1997 (1)

The Zimbabwe Law Reports 1997 [Part 1]

BOPOTO v CHIKUMBU & ORS 1997 (1) ZLR 1 (HC)

Court **High Court, Harare**

Robinson J

Civil application

20 July 1995Case No. HH-1-97

Flynote

Practice and procedure - default judgment - setting aside - application by third party - whether that party has locus standi - allegation that judgment obtained by fraud - correct procedure for raising such issue

Headnote

A buyer of a house had obtained a court order obliging the seller to effect transfer of the house. The seller had not opposed the buyer's application for this order and the judgment had been given in default. The applicant, who had not been a party to those proceedings, applied for rescission of judgment. She alleged that the seller and buyer had acted fraudulently in entering into the agreement of sale in order to defeat the applicant's claim.

Held, that only a party against whom a judgment has been given in default may apply to have that judgment set aside. The applicant was not such a party and therefore had no locus standi to apply for rescission of the judgment.

Held, further, that the correct course for the applicant to have adopted was to seek to have the judgment set aside on the ground that the sale agreement upon which the judgment was based had been fraudulently entered into so as to defeat the applicant's claim.

Held, further, that it is a well established principle of procedural law that, generally, an applicant must stand or fall on his founding papers and that an applicant may not raise a different cause of action in his answering affidavit.

Held, further, that, in any event, on the basis of the papers the applicant had not shown sufficient to succeed on the ground of fraud, particularly

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bearing in mind the heavy onus resting on a party who relies on that ground.

Case Information

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I E G Musimbe for the applicant

B Wabatagore, for the first and second respondents

Judgment

Robinson J: I have been asked to record my reasons for having dismissed the application in this matter on 20 July 1995. These are my reasons.

On 1 June 1994, my sister Ziyambi granted an unopposed application brought by David Chikumbu against Lovemore Bopoto and the Chitungwiza Town Council, the first and second respondents respectively in that matter, being Case No. 585/94, in consequence of which it was ordered as follows:

> "1. That first respondent sign within 7 days of service of this order all the necessary papers to effect transfer of the first respondent's rights, title and interest in Stand No. 17749, Unit 'M', Seke.
>
> 2. That failing compliance with this order by the first respondent the Deputy Sheriff be and is hereby empowered and authorised to sign all papers as may be necessary to effect the said transfer on his behalf.
>
> 3. That the order be served on the first and second respondents.
>
> 4. That the first respondent pay costs of suit."

It is common cause that at the time the said order was granted by Ziyambi J, Lovemore Bopoto, the second respondent in the present application (hereinafter referred to as "the seller"), was regarded by the Chitungwiza Town Council, the third respondent in the present application (hereinafter referred to as "the Council"), as the person entitled, *prima facie*, to acquire from the Council ownership of the property referred to in para 1 of the said order granted by Ziyambi J, being Stand No. 17749, Unit 'M', Seke (Chitungwiza) (hereinafter referred to as "the Stand").

It is further common cause that David Chikumbu, the first respondent in the present application (hereinafter referred to as "the purchaser"), proceeded against only the seller and the Council in Case No. 585/94 and that the Council gave effect to the cession of the seller's right, title and interest to and in the stand to the purchaser in terms of the said order granted by Ziyambi J.

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That being the situation and since r 63(1) of the High Court Rules expressly provides that only a party against whom a judgment has been given in default may apply to have that judgment set aside, it follows that in the present matter the applicant, Charity Bopoto, had no locus standi to apply for rescission of the order granted by default in Case No. 585/94, seeing that she was not a party to those proceedings. In other words, the applicant was "barking up the wrong tree" in her application.

Unfortunately for the applicant, however, if, as suggested by her in her affidavit in answer to the purchaser's opposing affidavit, there was in fact any fraudulent connivance between the seller and the purchaser over the sale and cession of the stand by the seller to the purchaser to defeat the applicant's claim to it, her legal practitioner, Mr Chingore, completely misconceived

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the applicant's remedy. He applied to have the order granted by Ziyambi J rescinded, instead of seeking to have it set aside on the ground that the seller and the purchaser had acted fraudulently in entering into their agreement of sale in regard to the stand in order to defeat the applicant's claim to it.

Although my ruling in this regard concludes the matter, I would like to comment on the merits of the application, assuming that the applicant had had locus standi to bring it.

In her founding affidavit, the applicant alleged inter alia:

(a) that the seller was her husband;

(b) that cession should not have been effected to the purchaser for the following reasons:

(i) When the seller sold the property (to the purchaser), he had not, as the applicant's husband, advised the applicant that the property was being sold;

(ii) In applying "for a house", the seller advised the Council that he was married to the applicant and it was on that basis that he obtained the stand and that the stand was obtained in the seller's name because it could not be obtained in the applicant's name.

(iii) The stand was sold for a mere $32 000, of which only $12 000 had been paid and cession of the stand should, therefore, not have been effected until the full purchase price had been paid.

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(iv) The applicant had been paying the monthly instalments due to the Council from the time the stand had been allocated to the seller and she had also used money earned by her from selling vegetables to build the house on the stand while the seller had not contributed financially towards the construction of the house.

The applicant therefore claimed that the stand effectively belonged to her.

However, quite apart from the conflicts of fact raised by the seller in his opposing affidavit, none of the reasons given by the applicant in her founding affidavit was sufficient to frustrate the seller's right to sell the stand. In addition, the following points were noted:

(a) No evidence was produced by the applicant in support of her allegations that the stand was "valued for much more" than the purchase price of $32 000 and that the price was not "reasonable in the circumstances".

The applicant did not deny the purchaser's allegation in para 3 of his opposing affidavit that he had "paid about $17 000 to date" towards the purchase price of the stand.

(b) It was clearly competent for the seller to agree to cede his right, title and interest to and in the stand before the purchase price had been paid to him in full. In this connection,

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clause 4 of annexure B to the purchaser's application in Case No. 585/94, being the amplified agreement of sale in regard to the stand subsequently entered into by the seller and the purchaser on 17 November 1993, expressly provides as follows:

"4. In view of the fact that the property is occupied by an illegal tenant, namely, SHIRLEY NYAKURIMWA, proceedings calling upon seller to pass cession shall be instituted prior to the payment in full of the purchase price so that the property shall be registered in the name of the purchaser."

It is common cause that the said Shirley or Shelly Nyakurimwa is one and the same person as the applicant.

(c) In her affidavit in answer to the seller's opposing affidavit, the applicant, in reply to the seller's averment that the applicant merely makes bald assertions that she is married to him but does not disclose the nature of the marriage "so as to inform the court whether or not as a result of such marriage applicant can stop me from selling my own house", simply

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stated that she was married to the seller "in terms of African custom and the marriage exists" and that she has children with the seller.

Accordingly, it would appear that the applicant's so-called marriage to the seller was an unregistered customary law union which, consequently, would destroy the position taken by the applicant in her founding affidavit that there was a valid marriage between her and the seller which justified her claim to the stand.

In any event, it would appear from the applicant's allegation in para 11 of her founding affidavit, as admitted by the seller in para 6 of his opposing affidavit, that the seller had vacated the stand and was staying with another woman and from her allegation in para 7 of her affidavit, in answer to the purchaser's opposing affidavit, that the seller had "run away from the matrimonial home", that the customary law union between the applicant and the seller may have terminated by the time the seller sold the stand to the purchaser, in which case there would certainly have been no legal need for the seller to have consulted the applicant before selling the stand to the purchaser.

Finally, it is of significance that it was only in her answering affidavit to the purchaser's opposing affidavit that the applicant, in para 7 thereof, raised squarely for the first time the allegation that the "circumstances of this matter clearly show lack of *bona fides*" on the part of both the seller and the purchaser. However, it is a well established principle of procedural law that, generally, an applicant must stand or fall on his or her founding papers and that an applicant may not, as the applicant has attempted to do in this matter, raise a different cause of action in his or her answering affidavit. In any event, even if one had allowed the applicant to rely on the ground of a "lack of *bona fides*" on the part of the seller and the purchaser on the basis of her papers, the applicant has not done or shown sufficient to succeed on that ground, particularly bearing in mind the heavy onus resting on a party who relies on such a ground.

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In the circumstances, I found myself with no alternative but to dismiss the application, the seller's and the purchaser's entitlement to costs being waived by their legal practitioner by virtue of the applicant's being represented in forma pauperis.

Honey & Blanckenberg, legal practitioners for the applicant

Guni, Wabatagore & Co, legal practitioners for the first and second respondents

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S v MUTSINZIRI 1997 (2) ZLR 6 (HC)

Court **High Court, Harare**

Gillespie J & Assessors

4, 5, 6 and 7 November 1996

Criminal trial Case No. 23381

Flynote

Criminal procedure - irregularity - witness - questioning of - State counsel questioning witnesses in such a way that prejudicial and inadmissible evidence emerged - correct method of leading evidence from witnesses - accused conducting own defence in High Court - whether appropriate

Evidence - fingerprints - expert evidence given - extent to which court should make its own observations of the alleged similarities between the sets of prints

Evidence - identification - photographic - showing of photograph of accused to witness - whether permissible

Evidence - identification - dock identification of accused - value of - how should be made

Evidence - similar facts - multiple counts - extent to which similar facts can be used where identity is in issue

Legal practitioner - conduct and ethics - defence counsel in criminal case - withdrawal from the case - when and how permissible

Legal practitioner - prosecutor - duty - disclosure of inconsistent statements made by State witnesses - what inconsistencies need to be disclosed

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Headnote

Where a legal practitioner representing an accused person, whether pro Deo or on a private brief, has difficulty taking instructions from the accused, he is nevertheless enjoined to do all he can to represent the interests of his client. It is utterly inimical to those best interests for him to state in open court that he is having difficulty and wishes to be excused. In the very limited circumstances where a legal practitioner might properly withdraw from further attendance upon the accused in the course of proceedings, he is bound to explain himself, in the most discrete way possible and in a manner least calculated to prejudice his client, not by a dramatic announcement in open court.

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Counsel for the State, when leading evidence from a witness, should not simply give the witness his head. He should exercise control by asking a series of individual questions and insisting on an answer to that question alone. The witness might otherwise have the opportunity - whether deliberately or innocently - to blurt out evidence which may be inadmissible and even prejudicial.

The prosecutor has a duty, where there is a material discrepancy between the statement made by a witness to the police and the evidence which the witness gives in court, to disclose that discrepancy to the court. It may sometimes be difficult for the prosecutor to arrive at a conclusion whether a discrepancy is so material as to justify disclosure of the statement to the defence or whether the discrepancy is not material and is such as would result in a captious and hair-splitting form of cross-examination. Where the prosecutor is faced with that difficulty, the safe and proper course is to disclose rather than not to disclose. The court may then form a judgment as to the materiality of the discrepancy and whether the cross-examination is proper or captious. Where there is a discrepancy between the witness's evidence and the summary of the State case which the defence has received, it is irregular for the prosecutor in effect to give evidence from the bar by stating that there was no discrepancy between the eidence and the witness's statement. It is all the more reckless for the prosecutor to do so where there is an obvious discrepancy between the State summary and the witness's evidence. 1(1)

Where identity is in issue and the accused is identified by means of a photograph of him in the possession of the police, it is not inevitable in

all cases that the witness would thereby conclude that the accused is known to the police and has a known or suspected criminal record. The police may come by photographs of the suspect in perfectly innocent circumstances and it is not necessarily harmful to the accused, where a policeman does no more than say that he was able to identify the accused from a photograph or to say that he tried to locate an accused by distributing photographs.

A "dock identification", where a witness is asked whether the person in the dock is the offender, suffers from considerable disadvantages. Everything about the atmosphere of the court proceedings points to the accused, and to him alone, as the person who is to be identified by the witness. These circumstances are inevitable unless one insists that any dock identification take the form of an identity parade. The manner in which a dock identification is elicited from witnesses by the prosecutor can be done the right way or the wrong way. The wrong way is one which makes it virtually impossible for the witness to say anything other than that the accused is the culprit. This way constitutes an irregularity. The better way is to get the witness to recount all the events without reference to the accused in the dock, and only when the witness has said all he has to say about the events should he be asked whether any person in the court is recognised. This form of identification still carries the defective feature ofa dock identification, that the accused is obviously the person who is suspected of committing the offence, but it avoids leading questions and putting the identification into the witness's mouth.

The principles of similar fact evidence are well established: the similar facts must bear a striking resemblance to the case in hand. Where there are multiple counts, the fact that each one must be looked at separately does not prevent material which could be admissible under the rules

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relating to similar fact evidence from being received. Even evidence on one count which ultimately leads to an acquittal may be used, but for such evidence to be receivable and acted upon by a court of law, those discreditable acts of the accused must share with the discreditable conduct in issue features of such an unusual nature and striking similarity that it would be an offence to common sense to assert that the similarity was explicable on the basis of coincidence. Similar fact evidence may be admitted on one count in order to bolster evidence on another count, where there is an issue as to identity.

Where fingerprint evidence is given by an expert, the court ought not insist on its own ability to make a fingerprint identification by study of a comparison chart between the latent print (that found at the scene) and the inked print (that recorded from the suspect). Nevertheless, the court

is still faced with a decision as to whether or not to accept the expert's evidence when he purports to find sufficient points of identity between the latent and the inked print. The court must take into account the witness's experience and the apparent weight and reliability of his opinion. The court may, if it considers it necessary, insist on a study of the comparison chart; and where the court is in a position to make its own examination of the comparison, it may, to the extent which it considers proper, attempt of its own accord to confirm the validity of the expert's opinion. In an appropriate case it may depart from the expert's opinion, if it is unable to find on the chart the points of similarity which so impressd the expert.

Cases cited:

Laubscher v National Foods Ltd 1985 (1) ZLR 10 (H)

R v Butelezi 1944 TPD 254

S v Gokool 1965 (3) SA 461 (N)

S v Malindi 1983 (4) SA 99 (T)

S v Maradu 1994 (2) SACR 410 (W)

S v Mthetwa 1972 (3) SA 766 (A)

S v Mubaiwa 1980 ZLR 477 (A)

S v Mupah 1989 (1) ZLR 279 (S)

S v Mutandi 1996 (1) ZLR 367 (H)

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

S v Nkomo 1989 (3) ZLR 117 (S)

S v Phetshwa 1982 (3) SA 404 (E)

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S v Segai 1981 (4) SA 906 (O)

R v Steyn 1953 SR 76

R v Tapera 1964 RLR 197 (A)

S v van Wyk 1982 (2) SA 148 (NC)

Case Information

Mrs M Zimba, for the State

R E Chivaura, for the accused

Judgment

Gillespie J: This case constitutes a cautionary compendium for court and counsel alike. It is a matter which has been riven with irregularities, irregularities which have caused the learned assessors and me considerable difficulty in arriving at a just conclusion. The difficulty which we have experienced is out of all proportion to the evidence which has been led, which is substantially uncontested.

The accused, charged with 4 counts of robbery and one count of theft, has

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predicated his defence upon a denial of identity. He has not sought to put in issue the evidence of the complainants relating to the circumstances of the offences which they claim were committed against them. He has attempted, rather, to contest that evidence only to the extent to which it may identify him as the perpetrator of the various offences.

He has in addition put in issue evidence of those policemen who have given their testimony and where that evidence relates to an identification of him as the criminal concerned or where they have spoken about his willingness or otherwise to stand on identification parade or to give evidence or to make statements. Because of the uncontested nature of the salient facts surrounding the commission of the offences, the court is able to state with complete confidence the following facts as uncontested or scarcely contested in the commission of the offences.

[The learned judge than outlined the evidence on the individual counts and continued:]

From the brief summary I have just given, it is apparent that a conviction of the accused, if any is to follow in this trial, must depend upon satisfactory identification of the accused on count 1 by the headmaster, Ernest Nyapokoto and the witness Kenneth Samkange. On count 2, by the complainant John Nemutambwe. On count 3, by the expert evidence of the finger print expert, Detective Inspector Mukuyu. On count 4, by the satisfactory identification of the accused by Amson Bande and on count 5, by the satisfactory identification of the accused by Agnes Mikah, Owen Hundermark, Cst Musimiki and Cst Chasi and whatever other evidence the police are able to give concerning the taking of the accused into custody.

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Before I turn to attempt an analysis of that evidence of identification by means of visual observation or finger print evidence, I must however, first examine a number of irregularities which, as I intimated at the outset of this judgment, have plagued the proceedings. The first of these irregularities or potential irregularities relates to the representation of the accused during the course of the trial. He was at the commencement of proceedings represented by a Mr Chivaura, appointed pro Deo.

On the first day of the proceedings, after evidence had been led from three or four witnesses, Mr Chivaura rose to his feet and told the court that he was having difficulty with the accused. His intimation drew a sharp rebuke from myself: I observed that it was inappropriate for him to be saying such a thing.

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He took his courage in both hands and stated that he wished to recuse himself from the proceedings. He was told that recusal was a function of judicial office, that he could not recuse himself and that in any event he would not be excused from further representation of the accused. I said that he had been appointed to perform a function, that there was no reason why he should not discharge it and that he should continue to do so .

Where counsel has difficulty in taking instructions from an accused person whether on a private brief or pro Deo, he is nevertheless enjoined to do all he can to represent the interests of the client and it is utterly inimical to those best interests for counsel to state in open court that he is having difficulty with his client and to wish to be excused. In the very limited circumstances where a legal practitioner might properly withdraw from further attendance upon the accused in the course of proceedings, he is bound to explain himself in the most discrete way possible, in the manner least calculated to prejudice his client, and should do so without dramatic pronouncement in open court.

I therefore regard what transpired on that occasion as an irregularity in the proceedings and one that could potentially prejudice the accused. As it happens, I consider that the potential prejudice arising after that transaction has been completely dispelled; for, a witness or so later, the accused himself asked leave to address the court. That leave being given, the accused moved permission to conduct his own defence, stating a dissatisfaction with the manner in which counsel was complying with his instructions.

Normally, I would be slow to expose an accused to the pressures and uncertainties of having to conduct his own defence in the High Court but because from the earlier exchange it appeared that the accused and counsel had already lost confidence in one another and because it was possible that important questions had not been put in cross-examination of the State witnesses led thus far, I acceded to the accused's request. At the same time, I gave directions allowing the recall for further cross-examination of those witnesses whom the accused felt had been inadequately tested thus far and also directing the continued participation in the proceedings by Mr Chivaura on a watching brief. I am satisfied that those directions dispelled any possible concern that any possible impression that might have been given that the lawyer had lost confidence in his client and offered the convincing alternative explanation that the client had

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actually lost confidence in his lawyer. Despite the irregularity which I have mentioned, herefore, I do not consider that in itself it has led to any miscarriage of justice.

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A further potential irregularity has arisen from a combination of factors. Counsel for the State has, in leading evidence from policemen, been content generally to give her witnesses their head. She has not sought to exercise control by asking a series of individual questions and insisting on response to the question alone, and this has given the witness the opportunity to blurt out matter which may not be admissible. When this manner of examination by the prosecutor is allied with a tendency on the part of certain policemen - whether deliberately or innocently I cannot say - to reveal prejudicial and inadmissible evidence, then there is serious cause for concern. In particular, this method of proceeding has brought about inter alia the following highly prejudicial utterances by various policemen. Thus, the recovery of the glass fragments on the person of the man arrested after count 5 has been explained by more than one policeman in this fashion: "We took from him the pieces of glass which are used by peoplewho want to defraud other people into buying fake emeralds." I am hard pressed to think of any more seriously prejudicial, irrelevant and inadmissible an utterance than that. It is quite deplorable that a policeman of any experience should think it proper to make such a revelation and it is most regrettable that State Counsel should have examined a witness in a way that made it possible for him to say such a thing.

On each occasion when matter such as this was revealed, I issued a stern reprimand both to the policemen and to State Counsel. I directed the assessors that the matter was inadmissible and to be disregarded. I gave a warning that this sort of irregularity should cease. Despite that warning, it happened more than once.

A similar inadmissible statement was one which is very material to the third count. In summarising the evidence of Sgt Sanhanga on that count, I have recorded that whilst conducting inquiries at the business centre nearest to the place regarded by him as the accused's home, he saw a vehicle, a white Mazda pick-up, drive past. He received a report which caused him to direct his attention to that vehicle and give it chase. That is the most that the policeman could properly have said. In fact it is not what he said at all. What he said was, "I received a report. I was told that the accused had been seen driving that vehicle." The reckless utterance of this hearsay evidence is inexcusable and once again it is attached to a manner of eliciting evidence-in-chief which leaves the way open for a policeman, whether incautiously or deliberately, to perpetrate such an irregularity.

That instance too evoked my displeasure and the appropriate direction to the assessors. Nevertheless, the damage was done. A further instance of such

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irregularity was what I cannot help feeling was a deliberate act by the investigating officer, D/Cst Mupfumi. On being questioned by the accused on the subject whether the accused had been

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assaulted or not, the witness quite gratuitously said, "Are you referring to that time you tried to steal my weapon from me?" That was, in my view, calculated to prejudice. Once again the reprimand, which appears to have been unobserved by all concerned, was issued and a warning was given that if these irregularities persisted the court would have to consider whether or not the proceedings ought to be held to be vitiated.

All these instances, and many others of lesser importance, are in my view serious irregularities. Yet still another irregularity occurred during the course of the evidence of Ernest Nyapokoto. This was an irregularity related to the duty of a prosecutor to reveal to the court inconsistent statements made by a State witness. That such a duty exists admits of no doubt. Indeed it is precisely because it does exist that the courts have for generations placed great reliance upon the due observance by the prosecutor of this duty.

It has been held, particularly in the case of *R v Steyn* 1953 SR 76, that the proofs of witnesses evidence of the State witnesses are privileged documents. In reaching this conclusion, Tredgold CJ at p 80 said:

> "In the result, I am satisfied that the defence cannot as of right demand to see the witnesses' statements of Crown witnesses. Disclosure must be left in 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 of the 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 is special and cogent reason to the contrary make the statement available for cross-examination. I may say that this is the almost invariable practice of prosecutors in this Colony. So much so is this the case that in the only instance in which to my knowledge a subordinate prosecutor failed in his duty in this regard, the Attorney-General took the most serious view of his conduct and himself took action to have set aside the conviction which had ensued. But on the other hand a prosecutor is amply justified inrefusing disclosure of 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."

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In the same case, Beadle J, as he then was, reaching the same conclusion on the privilege of proofs of evidence for Crown witnesses, said at p 88:

> "I may say that I am fortified in my conclusion by the established practice of the courts of this Colony which has always been to regard the statements as privileged. It is, however, also the practice in the case of any material discrepancy between a witness's evidence and a statement to the police for the prosecutor to draw the attention of the court to this discrepancy and I think it is proper in the interests of justice that he should always do so."

The same point has been made in many cases since, for instance in *R v Tapera* 1964 RLR 197 (A) at 198E-G and again, since Independence in this country, in S v Mubaiwa 1980 ZLR 477 (A) at 482C-F. At that passage Lewis JP said:

> "Before concluding I would like to express my great concern at the way in which the prosecution was conducted by the prosecutor. A prosecutor as an officer of the court has a duty to the court to conduct its case, however vigorously, with fairness towards the accused, especially where as in this case the accused is undefended, and not to conceal facts favourable to the accused."

The duty of impartiality of the prosecutor was expanded upon on pp 483-484.

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It is understandable that a prosecutor may find it difficult in arriving at a conclusion whether a discrepancy which appears is material such as justifies disclosure of the statement to the defence or not material and such as would only result in the captious and hair splitting form of cross-examination to which Tredgold CJ referred. Where the prosecutor has difficulty in reaching that decision however, the safe and proper course is in all circumstances to disclose rather than not to disclose. The court may then form a judgment as to whether the discrepancy is material and as to whether cross-examination on the alleged discrepancy is proper or is, as the learned former Chief Justice put it, captious and hair splitting. The prosecutor assumes an unnecessary burden upon himself if in the face of doubt he forms the conclusion that he will not disclose the discrepancy.

In this case, it is not so much a failure of State counsel to disclose a discrepancy which troubles me, but something rather different. That there was an evident discrepancy emerging in the testimony of Ernest Nyapokoto

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appeared from a comparison of his viva voce evidence with the summary of the State Case. Thus, in the summary he testifies as to how when he stopped his vehicle, he was approached by a man on the passenger side who knocked on the door, opened it, got inside and then brandished a knife. All this happening before he had chillies thrown into his face by the man on the driver's side. He said nothing of the sort in his evidence-in-chief. He altogether omitted reference to the man at the passenger door and to the knife.

It may be that these are matters of detail and that they were irrelevant in view of the witness's explanation that since these matters did not induce a submission to the taking. That might be a true explanation for the departure but it is one that has to be given. It is not a departure that could properly be considered to be non-material. It is particularly material when the recollection and identification by the witness of the accused is in issue. Anything which tends to cast doubt upon the accuracy of his recollection is highly material.

Instead, however, of producing the statement, State Counsel rose to her feet and solemnly informed the court that there was no discrepancy between the witness's evidence and his proof of evidence. I consider that to have been an irregularity. The prosecutor has no function to produce, by a statement from the bar, mere evidence of a previous consistent statement. And that is what he does, if he purports to assure the court that no discrepancy exists. It is all the more reckless for a prosecutor to do so where in fact there is an obvious discrepancy between the State summary and the witness's evidence. I reprimanded the prosecutor for that statement at the time it was made and allowed cross-examination by the accused on the basis of the discrepancy to continue. As that cross-examination continued, it became more and more obvious that no matter what the prosecutor had said to me, there must be a material discrepancy between the evidence and the statement. I would have expected at that late stage that the prosecuor too would have come to the same conclusion and would have produced the statement. Nevertheless, she did not. I was therefore obliged to order the prosecutor to produce the statement and to hand it to the accused for his examination. That order itself was complied with, but only after an unsatisfactory physical demonstration of dissent and dissatisfaction which

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is not at all well received by the court.

An examination of the statement showed that in it, the witness who had purported to identify the accused in the course of the dock identification (as I will come to recount in due course) had said that he would be unable to identify the accused. That in itself was a discrepancy hitherto unrevealed which should have been revealed. An irregularity therefore occurred. It is

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one, however, which was probably rectified, albeit belatedly, by the production of the statement.

Before I conclude this examination of potential irregularities, I should mention one further point advanced to me as an irregularity by Mr Chivaura in his closing address. Referring to *S v Nkomo* 1989 (3) ZLR 117 (S), in particular at pp 121 et seq, Mr Chivaura said that in any circumstance, for policemen to give evidence that they have a prior photograph of an accused is to give an intimation that the accused person is a known criminal. He based this submission on a dictum of McNally JA at 121F, where, dealing with evidence that a complainant in a rape case in that matter had identified the appellant from an album of photographs, the learned Judge of Appeal said this:

> "Two points have been made about the girl's identification of the appellant from this photograph. The first is that the album is labelled in such a way as to indicate that the persons depicted in it were all criminals guilty of sex crimes or violence. The answer to this is that she said she did not notice the label. There is no reason to disbelieve her. In any event, even without the label, police are unlikely to keep an album of photographs of film stars or Supreme Court judges. It is inevitable that a witness may suspect that the photographs are of known or suspected criminals."

At 122B the following appears:

> "Then at the request of the defence, she went through the album in court and picked up the same photograph. Thereupon apparently by consent the album was put in as an exhibit. The defence made a formal admission that the photograph was a photograph of the appellant. The unfortunate result of all this is that the court was virtually being told that the appellant had at least one previous conviction for a crime of sex or violence or both."

In many cases, I have no doubt that Mr Chivaura's submission would be correct: that to reveal the fact that the police are in possession of a photograph of an accused may well be to reveal that he is known to police and has a known or suspected criminal record. This is not the inevitable conclusion to be drawn from the intimation that police have a photograph of the accused. As Mrs Zimba rightly said in reply to that point, the police may come by photographs of suspects in perfectly innocent circumstances and it is not necessarily harmful of an accused person, where a policeman does no more

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than say that he was able to identify an accused whom he had taken into custody from a photograph he had, or to say that he made attempts to locate an accused by distribution of photographs. That, on my understanding of the investigating officer's evidence in this case, is as

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far as the evidence went. I am not sensible of any irregularity in that evidence in the peculiar circumstances of this case.

There is one more irregularity which is crucial to a determination of this case and upon which I must dwell at some length. It is an irregularity which, in my judgment, emerges from the manner in which evidence of identification was led. In order to deal with that irregularity, I will first, however, turn to examine the law as it is concerning evidence of identification. I have already cited Nkomo above, where McNally JA went to considerable pains in order to demonstrate the properly cautious approach to evidence of identification.

At pp 121-122, the learned Judge of Appeal gave a very brief summary of legal principles and the manner in which he applied those principles in the succeeding pages is, with great respect, instructive. I myself attempted to summarise the principles in the case of *S v Mutandi* 1996 (1) ZLR 367 (H). In that case I said:

> "His judgment shows that the magistrate was obviously prepared to believe the complainant and indeed good reasons were given tending to show the genuineness of her belief and the truthfulness of her evidence. It is not however enough to be able to find that the complainant honestly believes that she has correctly identified the accused. She might be honestly mistaken. This is the true danger which the magistrate, although he uttered words of caution to himself, failed to appreciate or to consider."

I refer also to the well known dictum of Holmes JA in S v Mthetwa 1972 (3) SA 766 (A) at 768A-C where the learned Judge of Appeal said:

> "Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest, the reliability of his observation must also be tested. This depends on various factors such as lighting, visibility and eye sight. The proximity of the witness, his opportunity for observation both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestability, the

> accused's face, voice, build, height and dress, the result of identification parades if any and of course the evidence by all on behalf of the accused."

Similarly, in *S v Ndhlovu* & Ors 1985 (2) ZLR 261 (S) at 263G-264E, Gubbay CJ said:

> "Confidence and sincerity are not enough. The possibility of a mistake occurring in the identification, especially where the witness is not known to the person previously, demands that the greatest circumspection be employed."

The assessors and I have, therefore, been circumspect in our examination of the evidence of identification. We have borne in mind the need for caution, the need to go beyond a mere acceptance of confidence and sincerity on the part of the witness and where necessary to seek corroboration. Our task here has been made that much harder by the manner in which evidence of identification has in many instances been elicited during the course of evidence.

For whatever reason (and the reason is something that is in substantial issue) no identification parade was held prior to the proceedings. This means that a premium is placed upon the reliability of observation of the complainants and every effort should have been taken in court to avoid the sort of inept handling of the dock identification that is so frequently the cause of

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criticism.

During the course of his cross-examination of the various State witnesses, the accused, who revealed a native skill and ability in cross-examination that might well be the envy of pro Deo defence counsel, made the telling point that he was identified because he is the only one charged with this offence; because he is the only one standing in court as the accused person; because the witnesses have come to court expecting to identify the person who committed offences against them. There can be no doubt whatsoever that an identification given only during the course of evidence is an identification which suffers from considerable disadvantages. A witness coming into court even for the first time will see in all his glory the judge sitting with assessors at the bench. He will see counsel duly robed at the bar. He will see what is obviously a public gallery and there off to one side, alone save for his escort of uniformed prison officers, he will see more than likely an unhappy and depressed looking accused. An accsed made all the more individual in his appearance by the fact that he alone in court is wearing a prisoner's uniform

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and is either barefoot or at least discalceate. Everything about the atmosphere of the court proceedings points to the accused, and to him alone, as the person who is to be identified by the witness. These circumstances are inevitable unless, as has been suggested in the past, one insists that any dock identification take the form of an identification parade. Such a suggestion has been considered in the case of S v Marado 1994 (2) SACR 410 (W) at 413. In England, a committee set up under the chairmanship of Lord Devlin has recommended the dock identification should become a purely formal matter, allowed only where identification has been made by parade.

While the circumstances such as I have already described cannot be avoided without an actual parade of identification in court, nevertheless, the manner in which that identification is elicited from witnesses by State counsel can be done the right way or the wrong way. The wrong way, in fact the worst of all possible ways is the way which, on one or two occasions, the State counsel unhappily adopted in this matter. What she did was this: having led formal evidence from the witness as to the witness's name, address and occupation, she would invite the attention of the witness to the complainant with the words "Do you see the accused in the dock?" The attention of the witness is accordingly immediately directed to that man and that man only. The witness would then be asked, "Do you know the accused?" or even worse, "Do you recognise the accused?" or worse still, "Have you seen the accused before?"

All these questions, related solely as they are to the eliciting of evidence as to a crime that has been perpetrated, beg the response: "The accused is the one who stole my car, assaulted me, whatever the case may be." An identification elicited from the dock in those circumstances is valueless but it is more than that. In Marado's case at 413 Blieden J, who was sitting with Nugent J on appeal, said:

> "To my mind, the danger of a dock identification is the same as that created by leading questions in examination in chief. It suggests the answer desired. As the latter type of question is inadmissible, I see no reason why a dock

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identification should also not be inadmissible, save in certain special circumstances."

In the present case, there are no such special circumstances.

The learned judge was holding not simply that the dock identification might lose weight but that it is inadmissible. I am inclined to agree with him. Where the dock identification is conducted in the manner such as I have just

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characterized, which makes it virtually impossible for the witness to say anything other than, "Yes, he is the man who did this to me", that constitutes an irregularity. Irregularity can be avoided. Indeed, during the course of the trial, once I became aware of the propensity to question in a manner that was conducive to irregularity, I intervened in an attempt to prevent such irregularity. I put questions in a form which is well known by experienced advocates, the form which has been commonly accepted as better calculated to try and avoid the pitfalls of a dock identification. The form is this. The witness is asked to recount the events without any reference to the accused standing in the dock. Once the witness has said what he has to say concerning the events, he is invited to look al around the court. He is then asked whether any person in the court is recognised. If the accused is then pointed out, he is then asked in what capacity the accused is identified and the witness may then say, "He is the person who did so and so to me."

Evidently, this form of questioning still carries with it all the defective features of a dock identification that arise from the fact that the accused is obviously the one suspected of committing the offence, but at least by conducting the matter in that way, leading questions and putting of words and identification in the witness's mouth is avoided as much as possible. An identification done in that form at least is not inadmissible although it might still be of very little weight.

The court is presently faced not only with the difficulty of determining a number of counts on the basis of identification alone or of identification mainly, but also with the difficulty that the dock identification of the accused by complainants has been attended by circumstances of irregularity. I have therefore directed the assessors that in an assessment of the reliability of the identification, a cautious approach must be adopted and these possible irregularities must be taken into account. I turn now to an examination of whether or not the identification of the accused by the witnesses on the various accounts can be accepted.

[His Lordship then considered the evidence of two of the witnesses and continued:]

The learned assessors are content to accept that identification as it stands without further corroboration. Because, however, as I have already said, of the concern over the irregularities which I have enumerated, I have asked them to assume that corroboration is required and to determine whether or not any such corroboration exists. This search of corroboration for the

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identification which should otherwise be acceptable by both Kenneth Samkange and John Nemutabwe has led me to consider the rules of evidence relating to the admissibility of evidence of similar fact.

In the matter of *Laubscher v National Foods* Ltd 1985 (1) ZLR 10 (H) at 11D Reynolds J had this to say on the subject of similar fact evidence:

> "The principles relating to the admissibility of similar fact evidence are well established. It has been widely accepted that a broad test of admissibility is that the similar facts must bear a striking resemblance to the case in hand. In this regard, see for example, R v Kilbourne [1973] AC 729 and R v Inder (1978) 67 Cr App Rep 143. It has also been widely accepted that principles of admissibility of similar fact evidence are the same in both criminal and civil cases. Lord Denning in Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] 1 All ER 763 added a proviso to this that such evidence should not be oppressive or unfair to the other side and that the other side should have fair notice of it and be able to deal with it. But this is not the only criterion, with respect, and in the words of Lord Watson in Metropolitan District Asylum v Hill (1882) 47 LT 29, such evidence should not merely 'afford a reasonable presumption as to the matter in dispute but should be reasonably conclusive and should not raise a dfficult and doubtful controversy of precisely the same kind as that which the jury have to determine.' Furthermore, and as Mr de Bourbon has said, it is a relevant consideration that Pandora's box might be opened by the calling of such evidence and this should give rise to a host of collateral issues incapable of ready resolution.
>
> It is not necessary or even possible to suggest the precise formulation of the 'similar fact' rule but in essence and as I understand the position, similar fact evidence is generally admissible if it is relevant to the question in issue but it will be excluded if it proves only disposition or a mere general similarity. It is also necessary that the presumptions or inferences sought to be drawn by the similar fact evidence are sufficiently cogent to counter-balance the inconvenient delays and other dangers that might arise from the admission of such evidence."

That general principle of admissibility of similar fact evidence finds a particular application in criminal cases when one is dealing with a multiplicity of counts charged in the same trial against one person. The question then arises whether evidence on one count may be used in support of evidence on another count.

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On one hand, it has been said by Schreiner J (as he then was) in R v Butelezi 1944 TPD 254 at 260:

> "Even if the circumstances deposed to on each count had been precisely similar ... this would not justify the treatment of each complainant as corroborating the other. The complainants speak to different incidents and what each says cannot be checked by what the others say."

This however is not regarded as a correct statement of general principle. More usually accepted is the proposition of Harcourt J in S v Gokool 1965 (3) SA 461 (N) at 475E where the learned judge, although acknowledging that each count must be considered separately, nevertheless said that this does not prevent material which could be admissible under the rules relating to similar fact evidence from being received merely because a multiplicity of counts is involved in a case.

In our own Supreme Court, in S v Mupah 1989 (1) ZLR 279 (S), Korsah JA explained certain of

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the principles upon which similar fact evidence may be admissible. The learned Judge of Appeal was dealing particularly with the admissibility of evidence on one count in support of the evidence against another count and the question whether evidence on a count which ultimately led to an acquittal could be used in support of evidence on another count so as to lead to a conviction on that other count. At p 281B-C of the judgment he said:

> "The circumstances under which evidence of facts relied upon to establish the guilt of an accused person in one case may be introduced upon his trial on a similar charge have always presented great difficulty. It is perfectly clear that evidence of a previous offence is admissible to rebut the defence of accident or a defence of innocent intent. What to Mr Lang was unclear was whether evidence of acts by an accused person which had not resulted in a conviction may be receivable of similar facts for the purpose of grounding a conviction. There is authority of persuasive force that such evidence is receivable and may be used to ground a conviction."

The learned Judge of Appeal went on to review some of that authority and to approve of a number of principles, in particular the following extract from Wigmore on Evidence, set out at p 283B of the judgment, where the admissibility of similar fact evidence is said to rely upon an added element which added element then must be "not merely a similarity in the results but such a concurrence of common features that the various acts are naturally to

be explained as caused by a general plan of which they are the individual manifestations." In his own words, the learned Judge of Appeal said at 284B:

> "But for such evidence to be receivable and acted upon by a court of law, those discreditable acts of the accused must share with the discreditable conduct in issue features of such an unusual nature and striking similarity that it would be an offence to common sense to assert that the similarity was explicable on the basis of coincidence."

The same learned Judge of Appeal applied that own dictum of his in the unreported judgment of the S v Tirivanhu S-170-91 where he held that a person who has no borehole but is found in possession of five borehole pumps and gives a different explanation for each of those possessions strains common sense when he asks the court to infer that his innocent explanation for the possession of stolen pumps on each count must be regarded as true and coincidental.

Particular instances, where similar fact evidence has been admitted on one count in order to bolster the evidence on another count charged in the same trial, involve cases where there is an issue as to identity. As a general rule, Hoffmann and Zeffertt South African Law of Evidence 4 ed p 73 state that in cases in which identity of the criminal is a substantial issue, evidence that the accused had a propensity to commit the offence in question may in the circumstances of the case be so highly relevant to the question of his identity as to be admissible.

In applying the principles which I have attempted briefly to extract, I have invited the learned assessors to consider with me the question whether there is any striking similarity of circumstance in the two different counts, counts 1 and 2, such as would entitle one to draw the conclusion that the accused's defence of mistaken identity on each count strains common sense or calls upon us to hold that the mistake in identity is such a coincidence as could not be regarded as sustaining a reasonable doubt. The features which have been advanced to us in

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argument as showing a striking similarity are these.

In each case, the hapless complainant was flagged down by three men. Of these three men, one in each case was identified as wearing black sunglasses. The other was identified as the accused. In each case the accused was said to have been responsible for throwing chilli into the complainant's eyes. He has been identified effectively as the leader of the gang. The flagging down of the

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complainants in each case was effected by a ruse, either that a lift was requested or that there was something wrong with the vehicle that required that it be stopped.

After giving the matter much careful consideration and after placing some reliance in each case on the apparent reliability of the identification by Samkange and by Nemutabwe, we are all of the view that if corroboration of this identification is required, it is to be found in striking similarity of the circumstances surrounding the commission of the offence which lead us to the conclusion that the same person or group of persons committed both crimes. This is a conclusion which had already commended itself to the investigating officer before ever he had arrested the accused. He himself as a trained investigator had remarked upon these similarities in his testimony.

We are satisfied that we can rely upon these similarities in order to say that the accused's claim of a mistaken identity in each count cannot reasonably possibly be true. After giving the matter much careful consideration, I have come to the conclusion that the irregularities which have caused me considerable difficulty are not such as should be held to vitiate the proceedings on those two counts or to cast any great doubt upon the identification of the accused by Samkange or Nemutabwe.

Chronologically, one would then deal with the third count. I prefer, however, for reasons that will become apparent later, not to address this count immediately, but to go on to consider the evidence of identification on the fourth count.

Amson Bande is a man who gave his evidence of identification very well indeed. Not only did he have the opportunity for observation which presents itself in spending a lengthy time in the company of the three people who eventually stole his car; not only did he engage them in conversation both inside and outside the car over a journey of some 40 km; but also he had the cause to make observation of his assailants during the fight that ensued upon the initially unsuccessful attempts to overwhelm him. He had no hindrance in his observation such as is present by having hurtful substances put in his eyes. The dock identification which he gave was one which was not elicited by inappropriate questioning and was one which was maintained in the face of cross-examination, which, as I have said, was not unskillful. He impressed us with the genuineness and sincerity of his identification. After applying to the issue the caution which I have commended to them, the learned assessors have concluded that they are prepared toact upon his evidence of identification

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standing alone. Once again, however, I have urged them to greater heights of caution, as I shall explain in a moment.

Turning to count 5: the evidence of Agnes Mikah, though apparently reliable in its general detail and recollection, does not carry quite the same weight in the identification as we have been able to repose in that identification given by Samkange, Nemutabwe and Bande. She had a lesser opportunity for observation and her dock identification was not given under the most favourable circumstances. However, the persons who assaulted her and despoiled her of her motor vehicle were immediately subjected to pursuit by the witness Owen Hundermark. He never lost sight of the person who had been driving the vehicle from the moment that person emerged from the car until he finally reduced him to submission. He questioned that person himself asking him his name and received the response "Onwell", which is the forename of the accused. He handed the accused over to the passing policeman, Cst Musimbo, who found in his possession the cards in the name of Amson Bande. Cst Musimbo handed him over to Cst Chasi, who again identifed the man. Upon the accused being handed over to the custody of the police from Mutare, he saw the person who had been arrested in possession of the cards in the name of Amson Bande. Cst Mupfumi repeats the identification of the accused and identified the cards in the name of Amson Bande which he recovered from him. Amson Bande himself in his own evidence identified the cards, which were produced in evidence as having been recovered from the accused, as his own.

There is a thread of evidence, then, a chain which identifies the accused as the perpetrator of count 5 from the moment he first met Mrs Mikah until the time he was securely locked in jail at Mutare. But not only that, there is also a very credible link, namely the business cards, which shows that the person who committed the offence against Amson Bande is the same person who committed the offence against Agnes Mikah. The inference to be drawn from those cards is rendered all the stronger when one considers the time within which the two offences were committed. The day after Amson Bande's motor car was recovered, abandoned and a non-runner, Agnes Mikah suffered her deprivation. We have no doubt that the person who accosted Amson Bande is the same person who accosted Agnes Mikah.

Although we place little reliance on the identification by Agnes Mikah standing alone, we place much more reliance upon the identification of Owen Hundermark, a man who is to be commended for his promptness and bravery in his rescue of Agnes Mikah and for his civic mindedness in pursuing and

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apprehending the wrongdoer. It is fortunate that the accused and his gang did not have the gun with which they pretended to threaten John Nemutabwe.

Thus although Cst Musimbo and Cst Chasi gave their identification of the accused physically and in the circumstances of a dock identification elicited by the badly leading questions, that

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identification is not something upon which we need rely. Provided we can be satisfied that the man apprehended by Hundermark, handed over to them, and eventually transfered to the investigating officer, Cst Mupfumi, was the accused, we can be certain that it is the accused who committed both counts 4 and 5. The accused therefore has mounted his most vigorous challenge of all against the proposition that it is he who was arrested and detained at Cashel on the evening of 4 April. He claims that he has never been to Cashel. He points to the detention book at Cashel and shows that the only person recorded as having been detained there for robbery was one Amos (*sic*) Bande. He insists upon the production of the Mutare Detained Persons' Book and shows that in that book, Onwell Mutsinziri, that is a person bearing his name, is recored as having been detained in Mutare on 4 April. He claims that he was arrested and detained in Mutare following a beerhall fight.

In support of his evidence, he has called Cst Kanye, a policeman from Glen View whom he chanced to meet on the evening upon which he says he was arrested and detained in Mutare. The essence of his defence then is that a person named Amos Bande, not himself, was arrested by Hundermark and detained in Cashel, whereas he was arrested for some cause quite alien to anything involving robbery or motor cars. As a result of a Machiavellian conspiracy by police, he has been charged with that robbery despite the fact that the real perpetrator was arrested and detained by the police who caught him red-handed.

Tenuous as this defence appears to be, it received, surprisingly, apparent support from Cst Kanye who testified that in early April 1995 he was indeed in a night club in Mutare where he witnessed the accused being arrested by people who must have been detectives in Mutare for a beerhall fight. It is only the fact that this policeman kept a note book according to standard procedures that we have been able to find that, by what is undoubtedly a curious coincidence, the accused was arrested in Mutare, as he says he was, on or about 31 March or 1 April, that is, when Cst Kanye was in Mutare, and must have been released thereafter. We have examined the detained book that was put before us and have not found in the detained book any record of the accused having been detained in Mutare at any time other than after 4 April.

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His having been released by police, consequent upon the beerhall fight, we have no doubt that the accused was at liberty until his arrest by Hundermark and delivery into the hands of the police atCashel on 4 April. The fact that Cst Kanye has recorded in his book that he returned to his station at Glen View from Mutare on 1 April enables us to make this finding positively.

We are therefore in a position where we can accept without any qualm at all the evidence of identity by Hundermark and the record of the police dealings with the accused, his being detained in Cashel under the name Amos Bande and his being transfered to Mutare under his own name that same evening. The fact that the name Amos Bande appears in the Cashel Detained Book is, we have no doubt, because of the accused's native cunning, when, taking advantage of his possession of the Amson Bande business card, he pretended to the police that that was his identity.

The incontrovertible nature, as we hold it to be, of the chain of evidence linking the accused with

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the arrest by Owen Hundermark and the attack on Agnes Mikah, satisfies us beyond any shadow of the doubt that he perpetrated that offence and the decided link which that case has with the crime against Amson Bande satisfies us that if Amson Bande's identification does need corroboration, it is to be found in the recovery on the accused's person of Bande's business cards.

I have therefore reached the conclusion that the irregularities which I have enumerated cannot be held to vitiate the proceedings on count 4 and count 5. No miscarriage of justice there has been perpetrated.

Returning to count 3, the identification on this count depends upon fingerprint evidence. Authority exists to the effect that where fingerprint evidence is given by an expert, the court must be in a position to satisfy itself by its own examination of a comparison chart of a latent print, that is a print left at the scene by a suspect, and an inked print, that is, a fingerprint taken under controlled conditions from a known person by a trained operative. That authority is S v Segai 1981 (4) SA 906 (O). I do not consider that to be a correct authority. It has been over-ruled or disapproved on a number of occasions since. The Northern Cape Provincial Division declined to follow it in S v van Wyk 1982 (2) SA 148 (NC) and in the Eastern Cape a similar result was reached in S v Phetshwa 1982 (3) SA 404 (E). The correctness of Segai's case was doubted in S v Malindi 1983 (4) SA 99 (T).

Although the court ought not to insist upon its own ability to make a

fingerprint identification by study of a comparison chart, nevertheless, whenever fingerprint evidence is tendered to a court, it is still faced with a decision as to whether or not to accept the evidence of the fingerprint expert when he purports to find sufficient points of identity between the latent and the inked print. In determining whether to accept the evidence of the expert, the court will take into account the expertise of that man and the apparent weight and the reliability of his opinion, bearing in mind his training and experience. Although it need not insist upon a study of a comparison chart, where the court considers that that is necessary from its own perception of the weight to be attached to the expert's evidence, it may do so. In any case where the court is in a position to make its own examination of a fingerprint comparison, it may, to the extent to which it considers it proper, attempt of its own accord to confirm, tothe extent to which it is able, the validity of the expert's opinion. This appears to me to be a proper approach to fingerprint evidence bearing in mind the cases of Segai, van Wyk and Phetshwa which I have already referred to and in particular the judgment of Le Roux J in S v Malindi. The court should be slow, purely upon its own examination of a fingerprint chart, to depart from the uncontroverted opinion of an expert, but where proper, the court might well regard as important its inability to find on a comparison chart the points of identity which so impressed the expert. It may take into account that inability in assessing the weight to be attached to the fingerprint expert.

I have carefully directed the learned assessors to follow this approach. I have reminded them that the policeman is the expert and not us. I have invited their attention to the comparison

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chart, with the policeman's expertise in mind. I have directed them that their function is to decide whether or not the opinion of the expert can be accepted and in attempting to reach a conclusion on that question, the learned assessors have all studied the comparison chart.

The latent print is a very faint one. We are unable to see in that latent print the identity and sequence of ridge characteristics which the expert presses upon us. The faintness no doubt is a perfectly explicable dissimilarity. It is not a fundamental dissimilarity. But nevertheless because of that, we are unable to see the points of identity. On that ground alone, the learned assessors are reluctant to accept the evidence of the expert. I have every sympathy with that approach. Although the expert is a man with appropriate training and considerable experience and although he gave his opinion with confidence, I am of the considered view that the irregularities attendant upon this case have been such that there is an added need for caution.

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Examining the comparison chart cautiously, and anxious that we are not the experts, we nevertheless failed to discern the alleged points of similarity and are unable to hold, beyond reasonable doubt, that the suspect impression was left by the accused's fingertips. It is possible that, in our reluctance to accept the expert's opinion, we are doing that man an injustice. It is possible that our reluctance is borne of an over-scrupulous concern to exclude from our minds consideration of the many irregularities we have had to bear. Amongst those irregularities are the irregularities pertaining to the identifications that were elicited and the inadmissible utterances that were made, but particular amongst the irregularities material to this count is the deplorable utterance by Sgt Sanhanga that he received information that the accused had been seen driving the car.

In our attempts to exclude that from our minds, we have no doubt over-compensated by being scrupulously, maybe even over-scrupulously, strict in our assessment of the expert's evidence. We consider that, however, to be the only proper approach where a trial has been so riven with irregularities as this one.

Indeed, speaking solely for myself, had the learned assessors been of the view that they should act upon the expert's evidence, I would have been unable to exclude a reasonable possibility that in doing so they had been influenced by the inadmissible evidence and I would have held that a conviction could not be sustained on the grounds solely of irregularity and I would, for that reason, have discharged the accused on this count.

Since, however, we are all in agreement that we cannot accept the witness's opinion without some little degree of corroboration in our own examination of the comparison chart and since that examination of the comparison chart provides no support at all in our minds for the witnesses' opinion and since that is our unanimous view, it is unnecessary for me to make the result on this count dependent upon the finding as to irregularities which I would otherwise have made.

The manner in which we have reached our decision makes it unnecessary for us to consider a number of other issues that were raised specifically between the accused and the policeman as

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to, for instance, whether or not the accused declined to stand on an identification parade; whether or not he made statements attempting to explain any such refusal; whether or not he was denied access to a lawyer. We are satisfied that, whatever might be the result of an attempt to resolve those disputes, it can have no bearing upon the correctness of the verdict which I am about to pronounce.

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I would add however, that any suggestion that an adverse inference should be drawn against an accused who refuses to stand on an identification parade is a suggestion to be resisted.

Our verdict accordingly is, that on counts 1, 2, 4 and 5, the accused is found guilty as charged.

On count 3, the accused is found not guilty and is acquitted.

FSI HOLDINGS LTD v RIO TINTO ZIMBABWE LTD & ANOR 1997 (2) ZLR 31 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Civil appeal

26 November 1996 & 7 January 1997 Judgment No. S-264-96

Flynote

Arbitration - proceedings - conduct of - whether must be conducted in manner similar to court procedure - hearing of evidence from each side in absence of the other - whether permissible - submission to arbitration giving arbitrator a wide discretion as to how to conduct proceedings - parties acquiescing in proceedings in which each side to be heard separately - not open to one party to rely later on any irregularity - audi alteram partem rule - not necessary that hearing be held to comply with rule - natural justice - what it means - award - setting aside - grounds - award made in terms of submission - limited grounds on which award may be set aside

Headnote

The parties were engaged in a dispute which was submitted to arbitration. A chartered accountant was appointed as the sole arbitrator and the parties agreed that he be given "wide and unfettered discretion in the procedures to be adopted by him and in regard to the nature and extent of the evidence that he might require to be led". The parties also agreed that unless the arbitrator considered it necessary, and only if one of the parties applied for evidence to be heard on a particular issue, evidence was not to be led. The arbitrator advised the parties that the procedure he would adopt would be to hear representations from each side separately. This procedure was followed and an award was made against the appellant. The appellant applied to have the award set aside on the grounds of misconduct, the grounds being that the arbitrator failed to allow the parties to hear what each party had to say, failed to give each party the opportunity to cross-examination and lead evidence in rebuttal, and failed to determie the issue

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referred to him.

It was argued for the appellant that an arbitrator must ensure a fair administration of justice, which includes the duty to afford the parties a proper hearing and opportunity to examine the other side, and to hear what they have to say.

Held, that the principle that arbitrators should broadly follow the procedures employed in the course of judicial proceedings is neither absolute nor inflexible. The rule can, for instance, be modified by the agreement of the parties. If that is what the parties agree, evidence received in accordance with the agreement cannot ground a right for either party to resile from the award. The appellant was given an opportunity to reply to the respondent's averments and declined to attend a meeting at which both parties were present. It could not then, if there was an irregularity, rely on the irregularity to resile from the award.

Held, further, that it is not an irregularity to proceed in a manner different from court procedure where the parties have agreed to do so, or unfettered discretion has been conferred upon the arbitrator as to how to proceed and the parties have consented to the procedure proposed by him.

Held, further, that the arbitrator not only acted in accordance with the submission to him but also complied with the rules of natural justice. The rules of natural justice are not limited to the audi alteram partem and nemo iudex in sua causa rules. Natural justice is a manifestation of a broader concept of justice and fairness; it is fair play in action. On this basis, the appellant could not complain that the procedure agreed to or acquiesced in and followed was either prejudicial to it or gave the respondent an unfair advantage.

Held, further, that the decision of an arbitrator will not be set aside unless he has misconducted the proceedings, and the courts will be loath to follow that course unless the misconduct is of a sufficiently serious nature. An award may always be challenged if the arbitrator has exceeded his powers, but where he has made an award in terms of the submission, the court may set it aside only where it is proved either that the arbitrator has misconducted himself or that the award was improperly procured. A *bona fide* error does not constitute a ground for setting aside an award.

Cases cited:

Adamstein v Adamstein 1930 CPD 165

Amal Clothing & Textile Workers Union v Veldspun (Pvt) Ltd 1994 (1) SA 162 (A)

Chelsea West (Pty) Ltd & Anor v Roodebloem Invstm (Pty) Ltd & Anor 1994 (1) SA 837 (C)

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Clark v African Guarantee & Indemnity Co Ltd 1915 CPD 68

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Cone Textiles (Pvt) Ltd v Redgment & Ors 1983 (1) ZLR 88 (S)

Dickenson & Brown v Fisher's Exors 1915 AD 166

Field v Grahamstown Municipality 1928 EDL 135

Grant Bros v Harsant 1931 NPD 477

Marlin v Durban Turf Club & Ors 1942 AD 112

Shippel v Morkel & Anor 1977 (1) SA 429 (C)

van Huyssteen & Ors v Min of Environmental Affairs & Tourism & Ors 1996 (1) SA 283 (C)

Witton v Gatonby & Anor 1994 (4) SA 160 (W)

Case Information

A P de Bourbon SC, for the appellant

J C Andersen SC, for the first respondent

No appearance for the second respondent

Judgment

Korsah JA: On 10 April 1996, the High Court, Harare, dismissed with costs the appellant's application for an order that:

" 1. The award of the second respondent as arbitrator in the dispute between the applicant and the first respondent dated 19 September 1995 be and is hereby set aside in its entirety.

2. The first respondent shall pay the costs of this application."

It is against the order dismissing the above application that this appeal is launched.

A dispute arose between the appellant ("FSI") and the first respondent ("RTZ") in respect of an agreement of sale, in terms whereof FSI bought from RTZ the latter's beneficial shareholding in a company known as Tinto Industries Ltd ("TI").

By the terms of the said agreement FSI was to pay to RTZ $40 million for its shares and cession of its loan accounts. $13 million of the said amount was payable on the effective date of the agreement and the balance one year later. RTZ gave certain warranties in clause 7 of the agreement which were referred to as essential warranties.

FSI contended that RTZ had breached certain express warranties, in particular subclauses (4) and (5) of clause 7. Those warranties are in respect of balance sheets for 1992 and 1993, which had already been prepared, and of the

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balance sheets for 1994, which were prepared subsequent to the agreement. The following facts, culled from the judgment appealed, are not in dispute.

FSI claimed that the values of stocks and debtors in the balance sheet of TI as at 1 January 1994 had been overstated and the creditors understated. FSI, therefore, claimed compensation for a shortfall in a fixed asset to the extent, in total, of $7 064 065,15. RTZ accepted $512 000 of the amount claimed as being valid, it being the cost of a new crane to replace one not handed over to FSI, but rejected the balance of the claim. In essence, the dispute between the parties was whether FSI was entitled to a reduction in the purchase price for TI by way of damages or otherwise on the ground that there had been a breach of the warranties in clause 7 of the agreement.

Although the agreement of sale did not contain an arbitration clause, FSI and RTZ agreed that the dispute on whether or not there was a breach of the express warranties should be referred to arbitration.

The terms of reference to the arbitrator were settled in a series of letters between the legal practitioners of the parties.

It commenced with a letter from the lawyer of RTZ suggesting that the dispute be referred to a single arbitrator, who should be a senior chartered accountant in Harare, to be agreed upon by both parties; that the arbitration be conducted in an informal manner with both parties being represented by their respective accountants; that there be no formal pleadings in the matter, excepting that two letters between the parties dated 10 February 1995 and 14 March 1995 respectively, be treated as defining the matters in dispute; that the arbitrator's decision should be final; and that the costs of the arbitration should be in the discretion of the arbitrator.

The lawyer for FSI accepted the above proposals, subject to the appointment of the second respondent ("Bailey") as the sole arbitrator with wide and unfettered discretion in the procedures to be adopted by him and in regard to the nature and extent of the evidence that he might require to be led, as well as in relation to any decisions or determinations which he might deem fit.

The lawyer for RTZ accepted the qualifications and added a condition that RTZ should be permitted to adduce evidence and to argue that, by reason of the manner in which the deal was structured, the various points taken by FSI were not relevant.

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he lawyer for FSI responded that FSI would not wish to fetter the broad discretion given to the arbitrator by stipulating the nature and extent of the evidence which the arbitrator would be required to hear. He therefore did not agree to the additional condition because FSI would prefer to give the arbitrator the broadest possible mandate in regard to the nature and extent of the evidence he might require to be led and as to the procedures he might choose to follow. Notwithstanding his objection, he indicated that RTZ would be free to suggest to the arbitrator that it should be entitled to adduce such evidence and the arbitrator should be free to determine

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whether or not RTZ should be so entitled.

The lawyer for RTZ replied expressing his agreement that the arbitrator had to be vested with the broadest possible mandate, but indicating nevertheless that it was a point of cardinal importance, in the case of RTZ, that the deal was structured as alleged by it in earlier correspondence. He sought an undertaking from FSI that it would not oppose the adduction of the necessary evidence to establish the manner in which RTZ alleged the deal was structured. He said if FSI were minded to oppose the introduction of such evidence RTZ would decline to follow the arbitration path and pursue its rights by way of action for the recovery of the amounts allegedly due to it.

The lawyer for FSI agreed that RTZ was free to show, by evidence, that the transaction was structured in such a way that the individual items which form the basis of FSI's case could not be considered in isolation, but had to be looked at in the context of the structuring of the deal as a whole.

On 1 September 1995, the lawyer for RTZ wrote to Bailey and enclosed copies of the agreement of sale and all the correspondence which spelt out the arbitrator's terms of reference. The penultimate paragraph of that letter reads:

> "As it will be apparent from the letters listed 9-14 above it has been agreed that, apart from the issues disclosed in the documents listed at 2 and 3 above, it will be open to the arbitrator, in his discretion, to hear evidence on the contention by Rio Tinto Zimbabwe Ltd that the transaction between the parties was so structured that the items of complaint raised by FSI Holdings Ltd are irrelevant. Should the arbitrator allow such evidence to be led, FSI Holdings Ltd shall be given the opportunity to gainsay the same."

Under cover of a letter dated 4 September 1995, the lawyer for RTZ sent to

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the lawyer for FSI a copy of his letter to Bailey and intimated that this was in accordance with the agreement reached by them.

