popup)

Hoffman & Zeffert *S A Law of Evidence 4 ed p 119; but see S v M* 1980 (1) SA 586 (B).

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62 (Popup - Popup)

R v Gannon 1906 TS 114 at 116.

63 (Popup - Popup)

1985 (2) ZLR 313 (S) at 316C-E

64 (Popup - Popup)

In which case it would be binding on the world.

65 (Popup - Popup)

See Hoffman & Zeffertt *SA Law of Evidence* 4 ed p 340.

66 (Popup - Popup)

Madondo v Fyfe \& Ors 1988 (1) ZLR 138 (H) at 141F-G.

67 (Popup - Popup)

Cf Hoffmann & Zeffertt *op cit* pp 341-2 and 346-350.

68 (Popup - Popup)

1932 TPD 345 at 350-1.

69 (Popup - Popup)

See *Wolfenden supra* 317D-F.

70 (Popup - Popup)

See *Munemo v Muswera* 1987 (1) ZLR 20 (S) at 22D.

71 (Popup - Popup)

1995 (1) SA 653 (A).

72 (Popup - Popup)

Idem actor, *idem reus*, *eadem res*, *eadem causa petendi*.

73 (Popup - Popup)

Eaden quaestio.

74 (Popup - Popup)

See *Hefer v van Greuning* 1979 (4) SA 952 (A).

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75 (Popup - Popup)

Silberberg & Schoeman *The Law of Property* 3 ed s 282

76 (Popup - Popup)

van der Merwe *The Law of Things & Servitudes* s 186.

77 (Popup - Popup)

The Acquisition and Protection of Ownership pp 334-5.

78 (Popup - Popup)

In *Erasmus Mittel & Reichman* 1913 TPD 617 at p623 it is said that a *bona fide* possessor in strict law is one who occupies a property believing himself to be the owner thereof.

79 (Popup - Popup)

Per BEADLE J (as he then was) in *BC v CoT* 1957 R & N 808 (SR) at 818; 1958 (1) SA 172 (SR) at 179; see also *Lyndenburg Properties Ltd v Min of Community Development* 1963 (1) SA 167 (T) at 172.

80 (Popup - Popup)

Lewis *Legal Ethics* pp 49-50 and 58 *et seq.*

81 (Popup - Popup)

Cf *de Kuszaba-Dabrowski et uxor v Steel* NO 1996 RLR 60 (A) at 65C-G.

82 (Popup - Popup)

Burchell *Law of Defamation in South Africa* p 85, *National Union of Distributive Workers v Cleghorn & Harris* 1946 AD 984 at 997.

83 (Popup - Popup)

Argus P & P Co v Esselen's Est 1995 (2) SA 1 (A) at 21.

84 (Popup - Popup)

Esselen's Est supra at 21A; *Auridiam Zimbabwe (Pvt) Ltd v Modus Publicantions (Pvt) Ltd* 1993 (2) ZLR 359 (H) at 366C-E.

85 (Popup - Popup)

In which case the test would be whether taking into account the special facts alleged, the words are capable of bearing the defamatory meaning alleged: *Conroy v Stewart Printing Co Ltd* 1946 AD 1015 at 1018.

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86 (Popup - Popup)

Esselen's Est supra 20 at 20F-G, *per* CORBETT CJ; *Auridium supra* at 371.

87 (Popup - Popup)

Channing v SA Financial Gazette Ltd & Ors 1996 (3) SA 470 (W) at 474A-C; *Auridium supra* at 371.

88 (Popup - Popup)

per McEWAN J in *HRH King Zelinthini of KwaZulu v Mervis & Anor* 1978 (2) SA 521 (W) at 524G. See also *Demmers v Wyllie & Ors* 1978 (4) SA 619 (D) at 622F-G and 1980 (1) SA 835 (A) at 845E-G.

89 (Popup - Popup)

Nathan *The Law of Defamation in South Africa* p 15.

90 (Popup - Popup)

Ibid at pp 117-8.