Upon receiving the letter of 1 September 1995 *supra*, Bailey had the parties contacted to agree on suitable dates for the hearing. Having ascertained the convenient days for hearings, he addressed a letter dated 5 September 1995 to the representatives of the parties, to indicate the procedure he would be adopting and to confirm the times for the meetings as follows:

> "Dear Mr Fraser,
>
> SUMMARY ARBITRATION: RIO TINTO ZIMBABWE LTD (RTZ) AND FSI HOLDINGS LTD (FSI)
>
> I have now received copies of the sale agreement and exchanges of correspondence between the parties to the arbitration. Advice has also been received that you have been asked to keep Monday 11 and Tuesday 12 September free to meet with me in connection with the arbitration.
>
> Accordingly, the following timetable has been drafted for meetings with me. I shall be grateful if you will advise me as soon as possible if the timings are not possible and/or if you would wish to bring anyone else:
>
> MONDAY 11 SEPTEMBER 1995

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9.30 am Representations from FSI

J L Fraser

M D Frudd

2.05 pm Representations from RTZ

J H K Sachikonye

T G M Hooley

TUESDAY 12 SEPTEMBER 1995

10.00 am Provisional meeting with FSI representatives to hear further representations.

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11.30 am Provisional meeting with RTZ representatives to hear further

representations.

If necessary further meeting(s) can be held on Tuesday afternoon.

Mr D J M Vincent is not available on Monday or Tuesday. As RTZ wishes his views to be made known an attempt will be made to meet with him later this week, or failing that later next week.

Yours faithfully,

P L BAILEY

ARBITRATOR."

I have reproduced the above letter in full because it is contended by FSI that, while the parties agreed to an informal arbitration, with the arbitrator having a wide discretion as to how the arbitration was to proceed but with the parties having the right to lead evidence to deal with those matters which were in dispute, at no stage did the parties agree to the procedure which was in the end result adopted by the arbitrator.

I do not think it lies in the mouth of any representative of FSI to protest the procedure adopted by the arbitrator, unless such procedure was manifestly unfair and flies in the teeth of justice. I say so because it was the lawyer for FSI who stipulated in his letter of 18 June 1995:

> "... that the arbitrator shall have a wide and unfettered discretion in the procedures to be adopted by him and in regard to the nature and extent of the evidence that he may require to be led, as well as in relation to any decisions or determinations which he may deem fit."

This letter was one of the letters, settling the mandate of the arbitrator, which was passed on to Bailey under cover of the letter of 1 September 1995 by the lawyer for RTZ.

Clearly, the parties agreed, as submitted by Mr Andersen that, unless the arbitrator considered it necessary, and save that if RTZ applied for evidence to be heard on the issue as to whether the purchase price was in any way affected by the warranties, which application would not be

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opposed by FSI,

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evidence was not to be led. This implied that there would be no viva voce evidence, cross-examination, evidence in rebuttal or a hearing at which both parties would be present as a matter of course. There was, however, nothing to prevent either party from requesting such a procedure. But the manner in which the arbitration should take place was left very much to the discretion of the arbitrator.

In accordance with the procedure proposed by Bailey in his letter to the parties, which did not provoke dissent from either party, he held two meetings each with representatives of FSI and RTZ at which oral submissions were made and questions asked concerning the dispute. A brief meeting was also held with Mr D J M Vincent to receive submissions from him.

Notwithstanding the assumptions of Mr Fraser that Bailey would require the representatives of the parties to meet together in his presence so that their respective contentions, representations and arguments could be properly challenged, in order to assist Bailey in making a fair adjudication, it must have been obvious from Bailey's letter to the parties regarding the procedure outlined therein that he intended to hear the evidence and arguments from each party separately; that, having heard the evidence and arguments on the Monday, he would then put to each party the representations which had been made by the other and give them an opportunity to respond. This was exactly what occurred. If either party had requested a further meeting in any form, Bailey, as intimated in his letter to them, was prepared to hold such a meeting, with all the parties together, on the Tuesday afternoon. With no request or protest emanating from either party the need for a further meeting on the Tuesday afternoon fell away.

FSI admitted that at the meeting on 12 September 1995, Bailey furnished it with a synopsis of the representations which had been made to him the previous day by the representatives of RTZ, and FSI attempted to answer each of the points raised in considerable detail. FSI then specifically declined the necessity for a further meeting, with all the parties present, on the Tuesday afternoon.

The grounds of misconduct on which FSI relies to have the award set aside are:

(a) failing to allow the parties to hear what each party had to say;

(b) failing to give each party the opportunity to cross-examine and lead evidence in rebuttal; and

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(c) failing to determine the issue referred to him.

On behalf of FSI, Mr de Bourbon submitted that the position at law is that an arbitrator must ensure a fair administration of justice between the parties, which includes the duty to afford the

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parties a proper hearing and opportunity to examine the other side, and to hear what they have to say. For this submission, he drew support from the dictum by Seligson AJ in Chelsea West (Pty) Ltd & Anor v Roodebloem Investment (Pty) Ltd & Anor 1994 (1) SA 837 (C) at 845 that:

> "(An arbitrator) acts in a quasi-judicial capacity and must conduct himself accordingly ... Whilst not obliged to observe the precision and forms of a court of law, the arbitrator must proceed in such a manner ... 'as to ensure a fair administration of justice between the parties' (Clark v African Guarantee & Indemnity Co Ltd 1915 CPD 68 at 77 *per* Gardiner J). This includes the duty to afford the parties a proper hearing. Inherent therein is that the arbitrator must not examine the parties or witnesses or conduct a hearing in the absence of one or either of the parties. If he does so he commits an irregularity which will result in his award being set aside."

In the earlier case of Shippel v Morkel & Anor 1977 (1) SA 429 (C) at 434B van Winsen J had expressed a similar view that:

> "Our courts have accepted that in deciding upon matters submitted to them arbitrators are required to follow, at any rate in broad outline, the precepts which govern the procedure employed in the course of judicial proceedings."

However, this principle, like all rules of adjectival law, is neither inflexible nor absolute. A hint was given of possible departures from this principle by Jones J in Adamstein v Adamstein 1930 CPD 165 at 168, cited with approval in the Chelsea West (Pty) Ltd case *supra* at 845J, when he said:

> "Courts of law jealously guard the rights of a person to be present at and heard at proceedings to which he is a party, and will only tolerate a departure from the rule which recognises this right in very special circumstances."

There can be no doubt that van Winsen J was mindful of the possibility of valid departures from the general rule when he remarked in Shippel v Morkel & Anor *supra* at 434F-G that:

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> "As Mr Marais for (the) second respondent rightly points out, this rule can be modified were the parties to agree that the arbitrator be permitted to hear evidence in the absence of one of the parties. He submits that by clause 4 of the submission to arbitration the arbitrator may proceed ex parte
>
> > 'in the event of either party failing after reasonable notice to ... attend the hearing'.
>
> If it could have been said that evidence has been received before the arbitrator in the absence of one party under the circumstances contemplated by clause 4 then that would have afforded protection to such proceedings. In my view, however, the arbitrator did not take such action as was necessary to invoke the provisions of that clause."

It is therefore abundantly clear that in law, where the parties agree that evidence or submissions may be given or made before the arbitrator in the absence of one or either party, evidence or submissions so received in strict compliance with their agreement, cannot ground a right for either party to resile from the award.

At the risk of being tedious, it is important to remember that it was FSI which submitted "that the Arbitrator shall have a wide and unfettered discretion in the procedures to be adopted by him in regard to the nature and extent of the evidence that he may require to be led ..." FSI also raised no objection to Bailey's letter of 5 September 1995 *supra*, in which he outlined the procedure he intended to adopt. It is, therefore, rather surprising to read in para 12 of the founding affidavit

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deposed to by Mr Fraser on behalf of FSI the complaint:

> "... That the second respondent made it clear that, in his view, the summary of the points made by the first respondent should be sufficient for our purposes and that it would be unnecessary in his view for either party to hear the totality of the evidence given by each of them to him as arbitrator ... He did state that he would be prepared, if we insisted, to start the proceedings afresh on the basis that both parties would lead their evidence again before him and in the presence of each other but he made it clear that he felt that this was unnecessary and wasteful in terms of time given that it would, in effect, mean starting the arbitration all over again. It was my view then that the arbitrator clearly did not wish to hear both parties together ..."

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In para 13 Mr Fraser says:

> "That in retrospect I verily believe that we ought properly to have insisted that the arbitration be reheard with both parties present ..."

Mr Fraser, of course, was recalling from memory what had transpired at FSI's last meeting with the arbitrator.

Bailey, however, had all the meetings by the parties with him tape-recorded and his account of what was said is to be preferred to that of Mr Fraser as the more accurate. He stated, after he intimated to FSI that he would be very happy to arrange a session where both sides sat and discussed the relevance of how the agreement was structured, what followed in para 14.5 of his affidavit, which states:

> "I then explained that what I had shown them as the contentions of the first respondent was in fact dictated by the representatives of the first respondent and, therefore, accurately portrayed its contentions. Mr Fraser then said: 'OK. No, the last thing I think that we want to get into is a slanging match across the table to be honest because it is unnecessary. And I personally feel what is on here is blown out of the water, it's irrelevant. I don't know what you guys think?' Mr Frudd said: 'Well I certainly, and Dave Lake also, we knew that was there, that sort of argument from the discussions we had in their boardroom'. Mr Fraser said: 'Correct'."

Thus, as Bailey deposed to, and was accepted by Mr Fraser, Bailey offered to hold a meeting with all the parties present but the offer was not taken up.

It is patent that FSI was well aware of the procedure suggested by Bailey and acquiesced in it. It was fully informed of the averments in a minute by RTZ dated 11 September 1995, which stated that:

> "FSI purchased the business based on its ability to generate future earnings, and not upon its asset base. This is evidenced by the following:
>
> 1. The heads of agreement were signed with an agreed price on 16.12.93 before balance sheets at either 31.12.93 or 1.1.94 were available based on a careful examination of the 1994 budgets.
>
> 2. Fixed assets sold prior to 1.1.94 were sold at adjusted values to suit FSI.

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3. The final agreement dated 24.3.94 contained no clause to the effect that the price would be increased or reduced if net assets were above or below an agreed figure. Such a clause is common in agreements where asset values are considered important.

4. FSI did not arrange for a due diligence investigation to be undertaken nor sent observers to stock-counts which they would have done if asset values were important.

5. Clause 14.4 states that FSI purchases the shares voetstoets and accepts control of the Company's assets voetstoets."

FSI was given the opportunity to respond to the averments in the above minute. It was also advised that a hearing with both parties present would be held if it wished, but declined the holding of such a hearing. Having exercised its option to decline the holding of a hearing where all the parties would be present together, FSI cannot, even if the procedure it acquiesced in was irregular, rely on such irregularity to resile from the award; for an aggrieved party forfeits his right to have an offending step or proceeding set aside if he has taken any further step in the cause with the knowledge of the irregularity or the impropriety.

I am in entire agreement with Mr Andersen that the manner in which the arbitrator acted was consistent with his mandate and the discretion reposed in him, as stipulated by FSI itself and accepted by RTZ. Furthermore, as in a court of law in a case where all the facts are common cause, there would have been no point in holding a formal hearing, in the form of hearing evidence, as the arbitrator did not have to resolve any dispute of fact but to decide the matter on the facts which were common cause and on his interpretation of the agreement.

In para 13 of FSI's heads of argument it was conceded that FSI acquiesced in the procedure adopted by Bailey, but that such acquiescence was merely a matter of convenience and not an abandonment of any legal rights. However, such acquiescence was not qualified. It was made without regard to any secret or unexpressed reservation FSI may have had. Neither Mr Fraser nor Mr Frudd, who are mature and experienced in their fields of endeavour as company director and chartered accountant respectively, said they did not know or appreciate what they were doing when they declined the invitation to hold a meeting with all the parties. Obviously, the application to have the award set aside would not have been mounted had the award gone in favour

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of FSI. As Mr Andersen remarked, their (Mr Fraser's and Mr Frudd's) case is effectively that the procedure adopted was acceptable to them provided FSI was successful, but because FSI was not successful the award must be set aside.

In Shippel v Morkel & Anor *supra* at 436E-G van Winsen J observed that:

> "On the assumption that the holding of the hearing on 30 September ... constituted an irregularity, (the) applicant could have acquiesced therein and were it to appear clearly from all the evidence that he had done so, he could not subsequently complain on that score. The courts have recognised that a party can acquiesce in an irregularity."

The learned judge cited several authorities in support of this proposition and expressed the view

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at 437B that:

> "I do not think it is open to a party to lie by and take no action until he sees which way the award goes. Such conduct is difficult to reconcile with an intention to enforce his rights."

Mr Andersen submitted, and I entertain no doubt as to the soundness of that submission, that the learned trial judge rightly held that there is no basis on which FSI was entitled to stand by and raise the issue of irregularity later if the award was contrary to its interest.

Turning then to the second ground of misconduct alleged - that the arbitrator failed to give each party the opportunity to cross-examine each other and lead evidence in rebuttal - Bailey not only acted in accordance with the submission to him, but also complied with the rules of natural justice. The audi alterem partem rule requires no more than an opportunity to make representations, to place one's own version before a tribunal, and to rebut the evidence against oneself. The holding of a hearing was not necessary, in this instance, for the purposes of the audi alterem partem rule. FSI was well aware of the contentions of RTZ, as discussed in the boardroom and as spelt out in the interchange of correspondence between the parties which constituted the submission, and had every opportunity to be heard as, indeed, it was heard.

Again I find myself in agreement with Mr Andersen that Mr de Bourbon's submission, that "in law an arbitrator must ensure a fair administration of justice between the parties, which includes the duty to afford the parties a

proper hearing and the opportunity to examine the other side, and to hear what they have to say", in the unqualified manner in which it has been set out, does not accurately reflect the law.

An arbitration flows from a submission by the parties, which is an agreement indicating the mandate of the arbitrator and the dispute to be resolved. The nature of the proceedings very much depends on the nature of the agreement. It is not an irregularity to proceed in a manner different from court procedure where the parties have agreed to do so, or unfettered discretion has been conferred on the arbitrator as to how to proceed and the parties have consented to the procedure proposed by him. As the learned trial judge remarked:

> "Whilst I agree that the rules of natural justice require adherence to the audi alterem partem rule, it is also true that the parties may agree to a procedure in which the principles of that rule are not strictly adhered to. The procedure adopted by Bailey, which as I say was accepted by the parties, meant that the submissions and arguments raised by each party were made known to the other party and it was given an opportunity to respond. A similar procedure was accepted by the court as being acceptable in Landmark Construction (Pty) Ltd v Tselentis 1971 (1) RLR 56 (G) at 59-61. The difference in that case was that the arbitrator did not apprise the other party of the (additional) evidence adduced. Although FSI subsequently raised the point that the evidence from RTZ had not been given in its presence, its representatives felt that a joint meeting of the parties was not necessary. A similar attitude was adopted by the applicant in the Shippel case *supra*. Accordingly, I find that there was no misconduct in the roceedings insofar as the audi alterem partem rule was not strictly adhered to. Bailey did apprise each party of the evidence led by the other and gave it an opportunity to rebut or otherwise deal with the evidence."

If Bailey had heard one party and refused to hear the other this court would have interfered and set aside the award, but that was not the case. See Clark v African Guarantee & Indemnity Co

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Ltd *supra* at 77.

In van Huyssteen & Ors v Min of Environmental Affairs & Tourism & Ors 1996 (1) SA 283 (C) at 304-5 Farlam J made the valid point that the rules of natural justice in our law are not limited to the audi alterem partem and the nemo iudex in sua causa rules. The learned judge appeared to accept that natural justice is a manifestation of a broader concept of justice. He said:

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> "... everyone appears to accept the correctness of Tucker LJ's dictum in Russell v Duke of Norfolk & Ors [1949] 1 All ER 109 (CA) at 118D-E which is in the following terms:
>
> > 'There are, in my view, no words which are of universal application to every kind of enquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting (the submission), the subject-matter that is being dealt with, and so forth.'

(This dictum has been quoted with approval from time to time in South African decisions: see for example Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 646E).

One of the statements cited by Craig Administrative Law 2 ed 207 for the view that natural justice is a manifestation of the broader concept of fairness is the well-known dictum of Lord Morris of Borth-y-Gest in Wiseman v Borneman [1971] AC 297 (HL), [1969] 3 All ER 275 at 308H-309B (AC) and 278C-E (All ER) which reads as follows:

> 'My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The Common Law has abundant riches; there may we find what Byles J called: "the justice of the common law" (Cooper v Wandsworth Board of Work (1863) 14 CBNS 180 at 194)'."

See also Marlin v Durban Turf Club & Ors 1942 AD 112 at 126.

On the above view of the broader concept of justice, FSI cannot complain that the procedure agreed to or acquiesced in and followed was either prejudicial to it or gave RTZ an unfair advantage.

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In Field v Grahamstown Municipality 1928 EDL 135 the arbitral award was set aside on the grounds (1) of the failure of the arbitrators to give the applicants an opportunity of calling evidence in the absence of proof of an agreement or acquiescence on the part of the applicants; and (2) that the arbitrators took the statement of the witness in the absence of and without notice to the applicants. In the instant case, everything that Bailey did was with notice to the

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parties and the parties agreed to and acquiesced in it. So also in Grant Brothers v Harsant 1931 NPD 477 at 480 it was held that arbitrators must observe the fundamental rules which govern judicial proceedings; and that they must base their decision on the evidence adduced before them, unless the parties agreed, as in the instant case, that they should decide without evidence or notice to the parties to attend together before them.

There is a consensus among the pundits of the law of arbitration as to the overriding effect of the parties' agreement. Thus Russell On Arbitration 20 ed 254 has this to say:

> "Arbitration being a private procedure established by agreement it is possible for the parties to agree (whether by subscription to the printed code of procedure of an institution or otherwise) to lay down for themselves the procedure to be followed. It would be the duty of the arbitrator to give effect to the agreed procedure, otherwise he acts without jurisdiction. Of course, such a code could include - or even wholly consist of - a discretion that the arbitrator should use his own judgment. 'No doubt it is possible for a formal submission to arbitration to include a provision that the arbitrator shall have a general power to regulate the procedure as he thinks fit, and such a provision would receive due effect'.
>
> However, in the absence of such a general power the arbitrator should follow the code, and any general words therein must be rightly construed."

See also the Chelsea West (Pty) Ltd case *supra* at 846C-F and 849B-G. Jacob The Law of Arbitration in South Africa at p 114 has this to say:

> "The procedure at an arbitration tribunal will, in the absence of any agreement to the contrary or in the absence of an agreement determining the procedure, follow the procedure that is ordinarily adopted in a trial in a court of law."

See also Mustill and Boyd The Law and Practice of Commercial Arbitration

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in England pp 16 to 17; and Witton v Gatonby & Anor 1994 (4) SA 160 (W) at 167F.

Finally, it was contended by Mr de Bourbon that the award did not deal with the submission, namely that it did not deal with the matters or issues placed before Bailey for arbitration, and that he overlooked or misconceived what he was required to determine.

When the correspondence and papers constituting the submission are considered in their entirety, it becomes evident that the issue was not merely whether there had been compliance with the warranties, but whether FSI was entitled to a reduction of the purchase price. FSI was claiming a reduction in the purchase price because of alleged breaches of the said warranties. This gave rise to the issue whether the warranties were linked to the purchase price to the extent that breaches of them would have the effect of reducing the purchase price. Clearly, Mr Andersen's submission that a determination that FSI was not entitled to a reduction in the purchase price by way of damages or otherwise rendered a determination of the disputes as to the warranties unnecessary and academic cannot be faulted.

Bailey was well aware of the basis on which FSI claimed a reduction in the purchase price. He stated it succinctly in para 1.2 of his determination as follows:

" 1.2 In a series of letters dated 10 February, 21 March and 14 June 1995, FSI claimed that the values of stock

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and debtors in the Tinto balance sheet at 1 January 1994 had been overstated, creditors understated and requested compensation for a shortfall in a fixed asset to the extent, in total, of $7 064 065,15."

He concluded in para 5 of his determination that:

" 5.1 In the light of my understanding of the Sale Agreement, I am of the opinion that the only claim FSI has against RTZ is for $512 000 because both parties have agreed to it.

"5.2 The balance of FSI's claim, amounting to $6 552 065,15 cannot, in my view, be sustained by the Sale Agreement as worded."

The learned trial judge observed in his judgment that:

"His (Bailey's) mandate was to determine whether the deductions were

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permissible. There would be little point in him deciding that there had been a breach of the express warranties if he did not go on to determine the consequences of such a breach. In the award Bailey analysed each of the express warranties in the context of the agreement of sale. Some, he felt, were not relevant to the dispute or to the business taken over. One, he felt, could not give rise to any claim for damages because FSI had not suffered any loss as a result of any breach thereof. There was only one warranty (clause 7.5 of the agreement) which he felt was relevant. If there was a breach of that warranty he considered that FSI would be entitled to cancel the agreement. But the breach could not in his opinion give rise to any claim for damages or a reduction in the purchase price. That being the case, he felt that there was little point in him investigating the question of whether or not there had been a breach. In the circumstances, he prformed his mandate. Whether or not he was correct in his determination is not for this court to decide."

The decision of an arbitrator will not be set aside unless he has misconducted the proceedings, and the courts will be loath to follow that course unless the misconduct is of a sufficiently serious nature: Cone Textiles (Pvt) Ltd v Redgment & Ors 1983 (1) ZLR 88 (S) at 92A-93C; Amalgamated Clothing & Textile Workers Union v Veldspun (Pty) Ltd 1994 (1) SA 162 (A) at 169G-H.

An award may always be challenged if the arbitrator has exceeded his powers, but where he has made his award in terms of the submission, the court has jurisdiction to set it aside only where it has been proved either that the arbitrator has misconducted himself or that the award was improperly procured: Dickenson & Brown v Fisher's Executors 1915 AD 166 at 175. It is not alleged that the award was made mala fide or one which, acting reasonably, the arbitrator could not possibly arrive at. Thus, even if Bailey's interpretation of the agreement was incorrect the award may not be set aside. A *bona fide* error does not constitute a ground for setting aside an award. Jacob op cit at p 143; Dickenson & Brown's case *supra* at 174.

Bailey did not join in the dispute before the trial court or in this appeal, save that he furnished the court with information which proved invaluable both to the trial court and this court. Our attention has been drawn to the fact that he incurred legal costs in dealing with this matter and that any ultimate order for costs should take this into account. It is only right that FSI should pay such legal costs as Bailey incurred in this matter. Accordingly:

1. The appeal is dismissed with costs.

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2. FSI is to pay such legal costs as the arbitrator incurred in this matter.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

Gill, Godlonton & Gerrans, first respondent's legal practitioners

Atherstone & Cook, second respondent's legal practitioners

PTC v STAKOLD REFRIGERATION & DAIRY SERVICES (PVT) LTD 1997 (1) ZLR 50 (HC)

Court **High Court, Harare**

Smith J

Civil action

25, 27, 29 November 1996 &

8 January 1997 Case No. HH-180-96

Flynote

Interpretation of statutes - regulations - validity - by-law providing that account rendered shall for all purposes be sufficient evidence of amount due - whether account rendered conclusive or *prima facie* proof of amount due - whether by-law could make account conclusive proof of amount due

Evidence - presumptions - statutory - provision in by-laws that telephone account is sufficient evidence of amount due - whether account conclusive evidence or merely *prima facie* evidence

Headnote

In terms of s 73(2) of the Postal and Telecommunication Services (Telephone) By-laws 1973 (RGN 399 of 1973), a telephone account rendered to a subscriber "shall for all purposes be sufficient evidence of the amount due by the subscriber".

Held, that, properly interpreted, this provision means that an account is *prima facie* proof of the amount due and not conclusive proof thereof. There is a distinction between sufficient and conclusive proof. "Conclusive proof" means that the evidence is incontrovertible and no evidence may be led to contradict it, whereas "sufficient proof" means that the evidence will be accepted as proof if there is no countervailing evidence.

Held, further, that there is another good reason for interpreting the provision in this way and that is that a provision in the telephone by-laws that laid down that an account rendered by the PTC was conclusive proof of the

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amount due would have been ultra vires the Act under which this subsidiary legislation fell because the provision would be contra bonos mores. A conclusive proof clause in favour of a creditor in terms of which the creditor will be the author of the certificate of balance owing is contrary to public policy and void.

Held, further, that the onus of proof was on the PTC to establish that it was owed the amount being claimed by it and, on the facts, it had failed to establish this.

Cases cited:

Donelly v Barclays National Bank 1990 (1) SA 375 (W)

Karimazondo v Standard Chartered Bank Zimbabwe 1995 (2) ZLR 404 (S)

Ex p Min of Justice: In re Donelly v Barclays National Bank 1995 (3) SA 1 (A)

Nedbank Ltd v Abstein Distributors (Pty) Ltd & Anor 1989 (3) SA 750 (T)

Retrofit \(Pvt\) Ltd v PTC \& Anor 1995 (2) ZLR 199 (S)

SA Army Fund v Umdloti Beach Health Committee 1974 (4) SA 948 (N)

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)

Standard Bank Financial Nominees v Bamberger & Ors 1993 (4) SA 84 (W)

S v Galgut's Garage (Pty) Ltd & Anor 1969 (2) SA 459 (A)

S v Moroney 1978 (4) SA 389 (A)

Telkom Suid-Afrika Bpk v Richardson 1995 (4) SA 183 (A)

The court referred to the following enactments:

Postal and Telecommunication Services (Telephone) By-Laws 1973 (RGN 399 of 1973), s 73(2)

Case Information

A J Dyke, for the plaintiff

B G Venturas, for the defendant

Judgment

Smith J: The plaintiff (hereinafter called "the PTC") issued summons claiming from the defendant (hereinafter referred to as "Stakold") $79 218,03 for telephone calls made by Stakold in the period September 1990 to January 1993. Stakold denies that it owes money to the PTC and claims that in fact it has overpaid the PTC at least $55 000 and has filed a counterclaim for

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a refund of the $55 000.

At the hearing, Mr Dyke said that certain payments had been made by Stakold

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which were not credited to its account by the PTC. He undertook to hand in a document setting out the amounts so paid and an amended figure reflecting the PTC's claim. Section 73(2) of the Postal and Telecommunication Services (Telephone) By-laws 1973 (RGN 399 of 1973) (hereinafter called "the Telephone By-laws") provides that an account rendered by the PTC shall for all purposes be sufficient evidence of the amount due by the subscriber. The parties agreed that by virtue of this provision,the onus was on Stakold to prove that it did not owe the amount claimed by the PTC. I would point out that the court is not compelled to accept this interpretation of s 73(2) of the Telephone By-laws if it does not agree therewith - see Telkom Suid-Africa Bpk v Richardson 1995 (4) SA (A) at 183.

Stakold called five witnesses, being Mr and Mrs Cole and John Chatikita, who are all employees of Stakold, and Mr Went and Mr Robinson, who are experts on the telecommunication equipment and systems used by the PTC in the period 1990 to 1993. The evidence of Mr Cole, the managing director of Stakold, was to the following effect. Stakold provides services to dairy farmers and has been in business since 1965. It is a small company with only six other employees. It has had two incoming telephone lines and a telex line since 1989. Excessive bills for telephone calls started to come in towards the end of 1989 and continued to arrive until the end of 1992. In an effort to reduce the bills the telephone extensions were reduced to two, one being in his office and the other in the main office. He produced two tables derived from the accounts submitted by the PTC, one showing the number of metered calls each month from October 1988 to January 1993 and the other showing the monthly costs of the metered calls over the sae period. Over the ten months prior to October 1988 the monthly usage had been below 5 000 units, averaging 4 857 units a month. In 1989, the number of monthly metered calls exceeded 5 000 in 8 of the 12 months. From March 1990 to December 1992 in only one month was the number of monthly metered calls less than 10 000. Usually the number exceeded 20 000 and on 4 occasions it reached 40 000. In June 1991, almost 60 000 metered calls were recorded. Because Stakold refused to pay the accounts submitted, the PTC had cut off the telephone in August 1995. He had then obtained two lines in the name of T J Cole and Sons, which were used by Stakold, and the average number of units registered each month between August 1995 and July 1996 was 4 395. At the office, only he and the telephonist, John Chatikita, used the telephone. On average, he and John made about 15 calls a day and just over 30 incoming calls were received. They made a limited number of trunk calls within the country and virtually no overseas calls were mde. If he wanted to contact a supplier outside the country he sent a fax. During the period in question, namely mid-1989 to the

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end of 1992, they had considerable problems with crossed lines and locked lines when the

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telephone could not be used. On many occasions they hooked into calls to or from foreign countries such as the United States of America, Hong Kong, the United Kingdom and South Africa. On one occasion they could not use the telephone for more than 45 minutes because the line was hooked into a call to the United States and on another the telephone could not be used for more than 30 minutes because the line was hooked into a call to Hong Kong. On many occasions, he picked up the receiver to make a call but could not get dialling tone. Often, after making an internal trunk call using the STD, he would put the receiver down and then when he picked up the receiver 5 or 10 minutes later the line was still locked and he could not make his call. Sometimes the line was locked that way for days on end. Wheever possible he reported the fault. Sometimes the operator would give him a fault number but usually the operator did not. When the faults became more numerous he kept a record of the fault-reports, starting it on 4 May 1991. He started to keep the record because the PTC was doing nothing to remedy the position. John Chatikita was the one who actually recorded the reports in the book. From May 1991 to December 1993 the number of faults reported varied from two in January 1992 to eleven in August 1992, with the average being from six to eight a month. There were many times when faults would not be reported because there was no line that could be used. The record showed that the months in which the greater number of faults were reported were those in respect of which the account was higher. Right from the beginning of the period Stakold would query the accounts and ask to see a technical person to discuss the matter but the standard reply was that no faults were found. Letters were written to the PTC to try toresolve the dispute but the PTC was not co-operative. Several meetings with PTC officials were arranged but on every occasion the official would cancel the meeting a few hours before it was due to start. When a PABX was installed at the office the faults were reported to the company which supplied the PABX (Philips) which then dealt with the PTC. On one occasion, on 29 September 1992, he made an STD call to a customer in Gweru at about 9.15a.m. It was a Saturday morning. After finishing the call he put the receiver down. Later he tried to make another call but could not get dialling tone because the line was locked, presumably to the line of the customer in Gweru. He checked twice on Sunday and the line was still locked. On the Monday, he reported the fault to Philips which contacted the PTC and the line was cleared at about 11.30 a.m. From the time the telephone accounts started to increase so dramatically, he went to great lengths to economise on the use of the telephone. That made no difference. He asked te PTC if the lines could be monitored but the PTC official refused because the PTC had only three monitoring devices in the

country and none could be spared for Stakold. He kept the office locked so no-one could use the telephone outside office hours. Only he, his wife and John Chatikita could use the telephone during office hours.

Mr Cole was subjected to a searching cross-examination. His evidence was not shaken. He said that there were locks on each telephone receiver to prevent unauthorized calls, as well as every office being locked when they closed for the day. He kept all the keys. He had written to the PTC in April 1991 setting out his complaints and the PTC had eventually replied in February 1992, some ten months later. Generally speaking, the PTC had not been co-operative and even

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when the officials did agree to meet him, the meetings were subsequently cancelled. He had complained to the Consumer Council and the Parliamentary Committee and done everything he could to try to reconcile the dispute but to no avail.

The next witness was Mrs Cole, whose evidence corroborated that of her husband. She also referred to the tremendous problems Stakold experienced with the telephones. She too said that the telephones could be used to only a very limited extent during the period in question because of faults related to crossed lines and locked lines. She personally had reported over 150 faults in that period, even though she did not visit the office every day. As she handled the accounts for Stakold, she had visited the PTC offices in Harare to query the telephone accounts. Initially she was told to pay what she thought Stakold owed and the accounts would be sorted out later. Accordingly, from October 1988 to January 1993 she had made payments totalling $99 785,15. The PTC did nothing about the complaints. She would visit the PTC offices every couple of months but was passed from person to person and got no satisfaction. Some of the payments she made were not reflected in the accounts sent out by the PTC. When she complained tothe PTC she got no satisfaction. She filled in the complaint forms provided by the PTC but that elicited no response. She was still waiting for a response to a report she had handed in a year ago. She had prepared the schedule setting out the overpayments made to the PTC, which totalled $54 600. The figures were taken from the statements received from the PTC. Under cross-examination, Mrs Cole said that the counterclaim was based on assumed usage, not actual usage, because no record of actual calls made had been kept.

The third witness was Mr John Chatikita, whose evidence corroborated that of Mr Cole. He said that he and Mr Cole were the main users of the telephone and that Mrs Cole occasionally made telephone calls. Other members of staff did not use the telephone. The telephone receivers were kept locked and the

offices were locked after office hours. There were many problems with the telephones during the period in question. It was often impossible to use the telephone. On many occasions there were crossed lines and locked lines. He often reported faults. He never made international telephone calls.

Mr Went of Philips gave evidence as follows. From January 1991 to January 1993, Stakold had reported numerous faults. Many of the complaints related to crossed lines or locked lines. He considered that either kind of fault could result in the meter for one of the Stakold lines metering the call. On 2 July and 23 October 1992, Philips had written to Stakold about the many faults that Stakold had reported and the PTC had accepted that the faults were on the PTC part of the system. Most of the faults had been released at the PTC exchange unit. It was unusual for one subscriber with only two lines to experience so many faults. There were 38 line faults which showed that there was definitely a technical problem somewhere. There was something drastically wrong with the equipment which was part and parcel of the metering system. Whilst it was obvious that a technician had cleared the faults that were reported, the cause of the faults had not been investigated. Under cross-examination this witness said that the probale cause of the excess metering of calls was double-switching because of the worn and over-worked

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equipment which resulted in bridging between two or more lines. A complaint in September 1987 showed that Stakold's meter under-stepped by 466 units. He conceded that the high number of metered calls could have been due to excessive use of the telephones.

The final witness for Stakold was Mr Robinson whose evidence was as follows. The PTC equipment needed a lot of maintenance. If there was double-switching, both meters could register the call. It was a common problem resulting from bad adjustment of the equipment. The records produced showed that many faults had been reported and rectified but there were no engineer's reports. Furthermore, the maintenance records were not produced by the PTC. If routine maintenance had been carried out, there would not have been so many faults.

The only witness called by the PTC was Mr Thembani, the District Manager for Harare Central, who has worked for the PTC for 35 years. His evidence was to the following effect. Every meter was unique to one particular line or customer. The meter was only activated when an outgoing call was answered. A crossed line would not activate the meter of the subscriber who butted into a call between two other subscribers. Also, where a subscriber's line became locked after he had replaced the receiver, the meter would not continue to

record after the subscriber replaced the receiver. Where there were crossed lines it was possible that two meters would be activated. If there was any understepping by the meter only the PTC would be prejudiced, not the subscriber. The meter would never register more units than were actually used. The complaints by Stakold were all investigated. The meter was not faulty but there was a problem in the circuit. If the line was locked after an international call the meter would not continue t register. In November 1988, a new system was installed at the Harare exchange but Stakold continued to complain of faults after that date. The PTC had a highly skilled work force. The equipment was 25 to 30 years old but its useful life had been extended because of the high degree of maintenance. The PTC kept a "fault card" for each subscriber but when the system was replaced with digital equipment in 1993 all the fault cards had been thrown away. Where a customer disputes the number of units charged in his account the matter is always investigated. The meter would be tested and, if necessary, a technician would investigate more deeply and then write a technical report stating what he had found and done.

Mr Thembani was subjected to a rigorous cross-examination. He said that he had not personally dealt with any of the complaints by Stakold and so his evidence was based on the reports kept by the PTC. The exchange were maintained regularly and cards were filled in by the technicians to indicate each time a maintenance check was carried out. He had not been able to check Stakold "fault cards" because they had all been destroyed in 1993. The telephones at Stakold must have been used to make the number of calls metered because the meters would not have registered any units unless calls were made. On average, the PTC received 5 000 to 6 000 complaints a day relating to the telephone service.

Part VI of the Telephone By-laws deals with accounts. Section 71 thereof provides that the subscriber shall be responsible for the payment of all charges arising out of the use of his

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telephone. Then s 73(1) provides that accounts for telephone calls shall be paid to the PTC within 14 days of the date of the account. In terms of subs (2) of s 73, the account rendered "shall for all purposes be sufficient evidence of the amount due by the subscriber". If a subscriber fails to pay his account for telephone calls within the period specified in para (a) or (b) of subs (3) of s 73, the PTC may summarily suspend the service to the subscriber. There is no provision in Part VI for the querying of any account rendered by the PTC. What is the effect of s 73(2) of the Telephone By-laws? Is an account rendered by the PTC *prima facie* proof of the amount due by the subscriber or is it conclusive proof? In SA Army Fund

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v Umdloti Beach Health Cttee 1974 (4) SA 948 (N) the court had to consider the effect of a provision in th Defence Act of South Africa which stated that the production of a document indicating that the relevant Minister had certified an institution "shall be sufficient evidence" that it was an institution covered by the relevant section of the Act. At 954D-G, Hoexter J said:

> "The argument derives from the use of the phrase 'sufficient evidence' in s 149 (2) of the Defence Act as amended by s 12 of the 1972 Act. In the course of full and helpful argument on both sides I was referred to a great many decisions of the English Courts which have involved judicial interpretation of the phrase 'sufficient evidence' in a variety of statutes. I do not propose to delve into them here. Counsel were agreed, I think, that from a study of them little more could be extracted than a very broad indication that while in certain statutory settings the phrase may be susceptible of meaning 'conclusive proof', without undue violence to language, the latter meaning is not the plain and ordinary meaning of the phrase. In the present case, the authoritative Afrikaans text makes reference not to 'voldoende bewys' but to 'voldoende getuienis'. It is hardly necessary to quote authority for the proposition that in the interpretation of statutes there exists a presumption against the exclusion of the jurisdictin of the courts. And as was pointed out by Innes CJ, in R v Padsha 1923 AD 281 at 304
>
> > 'Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what *prima facie* is their duty, namely, from investigating cases of alleged injustice or illegality.'
>
> In my view, the contextual setting of the phrase 'sufficient evidence' in the present case provides no compelling reasons pointing to the conclusion that it should be construed as 'conclusive proof'. In my opinion, the proper construction to be put to the relevant provision in s 149(2) is simply this: that production of the certificate therein described serves as *prima facie* evidence of what is certified; and as evidence which, in the absence of any countervailing evidence, a court will be disposed to accept as proof of what is certified."

Similar views were expressed by van Winsen AJA in S v Moroney 1978 (4) SA 389 (A) where the court considered what meaning was to be given to a section in an Act which provided that a notice published in the Gazette stating that a publication was, in terms of a decision of a committee, undesirable

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"shall for the purposes of this Act be sufficient proof" of the undesirability of that publication. At 406E-H, the learned judge said:

> "The problem of interpretation in relation to this section is to determine the range of ambit of its operation. Was it intended, as appellant's counsel argues, as an aid to the State in proof of the fact that an accused had produced an undesirable publication or was it intended to render the committee's decision conclusive proof of such fact?

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'Sufficient proof' of a fact connotes proof which in the absence of countervailing evidence may be accepted by a court as establishing such fact. 'Conclusive proof' of a fact connotes proof which a court is obliged to accept, to the exclusion of all countervailing evidence, as establishing fact. When a statutory enactment prescribes that a document or a certificate by its production to a court constitutes 'sufficient proof' of some stated fact or conclusion the effect of such enactment is that such document or certificate can in the absence of countervailing evidence constitute proof of such fact. 'Sufficient proof', unless the context in which it is used compels another onclusion, is equivalent to *prima facie* proof. However, where the enactment provides that a document or certificate will on production constitute conclusive proof of some stated fact then the effect of the enactment is to create a presumptio juris et de jure that the document or certificate establishes incontrovertibly the truth of that fact. No evidence may be led to contradict it. The distinction between 'sufficient' and 'conclusive' in relation to 'proof' or to 'evidence' is well established."

This exposition was cited with approval by M T Steyn JA in Ex p Min of Justice: In re Donelly v Barclays National Bank 1995 (3) SA 1 (A) at 15B-D.

There are other good reasons for interpreting s 73(2) of the Telephone By-laws as meaning that an account rendered by the PTC would be *prima facie* proof of the amount due and not conclusive proof thereof. In S v Galgut's Garage (Pty) Ltd & Anor 1969 (2) SA 459 (A) at 464B-C, Botha JA said:

"The legislature is clearly entitled to except, ex abundante cautela, from a prohibition conduct which does not strictly come within the ambit of the prohibition, and, where, it has done so in clear and unambiguous language, no rule of interpretation would justify a departure from the ordinary meaning of the excepting provision, especially where, in the case of subordinate legislation, the construction thus placed upon the

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excepting provision would result in its invalidity. To do so would be to offend against the rule ut res magis valeat quam pereat, according to which that interpretation of subordinate legislation which would not result in its invalidity is to be preferred to that which would."

In my view, a provision in the Telephone By-laws stating that an account rendered by the PTC would be conclusive proof of the amount due by a subscriber would be ultra vires because the provision would be contra bonos mores. In Nedbank Ltd v Abstein Distributors (Pty) Ltd & Anor 1989 (3) SA 750 (T) the court considered the validity of a clause in a deed of suretyship which provided that a certificate of indebtedness signed by the bank manager would be conclusive proof of the surety's indebtedness. Le Roux AJ held that the clause in question was contra bonos mores and therefore void. In reaching that conclusion, the learned judge relied, inter alia, on the decision of the court in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A). In delivering judgment in that case Smalberger JA at 14J-15D said:

"The effect of the provisions of clause 3.24.2 is that such certificate cannot effectively be challenged on any ground save fraud. It constitutes the sole memorial of Beukes' indebtedness, and is conclusive proof of such indebtedness and the amount thereof. These clauses purport to oust the court's jurisdiction to enquire into the validity or accuracy of the certificate, to determine the weight to be attached thereto or to entertain any challenge directed at it other than on the ground of fraud. As such they run counter to public policy. (Cf Schierhout v Min of Justice 1925 AD 417 at 424). Although perhaps not *per* se contrary to public policy, the provisions of clause 3.21.3.1 are indicative of the extreme lengths to which the deed of cession goes in curtailing the rights of Beukes."

In Standard Bank Financial Nominees Ltd v Bamberger & Anor 1993 (4) SA 84 (W), Levy AJ held that a clause in an agreement which rendered a certificate signed by any director or

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secretary of a company conclusive proof of the amount of the surety's indebtedness was contrary to public policy.

In Donelly v Barclays National Bank 1990 (1) SA 375 (W), the court came to a different conclusion, with Kriegler J holding that the effect of the decision in the Sasfin case *supra* was not that which was relied upon by Smalberger JA in the Nedbank case *supra*. Kriegler J held that a clause which provided that a certificate of indebtedness signed by a bank manager would be conclusive proof of the amount stated therein was due and owing was part of established banking practice both in South Africa and in the

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United Kingdom and there was no reason for holding that such clauses offended against public policy. The conflict between the decisions in the Nedbank and Donelly cases *supra* was referred by the Minister of Justice to the Appellate Division for resolution. The decision of the Appellate Division was given in Ex p Min of Justice: In re Donelly v Barclays National Bank 1995 (3) SA 1 (A) where the court held that the interpretation adopted by Le Roux AJ in the Nedbank case was correct; namely that a "conclusive poof clause" in favour of a creditor in an agreement in terms whereof the creditor is to be the author of the certificate of balance issued under such a clause is contra bonos mores and therefore void. See too *Karimazondo v Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S). Where the author of the certificate of balance or indebtedness is a third party, and not the creditor, then a "conclusive proof clause" may well be held not to be contra bonos mores.

In the Nedbank case *supra*, at 751H-I, Le Roux AJ said, in relation to a certificate constituting proof of indebtedness:

> "In my view there is, however, no comparison between *prima facie* proof and conclusive proof. In the first-mentioned instance the certificate would not even transfer the onus of proof in the proper sense of the word. In the last-mentioned instance, it would dispose of proof of the extent or even existence of the debt."

The PTC has attached to the summons which commenced this case accounts which it had rendered to Stakold. However the PTC has conceded that on at least two previous occasions mistakes were made in the accounts rendered to Stakold and that the accounts had had to be rectified. Mr Dyke also conceded that the PTC's claim for $79 218,03, as contained in the summons and verified by the accounts rendered, cannot be supported because the accounts do not reflect a payment of $1 656,79 which Stakold has paid. That being the case, the accounts rendered by the PTC to Stakold cannot even be accepted as *prima facie* evidence of the amount owed by Stakold because the accounts are wrong.

Mr and Mrs Cole and John Chatikita gave their evidence well and were not shaken in cross-examination. I accept their evidence that they did not use the telephones during the period from the end of 1989 until December 1992 to the extent shown on the accounts submitted by the PTC. Their *bona fides* are demonstrated by the lengths they went to in trying to resolve their dispute with the PTC over the accounts they were sent. It cannot be disputed that there

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were numerous faults and that many of them were reported to the PTC. Mr Went said that in his opinion the faults experienced by the Coles and Chatikita could well have caused the meter to record calls that were not made by persons using the Stakold telephones. The number of faults experienced by Stakold was unusual. There must have been something drastically wrong with the equipment. Although Mr Dyke was very critical of Mr Robinson and questioned whether he was an expert in the field, I am satisfied that Mr Robinson had sufficient experience to establish that e was well qualified to give expert evidence on the equipment used by the PTC in the period 1990 to 1993. He too said that the faults experienced would well have caused the meters to record calls that were not made by Stakold.

On the other hand, Mr Thembani, who is also an expert in this field, was adamant that the meter could not possibly have recorded any calls unless the calls were made by people using the Stakold telephones. He also stated categorically that the equipment in question was maintained properly and at regular intervals. Unfortunately, the fault cards which the PTC kept for each subscriber, and the records showing the maintenance done at the relevant telephone exchange have been destroyed. However, Mr Thembani could not dispute that there were many faults reported by Stakold and that some action had had to be taken at the exchange to clear the fault. He said that the PTC used to receive between 5 000 and 6 000 complaints relating to the telephone service every day. That is not consistent with his evidence as to the state of the equipment at the exchanges. MrÊThembani's assessment of the condition of the telephone equipment of the PTC is not shared by everybody. In *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S) at 207, Gubbay CJ, after referring to several reports, said:

> "The wireline telephone service, notwithstanding the efforts of the Corporation to improve its efficiency, remains a delinquent service in need of a 'crash programme'."

In my view, it is not sufficient for the PTC to produce a bundle of accounts specifying the number of metered calls in each month and expect those accounts to be accepted without question, especially where there have been numerous faults reported during the period covered by the accounts. In this case, the PTC should have produced the fault cards and all the engineer's and other reports indicating what had had to be done to rectify the faults and then establish that such faults could not have affected the meter reading of telephone calls made. In addition, the PTC should have produced a full set of maintenance records to show that the equipment had been maintained

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regularly. If such records had been produced, then it would have been for Stakold to prove that the disputed calls had not been made from its telephones. However the PTC has produced nothing other than copies of the accounts it has sent to Stakold and even those were not correct because they did not show a payment of $1 656,79 by Stakold. They do no therefore provide even *prima facie* of the amount owed by Stakold. The PTC has not produced any records or reports to show that the meters and associated equipment relating to the two telephone lines

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used by Stakold were in good repair and efficiently maintained. The evidence of Mr Thembani to that effect is not sufficient, standing on its own and unsupported by other contemporaneous records, in the light of the numerous faults which undoubtedly occurred on the lines concerned.

For the reasons set out above, I consider that the onus of proof lies on the PTC and that the PTC has not established that it is owed $77 561,06 by Stakold. The PTC produced no proof other than accounts rendered to Stakold which were not correct.

With regard to the counter-claim for $55 600,36, Stakold has not established that it has in fact overpaid the PTC that amount. I think it is fair to say that Stakold probably did pay the PTC more than it should have, because of the threats to withdraw the service, but Stakold has not established the quantum. Its claim cannot be proved on the basis of average usage over certain periods. The PTC cut off the services to Stakold in August 1995 because the accounts were not paid. It is interesting to note that in the Telkom Suid-Afrika case *supra*, the Appellate Division upheld the decision of the court *a quo* that where a telephone account was queried and not paid, Telkom did not have an automatic right to suspend the telephone service. It would only do so if it had made some enquiry and satisfied itself as to the amount actually owed by the subscriber.

With regard to costs, the PTC has not been successful in its claim. On the other hand, Stakold was not successful in its counterclaim. However, almost all of the proceedings during the trial dealt with the claim by the PTC. The amount of time spent in dealing with the counterclaim was minimal. Accordingly, I consider that in all fairness PTC should be required to pay the costs of the case.

It is ordered that:

(1) the PTC's claim is dismissed;

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(2) the counterclaim by Stakold is dismissed; and

(3) the PTC shall pay Stakold's costs.

Coghlan, Welsh & Guest, legal practitioners for plaintiff

Byron Venturas & Partners, legal practitioners for defendant

MAPURANGA v MUNGATE 1997 (1) ZLR 64 (HC)

Court **High Court, Harare**

Malaba J

Civil trial

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8 January 1997 Judgment No. HH-183-96

Flynote

Delict - actio injuriarum - administration of noxious or deleterious substance - what plaintiff must show - no need to establish that substance was poisonous

Delict - actio injuriarum - assault - assault on plaintiff by a person other than defendant - when defendant can be held liable

Delict - actio injuriarum - defamation - defamatory matter - adultery - allegation that plaintiff had committed adultery with defendant's wife

Delict - actio injuriarum - liability - when defendant may be held liable for acts committed by another

Delict - actio injuriarum - false imprisonment - what constitutes - onus cast on defendant to establish lawfulness of imprisonment

Evidence - witness - hostile - what is - factors court should take into account in determining whether witness is hostile

Practice and procedure - affidavit - witness - statement taken on affidavit - desirability of

Headnote

The plaintiff issued summons against the defendant, claiming damages for, among other things, defamation, assault, false imprisonment and the administration of a harmful concoction. The claims arose out of an

incident at the defendant's house, where the defendant, in front of several other people, accused the plaintiff of having committed adultery with the defendant's wife. When the plaintiff denied the allegation, he was assaulted by the defendant and others, including the defendant's brother, then prevented from leaving the defendant's house before being forced into the defendant's car and taken against his will to a traditional healer, where he was forced to drink a herbal concoction which caused him to lose consciousness.

The defendant called his wife to say that she had committed adultery with the plaintiff. He had an affidavit from her to that effect. However, in court she denied what was in the affidavit, saying that she had been coerced into making it. Counsel for the defence sought to have her declared a hostile witness. In respect of the claim for damages for assault, it was argued for the defendant that he could not be held liable for the assault by his brother

Held, that to accuse a person of committing adultery is still defamatory, in spite of great changes in general notions on the subject. Although adultery is no longer criminal, the reason why an allegation of adultery is defamatory is because adultery is an act of sexual incontinence which brings the perpetrator into odium from a social point of view.

Held, further, that hostility of a witness is a question of attitude, whose proof the judge must decide by reference to the demeanour of the witness, the witness's relationship to the party calling him and all the circumstances of the case, including the contents of any previous inconsistent statement. In this case, the witness had not exhibited hostility in her demeanour

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and the contents of the affidavit were contradictory and indicative of fabrication. The witness's explanation for the inconsistencies was satisfactory. The fact that the statement was taken in affidavit form was an indication of coercion.

Held, further, that it was undesirable in a civil case to take statements from witnesses in the form of affidavits.

Held, further, that although the doctrine of common purpose, applicable in criminal cases, has not been accepted in civil actions, a defendant will be liable for a delict committed by another where he has by his acts created the situation leading to the delict or has failed to act to prevent its commission when he was under a legal duty to act. The plaintiff had been invited to the defendant's house and the defendant had thereby assumed a legal duty to protect him from foreseeable harm. The defendant's brother had been invited to confront the plaintiff on an emotional subject which a reasonable man would have foreseen would be likely to provoke an assault. The defendant, observing the assault by his brother, did

nothing to prevent it and even joined in. Consequently, he was liable for the assaults by his brother.

Held, further, that the mere intentional seizure or physical confinement of a person by another for any time, however short, *prima facie* constitutes false imprisonment. Once an act of imprisonment or complete deprivation of liberty has been established, there is a presumption that the imprisonment was wrongful. It is not necessary for the plaintiff to establish malice or the absence of a reasonable cause for the imprisonment, or even that he was at all times aware of the imprisonment. On the facts, the plaintiff succeeded on this claim as well.

Held, further, that it is an actionable wrong to administer a deleterious herbal concoction to an unwilling victim, but the plaintiff does not have to show that the substance was poisonous. It need not be poisonous; forcing someone to drink any substance could constitute an assault. Procuring another person to administer a concoction renders the procurer as liable as the person who administered it.

On the question of quantum:

Held, that adultery is still widely reprobated by public opinion and the slander was inherently serious. It was made at a meeting that resembled a trial and there was no apology or retraction. However, the slander was not extensive or permanent and was limited to the six people present.

Held, further, that detaining a man and denying him freedom of movement is a serious infringement of his liberty, far beyond the estimate of mere money damages. The motive for the imprisonment was dishonourable and malice was present.

Cases cited:

Allen v Flood [1898] AC 1

Mabikwa v Ndlovu HB-18-92

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Birch v Johannesburg City Council 1949 (1) SA 231 (T)

Botha v Lues 1983 (4) SA 496 (A)

City Panel Beaters v Bhana & Sons 1985 (2) SA 155 (D)

Du Toit v Domingo (1904) 14 CTR 661

Furusa & Anor v Furusa & Anor HB-58-90

Hersman v Angilley 1936 CPD 386

Ingram v Min of Justice 1962 (3) SA 225 (W)

Jabaar v SAR&H 1982 (4) SA 552 (C)

McKenzie v van der Merwe 1917 AD 41

Manyemba v Muzukira S-163-90

Masawi v Chabata \& Anor 1991 (1) ZLR 148 (H); 1991 (4) SA 764 (ZH)

Min van Polisie v Ewels 1975 (3) SA 590 (A)

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Moosa v Duma & Anor 1944 TPD 30

Myburgh v de Villiers (1839) 3 Menz 20

Newman v Prinsloo & Anor 1973 (1) SA 125 (W)

O'Kelly v Jamieson 1906 TS 822

Potgieter v Cape Dairy & General Livestock Auctioneers 1942 TPD 130

S v A en 'n Ander 1993 (1) SACR 600 (A)

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

R v Kelaman (1897) 14 SC 329

S v Marx 1962 (1) SA 848 (N)

R v Sigcau (1895) 12 SC 263

R v Sophi 1961 R & N 358 (FS)

R v W & Anor 1960 (3) SA 247 (E)

Salzmann v Holmes 1914 AD 471

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Silva's Fishing Corp (Pty) Ltd v Maweza 1957 (2) SA 256 (A)

Stoffberg v Elliot 1923 CPD 148

Thandani v Min of Law & Order 1991 (1) SA 702 (E)

White v Riley [1921] 1 Ch 1

Case Information

S Mushonga, for the plaintiff

D M Foroma, for the defendant

Judgment

Malaba J: On 12 February 1993, the plaintiff issues summons against the defendant claiming the following general and special damages with interest thereon:

1. $10 000 for defamation;
2 $10 000 for assault;
3. $ 5 000 for false imprisonment;
4. $ 5 000 for administration of a herbal concoction; and
5. $100 for medical treatment;

and costs of suit.

The claim arose out of an incident at the defendant's house at Nzvimbo Growth Point on 18 September 1992. The declaration states that the plaintiff, a married man, was a Senior Executive Officer for Chiweshe District Council, a pastor in the local branch of the Apostolic Faith Church and a Member of the ZANU (PF) provincial executive council.

MALABA J

The defendant was a businessman at Nzvimbo Growth Point and a member of ZANU (PF) provincial executive council. He was married to one Media Mungate (nee Marime). Both parties resided at Nzvimbo Growth Point. I will henceforth refer to the plaintiff as "Mr Mapuranga" and to the defendant as "Mr Mungate".

The allegations on which the claims are based are these. At 7 pm on 18 September 1992, Mr Mapuranga was preparing to go to church when two men approached and told him that he was wanted as a matter of urgency at Mr Mungate's house. When Mr Mapuranga entered the house he found Mr Mungate, his brother Tavengwa, Media Mungate and her aunt. The two men who called him joined the other people in the house. It was alleged that in the presence of the seven people in the house, Mr Mungate spoke slanderous words to the effect that Mr Mapuranga had

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had sexual intercourse with his wife and made her pregnant.

It was alleged further that when Mr Mapuranga denied the accusation he was assaulted by Mr Mungate, his brother Tavengwa and one of Mr Mungate's employees, called Lust. Mr Mapuranga was prevented from leaving the house before being force-marched to Mr Mungate's motor vehicle, force to get into it and taken against his will to Manhambara Village where he was forced to take a herbal concoction administered by a traditional healer.

In his plea, Mr Mungate admitted that he invited Mr Mapuranga to his house; that he took him to Manhambara Village where the latter took the herbal concoction administered by the "nganga". He denied uttering the slanderous words or assaulting Mr Mapuranga; or falsely imprisoning him or forcing him to submit to the administration of the herbal concoction. He also denied knowledge of the damage claimed by Mr Mapuranga.

It is not in dispute that Mr Mungate was attending a conference in Germany from May to July 1992. He returned home on 27 July and had sexual intercourse with his wife on three consecutive days. He claimed that on 1 August 1992 his wife told him that she had conceived during of the acts of sexual intercourse they had had on his return from Germany. His wife denied in evidence that she told him she was pregnant. I will make a finding of fact on this issue in the course of the judgment. I set out here what Mr Mungate said by way of background to the dispute between and Mr Mapuranga. He said he got surprised by her wife's alleged pregnancy and decided to look into her hand bag.

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He saw a packet of brown tablets and got convinced that his wife had committed adultery in his absence. He questioned her until she admitted that she had committed adultery but refused to disclose the identity of her paramour. On 17 September, he told her to pack her belongings and return to her maiden home. She then told him that the paramour was Mr Mapuranga.

He told his elder brother what Media had disclosed to him. It was agreed that a meeting of the people mentioned above be convened at his house to confront Mr Mapuranga with the allegation that he had committed adultery with Media. It is what happened at that meeting and thereafter which is in dispute.

I now turn to consider the evidence in respect of one injuria at a time making findings of facts where necessary on the basis of the credibility of the witnesses and the probabilities raised by their evidence.

DEFAMATION

Mr Mapuranga's evidence was to the effect that when he entered the house and sat down Mr Mungate said:

> "When I was away in Germany you had sexual intercourse and impregnated my wife."

He told Mr Mungate that he knew nothing about the allegations. It is of course defamatory *per* se to say that a man has had sexual intercourse with one's wife and made her pregnant. Where

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the words alleged to have been spoken of the plaintiff by the defendant in the presence of one or more people are defamatory *per* se, *animus* injuriandi is inferred therefrom and the plaintiff has to prove the publication only. Gatley on Libel and Slander 3 ed at p 141 states that:

> "Where the words complained of are defamatory in their natural and ordinary meaning the plaintiff need prove nothing more than their publication."

See also Moosa v Duma & Anor 1944 TPD 30.

In Myburgh v de Villiers (1839) 3 Menz 20 the defendant told a minister of his church that the plaintiff had had carnal connection with the wife of a Mr J W Hurter. It was held to be slanderous of the plaintiff to say he had carnal connection with Hurter's wife

MALABA J

In du Toit v Domingo (1904) 14 CTR 661 the defendant on divers occasions and to different people spoke words to the effect that a husband had divorced his wife on account of the plaintiff having been found cohabiting with her. Buchanan J (as he then was) said at p 663:

> "It was not denied that these words used about anybody were defamatory in the highest degree and the defendant did not attempt to justify the words as true but simply denied having uttered them."

In Mabikwa v Ndlovu HB-18-92 the defendant, in a letter to the Chief Magistrate, accused the plaintiff, a community court presiding officer, of having a love affair with his wife. Muchechetere J (as he then was) agreed that the allegations injured the "plaintiff's good name, fame and reputation."

Lastly, Nathan Defamation in South Africa states at p 59:

> "Notwithstanding great changes in general notions on the subject, the law as the official guardian of morals still regards with disapproval ... adultery on the part of spouses ... And according to conventional social standards, acts of the kinds mentioned are reprobated by public opinion. Consequently, it is defamatory to say or to write of a person that he or she has committed one or other of these acts. As to adultery which in older times was a criminal offence by the laws of most countries ... the reason why the statement that a person is guilty thereof is defamatory is not based on its supposed criminality but because it is an act of sexual incontinence which brings the perpetrator into odium from a social point of view."

The question is therefore whether or not the slanderous words were uttered by Mr Mungate.

[The learned judge considered the evidence given by the defendant and the plaintiff and continued:]

Mr Mapuranga's evidence is simple and convincing. He said it was Mr Mungate who accused him of having had sexual intercourse with his wife when he was in Germany.

Mr Mungate is the only person who had in mind a story involving his wife getting pregnant. In his evidence he said the saga began on 1 August 1992, when Media told him that she was pregnant. Mr Tavengwa did not say in his

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MALABA J

evidence that Media mentioned pregnancy. It was not suggested to Mr Mapuranga that anyone suggested to him outside the house that Media was alleging that he had made her pregnant. Mr Mapuranga must have heard about the alleged pregnancy of Media when he was in the house on 18 September. He said the person who accused him of having sexual intercourse with Media also mentioned that he had made her pregnant. The only person who could have mentioned words to the effect that Mr Mapuranga had made Media pregnant is Mr Mungate.

Whilst denying that he uttered the slanderous words, Mr Mungate called Media to say that she had had sexual intercourse with Mr Mapuranga on three separate occasions when he was in Germany. He was armed with an affidavit statement (Exhibit 5) with which to discredit her should she not say what he wanted her to say. To his anticipated horror, she denied in evidence that she had told him she was pregnant and that she had had sexual intercourse with Mr Mapuranga. She said the story he wanted her to testify to was his brain child. He had threatened to stab her to death with a knife if she did not copy in her own handwriting a statement he had already written. He had told her that his lawyer wanted the statement. He took her to the offices of his legal practitioners in Harare. He told her that his legal practitioner was going to take her before commissioner of oaths who would ask her whether the statement was true. He said she must say it was true. Her husband used to carry a knife on his person. He was outside th door to the room where she swore to the truthfulness of the statement fore the commissioner of oaths. She feared for her life and did as told by her husband.

He denial of the allegation that she had told her husband that she committed adultery with Mr Mapuranga removed her from the possible sources of the slanderous words. Mr Foroma found himself without an alternative to an application to have her declared a hostile witness. I refused the application for these reasons.

It does not necessarily follow from the existence of an inconsistent statement or the failure by the witness to give the evidence the party calling him wants him to give that he is being hostile. The decision whether or not to declare a witness hostile depends on the circumstances of each case.

The principles to be borne in mind in considering an application to declare a witness hostile are summarised from decided cases by Hoffmann and Zeffertt *South African Law of Evidence* 4 ed at pp 454-455 in these words:

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> ''Not all witnesses who give unfavourable evidence are hostile. A witness is hostile if he is 'not desirous of telling the truth to the court at the instance of the party calling him'. The mere fact that he gives evidence contrary to what the party calling him expects does not make him hostile. Nor is the fact that he has made a previous inconsistent statement necessarily conclusive, it is merely a factor that can be taken into account in making decision ... As de Villiers JP said in Meyer's Trustee v Malan 1911 TPD 559 at 561,
>
> > 'The court must come to a decision as to whether the witness is adverse; i.e. hostile from his demeanour in the box, his position towards or relationship to the party calling him and from the general circumstances of

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the case'."

See also Potgieter v Cape Diary & General Livestock Auctioneers 1942 TPD 130 at 132-133; Jabaar v SAR&H 1982 (4) SA 552 (C) at 553H.

Hostility is a question of attitude whose proof the judge must decide by reference to the demeanour of the witness, his relationship to the party calling him and all the circumstances of the case, including the contents of the previous inconsistent statement.

In this case, I was alive to the fact that Media gave her evidence calmly. She did not exhibit signs of hostility towards Mr Mungate. She answered all questions asked of her by Mr Foroma without being unnecessarily evasive or hesitant. She said although they were on separation she loved her husband. It was not as if she had become resentful of him.

I examined the affidavit statement. The striking feature about it was the incoherence in the sequence of events it purported to refer to. It did not arouse in the mind of the reader the conviction that it was written by one steeped in the actual occurrence of the events it referred to. When I read the statement I could hardly keep out of my mind that intruding perception that it related to fabricated events. The events narrated therein lacked their natural authenticity. As one example; it was stated that on the first day of their alleged adulterous relationship, Media asked Mr Mapuranga what they would do if caught. He is alleged to have replied,

"We will not do it in such a way that we get caught, we are used to these matters."

How could he give such a reply to her question when it was the first time to

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commit adultery? I also noted that no dates were given when the acts of sexual intercourse are alleged to have taken place.

If the statement was about what she knew she had done, she probably would not have mentioned as it did, that she menstruated after each act of sexual intercourse.

Unwittingly, the statement suggested that the last act of adulterous sexual intercourse took place after Mr Mungate had returned home. That would have been the act of sexual intercourse that led to her alleged conception. The statement said Mr Mapuranga asked Media whether Mr Mungate was home that evening. It betrayed an unwitting contradiction.

Mr Mungate said he returned on 27 July 1992 and had sexual intercourse with his wife on three consecutive days. Why would Media want to absolve her husband from the responsibility for her pregnancy if indeed she had conceived? There was no suggestion from Mr Mungate in his evidence that Media committed adultery after his return from Germany. One is then left with the impression that the statement was a result of a carelessly though out fabrication.

The statement was obtained from Media by the exercising of undue influence. If Mr Mungate's evidence was anything to go by she told him who her paramour was after six weeks of questioning. That itself suggests an element of coercion. Her evidence was that she wrote the

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statement under duress. There was evidence of Mr Mungate using improper methods to get evidence in furtherance of his cause. This emerged from the evidence a system of operation.

He had taken six weeks pressuring her to disclose the alleged paramour. He was alleged to have threatened Mr Mapuranga with assault if he did not write words dictated to him to the effect that he wanted to go and drink "muteyo". There was evidence of him threatening Christine Chakuchichi with death if she did not administer the herbal concoction to Mr Mapuranga.

The mere fact that the statement was taken in the form of an affidavit suggested to me the existence of subtle coercion. Taking statements from potential witnesses in the form of affidavits is generally frowned upon in civil cases. In Hersman v Angilley 1936 CPD 386 Davies J delivered himself of the following at pp 387-388:

MALABA J

> "It has been stated time and again by judges of this court that witnesses' statements should not be taken in the form of an affidavit upon oath.
>
> If it is desired to have a record of what the witnesses states outside the court for one reason or another, that purpose could just as well be served by taking the statement in writing and getting the witnesses to sign it. There is no reason for taking the evidence in such a case in the form of an affidavit upon oath excepting presumably to frighten the witness later into not giving evidence at all."

The fact that the evidence she gave in court was damaging to his case does not come into the consideration of her being hostile. It does not have a bearing on the question of hostility: City Panel Beaters v Bhana & Sons 1985 (2) SA 155 (A) at 160.

In R v Gumede 1949 (3) SA 749 (A) at 756 van den Heever JA said:

> "There may be motives inducing a witness at one stage to tell falsehoods and subsequently to confess the truth and it would be arbitrary rashness to hold that the later evidence must necessarily be rejected ... "

That case illustrates the principle that in a proper case a court is entitled to accept evidence given by a witness at the trial notwithstanding that it is shown that the witness made a previous inconsistent statement on oath provided that the motives of the witness for making the earlier contradictory statement satisfy the court that the final evidence given by the witness at the trial is substantially the truth: (*R v W* & Anor 1960 (3) SA 247 at 251A-B).

The explanation Media gave for making the previous inconsistent statement was in my view satisfactory. I therefore did not consider her to be a hostile witness.

The only credible evidence was therefore that it was Mr Mungate who uttered the slanderous words. Mr Mapuranga gave his evidence well. He was candid enough to reveal in evidence that after the words were spoken by Mr Mungate he turned to Media and asked her whether what her husband said was true. He said she said it was true. A dishonest and untruthful witness would probably not have revealed this evidence in fear it would destroy his case. Mr Foroma argued that her reply established as a fact that Mr Mapuranga committed adultery with her. I disagree. That view of the reply ignores the evidence of the hostile and intimidating situation

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that prevailed in the house

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at the time. Media was however not asked in court whether she gave that reply. Mr Mungate did not mention it in his evidence. The revelation of the reply by Media reflects the candour of Mr Mapuranga as a witness.

I find the plaintiff on the issue whether the slanderous words complained of were uttered by the defendant.

ASSAULT

Mr Mungate denied in his plea that he assaulted Mr Mapuranga. His plea in the alternative was however to the effect that he assaulted him under provocation. In raising the defence of provocation he was inevitably admitting the precedent assault. He suggested in evidence that he was admitting grabbing and pushing Mr Mapuranga. Mr Mapuranga said Mr Mungate kicked him on the back of the head and slapped him on the face. Tavengwa slapped him on the left side of the face and punched him on the forehead.

The evidence established that the first reaction to the accusation of adultery was its denial by Mr Mapuranga. It established that Mr Mapuranga asked Media where and when she alleged he had had sexual intercourse with her. Tavengwa then slapped him on the face. Mr Mungate told him not to ask her questions. He demanded $10 000 as damages for the alleged adultery. When Mr Mapuranga asked them how they had satisfied themselves he had committed adultery when they did not allow him to question her he was punched on the forehead by Tavengwa and kicked on the back of the head by Mr Mungate. He sustained a cut on the forehead.

From the evidence of Mr Mungate and Tavengwa the parties are agreed that there was a violent reaction to Mr Mapuranga's denial. It will be recalled that Tavengwa's evidence was that it was Mr Mapuranga who followed his denial by advancing angrily towards Media with the intention of assaulting her. He was supported in that regard by Mr Mungate.

I however found Mr Mapuranga's version of events the more probable. The fact that he said it was Tavengwa who assaulted him first adds to his credibility. He could have said it was Mr Mungate against who he claimed damages for the assault. Mr Mungate admitted developing feeling of anger towards Mr Mapuranga at about the time he denied the allegations of adultery. The probability is that the anger intensified at the time Tavengwa punched Mr Mapuranga on the face. The anger was further aggravated by Mr Mapuranga's refusal to agree to the payment of $10 000 damages

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for the alleged adultery. Mr Mapuranga's evidence is supported by the probability of Mr Mungate

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having assaulted him in the feat of the anger. The evidence was also supported by the fact that Mr Mungate signed an admission of guilt form and paid a deposit fine of $40.

Christopher Kaduta said when he entered the house he observed that Mr Mapuranga's forehead was swollen. He was himself assaulted by Mr Mungate before he ran out of the house. Christopher impressed me as an honest and truthful witness. Christine Chakuchichi also said when Mr Mapuranga arrived at her homestead she observed that his forehead was swollen.

It was argued by Mr Foroma on behalf of Mr Mungate that he could not be held liable for assaults perpetrated on Mr Mapuranga by Tavengwa. Liability in civil actions is for personal wrongdoing save cases to which the principle of vicarious liability is applicable. The doctrine of common purpose by which in criminal cases an accused may be found responsible for the consequences of the acts of his accomplice committed in furtherance of an agreed purpose has not been accepted in civil actions.

Rejecting an attempt to extend the doctrine to civil case Innes CJ in McKenzie v van der Merwe 1917 AD 41 said at p 45:

> "To establish liability for delicts which the person concerned neither instigated, perpetrated, aided nor abetted, facts must be shown from which it follows without doubt that he authorised them ..."

Solomon JA stated the same principle at p 15 and said:

> "Under the Lex Aquilia not only the persons who actually took part in the commission of a delict were held liable for the damage cause, but also those who assisted them in any way as well as those by whose command, or instigation or advice the delict was committed. To a similar effect is the passage which was quoted from Grotius (3. 32. 12. 13) that everyone is liable for a delict 'even though he has not done the deed himself, who has by act or omission in some way or other caused the deed or its consequence; by act that is by command, consent, harbouring, abetting, advising or instigating'."

A defendant will be liable for a delict committed by another where he has by his acts created the situation leading to the delict or has failed to act to prevent its commission when he was under a legal duty to act. See Silva's Fishing

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Corp (Pty) Ltd v Maweza 1957 (2) SA 256 (A) at 265C-266G; Min van Polisie v Ewels 1975 (3) SA 590 (A).

Tavengwa was in fact minding his brother's business. Mr Mungate invited him to his house and entrusted him with the right to confront Mr Mapuranga on an emotional subject which a reasonable man would have foreseen was likely to provoke an assault on him. He had seen Mr Tavengwa strike Mr Mapuranga the first blow with an open hand on the left side of the face. He did nothing to protect Mr Mapuranga from further assaults. The second assault on Mr Mapuranga was reasonably foreseeable. Mr Mungate joined in the assault instead of preventing it. He was under a legal duty to take steps to protect Mr Mapuranga from the assaults by Tavengwa. As the owner of the house, Mr Mapuranga was his invitee.

He invited him into his house thereby assuming a legal duty to protect him from reasonably

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foreseeable harm whilst he was in his house. Mr Mungate is therefore liable for the assaults perpetrated on Mr Mapuranga by Tavengwa.

Mr *Foroma* argued that the assault was trivial. It is correct to say that the evidence of the seriousness of the injuries sustained by Mr Mapuranga was not supported by the medical report. Every person's body is however sacred and inviolable. No other man has a right to meddle with it in the slightest manner except in the circumstances prescribed by the law. The person assaulted is entitled to damages even though he suffered no severe pain or any damage at all other than the insult of having his bodily integrity interfered with: O'Kelly v Jamieson 1906 TS 822, Stoffberg v Elliot 1923 CPD 152. I find for the plaintiff on the issue of assault.

FALSE IMPRISONMENT

[His Lordship considered the evidence on this claim and continued:]

The plain and incontestable principle is that every person has a right to personal liberty. The law prohibits completely interference with or infraction into the personal liberty of one man by another except in specific instances and in accordance with the procedures prescribed by the law. The mere intentional seizure or physical confinement of a person by another for any time, however short, *prima facie* constitutes the delict of false imprisonment: Cohen Lazar & Co v Gibbs 1922 TPD 142 at 144.

Manfred Nathan Common Law of South Africa vol 3 p 1694 states that:

MALABA J

> "The action for false imprisonment lies where a person is wrongfully deprived of his liberty and freedom of personal movement by a person who has no colour of right under which he may imprison the plaintiff that is to say where the person who takes and imprisons the plaintiff is not acting within the scope of his ordinary duties in imprisoning the plaintiff, or has no jurisdiction or authority conferred upon him by law or where there is an informality or illegality in the act of arrest and imprisonment itself. Thus where a private person detains the person of the plaintiff against his will in a case where he is not authorised by law to arrest, he is guilty of a false imprisonment."

See also *Masawi v Chabata \& Anor* 1991 (1) ZLR 148 (H) at 156C-157A; 1991 (4) SA 764 at 770H-771C (ZH); Newman v Prinsloo & Anor 1973 (1) SA 124 (W) at 127.

Once the act of imprisonment or complete deprivation of liberty has been established there is a presumption, until the contrary is proved that the imprisonment was wrongful (false). In Ingram v Min of Justice 1962 (3) SA 225 (W) Vieyra AJ (as he then was) said at 227D:

> "All interferences with the liberty of the citizen are *prima facie* odious and it is for the person responsible to establish why in the particular circumstances such, interference is legally justified."

See also Botha v Lues 1983 (4) 496 (A) at 497.

The act of restraining the plaintiff's freedom is that of the defendant or his agent and he is *privy* to the reasons for the interference. Hence it is not necessary for purposes of establishing the injuria of false imprisonment for the plaintiff to prove malice on the part of the defendant or to

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establish the absence of a reasonable cause or justification for the imprisonment.

It is also not necessary for the plaintiff to show that he was at all material times aware of the imprisonment. A person who is asleep or unconscious may be imprisoned as long as it is shown that his imprisoner would have prevented him from leaving the place where he was confined: Birch v Johannesburg City Council 1949 (1) SA 231 (T) at 238.

I have already found as facts proved that Mr Mapuranga was wrongfully prevented from leaving Mr Mungate's house. He was taken against his will in Mr Mungate's vehicle to Manhambara Village. Mr Mungate stood guard

on him when he took the herbal concoction. He fell unconscious at 12 midnight only to come to at 4 am. He was imprisoned even during the time he was unconscious. He did not have to be aware of his imprisonment at all the material time.

I find for the plaintiff on the issue of false imprisonment.

ADMINISTRATION OF THE HERBAL CONCOCTION

The evidence established that Mr Mapuranga inhaled the herbal concoction that was placed in his nostrils by Christine Chakuchichi the traditional healer. He suffered bodily injuries as a result of the inhalation of the herbal concoction. He said his nostrils, forehead and the whole face became very hot. He felt a severe headache and dizziness before losing consciousness. The medical report showed that he wore a puffed face and had tenderness and redness of the nasal base. Mr Mungate did not challenge the evidence of the consequential symptoms were exhibited by Media to whom the herbal concoction was also administered. She was an honest and truthful witness who have simple and straight forward evidence.

[The learned judge thus examined the defendant's evidence and continued:]

It is an actionable wrong to administer a deleterious herbal concoction to, an unwilling victim. Voet 47.10.7 (Gane's Translation) states that an injuria may be inflicted in another by -

> "The robbing of a person of his sense through a drug or with anything else, as perchance by loading him with too much wine, so as then to hold him up to mockery."

In R v Kelaman (1897) 14 SC 329 Buchanan ACJ said the administering of a poisonous substance to another was a wrongful and unlawful act. Solomon J added that the wrong came within the categories of personal injuries treated by van der Linden (11.5.15). The categories of personal injuries were not limited to injuries committed corpore corpori. Clayden CJ declared in R v Sophi 1961 R & N 358 (FS) at 361 that, "that administration of poison to an unwitting victim is, of course, a physical assault."

That statement of the law was adopted with approval by Williamson JP in S v Marx 1962 (1) SA 848 (T) at 854. The defendant in that case had administered alcohol to two small children aged 7 and 5 years. The children

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became very intoxicated. The girl aged 5 years was unable to walk properly and was vomiting. The boy was also vomiting and completely unable to walk having to be carried home in a semi-conscious state. It was held that the defendant had committed an assault on the children. Williamson JP stated at p 853 that there was an actionable injuria where a defendant administered to the plaintiff "some substance which will cause the drinker bodily harm, albeit internal harm instead of external harm".

It was made clear in *S v A* en 'n Ander 1993 (1) SACR 600 (A) that the plaintiff does not have to prove that the substance administered to him is poisonous. It does not have to be poisonous. The defendants in *S v A* en 'n Ander *supra* forced "M" to drink urine. The court *a quo* had decided that the act of forcing "M" to drink his own urine was not an assault because it had not been shown that the fluid was poisonous or dangerous. The head note to the judgment, which is in Afrikaans, states that it was decided on appeal that the court *a quo* erred in holding that defendants' actions did not constitute assault. It was held that the forced drinking of any substance could constitute an assault.

The facts found proved clearly show that the administration of the herbal concoction to Mr Mapuranga against his will was an assault on him. The herbal concoction was administered by Christine Chakuchichi the nganga. Can Mr Mungate he held liable for her deeds? In White v Riley [1921] 1 Ch 1 at 21 the dictum by Lord Watson in Allen v Flood [1898] AC1 96 was quoted with approval, and his Lordship said:

> "There are, in my opinion two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability, if he knowingly and for his own ends induces that other person to commit an actionable wrong."

(The second ground is not relevant to this judgment). Voet 47.10.3 (Gane's translation), considering who can inflict an actionable wrong, states that:

> "Moreover, it does not matter whether a person himself inflicts a wrong or on the other hand was prompted, ordered or given a mandate for the infliction of it, or has in any other manner secured the wreaking of it, so that he who gave the mandate is held liable in the action on wrongs just as much as he who undertook it and carried it out."

The evidence established that Mr Mungate threatened to shoot Christine if

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she did not administer the herbal concoction to Mr Mapuranga. She denied this in her evidence. I however, got the impression she was a malicious witness who was prepared to give evidence to a fabricated story. She gave evidence of matters that were not mentioned by other witnesses. She said Media confessed to her that she had had sexual intercourse with Mr Mapuranga three times and wrote the confession on a piece of paper. She said she told Mr Mungate about the confession and placed the piece of paper in a glass jar kept in her kitchen hut. Mr Mungate did

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not mention this confession in his evidence. His wife did not mention it. It is however important to note that Christine gave evidence towards the end of the defence case.

Media had already damaged the defence case by denying that she had sexual intercourse with Mr Mapuranga. The evidence Mr Mungate had hoped to lead through Media was led through Christine. She however, embellished the story in an attempt to steal the court's credulity.

I however accept Mr Mapuranga's evidence on this issue. It was to the effect that when she refused to administer the herbal concoction to him Mr Mungate threatened to shoot her. The act of administering the herbal concoction became Mr Mungate's act. By forcing Christine to administer the herbal concoction he constituted her as his agent. He therefore remained the substantial cause of the bodily harm suffered by Mr Mapuranga as a result of the inhalation of the herbal concoction. He ordered Christine to administer the herbal concoction and intended its probable consequences.

I find for the plaintiff on the issue of the administration of the herbal concoction.

No evidence was led to prove the special damages of $100. That claim is dismissed. I turn to consider the quantum of damages.

QUANTUM

DEFAMATION

Mr Mapuranga claimed general damages in the sum of $10 000 for the defamation. The factors to be taken into account in the assessment of damages were outlined in Gatley on Libel and Slander 3 ed at p 702 in these words:

> "In an action of libel, the assessment of damages does not depend on any

> legal rule. The amount of damages is peculiarly the province of the jury, who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the model and extent of publication, the absence of any retraction or apology, and the 'whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict'. They may take into consideration the conduct of the defendant before the action, after the action and in court at the trial of the action, and also it is submitted, the conduct of his counsel who cannot shelter his client by taking responsibility for the conduct of the course."

In Salzmann v Holmes 1914 AD 471 Innes ACJ (as he then was) referred to the above principles and said at pp 480-481:

> "As already pointed out, the judge is entitled by our law to take into account all the circumstances of the case.
>
> In England the same rule has been very broadly stated ... 'the jury in assessing damages' said Lord Esher Mr in Praed v Graham (24 QBD p 53), 'are entitled to take into consideration the whole conduct of the defendant in the matter from the time the libel was published down to the time their verdict is given'. But this rule, common to both systems of law, must, I take it, be confined to circumstances and conduct directly connected with the defamation sued upon. It would not justify the award of damages for a separate injuria not before the court, under the guise of an aggravation of the injuria sued upon. Now it is unnecessary to attempt to indicate all the circumstances which

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should be taken into consideration in assessing damages nor would it be possible to do so.

Each case must depend upon its own facts. The grossness and gravity of the slander would, of course, be an important element; the existence of actual malice; the manner of publication and the area of dissemination; and the general damages proved to have resulted to plaintiff's reputation.

These among other circumstances would properly be considered and weighed by a trial court."

Adultery is still reprobated by public opinion as an act of sexual incontinence. The slander was inherently serious in that it exposed Mr Mapuranga to odium. As a Senior Executive Officer of a District Council; a pastor and a

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member of ZANU (PF) provincial executive council, he enjoyed a high social status and would have been seriously injured in his reputation by words that accused him of immoral conduct.

Mr Mungate was motivated by malice in publishing the slanderous words. He knew that there was no truth in them. The damages were aggravated by his use of the slander to attempt to extort $10 000 from Mr Mapuranga in the form of damages for the contrived adultery.

The publication of the slander was made at a meeting that resembled a trial. Mr Mungate created in the minds of his audience the impression that he had established the truthfulness of the charges he leveled against Mr Mapuranga from his wife. In the circumstances, his audience believed that Mr Mapuranga was guilty of adultery and had the esteem in which they held him lowered, to the extent that some of them expressed their anger over his perceived moral incontinence by assaulting him.

There was no apology or retraction. Mr Mungate defended the slander right up to the moment of verdict. He employed unlawful means to obtain evidence with which to defend the slander. For example, he threatened his wife with death in order to force her to write an affidavit statement supporting the basis of the slander.

There are however factors of mitigation. The publication of the slander was not extensive and permanent. It was limited by the number of people to whom the words were spoken - six people who were in Mr Mungate's house. The people to whom the slanderous words were spoken were not highly placed in the community in which Mr Mapuranga lived. They were not men and women of substance in whom he was particularly concerned to retain a good name. He was, of course, concerned to clear his name. The trial and the favourable verdict must have gone a long way towards vindicating his good reputation.

In Mabikwa v Ndlovu *supra*, Muchechetere J (as he then was) awarded damages in the sum of $5 000 for defamation published through a letter. Considering the decrease in the value of money I am of the view that a similar amount of $5 000 is also a fair and just compensation for the defamation suffered by the plaintiff in this case.

ASSAULT

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Mr Mapuranga claimed general damages in the amount of $10 000 for the

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assault. The mere assault without the consideration of its consequences constitutes an unwarranted interference with personal security. Mr Mapuranga was punched on the forehead, kicked on the back of the head, slapped on the face, grabbed by the lapels of his jacket and pushed. The use of violence on Mr Mapuranga was reprehensible because the motive was to force him to admit a false charge of adultery leveled against him.

Contumelia was present in the assault. Mr Mapuranga was humiliated and insulted by the degrading and violent attack on his person. He was assaulted in the presence of Mr Mungate's wife, her aunt and two workers. He said he felt embarrassed by the manhandling.

Mr Mapuranga did not, however, receive serious physical injuries from the assault. His forehead was swollen. The doctor who examined him a day after the assault observed that his face was puffed. There was no evidence of the intensity and duration of the pain and suffering endured by Mr Mapuranga. He however, said he was given pain killing tablets and discharged from hospital on the same day he first visited it for treatment.

In Furusa & Anor v Furusa & Anor HB-58-90 a wife was struck with an iron bar on the elbow and breast when she intervened to stop an assault by the defendants on her husband. The assault caused her pain that lasted for some months. She was awarded general damages in the sum of $750 for the assault. In Manyemba v Muzukira S-163-90 the plaintiff was awarded $200 for a minor assault.

Taking into consideration all the circumstances of the case I consider an amount of $500 to be fair compensation for the assault in this case.

FALSE IMPRISONMENT

Mr Mapuranga claimed general damages in the sum of $5 000 for false imprisonment. Detaining a man and denying him the freedom of movement is a serious infringement of his liberty. The inherent seriousness of false imprisonment finds expression in the process of the assessment of damages in the abhorrence with which the courts view its interference with personal liberty which is one of fundamental human rights.

In R v Sigcau (1895) 12 SC 263 de Villiers CJ said at p 285:

> "The value of a man's personal liberty is far beyond any estimate of mere money damages."

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In *Masawi v Chabata \& Anor supra* at 161 (774 of the South African report) Greenland J delivered himself of the following:

> "Liberty is a sacrosanct fundamental human right which must be meaningfully protected by the courts. A court

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must guard against trivialising a human rights breach involving liberty simply because it is categorised as civil."

In Thandani v Min of Law & Order 1991 (1) SA 702 (E) at 707B van Rensburg J said that in assessing damages for false imprisonment sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society. There is a duty on the courts to preserve the right against infringement.

The detention of Mr Mapuranga for eight hours constituted a serious inroad into his freedom. He suffered physical discomfort over his period and was under the control and direction of Mr Mungate. In the process, Mr Mapuranga was humiliated and injured in his personality and dignity. He is a married man aged 39 years and was obviously a man of some standing in his community. He is an educated man who was conscious of the price he was being made to pay by being deprived of his liberty. The experience was traumatic for him.

The motive for the imprisonment was dishonourable. Mr Mungate detained Mr Mapuranga in order to force him to take a herbal concoction in the hope that he would purge himself and admit the charge of adultery he had leveled against him. Malice was therefore present.

I consider the sum of $4 000 to be the fair compensation in damages for false imprisonment.

ADMINISTRATION OF A HERBAL CONCOCTION

Mr Mapuranga claimed general damages in the amount of $5 000 for the injuries received from the inhalation of the herbal concoction.

The act of administering the herbal concoction without the consent of the victim is a serious violation of personal security. Mr Mapuranga espoused Christian values and did not believe in the potency of herbal concoctions. It was therefore a particularly traumatic experience to have the herbal concoction forced down his nostrils.

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He said he had heard that some of the people who took the herbal concoction died. The fear and anxiety he endured were directly associated with Mr Mungate's reprehensive conduct of forcing him to inhale the herbal concoction.

Mr Mapuranga endured pain and suffering as a result of the administration of the deleterious substance. He had a severe headache, dizziness and lost consciousness. The medical report showed that his body temperature was high; had tenderness and redness of the nasal base. Even after receiving treatment at Howard Hospital, Mr Mapuranga continued to experience occasional severe headaches. He had been a healthy man before the administration of the herbal concoction.

Taking into consideration all the circumstances of the case I consider the sum of $4 000 to be fair compensation for the injuria resulting from the administration of the herbal concoction.

Judgment is therefore granted to the plaintiff in the total sum of $13 500, with interest thereon

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from the date of service of summons to the date of full payment, and costs of suit.

Mushonga & Associate, plaintiff's legal practitioners

Sawyer & Mkushi, defendant's legal practitioners

S v MUTOWO 1997 (1) ZLR 87 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

8 January 1997 Judgment No. HH-178-96

Flynote

Criminal procedure (sentence) - statutory offences - Criminal Law Amendment Act [Chapter 9:05] - s 3 - unlawful carnal knowledge of girl under 16 years ("statutory rape") - factors to be taken into account - factors affecting sentence - AIDS - potential risk of HIV infection - weight to be accorded

Headnote

The sentencing of persons found guilty of "statutory rape" is a difficult matter because of the wide range of differing circumstances that can attend this crime. The factors that should be considered include, inter alia, the age, appearance and character of the complainant, the age of the accused and the circumstances of the offence. The complainant's age is relevant because the younger she is, the more seriously will the court regard the exploitation of her youth, while the closer she is to 16 the less justified will be any presumption of her incapacity to make an informed decision about sexual intercourse. Her appearance is important because the moral blameworthiness of the man will be less if he wrongly believes, from her appearance, that she is older than she actually is. Similarly, the girl's character - whether she be virgin or promiscuous, a flirt or demure - must have a like bearing on whether the accused was knowingly preying on the innocent or merely risking the consequences of lying with an under-ae but worldly-wise girl. In no case, though, can the girl's sexual experience be a defence. The accused's age is important because of the relevance to his moral blameworthiness of his own experience or lack of it and of any disparity in the ages of the parties. Apart from the accused's age, it is also important to determine

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whether the accused was in a position of responsibility to the girl. A careful investigation of these and other relevant factors by the trial court is essential.

A twenty-seven year old man, whose wife had recently died, had sexual intercourse with a girl aged thirteen and a half. Because of an inadequate investigation into the factors relevant to

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sentence, the review court was obliged to give the accused the benefit of the doubt and to treat the accused as a mature widower who, recently bereaved, sought release, if not comfort, with a willing and experienced teenager, whom he took to be fifteen. The court decided that the accused did not deserve to go to prison for this offence.

Cases cited:

S v Chiwara HB-103-91

S v Five 1988 (2) ZLR 168 (S)

S v Mathe HH-197-91

S v Mhandu 1985 (1) ZLR 228 (S)

S v Mlambo HB-100-92

S v Moyo HB-89-92

S v Nare 1983 (2) ZLR 135 (H)

S v Ngwenya HB-13-93

Judgment

Gillespie J: The imposition of punishments in cases of contraventions of section 3 of the Criminal Law Amendment Act [Chapter 9:05] continues to cause understandable difficulty. This problem is probably caused by the very wide range of differing circumstances potentially attendant upon different occasions of offence.

Decided cases have attempted to show the basis of sentencing. In *S v Nare* 1983 (2) ZLR 135 (H) at 137 H, Gubbay J (as he then was) said:

> "The rationale of this offence is to protect immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility that psychic or physical injury may be suffered. That protection is achieved not by punishing the female, but rather the male partner, who in effect is assumed to have been responsible for inducing her to engage in sexual relations."

The learned judge showed that, in order to assess this punishment justly, it is necessary to consider, inter alia, the age, appearance and character

of the complainant; the age of the accused; and the circumstances of the offence.

The age of the complainant is important because the younger she be, the more seriously the court will regard the accused's exploitation of her youth, while the closer she is to sixteen years the less justified will be any presumption of her incapacity to make an informed decision as to sexual intercourse. For similar reasons, her appearance is relevant to sentence, since the moral blameworthiness of the man who knowingly has intercourse with a thirteen year old girl is

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somewhat less than that of a man who wrongly believes from her appearance that a girl of that age is, say, fifteen and experienced in carnal matters. The character of the girl, whether she be a virgin or promiscuous; a flirt or demure, must have a like bearing upon whether the accused was knowingly preying on the innocent or merely risking the consequences of lying with an under-age but wordly-wise girl. In no case, of course, can the sexual experience of an underage girl be a defence to the charge in this matter: I say only that the less innocnt she be the less serious may be the offence and possibly the more lenient the punishment deserved. This itself should not be thought, however, to be an immutable rule. It may well be that intercourse with a young girl who is driven into prostitution is aggravated by the man's exploitation rather than mitigated by the girl's carnal experience.

The age of the accused is important because of the relevance to moral blameworthiness of the accused's own experience (or lack of it) and of any disparity in age between the two people. Korsah JA said in *S v Five* 1988 (2) ZLR 168 (S) at 1714 that:

> "In cases of unlawful sexual intercourse the disparity between the ages of the defendant and his victim has always been acknowledged as a factor, either of mitigation or aggravation, depending on whether the difference in ages is small or great."

Even more important than the mere disparity of age, however, will be the question whether the accused, apart from being simply older than her, was in a position of responsibility to the girl (see *S v Mhandu* 1985 (1) ZLR 228 (S). Again it will be seen that the underlying rationale is the extent to which any such circumstance might confirm or rebut the assumption that the male induced the girl into intimacy.

Other circumstances surrounding the offence can scarely be exhaustively listed. Some are mentioned in Nare (above). In S v Mathe HH-197-91

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ROBINSON J set out many potential features of aggravation. Depending upon the presence of one or more of these, or of any peculiar feature of mitigation, punishment may range from a caution, where a young man impregnated, but supported and promised to marry, a girl almost 16 (*S v Moyo* HB-89-02; see also Five (above)), to imprisonment for some years; for instance, the sentence of two years' imprisonment with one suspended imposed in *S v Ngwenya* HB-13-93, where in an incident said to be bordering on rape, a twenty three year old youth pulled a thirteen year old into a kitchen and had intercourse with her.

Despite the logic of these considerations, there remains a troubling disparity in punishments actually imposed. In this case, the accused is a twenty seven year old widower. His wife had only recently died. The girl is said to be thirteen and a half. Both live on Dover Estate in the Featherstone area; he was a tractor driver, she sold to farmworkers beer apparently brewed by her grandmother. He is said to have "proposed love" to the girl; a most infelicitous expression which may either mean "solicited a fleeting sexual encounter" or "proposed a more lasting intimate relationship". This observation, it should be noted, is no mere pedantry but addresses a failure to particularize facts relevant to sentence. Whatever the motive of the proposition, it found favour with the girl who accompanied the man to a "hidden place within the compound"

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where they coupled. The place was not so hidden that the girl's brother did not stumble upon them and make open that which they had sought to conceal.

The accused, a first offender, pleaded guilty. He admitted the facts alleged but added:

> "The day after the incident the complainant's people brought complainant to my brother's residence. The uncle later came and the father of the complainant demanded $500 from me but I failed to secure the money. The following day I was taken by the police. That is all."

He admitted the essential elements of the offence but asserted:

> "I did not know that she was under the age of 16 years. I thought she was 15 years old."

In mitigation, he pleaded:

> "I had sexual intercourse with complainant when my wife had died.

GILLESPIE J

> Complainant is not pregnant because of me having sexual intercourse with. I had sexual intercourse with complainant only once."

None of these statements was contested.

The magistrate made no attempt to investigate the complainant's appearance or character. He did nothing to discover whether the girl was sexually active. He showed no interest in the questions whether she solicited an encounter or had to be persuaded. He has ignored the suggestion of an attempt to extort money from the accused. He left out of account the accused's uncontested belief in the relative maturity of the girl. He gave no overt thought to the fact that imprisonment might mean the loss of the accused's employment. It did not occur to him to question whether this was a commercial encounter between a recently bereaved man missing connubiality and a juvenile prostitute. He said in sentencing the accused:

> "You are a person aged 27-years-old and you took advantage of complainant's youthfulness in having sexual intercourse with her. You have informed the court that you are a widower as your wife passed away recently because of stomach problems. You had sexual intercourse with complainant after the death of your wife. You have put the life of complainant at risk as there is a possibility of her contracting HIV."

The accused was sentenced to twenty four months' imprisonment of which 10 months were suspended on conditions of good behaviour.

The sentence is defective, the magistrate having misdirected himself in failing to determine the full circumstances of the occasion. In my judgment, the comment concerning the human immuno-virus is also misdirected. It is no doubt true that the incidence of this sexually transmitted fatal disease is such that it provides an added reason to protect youthful teenage girls from sexual encounters and lends extra impetus to the tendency to regard the commission of this offence as a potentially serious exploitation of adolescence. The possibility of infecting the complainant in any case, however, cannot be an aggravating feature unless the accused knew himself to be infected or recklessly put the girl at risk without knowing himself to be free of

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the virus.

The sentence would no doubt be appropriate were the complainant an innocent virgin seduced by an older man. It would then be comparable to that passed in Ngwenya (above). On the facts proved, it is undoubtedly excessive when measured against S v Chiwara HB-103-91, where a 22 year old

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apprentice lured a 14-year-old school girl into his room where they spent the night and had intercourse. Chiwara was punished with imprisonment of eight months of which four were suspended. Also the decision in *S v Mudambi* S-156-95 would indicate severity; in circumstances similar to the present the offender there was sentenced to twelve months of which three were suspended.

It is, however, without assuming a number of aggravating features not given, a little difficult to distinguish the case in severity from *S v Mlambo* HB-100-92. In that matter a twenty three year old impregnated a thirteen year old girl. The State there conceded that imprisonment should normally be reserved for cases showing definite features of aggravation. The sentence imposed on appeal was a fine of $400 or four months imprisonment.

On balance, while this may have been the sort of case for which imprisonment is appropriate, I do not see how this conclusion can possibly be reached on the very scanty facts before me. Had the magistrate been assiduous in uncovering the relevant circumstances he might have found matters of aggravation. He might also have found considerable reason mitigating the offence. The best that can be done in the circumstances is to give the accused the benefit of the large area of doubt that remains. He must be punished as a mature widower who, recently bereaved, sought release, if not comfort, with a willing and experienced teenager, whom he took for fifteen. Such an offender should not go to gaol. I alter the sentence to a fine of $300 or one month imprisonment. That month has been served. The accused will therefore be released.

Bartlett J agrees.

S v TAU 1997 (1) ZLR 93 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

8 January 1997 Judgment No. HH-182-96

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to trial within a reasonable time - lengthy delays in starting trial due to witnesses failing on several occasions to come to court

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- delay of over five years - effect

Criminal procedure - trial - conduct of - unrepresented accused - magistrate's duty towards - duty to ensure trial takes place speedily - when magistrate should query requests for remand

Headnote

There is a right, provided by s 18(2) of the Constitution, to a fair trial within a reasonable time. Subjection to a criminal charge, with the passage of time, gives rise to restrictions on liberty, inconveniences, social stigma and pressures detrimental to the mental and physical health of the individual. Where the trial is delayed, it is not only the innocent who suffers. If anything, the actual disruption to life is even greater to a person eventually found guilty after a trial delayed beyond all justification. His rehabilitation after an offence is seriously imperilled. No matter what he does to mend his ways, to secure employment, even to start a family, all this is rendered fruitless and perhaps positively harmful, if years later he is to be condemned for a transgression forgiven by all except the mindless inexorability of blind justice. Indeed, it is an error to have regard to the innocence or guilt of the affected person when considering whether he enjoyed the protection of the law, as until convictio all are to be regarded as not guilty.

The decision whether or not there has been a contravention of s 18 involves

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consideration of the length of the delay, the reason for the delay, whether the person asserted his right, and the prejudice to him. The relevant period is the entire pre-trial period, including the period after he is charged.

The accused had been convicted in April 1996 of stock theft, the trial having begun in December 1995. The offence had been committed in November 1990 and the accused identified as the suspect in May 1991. The trial had been initially set down for August 1991 but then and on numerous subsequent occasions the matter was remanded because the State witnesses did not arrive. The accused's only contribution to the delay was in March 1993, when he failed to appear, having been remanded out of custody.

Held, further, that even by the most lackadaisical and negligent of standards the delay in this case was beyond inordinate: it was inexcusable.

Held, further, that the reasons for the delay in this case were, save for one default by the accused, entirely the fault of the State, occasioned by administrative inertia or incompetence. There was no fact, such as failure to assert, or waiver of, the right to a speedy trial or lack of prejudice, which robbed the accused of his entitlement to claim protection.

Held, further, that the fact that the accused did not assert his right to a speedy trial should not be regarded as acquiescence in the wrong or waiver of his rights. He was unrepresented and uneducated. He was entitled to the protection of the court and the magistrate should have scrupulously scrutinised the applications by the State for remand after remand. A magistrate should not have to be asked to refuse further remands where they are insupportable; he should do so mero motu. As to when a magistrate should start questioning the State on application for

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remands, in all cases this should be done after delays approaching a year, but in some cases even that delay may well be unreasonable and oppressive.

Held, therefore, that the delay constituted a fatal irregularity and the conviction should be set aside.

Cases cited:

Barker v Wingo 407 US 514 (1972)

In re Masendeke 1992 (2) ZLR 5 (S)

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

In re Ndimande: A-G v Ndimande 1992 (2) ZLR 259 (S)

S v Demba S-194-94

S v Marisa S-126-95

S v Matarutse S-101-94

S v Midzi \& Ors 1994 (2) ZLR 218 (S)

S v Mwezi S-195-94

GILLESPIE J

Judgment

Gillespie J: In May 1996, this matter came before me on review. I observed that the offence of stock theft with which the accused was charged had been committed in November 1990. The trial had only commenced on 1 December 1995 and, despite the fact that only six witnesses in all testified, was only concluded in April 1996. I was appalled at the delays incurred and demanded an explanation. That, regrettably, caused only further delay.

Although my minute was dated 16 May, it was not until 2 July that the magistrate at Kadoma replied. The response was itself singularly unhelpful stating only that -

> "The trial magistrate, Mr Murambasvina has left employment in pursuit of greener pastures. Maybe the trial prosecutor may respond to your query."

Had the magistrate been properly attentive to his duty he would have demanded an explanation himself from the prosecutor and submitted it to me.

I then addressed the same query to the Attorney-General who caused the prosecutor in Kadoma to lay before me this explanation dated 10 October 1996.

> "Although the offence was committed in November 1990 and reported to the police soon thereafter, it was only in May 1991 that the police identified the accused as the culprit. After completing their investigations, the police referred the docket to the prosecutor's office, Kadoma. The matter was set down for trial for the first time on 30

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August 1991.

The matter did not take off because the State witnesses did not turn up. The case was withdrawn before plea on that date. The matter was re-set for trial on 30 September 1992 but because of lack of time, accused was remanded to 26 October 1992. On 20 October 1992, accused was again remanded to 16 December 1992 because witnesses had not been in attendance.

On 16 December 1992, the case was again withdrawn before plea because the State witnesses had again failed to turn up. The police were instructed to summon the accused and subpoena the State witnesses for

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26 January 1993. Again the witnesses failed to turn up and the accused was remanded to 17 March 1993. On 17 March 1993, the accused was in default and a warrant for his arrest was issued. Accused was brought to court for a default enquiry on 24 March 1993 after which enquiry he was remanded to 28 June 1993.

The matter did not take off on 28 June 1993 for reasons not apparent from the docket and accused was remanded to 27 July 1993. Witnesses did not attend again, and the accused was remanded to 24 August 1993 again because of the non attendance of witnesses. It was again remanded to 21 September 1993 because of the non attendance of witnesses.

On 21 September 1993, the matter was again withdrawn before plea owing to the non availability of State witnesses. After ascertaining that the witnesses were still available and still willing to come to court, the matter was again set down for trial for 25 August 1995.

Accused attended but again none of the State witnesses attended and the accused was warned to attend on 28 September 1995.

On 28 September 1995, the trial did not commence for reasons not apparent from the docket. It was set again for 30 October 1995 after the police had been firmly instructed that they should only summon the accused after satisfying themselves that the witnesses were still available and willing to testify against the accused.

On 30 October 1995, the matter did not take off again for reasons not apparent from the docket, and it was finally set down for 1 December 1995 when the witnesses attended and the trial commenced.

During the course of the trial certain matters emerged which had not been canvassed during the investigations. Instructions were issued to the police to clarify certain points and the trial proceeded gradually over a period of time until judgment and sentence were handed down on 26 April 1996.

It emerges therefore from the foregoing that the non-attendance of State witnesses was largely to blame for the delay in the conclusion of this matter."

It appears that the accused contributed to the delay in only a small measure.

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That is when he defaulted on 17 March 1993. This explanation was placed before me on 26 November 1996.

Upon perusing the matter afresh, and in particular after consideration of the excuse for the delays, I was satisfied that the accused had not enjoyed his constitutional right to a speedy trial and had not been afforded the protection of the law. With the concurrence of Bartlett J, I

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therefore issued immediately a warrant of liberation. These are my reasons for interference.

The Constitution of Zimbabwe, by s 18(1), secures for every person "the protection of the law". More particularly, subs (2) requires for all charged with a criminal offence "a fair hearing within a reasonable time". The Supreme Court has, in *In Re Mlambo* 1991 (2) ZLR 339 (S) at 344B-C, described the purpose of this protection as:

> "To minimize the adverse affect on the person charged flowing from the pending disposition of a still to be determined criminal charge. The right, therefore, recognises that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma and pressures detrimental to the mental and physical health of the individual. It is a truism that the time awaiting trial must be agonising for accused persons and their immediate family. I believe there can be no greater frustration for an innocent charged with an offence than to be denied the opportunity of demonstrating his lack of guilt for an unconscionable time as a result of delay in bring him to trial" (*per* Gubbay CJ).

It is not, of course, only the innocent who suffers where the trial is delayed.

If anything the actual disruption to life is even greater in the case of a person eventually found guilty after a trial delayed beyond all justification. Even if such an one is not held in custody on remand, his rehabilitation after an offence is seriously imperilled. No matter what he does to mend his ways, to secure employment, even to start a family, all this is rendered fruitless, and perhaps positively harmful, if years later the man is to be condemned for a transgression forgiven by all except the mindless inexorability of "blind justice".

Hence, the learned Chief Justice continues in Mlambo (at 344E-F) concerning the person who is guilty:

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> "His interest is best served by having the charge disposed of within a reasonable time so that he may get on with his life. A trial at some distant date in the future, when his circumstances may have drastically altered, may work an additional hardship upon him and adversely affect his rehabilitation."

Innocent and guilty alike are entitled to the protection.

Indeed, it is an error to have any regard to guilt or innocence of the affected person when considering whether he enjoyed the protection of the law. Prior to conviction, all are to be regarded as not guilty because that is precisely what they remain. All are to be afforded equally the benefits of s 18 of the Declaration of rights. If that protection is not extended, then it is scarcely relevant that the person affected is subsequently convicted. That conviction would have ensued in circumstances of fatal irregularity involving a violation of the constitutional freedoms.

The decision whether or not there has been a contravention of s 18 involves a consideration of the length of the delay; the reason for the delay; whether the affected person has asserted his right and prejudice to that person (see Mlambo at 350 citing Barker v Wingo 407 US 514 (1972) at 530-2). The relevant period to be examined for the purposes of assessing the length of the delay is the entire pre-trial period (see Mlambo at 346G) and includes the period after the person is charged while not being confined to that latter period. In this case: a period of a year

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pending investigation; thereafter a further 4 years before trial commenced; and an additional 4-5 months on trial. The delay has been six years in all. The withdrawal of charges before plea, an expedient twice adopted by the State, does not interrupt or reduce this period (see Mlambo at 349F). Even by the most lackadaisical and negligent of standards this delay was beyond inordinate. It was inexcusable.

In itself it provides considerable cause for concern. A delay of 28 months has been held (in S v Musvitisi & Anor S-229-93) as being sufficient to "trigger the enquiry" into whether an individual's human rights have been infringed. That is to say, such a delay constitutes *prima facie* grounds for considering such an infringement to be disclosed and for requiring an explanation from the State.

I examine next the reasons for delay in this case. They are, save for one default by the accused, entirely the fault of the State. The initial delay of a year is entirely unexplained. The lengthy delays before proceedings commenced

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were occasioned solely by administrative inertia or incompetence. The subsequent delay during the trial is to be laid at the door of the prosecution or the magistrate, I know not which, but is none of the accused's doing. These delays are totally unacceptable. The explanation for them is neither excuse nor apology for the infringement. In the three matters Mlambo *supra*, In re Masendeke 1992 (2) ZLR 5 (S) and In re Ndimande: Attorney-General Ndimande 1992 (2) ZLR 259 (S) delays of between four years to seven years caused by systemic and other delays not attributable to the accused resulted in the accused all winning a permanent stay of prosecution.

The only occasions when such a delay might not lead to such a result have been occasions where it might be said that the accused contributed to the delay (as in S v Marisa S-126-95); or had failed to assert (as in S v Matarutse S-101-94) or had waived (as in S v Mwezi S-195-94) his right to a speedy trial; or had failed to show any prejudice arising from the delay (as in Mwezi *supra* and S v Demba S-194-94). The case of S v Matarutse *supra* in particular should be regarded as very much a decision confined to its peculiar facts. A combination of inactivity on the part of the accused and lack of any proof of prejudice caused the Supreme Court to countenance, I would respectfully think most exceptionally, a delay of over five years.

I do not consider that any such fact robs the accused of his entitlement to claim protection in this case. His one default caused a delay no greater than three months and came at a time, thirty months after the commission of the offence, when the protection provisions of the law had already been denied him. I do not regard it as at all significant in the overall sequence of events.

The fact that he has not complained of the delays I cannot properly regard as constituting acquiescence in the wrong or waiver of his rights. This man was unrepresented. He is uneducated. He was entitled to rely upon the court to protect his rights and to ensure fair treatment of him. It was his privilege to expect that the magistrate would advise him of his rights and would scrupulously scrutinize the applications by the State for remand after remand. He received no such advice or protection. He evidently knew of no rights. He cannot have

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condoned his ill-treatment.

The vast majority of criminal prosecutions are against unrepresented persons. The magistrate is the primary bulwark defending the ignorant or impoverished against the potential injustices wrought through an excess of zeal; pressure of work; administrative inefficiency or plain ineptitude in the investigation and prosecution of offences. Thankfully, most magistrates appear to be equal

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to this task; were they not, a judge's responsibilities on review would be unbearably burdensome. A major part of the magistrate's task has always been to refuse further remand where such is insupportable; to discharge for want of prosecution where this is indicated. He ought not need to be asked to do this, but should where necessary intervene mero motu on behalf of an unrepresented accused.

He may wonder when it is necessary to intervene. This depends upon many circumstances. The nature of the charge; whether the accused is in custody; the likely sentence if convicted; the continuing disruption to the accused's life pending trial; the possible prejudice to his defence in delaying the matter. Thus in *S v Midzi \& Ors* 1994 (2) ZLR 218 (S) it was said that a delay of twelve months does not normally "trigger the enquiry". That was no doubt an appropriate conclusion for a complicated case of fraud and corruption where the accused were on bail. In a different situation, however, twelve months delay might well be unreasonable and oppressive. I would venture to suggest that the scrupulous magistrate would in all cases be questioning the State very closely indeed on any application for further remand made after delays approaching a year. That this magistrate countenanced such delays and allowed the accused to be arraigned nearly six years after the event demonstrates just how abysmally the law failed hereto protect the accused.

Finally, I examine the question of prejudice. I consider the uncertainly of the accused's existence throughout six years to be prejudice itself. I am not advised whether he spent time in gaol awaiting trial, but even if he did not, for over six years he was not a free man. The defence may have been prejudiced. The evidence showed that the accused had slaughtered a beast, quite openly, and sold the meat. He claims his mother gave it to him for slaughter. Simultaneously, a neighbour lost an animal. One who assisted in the slaughter described the butchered animal to the complainant who purported to recognise in the description his missing beast. The delay renders quite impossible any question of recovery of the hide and makes suspect the various descriptions of the slaughtered animal. It is also the possible source of minor discrepancies between the evidence of the accused's mother, who supported his defence although called by the State, and the accused's own testimony. At this remove in time it is quite impossile to accept the hearsay identification and dismiss the defence without risking injustice.

A third and very real element of prejudice arises thus. It is quite simply repugnant to send a man to gaol six years after the alleged crime and only the most persuasive of reasons would justify such a belated and oppressive

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invasion. The magistrate, however, did not even mention the delays as a mitigating circumstance. He sentenced the accused to 30 months' imprisonment of which 15 months was suspended on certain conditions including one of restitution. This is a sentence entirely within the general run and reflects not at all the peculiar circumstances of the case.

My conclusion therefore is as follows. The accused was denied his right to a trial within a reasonable time. He was not afforded the explanation of his rights by the magistrate. His defence may well have suffered by the delay - even as it stands the evidence for the State is questionable. He was sentenced without any regard for the mitigating features of delay. I consider all this to disclose a fatal irregularity in the proceedings. I cannot possibly say that there has been no miscarriage of justice. I therefore quash the conviction and set aside the sentence.

BARTLETT J agrees.

S v YUSUF 1997 (1) ZLR 102 (HC)

ourt **High Court, Harare**

Gillespie J

Criminal review

8 January 1997 HH-179-96

Flynote

Criminal procedure - trial - conduct of - right to fair hearing - right to call witness in defence - accused asking for matter to be finalised after numerous postponements - whether a waiver of right - effect of waiver - whether failure to secure defence witnesses amounts to gross irregularity in proceeding

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(3)(e) - right to fair trial - right of accused to call witnesses to testify in his defence

Headnote

The accused, who was not legally represented, had intimated to the magistrate that he would like a handwriting expert to be called to testify as to the authorship of certain key documents in a fraud case. The prosecutor undertook to arrange for handwriting tests to be carried out. The matter was remanded on a number of occasions because the prosecutor failed to honour his undertaking. Finally, the accused indicated that he wished the matter to be finalised because he had been on remand too long. The magistrate proceeded to give judgment in which he found the accused guilty. On review:

Held, that when a person is on trial for a criminal offence he must be given a full opportunity to give evidence in his defence and to call such witnesses as he may wish. This right is laid down

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in s 18(3)(e) of the Constitution and is a fundamental principle of natural justice. Section 18(3)(e) provides that the accused is entitled to obtain the attendance of witnesses on the same conditions as those applying to witnesses called

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by the prosecution. This includes the right to the subpoenaing of reluctant witnesses.

Held, further, that the failure to call the handwriting evidence constituted a irregularity. The indication by the accused that he wished the proceedings to be finalised did not amount to a waiver of his right to call the witness. It was not expressed as such and meant no more than he did not want a further postponement. Where the accused is faced with the inability or reluctance of the State to provide necessary facilities or rights, the powerlessness of the unrepresented accused should not be taken as acceptance of that default.

Held, further, that even if the magistrate erroneously took the accused's statement that he did not want a further postponement to be a waiver, this would not not have cured the irregularity as the accused was in no way to blame for the irregularity or for any misunderstanding on the part of the magistrate.

Held, further, that even if the accused had consented to be tried without the witness, there still would have been a fatal irregularity, as such consent would truly have been no more than an impotent acquiescence in the face of the failure or refusal by the state to comply with its undertaking and obligation to secure the attendance of the witness. The accused was entitled to have his witness's attendance enforced by the machinery of the State and the judicial process. The bumbling and ineffectual measures taken by the prosecutor and his unexplained broken promises fall far short of affording the accused his right to a fair hearing.

Cases cited:

District Commandant, SA Police & Anor v Murray 1924 AD 13

S v Makanyanga 1996 (2) ZLR 231 (H)

S v Mutandi 1996 (1) ZLR 367 (H)

Judgment

Gillespie J: The accused has been convicted of fraud. The evidence reveals a cunning plan by which an unidentified person approached a shop called Factory Shoes, in Harare, pretending to represent an institution called Potter House Christian College. He requested a quotation for 26 pairs of shoes. The quotation given for $6 734 was in fact an order form on the Potter House stationary with a space for the insertion of the price quoted. The quotation was produced and the enquirer left. Thereafter one Albert Nzvimbo arrived, referred to the quotation and asked in whose name a cheque in payment of the quoted price should be drawn. He too left after being given an answer. A little later he returned with a cheque completed in accordance with the quotation and advice given and tendered this against delivery of the shoes.

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GILLESPIE J

All these transactions had been conducted with a shop assistant named Charity Dube. She, so the magistrate records, on the occasion of the presentation of the cheque, smelt a rat - an olfactory experience which I take to be as figurative as it might have been unpleasant had it been literal. Acting on her suspicions, and showing little in the nature of charity, she caused the arrest of Albert Nzvimbo. Her suspicions proved to be as well-founded as charity would have been misplaced. The cheque had come from a stolen cheque book and had been forged.

Immediately on his arrest, Albert revealed that he had not been acting alone (the magistrate did not say that Albert "ratted"). He led his police captors outside and after patrolling a few street blocks indicated to them the accused who was walking as much as a few hundred metres away from the shop amongst a throng of other pedestrians. The police arrested the accused, searched him and claim to have found on his person a document said to bear the address of Potter House Christian College and to be similar to the order form or quotation first mentioned.

The evidence for the State thus consisted of the testimony of two policemen who arrested Albert and the accused and who claimed to have recoved from the accused the incriminating document; and that of Charity Dube who, in addition to facts pertaining to her dealings with Albert and the other unidentified person, claimed to recognize the accused as having been loitering in the shop on the occasion when the unidentified man had first made enquiries. Other evidence against the accused came from Albert, who was in fact charged with the accused, who asserted that he had indeed done all that Charity said he did, but that he was acting innocently on the commission of the accused who had recruited him for that express purpose. This innocent explanation was accepted. Albert was discharged at the close of the defence case, the prosecutor withdrawing the charges.

The accused denied ever having been in the shop. He denied any dealings with Albert. He denied that any documents such as those described had ever been on his person. In the course of questioning by the bench, the magistrate said:

> "If we sent the documents in question (meaning the quotation and cheque taken from Albert) to a handwriting expert, he would say you did not write them out?"

The accused answered

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> "I agree with that."

Later, at the end of his evidence, there was the following exchange between the accused and the bench:

" Q. In the presentation of your defence do you wish the court to assist you call a handwriting expert?

A. Yes - I want him called to court.

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Court to PP:

Q. Is accused's request feasible?

A. Yes - I will call police to come and take samples of his handwriting."

The matter was then postponed (that day being 7 October 1996) to 22 October for the stated purpose. On 22 October, the prosecutor applied as follows:

"May I ask for a further 2 weeks to contact I.O. so accused's samples can be taken."

The application was granted. On 6 November the following was recorded:

"PP. I need a further 2 weeks. I have not been able to get in touch with the I.O. I promise to do so in the next 2 weeks.

Accused: I agree that the matter be postponed."

Finally, on 14 November this was the denouement:

" Court to PP:

Q. Is the handwriting expert here?

A. I am having problems getting him to come to court.

Accused: I have stayed in remand for too long. I ask that the matter be finalized today.

PP: If it pleases his worship to proceed to judgment without the witness, his worship may do so.

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Court: I will proceed without the handwriting expert."

This the magistrate did. In convicting the accused he said:

"The accused (2) intimated he wanted handwriting experts called. It was the court's view that if the State had done its homework these experts should have been called as State witnesses. Accused 1 alleged that accused 2 wrote out the exhibits before the court. All the State needed to do was to take examples of accused 2's handwriting and match it with the handwriting on the exhibits. Court was however of the view that this mistake on the part of the State was not fatal to their case. After encountering difficulties in securing the attendance of these witnesses (whom I believe were just coming to seal the State case and that therefore their not coming was not prejudicial to the accused) I decided to proceed to judgment without further delay."

The irregularity and misdirection is starkly evident.

Section 18 of the Constitution provides for all persons the protection of the law. In respect of criminal charges, this protection extends to the right -

"To obtain the attendance and carrying out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution ... "

(by s 18(3)(e)). That an accused person should have a full opportunity to give evidence in his own defence and to call such witnesses as he may wish is in any event a fundamental principle of natural justice. A denial of such an opportunity is a gross irregularity. In this regard see the

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remarks of Innes CJ in District Commandant, South African Police & Anor v Murray 1924 AD 13 at 17-18.

In the present case, the accused made perfectly clear his wish to have called a witness in order to attempt to show that the writing on the exhibits was not his. Should that claim of his be established, or should it not be refuted, that would put in considerable doubt the evidence of Albert that the accused had written these documents and hence would cast considerable suspicion on Albert's evidence incriminating the accused as the person who engaged him to present the documents to the shop and to collect the shoes. Without Albert's evidence there is nothing against the accused. The claim by police to have recovered documents from the accused is quite worthless if those

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documents are not produced. It is most unsatisfactory that they should inexplicably be said to be lost. Charity's claim to have recognized the accused is also unconvincing and carries no weight.

The failure to call the handwriting evidence therefore is on the face of it a gross irregularity. I have not overlooked the fact that the accused said on 14 November that he wished the matter to be finalised. This, however, cannot be taken as a waiver of his right to call the witness. It was not expressed as such and appears to have meant no more than that he would consent to no further postponement. The magistrate did not rely on the remark as being a waiver of that right, as the passage from his judgment shows. Even had the magistrate misunderstood the remark as a waiver, that would not have cured the irregularity.

> "The true principle seems to be that a gross irregularity remains a gross irregularity even though due to a misunderstanding, and loses its efficacy as a ground for review if due to the fault of the person seeking to rely only on it."

(*per* Innes CJ in Murray *supra* at 18). There can be no suggestion that the accused is to blame either for the irregularity or for any misunderstanding.

Even if the accused had consented to be tried without the witness, I would still have held an irregularity to have occurred. Such consent would truly have been no more than an impotent acquiescence in the face of the failure or refusal of the state to comply with its undertaking and obligation to secure the attendance of the witnesses. The accused was entitled to have his witnesses' attendance enforced by the machinery of the State and the judicial process. The bumbling and ineffectual measures taken by the prosecutor and his unexplained broken promises fall far short of affording him his right

> "to obtain the attendance of witnesses ... on the same conditions as those applying to witnesses called by the prosecution ..."

(s 18(3)(e) Constitution of Zimbabwe), which conditions include the subpoenaing of reluctant witnesses. Where the accused is faced with the inability or reluctance of the State to provide necessary facilities or rights the powerlessness of the unrepresented accused should not be

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taken as acceptance of that default.

I cannot say that this irregularity has not caused a miscarriage of justice. In

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assessing the evidence of the accomplice the magistrate was obliged to adopt a cautious approach and carefully to exclude the possibility of false incrimination on the part of Albert. I wrote on the cautionary rule in the case of *S v Mutandi* 1996 (1) ZLR 367 (H) and also in S v Mahanyanga 1996 (2) ZLR 231 (H).

The risk of false incrimination in this case is the danger of false identification by Albert of an innocent man to add verisimilitude to his defence that he was unknowingly duped to take part in a fraud, and potentially to protect a real collaborator. The magistrate ignored this risk. Despite any words of caution he may formalistically have admonished himself with, his observation that the handwriting expert would simply have sealed the State case shows a complete absence of caution. It demonstrated that he had prior to the calling of the witness, or the decision to proceed without the witness, made up his mind on the evidence. It shows that he was quite wrongly prepared to assume that the handwriting evidence would confirm the accomplice's evidence. This serious error renders his acceptance of the evidence quite unpersuasive.

In the premises, the gross irregularity vitiates the proceedings. The evidence is inadequate to prove guilt. The accused is entitled to an acquittal. I accordingly quash the conviction, set aside the sentence and discharge the accused.

MUNGWIRA J agrees.