91 (Popup - Popup)

Per WESSELS J in *Masch v Leask* 1916 TPD 114 at 11; also CURLEWIS J at 117: "He must show that the circumstances were of such a nature that no reasonable man could look upon it as anything else than a joke."

92 (Popup - Popup)

cf Burchell *The Law of Defamation in South Africa* at p286.

93 (Popup - Popup)

1972 (1) RLR 262 (A); 1972 (3) SA 289 (RA).

94 (Popup - Popup)

1977 (3) SA 394 (A).

95 (Popup - Popup)

Wonesayi supra at 279E.

96 (Popup - Popup)

Ibid at 279H-280A, 300A.

97 (Popup - Popup)

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Ibid at 301A-E.

98 (Popup - Popup)

Ibid at 298F-G.

99 (Popup - Popup)

O'Malley at 403C-D.

100 (Popup - Popup)

Ibid at 405G-H.

101 (Popup - Popup)

Ibid at 402H.

102 (Popup - Popup)

Ibid at 403A-B.

103 (Popup - Popup)

See also Burchell in 1977 *Annual Survey of South African Law* pp 198 *et seq.*

104 (Popup - Popup)

Wonesayi supra at 299C-G.

105 (Popup - Popup)

See *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H), *Zimunya v Zimbabwe Newspapers* 1994 (1) ZLR 35 (H) 46E.

106 (Popup - Popup)

See in particular *Chinamasa v Jongwe P & P Co* 1994 (1) ZLR 133 (H) at 159 *et seq,* where BARTLETT J dealt with the defences clearly on this basis and in addition accepted the authority of *Neethling v Du Preez & Ors* 1994 (1) SA 708 (A) on the subject of the defence of privilege as a defence excluding unlawfulness.

107 (Popup - Popup)

1982 (3) SA 146 (A).

108 (Popup - Popup)

Supra.

109 (Popup - Popup)

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1994 (1) ZLR 35 (H) and *Zimbabwe Newspapers (1980) (Pvt) v Zimunya* 1995 (1) ZLR 364 (S).

110 (Popup - Popup)

At 48A-C.

111 (Popup - Popup)

per MUBAKO J at 46E-F.

112 (Popup - Popup)

At 48A-C.

113 (Popup - Popup)

Wonesayi supra at 297D.

114 (Popup - Popup)

See Feltoe, noting *Zimunye in Legal Forum* (1994) Vol 6 No 3 p 52 at 55 *et seq.*

115 (Popup - Popup)

Wonesayi supra at 279C; precisely the same definition of the intention to injure was used in *O'Malley supra* at 403C-D.

116 (Popup - Popup)

Zimunye supra at 48A.

117 (Popup - Popup)

1965 (3) SA 562 (W) at 576A.

118 (Popup - Popup)

Burchell *Law of Defamation in South Africa* p174; also 194-7; 1983 *Annual Survey of South African Law* pp 204-5; Feltoe *Legal Forum* (1993) Vol 5 No 2 p 43; A J G Lang *"Amicus Injuriandi"* (1972) 12 *RLJ* 149 at 158.

119 (Popup - Popup)

per MUCHECHETERE JA in *Zimbabwe Newspapers (1980) Ltd v Zimunye* 1995 (1) ZLR 364 (S).

120 (Popup - Popup)

At 407C-D.

121 (Popup - Popup)

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The only possible and rather tenuous manner in which these two decisions can be seen as at all relevant is, I think, suggested by Feltoe *loc cit* at p57.

122 (Popup - Popup)

Zimunye supra at 366G.

123 (Popup - Popup)

See Feltoe "Confusion upon confusion in the *Zimunye* case" *Legal Forum* (1996) Vol 8 No 1 at 58. The learned Professor's frustration and somewhat acerbic criticism of the Supreme Court judgment is entirely understandable. The opportunity to correct error, to reconsider the law and to contemplate future development of the law was squandered in this judgment.

124 (Popup - Popup)

Madhimba v Zimbabwe Newspapers \(1980\) Ltd 1995 (1) ZLR 391 (H) at 403E-405F.

125 (Popup - Popup)

Demmers v Wyllie 1980 (1) SA 835 (A) at 842B.

126 (Popup - Popup)

Ibid, *per* MULLER JA at 842 C.

127 (Popup - Popup)

Per LORD COLERIDGE in *Dublin, Wicklow & Wexford Railway Co v Slattery* (1878)3 App Cas 1155 at 1197.

128 (Popup - Popup)

Per TINDALL JA in *Young v Kemsley & Ors* 1940 AD 258 at 282.

129 (Popup - Popup)

Per LORD DEVLIN in *Lewis v Daily Telegraph Ltd* [1963] 2 All ER (HL) at 1245 G-H.

130 (Popup - Popup)

Salmond & Heuston *The Law of Torts* 18 ed 137; the ordinary reader does not engage in elaboration and analysis: *Johnson v Rand Daily Mail* 1928 AD 190 at 196.

131 (Popup - Popup)

Per DIEMONT JA in *Demmer's* case *supra* at 343H.

132 (Popup - Popup)

Gilbert & Sullivan *Yeoman of the Guard* Act 1.

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133 (Popup - Popup)

See above p 60. - *Editor.*

134 (Popup - Popup)

Ulpian, book 43 *ad Edictum*, Digest XII.6.26. In my translation: "Interest, and interest on interest, however, can neither be stipulated for nor recovered beyond twice the amount, and if paid, may be recovered".

135 (Popup - Popup)

Or, as JOUBERT JA remarked in *LTA Construction Bpk v Administrateur Tvl* 1992 (1) SA 473 (A) 477F and 481I, *"ultra sortem".*

136 (Popup - Popup)

Cf *LTA supra* at 476G-J.

137 (Popup - Popup)

Zimmerman *The Law of Obligations,* pp 166.

138 (Popup - Popup)

Ibid p 169 n 87 "Neither, incidentally, could arrears of interest be charged to the extent that they exceeded the amount of the capital that had been borrowed: Ulp. D. 12.6.26.1"; See also *LTA supra* at 477E: "The third method, which we must consider in detail, was the prohibition of interest *in duplum*": *per* JOUBERT JA (translation supplied by Adv Burman).

139 (Popup - Popup)

Codex IV.32.10 Emporer Antonius Pius (AD138-161) *a Donato*. My translation: "Interest paid from time to time is of no assistance to the debtor in calculation the double. For then, whenever the amount of interest paid as from time to time exceeds this calculation, that interest is not considered to be beyond the sum of the capital." I note a difference between Scott and me as to the literal meaning of this passage; the effect of both translations, however, is the same and shows that piecemeal payments are not included in the reckoning of the double.

140 (Popup - Popup)

"Ut particulares usurarum soutiones in duplum computentur" Emporer Justinian to Basil, Governor of Tarsus, *Novella Constitutionis* CXXI Chapter 2. My translation: ince therefore our laws intend that no payment should be made beyond the double, and since we differ to this extent from our predecessors, at least as to what debits might make up to the double, if no part payment made might so do; we repeat in truth that even payments in part discharge the debt once they attaing the double..." The

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translation of the title itself shows a purpose "That part payments of interest should be included in computing the double." Also *Novels* 138 and 160 (which latter excludes form this rule annual revenues due to cities).

141 (Popup - Popup)

Zimmerman *op cit* 169 n 87 *in fine.* To similar effect is Kaser *Roman Private Law* 2 ed p 148, s34.IV.

142 (Popup - Popup)

Simon a Groenewegen van der Made *De Legibus Abrogatis, ad Cod. IV.32 l27 "de usuris".* My trans" "Interest does not run beyond the double. The Senate of Friesland considers this to apply even to interest on money paid...But this is mistaken first as to annual interest...Secondly it is mistaken in respect of interest paid from time to time, which is of no assistance to the debtor ihn calculating the double: for then, whenever the amount of interest as paid from time to time exceeds this calculation, that interest is not considered to be beyond the sum of the capital, line 10 of this title on interest [here the learned commentator is directly citing the passage of Antonius Pius Cod. IV.32.10 set out in n 6 above] which law it is acknowledged was abrogated by Novels 121 and 138. However, by our customs it is called back into use...because in the day interest is not wholly lucrative but is paid in compensation of loss and because it is harmful to the creditor to have been without money..." Groenewegen cites Sande as authority. See also *LTA supra* at 480J as to the exception on annual interest and 481G as to the divergence between Friesland and Holland on this point and the manner in which it was eventually reconciled.