S v CHAKWINYA 1997 (1) ZLR 109 (HC)

Court **High Court, Harare**

Gillespie J

Transfer for sentence

10 January 1997

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to trial within a reasonable time - extreme and inexcusable delay in dealing with case - High Courts' power to protect rights of persons coming before it - stay of further proceedings granted

Court - High Court - jurisdiction - court's power to regulate its own proceedings and protect rights of persons coming before it - power to stay proceedings

Criminal procedure - stay of proceedings - trial commencing 2 1/2 years after accused first placed on remand - matter transferred to High Court for sentence - further 3 years before High Court seized of matter due to

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administrative incompetence - extent to which unrepresented accused can be expected to take steps to enforce his freedom - proceedings stayed permanently

Headnote

The accused was convicted of the rape of an 8 year old girl, his niece. The crime took place in July 1991 and had he been convicted and sentenced close to that time a sentence of 8 years' imprisonment would have been likely. However, the trial did not take place speedily. The accused was on remand in custody for 6 months, then released on bail. He remained on bail for over two years, until February 1994, when the trial began. The trial itself took four days, at the end of which the magistrate convicted the accused. The magistrate stopped the proceedings in order to obtain the Attorney-General's directions under s 54(2) of the Magistrates Court

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Act. The Attorney-General directed that the matter be transferred to the High Court for sentence. Nothing happened for another two years, when another magistrate discovered that the accused was still awaiting sentence. Through administrative incompetence, the record of the trial had been lost and had to be reconstructed. It took yet another year for the matter finally t be brought before the High Court.

Held, that every person, deserving or otherwise, was entitled to the protection of s 18 of the Constitution, which includes the right to a fair trial within a reasonable time. The delay in this case had been extreme and the reason for it was inexcusable. The prejudice to the accused was such that had he been convicted and sentenced when he should have been, he would more than likely have been released by now. To impose the sentence that would normally be expected would be unconscionably prejudicial.

Held, further, that it would be most inappropriate to hold against an unrepresented accused a failure to take assiduous steps to enforce his freedom. The accused was an unemployed communal land dweller who had never been advised of his rights. He was at the mercy of the system, and the system failed him. Elementary administrative checks would have revealed the accused's plight.

Held, further, that while s 24(4) of the Constitution gives the Supreme Court power to make orders to give effect to an individual's constitutional rights, this did not mean that the High Court was without remedy. The court had an inherent jurisdiction to regulate its own proceedings and to protect the rights of those coming before it. It had a power to put a stop to any wrong that had been done to an accused person in the name of the law. Where an infringement of the right to a speedy disposition of a trial has occurred, the minimum remedy must be a stay of further proceedings.

Held, therefore, that passing of sentence and further proceedings in the matter should be permanently stayed.

Cases cited:

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

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

S v Tau 1997 (1) ZLR 93 (H)

Statutory provisions considered:

Constitution of Zimbabwe 1980, ss 18(2) and 24(4)

Judgment

Gillespie J: The accused has been convicted of a most heinous offence. He raped an 8 year old girl.

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The little girl was his niece. In July 1991 the complainant's mother took the child and her two young brothers to visit the accused. She left them in his care and control, under his supervision while she went on a trip somewhere. At night he entered the hut where the little girl and her two brothers were sleeping. He crept into the bed and he had forcible sexual intercourse with this child threatening to kill her should she do anything to prevent him or to report him. He raped her twice in the hut where she was sleeping with her brothers. The repugnance which this offence inspires in one beggars description.

The offence of rape is one that seems to have been steadily growing in prevalence. It is one the punishment for which has been increasing over the last decade. That form of the offence which is constituted by a guardian taking advantage of his ward constitutes an alarmingly high percentage of the circumstances of this offence. In addition, where the violation is one which is done to prepubescent girls, there is an added element of horror involved in the offence. In short, if anyone is less deserving a consideration and of leniency than the accused, I have yet to hear of him.

In 1991, when this offence was committed, one might have expected imprisonment for a substantial period of anything up to 8 years to have been imposed upon an offender such as the accused. In 1992 judgment was given in this court in which it was said that offences by mature men upon young children, particularly young relatives, might well attract punishment in the region of 8 to 10 years' imprisonment. See *S v Moyo* 1992 (1) ZLR 158 (H). Someone who commits the offence today need not be surprised if he goes to gaol for 10 years.

There is, however, one very good reason why I should not impose that punishment upon the accused. He committed the offence in July 1991. There is no reason on earth why that docket should not have been ready for prosecution before the end of year. I can conceive of no explanation and none has been tendered, which could show me why the accused should not have been prosecuted and put on trial in late 1991 or in 1992. Instead, he was on remand for six months, which must have been until the latter part of 1992, before being released on bail. He was then held on remand on bail for another two years until February 1994 before the trial commenced. Two and a half years or even more were thus spent awaiting trial. The State has

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offered no explanation at all for that delay. The accused has said that from his observation the evidence was not prepared. If he is correct, then that is a source of alarming criticism for the State. If he is not correct then the cause for criticism is even greater.

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The trial started on 7 February 1994 and the regional magistrate convicted the accused on 11 February. After a wait of two and one half years for trial, the entire proceedings until the conviction took four days. The magistrate then understandably felt that he wished further guidance on the question of sentence and possibly wished the matter to be considered for transfer to this court for sentence. He accordingly stopped proceedings in accordance with s 54(2) of the Magistrates Court Act [Chapter 7:10] and submitted the record to the Attorney-General for his direction. That direction was that the matter be transferred to this court for sentence.

One might have expected that the administrative procedures involved in stopping the trial and obtaining the Attorney-General's direction and in securing a date for sentence for this hearing would have taken a few weeks. Far from it. Mathematics shows that three years have elapsed since the accused was found guilty. Nearly six years have passed since he committed the crime.

This second delay is again unexplained. It was discovered quite fortuitously by the regional magistrate who convicted the accused, when inexplicably he was brought before that officer for further remand. I am not aware of any reason why the accused should have been on remand if he was in fact awaiting sentence in the High Court. The magistrate ordered an investigation there and then and discovered that the record of the trial had been lost; that clerical staff had failed to transcribe the record; and that the administrative staff had failed to discover that the case was so long outstanding. There was no register kept of cases sent for transcribing. There was no record kept of who was responsible for losing necessary papers.

The record that is before me was in fact reconstructed from the police docket and from some manuscript notes kept by the regional magistrate. The regional magistrate in his report to the registrar of this court has written:

> "May I state at this stage that it had been the practice of this court that once accused had or has been remanded in terms of s 54(2) of Chapter 7:10 the trial magistrate who convicted him would not have any further dealing in the matter relating to that accused and he will act on the trust that all officers whose duty is related to the transfer of the accused and the papers pertaining to him to the High Court. They would carry out their respective duties in that regard without delay. That practice I must state with grave concern works to the total prejudice of the present accused."

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Even though the regional magistrate discovered this failure in February 1996 and took immediate steps to rectify it, it still took another year before this matter came before me. That delay is utterly inexplicable. The situation, therefore, is that, had the accused been sentenced in

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late 1991 or during 1992 as he should have been, and had he received a sentence of between 8 and 10 years with one or two years suspended, as he might well have expected, he would, with remission of the effective portion of that sentence, have served his sentence by now. On the worst case scenario for him, he might still have had some months to serve and would have expected to be released towards the end of this year. During that period of delay, he has in fact spent most of his time in gaol. Of the nearly six years' delay, he has spent nearly four years in gaol.

The Constitution of Zimbabwe entitles all persons to the protection of the law. By s 18(2) that protection includes the right to a fair hearing within a reasonable time. In In re Mlambo 1991 (2) ZLR 339 (S) Gubbay CJ set out various factors concerning the assessment of reasonableness of delay and the remedy to be given to an accused person who has suffered an infringement of his rights because of such delay. From that judgment it appears, at p 344B-C, that the purpose of this protection is to minimise the adverse effect of delay on the person charged pending the disposition of a still to be determined criminal charge.

The law therefore recognises that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, to inconveniences, to social stigma and to pressures detrimental to the mental and physical health of the individual. It is not just the deserving persons in Zimbabwe who are entitled to this protection. It is even persons like the accused who commit offences which shock and appall. They too are entitled to their civil liberties. I myself have written in the case of *S v Tau* HH-182-96 *(2) that the decision whether or not there has been a contravention of s 18 involves the consideration of the length of the delay; the reason for the delay; whether the affected person has asserted his right; and prejudice to that person.

The facts which I have recounted show that the length of this delay was extreme. The reason for the delay is inexcusable. The prejudice to the accused is such that had he been convicted and sentenced when he should have been he might well have served his term of imprisonment by now. To

impose now the sentence normally to be expected would be unconscionably prejudicial.

As to whether the accused has asserted his right, it would be most inappropriate to hold against the unrepresented accused failure to take assiduous steps to enforce his freedom. The accused is an unemployed person living a traditional communal life. He has never been represented. He has never been advised of his rights. He had no opportunity to enforce his rights. He was at the mercy of the system. This system failed him.

In *S v Tau*, to which I have already referred, I wrote at p 99F-G:

> "The fact that the accused has not complained of the delays I cannot properly regard as constituting acquiescence in the wrong or waiver of his rights. This man was unrepresented. He is uneducated. He was entitled to rely on the court to protect his rights and to ensure a fair treatment of him. It was his privilege to expect that the magistrate would advise him of his rights and would scrupulously scrutinise applications by the State for remand after remand. He received no such advice or protection. He evidently knew of no rights. He cannot have condoned his

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ill treatment."

In this case, too, the accused could have expected that magistrates would conduct a monthly check of criminal record books in order to ensure that matters outstanding did not escape attention. He could have expected that monthly returns by the prisons of unsentenced prisoners awaiting disposal would be rendered to the Chief Magistrate in order that the failure to determine his matter did not go on remand. I do not know whether he was able to complain to magistrates on any prison visit of the failure to dispose of his case. But any one of these three elementary administrative checks against possible abuse could and should have revealed his plight. The fact that they did not is cause for severe criticism.

I consider now the course which I should take in the light of this infringement of the accused's liberties. Of s 24(4) of the Constitution, the following is said by Gubbay CJ in Mlambo's case at 355B:

"Section 24(4) of the Constitution empowers the Supreme Court to make such orders, issue such writs and give such directions as it may consider appropriate and for the purpose of enforcing or securing the enforcement of the declaration of rights. It is difficult to imagine language which

GILLESPIE J

should give this court a wider and less fitted discretion but relative to s 18(2) whereupon balancing the various factors it is decided that the accused's rights to a fair hearing within a reasonable time has been contravened. The proceedings must be the minimum remedy, and therefore, to direct for instance if the trial proceeds forthwith would be to contradict the accepted claim that an ordinary delay had denied him the very right that is safeguarded under s 18(2). It would amount into participating in a further violation of this provision."

A similar provision to s 24(4), which pertains to the Supreme Court, is not made in respect of the High Court. That does not mean, however, that the High Court is powerless to give a remedy. Indeed this clause pertaining to the Supreme Court appears ex abundante cautela and lest otherwise it be thought that the Supreme Court, a court of appellate jurisdiction, has no original jurisdiction pertaining to the point at issue. Ubi ius, ibi remedium; and the remedy for the accused here lies in the inherent jurisdiction of this court to regulate its own proceedings and to protect the rights of those coming before it.

The court has a common law power to put a stop to any wrong that has been done to an accused person in the name of the law. In addition, I respectfully agree with the sentiments of the learned Chief Justice that where an infringement of a right to a speedy disposition of a trial has occurred, the minimum remedy must be a stay of further proceedings.

I find myself impelled, then, to hold that the factors which I have outlined reveal a breach of the accused's right to the protection of the law. It follows that conclusion that any punishment which I impose upon the accused will, therefore, perpetuate the wrong that has already been done to him. Undeserving as the accused may be, he is nevertheless entitled to that protection. It is of some comfort to the administration of justice that had he been sentenced when he should have been he would by now more than likely have been entitled to his release.

My order, therefore, is that passing of sentence upon the accused and further proceedings in this matter be permanently stayed. The effect of this is that the accused is now entitled to his

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release.

In re KWENDA 1997 (1) ZLR 116 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Referral in terms of s 24(2) of the Constitution

20 January 1997 Judgment No. S-1-97

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 24(2) - referral of question as to contravention of Declaration - pending criminal charge withdrawn before plea with intimation that the accused would later be indicted - not competent to refer matter to Supreme Court on basis of possible breach of s 18(2)

Criminal procedure - charge - withdrawal of - before plea - Attorney-General's unfettered discretion to withdraw charge before plea at any time and institute proceedings afresh

Headnote

The applicant was arrested in December 1993 on suspicion of theft. In December 1994 the charges were withdrawn before plea. In October 1995 she appeared in answer to a summons alleging the same counts of theft, but the proceedings were postponed several times until June 1996, when the magistrate directed that the trial should begin on 10 July. On that date the prosecutor withdrew the charge before plea, intimating that the applicant would be tried before the High Court. Defence counsel queried whether the further delay would violate the applicant's right, under s 18(2) of the Constitution, to a fair trial within a reasonable time and the magistrate referred the matter to the Supreme Court.

Held, that the referral was incompetent. The protection under s 18(2) is only afforded where the charge of a criminal offence is extant. Where the charge is withdrawn there is no right to be afforded a fair hearing within a reasonable time, there being no hearing before the court and no charge for it to adjudicate on.

GUBBAY CJ

Held, further, that the Attorney-General has an unfettered discretion to withdraw any indictment, summons or charge at any time before the accused has pleaded and to institute fresh proceedings. The court is bound by the withdrawal; it cannot prevent it or decline to accept it.

Held, further, that, as far as the period of delay was concerned, the State would not gain any advantage by the intended subsequent proceedings. The time frame to be considered ran from the date of the applicant's arrest and when she was charged again the reasonableness of whatever portion of the overall delay for which the State was responsible would have to be

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considered.

Cases cited:

MacFarlane v Sengweni NO \& Anor 1995 (1) ZLR 384 (S)

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

Wolman v Springs Town Council 1941 TPD 104

The court referred to the following statutory provisions:

Constitution of Zimbabwe 1980, ss 18(2) and 24(2)

Criminal Procedure and Evidence Act [Chapter 9:07], s 320(3)

Case Information

W T Manase, for the applicant

Miss B Hammond, for the Attorney-General

Judgment

Gubbay CJ: The question referred to this court by the presiding regional magistrate in terms of s 24(2) of the Constitution of Zimbabwe is whether the applicant is entitled to an order for the permanent stay of the criminal proceedings instituted against her by the State.

The applicant was arrested on 30 December 1993 upon the reasonable suspicion of having committed ninety-six counts of theft from her employer. The next day she was admitted to bail and placed on remand. Nothing of significance occurred until 29 December 1994, when the prosecution withdrew all the charges before plea.

On 16 October 1995, the applicant appeared before the regional court in answer to a summons charging her with the same counts of theft. The trial did not, however, commence as the co-accused she was to be tried with was in default. Thereafter numerous postponements were granted, some at the request of the defence, others at the instance of the State. Finally, on 3 June 1996, the regional magistrate made it known to the parties that no further

delays would be tolerated. She directed that the trial of the applicant was to commence on 10 July 1996, which was the earliest available date.

On 10 July 1996, in a move that took the defence by surprise, the prosecutor formally withdrew all the charges against the applicant before plea. He announced that this was done at the instruction of the Director of Public Prosecutions, who had decided to indict the applicant for trial before the High Court.

Perturbed by the turn of events, defence counsel raised the argument that notwithstanding the

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withdrawal of the charges the further delay consequent upon the institution of fresh proceedings, if taken in conjunction with that already suffered, violated the applicant's constitutional right to a hearing within a reasonable time. The regional magistrate was persuaded thereby to hold that the withdrawal of the charges before plea was not inconsistent with a breach of s 18(2) of the Constitution, and that the request for a referral was neither frivolous nor vexatious.

I am quite unable to agree. Section 18(2) makes it clear that the protection is only afforded where the charge of a criminal offence is extant. Where the charge is withdrawn there is no right to be afforded a fair hearing within a reasonable time. There is no hearing before the court and no charge for it to adjudicate upon. See *MacFarlane v Sengweni NO \& Anor* 1995 (1) ZlR 384 (S) at 387B. Moreover, the usual and logical form of redress for an infringement of s 18(2) is a permanent stay of proceedings. See In re Mlambo 1991 (2) ZLR 339 (S) at 355D-E. Where there are no proceedings in existence there is nothing to stay.

Section 320(3) of the Criminal Procedure and Evidence Act [Chapter 9:07] vests in the Attorney-General, or the public prosecutor with his authority or on his behalf, the unfettered right to withdraw any indictment, summons or charge at any time before the accused has pleaded; and the power to institute proceedings afresh before the same or any other competent court. The Attorney-General, or the prosecutor as the case may be, is *dominus litis*. The court is bound by the withdrawal of a charge before plea. It cannot prevent its occurrence or decline to accept it. See Wolman v Springs Town Council 1941 TPD 104 at 107. The accused is not entitled to an acquittal; but, if in custody, must be released.

I do not consider that the prosecutor acted unethically in withdrawing the charges facing the applicant. He very properly indicated that the State

intended to proceed with the charges at a later date and in another forum. The applicant was not therefore misled into believing that the matter was being laid to rest. Nor can it be contended that the State will gain any advantage, insofar as the period of delay is concerned, by the intended subsequent proceedings. The time frame still runs from the date of the applicant's arrest. See In re Mlambo *supra* at 348D-F. Consequently, when the applicant is again charged what will have to be considered is the reasonableness of whatever portion of the overall length of the delay for which the State is responsible in bringing her to trial.

Certainly, the referral by the regional magistrate was incompetent. There was no question to refer and no relief this court could grant the applicant.

In the result, the referral of the matter is struck off the roll. At the request of the Attorney-General, the applicant is ordered to pay the wasted costs.

McNALLY JA: I agree.

KORSAH JA: I agree.

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Manase & Manase, applicant's legal practitioners

MUSANHI v MOUNT DARWIN RUSHINGA CO-OPERATIVE UNION 1997 (1) ZLR 120 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

20 January 1997 Case No. S-5-97

Flynote

Evidence - onus of proof - incidence of onus - one party having means of establishing fact - practical convenience and fairness - dispute as to whether goods delivered by carrier - onus upon carrier to prove delivery

Headnote

A co-operative organisation bought its fertilizer from a fertilizer company. It entered into a contract with a transport company, in terms of which the transport company would accept, on behalf of the co-operative, delivery of fertilizer bought from the fertilizer company by the co-operative and would then deliver that fertilizer to the co-operative. Acting under this contract, the transport company collected 3700 bags of fertilizer from the depot of the fertilizer company. The co-operative denied that it had received this delivery and claimed either delivery or the value of the fertilizer. The transport company argued that the co-operative had failed to discharge the onus of proving non-delivery to it.

Held, that where the onus of proof lies is essentially a matter of policy and fairness based on experience of different situations. Where the incidence of the onus is uncertain, the court can have regard, inter alia, to matters of practical convenience and fairness such as the sources of knowledge available to the respective parties.

Held, further, that as the owner of the fertilizer the co-operative was entitled to claim under the rei vindicatio possession of his property from the transport company. The onus would then be on the transport company to prove that it had delivered the fertilizer to the co-operative. Viewed in

GUBBAY CJ

this way, the onus was clearly on the transport company to prove delivery.

Held, further, that the transport company had failed to prove that it had delivered the bags of fertilizer.

Cases cited:

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Chetty v Naidoo 1974 (3) SA 13 (A)

Groenendijk v Tractor & Excavator Spares (Pty) Ltd 1978 (1) SA 815 (A)

Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd 1972 (3) SA 583 (W)

Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A)

Munsamy (also known as Naidu) v Gengemma 1954 (4) SA 468 (N)

Case Information

D P Carter, for the appellant

J C Muzangaza, for the respondent

Judgment

Gubbay CJ: This is an appeal against a judgment of the High Court in which the appellant was ordered to pay the respondent the sum of $91 796 as damages, with interest at the prescribed rate from the date of service of the summons, and costs, for failure to deliver 3 700 bags of fertilizer.

The respondent is a registered co-operative society. Its committee and ordinary members reside in the communal area of Mount Darwin where its place of business is located.

The respondent used to purchase fertilizer from a firm in Harare known as Zimbabwe Fertilizer Company Ltd ("ZFC"). In July 1990, it entered into a contract with the appellant, a transport operator, in terms whereof he would accept delivery on the respondent's behalf of bags of fertilizer sold to it by ZFC. Upon collecting each order of fertilizer at ZFC's depots in Aspindale or Msasa, the appellant would be handed a delivery note made out in the name of the respondent. He would sign it. The note reflected the number of bags of fertilizer sold, the unit price and the total sum due for payment. The appellant would then prepare an invoice detailing the number of bags collected from ZFC and the charge for the particular delivery. He would also write on it the corresponding number of the ZFC delivery note.

Upon arrival at the respondent's business premises, the number of bags of fertilizer exhibited on the invoice would be counted by the respondent's

representative. If found to be correct, both he and the appellant's driver would affix their signatures to the invoice in acknowledgement of receipt of the delivery. The original invoice would be removed from the invoice book and given to the respondent's representative. The duplicate copy would remain fast in the invoice book.

The dispute between the parties concerned whether or not 3 700 bags of fertilizer, admittedly collected by the appellant from ZFC's depots over the period 6 August 1990 to 5 January 1991,

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were ever delivered to the respondent at Mount Darwin.

The respondent sued the appellant for an order compelling him to deliver the 3 700 bags of fertilizer; alternatively, for payment of the sum of $91 796, being the value thereof. The declaration made the specific allegation that the appellant had not delivered the fertilizer to it. The appellant responded in his plea by denying non-delivery and by then averring that his drivers had delivered the fertilizer at the respondent's premises. He admitted the value of the fertilizer in the amount claimed.

Thus the crucial and sole issue was whether the respondent had received from the appellant the 3 700 bags of fertilizer sold to it by ZFC.

At the trial, presided over by Sandura JP, the respondent began. Its only witness, who was employed as a supervisor, deposed that although the respondent had been debited by ZFC with the purchase price of the 3 700 bags of fertilizer, there were no entries in its books of account of any monies due to the appellant in respect of charges rendered by him for their delivery. What was evidenced in the books were merely the signed delivery notes. The appellant, therefore, had not been paid for the deliveries in contention.

Upon the close of the respondent's case, an application for absolution from the instance was made on the ground that the respondent had failed to discharge the onus of proving non-delivery to it. The learned Judge President refused the application.

The appellant then gave evidence. He had not personally made any of the disputed deliveries. Two of his drivers had done so. One had since died. The other was not called to testify. The invoice books claimed by the appellant to contain signed duplicate copies of the invoices reflecting the making of the deliveries of the 3 700 bags of fertilizer were not produced. They had passed into the possession of the police and could not be found.

GUBBAY CJ

The learned Judge President took the view that as the respondent could not be required to prove a negative, that is, non-delivery, the onus was on the appellant to prove the deliveries on a preponderance of probabilities. This he had failed to do.

Counsel for the appellant argued before this court that it is not a rule of our law that the onus of proof cannot lie upon the party who makes a negative allegation. It still has to be determined who can be said to assert and who to deny. I agree with that submission. It is not very helpful, in my opinion, to ask whether a party is making a positive or negative allegation. This is because by adroit linguistic manipulation a positive averment can always be couched into a negative statement. See Hoffmann and Zeffertt South African Law of Evidence 4 ed at 511. I prefer, and commend, the approach of Grosskopf JA in Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A) where, at 392D-E, the learned Judge of Appeal remarked:

> "It has often been said that determining the incidence of the onus of proof 'is merely a question of policy and fairness based on experience in the different situations'. (Wigmore as quoted in Mabaso v Felix 1981 (3) SA 865 (A) at 873C and During NO v Boesak & Anor 1990 (3) SA 661 (A) at 673A). As a matter of fairness and sound judicial policy, it seems reasonable that, where one party has the means of establishing a particular fact and his

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> opponent not, the onus should rather be on the former than on the latter. Although this factor would not be conclusive it should, in my view, be accorded some weight. It was taken into consideration in Mabaso's case *supra* at 873E-F in determining the onus in civil cases where a defendant relies on self-defence as a justification for what would otherwise be an assault."

And continued at 393D-F:

> "... it is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the onus is determined by law. In many cases the person burdened by the onus as laid down in the sources of our law may be required to prove a fact which is peculiarly within the knowledge of his adversary. This does not, however, mean that a court, where the incidence of the onus of proof in a particular situation is uncertain and has to be determined, may not have regard, inter alia, to matters of practical convenience and fairness such as the sources of knowledge available to the rival parties."

GUBBAY CJ

In the present matter, however, it is clear to me that the incidence of the burden of proof was governed primarily by the legal concept of ownership. As explained by Jansen JA in Chetty v Naidoo 1974 (3) SA 13 (A) at 20B-D:

> "It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (eg. a right of retention or a contractual right). The owner, in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and the defendant is holding the res - the onus being on the defendant to allege and establish any right to continue to hold against the owner."

See also Groenendijk v Tractor & Excavator Spares (Pty) Ltd 1978 (1) SA 815 (A) at 817G-H.

An owner is thus entitled to claim possession of his property with the rei vindicatio. The action is one *in rem*. But a claim for alternative relief on the assumption that the defendant may have disposed of the property is commonly and advisedly made.

It necessarily follows that the respondent's declaration ought to have alleged ownership of the 3 700 bags of fertilizer and that the appellant was in possession. Any averment of the appellant's failure or refusal to deliver the fertilizer would be, and was, unnecessary as not being an essential element of the cause of action. The appellant would then, as he did, allege that he had delivered the fertilizer. Viewed in this manner, the onus to prove delivery lay, without doubt, upon the appellant. The fact of delivery was his defence to the claim that he was in possession of the fertilizer owned by the respondent.

The case of Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd 1972 (3) SA 583 (W) is particularly apposite. The facts were these. The defendant, a carrier in Johannesburg, received from the plaintiff twelve radiograms for delivery on the plaintiff's behalf to a firm in Port Elizabeth. It was understood that if the consignee refused to accept the radiograms, the defendant was to return them to the plaintiff. Upon the consignee refusing acceptance, it became the obligation of the defendant to re-deliver them. The dispute between the parties related to whether delivery had been made to the plaintiff and upon whom the onus rested. Notwithstanding that the plaintiff had pleaded non-delivery, COLMAN J held that the onus was with the

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GUBBAY CJ

defendant to prove delivery (see at 586B-C). His judgment subsequently received the imprimatur of the Appellate Division in Groenendijk's case *supra* at 818A.

It was common cause at the trial that the respondent was the owner of the 3 700 bags of fertilizer which the appellant had collected from ZFC. The bags were sold to the respondent and delivery was effected by ZFC to the appellant as agent for the respondent. The appellant was in possession of the bags. He averred delivery of them in his plea. I am satisfied, therefore, despite the misconceived way in which the respondent's cause of action was framed, that Sandura JP was correct in placing the onus of proof upon the appellant.

I should also mention that the undertaking by the respondent of the duty to begin may have added to the confusion. But an acceptance of the onus to prove non-delivery is not to be implied inevitably from that procedure. See Munsamy (also known as Naidu) v Gengemma 1954 (4) SA 468 (N) at 471E-H; Harms Civil Procedure in the Supreme Court at 398.

Proceeding then on the basis that the onus fell squarely upon the appellant, I can only agree with the conclusion of the learned Judge President that the failure or inability to produce the signed invoices bearing the ZFC delivery note numbers, or to adduce the evidence of his drivers, disabled the appellant from proving the fact of delivery of the 3 700 bags of fertilizer.

It was essentially for the reasons aforegoing that at the hearing, after argument had been delivered by both counsel, it was ordered that the appeal was to be dismissed with costs.

McNALLY JA: I agree.

KORSAH JA: I agree.

Chikumbirike & Associates, appellant's legal practitioners

Ziumbe & Mtambanengwe, respondent's legal practitioners

ZESA v BOPOTO 1997 (1) ZLR 126 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

12 September 1996 & 21 January 1997 Judgment No. S-267-96

Flynote

Employment - contract- termination-dismissal- application to labour officer to dismiss employee - when must be made - effect of failure to make application timeously

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Headnote

Where an employer wishes to dismiss an employee, and there is no registered code of conduct governing the industry, undertaking or workplace, the employer may, in terms of s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), suspend the employee without pay and forthwith apply to a labour relations officer for an order terminating the contract of employment. "Forthwith" means "as soon as reasonably practicable in the circumstances". Failure to comply with this requirement may render the suspension inoperative.

The appellant company suspended the respondent employee and only applied to a labour relations officer four months later. The labour relations officer granted the application and the respondent appealed to the Labour Relations Tribunal. The Tribunal allowed the appeal, but did not direct reinstatement. Instead, it gave the employer an opportunity to indicate whether it would be practicable for it to comply with an order for reinstatement and if not whether it would be prepared to consider compensation. The employer said it was not prepared to reinstate the employee, whereupon the Tribunal ordered reinstatement.

Held, that the delay was intolerable and the Tribunal should have taken the point and declared the suspension to be inoperative.

Held, further, that failure by the labour relations officer to comply with the

KORSAH JA

requirements of the Regulations amounted to an irregularity which was a point of law which could be raised at any time, even on appeal.

Held, further, that the Tribunal should have specified an amount of damages to be awarded to the employee as an alternative to reinstatement.

Cases cited:

Ex p Barclays Bank 1936 AD 481

Cole v Union Government 1910 AD *263 Hama v NRZ* 1996 (1) ZLR 664 (S)

Kimpson v Markham [1921] 2 KB 157

Paddock Motors (Ply) Lid v Igesund 1976 (3) SA 16 (A)

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

West Rand Est Lid v New Zealand Ins Co Ltd 1926 AD 173

The court referred to the following statutes and regulations:

Labour Relations Act *[Chapter 28:01],* s 105(5) to (7)

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Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), s 3

Case Information

Miss *R Makarau,* for the appellant

D P Carter, for the respondent

Judgment

Korsah JA: This is an appeal against two decisions of the Labour Relations Tribunal ("the Tribunal"). Both decisions resulted from an appeal by the respondent against the determination of the senior labour relations officer authorising the appellant ("ZESA") to terminate the employment of the respondent in terms of s *3* of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, SI *371* of *1985* ("the Regulations").

In the first of the decisions appealed the Tribunal ordered on 24 May 1995.

> " 1. That the appellant's (now the respondent) appeal is allowed with costs.
>
> 2. That the Tribunal is not inclined to making an order which has no hope (prospect) of being complied with, the respondent (now the appellant) is granted an opportunity to be heard on this aspect and for this reason the Registrar of this Tribunal is directed to set Hthis matter down at the earliest possible opportunity."

KORSAH JA

This order was made because the Tribunal wanted ZESA

> "... to indicate whether or not it would be practicable for it to comply with an order of reinstatement and 2: If, however, and for whatever reason, the respondent (ZESA) would be unable to reinstate the appellant (now the respondent), it would be prepared to consider compensation as an alternative to reinstatement."

At the resumed hearing of the matter, counsel for ZESA indicated that ZESA was not prepared to reinstate the respondent. Whereupon the Tribunal made the following order on 22 December 1995:

> "Accordingly, the following order is substituted for para 2 of the Tribunal's order in judgment No. LRT-M13- 16-95 which must be read in conjunction with this judgment.
>
> That the respondent (ZESA) is hereby ordered to reinstate the appellant (now the respondent) on the same terms and conditions as applied before his suspension."

At the hearing before us, counsel for ZESA proposed that this court should first consider the appeal against the last determination of the Tribunal dated 22 December 1995, and thereafter deal with the appeal against the decision handed down on 24 May 1995. The reason proffered for this approach is that regard may be had to the earlier decision only if the later decision is first set aside 1 am unable to accede to this request as will hereafter appear.

The attack levelled at the order of 22 December 1995 was that the decision was null and void because, after handing down a decision on the merits of the matter in May 1995, the Tribunal

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became functus officio. This is tantamount to saying that if a court determines the liability of a party in a claim for damages and adjourns the matter for the parties to settle the quantum of damages, that court becomes functus officio and, if the parties are unable to agree on the quantum of damages, cannot entertain the matter to determine the issue of damages.

I am in entire agreement with Mr Carter that the Tribunal was aware of the law relating to reinstatement. It deliberately offered the parties a chance to resolve the matter other than by having an order of the Tribunal imposed, which opportunity ZESA spurned.

KORSAH JA

As is rightly pointed out by Mr *Carter,* the cases cited in ZESA's beads of argument in support of the submission that the Tribunal *was functus o*fficio are wholly irrelevant, as the Tribunal did not forget to make an order, for example, for interest a *tempore morae* as in *West Rand Estate Lid v New Zealand Insurance Co Ltd* 1926 AD 173, or to award an order already granted as in Ex p B*arclays Bank* 1936 AD 48 1. The Tribunal, placing reliance on then existing authorities of this court, found that it had no option but to order reinstatement once ZESA had spurned the opportunity to settle.

The general rule, as stated by Miss *Makarau, is* that the pronouncement of an order does not render a tribunal *functus officio* in respect of matters ancillary to or consequential upon such order and which were overlooked when the order was made: Ex p B*arclays Bank supra* at 485.

I now turn to the merits of the appeal before the Tribunal. On 30 July 1992, ZESA's deputy general manager addressed a letter to the respondent summarily suspending him from duty without pay. The letter reads:

> "You are hereby suspended from duty without pay with immediate effect (31 July 1992) in terms of Statutory Instrument 371 of the Labour Relations Act 1985 section 3(a) and 3(d) as read in conjunction with the, ZESA Code of Conduct section 2.4. 1 (a).
>
> The charges levelled against you are:
>
> (a) You were arrested on 8 April 1992 after a traffic accident and you were found guilty.
>
> (b) You authorised subordinates to alter quantities on MORFS (Material Order Requisition Forms) and approved LPOS (Local Purchase Orders) which is a violation of budgetary controls and procurement procedures.
>
> You will be advised of the date of the disciplinary bearing."

It was noted by the Tribunal that, under s 3 of the Regulations, "where an employer has good cause to believe that an employee is guilty of any of the offences enumerated above, the employer may suspend such employee without pay and other benefits and *shall forthwith apply* to a labour relations officer for an order or determination terminating the contract of employment" (emphasis added); and that the application to terminate the respondent's

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employment having been made nearly four months after the respondent's suspension, it was not tenable to argue that it was made forthwith.

In *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1996 (1)ZLR 123 (S) GUBBAY CJ emphasised the need to make a timeous application when he said at p 131D that

> "The word 'forthwith', though not as peremptory as 'immediately', means as soon as is reasonably possible in the circumstances."

In that case, the learned CHIEF JUSTICE held that the delay of six weeks between the suspension and the application to terminate the employee's contract was such as to render the suspension inoperative.

The situation may be somewhat different if there is in place a registered code of conduct., for s 10 1 (5) of the Labour Relations Act *[Chapter 28:011* ("the Act") in effect provides that a code of conduct, which is registered in terms of the Act, supersedes for a period of thirty days the provisions of s 3(1) of the Regulations. Subsections (5) to (7) of s 101 of the Act read:

> "(5) Notwithstanding this Part, but subject to subsection (6), no labour relations officer or senior labour relations officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under a code, nor shall he intervene in any such proceedings.
>
> (6) If a matter is not determined within thirty days of the notification referred to in paragraph (e) of subsection (3), the employee or employer concerned may refer such matter to a labour relations officer, who may then determine or otherwise dispose of the matter in accordance with section *ninety-three.*
>
> (7) Any person aggrieved by
>
> (a) a determination made in his case under a code; or
>
> (b) the conduct of any proceedings in terms of a code;
>
> may, within such time and in such manner as may he prescribed, appeal against such determination or conduct to the Tribunal."

This laxity in the duty to make an application *forthwith* where a code is

registered in terms of the Act is not accorded to situations where there is no code of conduct or, if there is one, it is not registered in terms of the Act. And even where there is a code registered in terms of the Act, the imposition of a grace period of thirty days before the intervention of a labour relations officer makes more pertinent the observation by the CHIEF JUSTICE in the *Matsika* case *supra* that "'forthwith' means as soon as is reasonably possible in the circumstances". In the instant case a delay of nearly four months between the suspension and the application to terminate is intolerable.

An unregistered code, however, remains subservient to the Regulations, the non-compliance with which may render a suspension inoperative: *Matsika's* case *supra*. There was ample

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evidence on record that at the relevant time ZESA had no code of conduct registered in terms of the Act or SI 379 of 1990. In my view, the point that there had been inordinate delay in making the application for termination of the respondent's contract of employment should have been taken by the Tribunal and his suspension declared inoperative. The delay in making the application was, in all fairness, considered by the Tribunal, but it expressed the view that: "it would not he proper to nullify the application on account of that procedural irregularity". The Tribunal did not explain why it would not be proper to do so. And I can find nothing improper in declaring a suspension which is depriving a person of his livelihood inoperative, if it is inoperative.

Failure to comply with the provisions of the Regulations amounts to an irregularity which is a point of law that can be raised at any time. It seems that to raise a point of law for the first time on appeal:

> "... it is sufficient to show that the point of law which is the subject of appeal has been brought before the judge's mind. Whether this is effected by argument or observation of the advocate, or whether the judge's own mind originated the point, makes no difference, so long as the point was before his mind in the case under appeal":

per AVORY J in *Kimpson v Markham [*1921] 2 KB 157 at 16 1.

A not dissimilar approach was adopted by INNES J in *Cole v Government of the Union of South Africa* 19 10 AD 263 at pp 272-3, cited with approval by JANSEN JA in *Paddock Motors (Pty) Lid v Igesund* 1976 (3) SA 16 (A) at 23D-F thus:

> " It is clear that:

KORSAH JA

> 'the duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it'

(*per* INNES J in Cole *v Government of the Union of South Africa 19* 10 AD *263* at p 272*).* For this reason the raising of a new point of law on appeal is not precluded, provided certain requirements are met.

> 'If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a court of appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong'."

The fact that the respondent was suspended by ZES A on 31 July 1992 was common cause; so also was it common cause that an application by ZESA to the labour relations officer for permission to dismiss the respondent was made on *21* October *1992.* Both the letter of suspension and the application to dismiss are exhibits in the record. There is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. The Tribunal should have taken proper cognisance of the irregularity and declared the suspension inoperative: *Matsika's* case *supra*.

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Since 1 have found the suspension of the respondent to have been inoperative due to the delay in applying for dismissal, there is no need to consider the grounds on which the Tribunal based its determination; for, die order to suspend being inoperative, there was nothing pending for determination by the Tribunal or the other fora that purported to determine the lawfulness or otherwise of what was not operative.

Mr *Carter* again rightly submitted that, in the light of the judgment in *Ilama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S), the respondent concedes that the Tribunal was obliged to comply with the proviso to s *96(1)(c)* of the Act and specify an amount of damages to be awarded to the respondent as an alternative to reinstatement.

Accordingly:

KORSAH JA

1. The appeal is dismissed with costs.
2. The matter is remitted to the Tribunal for assessment of damages as an alternative to reinstatement.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Makarau & Gowora, appellant's legal practitioners

James, Moyo-Majwabu & Nyoni, respondent's legal practitioners

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COPPER TRADING CO (PVT) LTD v CITY OF BULAWAYO 1997 (1) ZLR 134 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

1 August 1996 & 27 January 1997 Judgment No. S-261-96

Flynote

Contract - formation - contract not capable of being performed - whether contract enforceable

Practice and procedure - pleadings - amendment - defence erroneously abandoned - whether pleadings can be amended to revive defence - principles - fundamental issue not capable of being resolved unless defence revived - amendment granted

Headnote

The Government of Zimbabwe received a loan from the World Bank for urban development

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projects. The Bulawayo City Council was one of beneficiaries under the scheme and invited tenders for the supply of a wide variety of goods. The appellant company tendered for the supply of vehicles and plant. The Council had placed an advertisement inviting the tenders. The advertisement made it clear that the Council could only enter into a binding agreement only upon the terms and conditions of the loan agreement, except as the World Bank may otherwise agree. The Council could bind itself to perform only when the Government consented to the release of funds to cover a bid.

In correspondence, the Council advised the appellant that it accepted the appellant's bid, subject to two conditions. One related to the outcome of negotiation between the Council and the Government with regard to waiver of duties and taxes. The other required the appellant to comply in all respects with the general conditions of the contract specification, which formed part of the tender documents. It was not clear from those documents whether a binding contract came into effect by virtue of the

exchange of correspondence or after the contract form had been formally subscribed by both parties. The appellant's contention is that the former was the case and that the conditions referred to in the correspondence should be regarded as having been fictionally fulfilled. The Council in its opposing affidavit denied that there was a contract. However, at the initial hearing of the matter before the High Court, a supplementary affidavit was filed by the Council, in which the Council abandoned the defence originally pt forward but it still denied that there was a contract. In an affidavit filed later in support of an application to join the Government and the World Bank as co-respondents, the Council repeated in greater detail the defence raised in the first supplementary affidavit and sought to resuscitate the defence originally raised, that the agreement was subject to the result of the negotiations with the Government. The appellant contended that it was no longer open to revive the defence previously abandoned.

Held, that the granting or refusal of leave to amend is a matter entirely within the discretion of the trial court, with which an appeal court ought to be very chary in interfering. However, where a party comes to court and declares that in order that justice might be done it is necessary to alter the record to revive a defence erroneously abandoned, the judge may grant such amendments as are necessary for the purpose of determining the real question in controversy. The question here was whether the exchange of correspondence created a legally binding agreement. The resolution of that issue was fundamental to the dispute between the parties.

Held, further, that to determine the secondary issues without resolving the fundamental one would be a fruitless exercise, divorced from reality and may lead to a wrong decision. It is paramount that the discretion reposed in the courts in respect of amendments be exercised in a manner which allows the issues between the parties to be fairly tried. The fact that the amendment might lead to the defeat of the other party is not the kind of prejudice which should weigh with the court. The trial court ought to have allowed the Council to revive the defence which, in an erroneous appreciation of the legal position, it abandoned.

Held, further, that there was no general proposition of law that all contracts must *prima facie* be performed whether performance is possible or not. The very fact that in some cases impossibility of performance is an excuse shows that in those cases there is no absolute

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promise; it is conditional upon something, the possibility of performance. A contract is void if at the time of its inception its performance is impossible.

KORSAH JA

Cases cited:

de Beers Hdlgs (Pvt) Ltd v CIR 1986 (1) SA 8 (A)

Ex p de Jager 1950 (4) SA 583 (E)

Gcayiya v Min of Police 1973 (1) SA 130 (A)

G M F Kontrakteurs (Edms) Bpk & Anor v Pretoria City Council 1978 (2) SA 219 (T)

Laws v Rutherfurd 1924 AD 261

Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A)

Peters, Flamman & Co v Kokstad Municipality 1919 AD 427

Case Information

C W Jordaan SC, with him *D P Carter*, for the appellant

J C Andersen SC, for the respondent

Judgment

Korsah JA: On 9 February 1996, the High Court, Bulawayo, dismissed with costs the appellant's application for a declaratur:

1. that there is a binding contract between the parties in terms of which the applicant is obliged to supply to the respondent all items contained in Lot C (trucks) (excluding additional items 2.13.1, 2.13.2 and 2.13.3) in terms of the letter of the respondent of 5 May 1995, and the respondent is obliged to pay upon delivery and fulfilment of the terms of the contract the price of $28 553 115,25 to the applicant;

2. that the respondent shall present to the applicant within ten days hereof such documents as are necessary for the purposes of the respondent to set out the terms of the aforesaid contract and the applicant shall thereafter sign such documents; and

3. that the respondent shall pay the costs of the application.

This matter commenced with the granting of a loan by the World Bank to the Government of Zimbabwe for urban development projects. The respondent was one of the beneficiaries under the scheme. In accordance with the scheme, the respondent invited tenders from members of the public for the supply of a wide variety of goods in terms of the "Guide-lines and Procedures for Tender Opening, Tender Evaluation and Contract Preparation for Urban II Projects". The

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appellant put in a bid for the supply of vehicles and plant to the respondent.

In the tender documents furnished to bidders are to be found in s II "Instructions to Bidders". Clause 1.1 of those instructions reads:

KORSAH JA

> "1.1 The Government of Zimbabwe has received a loan from the World Bank, hereinafter referred to as 'International Financial Institution' (IFI) in various currencies towards the financing of a number of Urban Development Projects and intends to apply part of the proceeds of this loan to eligible payments under the contract(s) for which this invitation for bids is issued. Payment by the IFI will be made only at the request of the Government of Zimbabwe and upon approval by the IFI in accordance with the terms and conditions of the loan agreement and will be subject in all respects to the terms and conditions of that agreement. Except as the IFI may specifically otherwise agree, no party other than the Government of Zimbabwe shall derive any rights from the loan agreement or have any claim to the loan proceeds."

It seems to me clear, from the above clause, that the providers of the fund are giving notice to would-be bidders that the respondent can enter into a binding agreement relating to the fund only upon the terms and conditions of the loan agreement, except as the IFI may specifically otherwise agree. It is also obvious, from the source of the funding of the scheme, that the respondent can bind itself to perform only when the Government of Zimbabwe consents to the release of funds to cover a bid.

Clauses 32.1 and 32.2 provide that:

" 32.1 Prior to the expiration of the period of bid validity, the Purchaser will notify the successful Bidder in writing by registered letter or by cable or telex, to be confirmed in writing by registered letter, that its bid has been accepted.

32.2 The notification of award will constitute the formation of Contract."

It is evident from the language of clause 32 that a bid is to be considered as an offer and an award in terms of the bid constitutes the acceptance which brings about a contract between the parties.

Clause 33, which deals with the parties subscribing to the contract, recites that:

> "33.1 At the same time as the Purchaser notifies the successful Bidder that its bid has been accepted, the Purchaser will send the Bidder the Contract Form provided in the Bidding Documents, incorporating all agreements between the parties.

KORSAH JA

> 33.2 Within thirty days of receipt of the Contract Form, the successful Bidder shall sign and date the contract and return it to the Purchaser."

On 5 May 1995, the respondent, through its Town Clerk, addressed a letter (Annexure "A") to the appellant as follows:

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" Dear Sir,

CONTRACT 27/1993 - SUPPLY OF VEHICLES AND PLANT FOR THE CITY OF BULAWAYO

With reference to the above-mentioned tender and your submissions, I am pleased to inform you that the Council resolved (1 March 1995) with the concurrence of the Zimbabwe Government and the World Bank received on 3 May 1995, that your company *be awarded the contract to supply* all items contained in Lot C (trucks) (and excluding additional items 2.13.1, 2.13.2 and 2.13.3); at a total price of Z$28 553 115,24 (CIF and Inland delivery costs).

The award is *subject to (the) result of negotiations* between the Bulawayo City Council and the Zimbabwe Government on the waiver of duties and taxes.

The award of the contract to your company is *also subject to it complying in all respects with the general and special conditions of the contract specifications which form part of the tender documents signed by you.*

I would, therefore, be grateful if you would indicate the *acceptance of this offer as soon as possible, in writing, to enable me to finalise the contracts"* (emphasis added).

In response to the above letter, the managing director of the appellant replied as follows on 8 May 1995 (Annexure "B"):

" Dear Sir,

RE: CONTRACT 27/1993: SUPPLY OF VEHICLES AND PLANT

I acknowledge receipt of your offer letter referenced TSN/SN.CON 27/93 of 5 May 1995.

I hereby inform you that this Company does accept your offer and await to receive the contracts from you for signing."

KORSAH JA

Without attempting to resolve the issues raised by the above communications, it would appear that the letter of acceptance by the respondent must be subject to the two conditions stipulated in the letter of offer from the respondent, viz:

(a) the results of negotiations between the Bulawayo City Council and the Zimbabwe Government on the waiver of duties and taxes; and

(b) the appellant complying in all respects with the general conditions of the contract specifications which form part of the tender documents signed by the appellant.

Section III of the said Tender Documents provides for the General Conditions of Contract. Clause 1.1(a) thereof spells out what a contract is in these terms:

"1.1(a) The Contract' means the agreement entered into between the Purchaser and the Supplier, as recorded in the Contract Form signed by the parties, including all attachments and appendices thereto and all documents incorporated by reference therein" (emphasis supplied).

Clause 2.1 of the General Conditions of Contract declares that:

"These General Conditions shall apply to the extent that they are not superseded by provisions in other parts of

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the Contract."

It is not clear from the above whether a binding contract came into being by virtue of the exchange of correspondence between the parties on 5 and 8 May 1995, or whether a binding contract comes into being only after the Contract Form has formally been subscribed to by the parties, as clauses 1.1(a) and 2.1 of the General Conditions of Contract seem to suggest. The position is rendered even more confusing by the provision in the penultimate paragraph of the Bid Form in s VII of the Tender Documents, signed on behalf of the appellant, that -

> "Until a formal contract is prepared, this bid, together with your written acceptance thereto and your notification of award, shall constitute a binding contract between us" (emphasis supplied).

The Bid Form was part of the tender documents furnished by the respondent to the appellant. Was the statement in the penultimate paragraph of the Bid Form intended to create a binding legal relationship, or does a binding legal

relationship come into being only after the parties have appended their signatures to a formal contract?

The confusion is worse confounded by the recital in para 1 of the Contract Form that -

> "In this Agreement, words and expressions shall have the same meanings as are respectively assigned to them in the Conditions of Contract referred to." (I.e. "the agreement ... as recorded in the Contract Form signed by the parties").

Clauses 12 and 14 of the World Bank Summary of Guide-lines and Procedures for Tender Opening, Tender Evaluation and Contract Preparation for Urban II Projects stipulate that -

> "12. When the Council is given No-objection of awarding of tender, (the) Programme Co-ordinating Monitoring Unit (PCMU) notifies the Council, who in turn notifies the winning tenderer by way of Letter of Acceptance. This tells the Contractor exactly what the Council accepts, the contract price and implementation period. The contractor shall then within the time period specified in the tender documents, provide the required Performance Security and Security of Advance Payment, if he has requested for advance payment in his tender.
>
> However, should a contractor, after having received the Letter of Acceptance, (for) any reason decide to withdraw his tender, the Bid Security he has submitted, shall be forfeited.
>
> ...
>
> 14. A draft contract document shall be sent to (the) PCMU for approval. This draft contract shall include all the correspondence occurred after the issuance of tender, and be copied from the original tender document submitted by the contractor, to ensure that all the two-way information between the Council and the contractor is included in the draft contract document. The draft contract shall also have the Form of Agreement completed but not signed. Any missing information in the Contract Data shall be completed in the draft contract. When (the) Programme Co-ordinating Monitoring Unit (PCMU) in co-operation with (the) MPCNH for on site services, has checked and are satisfied that the draft contract document contains

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> all the required documents, the Council will be advised and given No-objection to sign the contract. Together with the draft contract, the Council shall submit a breakdown of the contract sum into local currency component and foreign currency component" (emphasis supplied).

It was the contention of the appellant in its founding affidavit in the court of first instance that the letters of 5 and 8 May 1995 established a binding legal agreement between the parties, for which it was entitled to specific performance. See the draft order above.

In its opposing affidavit to the application, it was stated on the respondent's behalf in paras 5 and 6 that:

" 5. As clearly appears from the second paragraph of Annexure 'A' (quoted above) to (the) applicant's said affidavit the contract in question was awarded to (the) applicant subject to the result of negotiations between the Bulawayo City Council and the Zimbabwe Government on the waiver of duties and taxes.

6. The afore-mentioned negotiations have not yet been finalised and (the) respondent accordingly denies that there is a binding contract between it and (the) applicant as alleged in para 8 of (the) applicant's said Affidavit."

The applicant in its answering affidavit denied that the negotiations between the Bulawayo City Council and the Zimbabwe Government had not yet been completed, and averred in the alternative that if the negotiations had not been finalised then the conditions ought to be regarded as having been fictionally fulfilled because it was an implied term of the agreement that the respondent was obliged to take reasonable steps and to act expeditiously in order to procure the fulfilment of that condition.

At the initial hearing of the matter on 10 November 1995, the trial court granted leave to the respondent to introduce a supplementary affidavit. Paragraph 2 of the "Supplementary Opposing (Replying) Affidavit" is as follows:

" That the respondent after further consideration and in the light of the contents of the remainder of this Affidavit no longer relies on the point taken in its Opposing (Relying) Affidavit."

The learned trial judge correctly observed that the only point raised in the

respondent's original opposing affidavit was that the contract between the parties was subject to the result of negotiations between the Bulawayo City Council and the Government of Zimbabwe on the waiver of duties and taxes. Thus the respondent abandoned the defence which it had originally put forward in its opposing affidavit.

The respondent alleged in para 3 of its supplementary affidavit:

> "3. That very shortly after Annexures 'A' and 'B' to (the) applicant's founding affidavit were written and received by (the) respondent various queries were raised by the World Bank, the Ministry of Local Government, Rural and Urban Development, and the Programme Co-ordinating Monitoring Unit (PCMU) of such Ministry relative to the validity of the bid submitted by the applicant, which queries led such bodies to believe that either actual or

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potential misprocurement had taken place in regard to the applicant's bid."

By paras 7, 8 and 9 of the said affidavit the respondent averred that it had a valid defence to the appellant's claim on the following grounds:

" 7. ...

(a) That the applicant was at all material times aware that the funds required by the respondent to pay the purchase price of the relevant trucks were to be made available to (the) respondent via a World Bank loan to the Government of Zimbabwe. Such fact was publicised in the Press and was furthermore notified in the Tender Documents referred to by (the) applicant in its Founding Affidavit. In such regard I annex hereto marked 'F' and 'G' copies of two pages of such Tender Documents and refer to Clauses 1 and 1.1 ...

(b) That the applicant was accordingly aware that in inviting bids for the supply of the relevant trucks (the) respondent was dependent upon the aforementioned funds being made available to it to pay the purchase price thereof to the successful bidder.

(c) That the whole tender process was accordingly dependent upon the necessary funds being made available to the respondent and, accordingly.

(d) That no finally binding contract exists or can exist between the

KORSAH JA

applicant and the respondent until such time as the necessary funds have been made available to (the) respondent.

8. That the present official position between the respondent and the Ministry remains as set out in Annexure 'E' hereto and that the funds required by the respondent as aforementioned have not been made available to it, nor will such funds be made available to it unless the Ministry should change its position appropriately.

9. That (the) respondent accordingly denies that there is presently a binding contract between (the) applicant and (the) respondent sufficient to entitle (the) applicant to the Order sought by it."

An application was subsequently filed on behalf of the respondent to have the Government of Zimbabwe and the World Bank joined as co-respondents. The affidavit in support of that application, apart from repeating in greater detail the defence raised in the first supplementary opposing affidavit, sought to resuscitate the defence which was raised in the original opposing affidavit, that the agreement was subject to the result of negotiations between the respondent and the Government of Zimbabwe concerning the waiver of duties and taxes. In other words, the exchange of correspondence on 5 and 8 May 1995 did not result in a legally binding agreement between the parties.

Mr Jordaan contended before the trial court that, after the abandonment of the defence that the waiver of taxes and duties by the Government of Zimbabwe was a condition precedent to the creation of a binding legal relationship, it was no longer open to the respondent to revive it: Laws v Rutherfurd 1924 AD 261 at 263; Ex p De Jager 1950 (4) SA 583 (E) at 588A-C. And in Gcayiya v Min of Police 1973 (1) SA 130 (A) it was held that the applicant could not on appeal raise a defence which he had specifically abandoned at the trial. It is, however, to be noted that this was an accident case and the amendment would have entailed the complete rejection of

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the plaintiff's case as made out in his declaration and supported by his evidence. It is impermissible for a plaintiff to rely on evidence which runs counter to his declaration. This was not so in the instant case.

Although Mr Andersen argued to the contrary that the respondent's original defence could be revived, the learned trial judge held that the right to rely on the defence raised in the original opposing affidavit had, by express abandonment in the supplementary opposing affidavit, perished for all time.

Admittedly, the granting or refusal of leave to amend is a matter entirely in

the discretion of the trial judge, with which this court ought to be very chary in interfering. But the discretion reposed in a judge must be judicially exercised. It seems to me that, where one of the parties comes to the court and declares that in order that justice may be done it is necessary that the record should undergo an alteration by allowing him to revive a defence erroneously abandoned, the judge may, in the judicial exercise of the discretion reposed in him, and having regard to all the circumstances of the case, grant such amendments as are necessary for the purpose of determining the real question in controversy.

Thus in Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at 24 Jansen JA said:

> "If for example, the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision ... If the contention the appellant seeks to revive is good, and the other two bad, it means that this court, by refusing to investigate it, would be upholding a wrong order. In all the circumstances it seems necessary for a proper adjudication to allow the appellant to revive its contention as based on the first question of law stated in the special case."

See also de Beers Holdings (Pvt) Ltd v Commr of Inland Revenue 1986 (1) SA 8 (A) at 33E-G.

The question here sought to be revived is whether the exchange of the correspondence, referred to in the appellant's founding affidavit, created a legally binding agreement between the parties. The resolution of that issue is fundamental to the dispute between the parties from which the secondary and dependent issues emanate. To determine the secondary and dependent issues without resolving the fundamental issue would be, in the words of Jansen JA, "a fruitless exercise, divorced from reality, and may lead to a wrong decision". It is paramount that the discretion reposed in the court in respect of amendments be exercised in a manner which allows the issues between the parties to be fairly tried. The fact that the amendment might lead to the defeat of the other party is not the kind of prejudice which should weigh with the court: G M F Kontrakteurs (Edms) Bpk & Anor v Pretoria City Council 1978 (2) SA 219 (T) at 222C-F.

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KORSAH JA

I am firmly of the view that the trial court, in the exercise of its discretion, ought to have allowed the respondent to resuscitate the defence which, in an erroneous appreciation of the legal position, it abandoned, so that the real controversy between the parties may be finally determined.

I would be doing less than justice to the appellant if I do not consider its main contention, that -

> "The court *a quo*, having correctly found that the parties had concluded a contract which had become perfecta on the writing of the letter of acceptance dated 8 May 1995, erred in law and/or in fact in not granting the order sought by the appellant."

To begin with, I know of no general proposition of law that all contracts must *prima facie* be performed whether performance is possible or not. There are, however, some contracts which are absolute in their nature whether or not the promissor warrants the possibility of performance - such as a contract where A promises to sell to B a house the right and interest in which has not been secured by A - thus he is bound to perform in any event or pay damages in breach thereof. There are other cases, however, where the promissor is only obliged to perform if he can. In a contract for personal performance where the promissor dies, or in certain other cases where the subject matter of the contract is destroyed, he cannot implement his promise. In such cases the promissor is excused performance unless he was in some way at fault, such as destroying the subject matter, either through his negligence or deliberate act. In either case, to make him liable his fault must be proved by the party who alleges that it destroys hs excuse.

The very fact that in certain cases impossibility of performance is an excuse shows that in those cases there is no absolute promise. It is conditional upon something - namely the possibility of performance.

The law was succinctly stated by Solomon ACJ in Peters, Flamman & Co v Kokstad Municipality 1919 AD 427 at 434-435, approved by Professor Christie in The Law of Contract in South Africa 2 ed p 503, as follows:

> "By the Civil Law a contract is void if at the time of its inception its performance is impossible: impossibilium nulla obligatio (D 50.17.185). So also where a contract has become impossible of performance after it had been entered into the general rule was that the position is then the same as if it had been impossible from the beginning: *etsi placeat*

KORSAH JA

> *extingui obligationem si* in *eum casum incideret a quo* incipere non potest (D 45.1.140.2) ... It is true that there are exceptions to the general rule laid down in the Lex of the Digest cited above, which concludes thus: 'Non tamen hoc in omnibus verum est'. For the purpose of this appeal, it is not necessary to discuss the exceptions ..."

Nor is it necessary to consider generally the circumstances in which it can be said that a contract has become impossible of performance since that issue has, implicit in the order of the trial court, been referred to trial.

I say implicitly referred to trial because the learned trial judge stated that -

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"I have found that there was a contract. But before I can accede to the applicant's prayer, I must go further and decide if such contract is a binding one in the sense that it is not vitiated by such things as misrepresentation, mistake, or fraud or void for any other ground."

He then declared that he was unable to resolve the conflict, as to whether or not there had been misprocurement, on the papers and said:

"If the respondent proves that the contract is vitiated in any way by the manner in which (the) applicant's bids were made then it would follow that it is not bound by the agreement."

It seems to me apt that the trial court which is to decide whether the contract is vitiated in any way should also be seized of the issue whether the correspondence between the parties on 5 and 8 May 1995 resulted in a binding legal agreement between the parties.

For the reasons I have stated, I would make the following order:

1. That the appeal against the refusal of the High Court to grant a declaratur on the papers filed is dismissed with costs.

2. That that part of the judgment which declared that the parties had concluded a contract which had become perfecta on the writing of the letter of acceptance dated 8 May 1995 is hereby set aside.

3. That the order of the High Court is hereby set aside and substituted with the following:

   "a. The application for a declaratur is dismissed with costs.

KORSAH JA

   b. The whole matter is referred to trial.

   c. The costs in the matter are reserved for the trial court."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Ben Baron & Partners, appellant's legal practitioners

Coghlan & Welsh, respondent's legal practitioners

PTC v CHIHORO 1997 (1) ZLR 148 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Appeal against decision of Labour Relations Tribunal

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21 & 28 January 1997Judgment No. S-4-97

Flynote

Employment - contract - termination - wilful disobedience to lawful order - refusal to carry out order on grounds of illness - when may be justified - lawful order - what is - whether lawful order must also be reasonable

Headnote

The respondent was employed by the PTC as a postal messenger. One afternoon, he told his immediate superior that he was feeling unwell and asked to leave early to visit his doctor. He was told to continue until 3 pm. On his way out, he was handed some telegrams to deliver before going to the doctor. Some he delivered, the others he brought back. In spite of being told to do so, he refused to complete the delivery on the grounds that unless he left immediately he would not be attended to by his doctor. He left, was seen by his doctor, who found him to be suffering from arthritis and recommended two days' bed rest.

The PTC applied for an order terminating the respondent's employment on the grounds of his wilful disobedience to a lawful order. The Labour Relations Tribunal found that the order to deliver the remaining telegrams was unreasonable as it would have resulted in danger to the respondent's health or life. The PTC appealed against this finding.

Held, that the refusal to deliver the telegrams was wilful disobedience by the respondent. Delivery of telegrams was an important part of his work.

Held, further, that a sick employee would only be justified in refusing to carry out an order relating to the character or capacity of his contract of employment if his illness were such as to make compliance with the order impossible.

GUBBAY CJ

Held, further, that the facts did not warrant a finding that the order given to the respondent was one which jeopardised his health or life. His state of health was not such as to make performance of his duty impossible or even difficult. The most that could be said was that the respondent had a moral excuse for his disobedience or that his immediate superior may have been somewhat uncharitable.