143 (Popup - Popup)

Simon Van Leeuwen *Censura Forensis* 1.4.4.35; Barber & MacFayden's translation.

144 (Popup - Popup)

Ibid.

145 (Popup - Popup)

Ibid.

146 (Popup - Popup)

Ulric Huber *Heedensdeagse Rechtsgeleertheyt* III.37.38-9; Gane's translation. Gane cites as authority Carpzovius.

147 (Popup - Popup)

Johannes Voet *Commentarius ad Pandectas* XXII.1.19; Gane's translation. Voet cites

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as authority Sande, van Leeuwen & Groenewegen.

148 (Popup - Popup)

Manfred Nathan *The Common Law of South Africa* Vol II p 669 s 808.

149 (Popup - Popup)

Niekerk v Niekerk (1830) 1 Menzies 452 at 454 *in fine.*

150 (Popup - Popup)

The earliest report was a single volume published in Edinburgh in 1899, between which date and 1911 there exists an hiatus in reporting.

151 (Popup - Popup)

1911 SR 154 at 160.

152 (Popup - Popup)

Per DE VILLIERS JP (as he then was) in *Union Government v Jordaan's Executor* 1916 TPD 411 at 413.

153 (Popup - Popup)

1928 WLD 52 at 65.

154 (Popup - Popup)

1947 (1) SA 576 (T).

155 (Popup - Popup)

Ibid per MILLIN J at 581-2.

156 (Popup - Popup)

1973 (2) SA 137 (T).

157 (Popup - Popup)

Hence *Mr Morris* proposed an *"in treblum"* rule in respect of accrual of interest on judgment debts where the double had been reached prior to judgment. Mr *Burman,* borrowing the same pattern of terminology, advanced a rule *in quadruplum*. I deal with this issue below.

158 (Popup - Popup)

1990 (3) SA 387 (W).

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159 (Popup - Popup)

Supra (see n 2).

160 (Popup - Popup)

Ibid at 482 *in fine* to 483.

161 (Popup - Popup)

1995 (4) SA 510 (C).

162 (Popup - Popup)

Huber *op cit* III.37.40; Gane's translation.

163 (Popup - Popup)

Supra (see n 23) at 139A-E.

164 (Popup - Popup)

Van der Kessel, *Praelectiones* 1178.

165 (Popup - Popup)

Supra (see n 25) at 139A-E.

166 (Popup - Popup)

See generally Buckland *A Textbook of Roman Law* 2 ed 695-701. Any greater examination of the Roman or Roman-Dutch law concerning *litis contestatio* is beyond the scope of this judgment.

167 (Popup - Popup)

Wessels *The Law of Contract in South Africa* s 2371.

168 (Popup - Popup)

Swadif (Pty) Ltd v Dyke 1978 (1) SA 928 (A) at 944F-H.

169 (Popup - Popup)

Christie *The Law of Contract in South Africa* 2 ed 543.

170 (Popup - Popup)

Contributing the article on Loan in *Law of South Africa* Vol 15 p 199; at para 297 p 211.

171 (Popup - Popup)

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The authority quoted for the proposition in the last sentence is given, wrongly I think, as "van der Keessel 549". Although van der Keessel does support the statement, the reference is as in note 31 above.

172 (Popup - Popup)

Supra at 578G.

173 (Popup - Popup)

Voet, Book XXII, trans Horwood; note to Title 1 para 10.

174 (Popup - Popup)

I see that the learned translator remarked that this rule was one which could not be justified in circumstance where the old law regarding usury and compound interest was no longer part of our law; note to Title 1 para 19.

175 (Popup - Popup)

1988 (1) SA 290 (A).

176 (Popup - Popup)

At 298G-299A.

177 (Popup - Popup)

The Prescribed Rate of Interest Act [*Chapter 8:10*].

178 (Popup - Popup)

By s 4.

179 (Popup - Popup)

By s 5(1) .

180 (Popup - Popup)

By s 2 *sub voc* "judgment debt"

181 (Popup - Popup)

Which I think can only apply to a case where judgment is given on a debt which does not carry interest and no interest was prayed from the court from the date of judgment.

182 (Popup - Popup)

Oneanate supra at 550-1.

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183 (Popup - Popup)

Cf NESTADT J in *Trust Bank of Africa Ltd v Senekal* 1977 (2) SA 587 (W) at 599D-F.

184 (Popup - Popup)

Oneanate supra at 560-570.

185 (Popup - Popup)

Ibid at 560G-561A.

186 (Popup - Popup)

Per SELIKOWITZ J in *Oneanate supra* 565H-J.

187 (Popup - Popup)

Re *Morris, Mayhew v Halton* [1922] 1 Ch 126 (CA) *per* LORD STERNDALE MR at 133.

188 (Popup - Popup)

Inland Revenue Commissioners v Oswald [1945] 1 All ER 641 (HL) at 647g *per* LORD MACMILLAN.

189 (Popup - Popup)

Ibid at 651h *per* LORD PORTER.

190 (Popup - Popup)

Per LORD ATKIN in *Paton supra* at 790f-h.

191 (Popup - Popup)

The passage also explains the fallacy in the earlier submission of counsel that all debit items in a current account, including charges and interest, are loans.

192 (Popup - Popup)

Ibid at 796g-h.

193 (Popup - Popup)

[1990] 1 All ER 78 (HL).

194 (Popup - Popup)

Loc cit at 82b.

195 (Popup - Popup)

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At 566 *et seq.*

196 (Popup - Popup)

1905 TS 624.

197 (Popup - Popup)

At 627.

198 (Popup - Popup)

At 633-4.

199 (Popup - Popup)

1966 (2) SA 379 (T).

200 (Popup - Popup)

Per DE WET JP at 381 *in fine.*

201 (Popup - Popup)

Supra n 50.

202 (Popup - Popup)

"In banking practice interest becomes capitilised, and this is an age-old banking practice, interest is added to the capital amount monthly where the customer does not make special provision for the same from his own funds. The consequent interest calculations are not to be regarded as interest upon interest. Since where interest is capitilised this is in truth an additional advance to the customer" (my translation). I have already examined and rejected Mr *de Bourbon's* attempted theoretical justification of this proposition. It is comforting to find that it did not impress NEDSTADT J either.

203 (Popup - Popup)

At 600B-F.

204 (Popup - Popup)

Sub nom Senekal v Trust Bank of Africa Ltd 1978 (3) SA 375 (A).

205 (Popup - Popup)

At 383 *in fine.*

206 (Popup - Popup)

Per SELIKOWITZ J in *Oneanate supra* at 568H-569A.

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207 (Popup - Popup)

1991 (3) SA 387 (A) at 390D-F.

208 (Popup - Popup)

Cf at 390C-E.

209 (Popup - Popup)

Per SELIKOWITZ J in *Oneanate supra* at 572B-D.

210 (Popup - Popup)

(1886) 2 SAR 78 at 85 *per* KOTZÉ CJ.

211 (Popup - Popup)

At 566C.

212 (Popup - Popup)

Cf Zimmerman, *supra* 169 n 87.

213 (Popup - Popup)

I remark only that in the abscence of agreement, the bank would have to ensure that the interest charged on these debits to the current account did not exceed the agreed rate of interest on the loan account.

214 (Popup - Popup)

See how the deponent avoids saying that the unpaid interest debited to the current account is either "paid" by the customer or is itself a loan.

215 (Popup - Popup)

The deponent's emphasis.

216 (Popup - Popup)

Per SELIKOWITZ J, *Oneanate*, *supra*, at 576C.

217 (Popup - Popup)

Devaynes v Noble; Clayton's Case (1816) 1 Mer 529; 35 ER 767.