Held, further, that there is no requirement that a lawful order must also be reasonable; but if it is so unreasonable as to defy common sense then it cannot be lawful. Something is "lawful" if it is in conformity with, or frequently not opposed to, the principle or spirit of the law, whether moral or judicial. An order so unreasonable as to oppose that spirit or principle cannot be lawful. Implicit in lawful is what is not unreasonable.

Dicta in *National Foods Ltd v Masukusa* 1994 (1) ZLR 66 (S) at 69B-C explained.

Cases cited:

Marshall v Alexander Sloan & Co Ltd [1981] IRLR 264

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Matereke v C T Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (S)

National Foods Ltd v Masukusa 1994 (1) ZLR 66 (S)

Punjabhai v Bhagwandas (1928) ILR 53 Bom 309 (CA)

R v Qumba 1930 CPD 396

Turner v Mason (1845) 153 ER 411

Case Information

A J Dyke, for the appellant

L T Biti, for the respondent

Judgment

Gubbay CJ: This is an appeal brought pursuant to s 97(1)(a) of the Labour Relations Act [Chapter 28:01] against the decision of the Labour Relations Tribunal ("the Tribunal"). It set aside the determination of a senior labour relations officer to the effect that the respondent, Mr Timothy Chihoro, had breached s 3(1)(b) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985) ("the Regulations"), and ordered instead that he be reinstated in the employment of the appellant, the Posts and Telecommunications Corporation.

The facts upon which the appeal turns, as found by the Tribunal, may be stated as follows.

The respondent was employed as a postal messenger at Cranborne Post Office in Harare. His duties, as one would expect, included the delivery of letters and telegrams in the area falling under the responsibility of the afore-

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mentioned Post Office. A Mr Chipadze, a postman higher grade, was the respondent's immediate superior.

During the early hours of the afternoon of 28 February 1994, the respondent informed Mr Chipadze that he was feeling unwell and requested permission to leave before the normal closing time in order to consult his doctor. He was told to continue with his work until 15.00 hours. A short while later, when the respondent was changing out of his uniform ready to depart, he was handed telegrams to deliver by Mr Chipadze. The number was not clearly established, but did not exceed seven and was probably five. Mr Chipadze instructed the respondent that the telegrams had to be delivered by him before he went to the doctor. The respondent delivered all but three of the telegrams. He then returned to the Post Office where he was ordered by Mr Chipadze to complete the delivery. The respondent refused to do so. He protested that unless he departed immediately he would not be attended to. Mr Chipadze, however, was unsympathetic to the respondent's problem. He was adamant that the three

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remaining telegrams were to be deliverd. The respondent was defiant. He placed the undelivered telegrams on Mr Chipadze's desk and left the Post Office. He was examined by his doctor later that afternoon and found to be suffering from arthritis. A couple of days' bed rest was recommended.

On 29 August 1994, after suspending the respondent without pay and other financial benefits with effect from that date, the appellant applied in terms of s 3(1) of the Regulations for an order or determination terminating the respondent's contract of employment on the ground of his wilful disobedience to the lawful order given him on 28 February 1994.

It was upon this factual summation that the Tribunal held that as the order to deliver the outstanding three telegrams was not reasonable, for its performance would have resulted "in danger to the health and life" of the respondent, he was not guilty of wilful disobedience. In the words of the Chairman:

> "The order for (the employee) to abandon his proposed visit to his doctor and instead go and deliver the telegrams was an unlawful order and as such he was justified in disobeying it."

The observation that the order was one that jeopardised the health and life of the respondent, in my view, was totally unwarranted on the facts. There was no evidence in support of it. Indeed, it was not the respondent's case that he was physically incapable of carrying out the order. His reason for not completing the task at hand was that he was not feeling well and wanted to

be at the surgery before it closed for the afternoon. He did not even claim to be undergoing some form of treatment which necessitated that he be attended to by his doctor that particular afternoon. It is apparent that if the surgery was due to close at an hour which would have enabled the respondent to deliver all the telegrams, he would have done so. His state of health was not such as to make performance of that duty impossible or even difficult.

In Matereke v C T Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (S) this court had occasion to consider the law relating to the dismissal of an employee for wilful disobedience to a lawful order. It was held that two requirements had to be met. First, there must be a deliberate and serious refusal to obey. Knowledge and deliberateness must be present. The disobedience must not be trivial. It must be such as to be likely to undermine the relationship between the employer and the employee. It must go to the very root of the contract of employment (see at 211G-212A).

Second, the disobedience must be directed at an order appertaining to the character or capacity of the employee's contract of employment. An order which involves a reasonable apprehension of immediate danger to life or limb of the employee, not reasonably contemplated under the contract of employment, would be unlawful and justifiably disobeyed (see at 212E-G).

I entertain no doubt that the refusal to deliver the three remaining telegrams amounted to wilful disobedience by the respondent. It was disobedience of a serious degree. Delivery of telegrams is an important part of a postman's function. A postal service owes an obligation to

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both the sender and prospective recipient of a telegram to ensure speedy delivery. Undue delay cannot be tolerated in the conveyance of this form of postal communication. There can be no question but that the respondent appreciated the urgency attaching to the delivery of the outstanding telegrams; and, in that knowledge, intentionally and wilfully refused to carry out the task assigned to him.

The next issue is whether the respondent's admitted indisposition and his desire to receive treatment for the ailment from a particular doctor who closed his surgery early, justified him in disobeying Mr Chipadze's order. Or, to put the point differently, did the respondent's situation render the order unlawful?

Again, I am satisfied that the requirement of lawfulness was established. The respondent was suffering from a bout of arthritis. He was not in desperate need of medical attention. He was not faced with an emergency. Time was

not of the essence. It may have been convenient for him to be treated by the particular doctor whose surgery closed early every afternoon, but there were other doctors the respondent could have consulted after completing the delivery of the telegrams.

The decision of the Employment Appeal Tribunal of England and Wales in Marshall v Alexander Sloan & Co Ltd [1981] IRLR 264 is directly supportive of the proposition that a sick employee is only justified in disobeying an order relating to the character or capacity of his contract of employment if his illness is such as to make compliance with it impossible. The facts were these. The appellant was employed as a travelling saleslady. Her employer provided her with a motor car in which she carried the merchandise for sale. The appellant fell ill and was confined to bed. The motor car, with the merchandise, was parked in a busy street. The appellant's supervisor visited her and told her to remove the merchandise from the motor car, for it was liable to be stolen. The next day the supervisor called again. On noticing that the merchandise had not yet been offloaded, she ordered the appellant to do so. The appellant, who was still in bed, undertook to comply. When the appellant did not come to work the following day the supervisor went to recover the motor car for use by another traveller. She found the merchandise still left in it.

In upholding the decision of the Industrial Tribunal that the appellant had been lawfully dismissed, Browne-Wilkinson J (as he then was) said at 265:

> "Obviously, there has to be some term implied in the contract limiting the employee's obligation to perform all the terms of his contract of employment during such time as he is sick. But one does not imply into any contract any term wider than is necessary to give it business effect. In our view business commonsense does not require that all obligations of an employee are suspended during sickness. The commonsense implication is that the employee is relieved of the obligation to perform only those duties as the sickness from which he is suffering prevent him from carrying out.
>
> ... (Mrs Marshall's) sickness was not of a kind which prevented her from carrying out her undoubted obligation not to leave the merchandise in the motor car. Therefore she could lawfully be ordered to remove it."

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See also the similar approach of Parke B in Turner v Mason (1845) 153 ER 411, cited with approval in Matereke's case *supra* at 212 in fine - 213C.

GUBBAY CJ, McNALLY JA, KORSAH JA

The very highest that one can put the respondent's case is that he had a moral excuse for such disobedience. Or, perhaps, that Mr Chipadze may have been somewhat uncharitable in not permitting him to leave work early and in not instructing another postal messenger to make the deliveries.

In the result, the appeal is allowed with costs. The order of the Tribunal allowing the appeal against the determination of the senior labour relations officer is set aside. In place thereof is substituted the following:

> "The appeal is dismissed."

McNally JA: I agree.

Korsah JA: I entirely agree with the reasons for the decision so eloquently expressed in the judgment of the learned Chief Justice. However, I am of the view that I must set right a view expressed by me in another case.

Mr Biti, before this court, relied on the following statement made by me in *National Foods Ltd v Masukusa* 1994 (1) ZLR 66 (S) at 69B-C:

> "While there is no fixed rule as to what will justify summary dismissal, it is generally accepted that wilful disobedience to the lawful and reasonable order of the employer ... may justify summary dismissal."

He sought to argue that to justify dismissal for wilful disobedience the order must not only be lawful but that it must be reasonable as well.

Any confusion that my introduction of the word "reasonable" may have created in what conduct may justify summary dismissal was unintended. What is a reasonable order must necessarily rest on the circumstances of each case. There is no requirement that a lawful order must in addition be reasonable. If an order be so unreasonable as to defy common sense then it cannot be a lawful order. For instance, if the respondent herein had been ordered to go and deliver the telegrams immediately after suffering an epileptic seizure the order would have been so unreasonable that it could not be categorised as lawful, and disobedience to it would not justify summary dismissal. Similarly, if the respondent had been requested to deliver the telegrams at a place where a riot was in progress it may well be that his refusal to comply with the order would not justify his summary dismissal.

It is not an offence to refuse to obey an unreasonable order, for such an order

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is not a lawful order: R v Qumba 1930 CPD 396. And in the Indian case of Punjabhai v

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Bhagwandas (1928) ILR 53 Bom 309 (C) (cited in Words and Phrases Judicially Defined) Mirza J expressed the view that -

> '"Lawful' is what is in conformity with (or frequently not opposed to) the principle or spirit of the law whether moral or judicial."

An order so unreasonable as to oppose the principle or spirit of the law cannot be lawful.

What I said in the National Foods case *supra* should be read in this light. Implicit in lawful is what is not unreasonable.

Coghlan, Welsh & Guest, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

NKOMO v MUJURU 1997 (1) ZLR 155 (HC)

Court **High Court, Harare**

Robinson J

Civil application

20, 22 & 30 January 1997 Judgment No. HH-15-97

Flynote

Contract - enforceability - assignment of immovable property - seller holding property under a lease - term of lease that lessee should not cede or assign lease or alienate the property without lessor's consent - seller seeking to cancel sale on grounds that it was void *ab initio* - whether agreement valid *inter partes*

Headnote

The applicant entered into a written agreement with the Government under which the Government leased to him a stand in Westwood, Harare, for a period of two years. The lease provided that the applicant should erect buildings worth at least $250 000, the building to begin not more than 9 months after the lease was signed. At the end of the lease period, the applicant would be entitled to purchase the stand. It was a term of the agreement that the applicant, as lessee, should not cede or assign the lease, or sublet or alienate the stand without the lessor's written consent. In spite of this clause, the applicant entered into an agreement with the respondent, in which he ceded to the respondent all his rights and obligations under the lease agreement with the Government for the sum of $25 000. He undertook to exercise his option to purchase the stand from the Government. He subsequently sought to cancel the agreement with the respondent. The ground he gave for doing so was that the respondent had erected structues on the stand without City Council approval.

The question for determination was whether the agreement with the respondent was void *ab initio* or whether, in spite of the clause requiring the lessor's consent for any alienation, the agreement was binding *inter partes*. The

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applicant argued that it was void *ab initio* on the ground that the prohibition against assignment in the lease agreement went to the substance of the applicant's rights and obligations and that any purported assignment of those rights and obligations was null and void.

Held, that the applicant's failure to comply with the condition prohibiting alienation did not amount to non-compliance with a contractual formality so as to render the agreement null and void. It was clear that the assignment was unenforceable and ineffective as against the Government at the instance of either the applicant or the respondent. On the other hand, it was not prohibited by statute or common law, nor was it contrary to public policy or contra bonos mores, nor were there statutorily required formalities to be complied with. It was therefore legally binding *inter partes*.

Held, further, that the applicant's conduct had been reprehensible. His complaints against the respondent were difficult to understand, if not groundless, and the applicant had dishonoured the agreement he had entered into.

Cases cited:

Gutu v Chimbunde & Anor HH-194-94

Hundah v Murauro 1993 (2) ZLR 401 (S)

Magwenzi v Chamunorwa \& Anor 1995 (2) ZLR 332 (S)

Paiges v van Ryn Gold Mines Ests Ltd 1920 AD 600

Pedzisa v Chikonyora 1992 (2) ZLR 445 (S)

Case Information

P Nherere, for the applicant

B S Kaseke, for the respondent

Judgment

Robinson J: When this application initially came up for hearing before me on 20 January 1997, Mr Nherere informed the court that he had been briefed at the eleventh hour to appear on behalf of the applicant and that he intended to rely on a point which had not been raised in the applicant's heads of argument filed by his instructing legal practitioners. After Mr Nherere had disclosed the point on which he would rely in argument, the matter was, by consent, postponed for hearing on 22 January 1997, when Mr Nherere informed the court that, after the hearing, he intended to file supplementary heads of argument. Consequently, after Mr Nherere had presented his argument, the parties' counsel agreed with the court's suggestion that this matter be postponed to 30 January 1997 to allow Mr Nherere time to file the applicant's supplementary heads of argument and the respondent's counsel time to consider and prepare his response

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thereto. Accordingly, this matter

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resumed on 30 January 1997 after the parties' supplementar heads of argument had been filed.

The salient facts, for purposes of the court's decision, are these:

1. In 1994 the Government, through the Minister of Local Government, Rural and Urban Development, as lessor, and the applicant, as lessee, entered into a written agreement ("the Government lease agreement") in terms of which, inter alia -

   (a) The Government let to the applicant Stand No 248 situate in the township of Westwood, Harare ("the Stand") for a period of two years from 1 August 1994 at an annual rental of $3 908, payable in advance on the 1st day of August, commencing the first such payment on 1 August 1994.

   (b) Buildings, exclusive of outbuildings, to the value of not less than $250 000 were to be erected on the Stand by the applicant at his expense during the currency of the Government lease agreement and such buildings were in all respects to comply with any building by-laws and regulations of the local authority, being the Municipality of Harare, and with plans and specifications to be approved in writing by the Harare City Council.

   (c) The applicant was to commence the erection of the buildings not later than nine months after the date of commencement of the Government lease agreement, the Government having the discretion to grant the applicant such further period within which to commence and complete the buildings, for purposes of which the Government could grant the applicant an extension of the Government lease agreement.

   (d) It was provided in clause 12 -

> "That the Lessee shall not cede or assign this lease or sublet or part with the possession of the stand/stands, or any part thereof, or alienate, mortgage, donate or otherwise dispose of the same, or cede or assign any right acquired by him/it hereunder without the previous consent in writing of the Lessor, or until title to the stand/stands shall have been granted to him/it as hereinafter mentioned."

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   (e) It was provided in clause 15 that if the lessee failed to pay the rent or any part thereof on the date when it was due and payable or if the lessee committed any other breach of the terms and conditions of the Government lease agreement or if the lessee failed to commence or complete the erection of the buildings as provided, the lessor would be at liberty forthwith to declare the Government lease agreement terminated and to take possession of the Stand and to eject the lessee

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therefrom.

(f) Upon the lessee's duly completing the erection of the buildings on the Stand during the period of the Government lease agreement or any extension thereof granted by the Government, the applicant was to have the option to purchase the Stand for $39 080 subject to certain conditions.

(b) The Stand was, in terms of clause 25, to be "used for no purpose save a creche and other uses directly ancillary thereto".

(h) It was further provided in clause 22 that should the lessee fail to carry out any of the terms, conditions or clauses of the agreement, then the lessor would have the right to cancel the agreement summarily and to eject the lessee from the Stand, in which event the lessee would not be entitled to claim compensation for any improvements constructed on the Stand by him.

2. On 13 May 1996 the applicant and the respondent entered into a written agreement headed "Memorandum of Agreement of Sale Assignment" ("the sale/assignment agreement") in terms of which, inter alia -

(a) The applicant agreed to cede, transfer and assign to the respondent all the applicant's rights and obligations under the Government lease agreement in respect of the Stand for the sum of $25 000, which sum the applicant acknowledged had been paid to him in full.

(b) The applicant, notwithstanding the provisions of clause 12 of the Government lease agreement (which are quoted in para 1(d) above), agreed to renounce and disentitle himself of all his right, title and interest in the Stand, which he thereby assigned to the respondent.

(c) Upon fulfilment of the relevant conditions in the Government lease

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agreement, the applicant undertook that he would, within seven days of request by the respondent, exercise his option to purchase the Stand from the Government and that he would, after the Stand had been transferred to him, transfer the Stand to the respondent or his nominee.

(d) The applicant guaranteed and warranted in clause 6 that the Stand would not be repossessed by the Government and that at no time would he "by word or deed or impliedly act in any manner that will prejudice the interests of" the respondent in terms of the sale/assignment agreement until such time as the respondent or his nominee had taken transfer of the Stand with the permanent improvements thereon.

Although in his legal practitioners' letter to the respondent dated 24 September 1996, being annexure C to the applicant's founding affidavit, the applicant, in seeking to cancel the

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sale/assignment agreement on the ground that the respondent had erected structures on the Stand without City Council approval, treats the sale/assignment agreement as valid *inter partes* and in his draft order the applicant seeks an order that the sale/assignment agreement be "set aside", it emerges from the applicant's founding affidavit that the applicant's contention is that since the sale/assignment agreement was entered into by the parties without the previous written consent of the Government, at a time when the applicant had not been granted title to the Stand, in breach of clause 12 of the Government lease agreement, the sale/assignment agreement is null and void.

Accordingly, the sole issue for determination in this matter is whether the sale/assignment agreement is null and void or whether, notwithstanding the fact that the agreement was entered into by the parties without the previous written consent of the Government, in breach, therefore, of the prohibition against assignment or the "pactum de non cedendo" contained in clause 12 of the Government lease agreement, the sale/assignment agreement is legally binding *inter partes*.

In this regard, it is Mr Nherere's contention that the sale/assignment agreement is null and void, not on the ground relied upon by the Supreme Court in *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S) ("Pedzisa's case"), that is to say, that the agreement in that case, which, loosely speaking, was equivalent to the sale/assignment agreement in this case, failed to comply with a contractual formality, but that it is null and void on the ground that the

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prohibition against assignment or the "pactum de non cedendo" contained in the Government lease agreement creating the rights and obligations which the applicant purported to assign to the respondent goes to the substance of those rights and obligations, with the result that any purported assignment of those rights and obligations without the previous written consent of the Government is null and void. In other words, Mr Nherere was submitting that Pedzisa's case was correctly decided by the Supreme Court but for the wrong reason.

Accordingly, I turn first to examine the present state of the law on this issue as pronounced by the Supreme Court.

As I interpret the law, in *Magwenzi v Chamunorwa \& Anor* 1995 (2) ZLR 332 ("Magwenzi's case"), the Supreme Court moved from the position adopted by it in Pedzisa's case and *Hundah v Murauro* 1993 (2) ZLR 401 (S) ("Hundah's case"). I say this for the following reasons.

In Magwenzi's case, Ebrahim JA had occasion to comment on the validity of an agreement between the lessee-to-buy and the person whom the lessee-to-buy had initially allowed to occupy the property in question under a sub-lease and to whom, later, the lessee-to-buy purported to sell the property in breach of a provision in the contract between the owner of the property, being the City of Harare, and the lessee-to-buy prohibiting the lessee-to-buy from, inter alia, parting with the possession of the property or any part thereof or from alienating, donating or otherwise disposing of the property without the prior written consent of the owner, which the lessee-to-buy had failed to obtain.

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In that case, Ebrahim JA stated at p 335G that the "agreement in Pedzisa's case, *supra*, was described as 'invalid' because it had failed to comply with a contractual formality. Kelly v Wright 1948 (3) SA 522 (A) ('Kelly's case') was cited as authority for that statement".

However, I would immediately point out, with respect, that in Pedzisa's case the learned Chief Justice did not cite Kelly's case as authority for the statement that the agreement in Pedzisa's case was invalid because it had failed to comply with a contractual formality. As Ebrahim JA himself observed in Magwenzi's case at p 335G, "With respect, Kelly's case *supra*, appears to relate to a situation where as a matter of statutory law the consent of an official was required before a certain property could be leased. Without that consent, the lease was illegal" (my emphasis).

ROBINSON J

Ebrahim JA then went on immediately to say, at the same page:

> "I would respectfully agree with the proposition that the present situation was not one where the purported sale was invalid because of failure to comply with the requirement to get the Municipality's consent."

With the greatest respect, I have difficulty with this statement since, given that the learned Judge of Appeal was not concerned with a statutory requirement, such as that in Kelly's case, and that the condition to obtain the Municipality's consent is not, in the legally accepted meaning of the term, a contractual formality (see the judgment of Smith J in Gutu v Chimbunde & Anor HH-194-94 (not reported) ("Gutu's case") at pp 6 and 7 of the cyclostyled judgment), the situation facing the learned judge was one where, at the time of the purported sale, the lessee-to-buy had sold the property in question to the purchaser in breach of the condition in the agreement between the Municipality and the lessee-to-buy which prohibited the lessee-to-buy from disposing of the property without the prior written consent of the Municipality.

Consequently, the fact that the court did not find the purported agreement of sale null and void on the ground that it failed to comply with a contractual formality, that is to say, the failure to obtain the Municipality's prior written consent, as the court had found in the case of the agreements in Pedzisa's case and Hundah's case, can only, in my most humble view, be taken to mean that in Magwenzi's case the Supreme Court accepted that the lessee-to-buy's failure to comply with the condition prohibiting the lessee-to-buy from disposing of the property without the Municipality's prior written consent did not amount to non-compliance with a contractual formality so as to render the agreement in question null and void. If my interpretation of Magwenzi's case is incorrect in that regard, then, with respect, one can perhaps be forgiven for wondering why the court did not take the obvious route by holding the agreement null and void rather than talking about the agreement's being unenforceable, which, of course,it could not have been had the agreement been null and void.

Accordingly, once it is accepted, as, I believe, in effect it was in the judgment in Magwenzi's case (with which the learned Chief Justice concurred), that the failure to comply with the condition to obtain the Municipality's prior written consent did not amount to non-compliance with a contractual formality so as to render the agreement null and void, it is, with the greatest

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respect, difficult to know on what possible ground the agreements

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in Pedzisa's case and Hundah's case can still be regarded as being null and void.

That being the position, while it is quite clear that, on the one hand, the sale/assignment agreement is unenforceable and ineffective as against the Government at the instance of either the applicant or the respondent, on the other hand, since the sale/assignment agreement is not, to use the words of Smith J in Gutu's case at p 7 of the cyclostyled judgment, "prohibited by statute or common law, it is not contrary to public policy or contra bonos mores and there are no statutorily required formalities to be complied with", the agreement is, in my respectful opinion, legally binding *inter partes*.

I would mention here that at the outset of his argument, Mr Nherere accepted that there was no statutory provision prohibiting the parties from entering into the purported assignment without the Government's consent.

I turn now to consider Mr Nherere's submission that while the decision in Pedzisa's case in holding the agreement in issue to be null and void was correct, it was arrived at for the wrong reason, namely, that the requirement of the owner's/lessor's prior written consent to the agreement was a contractual formality which had not been complied with.

It is Mr Nherere's contention in this case that the prohibition in the Government lease agreement against the assignment by the applicant of his rights and obligations under that agreement or, to put it another way, the pactum de non cedendo, without the Government's prior written consent, goes to the substance of the rights and obligations created by the Government lease agreement which were purportedly assigned by the applicant to the respondent under the sale/assignment agreement, with the result that the failure to obtain the Government's prior written consent to the sale/assignment agreement renders that agreement null and void.

The applicant's contention would appear to echo the following statement made by de Villiers JA in Paiges v van Ryn Gold Mines Estates Ltd 1920 AD 6 ("Paiges' case") at p 617 where the learned Judge of Appeal said:

> "The stipulation against cession is part and parcel of the agreement creating the right, and the right is limited by the stipulation."

However, in *Paiges*' case the Appellate Division was concerned only with the defence by a party to an agreement containing a pactum de non cedendo to a claim by the cessionary against that party, being the cedent's employer.

ROBINSON J

The validity of the cession itself was never raised or considered. Indeed, if the applicant's contention is well founded, one would surely have expected the Appellate Division in Paiges'

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case to have added that, in any event, because the cession between the cedent and the cessionary was null and void, the cessionary could not possibly succeed in an action against the cedent's employer.

After examining the case and textbook authorities to which Mr Nherere referred me, I can find no substance whatsoever in the applicant's line of argument. To put the applicant's case another way, it is his submission that if, for example, a lessee were to sub-let the leased premises to a sub-lessee, who was unaware of a clause in the main agreement of lease prohibiting the lessee from sub-letting the leased premises without the lessor's prior written consent, and the lessor were subsequently to learn of the sub-lease and to cause the sub-lessee to vacate the leased premises, the sub-lessee, according to the applicant, would not be able to rely on the agreement of sub-lease between him and the lessee to sue the latter for a breach of that agreement because the agreement of sub-lease would be null and void on account of the lessee's breach of the prohibition against sub-letting contained in the main agreement of lease.

I cannot for a moment subscribe to the applicant's submission in that regard since, in the absence of anything rendering the agreement of sub-lease or, in this case, the sale/assignment agreement illegal in the manner referred to by Smith J in Gutu's case at pp 6 and 7 of the cyclostyled judgment and in the manner described by Smith J in that case a p 7, as quoted above, both agreements are, in my view, legally binding *inter partes*.

The applicant sought to fortify his argument by contending that an assignment, in the sense of involving the transfer of both rights and obligations under an agreement, is not valid without the consent of the party who has entered into the main agreement with the assignor. Certainly, an agreement of assignment would not be enforceable to effective against the party who has entered into the main agreement with the assignor except with that party's consent to the assignment. However, in my view, whether one is dealing with a pactum de non cedendo or a prohibition against assignment in the main agreement makes no difference to the legally binding effect, *inter partes*, of an agreement under which a cedent or an assignor purports to cede his rights or to transfer his rights and obligations to the cessionary or assignee.

In the result, I find no merit in the applicant's argument and his application is therefore dismissed with costs.

ROBINSON J

I must say that I am happy to have reached the conclusion I have on the legal merits of the matter since, on the equities of the case, the applicant's conduct appears to have been reprehensible in the light of the following factors.

1. According to the respondent, he was approached by the applicant when the applicant was experiencing financial problems in fulfilling his obligations under the Government lease agreement to commence construction of the buildings which he had to erect on the Stand to the value of not less than $250 000 and to pay his annual rent for the second year of the lease. In the circumstances, the applicant offered to make over his

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rights under the Government lease agreement to the respondent for the sum of $25 000 which the respondent duly paid the applicant upon the assignment of the applicant's rights and obligations under the Government lease agreement to the respondent, who, on 10 September 1996, also paid the Government the arrear annual rent of $3 908 due in advance by the applicant on 1 August 1995, for the second year of the Government lease agreement.

2. The applicant entered into the sale/assignment agreement in the full knowledge that the Government lease agreement contained a clause prohibiting him from assigning his rights and obligations under that agreement to any third person without the Government's prior written consent.

3. At the time he entered into the sale/assignment agreement, the applicant was fully aware that clause 25 of the Government lease agreement required the Stand to "be used for no purpose save a creche and other uses directly ancillary thereto" and so his complaint that the respondent would be competing against him in using the Stand for the purpose of running a creche is difficult to understand.

4. After first attempting to have the sale/assignment agreement amended following legal advice which he told the respondent he had obtained, the applicant then sought to have the sale/assignment agreement cancelled and the respondent evicted from the Stand on the ground that the respondent had unlawfully erected structures on the Stand without the approval of the Harare City Council, a ground which the applicant repeated in clause 5 of his founding affidavit when he alleged as follows:

> "The worst thing though about the construction of the building is that it is unlawful in that Respondent is not using plans approved by the Harare City Council. I challenge him to produce approved plans if he avers the contrary."

ROBINSON J

Suffice it to say that the respondent took up the applicant's challenge in his opposing affidavit by countering the applicant's allegations and by annexing the building plan approved and signed by a building inspector of the City of Harare. The respondent thus effectively put paid to the groundless allegations levelled against him by the applicant, who, it is noted, failed to file any answering affidavit.

5. In next seeking to have the sale/assignment agreement declared null and void so that he could have the respondent evicted from the Stand and could take over the building which the respondent had erected thereon at considerable cost to himself, it is significant to observe that the applicant, in his founding affidavit, offered merely "to restitute the Respondent whatever he may have paid to me pursuant to the agreement", which, presumably, meant only the sum of $25 000 which the respondent had paid the applicant in consideration of the applicant's assigning his rights and obligations under the Government lease agreement to the respondent.

Accordingly, it appears that if he had succeeded in having the sale/assignment agreement

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declared null and void, the applicant would not have honoured, in conscience, clause 5 of the sale/assignment agreement, which provides as follows:

> "In the event of the Assignor breaching the terms of this agreement, the Assignee shall be entitled to full compensation, being the purchase price lease amounts paid and the reasonable value for the improvements which the latter will have effected on the Stand or alternatively the market value of the Stand and improvements effected, which full and total amount shall become due and payable to the Assignee, all at once within one calendar month from the date of demand by the Assignee."

By attempting to renege on the sale/assignment agreement, the applicant showed his true colours by dishonouring his undertaking in clause 6 thereof that "at no time shall he by word or deed or impliedly act in any manner that will prejudice the interests of the Assignee in terms of this agreement until such time as the Assignee or his nominee shall have taken transfer of the Stand with the permanent improvements then thereon."

Muskwe & Associates, applicant's legal practitioners

Chinamasa, Mudimu & Chinogwenya, respondent's legal practitioners

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MAKONI v KHATSO & ANOR 1997 (1) ZLR 166 (HC)

Court **High Court, Harare**

Robinson J

Chamber application

2 February 1996 *(3) Judgment No. HH-2-97

Flynote

Immovable property - sale - property subject to mortgage bond - transfer - requirements - whether seller may require buyer to pay balance of purchase price before transfer registered

Headnote

Where immovable property is the subject of a mortgage bond and is sold, conveyancing practice and procedure requires -

(1) the buyer to give the seller, through the conveyancers, a suitable guarantee for payment of the balance of the purchase price to the seller against simultaneous registration of transfer of the property in the buyer's name and registration of a mortgage bond in favour of the buyer's mortgagee. The mortgagee will in turn give the buyer, through the conveyancers, a suitable guarantee for payment of the balance of the purchase price against registration of the mortgage bond in favour of the mortgagee;

(2) the seller to give his mortgagee, through the conveyancers, a suitable guarantee for payment of the amount due to the mortgagee under the bond, against simultaneous

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cancellation of the bond and registration of transfer to the buyer.

Accordingly, the applicant (the seller) was not entitled to require the first respondent (the buyer) to pay him the balance of the purchase price for his use before the property was registered in the first respondent's name.

ROBINSON J

Case Information

F Chambakare, for the applicant

J Dondo, for the first respondent

Judgment

Robinson J: I must confess that I was astonished when I was asked to record, for the purpose of an appeal noted against my decision, my reasons for dismissing the urgent application brought before me in chambers in this matter. I say this because I believed that I had, at the time I dismissed their client's application, convincingly explained to the applicant's legal practitioners, Chambakare and Partners, why, in my view, the application should never have been mounted in the first place; and because I fail to understand on what conceivable basis the applicant's subsequently appointed legal practitioners, Munyanyi and Associates, could have advised the applicant that he had any prospects of succeeding on appeal.

The starting point to this matter is the order which my brother Garwe made at the conclusion of an opposed motion on 6 June 1995 in case No. HC-1812-95, between the present first respondent as the applicant and the present applicant and the Registrar of Deeds as the first and second respondents, respectively. The order decreed the implementation of a written agreement of sale entered into on 24 February 1994 between the present applicant, through the agency of his brother, Donald Sarudzai Makoni, as the seller and the present first respondent as the purchaser of the immovable property, Stand 678, Glen Lorne Township, 16 of Glenwood Estate situate in the district of Harare, more commonly known as 678 Rumbavu Drive, Glen Lorne, Chisipite, Harare. The order directed as follows:

"1. That on tender of the balance of $300 000 to first respondent Stand 678, Glen Lorne Township, 16 of Glenwood Estate situate in the District of Salisbury be transferred into applicant's name.

2. That on tender of the balance of $300 000 to first respondent, first respondent sign all papers and or documents necessary to enable Stand 678, Glen Lorne Township, 16 of Glenwood Estate to be transferred aforesaid.

3. That should first respondent fail and or refuse to sign the said papers and or documents necessary to have the above transfer take place within 10 days from the date of tender of the outstanding amount then the Deputy Sheriff, Harare be authorised to sign on behalf of first respondent all papers and or documents necessary to effect such transfer into Applicant's name.

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ROBINSON J

4. That subject to proof of payment of the balance of the purchase price the Second Respondent register the transfer of Stand 678, Glen Lorne Township, 16 of Glenwood Estate situate in the District of Salisbury into applicant's name.

5. That First Respondent together with all those claiming title through him vacate Stand 678, Glen Lorne Township, 16 of Glenwood Estate also known as 678 Rumbavu Drive, Glen Lorne, Chisipite, Harare within seven (7) days of the date of payment of the balance of the purchase price failing which the Deputy Sheriff be and is hereby authorised to end (*sic*) first respondent and all those claiming title through him.

6. That costs of this application be borne by first respondent."

The word "end" appearing in para 5 of the order is a typographical error which, according to the judge's manuscript amendment to the draft order, should have read "evict".

According to the present applicant's founding affidavit, it is evident that the applicant completely misunderstood the meaning and effect of the provisions of paras 1 and 2 of the order made by Garwe J, wrongly believing that he was entitled to receive payment of the balance of $300 000 before he signed the documents necessary to process the transfer of the property referred to in the order made by Garwe J (hereinafter referred to as "the property") and before transfer of the property was registered. The applicant's misapprehension in this regard is borne out by paras 3 and 4 of his founding affidavit in which he averred as follows:

"3. An order was issued to the effect that I had sold the property to the first Respondent. The High Court order dated 6 June 1995 attached to this affidavit" [the order was not in fact attached to the applicant's affidavit] "stated among other issues that after tender of payment of the balance of $300 000 I was to sign all the documents to effect the transfer to the first respondent.

4. The first respondent failed to tender the balance of $300 000 but his legal practitioners Messrs V Nyangulu ordered me, through my legal practitioners, to sign the documents and get the balance later. This I refused as it was contrary to the provisions of the order."

ROBINSON J

As indicated in para 8, as read with paras 3 and 4 of his founding affidavit, the applicant expected to receive payment of the balance of $300 000 before registration of transfer so that he could use these moneys "to look for alternative accommodation", his expectation in this respect being confirmed by the statement made by his legal practitioners in para 3 of the document headed "URGENT CHAMBER APPLICATION" that the "Applicant never received his balance of $300 000 prior to the transfer of the property condition of the transfer" (my emphasis).

Again, insofar as in the final paragraph of his certificate of urgency, the applicant's legal practitioner, Mr Chambakare, alleges that unless "the order is granted the applicant will suffer hardship as (he) was not paid the balance prior to transfer which would have allowed him to obtain alternative accommodation" (my emphasis), it is abundantly clear that both the applicant and his legal practitioners misconstrued the words, "on tender of the balance of $300 000 to first respondent" to mean "on payment of the balance of $300 000 to first respondent", as borne out by the statement of the applicant's legal practitioner in the second paragraph of his certificate of

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urgency that the "first respondent failed to tender payment of $300 000 prior to signing the documents but the Deputy Sheriff signed without any proof of payment".

It was indeed unfortunate that the applicant's legal practitioners, as indeed also Munyanyi and Associates, failed to appreciate the correct and obvious meaning of the words, "on tender of the balance of $300 000 to first respondent" appearing in paras 1 and 2 of the order made by Garwe J. Otherwise, they would have explained to the applicant that, in the case of the transfer of an immovable property which was subject to an existing mortgage bond passed by the person liable to transfer the property (hereinafter referred to as "the transferor") and which was to be subject to a mortgage bond to be passed by the person to whom the property was to be transferred (hereinafter referred to as "the transferee") in order to finance and secure payment of the balance of the purchase price due to the transferor, conveyancing practice and procedure requires -

(a) the transferee to give the transferor, through the conveyancers attending to the transfer (hereinafter referred to as "the conveyancers"), a suitable guarantee for payment of the balance of the purchase price to the transferor against simultaneous registration of transfer of the property in the transferee's name and registration of a mortgage bond passed by the transferee over the property in favour of the transferee's prospective

mortgagee who, in turn, will give the transferee, through the conveyancers, a suitable guarantee for payment of the balance of the purchase price against registration of the mortgage bond in its favour;

(b) the transferor to give his mortgagee (in this case the Reserve Bank of Zimbabwe), through the conveyancers, a suitable guarantee for payment of the amount due to the mortgagee under its mortgage bond registered over the property against simultaneous registration of transfer and cancellation of the said mortgage bond.

In other words, there was no question of the first respondent's being obliged to pay the applicant the balance of the purchase price in the sum of $300 000, for the applicant's use, before registration of transfer of the property in the first respondent's name, as a condition sine qua non to the applicant's signing the documents necessary to enable transfer to be registered.

Accordingly, because of the applicant's refusal, as expressed in para 4 of his founding affidavit, to sign the necessary documents to enable transfer of the property to be registered simultaneously against the cancellation of the applicant's mortgage bond in favour of the Reserve Bank of Zimbabwe and the registration of the mortgage bond to be passed by the first respondent over the property in favour of Zimbabwe Building Society to clear the way for payment to be made of the amount owing by the applicant to the Reserve Bank of Zimbabwe under the latter's mortgage bond and for payment of the balance remaining to be made to the applicant after deduction of the amount paid to the Reserve Bank of Zimbabwe and of the applicant's share of rates due in respect of the property (which it was necessary to pay in order to obtain a rates clearance certificate from the appropriate local authority before transfer could

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be registered by the Registrar of Deeds) and the set-off of the first respondent's taxed costs payable b the applicant in terms of the order made by Garwe J, the applicant has only himself to blame for blocking the registration of transfer through his own legal practitioners. He cannot, therefore, be heard to complain about transfer being processed by another conveyancer, in this case V S Nyangulu and Associates, who were acting for the first respondent's prospective mortgagee, Zimbabwe Building Society (see the last sentence of annexure C to the first respondent's founding affidavit in his court application filed in case No. HC-1812-95) and about the Deputy Sheriff's having signed the necessary documents, in terms of para 3 of the order made by Garwe J, to enable transfer to be registered.

In this connection, I quote below the text of a letter addressed by V S

ROBINSON J

Nyangulu & Associates to the applicant's legal practitioners on 5 January 1996, which was submitted by the first respondent's legal practitioner, Mr Dondo, at the hearing of the application in chambers, reflecting the balance due to the applicant after the registration of transfer, being the sum of $244 312,22, for which amount a cheque was enclosed with that letter:

" Dear Sirs,

RE: T S J MAKONI TO J L KHATSO

Further to previous correspondence herein, as your client refused to sign the transfer documents, we got the Deputy Sheriff to sign the same in terms of the Court Order.

We now enclose herewith, our cheque for $244 312,92 made up as follows:

Balance of purchase price		$300 000,00
Less paid to Reserve Bank of Zimbabwe	$45 560,92	
Less share of rates	6 867,17	
Less taxed costs of Chinamasa, Mudimu & Chinogwenya	3 259,69	
Our cheque herewith	244 312,22	
	$300 000,00	$300 000,00

We have now discharged our duty, any further dealing should be directed to the purchaser and his legal practitioners unless it is to do with the sum of $300 000 dealt with above."

From the information given in that letter, it is patent that the conveyancers handled the transfer in an entirely proper manner.

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In the circumstances, it is difficult to understand on what possible ground the applicant's legal practitioners could state in para 4 of the document headed "URGENT CHAMBER APPLICATION" that unless "the order is granted the applicant will severely be prejudiced as he has no money from the sale of the property," seeing that on 5 January 1996 V S Nyangulu & Associates remitted him a cheque for $244 312,22 in payment of the balance of moneys due to him from the sale, following the registration of transfer; or on what

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conceivable basis the applicant could file an application "for an order declaring the transfer null and void because the respondents did not comply with the High Court Order in case No. HC-1812-95", as alleged in the second paragraph of the certificate of urgency signed by the applicant's legal practitioner, Mr Chambakare.

The contents of para 6 of the applicant's founding affidavit that the "signing of the documents by the Deputy Sheriff as if I had refused to do the same after tender of the balance of $300 000 was illegal and it is my desire to file an application in the High Court for an Order declaring the transfer null and void" are totally ill-founded and misconceived and the applicant's contention in para 7 that his "property was transferred illegally because the first respondent failed to tender payment prior to transfer", in the sense that the first respondent failed to pay the balance of $300 000 to the applicant prior to the registration of transfer, is equally ill-founded and misconceived.

It was for these reasons that I had no hesitation in summarily dismissing, with costs, the applicant's application for a provisional order calling upon the first and second respondents to show cause why a final order should not be made that the second respondent be interdicted from evicting the applicant from the property "until the applicant's application to the High Court" (for an order declaring the transfer null and void) "is finally concluded" and that the respondents pay the costs of the application and for an interim order interdicting the respondents from evicting the applicant from the property, as the first respondent was clearly entitled to do in terms of para 5 of the order made by Garwe J.

Chambakare & Partners, legal practitioners for the applicant

Chinamasa, Mudimu & Chinogwenya, legal practitioners for the first respondent

RENNIE GRINAKER HOLDINGS (PVT) LTD v SOCIEDADE INTERCONTINENTAL DE COMPRESSORES HERMETICOS SICOM LTDA 1997 (1) ZLR 173 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

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10 October 1996 & 10 February 1997 Judgment No. S-269-96

Flynote

Ownership - passing of - cash sale - price not paid after possession passed - when seller may vindicate property - when cash sale may be converted to sale on credit

Headnote

The respondent was a Brazilian company which manufactured refrigeration compressors. The appellant was a Zimbabwean company which carried on business as a freight forwarding agency. In 1994 another Zimbabwean company ordered a container of compressors from the respondent. The order was confirmed by a pro forma invoice, which showed that the consignment was to be delivered f.o.b. to Santos in Brazil, for shipment to Harare. Payment was to be made in pounds sterling and to be effected by letters of credit, through an Irish company. The goods were delivered to the port and shipped to Zimbabwe.

In the meantime, discrepancies arose in the letters of credit. These discrepancies held up payment of the purchase price to the respondent. Some six months after the goods had been shipped, the respondent applied for an order against the appellant and the buyer of the compressors, requiring the appellant to deliver the compressors to it. The respondent contended that ownership of the compressors remained with it, as payment had not been made. The appellant claimed that it had a lien on the goods for the freight charges and import duty it had paid. In any event, it claimed, ownership in the goods no longer vested in the respondent.

It was clear from the facts that the appellant was aware that the goods were

subject to payment by letter of credit but that even before clearing the goods the appellant had entered into an agreement to dispose of them to reduce the buyer's indebtedness to it. The question was whether the sale was one for cash or for credit.

Held, that if a sale is for cash and the price is not paid, delivery of the goods does not pass ownership to the buyer. Ownership remains with the seller.

Held, further, that every sale is presumed to be for cash unless an agreement to give credit is proved by the person who alleges that the sale is one on credit. Credit may not be presumed from the mere fact that the goods were delivered before payment was received.

Held, further, that if a contract contains a specific term making it a sale for cash, the sale cannot be converted into one for credit. It is only where there is uncertainty as to the intention of the parties that a cash sale can be converted to a credit sale. A cash sale is not converted to a credit sale merely by the effluxion of time. All the circumstances must be looked at to see whether the parties had intended the sale to be on credit. In this case, the fact that the buyer, before the shipping of the cargo, issued an irrevocable letter of credit could only be illustrative of a sale for cash.

Held, further, that the law provides no specific period within which the seller who had not been paid must vindicate his property from the buyer. He is required only to do so within a reasonable

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time. What is a reasonable time will depend on the facts of each case. The delay in the present case was not so unreasonable as to convert the sale from a cash sale into a sale on credit.

Cases cited:

Crockett v Lezard 1903 TS 590

Dalrymple, Frank & Feinstein v Friedman (2) 1954 (4) SA 649 (W)

Daniels v Cooper (1880) 1 EDC 174

Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & Anor 1973 (3) SA 685 (A)

Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd 1983 (2) SA 95 (C)

Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola & Ors 1976 (4) SA 464 (A)

Loomcraft Fabrics CC v Nedbank Ltd & Anor 1996 (1) SA 812 (A)

Potgieter v Cape Dairy & General Livestock Auctioneers (2) 1942 WLD 147

Sadie v Standard Bank (1889) 7 SC 87

United City Merchants (Invstms) Ltd & Ors v Royal Bank of Canada & Ors [1982] 2 All ER 720 (HL)

KORSAH JA

Case Information

J C Andersen SC, for the appellant

A P de Bourbon SC, for the respondent

Judgment

Korsah JA: The respondent herein is a duly registered Brazilian corporation with principal offices at Rua Coronel Jose Augusto de Oliviera Salles, 478, Sao Carlos, Brazil. It specialises in the manufacture and sale of refrigeration compressors.

The appellant is a company registered in Zimbabwe which carries on business as a freight forwarding agent from diverse premises, including those situate at 1 Kenilworth Road, Highlands, Harare.

On or about 26 August 1994, Walcat Enterprises (Pvt) Ltd ("Walcat"), a company incorporated according to the laws of Zimbabwe with its registered office situate at 10 Forest Road, Mount Pleasant, Harare, placed orders with the respondent for the manufacture and purchase of, inter alia, one container of 1.8 HP Compressors.

On or about 1 September 1994 the aforesaid order was confirmed by the respondent by a pro

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forma invoice, number 410012/94, a copy of which was annexed to the papers. It is evident from the annexure that the terms of the contract were that:

(a) The seller was to deliver the consignment free on board ("f.o.b.");

(b) The port of loading was to be Santos-SP-Brazil;

(c) The destination of the consignment was to be Harare, Zimbabwe;

(d) The purchase price was GBP 43 824;

(e) Payment was to be effected by letters of credit at sight.

The respondent was advised by Walcat that payment was to be made through Joscan International Ltd ("Joscan"), a company registered in Ireland. On or about 28 November 1994, the respondent received an original letter of credit, by order of Joscan in favour of the respondent for an amount of GBP 43 824, a copy of which was annexed to the papers.

The goods were duly delivered on board the vessel "Sunshine La Plata" at the port of Santos, Brazil, on 5 December 1994. A copy of the bill of lading

KORSAH JA

was exhibited as Annexure E. In compliance with terms 3 and 4 of the letter of credit, which stipulated that a set of negotiable documents be sent to the appellant to facilitate receipt of the consignment, the respondent dispatched a set of such documents to the appellant.

On or about 26 December 1994, the respondent discovered that certain minor discrepancies existed in the letter of credit, namely:

(i) The port of loading was in fact Santos and not S‹o Carlos, as stated in the letter of credit;

(ii) The packing list omitted to show the quantity of goods in each package, as required by term 2 of the letter of credit;

(iii) It became clear that the documents could not be presented within twenty-one days of the date of the bill of lading (additional condition B).

Upon the respondent contacting Walcat, Walcat agreed to ask its bankers to accept the discrepancies and pay out on the letter of credit. However, on or about 13 January 1995, the respondent was informed by its bankers in Brazil that the issuing bank in Harare had advised that it would not effect payment in respect of the cetter of credit as there were material discrepancies, and that payment would be made outside the terms of the letter of credit. On or about the same date Walcat notified the respondent of its intention to "remit directly outside the terms of the letter of credit".

The respondent had received nothing by way of payment for the consignment of goods it shipped at the instance of Walcat when it launched its application, on 30 June 1995, against the

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appellant, as the first respondent, and Walcat, as the second respondent, for an amended draft order that -

"1. The first respondent (now the appellant) shall deliver to the applicant (now the respondent) the 758 refrigeration compressors presently held by the first respondent in Harare, Zimbabwe.

2. The first respondent shall pay to the applicant an amount equal to the sum of the proceeds received by the first respondent in respect of those compressors already sold by the second respondent through the first respondent less the sum of $104 640,57 in discharge of the lien held over the goods by the first respondent.

(Alternatively, the first respondent shall furnish the applicant with

KORSAH JA

the identities and addresses of all subsequent purchasers of the compressors and details of the amounts paid).

3. The costs of this application shall be paid by the respondents, the one paying the other to be absolved."

It was the contention of the respondent herein that ownership of the goods was only to pass to Walcat upon payment and that since payment had not been effected the goods remain the property of the respondent.

The respondent declared that it had exercised its option to cancel the contract with Walcat; and that the appellant, who is the forwarding agent for Walcat, is currently in possession of the compressors and refuses to release the goods to the official representative of the respondent.

The appellant averred that it had paid the freight charges in respect of the goods, together with the import duty thereon, and, in that regard, claims to have a lien on the goods. The respondent readily conceded that the appellant, to the extent of the freight charges and the import duty paid, has a lien or right of retention over the goods and declared its willingness to pay such costs and charges incurred by the appellant in discharge of the lien.

It was contended on behalf of the appellant that the respondent would not be entitled to a release of the goods, even after a discharge of the lien, as ownership of the goods no longer vested in the respondent.

The respondent posited that, as the sale was one for cash, ownership in the goods would only pass upon payment of the purchase price, and that as the purchase price has not been paid it follows that ownership is still vested in the respondent. It was submitted that, as ownership is vested in the respondent, the respondent is entitled to regain possession of the compressors on discharge of the lien.

So as to arrive at a just solution of the dispute, I state hereunder the facts relied upon by the appellant and the stance taken by the appellant.

According to the appellant, it established independent letters of credit on behalf of Walcat in favour of Joscan for an amount of US$75 000. Payment in respect of those letters of credit was also not effected because of discrepancies, and Walcat advised the appellant that it would

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effect payment itself. Nothing hinges on this, save to say that from the inception the appellant knew that payment for the consignment was to be effected by letters of credit.

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The appellant said that it was not aware that separate letters of credit were established by Walcat in favour of the respondent. Nor was it aware that the purchase price in respect of the sale from the respondent to Walcat had been translated into the amount of GBP 43 824. This is of no relevance, as will hereinafter appear.

The appellant continues: the consignment arrived in Harare and was taken into the custody of the appellant on 20 January 1995. The appellant cleared the goods by paying the freight and charges amounting to $44 320,30; customs clearance and charges of $54 619,96; and letter of credit charges of $5 700,31, as *per* documentation attached to the papers; all amounting to $104 640,57. There can be but no doubt that the appellant was painfully aware that payment for the consignment was to be effected by letters of credit.

The appellant maintained that, even if payment was to be made on sight of the documentation referred to in the letter of credit or on delivery, an inordinate time has elapsed since then and that in the circumstances credit must be deemed to have been given to Walcat and accordingly ownership had passed to Walcat. The appellant, therefore, contended that the respondent's only cause of action lay against Walcat for the recovery of the purchase price of the goods, and not for the recovery of the goods.

The appellant further argued that an agreement had been struck between Walcat and the appellant, whereby the consignment, the subject of this appeal, would be pledged to the appellant and sold by Walcat through the appellant to various customers so that the indebtedness of Walcat to the appellant would be reduced.

The appellant alleged that pursuant to the above arrangement it sold approximately half of the consignment and divested itself of possession of the goods sold. The appellant is consequently left with only 758 of the compressors. The appellant alleges that it acted in good faith and that it would be prejudiced if an order is made in favour of the respondent. It avers that if a timeous demand had been made by the respondent for the delivery of the goods it would not have cleared the goods and would have made alternative arrangements to collect the debt which Walcat owed it.

What comes into bold relief is that not only was the appellant aware that the goods were subject to payment by letter of credit, but even before clearing the goods it had already entered into an agreement to dispose of the same to

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reduce the indebtedness to it by Walcat. The appellant's insistence on a timeous demand by the respondent before delivery of the goods to Walcat is rendered spurious in the face of these

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facts. When was such a timeous demand to be made, considering that terms 3 and 4 of the letter of credit, in compliance with which the respondent dispatched the goods, stipulate that a set of negotiable documents be sent to the appellant to facilitate clearance and receipt of the consignment, and it was by virtue of the said negotiable documents forwarded by the respondent that the appellant received the goods into its custody for and on behalf of Walcat? Thus the appellant was at no time in the position of an innocent third party without notice that the goods were subject to payment by a letter of redit when it started dealing in the goods.

The law as to the transfer of ownership upon a sale is not in dispute. What Mr Andersen contended is in dispute is whether the sale in the instant case was for cash or credit. The basis of this contention is that, if goods are sold for cash, then even though they are delivered, the property in the goods does not pass until the price therefor has been paid. But where the goods are delivered to the buyer and the intention is manifest that the seller intended to accord the buyer credit, the property in the goods passed to the buyer upon delivery.

The law was expressed by Innes CJ in Crockett v Lezard 1903 TS 590 at 592 thus:

> "The general law as to the transfer of dominium in a thing sold is clear. Though the purchase price has been agreed upon and the contract is complete, yet until delivery has taken place the dominium in the thing sold does not pass to the buyer. Where the thing is delivered to the buyer, and the intention of the seller is to allow the buyer credit, the property passes on delivery, even before the payment of the purchase price. But if a sale be a sale for cash, and if the price is not paid and credit is not given, mere delivery does not pass dominium to the buyer; it still remains in the seller. That principle may be wise or unwise, advisable or inadvisable, but it is the law of this country."

In Daniels v Cooper (1880) 1 EDC 174 at 185-6 Shippard J observed that:

> "It seems then beyond doubt that by the Roman-Dutch or common law of this Colony, a seller for cash may, probably within six weeks at the latest, recover the thing sold in default of payment of the price, not only from the original purchaser, but from any subsequent purchaser, even for

KORSAH JA

> valuable consideration duly paid, without notice, save only where a sale in market overt has intervened" (emphasis added).

It seems to me from the authorities that there is no specific period laid down by law within which the vendor for cash, who has not been paid the purchase price, must vindicate his goods from a purchaser, or even in the hands of a *bona fide* purchaser, save that he must do so within a reasonable time after the sale: Norman's Purchase and Sale in South Africa 4 ed 249; Dalrymple, Frank & Feinstein v Friedman (2) 1954 (4) SA 649 (W). And, of course, what is a reasonable time in the circumstances will depend on the facts of each case.

There is also a consensus by the authors that -

> "Every sale is presumed to be a sale for cash unless an agreement to give credit is proved by the person who alleges the sale is one on credit. (Hook's Estate v Hook 1927 EDL 88 at 93)",

per Norman *supra* at 249. Mackeurtan's Sale of Goods in South Africa 5 ed p 26 expresses the

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same principle in these words:

> "In deciding whether a sale is for cash or on credit, it is presumed to be for cash unless it is shown to have been on credit, and it is not to be taken that credit was given merely from the fact that the goods were delivered before payment had been received" (emphasis added).

At p 27 of Mackeurtan op cit is to be found the following:

> "Today there is no fixed period in which the seller in a cash sale must assert his rights or risk being held to have waived the need for cash and to have substituted credit in its place. The only requirement is that he must have acted in a reasonable time ..."

The learned trial judge noted in his judgment that it seemed to be common cause between all the parties that: "the sale was for cash by letters of credit and not for credit". It is, therefore, not surprising that Mr de Bourbon also commenced the respondent's heads of argument with the statement: "It is clear that the parties now accept that the sale in the present matter was for cash ..." Mr Andersen, for the appellant, while not disputing this assumption, contended that if such a concession was made on behalf of the appellant, the appellant is not bound by a concession of law made in the heads of argument.

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Undoubtedly, if a concession as to the law is made by a party, it is for the tribunal before which the matter is pending to determine whether or not such a concession was properly made, and a party cannot be bound by a concession of law which is bad. However, having regard to the presumption that all sales are for cash unless the contrary is proved, I am unable to fathom what leverage this submission accords to the appellant's case: Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd 1983 (2) SA 95 (C) at 100D and 101H.

In my view, it accords with the law to start with the presumption that the sale was for cash and thus ownership did not pass, even though delivery had been effected in the meantime, until the price was paid: Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & Anor 1973 (3) SA 685 (A) at 694A. Unless, of course, by the proper construction of the agreement entered into by the parties, there is a strong inference that they intended a delivery in pursuance of the contract to transfer ownership.

Mr Andersen contended that the agreement was entered into in Brazil, as evidenced by the pro forma invoice; that when the letter of credit was to be presented was not stated in the said agreement; and that, the letter of credit being subject to the conditions therein being complied with, the sale was not a sale for cash.

I am unable to agree with Mr Andersen, because Annexure D to the papers specifically indicated that the letter of credit was to be valid from 30 December 1994, payable on sight, and that "payment will be effected upon receipt of conform documents at our counters". Therefore it was not necessary to state any specific date for payment to make the sale one for cash.

Mr Andersen also contended that, regard being had to the bill of lading (Annexure E), which was made to the order of the appellant as the consignee on account of Walcat as the purchaser,

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before payment by the letter of credit could be made the goods had already been delivered f.o.b. to the consignee or the purchaser. Since the time of delivery and the time for payment were not the same, the sale could not be one for cash, but rather one for credit. As already indicated, the correct view of the law is as expressed by Mackeurtan, that "it is not to be taken that credit was given merely from the fact that the goods were delivered before payment had been received".

Mr de Bourbon strenuously contended that the judgment in Potgieter v Cape Dairy & General Livestock Auctioneers (2) 1942 WLD 147, in which it was

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held "that in view of the plaintiff and B accepting cheques which could only be presented after the lapse of some days and their knowledge that the cattle were intended for resale, the sale must be regarded as being on credit and not for cash", and "further that in view of the long delay in claiming the ownership of the cattle a presumption arose that the sales were for credit", ought not to be interpreted as authority for the proposition that a cash sale is converted into a sale of credit by the effluxion of time. He submitted that, insofar as the judgment in the Potgieter case *supra* rested on the view expressed by de Villiers CJ in Sadie v Standard Bank (1889) 7 SC 87 at 91-92, all that the learned Chief Justice implied was that on the facts of a particular case the law would presume a sale on credit rather than a sale for cash. I agree with Mr de Bourbon that in uch cases a presumption of law would only arise after a consideration of all the facts.

Mr de Bourbon reiterated what was common ground: that it was a term of the agreement that payment for the goods would be by an irrevocable letter of credit at sight. He contended, rightly in my view, that an irrevocable letter of credit at sight is the equivalent of a cash payment, although the cash is not available until the documents above referred to have been received.

Mr de Bourbon further contended that, in addition to payment by an irrevocable letter of credit at sight and the conditions attaching thereto, delivery in the present matter occurred when the goods were placed on board the vessel, which was done on 5 December 1994. It was only thereafter that difficulties with the letter of credit arose. It cannot be disputed that the parties (or at least the respondent) could not have contemplated contracting on the basis of a defective letter of credit, and the respondent did indeed aver, in para 11 of its founding affidavit, its policy not to order that compressors be manufactured until an original letter of credit has been presented. Accordingly, the fact that payment was not made because of defects in the letter of credit did not change the nature, either of the transaction, or the relationship between the respondent and Walcat.

Mr de Bourbon emphasised the fact that in contracts of this nature, as was certainly in the instant case, it was for the buyer, Walcat, prior to the shipping of the cargo, to furnish the seller, the respondent herein, with an irrevocable letter of credit issued by a bank acceptable to the seller. Such an arrangement can only be illustrative of a sale for cash. He submitted that the law in this regard is accurately stated in the judgment of Corbett JA (as he then was) in Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola & Ors 1976 (4) SA 464 (A) at 489-90

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thus:

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"(1) According to our law, unlike certain other legal systems, ownership cannot pass by virtue of the contract of sale alone: there must, in addition, be at least a proper delivery to the purchaser of the contract goods (see Crockett v Lezard 1903 TS 590 at pp 592-3; Commissioner of Customs & Excise v Randles Bros & Hudson Ltd 1941 AD 369 at p 398; Ambassador Factors Corporation v K Koppe & Co; K Koppe & Co v Accreylon Co Inc 1949 (1) SA 312 (T) at p 318; American Cotton Products Corporation v Felt & Tweeds Ltd 1953 (2) SA 753 (N) at pp 756-7). Whether delivery alone will suffice depends in general upon the intention of the parties (see Weeks & Anor v Amalgamated Agencies Ltd 1920 AD 218 at p 230; Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & Anor 1973 (3) SA 685 (A) at p 694); and in this connection important considerations are (a) whether the contract contains conditions affecting the passing of ownership (see the Randles Bros case *supra* at p 398) and (b) whether the sale is for cash or on credit.

(2) Assuming unconditional contracts, under a cash sale ownership is normally taken to have been intended to pass once there has been, in addition to delivery, due payment of the purchase price; whereas in the case of a credit sale the fact that credit has been granted by the seller to the purchaser is taken as a strong indication that ownership was intended to pass merely on delivery (see Crockett v Lezard *supra* at pp 592-3; Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & Anor *supra* at p 694). Usually, delivery alone will also pass ownership where the seller has taken security for the payment of the purchase price, probably because in that event credit is regarded as having been given by implication (Laing v SA Milling Co Ltd 1921 AD 387 at p 398; Phillips v Hearne & Co 1937 CPD 61 at pp 63-4).

(3) A cash sale requires payment of the purchase price to be made against delivery of the goods. A credit sale is one in which the time for payment has been postponed for a substantial, ie non-negligible, period after delivery (Laing's case *supra* at pp 394-5, 400-1; R v Salaam 1933 AD 318 at p 320). Whether a sale be for cash or on credit is a matter of agreement between the contracting parties, either expressly or tacitly; and in the latter case must be judged from all the terms of the contract, the surrounding circumstances

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and the conduct of the parties (Laing's case *supra* at p 400). In the absence of an express term as to the sale being for cash or on credit there is a presumption that it is for cash. This may be rebutted in various ways but the giving of credit cannot be inferred from mere delivery by the seller without receiving the purchase price. (See Laing's case *supra* at pp 394-5, 398-9; Newmark Ltd v Cereal Manufacturing Co Ltd 1921 CPD 52 at p 58; Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956 (3 SA 420 (A) at p 424). On the other hand, a sale which was expressly or presumptively for cash may by subsequent agreement, express or tacit, become one on credit (Crockett v Lezard *supra* at p 593)."