218 (Popup - Popup)

The report of *Clayton's* case itself commences at p781 of the ER volume, the judgment beginning at 791.

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219 (Popup - Popup)

At 792.

220 (Popup - Popup)

Per SIR WILLIAM GRANT MR at 793.

221 (Popup - Popup)

[1921] AC 756 (HL).

222 (Popup - Popup)

Per LORD ATKINSON at 771.

223 (Popup - Popup)

Per EVE J, at first instance, citing LORD SELBOURNE LC in Re *Sherry* (1884) 25 ChD 692 at 702, and quoted with approval by LORD SHAW OF DUNFERMLINE *loc cit* at 783.

224 (Popup - Popup)

This is no doubt why, as SELIKOWITZ J observed in *Oneanate* at 574D, LORD GREENE MR stated, in Re *Diplock's Estate* [1948] 2 All ER 318 (CA) at 365d, that there was no justification for extending the rule beyond the case of a banking account.

225 (Popup - Popup)

And as SIR WM GRANT MR acknowledges in *Clayton,* the English law too comes from the civil law on the point.

226 (Popup - Popup)

In *Oneanate* at 572I-573B.

227 (Popup - Popup)

Digest XLVI.3.5.2&3; Code IV.32.21.

228 (Popup - Popup)

Op cit XLVI.3.16 as one of 9 separate rules for appropriation of payments. Gane's translation: "In case of doubt the laws will have it that what is paid shall be credited first to interest which admits of collection, and then to the principal debt."

229 (Popup - Popup)

Institutes of Holland Book 1 Chapter 18, Henry's translation: "In debts which bear interest, the payment must be applied in reduction of the interest in the first place and afterwards to the

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principal."

230 (Popup - Popup)

Op cit para 2308 (xi).

231 (Popup - Popup)

Cf nn 21 and 22 *supra*.

232 (Popup - Popup)

Law of Obligation p 57 para 171.

233 (Popup - Popup)

And therefore, I suggest, nothing other than a process of inferential reasoning on the facts.

234 (Popup - Popup)

I was not asked to make a finding in this regard, but had I been so requested I would have been inclined to hold that the due payment of interest as it is debited to a current account is a term implied by trade usage in banking, just as in *Barclays Bank International v Smallman* 1976 (2) RLR 163 (G); 1977 (1) SA 401 (R) the charging of compound interest was held to be a matter of custom. Refer in particular to *Trust Bank of Africa v Senekal supra* at 601.

235 (Popup - Popup)

Here the learned author and CHIEF JUSTICE refers to the residual rules of appropriation set out by him in preceding text.

236 (Popup - Popup)

Wessels, *op cit* 2310.

237 (Popup - Popup)

Supra at 602F *et seq.*

238 (Popup - Popup)

Supra at 382.

239 (Popup - Popup)

Cf eg: Eastwood v Shepstone 1902 TS 294 at 302; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Olsen v Standaloft* 1983 (1) ZLR 67 (S).

240 (Popup - Popup)

Per KOTZÉ CJ in *Taylor v Hollard supra* n 77. It is of antiquarian interest to note, in passing,

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that some 14 years after writing this as Chief Justice of the South African Repuyblic, the learned judge became the Attorney-General of this country, during which time he was appointed King's Counsel, and where he served with distinction for some three years before resuming his judicial career in the Cape.

241 (Popup - Popup)

The words quoted appear in *Wills on Circumstantial Evidence* 7 ed p 45, and are said to be from a contemporaneous MS. However, the report conveys the same idea in different words - an example of the unreliability of the law reports of those times. - *Editor.*

242 (Popup - Popup)

See p 420 of this volume - *Editor*

243 (Popup - Popup)

A party who signs a bill otherwise than as drawer, acceptor or endoser becomes a surety of *aval;* Claassen *Dictionary of Legal Words and Phrases* vol 1 p 163 - *Editor.*

244 (Popup - Popup)

See above at p 256 - *Editor.*

245 (Popup - Popup)

The Posts and Telecommunications Corporation Act [*Chapter 12:03*] - *Editor.*

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