From the terms of the contract and all the surrounding circumstances, one, and only one, conclusion emerges: that the contract between Walcat and the respondent was a sale for cash, where the purchase price must be paid before property in the goods passes. My understanding of the authorities is that it is only after a reasonable time has elapsed between delivery by the seller and the non-payment by the purchaser that, having regard to the surrounding circumstances, a presumption of law may arise that the seller by his laches has conveyed the impression that he has opted for a sale on credit in place of a cash sale. What is a reasonable time will vary from case to case, with due regard always being given to the complexities of international trade and law and the difficulties to be encountered in giving legal instructions from a distant country. Regard being had to all that, I am of the view that the time which elapsed

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before the respondent commenced proceedings for the recovery of the goods was not so unreasonble as to convert what was a sale for cash into a sale on credit.

For the above reasons, I would dismiss the appeal.

Mr de Bourbon made a pertinent observation which I think is worthy of note. He said:

> "It is an important consideration that international trade with Zimbabwe would be adversely affected if a foreign supplier were to find that the contract upon which he intended to deal with a person in Zimbabwe was converted by operation of Zimbabwe law to something other than that which he and the person in Zimbabwe intended merely at the instance of a third party."

See also United City Merchants (Investments) Ltd & Ors v Royal Bank of

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Canada & Ors [1982] 2 All ER 720 at 725d-f; Loomcraft Fabrics CC v Nedbank Ltd & Anor 1996 (1) SA 812 at 815 G-I.

Mr Andersen, in reliance on an article by Dr Thomas Simons in issue 1/1996 of The International Legal Forum with regard to "Security of Goods in International Trade", pointed out that unfortunately the law as to reservation of title to goods in international trade is not internationally uniform. The body of rules, by which the legal validity of the security of goods is to be determined, is dependent on the law applicable to the contract and which is agreed upon by the parties at the time the contract was entered into. However, in the field of international sale of goods, disputes as to the security of goods are generally resolved by the courts of the country where the goods are found at the time, by applying their local international contract law rules to determine the lex fori. But the applicable law relating to security of title to the goods generally corresponds to the law of the country to which the goods are to be delivered. In the instant case, the contract law of Zimbabwe.

It seems to me that by our law if a contract contains a specific term making it into a sale for cash it cannot be converted into one for credit. It is only when there is uncertainty as to the intention of the parties that a sale for cash may be converted into a sale on credit.

The appeal is accordingly dismissed with costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

HOLLAND & ORS v MINISTER OF THE PUBLIC SERVICE,LABOUR AND SOCIAL WELFARE 1997 (1) ZLR 186 (SC)

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Court **Supreme Court, Harare**

Gubbay CJ, McNally JA, Korsah JA,

Ebrahim JA & Muchechetere JA

Constitutional application

23 January & 11 February 1997 Judgment No. S-15-97

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(9) - right to fair hearing in determination of civil rights - Private Voluntary Organisations Act [Chapter 17:05] - s 21 - provision entitling Minister to suspend executive of a private voluntary organisation on information supplied to him - whether such provision violates s 18(9)

Human rights - right to a fair hearing in determination of civil rights - meaning of civil rights - whether power of Minister to suspend member of executive committee of a private voluntary organisation affects that person's civil rights - whether entitled to fair hearing before such action taken

Headnote

The Association of Women's Clubs (AWC) is a registered private voluntary organisation and is a non-profit-making body founded mainly for the advancement of the education of women. In terms of its constitution, the members of the executive committee are elected at the annual general meeting of the organisation. The executive committee administers the funds of the AWC and is anwerable to the National Council for expenditure of funds.

Purporting to act in terms of s 21 of the Private Voluntary Organisations Act [Chapter 17:05], the respondent Minister suspended the applicants as members of the executive committee of the AWC from exercising all their functions in running the affairs of the AWC. As this suspension was not revoked within thirty days, the suspended members were in terms of

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the Act disqualified from their positions on the executive committee until such time as the Minister removed their disqualifications.

The applicants argued that s 21 of the Act was unconstitutional in that it violated three rights guaranteed in the Constitution, namely:

1. the right to receive a fair hearing in the determination of their civil rights provided for in s 18(9);
2. the right to freedom of expression provided for in s 20(1); and
3. the right to freedom of assembly and association provided in s 21(1).

Held, that s 18(9) of the Constitution provides that everyone is entitled to a fair hearing in the determination of the extent of his civil rights and obligations. Although the term "civil rights" is

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not easy to define, it has a wide meaning. It includes not only prejudice to property and liberty but also frustration of the reasonable and legitimate expectations of a person. The right to a "fair hearing" at very least requires that the person be given notice of the charge, that he be given an opportunity to state a case in answer to the charge and that he be afforded an impartial hearing.

Held, further, that the applicants had been elected to their positions as members of the executive committee. Before their suspension they were lawfully entitled and obliged to exercise those functions. In deciding to suspend the applicants, the Minister had determined that they were unfit to remain in office as executive committee members. This suspension prohibited them from exercising their rights and obligations until such time as the disqualification was removed by the Minister. By removing their entitlement to function as members of the executive committee, the Minister effectively determined the extent of their civil rights and obligations; he had curtailed such rights and obligations. Before the Minister suspended the applicants he had not granted them a fair hearing.

Held, further, that s 21 of the Act by necessary implication excluded the right to be heard before the Minister made his decision to suspend. The fact that the applicants had a right to take the decision of the Minister on review to the High Court did not provide an effective remedy as the review court could not order a hearing where the legislation excluded a hearing. Section 21(1) was therefore ultra vires s 18(9) of the Constitution. Since subss (2) and (3) could not stand independently of subs (1), s 21 had to be struck down in its entirety.

The court left completely open the issues of whether s 21 violated the freedom of expression and freedom of assembly guarantees in the Constitution.

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Cases cited:

Admin, Tvl & Ors v Traub & Ors 1989 (4) SA 731 (A)

Admin, Tvl & Ors v Zenzile & Ors 1991 (1) SA 21 (A)

de la Rouviere v SA Medical and Dental Council 1977 (1) SA 85 (N)

Durayappah v Fernando & Ors [1967] 2 All ER 152 (PC)

Golder v UK (1975)1 EHRR 524

H v Belgium (1987) 10 EHRR 339

Kanda v Government of the Federation of Malaya [1962] AC 322 (PC)

Kšnig v Federal Republic of Germany (1978) 2 EHRR 170

Marumahoko v Chrmn, PSC & Anor 1991 (1) ZLR 27 (H)

Moodley & Ors v Min of Education & Culture, House of Delegates & Anor 1989 (3) SA 221 (A)

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Ringeisen v Austria (No. 1) (1971) 1 EHRR 455

Russell v Duke of Norfolk & Ors [1949] 1 All ER 109 (CA)

Taylor v Min of Higher Education \& Anor 1996 (2) ZLR 772 (S)

Transvaal Agricultural Union v Min of Land Affairs & Anor 1996 (12) BCLR 1573 (CC)

Turner v Jockey Club of South Africa 1974 (3) SA 633 (A)

Winter & Ors v Admin-in-Executive Cttee & Anor 1973 (1) SA 873 (A)

The court referred to the following statutory provisions:

Constitution of Zimbabwe 1980, ss 18(9), 20(1) & 21(1)

Private Voluntary Organisations Act [Chapter 17:05], ss 20 & 21

Case Information

P Nherere, for the applicants

L Hove, for the respondent

Judgment

Gubbay CJ:

INTRODUCTION

At all material times since election in October 1992, the first applicant was the chairperson, and the eleven remaining applicants were members, of the executive committee of the National Council of the Association of Women's Clubs ("AWC"). Upon the allegation that the Declaration of Rights has been contravened in relation to them, they approach this Court direct for redress pursuant to s 24(1) of the Constitution of Zimbabwe.

The AWC is a registered private voluntary organisation whose membership consists of women's clubs in Zimbabwe as well as natural persons. It is an autonomous and non-profit-making body founded, in the main, to advance

the education of Zimbabwean women in domestic skills and principles of elementary nursing and hygiene, to promote literacy and pre-school education, and to foster and create a united and harmonious community. For the attainment of its laudable objectives, the AWC is empowered to collect and receive funding from any lawful source.

The National Council of the AWC consists of two members chosen from each region or province. Its function is to formulate policy, to ratify decisions made by the executive

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committee, and to elect members of the executive committee and other office bearers.

The executive committee is elected from the members of the National Council at the annual general meeting of the AWC. The chairperson and vice-chairperson of the National Council are the ex officio chair and vice of the executive committee which, in addition, consists of fifteen members as well as the voluntary organiser or deputy of every region. It is the executive committee which administers the funds of the AWC. It reports to the National Council on the receipt and expenditure of monies. And it may appoint sub-committees to raise funds.

Under General Notice 636A of 1995, published in the Gazette on 2 November 1995, the respondent ("the Minister"), purporting to act in terms of s 21 of the Private Voluntary Organisations Act [Chapter 17:05] ("the Act"), suspended the applicants as members of the executive committee of the National Council from exercising all their functions in running the affairs of the AWC. Excluded from the names listed were two executive committee members from Mashonaland, while included were two women who were not members.

THE CHALLENGE

The applicants attack the constitutionality of s 21 of the Act on three separate grounds. They contend that:

(i) s 21(1) empowers the Minister to determine their civil rights as members of a private voluntary organisation without affording them a "fair hearing" as mandated by s 18(9) of the Constitution;

(ii) the powers conferred upon the Minister by s 21 and the consequences of their exercise, are inconsistent with their fundamental right to enjoy freedom of expression, as guaranteed by s 20(1) of the Constitution; and

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(iii) the powers given under s 21 and the consequences of their exercise, constitute an unwarranted interference with their fundamental right to assemble freely and associate with other persons, as protected by s 21(1) of the Constitution.

The relief sought is that s 21 of the Act be declared ultra vires one or other of the said provisions of the Constitution and, accordingly, null and void.

THE SCOPE OF SECTION 18(9) OF THE CONSTITUTION

This provision reads in pertinent part:

> "Every person is entitled to be afforded a fair hearing, within a reasonable time, by an independent and impartial adjudicating authority established by law, in the determination of the existence or extent of his civil rights and obligations."

The first point to consider is whether in suspending the applicants from exercising all their functions as members of the executive committee, the Minister determined the existence or

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extent of their civil rights and obligations.

The term "civil rights" is of wide import. Its ambit is not easily defined. It has been held to embrace the right of access to a lawyer for the purpose of instituting a civil action. See Golder v United Kingdom (1975) 1 EHRR 524 at paras 26 and 27. The decision in Kšnig v Federal Republic of Germany (1978) 2 EHRR 170 gives a more apposite illustration. In that case a medical practitioner in Germany had his authorisation to practise medicine and run a clinic withdrawn by a regional medical society for alleged unprofessional conduct. The European Court held, inter alia, that a civil right was at issue - that the right to exercise his profession and the right to run his clinic were civil rights (see at para 89). See too Ringeisen v Austria (No. 1) (1971) 1 EHRR 455 at para 94; H v Belgium (1987) 10 EHRR 339 at paras 44 to 48. And generally, Robertson and Merrills Human Rights in Europe 3 ed at 88-91.

I am also in agreement with the observations of Adam J in Marumahoko v Chairman, Public Service Commission & Anor 1991 (1) ZLR 27 (H) at 44G that "civil rights and obligations" include not only the prejudicial effect on property and liberty but the reasonable and legitimate expectations of the aggrieved person. See, for example, *Taylor v Min of Higher Education \& Anor* 1996 ZLR (2) 772 (S).

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In this matter, the act of suspension was based on a determination made by the Minister that the applicants were unfit to remain in office as members of the executive committee; that they were to be prohibited from exercising all functions, that is, their rights and obligations, until he either revoked their suspensions within thirty days under s 21(2) of the Act; or thereafter, by notice in the Gazette, removed their disqualifications.

Now, membership of the executive committee was, of course, dependent upon the applicants being elected by the members of the National Council. Until 2 November 1995 the applicants were lawfully entitled and obliged to act in that capacity. They held a status that the law was there to protect. By removing their entitlement to function as members of the executive committee, the Minister effectively determined the extent of their civil rights and obligations; he curtailed such rights and obligations.

Next to consider is what constitutes a "fair hearing". Procedural fairness is, of course, an ambiguous concept. It varies according to context. Its breadth must be determined from the specific nature of the proceedings or inquiry in question. This emerges clearly from these oft-quoted remarks of Tucker LJ in Russell v Duke of Norfolk & Ors [1949] 1 All ER 109 (CA) at 118E:

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

These words have been approved by South African courts. See, for instance, Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 646H; de La Rouviere v SA Medical & Dental Council 1977 (1) SA 85 (N) at 98 G-H. And by Adam J in the Marumahoko case *supra* at 44E.

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At the very least, there are three fundamental requirements of natural justice to which a person directly affected by an impending inquiry is entitled. The first is the right to have notice of the charge or complaint. The second is the right to be heard - to be given the opportunity to adequately state a case in answer to that charge or complaint. And the third, mentioned expressly in s 18(9), is the right to an impartial hearing. See Kanda v Government of the Federation of Malaya [1962] AC 322 (PC) at 337 *per* Lord Denning; Baxter Administrative Law at 543-544; de Smith's Judicial Review of Administrative Action 4 ed at 196. Sections 18 (10) and (11) of the Constitution make provision for the proceedings, including the announcement of the decision, to be held in public.

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WHETHER SECTION 21(1) OF THE ACT CONTRAVENES

SECTION 18(9) OF THE CONSTITUTION

The impugned subsection reads:

> "If it appears to the Minister on information supplied to him in respect of any registered private voluntary organisation that -
>
> (a) the organisation has ceased to operate in furtherance of the objects specified in its constitution; or
>
> (b) the maladministration of the organisation is adversely affecting the activities of the organisation; or
>
> (c) the organisation is involved in any illegal activities; or
>
> (d) it is necessary or desirable to do so in the public interest;
>
> the Minister may, by notice in the Gazette -
>
> (i) suspend all or any of the members of the executive committee of a registered private voluntary organisation from exercising all or any of their functions in running the affairs of the organisation;
>
> (ii) amend or revoke any suspension effected in terms of subparagraph (i)."

It is settled law that where a statute empowers a public official or body to give a decision which will prejudicially affect an individual in his liberty, property or existing rights, the right to a fair hearing is to be given effect to unless the statute expressly or by implication indicates the contrary. See Winter & Ors v Administrator-in-Executive Committee & Anor 1973 (1) SA 873 (A) at 889 B-C; Administrator, Transvaal & Ors v Traub & Ors 1989 (4) SA 731 (A) at 748 G-H; Administrator, Transvaal & Ors v Zenzile & Ors 1991 (1) SA 21 (A) at 34H-35B; Transvaal Agricultural Union v Min of Land Affairs & Anor 1996 (12) BCLR 1573 (CC) at paras 24-25.

Opposing contentions were addressed by counsel as to whether by necessary implication subs (1) denies the right to a hearing, even to the extent of excluding the minimum basic requirements referred to. If it does, then it falls foul of s 18(9) of the Constitution.

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In my view, counsel for the applicants was correct in urging that subs (1) excludes by necessary implication the principle of the right to be heard. The following features are supportive of this conclusion:

First, the Minister is entitled to act on the basis of information supplied to him, regardless of the source of that information. It may be hearsay in nature or difficult to substantiate; or it may emanate from an unreliable or vindictive person. The Minister's discretion "does not hinge upon an inquiry into or a consideration of facts or circumstances in respect to which there may be a conflict; or upon any particular finding of fact": *per* Hoexter JA in Moodley & Ors v Min of Education & Culture, House of Delegates & Anor 1989 (3) SA 221 (A) at 235D.

Second, the Minister has an untrammelled discretion. He is not obliged to disclose the reasons for his decision.

Third, the power given to the Minister to suspend all the members of the executive committee by publication of a single notice in the Gazette, where it appears to him on information supplied that any of the matters specified in paras (a) to (d) have occurred - which by their nature may necessitate the taking of urgent action - points strongly in the direction of excluding the grant of hearings to what could well be a large number of affected members.

Fourth, the Minister's power under para (i), as read with subs (2), to revoke the suspensions of all or any of the members within thirty days, gives rise to the clear inference that it was the objective of the lawmaker to enable the Minister to suspend without attracting the delay resultant upon affording each affected member a hearing; and then, during the intervening period of suspension, to take the opportunity of assessing the veracity of the information supplied to him.

Fifth, s 20 of the Act empowers the Minister to appoint an inspecting officer to inspect any aspect of the affairs of any private voluntary association, to examine all documents, books and accounts relating to its financial affairs, and to report to the registrar of private voluntary organisations. It is an offence to fail to produce, without lawful excuse, any book or statement required by the inspecting officer; or to wilfully hinder or obstruct him in the exercise of his functions. Section 21(1) construed in conjunction with s 20 suggests to me that in the event of information relating to any of the matters detailed in paras (a) to (d) thereof being supplied by the registrar to the

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Minister, it would be permissible for the Minister to invoke the power of suspension forthwith.

The additional submission that s 21(1) of the Act is saved from being declared inconsistent with s 18(9) of the Constitution by reason of the right of the suspended member to take the decision

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of the Minister on review before the High Court, is not understood.

The existence of the common law right of review cannot render intra vires an enactment which infringes any of the fundamental rights and freedoms which are protected under the Declaration of Rights. Here the applicants are claiming an order that s 21 of the Act be struck down. To obtain that form of redress they were entitled to take the route offered by s 24(1) of the Constitution. They are not asking that the decision to suspend be set aside and that the Minister be directed to give them a fair hearing. They complain that the legislation is defective in that a hearing under s 21(1), prior to the Minister deciding to suspend, is designedly denied.

A review court is concerned to set aright procedural improprieties committed by the decision-maker. It cannot order a hearing where, under the particular legislation, the public official or body is not required to hold one.

WHETHER, IN EFFECT, THE TWELVE APPLICANTS RECEIVED A "FAIR HEARING"

The further argument advanced on behalf of the Minister, in the alternative, was that notwithstanding an unfavourable interpretation of s 21(1) of the Act, as a matter of reality the applicants were given a fair hearing before being suspended. This, too, fails to persuade.

That there were problems with the manner in which the executive committee was running the affairs of the AWC cannot be gainsaid. Certainly meetings with officials of the Ministry were attended by the first applicant and a few of her fellow members, in an effort to resolve such problems. These meetings, however, fell far short of constituting a fair hearing. They were not convened with the provisions of s 21(1) in mind. No specific charge or complaint was ever formally notified by the Minister. And, in the absence of any intimation that the Minister had in mind the suspension of the members of the executive committee, no defence was raised by the applicants. It was only days before the notice appeared in the *Gazette* that the first applicant was informed that the decision to suspend *all* the members of the executive

committee had been taken. But, most importantly, the meetings held were not attended by most of the twelve applicants. They had no opportunity to express their views.

A somewhat similar situation arose in Durayappah v Fernando & Ors [1967] 2 All ER 152 (PC), where the facts were these: As a result of complaints against the Jaffna Municipal Council, the Minister of Local Government sent his commissioner to enquire into allegations of mismanagement and to report to him immediately. The appellant, who was the mayor of Jaffna, afforded the commissioner every facility, but the commissioner did not give any members of the Council a hearing. He made his report to the Minister. On the same day that he received the report, the Minister made an order stating that the members of the Council were not competent to perform their duties. And pursuant to the powers conferred on him by s 277 of the Municipal Council Ordinance, he declared that the Council should be dissolved. On appeal, the Judicial Committee of the Privy Council expressed the opinion that the rule of natural justice was applicable to a decision of the Minister to make an order under s 277 of the Ordinance on the ground ofincompetence, and that the members of the Council had been denied a hearing (see

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at 157G-I).

THE DECISION

For the reasons outlined, s 21(1) of the Act is found to be ultra vires s 18(9) of the Constitution. Since subss (2) and (3) thereof cannot stand independently of subs (1), it follows that s 21 in its entirety must be struck down.

This conclusion makes it unnecessary for this Court to pronounce upon the validity of the two remaining grounds upon which the applicants sought the same redress. It suffices to state that each was argued strongly and with a fair measure of cogency. I prefer, however, to leave their resolution completely open.

THE ORDER

In the result, I would order as follows:

1. Section 21 of the Private Voluntary Organisations Act [Chapter 17:05] is declared in contravention of s 18(9) of the Constitution and is to be struck down.

GUBBAY CJ

2. The applicants are accordingly at liberty to resume membership of the executive committee of the National Council of the Association of Women's Clubs.

3. The respondent is directed to pay the costs of this application.

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

S v TASOSA 1997 (1) ZLR 197 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Criminal appeal

28 January & 11 February 1997 Judgment No. S-10-97

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Flynote

Roads and road traffic - offences - using a forged certificate of competency - knowledge that document was forged - proof of

Roads and road traffic - sentence - using a forged certificate of competency - prison sentence justifiable

Headnote

The appellant was stopped by the police for speeding and asked to produce his driver's licence. He produced a certificate of competency, the document that is issued after the conclusion of a successful driving test. A certificate of competency may be used for up to six months from the date of issue, pending the issue of a driving licence. The document produced by the appellant had apparently expired some 15 months before the date on which he was stopped by the police. The appellant claimed that, though the document was forged, he did not know it was forged. He also appealed against the effective sentence of two months' imprisonment imposed on him.

Held, that the appellant, as an educated person, could not possibly have believed that the document was genuine. He admitted getting it from a man at a hotel, and he must have known the correct procedure for obtaining a certificate of competency.

Held, further, that the offence was serious, involving corruption and physical danger to other road users. Deterrence was important and there was no basis for interfering with the sentence imposed.

Cases cited:

R v Arineshito & Ors 1964 RLR 126

1997 (1) ZLR p198

McNALLY JA

S v Rutsvara S-2-90

S v Sibanda HB-47-93

Statutes referred to:

Road Traffic Act [Chapter 13:11], s 10

Case Information

G S Wernberg, for the appellant

M Majuru, for the respondent

Judgment

McNally JA: The appellant was convicted of contravening what is now s 6(2)(c) of the Road Traffic Act [Chapter 13:11]. The section makes it an offence for any person who, "knowing that a document referred to in paragraph (a) or (b) has been forged or is likely to deceive, as the case

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may be, uses or has in his possession such a document or lends it to or allows it to be used by another person".

The document "referred to in paragraph (a)" is a driver's licence. The document which the appellant was using was in fact not a licence but a certificate of competency. This is a document issued in terms of s 10 of the Act. It is intended to be used in place of a licence pending the issue of a driver's licence. No point was taken in the trial or at the appeal hearing as to the distinction, if any, between a driver's licence and a certificate of competency. I note that s 10(4)(b) of the Act provides that a certificate of competency "shall be deemed for such period as may be prescribed, and for the purposes of this Act, to be a driver's licence ..."

It appears that the appellant was stopped for speeding on 28 January 1996, and was asked to produce his driver's licence. He then produced the document out of which this charge has arisen. It is not disputed that it is a forged certificate of competency. The issue is whether he knew that it was forged.

The explanation supporting his innocent state of mind is so patently false that I do not propose to dignify it by repeating it. An explanation of this nature might just possibly be credible if it came from a seventeen year old peasant. But we are dealing with a twenty-seven year old biological science graduate who is a packaging manager at a brewery.

The police witnesses, who were believed by the magistrate, say that the appellant first told them he had obtained the certificate from the Vehicle Inspection Department ("VID"), but then when he was disbelieved, admitted

McNALLY JA

he had obtained it from a man he met at the Jameson Hotel. He had paid the man $300.

If, as he claimed, he already had a learner's licence, he would have known the correct procedure. Indeed, even on the face of the fake certificate it states: "This certificate of competency is deemed to (be) a driver's licence in respect of the class of motor vehicle specified in paragraph 4 for a period of six months from the date of issue". It was issued on 26 April 1994, so it ceased to have even spurious validity on 27 October 1994. Yet he was still using it some fifteen months later. He claims to have telephoned the CVR (Central Vehicle Registry) to enquire about his "metal disc", and to have been told it was not yet ready. But since he did not hold a genuine certificate it is difficult to believe that they could have told him that. They could not have had a record of his name or of his certificate. The police seem to have had no trouble in getting that information from the CVR.

One must also bear in mind, in considering the question of *mens rea*, what kind of document we are considering. An innocent man may well possess, for example, a forged $10 note. Such notes circulate freely, and therefore mere possession of a forged note is not indicative of a guilty mind.

But to possess and use a driver's licence one first has to go through an elaborate and time-consuming set of procedures. So the holder of a driver's licence (or, as in this case, a

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certificate of competency) will know, especially if he is a graduate and a businessman, whether or not he has obtained it lawfully.

I have no hesitation in agreeing with the magistrate's conclusion that the appellant must have known that his document was obtained illegally and was not a genuine certificate. There is no reasonable possibility that his explanation could be true. The appeal against conviction fails.

The sentence imposed by the magistrate was one of imprisonment for four months, of which two were suspended on conditions.

Mr Wernberg has argued strenuously that the magistrate misdirected himself in assessing sentence and that, in any event, the sentence was manifestly excessive, warranting interference.

Certainly, the appellant is a young man of twenty-seven with a clean record, a good job, and a wife and child. He claims to have passed a Defensive

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McNALLY JA

Driving Course at the Zimbabwe Traffic Safety Board's testing ground, but strangely he failed to bring the certificate in question to court. The appellant was legally represented. His legal representative should have ensured that he brought the certificate. One is left with an uneasy feeling. Does he possess such a certificate? If he does, is it genuine? It is true that the prosecutor did not challenge his assertion.

Mr Wernberg's first contention was that the magistrate should have considered the option of a fine. Certainly, there is a great deal of law in favour of that proposition, where the penalty is a fine or imprisonment or both. See *R v Arineshito* & Ors 1964 RLR 126; S v Rutsvara S-2-90.

The answer to that submission is that the magistrate did consider carefully and reject the idea of imposing a sentence of community service. A fortiori therefore he must have rejected the idea of a fine. He was invited by the defence to impose a fine plus a suspended sentence. He noted the undesirability of sending first offenders to prison. He stressed the seriousness of the offence, both from the point of view of corruption and from the point of view of endangering the lives of other road-users. He concluded: "I will not belittle the lives and safety of the public by blessing the accused's conduct with a petty fine or a lenient sentence". So, in fact, he did consider a fine.

Second, Mr Wernberg submitted that the court should not have followed *S v Sibanda* HB-47-93. This was also a case of a man using a false certificate of competency. He pointed out that Sibanda did not have a Traffic Safety Board Certificate. That is true, but on the other hand Sibanda pleaded guilty and was thus entitled to a modicum of leniency.

I agree with the magistrate that this is a serious offence. Indeed, it is doubly serious, given the element of corruption and the physical danger to other road-users. Much as this court dislikes short periods of imprisonment, I agree that in this case deterrence is important. I can see no basis for interfering.

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The appeal is dismissed.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Gutu & Associates, appellant's legal practitioners

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(1) GONDO & ANOR v SYFRETS MERCHANT BANK LTD
(2) SANI TOILET SYSTEMS (PVT) LTD v SYFRETS MERCHANT BANK
(3) SYFRETS MERCHANT BANK v GONDO & ANOR
(4) SYFRETS MERCHANT BANK v SANI TOILET SYSTEMS (PVT) LTD 1997 (1) ZLR 201 (HC)

Court **High Court, Harare**

Devittie J

Civil application

12 February 1997 Judgment No. HH-33-97

Flynote

Practice and procedure - judgment by consent - rescission - error common to both parties - subsequent case establishing rule of law which would have affected parties' decision not to oppose judgment -r 449 of High Court Rules- application of - need to establish that rule out law had in fact been broken-whether court should use common law power to rescind its own judgment

Interest - rate - the *in duplum* rule - debtors not opposing judgment .because unaware of rule - seeking rescission of judgments on basis that would have defended claims had they been aware of *in duplum* rule

Headnote

Judgments had been obtained against the applicants in respect of certain debts owed by them. The applicants decided not to oppose the proceedings because they did not at the time think they had any defences to the claims. Subsequently, there had been a ruling by the High Court *(Commercial Bank of Zimbabwe Lid v MM Builders & Suppliers (Pvt) Lid & Ors* 1996 (2) ZLR 420), that had clearly established that the *in duplum* rule applied in Zimbabwe. If they had been aware of this they would have defended the actions, at least in respect of part of the claim. They applied for rescission of judgment.

DEVITTIE J

Held, that in terms of r 449 of the Rules of the High Court the court could rescind a judgment where the judgment was granted as a result of a common mistake of the parties. However, in the present case, even assuming that the parties were labouring under a common mistake, the applicants would have had to go further and prove that the amount of the judgment debt

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breached the *in duplum* rule. On the papers before it, the court could not be satisfied that the applicants had furnished the requisite proof that the judgment had been granted in error. The judgments in fact reflected the true decision of the court on the basis of the evidence presented.

Held, further, that although r 449 did not apply, the court also had a discretionary power under the common law to rescind its own judgments. This power extended beyond, and was not limited to, the grounds set out in the Rules of the High Court. In respect of the first application, rescission would not be granted as the first applicant had not established that he had a *bona fide* defence which carried some prospect of success as he had failed to demonstrate that the *in duplum* rule had been breached in his case. On the other hand, in respect of the second application, partial rescission of the judgment would be granted as the second applicant may have had a *bona fide* defence to part of die claim.

Cases cited:

Bakoven Lid v GJ Howes (Pty) Lid 1992 (2) SA 466 (E)

Commercial Bank of Zimbabwe Lid v MM Builders & Suppliers (Pvt) *Lid* 1996 (2) ZLR 420 (H)

de Wet & Ors v Western Bank Lid 1979 (2) SA 1031 (A) *Dzviti v Mutasa* 1990 (1) ZLR 342 (H)

Firestone SA (Pvt) Lid v Genticuro AG 1977 (4) SA 29 (A) *Maia v Total Namibia (Pvt) Lid* 1991 (2) SA 188 (Nm)

Standard Bank of SA v Oneanate Invstms (Pty) Lid 1995 (4) SA 5 10 (C) *Terrace Auto Svcs Centre (Pvt) Lid & Ors v First National Bank of SA* 1996 (3) SA 209 (W)

Tshivhase Road Council & Anor v Tshivhase 1992 (4) SA 852 (A)

Statutes and regulations referred to: High Court Rules 1971 (RGN 10471197 1), r 449

Case Information

J C Andersen SC, for the applicants

A P de Bourbon SC, for the respondents

Judgment

Devittie J: In recent times, the money market in this country has been

DEVITTIE J

characterised by high interest rates. This has had the consequence that where a debt remained unserviced it took a relatively short period of time (in comparison to economies with low interest rates) for a borrower's liability in respect of interest to equal or exceed the capital outstanding.

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This situation generated considerable public debate particularly amongst borrowers who, having defaulted on their loans, found cause to question whether there was cut off point beyond which they were not liable for interest. The debate received impetus from the judgment of SELIKOWITZ J in *Standard Bank of South Africa v Oneanate* Invstms 1954 (4) SA 5 10 (C), which applied what is now known as the *in duplum* rule.

It is against this background that four judges of this court seized the opportunity presented in three chamber applications for default judgment to deal with the application of the *in duplum* rule in this jurisdiction.

In *Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pvt) Ltd 1996 (2) ZLR 420 (H),* this court held that the *in duplum* rule was part of our law. GILLESPIE J, after a thorough review of the authorities, articulated the rule thus:

> "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 commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which cause was instituted."

An interesting sequel to the decision in the *MM* case concerns a debtor who having taken a deliberate decision not to oppose a claim for capital and interest subsequently seeks to set aside the judgment obtained on the grounds that the judgment debt contravenes the *in duplum* rule and that had he been aware of the rule he would have defended the claim in respect of which judgment was obtained. That is the contention advanced by the applicants in the two applications for rescission before me.

The judgments to be set aside were granted against the applicants on *26* January 1994 and *28* February 1995. The first application is by Reuben and

DEVITTIE J

Another HC-6612196 and the second application is by Sani Toilet Systems (Pvt) Ltd HC-6613/96. The respondent, in consequence of the judgments sought to be rescinded seeks an order confirming the sequestration of the estates of Reuben Gondo & Anor (first applicant) and an order placing Sani Toilet Systems (Pvt) Ltd (second applicant) in liquidation. For reasons which will become apparent, it was convenient to hear all the matters together.

Both applications for rescissions have their genesis in an action which respondent instituted in September 1993 against Kamsoko Holdings (Pvt) Ltd and Reuben Gondo & Another (the first applicant) in which it claimed payment of the sum of $1407 760A5 with interest at 39.5% calculated from 1 October 1993. The applicant entered appearance to defend whereupon the respondent applied for summary judgment. It is common ground that the first applicants did not contest the application for summary judgment as they considered that they had no defence to the claim. They state that they were not aware that a defence was available to them under the in *duplum* rule. Accordingly, the respondent obtained judgment on 26 January 1994 in the sum

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claimed.

After judgment was obtained, it appears that some efforrs were made to settle the matter. These efforts resulted in Sani Toilet Systems (Pvt) Ltd (the second applicant) giving an unlimited guarantee in respect of the judgment debt.

As 1 understand the in *duplum* rule, interest on the full amount of the judgment debt would have commenced to run afresh from the date of the judgment.

In January 1995, the respondent sought and obtained judgment against Sani Toilet Systems (Pvt) Ltd for the judgment debt which had been guaranteed and remained unsatisfied. In terms of the unlimited guarantee given by Sani Toilet Systems, the respondent claimed interest at the rate of 40.5% with effect from January 1995 and judgment was obtained in the sum of $2 490 751,56 on 28 February 1995. Sani Toilet Systems (Pvt) Ltd did not defend the action for the same reason that first applicant gives.

The two judgments remained unsatisfied and on 21 December 1995, the respondent filed an application for the liquidation of Sani Toilet Systems (Pvt) Ltd, and a separate application for the sequestration of the personal estates the Gondos.

Thereafter, the applicant initiated further efforts to resolve the matters in contention. The legal practitioner acting for both applicants requested details

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DEVITTIE J

of all monies lent and advanced to enable him to determine whether there had been a breach of the *in duplum* rule. These details were provided. On 1 March 1996, respondent's legal practitioner wrote to applicants' legal practitioners in the following terms:

> "Further to our letter of 23 February 1996, please note that without prejudice to its rights and in an effort to reach agreement in this matter without further delay, our clients are prepared to settle it on the basis of a payment by your client of the capital amount and interest in an equivalent amount."

The applicants were amenable to this suggestion and their legal practitioner undertook to calculate the capital and interest. On 16 April 1996, the applicants' legal practitioner wrote to the respondent:

> "The extent of our clients indebtedness is as follows:
>
> (a) Account No. 946094-4
>
> (i) capital $486945,89
>
> (ii) interest $486945,89
>
> (b) Account No. 9400763-4
>
> (i) capital $596284,13
>
> (ii) interest $596284,13

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$2 166 460,04

The respondent agreed to accept that that the total amount owing to it in respect of each judgment debts was $2 166460,04. The applicants sought an indulgence in paying this amount in installments but the respondent insisted on full payment. It is common ground that to date no payment has been made to settle the amount admitted by the applicants.

The applicants have opposed the applications for the sequestration and liquidation of their respective estates and they seek an order setting aside the judgments obtained on 26 January 1994 and 28 February 1995. If the applications for rescission succeed, then I must discharge the provisional orders.

The judgments sought to be rescinded are default judgments. In terms of the rules of court, an application for rescission of a default judgment, may, depending on the circumstances, be brought in terms of r 63, r 449 or the common law.

DEVITTIE J

The present applications for rescission are brought in terms of r 449 which provides that the court may, in addition to *another powers it* may have, mero motu or upon application of any party affected. rescind or vary:

> "(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected;
>
> (b) an order or judgment in which there is an ambiguity or patent erro or omission, but only to the extent of such ambiguity, error, or omission;
>
> (c) an order or judgment granted as the result of a mistake common to the parties."

Mr Andersen for the applicants submitted that the judgments ought to be set aside in terms of r 449(1) as they were obtained as a result of an error common to the parties. In support of his submission, he cited *Tshivhase Road Council* & Anor *v Tshivhase* 1992 (4) SA 852 (A) at 862 and *Dzviti v Mutasa* 1990 (1) ZLR 342 (H).

He submitted that both parties took the view that the *in duplum* rule "precluded interest in excess of the capital amount or further interest on the judgment debt and reached agreement that the amount due was $486 945,89 in respect of the capital sum and the same amount in respect of the interest". He submitted that but for the fact of a mistaken belief held by each of the parties, the respondent would not have claimed the amount it did in the first instance, and that the applicants would certainly have resisted any claim in excess of the amount subsequently agreed.

Mr *de* Bourbon for the respondent submitted that no mistake had occurred because a calculation of the capital and interest outstanding demonstrated no breach of the *in duplum* rule. On that basis, he submitted, the court had no jurisdiction to invoke r 449(1)(c).

The immediate question to be resolved is whether the judgments in respect of which rescission is sought were granted as a result of "a mistake common to the parties" in terms of r 449(1)(c).

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In *Tshivane Road Council* v Tshivane *supra* NESTADT JA stated that the South African equivalent of r 449 (which is worded in identical terms to our rule) is an exception to the general principle that "a final order, correctly

expressing the true decision of the court cannot be altered. The judge is *functus officio: Firestone South Africa (Pvt) Ltd v Genticuro AG 1977 (4) SA 29 (A)".* The court stated two broad requirements to be satisfied for r *499(1)(c)* to be successfully invoked:

> "One is that there must have been a 'mistake common to the parties'. I conceive the meaning of the expression to be what is termed, in the field of contract, a common mistake; they are, in this regard, *ad idem* (see Christie *Law of Contract in South Africa 2* ed at *382* and *397-8). A* mistake of fact would be usual type relied on. Whether a mistake of law and of motive must be reasonable are not questions which, on the facts of our matter arise. Secondly, there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been as the result of the mistake. This requires, in the words of ELOFF J in *Seedat v Orai & Anor 1984 (2) SA 198 (7)* at *201D,* that the mistake relate to and be based on something relevant to the question to be decided by the court at the time. Other cases which illustrate this are Ex p *Barclays Bank 1936 AD 481* and *van Zyl v van der Merwe 1986 (2) SA 132 (NC).* The principle is that you cannot subsequently create a retrospective mistake by means of fresh evidence which was not relevant to any issue which had to be determined when the original order was made. The reason is obvious: the court would at that time have had before it no evidence and thus no wrong evidence on the point; hence there would have been no mistake. Contrast this with the case where the subsequent evidence is aimed at showing that the factual material which led the court to make it's original order was, contrary to the parties assumption as to its correctness, incorrect. Here we would have the type of situation envisaged by r *42(1)(c)."*

In *Bakoven Ltd v G J Howes (Pty) Ltd 1992 (2) SA 466* (E) it was held that the purpose of the rule is to correct an obviously incorrect judgment or order.

In order for the rule to be invoked there must be a common mistake, in regard to which the parties were *ad idem.* Even it is accepted that the parties laboured under a common mistake as to the application of the *in duplum* rule, the applicant must go further and prove that the amount of the judgment debt in fact breached the *in duplum* rule. In other words, the mistake must be proved. I am not satisfied on the papers before me that the applicant has furnished the requisite proof. In the absence of demonstrable proof that the judgments sought to be impugned breached the *in duplum* rule I am unable to accept that judgment was granted in error. Furthermore, in my opinion, the judgments

reflected the true decision of the court on the basis of the evidence presented. As NESTADT JA stated in *Tshivase's* case, "You cannot subsequently create a retrospective mistake by fresh evidence which was not relevant to any issue to be decided at the time".

I must now deal with Mr Andersen's contention that the agreement which the parties reached as to the sum owing judgment, and that on that basis it is proper that it be set aside. Attractive though this submission may be, I do not consider that the respondent abandoned the judgment which it obtained. In the first instance, no agreement was reached, because the negotiations

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broke down over the terms of payment. There are many instances in which, after judgment has been obtained, the parties enter into negotiations in an effort to settle the amount claimed. I do not think that it would be fair to hold that if the parties agree on a settlement figure then that amounts to an abandonment of the judgment and disentitles the judgment creditor to rely on the judgment obtained in circumstances where there is no agreement as to the terms of payment. To do so would be to unnecessarily discourage the negotiations which take place after judgment has been obtained and which are part and parcel of ordinary day commercial life.

Although 1 have found that the applicants are not entitled to invoke r 449, this court has the jurisdiction at common law to rescind its own judgment and it is on the basis of the common law principles that I propose to decide the applications for rescission. 1 must add that I would not have considered it inappropriate had the application been brought in terms of r 63.

In de Wet & Ors v Western Bank Ltd 1979(2) SA 1031 (A) at 1043TRENGOVE MA, after an extensive review of the authorities, stated that the court's common law discretionary power should not be unduly restricted:

> "It follows from what 1 have said that the court's discretion under the common law extended beyond, and was not limited to, the grounds provided for in r 31 and 42(1), and those specifically mentioned in the *Childerley* case. These grounds do not, for example, cover the case of a litigant, or his legal representative, whose default is due to unforeseen circumstances beyond his control, such as sudden illness, or some other such misadventure.
>
> In the result, I have come to the conclusion that the court of first instance erred in taking too rigid a view of the ambit of the court's discretionary power to rescind default judgments. The test which it applied in deciding

DEVITTIE J

> whether to grant the applicants the indulgence sought was too stringent and not in accordance with the principles of our common law. That being the position, it now becomes necessary for this court to consider whether having regard to all the circumstances of the case, including the applicant's explanation for their default, this is a proper case for the grant of indulgence!'

I am prepared to accept in the applicants' favour that at the time they made what was a deliberate decision not to oppose the proceedings they were not aware of the *in duplum* rule and that, had they known of the rule, efforts would have been made to defend at least part of the claim. 1 do not consider the explanation given for the applicants' default to be unsatisfactory, given the fact that this matter involves a rule which until recently was not strictly adhered to.

In regard to the merits of the applicants' defence, it must be stated at the outset that the applicants conducted an exercise to determine the extent of their indebtedness and admitted liability in a specific sum. have not been apprised of the exact basis on which they sought amongst other considerations to apply the *in duplum* rule. I am not satisfied that, in respect of the first application for rescission, the applicant has shown a *bona fide* defence which carries some prospect of success. The applicants have not demonstrated the extent, if any, to which the rule was breached. It is not sufficient to simply make the averment that the amount claimed in interest exceeds the capital outstanding. My own assessment of the accounts does not lead me to the conclusion that the interest claimed exceeded the capital outstanding at the time

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proceedings were instituted.

In respect of the second application for rescission, 1 am prepared to accept that the applicant may have a *bona fide* defence to that part of the claim which exceeds the sum admitted. I propose to grant judgment in the sum admitted. I am satisfied that it is competent for me to grant what is in effect partial rescission.

In *Terrace Auto Services Centre (Pvt) Ltd & Ors v First National Bank of South Africa 1996 (3) SA 209 (W)* REUBEN *AJ* declined to grant partial rescission on the grounds that

> "once a defendant in an application for rescission presents a reasonable and acceptable explanation for his default, his default is purged. He is then entitled, provided he can show in addition that he has a *bona fide*

DEVITTIE J

> defence to the plaintiffs claim, to be put back in the position that he would have occupied but for his default. I can see no reason why a defendant should not in those circumstances be revested with the procedural advantages which the rules of court offer a defendant in the ordinary case."

REUBEN AJ recognised the court's discretionary power at common law to order partial rescission.

In *Maia v Total Namibia (Pvt) Ltd 1991 (2)* SA 188 (Nm) partial rescission was ordered in an application not brought in terms of the common law but in terms of the rules of court. O'LINN J stated that -

> "It is self evident that it is unreasonable and absurd to set aside a judgment for the total amount if only a *bona fide* defence against a small part of the claim is shown."

I think that the above comment applies to the second application for rescission. In my view, it would be inequitable not to order partial rescission. 1 therefore order as follows:

1 . In case No. *6612196,* the application for rescission is dismissed with costs.

2. In case No. *6613196,* the application for rescission partially succeeds, in that the applicant is given leave to defend the balance of the judgment debt only to the extent that it exceeds the admitted sum of $2 166 460,04. The judgment is confirmed in all other respects.

3. The applicant is to bear costs in respect of both applications.

I turn now to deal with the applications for the sequestration and liquidation of the applicants' respective estates. In the view of the orders 1 have made on the applications for rescission, the conclusion that inevitably flows is that the provisional orders ought to be confirmed.

The provisional orders in cases No. 9020195 and 9019/95 are accordingly confirmed.

Kantor & Immerman, legal practitioners for the applicants

Gill, Godlonton & Gerrans, legal practitioners for respondent

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S v KAYIMBANEMOYO 1997 (1) ZLR 211 (HC)

Court **High Court, Harare**

Adam J

Criminal review

12 February 1997 Judgment No. HH-17-97

Flynote

Criminal procedure - plea - guilty - charge of being found in possession of goods in circumstances giving rise to reasonable suspicion that goods are stolen - whether necessary to lead evidence even in event of plea of guilty

Headnote

The accused was charged with housebreaking with intent to steal and theft, alternatively with contravening s 12(2) of the Miscellaneous Offences Act [Chapter 9:15], that is, being found in possession of property in circumstances giving rise to a reasonable suspicion that the goods were stolen and being unable to give a satisfactory account of his possession. He pleaded guilty to the alternative charge and was convicted. The facts showed that shortly after a fishing rod and reel were stolen from a farm in Karoi, the accused was found by his employer (who ran a different farm) in possession of the rod and reel. He was unable to give a satisfactory account of his possession. The scrutinising regional magistrate declined to confirm the proceedings, on the grounds that oral evidence should have been led, even though the accused pleaded guilty.

Held, that there was ample evidence of circumstances giving rise to a suspicion that the goods were stolen. This imposed on the accused an obligation to give a satisfactory explanation for his possession of them. The circumstances were such that the accused could have been convicted of theft on the basis of recent possession. The accused agreed that he failed to give a satisfactory explanation. Accordingly, the proceedings should have been confirmed.

ADAM J

Cases cited:

S v Chitsinde 1982 (2) ZLR 91 (S)

S v Ganyu 1977 (2) RLR 87 (A)

S v Karasa HH-527-87

R v Mandele 1929 CPD 96

S v Mjikwa S-19-83

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Statutes referred to:

Criminal Procedure and Evidence Act [Chapter 9:07], ss 271(2)(b) and 272

Miscellaneous Offences Act [Chapter 9:15], s 12(2)(a)

Judgment

Adam J: The accused was charged with housebreaking with intent to steal and theft, alternatively with contravening s 12(2)(a) of the Miscellaneous Offences Act [Chapter 9:15]. He pleaded guilty to the alternative charge and on being convicted was sentenced to a fine of $900 or, in default of payment, 3 months' imprisonment with labour and, in addition, 4 months' imprisonment with labour wholly suspended for 5 years on condition he does not within that period commit any offence involving dishonesty or contravention of s 12 of the Miscellaneous Offences Act for which he is sentenced to imprisonment without the option of a fine or to a fine in excess of $150.

The facts accepted by the accused were that during March 1996, a fishing rod and reel were stolen from the office of George Heyns (the complainant) at Springbok Heights Farm in Karoi. The complainant discovered that his fishing rod and reel were missing and so carried out a private investigation. During that same month, March 1996, the accused was employed by William Nel at Buffalo Downs Farm in Karoi as a builder's assistant. He was during that month taken with other builders to Chirundu by William Nel. When leaving for his farm from Chirundu, William Nel spotted the fishing rod and reel that was being loaded into the vehicle by the accused. On being asked where the accused got this from, the accused failed to give a satisfactory answer. William Nel recovered the fishing rod and reel from the accused and informed the complainant of this. The complainant then positively identified the fishing rod and reel as his property. The value placed on this was $1 050. The accused had no right to it.

The acting regional magistrate queried the procedure followed in this case by the provincial magistrate, in that it appeared to be going against the principles laid down in *S v Chitsinde* 1982 (2) ZLR 91 (S) and S v Karasa HH-527-87. These cases seemed to suggest to the acting regional magistrate that oral

evidence had to be held for an offence under s 12(2) even where a person had entered a plea of guilty. In the present case, he asserted, no oral evidence was led.

In his reply, the provincial magistrate indicated that his understanding of rationale in *S v Chitsinde supra* was that before a court can convict a person on the basis of recent possession, there must be clear and cogent evidence to that effect, and that the Supreme Court emphasized that s 12(2) must only be invoked where there was evidence which established reasonable grounds for suspicion that the property was in fact stolen. Unless there was such evidence, then there was no obligation on the accused to give a reasonable explanation.

Further, s 12(2) did not apply where there was clear evidence that the property was in fact

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stolen. The provincial magistrate was of the view that *S v Chitsinde supra* did not unequivocally state that before an accused can be convicted on his guilty plea under s 12(2) oral evidence must be heard. He maintained that in the present case there was no evidence that the property was stolen by the accused although there was reasonable suspicion that it was stolen. The accused did not give a reasonable explanation as to how he came to be in possession of the items. If anything, the explanation he gave to the trial magistrate was incredible, dubious and false beyond any reasonable doubt.

As for S v Karasa *supra* Chidyausiku J, according to the provincial magistrate, said that s 12(2) must not be invoked where there was evidence that the property was in fact stolen. Also, he said that when an accused gives an explanation regarding how he had acquired the property in his possession, a court should enter a plea of not guilty and proceed to trial.

It is trite that the essential elements for the offence under s 12(2) of the Miscellaneous Offences Act [Chapter 9:15] are: there must be (a) possession of (b) goods in circumstances which give rise to (c) a reasonable suspicion that those goods were stolen and (d) the accused is unable to give a satisfactory account of such possession of those goods.

In *S v Chitsinde supra*, the accused had pleaded not guilty but was convicted by the magistrate. The Supreme Court held that for s 12(2) there must be evidence of the circumstances which could give rise to a reasonable suspicion that the goods were stolen. In that case, since there was no description of the chair and cutlery or their value, it was not possible to conclude that these were

the type of goods which one would not expect a person in the accused's position to own. Also, it seemed unacceptable to Georges JA (as he then was) to contend that because other stolen property also had been there where these items were found that there was reasonable ground for suspicion that these items were stolen property, since there was a great deal of property taken from the accused's house. Out of all that, comparatively, few items formed part of the charges laid against the accused and no special reason was given for picking out the chair and cutlery. There was no evidence either of the circumstances in which the item were found and no evidence of reports of loss of cutlery of similar description. The trial magistrate made no findings as to what were the circumstances which led to a reasonable suspicion. Georges JA said at 99-100:

> "It appears to me as a matter of interpretation that the terms of the section cannot apply where the property found in the possession of the accused person is proved to have been stolen. It is difficult to assert in the words of the section that a person has been in possession 'of goods of any description in circumstances which give rise, either at the time of the possession or at any time thereafter, to a reasonable suspicion that at the time of such possession the goods were stolen' when it is known that shortly after that person has been found in possession of the goods that they were in fact stolen goods. It is tantamount to an assertion that one can reasonably suspect that the goods were stolen because one knows that they have been stolen. The certain knowledge that the goods are stolen replaces reasonable suspicion which, as has been said, is a basis for the application of the section. A person found in possession of stolen goods can be convicted of theft or of receiving the goods knowing them to have ben stolen, if the evidence necessary to prove these offences has been established. Such a person would also face the possibility of a conviction if he fails to give a satisfactory explanation. Where, as here, an accused is

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found in possession of stolen goods so long after the theft that the presumption which may normally be drawn from the fact of possession of property which was recently stolen cannot safely be drawn, such a person cannot be called to account under s 12(2) of the Miscellaneous Offences Act."

With due deference to Georges JA, the doctrine of recent possession, has particular application for proof of theft and of receiving property knowing it to have been stolen. The fact that possession of property by a person long after the theft would not allow the doctrine to come into play does not mean that such a person found with the property could not be called upon to provide a

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satisfactory account in terms of s 12(2). As the learned Judge of Appeal correctly pointed out, the basis for the application of s 12(2) was that there must be evidence of the circumstances in which the property had been found in possession from which reasonable suspicion could arise that the property was stolen. In that case before the Supreme Court, no evidence had been adduced by the prosecution that the cutlery in question had been concealed in a suspicious manner, that a report had been made a long time back of loss of cutlery of a similar description and that the accused failed to provide a satisfactory account. If that had ben done, surely it could not have been maintained by George JA that just because the prosecution could not rely on the presumption of theft that might normally be drawn so long after the loss of the cutlery did not mean that the accused could then not have been convicted under s 14(1).

In S v Karasa *supra*, the accused had tendered a plea of guilty to s 14(1) of the Miscellaneous Offences Act and the trial magistrate found him guilty. The trial was stopped in terms of what is now s 54(2) of the Magistrates Court Act [Chapter 7:09] because the magistrate felt that he had insufficient jurisdiction to sentence the accused. A report was submitted by him to the Attorney-General, who placed the record of proceedings with his comments for review before the High Court. The Attorney-General asked that the conviction and sentence be quashed for the following reasons:

"(1) the magistrate ought not to have convicted the accused without hearing evidence - see *S v Chitsinde* 1982 (2) ZLR 91.

(2) section [12(2)] of the Miscellaneous Offences Act should not be invoked where it is known that the property was in fact stolen (Chitsinde's case).

(3) in any event when the accused told the court that he bought the goods for $200 from a man who did not give him a receipt, the magistrate should have recorded a plea of NOT GUILTY."

Chidyausiku J agreed with the Attorney-General's view and with the concurrence of Reynolds J quashed the conviction and set aside the sentence.

It is clear from the foregoing that the error committed by the trial magistrate was to continue with the trial on the basis that accused had pleaded guilty in spite of the fact that he had given an explanation about the goods. In such a situation, the magistrate should have altered the plea to not guilty in terms of

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s 272 of the Criminal Procedure and Evidence Act and required the prosecution to proceed to trial by calling witnesses to give oral evidence.

Chidyausiku J's review judgment is short. It did not provide the facts upon which the accused tendered his plea of guilty or the magistrate's explanation to the accused about the charge and the essential elements of the offence or whether the accused understood the charge and the essential elements.

It is true that the Attorney-General did indicate that the magistrate ought to have heard evidence citing *S v Chitsinde supra*. But in *S v Chitsinde supra* the accused had entered a plea of not guilty. Thereafter, a trial was held with witnesses giving evidence. Georges JA said that if the prosecution intended to rely on the evidence of possession by an accused of property then that evidence should have been presented to the court in as complete a manner as possible.

It may well be that this is what concerned the Attorney-General in S v Karasa *supra*, that evidence had not been presented in a complete manner and that is why he indicated that the magistrate ought to have heard evidence in that matter.

The provincial magistrate was correct to point out to the regional magistrate that in the present case there was no direct evidence before him that the fishing rod and reel was stolen by the accused.

There is no doubt that it is on the basis that he had suspicion about the accused's possession of the fishing rod and reel that William Nel asked him where he had got it from and the accused failed to give a satisfactory answer. The record of proceedings also disclosed that in May 1996, when the essential elements were explained to the accused and he was questioned by the magistrate, the accused agreed that during the month of March 1996 he was at Chirundu Fishing Camp where he was found with a fishing rod and reel and failed at that time to give a reasonable or satisfactory explanation about his possession of that fishing rod and reel. The accused was further asked by the magistrate about where he got them from and he answered that he did not remember. He was then asked why didn't he remember since March 1996 was fairly recent and he answered that he had picked them up. He gave no answer to the question where he had picked them up. But he answered to a further question that he did not remember when he pickedthem up.

Section 271(2)(b) of the Criminal Procedure and Evidence Act lays down the

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procedure on a plea of guilty. It clearly provides that the court must explain to an unrepresented accused the charge and the essential elements of the offence and requires prosecution to outline on what acts or omissions the charge is based by stating the facts of the case. Thereafter the court must inquire from that accused whether he understood the foregoing and

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whether his plea of guilty constituted an admission of the essential elements and the charge.

Section 272 lays down the procedure where there is doubt in relation to a guilty plea. In such a case, any time before sentence is passed the court must record a plea of not guilty and then a trial must be conducted in the normal way with the calling of witnesses.

There is nothing said by the Supreme Court in *S v Chitsinde supra*, which can be interpreted as negating what is provided in s 271(2)(b). It was not a case where the accused had tendered a plea of guilty. Also that case did not make an exception to what is provided in s 271(2)(b) where an accused enters a plea of guilty to a charge under s 12(2) of the Miscellaneous Offences Act [Chapter 9:15]. If the Attorney-General meant to indicate that *S v Chitsinde supra* required a trial in the normal way by calling witnesses where an accused enters a plea of guilty to a charge under s 12(2), then he erred.

Unlike *S v Chitsinde supra*, where there was no evidence either of the circumstances in which the items had been found or of the report of loss of items of similar description, in the present case George Heyns made known in March 1996, the theft of his fishing rod and reel by carrying out his own private investigations. In March 1996, William Nell, while in Chirundu, found the fishing rod and reel in the possession of the accused, at which time he questioned him about it. At that time, the accused failed to give a satisfactory account for his possession of them. Nel recovered that fishing gear during March 1996. It was identified positively in the same month by George Heyns. Both Nel and Heyns were from Karoi. The accused was employed during March 1996 by Nel. In light of the foregoing, it could not be maintained that evidence had not been presented by the prosecution in as complete a manner as possible. There was ample evidence of circumstances giving rise to a suspicion that the fishing rod and reel were stoen which imposed an obligation on the accused to give a reasonable explanation for his possession ofthem. Georges JA also spoke about the doctrine of recent possession in relation to a charge of theft. He agreed with Gardener JP in R v Mandele 1929 CPD 96 at 98:

> "... everything depends on what is recent, and recent possession must

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> vary very much with the nature of the articles stolen. Possession nine months afterwards may be recent in the case of one kind of article, and possession nine days afterwards may not be recent in the case of another. In fixing what is recent one has to depend upon the nature of the article. The question the court has to put to itself is, is the article one which would easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief?"

Georges JA said that a person found in possession of stolen property could also be convicted of theft or of receiving the goods knowing them to have been stolen where the prosecution can prove those offences. Clearly, the evidence of possession in the present case was not so long after the theft that the presumption which may normally be drawn from the fact of possession of the fishing rod and reel may not be applicable. A fishing rod and reel is unlike a suit of clothes or a pair of jeans which could easily be passed from hand to hand. In the present case, the items were found in the possession of the accused during the very same month they were stolen. That period was not too long. Accordingly, it was open to the prosecution to have charged him with

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theft. This of course did not mean that because the accused was not charged just with theft itself, that he could not have been convicted of the contravention of s 12(2) of the Miscellaneous Offences Act.

The acting regional magistrate also asserted that in his view, the nature of the items that were stolen and the period involved would not have ousted the doctrine of recent possession. It was for that reason too that he did not certify the proceedings and referred the record of proceedings to the High Court.

As Georges JA pointed out, on trial for theft itself, it may well be that the prosecution might fail to prove beyond reasonable doubt that the property was in fact stolen by the accused. In the present case, the prosecution court not have proved by direct evidence that the accused stole the fishing rod and reel. It would have had to rely on the doctrine of recent possession. But in cases of recent possession, the person who confronts the accused who has possession of stole goods would in the normal course have suspicion that the accused was the thief.

It must not be forgotten that although it is true that an accused is required to provide a reasonable explanation under s 12(2), but there is no onus on the accused that the account given by him was not a satisfactory account. The onus is always on the prosecution to prove that the account given was an unsatisfactory account: S v Mjikwa S-19-83.

ADAM J

Further, as stated in *S v Ganyu* 1977 (2) RLR 98 (A) at 104-105 by Macdonald CJ:

> "In deciding whether a reasonable suspicion has been proved, it must of necessity be recognised that a reasonable suspicion never involves certainty as to the truth. Where it does, it ceases to be suspicion and becomes fact. A reasonable suspicion that goods have been stolen is based on conjecture and therefore always admits of the possibility that the goods may have been acquired not by theft but by some other nefarious or unlawful means or, of course, innocently. It follows that a reasonable suspicion that goods have been stolen does not cease to be either a suspicion or to be reasonable because the person entertaining it perceives the possibility that his suspicion may be unfounded and that the goods may have been acquired by nefarious or unlawful means or innocently ... Since, however, suspicion is based on conjecture, it can never point unerringly and exclusively in a particular direction only."

In light of the foregoing, it would not in any way detract from what was said by Georges JA (about s 12(2) not applying to a case where the accused was in possession of property which was in fact stolen) to hold that where an accused is found in possession of or has been in possession of recently stolen property that the prosecution would be free to lay a charge of theft itself, alternatively contravening s 12(2) of the Miscellaneous Offences Act [Chapter 9:15]. Thereafter, during the proceedings, the prosecution, in the exercise of the discretion given to it, may accept a plea of guilty to the alternative charge. The presiding trial magistrate would not have erred if she were to proceed properly in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act by convicting and sentencing the accused.

Accordingly, the acting regional magistrate should not have declined to certify the proceedings in this matter.

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AIR ZIMBABWE CORPORATION v MLAMBO 1997 (1) ZLR 220 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

20 January & 13 February 1997 Judgment No. S-16-97

Flynote

Employment - contract - termination - dismissal - registered code of conduct in operation - dismissal purportedly in terms of the Code - appeal - to Labour Relations Tribunal - Tribunal finding serious irregularities in proceedings leading to dismissal - Tribunal's powers on appeal

Headnote

Purporting to act in terms of a registered code of conduct, the appellant dismissed the respondent, an employee. The respondent appealed against this decision to the Labour Relations Tribunal. The Tribunal found that there had been fatal irregularities in the proceedings that led to the dismissal and the procedures set out in the code had not been followed. It ordered the reinstatement of the employee. On appeal:

Held, that in terms of s 101(8) of the Labour Relations Act [Chapter28:01] the Labour Relations Tribunal is empowered, in the event of an appeal against a determination made under a code of conduct, to take one of three courses of action: (a) it may confirm the original decision; (b) it may remit the matter for a re-hearing; or (c) it may substitute its own determination for that appealed against. It did none of these things. Having decided that the decision could not be confirmed and that it could not substitute its own decision because of the inadequacy of the record, the Tribunal had only one course open to it, namely to remit the matter for a re-hearing.

Held, further, that although the Tribunal could not order reinstatement as such, the fact that there was a finding that the disciplinary proceedings

McNALLY JA

were a nullity meant that the respondent was never lawfully dismissed and must continue to be treated as an employee.

Held, further, that the matter should be be remitted for a rehearing by a disciplinary committee composed of different persons than those who sat originally, apart from the Chairman and Secretary.

Cases cited:

Minerals Marketing Corp of Zimbabwe v Mazvimavi 1995 (2) ZLR 353 (S)

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The court referred to the following statutory provisions:

Labour Relations Act [Chapter 28:01], s 101

Case Information

D M Foroma, for the appellant

A G Matika, for the respondent

Judgment

McNally JA: This is an appeal from the Labour Relations Tribunal ("the Tribunal"), against an order of reinstatement made by the Tribunal on 8 November 1995.

The factual background was briefly as follows:

1. Certain allegations were made against Mr Mlambo.
2. Purporting to act in terms of its Code of Conduct, Air Zimbabwe dismissed Mr Mlambo.
3. Mr Mlambo appealed to the Tribunal.
4. The Tribunal found that the proceedings against Mr Mlambo were hopelessly irregular.
5. Accordingly, it ordered his reinstatement.

There is no dispute about the irregularity of the proceedings. Air Zimbabwe has a code of conduct which is registered in terms of the provisions of SI 379 of 1990 and s 101 of the Labour Relations Act [Chapter 28:01]. The code was, surprisingly, not part of the record before us, but the parties at our request obtained copies for the court. There is no doubt in our minds that the Tribunal was justified in concluding that the proceedings were very far from complying with the procedure set out in the code. The employee was given

one day's notice of one charge against him. At the hearing the next day additional charges were brought forward. The record of the hearing was wholly inadequate. The record was not confirmed as correct by the chairman and the representative of the workers sub-committee. All these irregularities were contrary to the requirements laid down in s 8 of the code.

Having come to this conclusion, however, the Tribunal should not have granted the relief that it did, namely reinstatement. That is the argument put forward by Mr Foroma, who appeared for Air Zimbabwe. He relies on the provisions of subss (7) and (8) of s 101 of the Act, which read:

"(7) Any person aggrieved by -

(a) a determination made in his case under a code; or

(b) the conduct of any proceedings in terms of a code;

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may ... appeal against such determination or conduct to the Tribunal.

(8) On an appeal in terms of subsection (7), the Tribunal may -

(a) confirm the determination or proceedings appealed against; or

(b) remit the matter for determination by the person, committee or authority referred to in paragraph (d) of subsection (3); or

(c) substitute its own determination for that appealed against."

The Tribunal, says Mr Foroma, did none of these things. It did not confirm the determination. It specifically declined to remit the matter, saying "that would prejudice the appellant (Mr Mlambo) financially, and at the same time allow the respondent (Air Zimbabwe) to derive a benefit from its non-compliance with its own Code of Conduct". And finally, it did not substitute its own determination for that appealed against. In other words, it did not come to a conclusion on the merits of the case. Indeed its finding was that the inadequacy of the record made this impossible.

Against this, Mr Matika, for the employee, argues that as soon as there is a finding that the disciplinary proceedings were a nullity, it must follow that the employee is reinstated. After all, the basis for his dismissal has been set aside. So he has not been properly dismissed.

McNALLY JA

It seems to me that both contentions are correct. In the first place, the provisions of s 101(8) require the Tribunal to remit the matter once it makes the finding that it did make. But in the second place, that finding means that the employee was never lawfully dismissed. He must therefore continue to be treated as an employee pending the outcome of the hearing on remittal.

Our attention was drawn by Mr Foroma to an earlier decision of this court where the facts in issue were for practical purposes identical. In *Minerals Marketing Corp of Zimbabwe v Mazvimavi* 1995 (2) ZLR 353 (S) the employer had dismissed the employee after proceedings in terms of the relevant code. The Tribunal had found that the proceedings were fatally flawed. It set aside the proceedings and ordered the reinstatement of the employee. In the appeal hearing the major issue was whether or not the Tribunal was given powers of review under s 117A (now s 101). The court held that it was not. But the court went on to rule that the Tribunal was right on one point, and that point was sufficiently important to render the proceedings at least voidable at the instance of the employee.

That is precisely the conclusion we have reached in this case. However, the court in the Mineral Marketing case was not apparently invited to consider what the appropriate relief should be in the light of that finding. It did not advert to the provisions of s 101(8)(b). It simply confirmed the Tribunal's decision to reinstate the employee, and made provision in passing for what should be done if the employer decided to hold another hearing.

Although the effect is broadly the same, it seems to me that the order should follow the provisions of s 101(8)(b). The Tribunal is not given the discretion whether to remit or not. Once it decides that the proceedings were fatally irregular, and that it cannot come to a conclusion on

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the merits, it has no choice but to remit. I should add that I have discussed this matter with the judges who sat in the Minerals Marketing matter, and they are in agreement with this approach.

As to costs, I am of the view that a special order is warranted. On 2 October 1996, Mr Matika, for the employee, wrote to the employer's legal practitioners with the following proposal:

> "In the circumstances, we enquire whether your client is willing to reinstate our client with full benefits and to reserve its right to prefer charges against him, which, if it does so, will have to be heard by a different panel or committee from the one which tried his case in 1994."

McNALLY JA

This eminently sensible approach was not accepted. In practical effect, the appeal has gained nothing more for the appellant than was offered in the letter.

Accordingly, the following order is made:

I. The appeal is allowed.

II. The order of the Tribunal is set aside, and in its place the following is substituted:

> "1. The appeal is allowed with costs.
>
> 2. The dismissal of the appellant is set aside.
>
> 3. The matter is remitted for rehearing under the Air Zimbabwe Corporation Code of Conduct, provided that the members of the disciplinary committee for the purposes of this case, apart from the Chairman and Secretary, shall be different from those who took part in the original hearing, unless Mr Mlambo in writing agrees otherwise."

III. The appellant is ordered to pay the respondent's costs in this appeal incurred after 2 October 1996.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Sawyer & Mkushi, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

S v NDHLOVU 1997 (1) ZLR 225 (HC)

Court **High Court, Harare**

Chatikobo J

Criminal review

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19 February 1997 Judgment No. HH-26-97

Flynote

Criminal law - common law crimes - incest - prohibited degrees of affinity - wife's daughter by former marriage - marriage under customary law - incest only committed where affinity created by marriage recognised by the general law

Headnote

The accused had been convicted of incest on the grounds of his having had sexual relations with his stepdaughter. The girl was his wife's child by another man. There was no evidence that the accused's marriage was registered either under the Customary Marriages Act [Chapter 5:07] or under the Marriage Act [Chapter 5:11] and the likelihood was that it was an unregistered customary law marriage.

Held, that incest is committed by a person who has sexual relations with another person whom he cannot marry on account of consanguinity, affinity or adoptive relationship. Before there can be a bond of relationship based on affinity, there must be a marriage. It is not every marriage which creates the requisite affinity. The marriage must be one that is recognised as valid under the general law. A potentially polygamous marriage, which a customary law marriage is, is not so recognised and so the bond of affinity was not created.

Conviction set aside.

Cases cited:

R v Chavendera & Anor 1939 SR 218

R v Major 1967 RLR 208 (G)

R v Ncube 1959 (2) R & N 466; 1960 (2) SA 179 (SR)

R v Tshipa 1957 R & N 751 (SR)

CHATIKOBO J

Statutes referred to:

Customary Law and Local Courts Act [Chapter 7:05], s 6

Judgment

Chatikobo J: This matter comes before me on review from the Regional Magistrate of the Western Division sitting at Hwange. The record of proceedings was first received by me at the High Court in Bulawayo on 27 November 1996. On 3 December 1996, I addressed a query to the Regional Magistrate on a point which I considered material to the propriety of the conviction. His response, in which he concedes that the conviction is fatally flawed, is dated 23 January 1997. As it arrived in Bulawayo after I had left, I only received it in Harare in early February. On 12 February 1997, I ordered the release of the accused, with the concurrence of

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my brother Devittie, who agrees with me that the conviction is wrong. The accused who has been serving his sentence since 31 October 1996 has thus been needlessly incarcerated for over 3 months becuase of a delay which remains unexplained.

The facts are these.

The accused was acquitted on two counts of rape and one count of attempted rape. He was however convicted on two alternative charges of incest which alleged intercourse with his stepdaughter. The stepdaughter was his wife's child by another man. No evidence was led to show if the marriage was a registered one and if so whether it was registered in terms of the Customary Marriages Act [Chapter 5:07] or the Marriage Act [Chapter 5:11]. This is what I asked the regional magistrate to explain. He has since advised me that he did not investigate this aspect but he suspects that the marriage may not have been registered because he recalls that the accused said he had two wives.

Incest is committed by a person who has sexual intercourse with someone whom he cannot marry on account of consanguinity, affinity or adoptive relationship: Hunt South African Criminal Law and Procedure vol II 2 ed p 257.

If one assumes that the accused's marriage was not registered or that it was one solemnised according to the Customary Marriages Act, the question which arises is whether a man commits incest if he has sexual intercourse with his customary law wife's daughter. Before there can be a bond of relationship based on affinity there should be a marriage but it is not every form of marriage which creates the requisite affinity. In *R v Tshipa*

CHATIKOBO J

1957 R & N 751 (SR), Beadle J (as he then was) held, after an examination of Roman-Dutch and South African authorities, that under the Roman-Dutch common law, the crime of incest is not committed if a man, married under a system which permits polygamy, has sexual intercourse with a relative of his wife, to which relative he is related within the forbidden degrees prescribed by the Roman-Dutch common law. This accords with an earlier decision of Russell CJ in R v Chavendera & Anor 1939 SR 218 and the later case of *R v Ncube* 1959 (2) R & N 466; 1960 (2) SA 179 (SR) where Beadle J sid at 468E-F (180D-E):

> "I think that, so far as the criminal law of bigamy or incest is concerned, the opinions of the old Roman-Dutch writers, that the Roman-Dutch law does not recognise as a lawful marriage a marriage contracted under a polygamous system of law, must still be regarded as the Roman-Dutch law."

See also R v Major 1967 RLR 208 (G).

It would appear to be settled law that at common law, a conviction for incest cannot be sustained where the parties' relationship is based on affinity through marriage in the absence of proof that the marriage creating the affinity is a monogamous one solemnised in terms of the Marriage Act.

In the absence of any statutory provision altering this position, the State should always prove that there was a valid monogamous marriage through which the affinity was created. I can find

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nothing in the Customary Marriages Act which alters the established common law position. The Customary Law and Local Courts Act [Chapter 7:05] contains provisions which, on the face of them, seem to buttress the common law position. It is provided in s 6 that if a question arises in any civil case as to the effects of a customary marriage contracted by a person at a time when he had another wife or wives married to him according to customary law the court shall treat such marriage as valid for all civil purposes in so far as polygamous marriages are recognised by customary law. Polygamous marriages are valid for civil purposes and no more. Section 7 provides that customary law principles which apply to the prohibition of marriage between persons on account of their relationship by blood or affinity shall prevail over the gneral law of Zimbabwe in respect of persons to whom customary law applies. It also provides that in relation to a marriage solemnised under the Marriage Act [Chapter 5:11], the general law shall apply. Even if I assume that customary law prohibits marriage or sexual intercourse between a man and the daughter of his customary law wife

by another man, that would be no reason for holding that intercourse between such a man and his wife's daughter would amount to incest. Incest is only committed if there is in existence a marriage which is valid according to the general law. Prohibition of marriage between any two persons at customary law on account of consanguinity or affinity does not give rise to the implication that incest is committed when intercourse takes place between people who are related within the prohibited degrees of relationship. As Beadle J said in Tshipa *supra* at p 756A:

> "If the common law had been extended to such marriages, then this could have been only by implication from some statute. Here it must be noted that, as any such implication would be to create a crime where none existed before, that implication would have to be clear from the language of the statute; and in case of doubt the court would lean against making any such implication."

No such implication arises in this case. The position remains that no incest is committed between a man and his "stepdaughter" in the absence of a marriage recognised as valid under the general law of Zimbabwe.

In the absence of evidence to prove the existence of a valid marriage, the conviction cannot stand.

The conviction and sentence are accordingly set aside.

DEVITTIE J agrees.

S v DUBE 1997 (1) ZLR 229 (HC)

Court **High Court, Harare**

Bartlett J & Assessors

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Criminal trial

8-9 August 1996, 27-31 January, 3, 5, 13-14,

20 & 24 February 1997 Judgment No. HH-34-07

Flynote

Criminal law - defences - intoxication - voluntary intoxication - extent to which it can be a defence to a charge of murder - insanity - combination of drugs, alcohol and post-traumatic stress disorder - whether can cause accused to be mentally disordered so as not to be responsible according to law for his actions

Headnote

The accused was charged with murder, it being alleged that in the early hours of 24 September 1995, at Gwanzura Stadium, Harare, he had shot and killed the deceased. He had been urinating in a public place and was approached by the deceased, a police officer, who remonstrated with him. The accused did not deny the shooting, but gave evidence that he had been very intoxicated at the time. He also claimed that the deceased had approached him, referring to him as "Banana's wife". It was the accused's case that during the 1980s, when he was an aide to the then President, the Rev C Banana, the President had on various occasions committed homosexual acts on him against his will. The anger the deceased's comment induced also caused his violent reaction.

Psychiatric evidence was given that the accused was suffering from post-traumatic stress disorder as a result of these acts. There was a conflict between the evidence of the two psychiatrists called, one saying that the combination of this disorder and the accused's drunkenness would have amounted to a mental disorder and that as a result thereof the accused would not have been responsible according to law for his actions. The other psychiatrist said that the disorder would not have prevented the

accused from appreciating what he was doing or the consequences of his actions.

It was argued for the accused that in any event he was so drunk as to be incapable of forming the necessary intent to commit murder. It was argued that the court should follow the decision in S v Chretien 1981 (1) SA 1097 (A), which held that voluntary intoxication can effect criminal liability in the same way, and to the same extent, as youth, insanity, involuntary intoxication and provocation. The decision wiped out the traditional approach, which was that voluntary intoxication could negative "specific intent" in those crimes where such an intent was an essential element. It was also argued that the court should follow the decision in S v Arnold 1985 (3) SA 256, where the accused was acquitted of murder because of his emotional state.

The court dealt with the accused's evidence about President Banana's conduct on the basis that it could not be rejected as not reasonably possibly being true, but made no positive finding that it was true.

Held, on the question of the accused's mental state, that although post-traumatic stress disorder could fall within the wide definition of mental disorder found in the Mental Health Act, it was not

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a disorder, on the facts found proved, which would have prevented the accused from being aware of what he was doing or of the consequences of his actions. The combination of alcohol, drugs and the stress disorder would, however, have meant that the accused was suffering from diminished responsibility.

Held, further, that the decision in S v Chretien should not be applied in Zimbabwe without a detailed and careful consideration of the case and that the law in Zimbabwe continues to incorporate the long enshrined "specific intent" rule. This rule had, despite its imperfections, lasted well and for all its logical impurities had generally been applied without insuperable difficulty and without causing injustice.

Held, further, that Chretien's case would not be applicable in the present situation because, on the facts, there was no evidence that the accused was intoxicated to such an extent as to be unaware of what he was doing or unable to appreciate the consequences of his actions.

Held, further, that Arnold's case was incorrect on the law - Arnold should have been convicted of culpable homicide - and not applicable on the facts.

Held, therefore, that the accused, although affected by alcohol and drugs and by post- traumatic stress disorder, was nevertheless aware of what he was doing and was capable of forming the necessary specific intent, and that the he should be convicted of murder with actual intent, although with diminished responsibility.

1997 (1) ZLR p231

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Cases cited:

S v Arnold 1985 (3) SA 256 (C)

S v Chamunorwa & Ors S-137-86

S v Chin\'ono 1990 (1) ZLR 244 (H)

S v Chretien 1981 (1) SA 1097 (A)

S v Gomo HH-21-93

S v Mayo HH-468-86

S v Munyai 1986 (4) SA 712 (V)

S v Sibiya 1984 (1) SA 91 (A)

S v V 1979 (1) SA 656 (A)

S v van Vuuren 1983 (1) SA 12 (A)

Statutes referred to:

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Mental Health Act [Chapter 15:06], ss 2 and 28

Case Information

H Ushewokunze, for the State

B Hove, for the accused

Judgment

Bartlett J:

PRELIMINARY OBSERVATIONS:

The accused in this matter, Jefta Dube, an inspector in the Zimbabwe Republic Police, is charged with the murder of Patrick Mashire at Gwanzura Stadium on 24 September 1995. The deceased was a Constable in the Zimbabwe Republic Police.

The trial commenced on 8 August 1996 with myself sitting with two assessors. The trial was adjourned on 9 August 1996 and recommenced on 27 January 1997. Sadly in the intervening period one of the assessors died. State counsel and defence counsel - at a meeting in chambers prior to the recommencement of the trial - consented in terms of s 8(1) of the High Court Act [Chapter 7:06] to the trial proceeding with only one assessor. I accordingly decided to direct that the trial would so proceed. The court expresses, as it did, at the recommencement of the trial, its condolences to family of the late Dr Shava. He was always exemplary in his conduct as a High Court assessor and his experience and wise counsel will be missed.

Editor's note(4)

1997 (1) ZLR p232

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ORDER IN TERMS OF THE COURTS AND ADJUDICATING AUTHORITIES (PUBLICITY RESTRICTION) CHAPTER 7:04

At the commencement of the trial, after the charge had been put and the State outline read, but before the defence outline was read, I made mero motu an order in terms of s 3(1)(b) as read with s 3(2)(b)(v) of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04], and an order in terms of s 3(1)(d) as read with s 3(2)(b)(v) of the same Act. These orders prohibited the publication of the name, address or other information likely to reveal the identity of the person mentioned in para 5 of the accused's defence outline and also prohibited the publication of the contents of paras 4, 5, 6 and part of para 14 of the accused's defence outline together with the evidence led relating to those paragraphs.

The reason for these orders was that the accused's defence outline made very serious allegations against a person concerning events which happened over a decade ago - and which events were completely unrelated to the facts of tthe murder charge which the accused was facing. I was, accordingly, of the view that it was appropriate, during the course of the trial, to make the order I have referred to, to protect the private life of the person concerned. I stated,

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however, when making the order that in the judgment of the court at the conclusion of the trial all the evidence relating to the allegations would be fully and carefully analysed and appropriate findings made. I indicated that accordingly that the judgment of the court would be a document which would not be subject to any publicity restrictions. I also indicated that in view of the importance to ensure that justice is not only done but seen to be done that the trial itself would continue in open court - subject only to the publicity restrictions.

I would emphasise that the publicity restriction order which was made was mero motu by myself and not at the request of the defence counsel or, more significantly, not at the request of the Attorney-General's representative. I did, however, discuss my proposed order with both counsel after I adjourned court, just before the prosecutor was about to read out the relevant paragraphs of the defence outline. My understanding after the discussion in chambers was that neither the State counsel nor the defence counsel had any objection to the imposition of the restrictive order. But certainly, neither has suggested that the restrictive order should have any applicability to the court's judgment.

SUMMARY OF THE STATE CASE

We turn now to deal with the merits of the matter. We will first summarise

the State evidence and defence evidence before assessing the credibility of the various witnesses and then proceeding to make findings of fact and law.

We commence by summarising the evidence led on behalf of the State. This summary will be relatively brief but the important aspects of the evidence led by certain of the State witnesses will be dealt with in substantially more detail when assessing the credibility of those witnesses.

The basis of the allegation against the accused is that in the early hours of the morning of 24 September 1995 at Gwanzura Stadium he shot and killed the deceased. A musical show was being held at the stadium at the end of the All Africa Games and it is alleged that the accused was urinating in public when approached by the deceased (a Police constable) and told not to urinate in public. It is the State allegation that the accused then pulled a pistol from his waistband and shot the deceased through the head at close range - after telling him he would shoot him.

In support of its case, the State called two police constables who were on duty at the musical show at Gwanzura Stadium on the night in question - Cst Samhere and Cst Hove. Both described having their attention drawn to the situation in a corner of the stadium where they saw the deceased being held by the accused who was in civilian clothes. They both described the accused holding the deceased by the neck or collar and uttering the words "I will shoot you". They both described the accused then producing a pistol and shooting the deceased through the head. In the confusion which followed the firing of the shot they described the accused moving but not running away and being apprehended by Cst Hove.

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[The learned judge then dealt with the individual State witnesses, and continued:]

Evidence for the State was also given by Dr Mapunde, the pathologist who examined the deceased. He stated that the fatal shot had been fired at close range with the bullet entering just below the deceased's left eye. Ballistic evidence was given by Insp Takangovada. The effect of his evidence was that the pistol in question when cocked would require 12 pounds of pressure for the trigger to be fired. Evidence was also given by Derek Adams, a lighting engineer with 40 years' experience in the lighting of sports fields. He provided a fascinating insight into the strength of flood lighting at sports stadiums. He stated that 27 of the 44 floodlights at Gwanzura Stadium were

in working order on the night in question. He stated that full moonlight would provide light of .28 of 1 lux (which would provide sufficient light to read a newspaper by) but that one of the floodlights would provide light of 5.4 lux throughout the stadium. Such an amount of light, though totally inadequate to play sport by, would, in his view,have been sufficient to have provided sufficient illumination to recognise people by.

SUMMARY OF THE ACCUSED'S DEFENCE CASE

The accused gave evidence in his defence and called a number of witnesses.

In his evidence the accused described his movements on the day in question. He stated that a close friend of his had died after a short illness and that on the morning of 23 September he had gone to the mortuary to look at his friend's body. He stated that the death of his close friend caused him to feel substantially depressed. He then travelled with his police driver in a police vehicle to his aunt's house in Avonlea in order to inform her of the death of his close friend. He had lunch at his aunt's house and several whiskys. He then left his aunt's house and joined up with some friends of his and drove in a police vehicle to the National Sports Stadium to watch the final soccer match of the All Africa Games between Zimbabwe Under 23 and Egypt Under 23. On the way to the stadium, he and his friends bought half bottles of whisky and brandy and he assisted in the smuggling of these into the sports stadium. This alcohol was drunk during the soccer match.

After the match the accused and his friends went to the police mess at Harare Central Police Station and the accused stated that he consumed at least 5-6 beers. He then went with his friends to ZRP Southerton where he left his police service vehicle and went with his friends to a nearby bar where he consumed at least a further 4-5 beers. He stated that he had intended to carry on drinking within the bar in question but did not want to take his police UHF radio with him. He accordingly contacted his controller to say that he would be entering an "unreadable" area. He was, however, instructed to proceed to Gwanzura Stadium to assist in containing the situation there. He was therefore taken back by his friends to ZRP Southerton, where he collected a service vehicle to proceed to Gwanzura. On the way, he passed through his home and told his wife he was going to Gwanzura on duty. Before leaving he smoked a dagga cigarette. He said that he cannot do without dagga. On his way to Gwanzura he went to his

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girlfriend's ouse but was told that she was already at Gwanzura. He took her sister with him to Gwanzura. On arrival at Gwanzura Stadium, he went to the tent where his girlfriend was working and

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she provided beer for himself and her sister. He was on duty and was wearing civilian clothes but had his police CZ pistol tucked into his hip.

He went to relieve himself on a number of occasions and on one occasion heard a voice from behind him saying - "You homosexual, Banana's wife, *(5) why are you relieving yourself there?" The accused stated that he shouted insults back at this person telling the person he was mad and to leave him alone. He stated that he then remembered seeing a dark figure charging towards him and this figure appeared to have pulled something from the hip. The figure was coming from where the abusive voice had come from. The area was dark and the accused stated that he felt threatened and the next thing he heard was a gunshot. He stated that he did not realise that he had shot somebody until he was arrested by a policeman.

He stated that he was taken to Machipisa Police Station after being arrested and made to sit in the Charge Office and was handcuffed. He stated that arrangements were made for him to be detained and to surrender his shoes, money and valuables. He added that he was kept at Machipisa for a long time and at one time was put in the open cells. He stated that he was later taken to Harare Central Hospital at about 8 am to have blood samples extracted ...

The accused also stated in evidence that he was an habitual drunkard and had been for 10 years. He also stated that he was taking drugs while at the remand prison. These drugs he purchased from mental patients to whom the drugs had been prescribed.

The accused emphasised in evidence that he had no recollection of the deceased grabbing him or him grabbing the deceased and no recollection of shooting the deceased.

[His Lordship then summarized the accused's allegations against Canaan Banana and continued:]

A psychiatrist, Prof Stanley Acuda, was also called by the accused. This witness is the Professor of Psychiatry at the University of Zimbabwe and a consultant psychiatrist at Harare Central Hospital.

The substance of his report, which was produced in evidence, was that the

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accused has been suffering from post-traumatic stress disorder as a result of being subjected to homosexual acts against his wish. The Professor's report stated that the post-traumatic stress disorder had been manifesting itself with recurring thoughts, memories, dreams and nightmares of the acts. He also stated that the accused had been reliving these traumas as though they

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were happening now and had suffered severe attacks of fear and anxiety triggered by visits to the scenes of the acts or sight of the perpetrator live or on television. The doctor added that this disorder significantly contributed to the accused's abuse of alcohol and cannabis. He added that the accused was severely addicted to alcohol manifested by daily excessive consumption of alcohol.

He concluded his report by stating that he had formed the opinion that at the time of the crime the accused was severely intoxicated with alcohol, that his brain functions were so severely impaired that he did not know what he was doing or if he did know, he did not know that what he did was wrong.

Professor Acuda also stated that an important part of his professional function as a psychiatrist is to assess the truthfulness of the statements made by patients and that he was satisfied that the accused's complaints of homosexual abuse were genuine. He was, in short, of the view that the accused was not lying in making these complaints.

He stated that post-traumatic stress disorder is a mental disorder falling under the last part of the definition of mentally disordered or defective in the Mental Health Act. When questioned by the court he stated that his view was in fact that the accused should be found mentally disordered and that a special verdict should be entered in terms of the Mental Health Act.

The accused's defence outline had stated only that a psychiatrist would be called. There was nothing in the accused's defence outline - or indeed the accused's evidence - which suggested that the accused would be raising the possibility that he was mentally disordered at the time that the deceased was shot and therefore unable to appreciate what he was doing, thereby requiring a special verdict to be entered. I appreciate that the examination of the accused by Prof Acuda only took place in October 1996 after the defence outline had been handed in. But Prof Acuda's report, which was handed in as an exhibit, was sent to the accused's legal practitioners on 6 December 1996 - some 6 weeks before the trial recommenced. It is accordingly somewhat surprising that no application was made to amend the defence outline at the recommencement of the trial on 27 January 1997 or indeed after Prof Acuda's evidence which was heard on 3 February 1997.

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In view of these aspects, the State had been taken completely by surprise by the contents of the evidence of Professor Acuda. I accordingly asked the prosecutor whether he wished to apply to re-open the State case and request that the accused be examined by another psychiatrist to see whether the State accepted the conclusions of Prof Acuda. The prosecutor after this suggestion by the court did apply to re-open the State case in order to enable the accused to be examined by a psychiatrist at the request of the State. Mr Hove did not oppose this application and urgent arrangements were made for the accused to be examined by the Government Psychiatrist, Dr Chikara. I should record here that we are grateful to Dr Chikara for carrying out an examination of the accused at short notice at the request of the court.

Dr Chikara was provided with copies of the State and defence outlines, copies of the statements

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made by the accused and with a copy of Prof Acuda's report. When the matter resumed Dr Chikara produced his report which was handed in as an exhibit. The basis of his report was to agree with the finding by Prof Acuda that the accused was suffering from a post-traumatic stress disorder, probably caused by the homosexual advances as referred to by Prof Acuda in his report. Dr Chikara also agreed that the accused suffered from alcoholism and drug abuse and that he was probably affected by these conditions when the offence was committed. Dr Chikara, did not, however, conclude that the accused was mentally disordered in terms of the Mental Heath Act. He agreed that post-traumatic stress disorder was a mental disorder within the category of any other mental disorder as described in the definition of mentally disordered in the Mental Health Act. He emphasised, however, that the post-traumatic stress disorder did not prevnt the accused from appreciating what he was doing or appreciating the consequences of his actions. He stated that it would be the possible effect of the alcohol and drugs which might have prevented the accused from appreciating what he was doing. He stated that it was not his understanding that the consumption of alcohol or drugs constituted a mental disorder within the definition of mental disorder in the Mental Health Act.

Accordingly, the findings by Prof Acuda and Dr Chikara were identical. The difference arises from the conclusions they drew from those findings. In effect, Prof Acuda attributed a combination of the post-traumatic stress disorder with the alcoholism and drug abuse as constituting a mental disorder within the Mental Health Act. Dr Chikara, while agreeing with the three constituent parts, drew the conclusion that the mental disorder was not in itself such as to result in the accused not being able to appreciate the consequences of his actions. That is, Dr Chikara was of

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the view that the constituents of the diagnosis should be looked at in their individual effects.

I had initially considered that it would be appropriate to arrange for a third psychiatrist to examine the accused at the court's behest. On reflection, however, I agreed with Mr Hove's submission that this would not be necessary - as the differences between the two psychiatrists did not relate to the basis of their respective diagnoses.

[The learned judge then considered the credibility of the various witnesses, and continued:]

The test which we need to apply for the purposes of this case in assessing the accused's evidence in this regard is as laid down in S v Munyai 1986 (4) SA 712 (V) (which test I referred to with approval in S v Gomo HH-21-93). This approach is that -

> "... when dealing with the version of the accused, [the question] is whether, on all the facts, although the accused's evidence might be unsatisfactory his version can be rejected beyond reasonable doubt as false; alternatively put, whether his version could not reasonably possibly be true, although the court was not satisfied with the manner in which the accused gave evidence or his version as put to the various witnesses."

Accordingly applying this approach (as we must) in assessing the accused's evidence we need, in simple terms, to decide whether we are able to reject this aspect of the accused's version as not reasonably possibly being true. If we are unable to reject it as not reasonably possibly being

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true, we must then - because the onus is on the State to prove its case beyond a reasonable doubt - regard it as true.

Applying these criteria, although the accused himself must be regarded as of questionable credibility, his evidence is confirmed and supported by the credible evidence of the two psychiatrists and the evidence of the witnesses Muleya and ex-Senior Assistant Commissioner Chademana. It must also be stated in all fairness that on this aspect the accused's evidence as we have stated was clearly given and had a clear air of credibility. It is, however, we emphasise, the supporting evidence which we have referred to which is of particular importance.

Viewed overall, we are satisfied that it cannot be said that the accused's

evidence of the allegations against ex-President Banana can be rejected as not reasonably possibly being true. Accordingly, for the purposes of this case, we need to assess the accused's evidence as if they were true.

We hasten to add that this does not mean that we are making a finding of fact that the allegations are true. To do so would be entirely improper and a breach of a principle as basic as the audi alterem partem rule. Ex-President Banana is not before this court and it accordingly would be completely improper for this court to make any findings of fact in respect of allegations made against him. We were somewhat surprised that the State did not decide to seek to call ex-President Banana to deal with the allegations made in the accused's defence outline. If the State had done so we would have been in a better position to make a full finding of fact. It would, however, have been (in our view) entirely improper for the court to have sought to call ex-President Banana - as the court could then well have been construed as improperly entering the arena.

In summary, applying the law as we must apply it on the evidence that has been led, all we are able to say, in the case before us, is that it cannot be stated that the accused's evidence and allegations against ex-President Banana can be rejected as not reasonably possibly being true. For the purposes of this case we must accordingly assess the accused's evidence on this aspect as if it were true.

[The court then dealt with the credibility of the accused in respect of the remainder of the evidence, and continued:]

Accordingly, looking at the question of drunkenness, which is one of the critical aspects of the accused's defence, there is clear evidence led by a number of State witnesses that the accused did not appear to be affected in any serious way by the liquor he had consumed. The accused's evidence, far from contradicting the evidence of the State witnesses, does, from the accused's own clear description of what he was saying and doing, provide evidence in many respects supportive of the conclusions drawn by the State witnesses. Certainly the evidence before the court of the persons who saw the accused when it mattered on the night in question and shortly after the events concerned does not subscribe to the accused a state of drunkenness indicative that he was unaware of what he was doing and unable to appreciate the consequences of his

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actions.

The accused's blood count of 198 mg of ethyl alcohol *per* 100 ml of blood also does not indicate a level of intoxication such as to negative the ability to

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form intent - especially in view of the accused's history of alcoholism and continuous drinking. This, in our view, would be so even if the blood count in view of the delay in taking the sample were as high as the 250 mg referred to in Professor Acuda's report.

[The learned judge then examined other aspects of the accused's evidence and continued:]

THE PSYCHIATRIC EVIDENCE

We need to examine specifically the evidence of the two psychiatrists - Prof Acuda called by the accused and Dr Chikara called by the State. We need to decide whether the evidence of the psychiatrists is such that a special verdict should be entered in terms of s 28 of the Mental Health Act or whether it has not been established by the accused that such a verdict should be entered. Once we have made our assessment of the psychiatrists' evidence, we will need to examine the law relating to intoxication and other related matters in view of the address made by counsel for the accused.

As we indicated in assessing the evidence of the psychiatrists and summarising their evidence when considering their evidence in relation to the allegations of homosexual abuse, the basic findings of the two psychiatrists are identical. Both are in agreement that the accused was suffering from post-traumatic stress disorder which would fall within the meaning of "any other disorder or disability of the mind" in the definition of mentally disordered or defective in s 2 of the Mental Health Act [Chapter 15:06]. Both are of the view that intoxication and drug abuse were substantial causative factors in regard to the accused's conduct.

It is, however, of significance that the examination by psychiatrists came very late in the matter. The accused was arrested immediately after the offence on 24 September 1995. The first examination on behalf of the defence by Prof Acuda took place over a year later, on 9 October 1996. That interview was a single interview lasting several hours but included the examination of various documents and an interview with the accused's wife. Here we should add that the evidence of the accused's wife in regard to the accused's alcoholism and the effect of the post-traumatic stress disorder was credible. The examination by Dr Chikara took place in early February this year at the request of the court, after the court allowed the State case to be re-opened for a further psychiatric report to be obtained. That report was obtained after an examination lasting for about an hour. But the Government

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Psychiatrist, Dr Chikara, had the advantage of having, in addition to the surrounding documents,

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the report already prepared byProf Acuda. Both psychiatrists were of the view that their examinations were thorough enough and detailed enough to make their appropriate diagnoses and recommendations.

We would observe, however, that normally one would have expected - particularly in a matter of this nature and complexity - far longer examinations to be appropriate. For example, in S v Arnold 1985 (3) SA 256 (C) (referred to by Mr Hove), the examination by the psychiatrist took place immediately after the offence in question and consisted of a number of interviews taking some 19 hours. Although we have no doubt concerning the professional competence and expertise of the psychiatrists, it cannot be easy to deal fully and in detail with a matter, when interviews are conducted over a relatively short period of time and over a year after the events to which the diagnosis relates. That is a background factor we need to take into account in assessing the evidence of the two psychiatrists.

In regard to the effect of intoxication and drugs on the accused at the time of the commission of the offence, the court has had an advantage, which the psychiatrists did not have, in hearing viva voce evidence of the description of those events and of the accused's apparent appearance during those events. The psychiatrists had the State summary and defence outline, which of course were very substantially less detailed than the evidence which was led. The evidence on those aspects lasted a number of days, as opposed to a number of hours. There is of course no doubt in assessing the evidence of the State witnesses, the defence witnesses and the psychiatrists' evidence that alcohol and drugs played a role of substance in the accused's actions on the night in question. There is also no doubt that both psychiatrists are unanimous that the accused was suffering from a post-traumatic stress disorder - which both psychiatrists believe derived from the homosexual abuse which the accused had been forced to suffer.

The difficult question which has to be answered is whether the combination of the alcohol and the drugs the accused had consumed and the background factor of the post traumatic stress disorder, deriving from the homosexual abuse, resulted in making the accused at the time he fired the shot, mentally disordered or defective so as not to be responsible according to the law for his action at the time. What also needs to be emphasised is that in establishing that there is such a mental disorder the onus is on the accused on a balance of probabilities. This is one instance in the criminal law where the onus

transfers to the accused - albeit on a balance of probabilities. Mr Hove's submissions to the contrary were, in our view, incorrect - see Prof Feltoe *A Guide to Zimbabwean Criminal Law* p 11 and Burchell and Milton *Principles of Criminal Law* p 219.

Professor Acuda's opinion as contained in his report concluded as follows:

> "I have therefore formed the opinion that at the time of the crime Jefta Dube was severely intoxicated with alcohol, and his brain functions were so severely impaired (the impairment being made worse by the depressant effect of cannabis and low blood sugar) that he did not know what he was doing or if he did know, he did not know what he did was wrong. The firing of the gun was more likely a reflex action rather than a deliberate act."

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The important aspect, in our view, to note from the diagnosis is that, in his report, Prof Acuda, although previously having referred to the post-traumatic stress disorder, was not suggesting in his conclusion that the inability of the accused to be aware of what he was doing was due to a mental disorder. He was saying that it was due to the effect of alcohol together with cannabis and the low blood sugar.

It was only when questioned by the court, when the court asked if post-traumatic stress disorder could be described as a mental disorder, that Prof Acuda effectively amended his conclusion and concluded that a combination of all the factors would result in the accused being mentally disordered in terms of the Mental Health Act. As far as the professor's conclusion which we have read out, intoxication has not in Zimbabwe been regarded as a factor establishing mental disorder, unless there is clear evidence that the intoxication is to such a degree that it in fact causes insanity. That is not, as we read it, the conclusion reached by Prof Acuda in his report. A further factor relevant to Prof Acuda's evidence is that he accepted, when questioned by the court, that the detail which the accused was able to give describing exactly what he was doing and what was happening right up to the moment before the deceased was shot, was not in accordance with the professor's assessment of the effect of the intoxication. Pro Acuda candidly conceded that he would have expected a state of confusion and lack of clarity to have extended from substantially longer than a few seconds before the firing of the shot in question. Prof Acuda endeavoured to state that it was his understanding that the lack of clarity continued for a substantial period after the shooting. It was,

however, clear from the accused's own evidence that the accused's recollection of a clear sequence of events continued fairly shortly after the shooting. As we have indicated, the accused was taken almost immediately to the police station and was able to fully describe events from when he was at the police station.

An important consideration also is that the question of the degree of the intoxication is something which the court has had as good - in fact a better - an opportunity to assess. This is in view of the much greater detail of evidence which the court has heard on this aspect as opposed to the professor's two hour interview with the accused.

As against Prof Acuda's evidence there is the evidence of Dr Chikara who is and has been a Government Psychiatrist since 1984 and whose qualifications are similar to those of Prof Acuda. As we have indicated the basic conclusions of Dr Chikara are the same as those of Prof Acuda. They both agree on the three constituent factors - the post-traumatic stress disorder, occurring probably because of the alleged homosexual abuse, the alcohol and the drugs. The opinion of Dr Chikara is that at the time of the alleged offence the accused was drunk and that prior to this he was emotionally unstable and depressed - most probably due to trauma emanating from the alleged forced homosexual acts.

Dr Chikara's evidence emphasised that, although post-traumatic stress disorder could fall within the wide definition of mental disorder in terms of the Mental Health Act, it was not a disorder which would prevent a person being aware of what he was doing and being aware of the

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consequences of his actions. It was Dr Chikara's evidence that if the accused was to be regarded as unaware of knowing what he was doing and unaware of the consequences of his actions that would derive from the consumption of alcohol and drugs - not from the post-traumatic stress disorder. Dr Chikara emphasised that, from his experience, it was not the practice in Zimbabwe for persons who had consumed too much liquor to be regarded as mentally disordered, unless the state of intoxication was so marked as to indicate intoxication to that extremely high degree.

Accordingly, it was Dr Chikara's view that the accused was not mentally disordered but that he was suffering from diminished responsibility - that is, the doctor was of the view that there should be no special verdict in terms of the Mental Health Act but that the accused should be regarded as having diminished responsibility deriving from the intoxication, drugs and the post-traumatic stress disorder.

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We have considered as carefully as we are able the respective merits of the two psychiatrists. It is always difficult to assess evidence where there are two experts who both have endeavoured to give the court their fullest and most careful opinions. The court is, however, in view of the detailed evidence led, able to consider the likely background effects of the intoxication and drug taking.

It is our view that the opinion of Dr Chikara is preferable on those detailed aspects where it differs with Prof Acuda. We would point out that Dr Chikara's evidence as contained in his report has been consistent throughout, whereas Prof Acuda's evidence changed in emphasis - admittedly as a result of questioning by the court. Furthermore, as Prof Acuda fairly conceded, the accused's detailed recollection of events until immediately before the shooting was not in accordance with his diagnosis.

A further important aspect to realise is that if the court were to make a finding that the accused was mentally disordered then the onus is on the accused to establish that he is so mentally disordered on a balance of probabilities. It is our view that that onus has clearly not been discharged.

It is our view that the evidence, considered as carefully as we are able to, indicates that the accused was affected by alcohol, by drugs and suffered from post-traumatic stress disorder. But in our view it would be more probable and more correct to accept that the evidence indicates that the correct diagnosis is that of Dr Chikara - that the accused was not mentally disordered but that he was suffering from diminished responsibility. We consider that that is what the evidence as we have analysed it indicates, and reiterate that certainly the accused has not discharged the onus on a balance of probabilities to indicate the opposite.

We should now look at the law in relation to the specific defences raised by the accused before making our detailed findings of fact.

INTOXICATION

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Mr Hove on behalf of the accused has raised the applicability to Zimbabwe of the judgment of the South African Appellate Division in S v Chretien 1981 (1) SA 1097 (A). We can perhaps best indicate the import of Chretien's case by quoting from the Annual Survey of South African Law 1981 with regard to the effect Chretien's case had on the law regarding voluntary intoxication.

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In an article 1(6) by the eminent South African criminal jurists, Burchell & Milton it is stated at p 433-4:

> "S v Chretien 1981 (1)SA 1097 (A) has had far-reaching effects upon the law relating to voluntary intoxication.
>
> Prior to this decision, our courts (the leading case was *S v Johnson* 1969 (1) SA 201 (A) - see 1969 Annual Survey 291, Burchell & Hunt op cit 231-40), for policy reasons, adopted the 'specific intent' rule of the English law. According to this rule a distinction is made between charges of crimes involving 'specific intent', like murder, and those not requiring such intent, like common assault, or not requiring intent at all, like culpable homicide. In the case of the former, voluntary drunkenness of a degree sufficient to negative the relevant 'specific intent' was a good defence in the sense that the accused was found not guilty of the crime charged but guilty of a less serious crime for which such verdict was competent. Thus, voluntary intoxication resulted in murder being 'reduced' to culpable homicide, rape to indecent assault, and assault with intent to do grievous bodily harm to common assault. The difficulty of defining 'specific intent' (see Burchell & Hunt 230) demonstrated the arbitrary and artificil nature of the rule; and, more importantly, the rule was contrary to the basic principle that liability is dependent upon *mens rea*, for the accused was found guilty of the lesser crime automatically without requiring proof of *mens rea* for that crime (*ibid* 230-1).
>
> Where the crime did not require 'specific intent' for *mens rea* voluntary drunkenness, even if it resulted in unconsciousness, afforded no defence but could at most be a ground for mitigation of sentence. Johnson (*supra*) was the ultimate authority for this aspect of the rule (see Burchell & Hunt 231-4), which was also contrary to the principle actus non facit reum nisi mens sit rea.
>
> *Chretien* has wiped out the traditional approach of our courts to voluntary intoxication and has firmly set our law upon the basis of the legal principle."

The learned authors then continue, stating that Rumpff CJ (who handed down the decision in Chretien's case) described the rule in Johnson's case - that voluntary drunkenness is not a defence except where it leads to insanity

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- as "juridically impure" and grounded in "policy considerations". Rumpff CJ went on to dismiss the "specific intent" rule summarily on the ground that there is no place for it in our law and took the view that the rule should be regarded as unacceptable. Burchell & Milton conclude at 435-6 that -

> "in short, as far as the law is concerned, Chretien has removed voluntary intoxication from the direct influence of policy considerations and placed it firmly on the basis of legal principle, with the result that it can now affect criminal liability in the same way, and to the same extent, as youth, insanity, involuntary intoxication and, latterly, provocation."

So it can be seen that Chretien's case was in many respects a revolutionary decision made in

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South Africa in 1981, completely altering the law on intoxication as it had been in South Africa up until that date. It arguably established voluntary intoxication as a complete defence. The question is whether that is the law of Zimbabwe.

We have been referred by Mr Hove in his address to Chretien's case and several other South African cases but we have not been referred to any Zimbabwean authority dealing with this matter. If this court were to have the temerity to change the law as it apparently has existed in regard to intoxication in Zimbabwe for many years, we would have expected to have been provided by counsel with a very detailed analysis of the respective merits of the Chretien approach and the old approach. We would also expect to have been referred to a great deal of authority and academic argument on the matter. But this has not happened.

We have, however, conducted our own research and there appears to be no reported case in Zimbabwe since Chretien's case in which Chretien's case has been carefully analysed and considered and the respective merits analysed and decided upon. I have checked through the index of the Zimbabwe Law Reports and through the index to unreported Zimbabwe cases and there is no reference to any such decision. I have also checked through my own personal index of unreported decisions and in that index I have been able to find only two case references in Zimbabwe in Chretien's case.

There is a High Court review judgment by Ebrahim J (as he then was) in which Samatta J concurred in the case of S v Mayo HH-468-86. In that judgment Ebrahim J referred to Chretien effectively as if it appeared to be the law, but it was a review judgment where there was no argument addressed

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to the learned judges and there was no indication of any detailed analysis of the law nor of the potentially far-reaching consequences of holding Chretien to be the law. Chretien's case was also referred to by the Supreme Court in the case of *S v Chamunorwa* & Ors S-137-86 in a judgment by Dumbutshena CJ in which Gubbay JA (as he then was) and McNally JA concurred. In that judgment, Dumbutshena CJ simply quoted with approval (at pp 6-7) the second half of the English headnote in Chretien's case as follows:

> "The defence of drunkenness can only succeed if someone is dead drunk and is not conscious of what he is doing. Such a person is not liable because a muscular contraction which is done in this condition is not a criminal act. If such a person does an act but is so drunk that he does not realise what he is doing or he does not appreciate the unlawfulness of his act, he is not guilty of murder because he is not criminally responsible."

The Supreme Court, other than quoting that second half of the headnote, did not deal with the possible implications of Chretien's case. There was no detailed analysis of the legal principles involved and no reference to the very significant academic storm which had been swept up by Chretien's decision in South Africa.

Accordingly, although Chamunorwa's case appears to quote with approval part of Chretien's case, I do not regard it as indicating that Chretien's case as a whole should be regarded as part of Zimbabwean law. I reiterate that before Chretien's case could be decided or found to be part

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of the Zimbabwean approach to voluntary intoxication, there would need to be a detailed, careful consideration of that case with the benefit of properly prepared and researched argument from both sides of the bar - something which was absent in the cases I have referred to and which is absent from this case.

In my view, the present position of Zimbabwean law as to the effect of voluntary intoxication is as stated by Prof Feltoe in his Guide to Zimbabwean Criminal Law (1991 edition) at p 13, which states in broad terms the law incorporating the much criticized, but nevertheless long enshrined, specific intent rule.

It is clear that Chretien's case has, as I have indicated, caused considerable academic, and indeed public, discussion in South Africa and in 1988 a Criminal Law Amendment Act in South Africa was enacted which resulted in the consequences of Chretien's decision being avoided. As to the considerable academic discussion of Chretien's case see, for example, the

case notes in the 1982 SALJ at pp 189 1(7) and 547 2(8) and the article in the 1981 SALJ at p 177.3(9) These articles indicate the difficulty and complexity of the question raised in Chretien's case. I would observe that the Chretien approach is, as Rumpff CJ indicated, undoubtedly a logically, legally pure argument. But in this regard I would quote the conclusion drawn by Professor du Plessis at p 203 of his article in the 1982 SALJ:

> "Chretien is to date probably the greatest triumph and most 'famous victory' of the 'regswetenskaplike' approach to our criminal law. 'Regswetenskap' apparently demands that the law be a closely woven fabric of interlocking principles from which only logical conclusions are drawn and from which all illogicalities and inconsistencies have been removed or are in the process of removal.
>
> In many respects 'regswetenskap' appears to endeavour to be more scientific than the exact sciences. The whole science of electromagnetism is founded in Maxwell's four building blocks and no satisfactory theory that unites these four building blocks into a harmonious system has yet been advanced. Nevertheless electromagnetism is a flourishing science. Geometry is not a science devoid of things slightly suspect on the score of logic. The statement that an infinite number of parallel lines can pass through the same point is illogical: it is one of the foundations of modern physics ... When dealing with 'regswetenskap' one fears there may now be a concentrated effort to force the common law into a Procrustean bed of logic - a tendency abandoned with excellent results by many a true science."

Furthermore, in matters of this nature, policy considerations are also of considerable importance - and Rumpff CJ may well have under-estimated the cogency of those considerations. The specific intent rule (in my humble view) has, despite its imperfections, managed to last well and for all its logical impurities has generally been applied without insuperable difficulty and without causing injustice - something the Chretien approach might be hard put to match.

The question is at any rate obiter, because Chretien would not fall to be considered on the precise facts of this case or on the precise legal aspects

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required to be considered from the facts of this case. That is because Chretien was concerned with a person charged with attempted murder but so intoxicated as to be incapable of forming the necessary intent. The issue was whether such a person should be convicted of common assault even though he would also not be able to form the intention to assault. Chretien was not concerned with the question which is before this court - that is, the entirely uncontroversial question of whether a person who is charged with murder, but found to be unable to form the necessary intent, could be convicted of culpable homicide. Since culpable homicide is an offence which does not require specific intent, it is free from the academic and legal arguments surrounding the aspects of Chretien's case to which we have referred. At any rate, a reduction from murder to culpable homicide an be appropriate without reference to the specific intent rule, but on the basis that although the accused lacked the requisite *mens rea* for murder, he had nevertheless been negligent in regard to the consequences judged by the standard of the reasonable sober person: Burchell 1981 SALJ at p 183.

A further distinguishing factor is that Chretien's case would, however, not be relevant on the facts as we have analysed them in this case relating to the evidence as to intoxication. We have said that there was no indication from the evidence in relation to the intoxication that the accused was intoxicated to such a degree as to be unaware of what he was doing or unable to appreciate the consequences of his actions. Chretien - albeit somewhat vaguely - referred to various degrees of intoxication. In S v V 1979 (1) SA 656 (A) Jansen JA referred to the need, when considering degrees of intoxication, to have the clearest and most detailed evidence before the court in regard to the level of intoxication - before being prepared to entertain a finding that the intoxication was to such a degree as to render an accused person incapable of appreciating or knowing the consequences of his action (see also 1981 SALJ at p 192). We have looked at the matter in detail and in our view there would be no basis on the evidenceled to entertain such a finding.

We need to consider the further decision referred to by Mr Hove of S v van Vuuren 1983 (1) SA 12 (A). This case continued the approach as laid down in Chretien by indicating that it could be extended to aspects other than drunkenness, such as emotional stress. This decision was a development of the approach in Chretien's case. It is not relevant to our considerations in this case because of our findings on credibility. It is perhaps relevant to observe that similar factual conclusions as in this matter were reached by Diemont AJA in van Vuuren's case. The learned Judge of Appeal stated that, despite the evidence of liquor, provocation and mental stress, the appellant in that

matter knew what he was doing and was in full control of his physical faculties. In short, there was no absence of *mens rea*. The learned judge in van Vuuren's case also made a detailed analysis of the credibility of the accused in that case and found, for what appeared to us very compelling reasons, that there was no reasonable possibilit that the version put forward by the accused in certain critical aspects could be regarded as reasonably possibly true.

The next case to which Mr Hove referred was the controversial decision in S v Arnold 1985 (3) SA 256 (C). That case may be summarised by reference to the 1987 SALJ 539 at 542 5(10)

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where the learned author (Prof du Plessis) described Arnold's case as follows :

> "During an emotionally charged discussion between Arnold and his wife two shorts were fired from a pistol Arnold was holding in his hand. The second shot killed the wife. Arnold stated that he could remember the firing of the first shot, which had caused no damage, but could not remember the firing of the second, fatal, shot. His defence was twofold: first, that he could not act at the time of the firing of the second shot, as his will had not been in control of his body, and, second, that he had not appreciated the wrongfulness of his conduct when this fatal shot was fired. Both grounds of defence were successful and Arnold was acquitted."

I wholeheartedly concur with the next comments of the learned author that it appears, with respect, to be fairly plain that Arnold was guilty of culpable homicide. It was "negligent of him to commence a conversation which was really a confrontation in an emotionally charged situation with a pistol in his hand and it was certainly negligent of him not to put away the firearm after the first shot had gone off". But convicting Arnold of culpable homicide was not considered by the court.

In my view, it is quite clear that the court, if it had applied basic principles, would have convicted Arnold of culpable homicide. That view is also expressed in a further case note in 1985 SALJ at p 240 (by Prof Snyman) 6(11) where it is simply stated that the decision in Arnold's case was wrong and that Arnold should have been convicted of culpable homicide.

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It needs to be further stated that the only reason that culpable homicide was or should have been the deciding factor in Arnold's case were the very specific findings of credibility which the learned judge in Arnold's case made in favour of Arnold. There are no such findings of credibility in favour of the accused in this matter. Accordingly for the various reasons which we have referred to we are satisfied that Arnold's case was both incorrectly decided and is not applicable to this case. Mr Hove had also suggested that the facts of Arnold's case were on all fours with this case. In our view, they are not on all fours, and in fact are extremely different. As we have indicated Arnold was involved in an extremely stressful argument with his wife, there was a high degree of provocation involved, and there were a number of other factors which were not present in this case.

Accordingly we have analysed the authorities referred to by Mr Hove and are of the view that those authorities do not assist him in the defences put forward on behalf of the accused.

FINDINGS OF FACT

Having dealt with the evidence relating to the credibility of the respective witnesses for the State and the accused and having dealt with the aspects relating to the psychiatric evidence and also having dealt with the law on the points raised on the accused's behalf by Mr Hove, we must proceed to make findings of fact in regard to the matter.

In making these findings of fact we will obviously be guided by the detailed findings which we have made in respect of the credibility of the witnesses.

We accordingly make the following findings of fact:

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(1) In the early hours of the morning of 24 September 1995 at Gwanzura Stadium, the accused was urinating in an area between certain tents;

(2) That the deceased approached the accused, caught hold of him and told him that he should not urinate at that place. There was then an altercation between the deceased and the accused;

(3) The accused then took hold of the deceased by the collar and told the deceased that he would shoot him. He said this at least once, probably on several occasions;

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(4) The accused then took his police issue CZ pistol from his waistband and shot the deceased through the head with the bullet entering just below the left eye;

(5) At the time the shot was fired the only comment the deceased had made was to instruct the accused not to urinate at the place in question which was not a toilet;

(6) At the time the accused fired the shot which killed the deceased he had been drinking, probably over the greater portion of the previous day, and he had in all probability also smoked a dagga cigarette;

(7) The consumption of alcohol and drugs undoubtedly affected the action the accused subsequently took. But the accused was not intoxicated or drunk to such a degree as to prevent him from appreciating what he was doing, as to prevent him appreciating the consequences of his actions, or prevent him from forming the necessary specific intent;

(8) The accused was suffering from post-traumatic stress disorder as described by the psychiatrists, Prof Acuda and Dr Chikara. This post-traumatic stress disorder, in all probability, also affected the actions of the accused on the night in question;

(9) It has not been proved on a balance of probabilities by the accused that he was mentally disordered (within the meaning of the Mental Health Act) at the time the shot was fired;

(10) The evidence as we have analysed it establishes that the accused was suffering not from a mental disorder but from diminished responsibility; and

(11) We have, as we have indicated in our assessment in regard to the allegations of homosexual abuse made by the accused against ex-President Banana, found that the accused's allegations in that regard cannot be dismissed as not reasonably possibly being true. Accordingly for the purposes of this case we have, in dealing with the accused's defence, regarded them as true.

VERDICT

On the basis of our findings of fact we must deal with the question of what verdict is appropriate. We have, in making our findings of fact, considered that the action of the accused in firing a

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shot which killed the deceased was

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a complete over-reaction. We have considered whether the strange nature of the act itself should have resulted in the court making findings in favour of the accused in regard to the intoxication and mental disorder aspects. But we are satisfied that the nature of the act does not affect our findings in any meaningful way. We would refer to the comments by Prof du Plessis in 1987 SALJ 542 dealing with Arnold's case when he stated that -

> "a very high percentage of persons who commit a serious assault or a murder do so because of anger at or annoyance with their victim. In the popular sense of the phrase they could all probably be said to have lost their self control. The criminal law punishes this, it does not condone it. It is one thing to say that a man behaved violently because he lost his self control, it is an entirely different thing to say he behaved violently, or killed someone deliberately, because he could not do otherwise."

We are satisfied by our analysis of the evidence in this matter that the accused, although affected by the alcohol and drugs he had consumed and by post-traumatic stress disorder, was nevertheless aware of what he was doing and capable of forming the necessary specific intent. It is in our view of importance to note that on at least one occasion and probably several occasions the accused specifically told the deceased that he was going to shoot him - before removing the pistol from his waistband and so doing.

Accordingly, we are satisfied that the State has proved its case beyond a reasonable doubt and satisfied that it is appropriate to convict the accused of murder with actual intent, although with diminished responsibility. See *S v Chin\'ono* 1990 (1) ZLR 244 (H) at 252F-G where Smith J stated:

> "The court considers that the accused was not mentally disordered or defective as defined in the Medical Health Act 1976 and therefore a special verdict in terms of s 28 of that Act is not appropriate. The state of diminished responsibility reduces the moral, not the legal liability of the accused for his act. Therefore it would not be appropriate to find the accused guilty of culpable homicide."

See also S v Sibiya 1984 (1) SA 91 (A) at 97.

[The court considered the question of sentence and sentenced the accused to ten years' imprisonment with labour.]

Hove Mutasa and Associates, accused's legal practitioners

FORESTRY COMMISSION v MOYO 1997 (1) ZLR 254 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

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11 & 24 February 1997 Judgment No. S-26-97

Flynote

Review - condonation - failure to observe time limits - need to apply for condonation - condonation granted without application or explanation for the delay - grave non- compliance with rules of court - condonation should have been refused

Headnote

The respondent, an employee of the appellant, had been the subject of a disciplinary inquiry following a period of absence from work in April 1993. The meeting was held in mid-June 1993. He walked out of the disciplinary inquiry after being told that he would not be reimbursed the costs of travelling to attend the hearing. A week later he was advised that his contract of employment had been terminated and that he had a right of appeal under the appellant's code of conduct. In July 1993, he wrote to say he had placed the matter in the hands of his lawyers. In August 1993 a letter was sent by the appellant, asking whether the respondent intended to proceed under the code of conduct or in another way. Correspondence then took place between the lawyers and the appellant.

In June 1995, an application was lodged with the High Court. The point was made in limine that the wrong procedure had been used and that the decision of the disciplinary inquiry should have brought on review instead. The judge (Malaba J) held that relief susceptible to review could be granted even though the proceedings had not been brought under the review procedure provided in the High Court Rules. He also condoned the delay of over two years, although there had been no application for condonation or explanation for the delay. His reason for

doing so was that the decision to dismiss the respondent was null and void because of gross procedural irregularities by the disciplinary inquiry and so to dismiss the application would constitute a failure to redress an injustice.

Held, that though the rules of court are not an end in themselves, to be slavishly applied for their own sake, they are there to regulate the practice and procedure of the High Court and, in general, strong grounds would have to be advanced to persuade the court or judge to act outside them.

Held, further, that where an application for review is not brought within the time specified in the Rules, an application for condonation must be sought.

Held, further, that it was erroneous of the judge *a quo* to condone what was, on the face of it, a grave non-compliance with r 259, which requires an application for review to be instituted within eight weeks of the termination of the proceedings in which the irregularity or illegality complained of is alleged to have occurred. The making of the application is necessary to trigger the discretion to extend the time. Where proceedings are not instituted within the time period specified and an application for condonation is not made, the matter is not properly before the court. An explanation is also essential before a court can exercise a judicial discretion to condone.

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Held, further, that the ground relied upon by the judge *a quo* as the foundation for the inference that no proceedings were held was not a complaint raised in the papers and in any event was contradicted by the positive averment in the opposing affidavit of the appellant's general manager.

Held, further, that there had been no breach of the audi alteram partem rule by the disciplinary inquiry continuing after the respondent had walked out. He took a calculated risk that it would proceed without him and there was no obligation on the panel to postpone the hearing and call on him to appear at a later date.

Appeal allowed.

Cases cited:

Adfin (Pty) Ltd v Durable Eng Works (Pty) Ltd 1991 (2) SA 366 (C)

Bishi v Sec for Education 1989 (2) ZLR 240 (H)

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

Jockey Club of SA v Forbes 1993 (1) SA 649 (A)

Mabuza v Tjolotjo District Council HB-52-92

Makuruse v Hide & Skin Collectors (Pvt) Ltd 1996 (2) ZLR 60 (S)

Matsambire v Gweru City Council S-183-95

GUBBAY CJ

Min of Labour & Ors v P E N Tpt (Pvt) Ltd 1989 (1) ZLR 293 (S)

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

Radebe v Govt of the Republic of SA & Ors 1995 (3) SA 787 (N)

Rampa en Andere v Rektor, Tshiya Onderwyskollege en Andere 1986 (1) SA 424 (O)

S v Baleka & Ors 1986 (1) SA 361 (T)

Sec for the Interior v Scholtz 1971 (1) SA 633 (C)

Sumbureru v Chirunda 1992 (1) ZLR 240 (H)

Wilmot v Zimbabwe Owner Driver Organisation \(Pvt\) Ltd 1996 (2) ZLR 415 (S)

Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A)

The following rules of court were referred to by the court:

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High Court of Zimbabwe Rules 1971 (RGN 1047/71), rr 230 and 259

Case Information

G S Wernberg, for the appellant

W Sansole, for the respondent

Judgment

Gubbay CJ: Consequent upon the institution of an ordinary court application, the respondent obtained from Malaba J *(12) an order against the appellant that it reinstate him to his position as manager of Katombora Camp, Unit 6 of the Matetsi Concession Safari Area, with full pay and benefits from 29 April 1993 to the date of reinstatement.

The relevant historical events leading up to this appeal were, for the most part, common cause or not seriously in dispute. They are as follows:

1. In August 1988, the respondent was engaged by the appellant as area manager of its production section in Harare. Thereafter occurred a number of transfers and promotions, which ended with the respondent's appointment as manager of Katombora Camp, being Unit 6 of the Matetsi Concession Safari Area.

2. By July 1992, the respondent had accumulated eighty-four days leave but due to pressure of work and the fact that no-one was available to replace him, his request for leave was declined.

3. On 9 April 1993, the respondent submitted a written application to take eighty-four days vacation leave from 1 April to 23 June 1993. His

application was refused by his superior, Mr Rodwell Ngwarai. The respondent was, however, granted what was known as "time off".

4. The respondent was away from employment, on a private visit to Botswana, from 1 to 24 April 1993. On his return to work on 29 April 1993, he was suspended without pay. The notification, which came from head office, charged that he had committed certain offences specified in the appellant's written code of conduct. These included, under Table 4:

> "Absence without official leave for a period of five or more working days without reasonable excuse."

The dates in question were given as 1 to 24 April 1993.

5. By letter dated 12 May 1993, the respondent denied all the charges preferred against him. On the allegation that he had absented himself without official leave, he maintained that he had taken the days as "time off" on the authority of Mr Ngwarai.

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6. On 8 June 1993, the appellant wrote to the respondent calling upon him to attend a disciplinary inquiry to be held at its Bulawayo office on 14 June 1993 at 8.30 am, and to bring such witnesses as he required.

7. The respondent travelled from Victoria Falls to attend the inquiry on the morning of 14 June 1993. At the inception of the hearing he asked the investigation panel, of which Mr Ngwarai was a member, whether he was to be reimbursed the travel and subsistence expenses incurred in proceeding to Bulawayo for the hearing. Upon being informed in no uncertain terms that he would not be paid such expenses, the respondent walked out in protest.

8. On 22 June 1993, the appellant wrote to the respondent informing him that as a result of being found guilty of -

   (i) serious neglect of duty;

   (ii) misrepresentation of facts;

   (iii) absence from work without leave; and

   (iv) insubordination to the investigation panel;

GUBBAY CJ

his contract of employment had been terminated with effect from the date of suspension. The respondent was further advised of his right under the code of conduct to appeal against the decision within five working days of being served with the letter.

9. The finding of insubordination arose from the respondent's conduct in walking out of the inquiry.

10. On 23 July 1993, the respondent wrote to the appellant complaining about the decision reached and indicating that he had placed the matter in the hands of his lawyers.

11. Then came a letter from the appellant dated 24 August 1993 in which clarification was sought as to whether it was the respondent's intention to appeal in terms of s 7(2) of the code of conduct, or whether his lawyers intended to deal with the issue by way of "a different approach".

12. Correspondence subsequently ensued between the respondent's legal practitioners and the appellant.

13. On 23 June 1995, being two years and six days after the respondent had been informed of his dismissal, the application in question was lodged with the High Court. It was opposed by the appellant.

At the commencement of the hearing before the learned judge, the point in limine was taken on behalf of the appellant that the respondent had utilised the wrong procedure. He had instituted

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an ordinary court application in terms of r 230 of the High Court Rules instead of bringing the decision of the investigation panel on review under r 256 et seq.

The learned judge embarked upon a close examination of a number of decisions of the South African courts which lay down that relief susceptible to review may be granted even though the proceedings were not brought expressly under the review procedure provided in r 53 of the Uniform Rules of the Supreme Court of South Africa. In particular, he referred to S v Baleka & Ors 1986 (1) SA 361 (T) at 397I-398B; Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd 1991 (2) SA 366 (C) at 368E-H; and Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at 661E-662B. I readily accept the proposition exemplified in these and other authorities that rules of court are not an end in themselves, to be slavishly applied for their own sake.

GUBBAY CJ

Insofar as the High Court Rules are concerned, r 4C(a) 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. The provisions of the Rules are not strictly peremptory; but as they are there to regulate the practice and procedure of the High Court, in general strong grounds would have to be advanced to persuade the court or judge to act outside them. See *Sumbereru v Chirunda* 1992 (1) ZLR 240 (H) at 243B; *Makaruse v Hide \& Skin Collectors \(Pvt\) Ltd* S-140-96 1996 (2) ZLR 60 (S); *Wilmot v Zimbabwe Owner Driver Organisation \(Pvt\) Ltd* S-211-96 1996 (2) ZLR 415 (S).

Under r 53 of the Uniform Rules no period is prescribed within which proceedings for review must be brought. Yet it is clear that they must be brought within a reasonable time. See Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 39B; Radebe v Government of the Republic of South Africa & Ors 1995 (3) SA 787 (N) at 798A-B.

Rule 259 of the High Court Rules, on the other hand, requires an application for review to be instituted within eight weeks of the termination of the proceedings in which the irregularity or illegality complained of is alleged to have occurred. Its proviso allows the court to extend the time for good cause shown. In other words, if the application for review has been brought out of time, condonation for the failure to comply with r 259 must be sought. If authority is required for this self-evident concept, it is to be found in Bishi v Secretary for Education 1989 (2) ZLR 240 (H) at 242D; and *Mushaishi v Lifeline Syndicate \& Anor* 1990 (1) ZLR 284 (H) at 288E-F. The court is entitled to refuse the review or may condone the omission. It exercises a judicial discretion, while taking into consideration all relevant circumstances.

In adopting an incorrect procedure, the respondent did not advert to the time period prescribed in r 259. It was necessary for him therefore to apply for condonation in terms of the proviso to that rule. This he did not do, not even at the eleventh hour when the objection was taken by the appellant. Thus there was before the court *a quo* no endeavour to show good cause to justify it in extending the time in bringing the application. No explanation was offered in respect of the manifestly inordinate delay of just over two years in launching the proceedings. Was this due to the neglect of the legal practitioner? Or perhaps the respondent himself was responsible in

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prevaricating as to whether to bring proceedings? The court was left completely in the dark.

Notwithstanding that there was before him no application, the learned judge condoned the unexplained delay. He did so solely on the ground that as, in

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his opinion, the decision to dismiss the respondent was null and void on account of gross procedural irregularities by the investigation panel, to dismiss the application would constitute a failure to redress an injustice. Put tersely, he held that if an application for condonation had been made, it would have been granted "as a matter of course". The cases relied on, for what is an innovative approach to r 259, were Rampa en Andere v Rektor, Tshiya Onderwyskollege en Andere 1986 (1) SA 424 (O); Secretary for the Interior v Scholtz 1971 (1) SA 633 (C); and Jockey Club of South Africa v Forbes *supra*. None of these decisions, however, concerned the necessity to establish a reasonable explanation for the delay in instituting the application. The reasonableness of time within which the application was brought was not a factor in any of them. See also Mabuza v Tjolojo District Council HB-52-92 (not reported).

I entertain no doubt that, absent an application, it was erroneous of the learned judge to condone what was, on the face of it, a grave non-compliance with r 259. For it is the making of the application that triggers the discretion to extend the time. In Matsambire v Gweru City Council S-183-95 (not reported) this court held that where proceedings by way of review were not instituted within the specified eight week period and condonation of the breach of r 259 was not sought, the matter was not properly before the court. I can conceive of no reason to depart from that ruling. One only has to have regard to the broad factors which a court should take into account in deciding whether to condone such a non-compliance, to appreciate the necessity for a substantive application to be made. They are:

(a) that the delay involved was not inordinate, having regard to the circumstances of the case;

(b) that there is a reasonable explanation for the delay;

(c) that the prospects of success should the application be granted are good; and

(d) the possible prejudice to the other party should the application be granted.

See *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (S) at 357 D-G. How can a court exercise a judicial discretion to condone when the party at fault places before it no explanation for the delay?

Moreover, in every such application the respondent is entitled to be heard in

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opposition. He must be permitted an opportunity to persuade the court that the indulgence

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sought is not warranted. Without hearing him how can a court, for instance, be satisfied that he will suffer no possible prejudice by the condonation?

This conclusion effectively disposes of the appeal against the respondent. However, I think it as well to deal briefly with the grounds upon which the learned judge held that the decision of the investigation panel was null and void.

In the first place, much significance was attached to the failure by the appellant to lodge with the registrar the record of the proceedings of the investigation panel (termed a "report" under clause 6:7 of the code of conduct) in terms of r 260(1); or at the very least to have annexed the record to the opposing affidavit. Based on this perceived omission, the learned judge drew the inference that no record had been created because no inquiry was held after the respondent had walked out.

With due deference, I do not consider that such an adverse inference was justified in the situation that existed. If the respondent had indicated from the outset that he was bringing the proceedings of the investigation panel under review and had stated clearly the grounds upon which he was seeking to have them set aside, the appellant would have been alerted to its obligation to comply with r 260(1). Again, if the respondent had made the complaint in his founding affidavit that no inquiry had been held by the investigation panel and that this was a ground upon which he was relying for relief, the appellant would then have had to satisfy the court that it had complied with clause 6:7 of the code of conduct by producing the report. Not otherwise, so it seems to me.

It also must not be overlooked that the sole allegation of a breach of the code of conduct made by the respondent was that the appellant had not complied with clause 13, namely, that the charges specified by it did not allow of dismissal. This was not persisted in, since the charge relating to absence without official leave plainly fell under para (iv) of Table 4.

In sum, the ground relied upon by the learned judge as the foundation for the inference that no proceedings were held, was not a complaint raised in the papers. See Min of Labour & Ors v P E N Transport (Pvt) Ltd 1989 (1) ZLR 293 (S) at 296A-D. And, in any event, was contradicted by the positive averment in the opposing affidavit of the appellant's general manager that the

inquiry had been held - an averment that was not put in issue by the answering affidavit of the respondent.

The second and alternative ground, as I understand it, was that the respondent ought to have been afforded the opportunity to be heard even though he had walked out of the inquiry. I am unable to agree. If the cause of the respondent's abrupt departure had been because of a procedural defect in the conduct of the proceedings, his attitude would have been understandable. The respondent had been told that he would not be reimbursed his travel and subsistence expenses. Whether that decision was right or wrong was of no relevance. It remained open to the respondent to challenge it by recourse to the law. His exit indicated that he had no intention of participating in the inquiry. He took a calculated risk that it would proceed

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without him. There was, in my opinion, no obligation upon the investigation panel to postpone the hearing and call upon the respondent to appear at another date. The audi alteram partem rule was not violated.

It is for these reasons that I respectfully differ from the learned judge that the decision of the investigation panel was void *ab initio*.

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

> "The application is dismissed with costs."

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Sansole & Senda, respondent's legal practitioners

GUMBO v MINISTER OF LOCAL GOVERNMENT & ANOR 1997 (1) ZLR 263 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

17 February & 4 March 1997 Judgment No. S-37-97

Flynote

Local authority - elections - candidate - eligibility - candidate for election as executive mayor - disqualified from nomination as candidate if a full-time employee of the State

Headnote

The appellant had aspirations of becoming the executive mayor of Masvingo. He submitted his nomination papers as a candidate for the mayoral elections to the second respondent, the town clerk of Masvingo. He was told that he was not eligible as a candidate, being a full-time employee of the State, unless he could show that he had resigned his office or was not disqualified in terms of ss 25, 41 or 50 of the Urban Councils Act [Chapter 29:15]. The town clerk also rejected the nomination on the grounds that the nomination paper was defective. The appellant argued before the High Court that s 50 of the Act was no impediment to his candidature, but only to his taking office when duly elected and said that in that event he would resign from the Public Service. The High Court (Smith J) accepted his argument. The judge set aside the declaration that the only other candidate was duly elected and ordered the town clerk to scrutinise the appellant's nomination paper and, if it was found to be in order, hold an election

Held, that as the appellant held an office of profit under the State, he was disqualified by s 41(1)(g) of the Act from being nominated as a candidate for the post of councillor unless he

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could pray in aid the exemptions offered by subsections (4) and (5), which he admittedly could not. By s 49(1)(g) a person is qualified for election as mayor if not disqualified in terms of ss 25, 41 or 50 of the Act. Consequently, not only must a

candidate be eligible as a voter under s 25, but he must also be qualified for nomination as a councillor in terms of s 41(1)(g). Put another way, if one is not eligible as a voter, one cannot be nominated as a candidate for office as mayor; and if one is disqualified from nomination as a councillor, one is disqualified from nomination as mayor. It was wrong to commence the inquiry with the interpretation of s 50.

Held, further, that the town clerk was entitled to reject the appellant's nomination if he was satisfied that the appellant was not qualified in terms of s 49(1)(g).

Held, further, that s 50(2) had nothing to do with who was qualified for nomination as mayor. It would be possible for an employee of the State to be nominated as mayor, if the Minister exempted him under s 41(5). However, if such a person were elected, he could not take or continue in office as long as he remained in the employment of the State. Being qualified for nomination as mayor is not synonymous with being qualified to take office as mayor. There were numerous categories of persons in s 50(2) who were disqualified from taking office but were nowhere in the Act disqualified from standing as candidate for election.

Held, further, that s 23 of the Public Service Act [Chapter 16:04] gave a measure of protection to public servants seeking election to local authorities. It was possible under that provision for a public servant to leave the Service to stand for election and, if unsuccessful, to apply for re-appointment to the Service.

Held, further, that the town clerk had no discretion but to reject any nomination if he was satisfied that the would-be candidate was not qualified under s 49 to be elected or was disqualified under s 50 from taking office as mayor. The town clerk had properly rejected the appellant's nomination paper as the appellant, by his own admission, fell foul of s 49(1)(g) of the Act. The only other candidate was therefore legally declared as the duly elected mayor of Masvingo.

Appeal dismissed. Judgment of Smith J in Gumbo v Min of Local Govt & Anor 1996 (2) ZLR 372 (H) reversed.

Cases cited:

Re Maryon-Wilson's Trusts [1967] 3 All ER 636 (Ch D)

Touriel v Min of Internal Affairs, Southern Rhodesia 1946 AD 535

Shop & Store Development Ltd v IRC [1967] 1 AC 472 (HL)

SA Fabrics Ltd v Millman NO & Anor 1972 (4) SA 592 (A)

The court considered the following statutory provisions:

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Public Service Act [Chapter 16:04], s 23

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Urban Councils Act [Chapter 29:15], ss 25, 41(1)(g), 41(5), 45(7), 49(1)(g), 50, 56(4), 59

Case Information

P Nherere, for the appellant

No appearance for the first respondent

J S Sayce, for the second respondent

Judgment

Korsah JA: For determination before this court are an appeal and a cross-appeal against two orders made by the High Court, Harare. The appeal is centred on whether the second respondent, in terms of the provisions of the Urban Councils Act [Chapter 29:15] ("the Act"), was entitled to reject the nomination papers of the appellant as candidate for election to the office of mayor solely on the ground that the appellant, as a full time lecturer of the Masvingo Teachers Training College, was a paid employee of the State. The issue in the cross-appeal is whether the second respondent was entitled under the Act to reject the nomination papers for the reasons above stated.

The events leading up to these appeals are succinctly stated by Mr Sayce in the second respondent's heads of argument.

The appellant has aspirations of becoming the executive mayor of Masvingo. The first respondent is the Minister responsible for the administration of the Act. The second respondent, as the town clerk of Masvingo, is the returning officer for the Municipality of Masvingo ("the Municipality").

On 14 June 1996, the appellant, accompanied by his election agent, submitted his nomination papers as a candidate for mayoral elections of the Municipality, scheduled for 29 and 30 June 1996, to the second respondent. In the presence of the deputy town clerk and the director for housing and community services, whose assistance had been solicited by the second respondent in dealing with nominations received, the second respondent informed the appellant and his election agent that the appellant, being in full time employment as a lecturer at the Masvingo Teachers' Training College, was not eligible as a candidate for mayoral office unless he could furnish evidence that he had resigned his post or he was, in terms of s 49(1)(g) of the Act, "... not disqualified in terms of section twenty-five, forty-one or fifty".

The appellant repositted that although he was a full time employee of the State it was not necessary, despite the provisions of s 50(2) of the Act, for him to have resigned from the Civil Service prior to the submission of his nomination papers. The appellant maintained and is still of the view that s 50(2) of the Act, which recites that -

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> "A person shall be disqualified from taking office as a 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, organisation or association of persons",

is no impediment to his candidature as a mayor, but only to his taking office as mayor when duly elected. He said in the event of his being duly elected as a mayor, he would then resign from the Civil Service before donning the mantle of mayor.

This approach, in my opinion, is like looking through a telescope from the wrong end. It seems to me that in resolving this issue one has to construe the relevant sections of the enactment, as far as one can, without bringing one section into collision with another. To this end I shall commence with the sections which disqualify a person from being elected as a mayor stipulated in s 49(1)(g) of the Act.

Section 25 provides that persons who have been convicted of any offence and sentenced to an effective custodial term or sentenced to a fine of one thousand dollars or more and have not received a pardon from the State shall, for a period of three years from the date of their discharge, be disqualified from being enrolled on any voters' roll or continue to be so enrolled. It was not alleged that the appellant was disqualified as a voter under s 25 and, therefore, ineligible as a candidate for the office of mayor.

In terms of s 41(1)(g), by virtue of his engagement as a lecturer at the Masvingo Teachers Training College, he holds an office of profit under the State and is disqualified from being nominated as a candidate for, or from election as, a councillor, unless he can pray in aid the exemptions accorded by subss (4) and (5) of s 41. Since the appellant admitted that he had not been exempted in terms of subss (4) and (5) and intended to resign his post only if elected mayor, he was not qualified even for nomination as a candidate for, or for election as, a councillor.

By s 49(1)(g) "a person shall be qualified for election as a mayor" if he is not disqualified in terms of ss 25, 41 or 50 of the Act. The inescapable conclusion is that, to qualify as a candidate for mayoral elections, not only must a candidate be eligible as a voter under s 25, but he must also be qualified for nomination as a councillor in terms of s 41(1)(g). Put differently, if one is not eligible as a voter one cannot be nominated as a candidate for office as a mayor. Likewise, if one is disqualified from nomination as a councillor one is also disqualified from nomination for the higher office of mayor.

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To commence the enquiry, therefore, with the interpretation of s 50(2), which relates to the taking of office as a mayor but has no regard to disqualification for nomination as a candidate for mayoral election, is to obvert the whole process laid down by the Act. It is not dissimilar to looking through a telescope from the reverse end. And that clearly was not the intendment of

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the legislature; for there would be collision between the relevant sections of the Act if a person could be a candidate for mayoral election even though he did not qualify to be a voter or to be nominated as a candidate for election as a councillor. Such an interpretation would defeat the obvious intention of the legislation and produce a wholly unreasonable result. Indeed, it would reduce s 50(2) of the Act to an absurdity.

The appellant, having admitted that as a holder of an office of profit under the State he had not been exempted in terms of subss (4) and (5) of s 41 from being nominated as a candidate for, or for election as, a councillor, was disqualified for nomination as a mayor in terms of s 49(1)(g) of the Act.

Now s 45(7) of the Act empowers a returning officer, in this case the second respondent, to reject the nomination of any person if:

> "(a) he is satisfied that person is not qualified in terms of section forty to be elected as a councillor or is disqualified in terms of section forty-one from being nominated as a candidate."

With regard to the nomination of candidates for election to the office of mayor, s 56(4) of the Act provides that -

> "(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."

In South African Fabrics Ltd v Millman NO & Anor 1972 (4) SA 592 (A) at 600D Ogilvie Thompson CJ said:

> "The words mutatis mutandis mean subject to the necessary alteration."

Thus, with the necessary changes in points of detail, the second respondent was imbued with power by s 56(4) of the Act to reject the nomination of the appellant, if he was satisfied that the appellant was not qualified in terms of s 49(1)(g) of the Act.

Section 50(2) is the mast to which the appellant has pinned his colours. It declares that -

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> "(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, organisation or association of persons" (emphasis added).

It has already been pointed out that subss (4) and (5) of s 41 exempt certain categories of persons holding offices of profit under the State from disqualification as councillors. For the purposes of the appellant, the section relevant to our enquiry is subs (5), which reads:

> "(5) Where the Minister is satisfied that it is in the interests of the inhabitants of a particular council area that a person who is a member of the Public Service should be eligible for nomination as a candidate for and for election as a councillor, he may, by notice in writing, declare that paragraph (g) of subsection (1) shall not apply in relation to that particular person if the Minister responsible for the department or Ministry in which that person is employed, acting on the recommendation of the Public Service Commission, has certified that any duties of that person as a councillor, should he be elected, would not conflict with his duties as an employee of the State."

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Without the provision under s 50(2), persons exempted from disqualification under s 41(5) may be nominated for the office of mayor while still holding onto their offices of profit, since they are not disqualified under s 41(1)(g), and take office as mayor. One of the objectives of s 50(2) is to obviate the possibility of a person, who has been duly elected as a mayor, taking office while holding onto an office of profit. Section 50(2) effectively prohibits such persons, along with those categories of persons therein named in the subsection, from assuming the office of mayor unless on the day of their appointments they terminate all legal ties with the named bodies, associations and organisations. Section 50(2) has nothing whatsoever to do with who qualifies for nomination as a mayor. That is dealt with under s 49 of the Act. Section 50(2) relates solely to a person who, having been nominated for, and elected as, mayor because there was no legal impediment in his way, cannot take or continue in office, becausehe is in receipt of remuneration from the State or some other business source.

Section 50(2) is better appreciated if it is recalled that s 41(4) also allows certain categories of persons to be nominated as candidates for mayoral elections while in receipt of wages or salaries. The section provides that -

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"For the purposes of paragraph (g) of subsection (1) -

(a) a person shall not be regarded as holding an office of profit under the State unless he is in the continuous and regular employment of the State in respect of which he receives a wage or salary;

(b) a person shall not be regarded as holding an office of profit under the State by virtue of the fact that -

(i) he is in receipt of a pension which is payable by the State; or

(ii) he is an officer or member of the Defence Forces whose services in peace-time are not wholly in the employment of the State; or

(iii) he is an officer or member of the Reserve Force of the Police Force whose services are not wholly in the employment of the State; or

(iv) he is a consultant whose services are not wholly retained by the State; or

(v) he is a person nominated by or with the approval of the council to serve as a member of a commission, board or similar body established by or under this Act or any other enactment; or

(vi) he is a commissioner appointed in terms of the Commissions of Inquiry Act [Chapter 10:07]."

Relevant of note is the fact that in neither subs (4) nor subs (5) of s 41 of the Act is mention made of a person who is in the full time employment of "a company, partnership, or any other body, organisation or association of persons" being exempted, while still in full time employment of those legal entities, from nomination as candidates for mayoral office. And there is nothing in the whole of s 41 which disqualifies such persons from being nominated as candidates for mayoral office while still in the gainful employment of those legal entities. The exclusion of such persons from disqualification and the inclusion of those holding offices of profit under the State, unless they have obtained the necessary permission, is indicative that being qualified for nomination is not synonymous with being qualified to take office as a mayor. It is clear beyond

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peradventure that s 50(2), in which

KORSAH JA

persons working for companies, partnerships or any other bodies, organisations or associations of persons are mentioned for te first time, relates not to their nomination as candidates for mayoral honours but, as specifically stated in the said subsection, to the taking of office as a mayor, which is a step that follows after being duly elected.

The question is not whether 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 papers, but rather what was the intendment of the legislature when it put together the various provisions or the scheme of the Act.

A general presumption in interpretation of statutes is that the same expression is presumed to be read in the same sense throughout an Act. There follows the further presumption that *prima facie* a change of wording denotes a change in meaning.

A disqualification for election in terms of s 49(1)(g) must necessarily be different to disqualification from taking office in terms of s 50(2) of the Act. This is especially so as a disqualification for election, as already indicated, precedes and is antecedent to the procedure for electing a mayor. He cannot even have his name put forward as a candidate. He, therefore, cannot be elected as a mayor. And he cannot have the honour, if honour it be, of being disqualified from taking his seat.

No doubt, the learned trial judge was concerned that the abstract justice of the case requires a construction which would enable a person in full time employment of the State to contest elections without resigning from office, much the same as a person employed in the private sector. He said:

> "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."

Unfortunately, the attention of the learned trial judge was not directed, as ours has been by Mr Sayce, to the provisions made under s 23 of the Public Service Act [Chapter 16:04], which give a measure of protection vis-ˆ-vis the loss of employment to members of the Public Service seeking election to local authorities. The situation for a member of the Public Service aspiring for office on a rural or urban council or office of mayor is that he may obtain

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permission to do so and be declared to have ceased to be a member of the Public Service, provided that if he is not elected he may apply for re-appointment within thirty days of the election.

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It is eloquent testimony to the intentions of the law-maker that none of the categories of persons specified in s 50(2) of the Act suffer from any disqualification, under one or other of the provisions of the Act, to offer himself as a candidate for mayoral office. Any person, such as the appellant, who is clearly disqualified by s 41(1)(g) of the Act would be a strange bedfellow in such company. It would be straining unduly the language of s 50(2) to include in its ambit persons otherwise disqualified from election to the office of mayor, when categories of persons not otherwise disqualified from election to mayoral office are specifically mentioned in the said section.

The law-maker must be taken to have intended what was actually expressed in s 50(2) and no more, unless the language clearly admits of some other meaning. In Shop & Store Development Ltd v IRC [1967] 1 AC 472 at 493 Lord Morris of Borth-y-Gest said:

> "The decision in this case calls for a full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision."

That statement applies with equal force to the facts of this case. There is no warrant for including a person disqualified from standing for election as mayor in the persons qualified for election as such under s 50(2), save that the persons categorised under s 50(2) must give up their full time employment before taking office.

The conclusion reached is fortified by the provision in s 59 of the Act that -

> "Where -
>
> (a) ...
>
> (b) no candidate nominated for election to the office of mayor is qualified in terms of subsection (1) of section forty-nine for election as mayor; or
>
> (c) ...

KORSAH JA

> (d) ...
>
> the returning officer shall forthwith fix a new date for an election to the office as mayor, and thereafter section fifty-five and the other provisions relating of this Part to the election of a mayor shall apply accordingly."

Such a provision would be meaningless if persons, such as the appellant, who are clearly disqualified under s 41(1)(g) from nomination for election, are allowed to stand for election.

The learned trial judge also fell into error in finding that a declaration under s 41(5) of the Act would be inconsistent with s 50 and could override the latter. I place reliance on what was said by Ungoed-Thomas J in Re Maryon-Wilson's Trusts [1967] 3 All ER 636 (ChD) at 642 that -

> "If the court is to avoid a statutory result that flouts common sense and justice it must do so not only by disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed Parliamentary concern for common sense and justice."

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How does it accord with common sense and justice to have a person disqualified from election as a candidate for mayoral office taking up appointment as a mayor? Apart from that, if s 41(5) is read together with s 23(4) of the Public Service Act, the apparent inconsistency is resolved.

In my judgment, the language of ss 41(5) and 50(2) is not incapable of bearing the construction which gives effect to the scheme set out in the Act and which I favour. I consequently adopt it as according with what I conceive to have been the true intention of Parliament.

Section 56 of the Act, which deals with "Nominations of candidates for election to office of mayor", provides in subs (4) that -

> "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."

Leaving aside s 58, which is not relevant to our enquiry, s 45 deals with the nomination of candidates for election as councillors. The relevant provision is para (a) of subs (7) which, when read mutatis mutandis in relation to the nomination of mayors, should read, as Mr Sayce rightly submitted:

KORSAH JA

> "The returning officer shall reject the nomination of any person if -
>
> (a) he is satisfied that person is not qualified in terms of section forty-nine to be elected as a mayor or is disqualified in terms of section fifty from taking office as mayor or from continuing in office as mayor" (emphasis added).

See Touriel v Min of Internal Affairs, Southern Rhodesia 1946 AD 535 at 545. As Mr Sayce rightly submitted, it is worthy of note that under s 45(7) of the Act, a returning officer is under a duty to reject the nomination in the stated circumstances. No discretion reposes in him in the matter.

It follows that the second respondent, in the exercise of the statutory duty imposed on him, properly rejected the nomination paper or papers submitted to him by the appellant because the appellant, by his own admission, fell foul of s 49(1)(g) of the Act and there was no need to order the second respondent to accept the appellant's nomination papers for scrutiny. Francis Aphiri, being then the sole candidate for election to the office of mayor, was legally declared as duly elected mayor of Masvingo.

Accordingly:

(1) The cross-appeal is allowed with costs.

(2) The order made by the trial court in case No. HC-5400-96 is hereby set aside and in its place is substituted the following -

> "The application is dismissed with costs."

(3) The appeal is dismissed with costs.

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EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

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

Honey & Blanckenberg, second respondent's legal practitioners

S v SMITH 1997 (1) ZLR 274 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Criminal appeal

17 February & 5 March 1997 Judgment No. S-27-97

Flynote

Criminal law - statutory offences - Miscellaneous Offences Act [Chapter 9:15] - s 3(2) - allowing unmuzzled ferocious dogs to be at large - meaning of "at large" - distinction between "allowing" and "permitting" a thing to be done - whether knowledge of dogs' ferociousness is essential

A woman who was crossing through the appellant's farm was attacked and severely injured by the appellant's dogs. The dogs normally lived in the yard at the appellant's house, but had been known to roam around the farm. They had previously shown no tendency to act ferociously. The appellant was convicted in the magistrates court of allowing unmuzzled ferocious dogs to be at large, in contravention of s 3(2) of the Miscellaneous Offences Act [Chapter 9:15]. The main issues on appeal were whether the dogs were "at large"; if so, whether the appellant had allowed them to be at large; and if he had, whether it was necessary for him to know that they were ferocious.

Held, that although a dog roaming freely within enclosed private premises is not at large, these dogs were wandering freely on a farm which would be a large area and not likely to be fenced in such a way as to prevent them crossing the boundaries. Consequently, they were "at large".

Held, further, that for the appellant to have allowed the dogs to be at large, he must have had knowledge that they were at large. He must have consented to and sanctioned their being at large. The concept of "allowing" is different from "permitting". One may "permit" an act without meaning to sanction

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it, but one cannot "allow" an act unless one means to sanction it. Failure to prevent an act may result in one being regarded as having permitted it, but more than mere failure to prevent it is

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necessary before one can be regarded as having allowed it.

Held, further, that even if the appellant could be held to have allowed the dogs to be at large, it must also be proven that the appellant was aware that they were ferocious. The very fact that they were ferocious would help establish that awareness, but if there was a doubt about the appellant's awareness, the State would not have proved its case. The evidence led was that the dogs' behaviour was out of character and thus the appellant was able to rebut the *prima facie* presumption that would have been raised.

Cases cited:

Cole v Union Govt 1910 AD 263

R v Feltham 1930 TPD 45

R v Greenspan 1956 R & N 319; 1956 (2) SA 192 (SR)

R v Hopkins 1931 CPD 278

S v Huizamen 1974 (3) SA 224 (NC)

R v Khwaza 1954 (3) SA 253 (E)

S v Kritzinger en 'n Ander 1973 (1) SA 596 (C)

The court considered the following statutory provisions:

Miscellaneous Offences Act [Chapter 9:15], s 3(2)

Case Information

R M Fitches, for the appellant

Miss B Hammond, for the respondent

Judgment

Ebrahim JA: The appellant was convicted of contravening s 3(2)(v) of the Miscellaneous Offences Act [Chapter 9:15], it being alleged that he allowed to be at large unmuzzled ferocious dogs. The charge further alleged that he let the dogs bite the complainant, Morleen Murimwa, though letting dogs bite someone is not an element of the offence. He pleaded not guilty but was convicted and fined $50, which is the maximum fine for the offence.

I pause to note that the incident giving rise to the charge took place in August 1990. The summons was for 9 September 1993, but the trial only took place on 19 November 1993. Judgment was given on 21 January 1994. A notice of appeal was filed on 29 January 1994. Why this simple case took so long to get to court is not explained.

The dates of the subsequent events are not at all clear as the record is most

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confusing. There appear to be pages out of order. However, some time after conviction - it is not clear from the record when - an application was made in terms of what is now s 363 of the Criminal Procedure and Evidence Act [Chapter 9:07] for compensation for the injuries the complainant sustained. Evidence was led from the complainant and from a doctor. The prosecutor and defence counsel addressed the court on this subject on 31 March 1994. It appears, from the notice of appeal dated 20 June 1994, that an order for compensation was made on 10 June 1994. The record does not state the amount (yet another defect in this record) but it appears from the supplementary heads of argument for the appellant and the State that the sum awarded was $50 000.

Why it took from June 1994 until June 1996 for a copy of the record to be compiled and sent to the Supreme Court is unexplained. In view of the shortness of the record, the delay is unacceptable.

COMPENSATION ORDER

The appeal against the compensation order can be disposed of readily. I will assume that the court complied with the requirement, imposed by s 363, to make the award of compensation "forthwith". As I say, the record does not make it clear when the application for compensation was made or when the evidence was led. Assuming the application was made immediately after conviction, as it should have been, s 369 allows the court to receive further evidence, whether documentary or verbal, for the purpose of determining the question of compensation. If such evidence was not available at the time of conviction (though, given the inordinate time since the alleged offence took place, it should have been available long before the trial), it would have been permissible, in my view, to remand the case for a reasonable period to obtain such further evidence without derogating from the requirement to make the award "forthwith".

Miss Hammond, for the State, conceded nonetheless that the magistrate erred in making the order. The compensation award was made up of:

(a) special damages $5 500;

(b) pain and suffering and loss of amenities $20 000; and

(c) loss of future earnings $24 500.

She relied on s 366(1)(b)(i), which provides that compensation shall not be

awarded in respect of any personal injury where the amount of compensation due to the injured party is not readily ascertainable. Damages for pain and suffering are clearly by definition not "readily ascertainable". The evidence with regard to special damages and for loss of future earnings was also conceded to be unreliable. She relied on subpara (iii), which precludes the grant of compensation "unless the court is satisfied that the convicted person will suffer no prejudice as a result of the claim for compensation ... being dealt with in terms of this Part". I

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am satisfied that Miss Hammond's concession was properly made and that the magistrate should not have made an order for compensation.

THE FACTS

The facts were that Mrs Murimwa, who lived in the Madziwa Communal Land near Bindura, was making her way early one morning, through the farm on which the appellant was employed as manager, to another farm, where she intended to catch a bus. She had often used the route previously. While on the appellant's farm, about one kilometre from the appellant's house, she was set on by three dogs which it is now not disputed belonged to the appellant. They severely mauled her and caused considerable injuries to her head and arms. She also received injuries, though minor ones, to her legs and genital area. The baby she was carrying on her back was fortunately unharmed. She had seen the dogs on previous occasions, near the appellant's house, but they had never behaved in such a way before.

One of the appellant's former employees, who was present on the day, said that until this event he had regarded the dogs as friendly. The attack surprised him. He had previously seen no reason why the dogs should have been muzzled. The dogs usually were kept in the appellant's yard. Two other former employees of the appellant gave similar evidence about the dogs' previous friendly nature within the yard.

The appellant did not see the attack on the complainant, but when it was reported to him he went to the scene and ferried the complainant to Bindura Hospital. He put his dogs down. Having had a report that one had been bitten by a jackal, he suspected it of having rabies. Subsequent tests showed that it did not. The dogs had never shown aggression before although he knew that they roamed around.

THE LEGAL ISSUES

Section 3(2) of the Miscellaneous Offences Act provides:

KORSAH JA

> "Any person who allows to be at large an unmuzzled ferocious dog shall be guilty of an offence."

There are several aspects to this charge, accepting, as one must, that on that occasion at least the dogs were ferocious.

1. *Were the dogs "at large"?*

The phrase "at large" is defined as follows: Oxford Reference Dictionary: "at liberty". Webster's Third International Dictionary: "without restraint or confinement".

It was held in R v Orton 1961 (2) SA 408 (C) that a dog roaming freely within enclosed private premises was not "at large". The dogs in this case were roaming freely on the farm, but a farm is usually a large area and seldom fenced in such a way as to prevent small animals crossing the farm boundaries. Even though the farm is private property and even though the complainant

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was probably trespassing, I would conclude that the dogs were "at large".

2. *Did the appellant allow them to be at large?*

The only evidence about where the dogs were normally kept was to the effect that they stayed in the yard at the appellant's house. The record does not show whether that yard is fenced and gated and, if so, whether the gate is normally kept shut so as to keep the dogs in. The evidence does not show whether anyone is responsible for keeping the gate (if there is one) shut.

It is necessary to consider whether the word "allow" indicates that *mens rea* is required. This much is conceded by Miss Hammond, rightly in my view. There is ample authority to that effect. I need only refer to *R v Greenspan* 1956 R & N 319 (SR); 1956 (2) SA 194 (SR), where Beadle J (as he then was), said that the word "allow" connotes *mens rea*:

> "To allow a thing, the accused must have had knowledge that it has happened; he must have consented to and sanctioned its happening."

It was held there that the mere fact that cattle of one owner are found on the ranch of another is not conclusive evidence that the owner allowed them to stray, especially if there are other explanations of how they may have strayed without his knowledge or consent.

The word "allow", though similar to, is not the same as "permit". One may

KORSAH JA

permit an act without meaning to sanction it, but one cannot allow an act unless one means to sanction it. Failure to prevent an act may result in one being regarded as "permitting" it, but more than mere failure to prevent is necessary before one can be held to have "allowed" it: R v Khwaza 1954 (3) SA 253 (E) at 254G *per* Jennett J (as he then was). See also Cole v Union Government 1910 AD 263 and R v Feltham 1930 TPD 45 at 48.

In this case, there is no evidence at all as to how the dogs came to be running free outside the yard and thus there is no evidence that the appellant had "allowed" the dogs to be at large. The remark by the appellant that he knew the dogs roamed around is too vague to rely on.

It is unnecessary to deal with the numerous cases which deal with the meaning of the word "permit", though it might be mentioned that the word "permit" has been held to indicate that *mens rea*, in the form of knowledge and consent on the part of the accused, must be shown. It is sufficient, though, if the accused ought to have known, but in fact did not know, because he closed his eyes to the obvious, or permitted his servant to do something in circumstances where an offence would probably arise, reckless as to whether it would be committed or not: S v Kritzinger en 'n Ander 1973 (1) SA 596 (C) at 598 *per* Baker AJ (as he then was). If "allow" can be regarded as synonymous with "permit", it might be possible to have found that the appellant had "allowed" the dogs to be at large, in the sense that he failed to prevent them from being at large. In this event, there is another question to consider.

3. *Assuming that he did allow them to be at large, was it necessary that he should know that*

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they were ferocious?

Miss Hammond submitted that the act constituting the offence is allow a dog to be at large and that the *mens rea* must be in respect of the dog being at large, not in respect of it being a ferocious dog. I do not follow this submission. If *mens rea* is required in respect of the dog being at large, it seems entirely logical that there must also be *mens rea* in respect of the ferocity of the dog. Gardiner and Lansdown SA Criminal Law and Procedure 6 ed vol 2 p 1510 support this view, citing R v Hopkins 1931 CPD 278 and R v Feltham *supra*. The latter case does not deal directly with the question of *mens rea* in respect of the ferociousness, although it was raised by counsel for the appellant. I have some difficulty in understanding the learned judge's reasoning on this point; but fortunately my difficulties are resolved by S v Huizamen 1974 (3) SA 224 (N), where the identical issue was raised. The appellant there was

KORSAH JA

charged under a statute which penalised anyone who suffered to be at large any unmuzzled ferocious dg. van Rhyn J said at 225-226:

> "I agree with this statement by the learned judge (Krause J, in Feltham *supra*) except that I think that it must also be proven that an accused was aware that the dog or dogs he suffered to be at large were ferocious. I think that the State will have gone a long way if it shows that the dogs were in fact dangerous - or ferocious; but if there is a reasonable doubt about this or about the accused's awareness of the nature of the dog, then the State will not have proved its case beyond a reasonable doubt" (official translation).

I respectfully agree with van Rhyn J. It seems to me entirely illogical to hold that the accused's knowledge of the dog's nature must be irrelevant.

In this case, the evidence of the appellant, as well as of both State and defence witnesses who had known the dogs for some time, was to the effect that they had always been placid and that this behaviour was out of character. It seems to me that, although the State clearly established that on this occasion the dogs were ferocious, the accused rebutted the *prima facie* presumption that would have been raised against him.

For these reasons, I would allow the appeal and set aside the conviction and sentence, as well as the compensation order.

KORSAH JA: I agree.

MUCHECHETERE JA: I agree.

McNaught Wickwar, appellant's legal practitioners

GONDO v SECRETARY FOR THE PUBLIC SERVICE, LABOUR, AND SOCIAL WELFARE & ANOR 1997 (1) ZLR 281 (HC)

Court **High Court, Harare**

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Robinson J

Civil application

11 March 1997 Judgment No. HH-47-97

Flynote

Practice and procedure - set down - proof - opposed application - not containing proof of service of notice of set down on respondents - effect

Headnote

A party or, if legally represented, the legal practitioner at whose instance an opposed application has been set down in terms of rule 238(1), as read with subrule (3), of the Rules of the High Court must ensure that due proof of service of the notice of set down of the application on the other side in accordance with rule 42B is filed of record as soon as possible after service of the notice of set down and, in any event and at very latest, not less than three days (excluding Saturdays, Sundays and public holidays) before the date of hearing.

Case Information

Applicant in person

No appearance for the respondents

Judgment

Robinson J: I have been prompted by this case to write this judgment to clarify a point of practice in respect of opposed applications which does not appear to be specifically covered by the High Court Rules.

In this matter, the applicant, who is representing himself, filed a notice setting down his opposed application for hearing on Tuesday, 11 March 1997 at 9 am. However, when the Registry file was referred to me on Thursday, 6 March, 1997, it contained no proof of service of the notice of set down on the respondents.

1997 (1) ZLR p282

ROBINSON J

Experience has taught me that it can be both unproductive and a wholly time wasting exercise, not to mention the possible disruption of one's enjoyment of a weekend, to "plough" through papers in a file which are voluminous, as are the papers in this matter, on the assumption that the opposed application will take off on the scheduled date of hearing, only to find out, at the hearing, that there is no appearance by the other side and that the application cannot proceed because the notice of set down has not been served or duly served on the other side or that there is no due proof of service such as, as in this case, where the party is representing himself and has allegedly effected service of the notice of set down himself, an affidavit, as opposed to a certificate of service in terms of r 42B(1)(c) of the High Court Rules.

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Accordingly, the explicit message to all concerned is that the party or, if legally represented, the legal practitioner at whose instance the opposed application has been set down in terms of r 238(1), as read with subrule (3), of the High Court Rules, must ensure that due proof of service of the notice of set down of the application on the other side in accordance with r 42B is filed of record as soon as possible after service of the notice of set down and, in any event and at the very latest, not less than three days (excluding, of course, Saturdays, Sundays and public holidays) before the date of hearing.

If this is not done, then be it on the head of the party or his legal practitioner, as the case may be, if, at the hearing, the presiding judge is not prepared to entertain the application owing to due proof of service of the notice of set down not having been filed of record timeously and if the party or his legal practitioner is ordered to pay the wasted costs incurred as a result of the application not proceeding.

This judgment meets with the approval of the Judge President.

In the circumstances of this case, the application is postponed *sine die*.

S v SITHOLE 1997 (1) ZLR 283 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Criminal appeal

3 February & 13 March 1997 Judgment No. S-21-97

Flynote

Criminal procedure - charge - defective - defect being cured by evidence - when amendment should be made

Criminal law - specific common law offences - fraud - elements - prejudice - charge not specifically alleging prejudice - when allegation potential prejudice can be inferred from charge - *mens rea* - whether intent to defraud as well as intent to deceive must be shown - admittedly false document being uttered with purpose of assisting person to whom it was uttered

Criminal procedure (sentence) - common law offences - fraud - legal practitioner making false court document

Headnote

The appellant, who was at the material time a law officer in the Attorney-General's Office, was charged with fraud. The allegation was that he had falsely and with intent to defraud represented to a person who was the plaintiff in a civil claim that a document was a judgment of the High Court issued in favour of the plaintiff. He pleaded not guilty. It was only at the end of the defence case that the appellant's representative argued that the charge was fatally defective for lack of averment of prejudice. The magistrate ruled that the defect had been cured by the evidence. On appeal, it was argued that the charge was fatally defective and the conviction should not be allowed to stand. It was also argued that even if the appellant had wilfully falsified the court order, there was no proof that the appellant had intended to prejudice the plaintiff; his

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conduct was

directed solely at assisting the plaintiff. The effective sentence of 180 hours' community service was also attacked.

Held, that the magistrate should not have ruled that the defect was cured by the evidence, as the lack of the averment had been drawn to his attention before judgment. What should have happened was that the charge should have been amended before judgment, as the appellant would not have been prejudiced in his defence.

Held, further, that in a charge of fraud prejudice must be alleged or readily inferred and there should be a link between the misrepresentation particularised and the prejudice suffered. If an allegation of prejudice could be readily inferred, the charge sheet was not defective. In this case, what was to be readily inferred from the delivery of a false and forged judgment was the risk that potential prejudice could be caused. It was not necessary that there had to be a probability of harm, nor that prejudice would be caused. On the facts, there was such a risk. In any event, the statement outlining the State case even more clearly gave rise to an inference of potential prejudice.

Held, further, that an intention to deceive must be distinguished from an intent to defraud. The former means an intent to make a person believe something is true when it is not. It could be done in jest, as a practical joke. The latter involves an intention to induce a person to embark on a course of action which is actually or potentially prejudicial to him as a result of the misrepresentation. Generally speaking, if a misrepresentation which is capable of deceiving is made wilfully, the person making it intends to deceive the person to whom it is made, and objectively misrepresentation flows from it, that is enough to prove the intent to defraud.

Held, further, that the punishment erred on the side of leniency. For a legal practitioner to falsify an order of court was quite inexcusable. The offence was serious and sullied the reputation for integrity and propriety which the legal profession was anxious to maintain. Legal practitioners have a bounden duty to uphold the law and by their demeanour to set an example of impeccable trustworthiness and integrity. An effective prison sentence would have been deserved.

Case cited:

Re London & Globe Finance Corp [1900-1903] All ER Rep 891 (ChD)

S v Bell 1963 (2) SA 335 (N)

S v Black 1974 (1) RLR 355 (G)

S v Chaitezvi 1992 (2) ZLR 38 (S)

R v Gilbert 1953 SR 94

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R v Henkes 1941 AD 143

R v Heyne & Ors 1956 (3) SA 604 (A)

S v Huijzers 1988 (2) SA 503 (A)

S v Isaacs 1968 (2) SA 187 (D)

R v Jones & More 1926 AD 350

R v Lin Yunn Chen 1908 TS 634

R v McLean 1918 TPD 94

S v Minnaar 1981 (3) SA 767 (D)

S v Ndhlovu 1984 (1) ZLR 175 (S)

R v Olifant & Anor 1950 (2) SA 514 (O)

R v Seabe 1927 AD 28

S v Shepherd & Ors 1967 (4) SA 170 (W)

S v Tshoba en Andere 1989 (3) SA 393 (A)

S v Vambe 1986 (1) ZLR 168 (S)

Statutes referred to:

Criminal Procedure and Evidence Act [Chapter 9:07], ss 202, 203

Case Information

J C Andersen SC, for the appellant

Miss B Hammond, for the respondent

Judgment

Gubbay CJ: The appellant was charged in the court of the provincial magistrate with the crime of fraud. It was alleged in the charge sheet that -

> "... on a date to the prosecutor unknown, and in November 1994 and at the High Court, Harare, the accused unlawfully and with intent to defraud misrepresented to Peter Manyeza, acting in his capacity as a plaintiff in a case against Godwin Hunda, that the copy of the judgment in case No. 2789/94 issued to him by the accused was a true and valid document and properly signed by Justice Chatikobo and the Registrar of the High Court, Honey Bango; that is to say, the accused falsely made a copy of the judgment purporting to originate from the High Court of Zimbabwe and duly signed by Justice Chatikobo and the Registrar of the High Court, Honey Bango, whereas in truth and in fact when the accused gave out the document he well knew that it was false and had not been signed by Justice Chatikobo, and that Honey Bango was not a registrar of the High Court of Zimbabwe and did not exist."

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At the commencement of the trial, a written statement outlining the nature of the appellant's defence was produced by his legal representative in terms of s 188(b) of the Criminal Procedure and Evidence Act [Chapter 9:07].

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Besides denying the making of the false document and contending that, in any event, no prejudice had resulted from its issue, the point was taken that the omission to allege prejudice rendered the charge bad in law as not disclosing the offence of fraud.

Notwithstanding the complaint made, an application was not proceeded with in terms of s 178(1) of the Criminal Procedure and Evidence Act to quash the charge on the ground that it was calculated to prejudice or embarrass the appellant in his defence. Counsel allowed the appellant to enter a plea of not guilty to the charge. It was only at the close of the defence case that one of the arguments addressed was that the charge was fatally defective for lack of an averment of prejudice, an essential element of the offence. The presiding magistrate agreed that the charge was defective. But finding that the existence of potential prejudice had been proved by the State, he held that, by virtue of the provisions of s 203 of the Criminal Procedure and Evidence Act, the defect had been cured by the evidence; thereby making it unnecessary for the charge to be amended.

What the magistrate overlooked, however, was that s 203 was inapplicable to the situation before him, because "the lack of the averment had been brought to the notice of the court before judgment". See *S v Ndhlovu* 1984 (1) ZLR 175 (S) at 177G-H. Any amendment, if required, ought to have been made before judgment in terms of s 202, as there can be little doubt that the court was satisfied it would not have prejudiced the appellant in his defence. See *S v Ndhlovu supra* at 179B. Of course, the amendment was not applied for and not made.

The first argument advanced by Mr Andersen, who appeared for the appellant in this court, though not at the trial, was that the conviction could not be allowed to stand as the charge was fatally defective. Reliance was placed on the judgment of Jarvis J (as he then was) in S v Black 1974 (1) RLR 355 (G), that in a charge of fraud prejudice must be alleged or readily inferred, and that there should be a link between the misrepresentation particularised and the prejudice suffered. I have no quarrel with that principle, which is one well established.

Let me say, however, that I have considerable misgivings in permitting the appellant to raise this argument when, as indicated, the proper procedure was to have applied to quash the charge before plea. If that had been done and the complaint upheld, the trial would have been postponed so as to enable the prosecutor to frame the charge in proper form. If this court were now to

GUBBAY CJ

uphold the argument and set aside the conviction, it would mean that, as the charge facing the appellant was fatally defective, the State would be entitled to prosecute afresh - the appellant

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never being put in jeopardy under the initial proceedings. What then would be gained by the appellant? Nothing. The abortive trial would have caused both the defence and the State much wasted expense.

Be this as it may, for the reasons which now follow, I am not persuaded that the argument is sound.

What falls for determination is whether an allegation of prejudice may be readily inferred from the factual allegations set out in the charge-sheet. If it can, then the charge was not fatally defective. See S v Black *supra* at 356C; *R v Jones* & More 1926 AD 350 at 354; R v Olifant & Anor 1950 (2) SA 514 (O) at 515 in fine-516.

On behalf of the respondent, Miss Hammond urged that in effect the charge alleged that the appellant unlawfully and with intent to defraud misrepresented to the complainant that the document handed to him was a true and valid order of court, whereas the appellant well knew that it was not. That such a scenario gave rise to a clear inference of potential prejudice to the complainant. He was misled into believing that judgment against Hunda had been granted in his favour when in truth no action to recover the debt owed by Hunda had been instituted in the High Court. In essence, the misrepresentation was potentially prejudicial because it involved some risk of the complainant being induced by it not to institute valid proceedings to recover the debt before the claim against the debtor was extinguished by prescription.

Mr Andersen, on the other hand, submitted that the issue of a forged judgment would not be readily inferred as being potentially prejudicial to a so-called plaintiff; normally it would be inferred as being to his advantage.

I do not consider Mr Andersen to be correct. I am unable to apprehend how a forged judgment to a deceived plaintiff, whose action against his debtor had not even been instituted, coupled with a misrepresentation that the "judgment" was valid, could give rise to an inference of advantage or benefit to him. In my opinion, what is to be readily inferred from the delivery of a false and forged judgment is the risk that potential prejudice could be caused thereby. It is not required that there has to be a probability of harm, nor that prejudice would be caused. See *S v Chaitezvi* 1992 (2) ZLR 38 (S) at 42G-H and the cases there cited. In the event of the "debtor" becoming aware that the

"judgment" was invalid, such prejudice could result from the fact that proceedings against him had not been brought timeously; the debtor during the intervening period may have disappeared, or he may have depleted his assets to the extent that payment of the debt in full was no longer possible. The delay in recovering the debt couldalso affect the relationship of the plaintiff with his creditors. These contingencies are not too remote or fanciful as to obviate the risk of harm. See R v Gilbert 1953 SR 94 at 100; R v Seabe 1927 AD 28 at 42; S v Tshoba en Andere 1989 (3) SA 393 (A) at 417C.

In the premiss, I find that the misrepresentation that the false order of court was "a true and

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valid document" did give rise to an implicit averment of potential prejudice.

Moreover, there can be no question of the omission of an express allegation of prejudice in the charge-sheet being the cause of any embarrassment or hindrance to the appellant in the conduct of his defence. Quite apart, as I have mentioned, from the wording used giving rise to an inference of potential prejudice, the statement outlining the nature of the State's case did so even more clearly. It set out a sufficiently implicit allegation of prejudice to the complainant upon which the appellant was able to focus.

The defence that it was not the appellant who had falsified the order of court must now be considered.

The following facts formed the background to the prosecution of the appellant. They were either common cause or proved conclusively by the State.

During the material period the appellant was a law officer in the employ of the Attorney-General. He had also practised his profession in the private sector for several years.

In early 1994, the complainant was desirous of suing Hunda for payment of the sum of $24 987 which was owed him. He asked his brother-in-law to recommend a legal practitioner who would handle the matter for him. In March 1994 an introduction to the appellant was arranged. The appellant agreed to act for the complainant once the whereabouts of Hunda were ascertained. Eventually, on 28 November 1994, the complainant passed this information on to the appellant at the Attorney-General's offices. The appellant requested the sum of $175 which he said was required for revenue stamps to be affixed to the order of court. It was paid to him the next day.

GUBBAY CJ

In mid December 1994, the appellant advised the complainant that the chamber application seeking judgment against Hunda had been granted, but that the order had not been typed by the registrar's office and signed by the judge. Thereafter, the complainant on many occasions endeavoured to obtain the order of court from the appellant. He was met with a host of different excuses. Ultimately, on 10 May 1995, the complainant was handed a document dated 4 February 1995 under the stamp of the Attorney-General's office. It was in this form:

"IN THE HIGH COURT OF ZIMBABWE CASE No. 2789/94

HELD AT HARARE

IN THE MATTER BETWEEN:

P.T. MANYEZA PLAINTIFF

AND

GODWIN HUNDA

DRAFT ORDER

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WHEREUPON AFTER READING DOCUMENTS FILED OF RECORD IT IS ORDERED:

1. THAT PLAINTIFF BE AND IS HEREBY GRANTED JUDGMENT IN THE SUM CLAIMED TOGETHER WITH INTEREST AT THE PRESCRIBED RATE.

2. THAT DEFENDANT PAYS THE COSTS OF THIS APPLICATION.

(Sgd) JUSTICE CHATIKOBO 3/2/95

JUDGE

(Sgd) HONEY BANGO

REGISTRAR".

GUBBAY CJ

The signatures purported to be those of Mr Justice Chatikobo and of the mythical Honey Bango as registrar.

Upon handing this false order of court to the complainant, the appellant instructed him to obtain a civil imprisonment summons form, available at any bookshop. The complainant was unable to procure such a form and decided to try to obtain one from the registrar's office. He saw Mr Charles Nyatanga who, when shown the order, informed the complainant it was false. The complainant was furious. He went immediately to the appellant and sought an explanation. The appellant told him that a Mr Nenguke had handled the matter. The complainant demanded the return of the $175 as no revenue stamps had been affixed to the order. The appellant's response was that he had not noticed that the order bore no stamps. He returned the money several days later. The complainant left the appellant's office and reported the matter to the police. He also laid a complaint with the Law Society.

In evidence, the appellant persisted with the defence that it was not himself but Mr Nenguke who had prepared the false order of court. Mr Nenguke, a legal practitioner who no longer practises his profession, was called as a State witness. He emphatically denied having had anything to do with the matter. He said that he had had no dealings with the appellant with whom he was out of contact. Defence counsel did not exercise the right to cross-examine Mr Nenguke.

Not surprisingly, the trial court found the appellant untruthful on this vital conflict. It held that it was he who falsified the order of court and that, in issuing it to the complainant, he misrepresented that it was a genuine judgment in his favour in the amount claimed against Hunda.

I entertain not the slightest doubt that the factual defence raised by the appellant was correctly rejected as being demonstrably false.

Next to consider is the second well articulated argument of Mr Andersen. It was to this effect: notwithstanding that the appellant wilfully falsified the order of court, the State failed to prove that he intended to prejudice the complainant thereby. His conduct, though potentially

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prejudicial, was directed solely at assisting the complainant. Accordingly, there was no link between the potential prejudice (as outlined above) and the false representation that was made.

Certainly, the decision in *S v Vambe* 1986 (1) ZLR 168 (S) is supportive of

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the general proposition that there must be a nexus between the misrepresentation and the prejudice, actual or potential. In that case the tendering of a dishonoured cheque in payment of a pre-existing debt was held not to amount to fraud. The debt had been incurred even before the fraudulent cheque was given; and so the creditor had not been induced by the misrepresentation as to the cheque's validity to act to his prejudice or detriment (see at 170B). The debt remained.

An intention to deceive must be distinguished from an intention to defraud. The former means an intention to make a person believe that something is true when it is false. The latter concept, on the other hand, involves an intention to induce a person to embark on a course of action which is actually or potentially prejudicial to himself as a result of the misrepresentation. In Re London & Globe Finance Corp Ltd [1900-1903] All ER Rep 891 (ChD) at 893, Buckley J pointed to the difference in these words:

> "To deceive is, I apprehend, to induce a man to believe a thing is true which is false, and which the person practising the deceit knows or believes it to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put that to deceive is by falsehood to induce a state of mind, and to defraud is by deceit to induce a course of action."

See also R v Lin Yunn Chen 1908 TS 634 at 637-638; S v Isaacs 1968 (2) SA 187 (D) at 191H-192A.

Yet does it necessarily follow that before a person can be convicted of fraud it must be proved, not only that his wilful perversion of the truth caused prejudice or the risk of prejudice, that is, that he intended to deceive, but in addition, that he intended to defraud?

In R v Heyne & Ors 1956 (3) SA 604 (A) Schreiner JA appears to have proceeded on the basis that the intention to defraud includes an intention to occasion prejudice. He said at 625B:

> "There remains the question of the intention to defraud. It is clear that those who were responsible for the wilfully false entries and the deliberate omissions from the books intended that the inspecting members of the police should be deceived and that their actions should be affected by the deception. *The natural and probable, indeed the inevitable consequence, was a risk of harm to the State and the mental element*

GUBBAY CJ

> *requisite for the crime was accordingly present* to those who knowingly were parties to the entries and omissions" (emphasis added).

This view echoed that of Tindall JA in R v Henkes 1941 AD 143, where at 161 it was said:

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> "Generally speaking, if a misrepresentation which is capable of deceiving is made wilfully and the person making it intends to deceive the person to whom it is made, that is sufficient to prove the intention to defraud where the misrepresentation is one which causes actual prejudice or is calculated to prejudice."

Subsequently, in S v Shepard & Ors 1967 (4) SA 170 (W) at 175C, S v Minnaar 1981 (3) SA 767 (D) at 778H-779A, and S v Huijzers 1988 (2) SA 503 (A) at 507I-508B, it was found to be unnecessary to decide the issue. Nonetheless, in the last cited case, Grosskopf JA observed that judicial pronouncements were not as positive as academic writers that *mens rea* of fraud requires in addition to an intention to deceive, an intention to prejudice. Compare Hunt South African Criminal Law and Procedure Vol II 2 ed at 767; Snyman Criminal Law 2 ed at 511; Burchell and Milton Principles of Criminal Law at 530.

It cannot be gainsaid that there was a deliberate, intentional and purposeful deceit by the appellant of the complainant which was potentially prejudicial to him. The particular facts of this matter incline me to the view that the State was not obliged to go any further in proving an intention to defraud in the causing of the prejudice that has been found to exist. The reasoning of Tindall JA and Schreiner JA commends itself. It has the virtue of according with logic and common sense. I am therefore in respectful agreement that in general it is artificial and unnecessary to pose two separate enquiries. It is normally sufficient, as I understand the crime of fraud, if the State proves a wilful false statement made with the intention to deceive, and objectively - not subjectively - that prejudice flowed from it.

This was not a case like that in S v Bell 1963 (2) SA 335 (N), where it was shown that the deceit was undertaken by way of a jest or practical joke. The dissimilarity was made explicit by Miller J (as he then was) at 337C-G:

> "The primary object of a person who makes and issues a false document is almost invariably that it should deceive someone; otherwise he would not issue it. The person who tells a white lie to, or plays an innocent practical joke on, a friend, obviously practises and intends a deception.

GUBBAY CJ

> The circumstances in which an intention to deceive becomes synonymous with fraudulent intent are not always easy to define, however, and because an intention to deceive so often is or becomes an intention to defraud, the words 'with intent to deceive' are frequently used when 'with intent to defraud' is really meant. In general, a person who makes and issues a false document with the intention that it should be acted upon to the prejudice of another whom he intended to prejudice thereby, makes the document not only deceitfully, but fraudulently. But even this general proposition does not hold true for all cases. The maker of the document may have an intention, which is revealed by the facts and circumstances of the case, to do o more than play a joke on his victim; that may be his sole intention. If that is so, the fact that his victim is prejudiced by the joke, and that the joker contemplated that prejudice of that sort would or might result, does not, in my opinion, necessarily make him guilty of forgery."

See also R v McLean 1918 TPD 94 at 97 *per* Wessels J.

In any event, I am satisfied that the appellant's claim, that his intention was merely to assist the complainant out of the kindness of his heart and without any thought of personal gain, was false. It is totally improbable that he would have gone to the lengths he did simply from altruistic motives. The complainant was not a friend of his. In fact, after the appellant agreed to act, the complainant made a nuisance of himself by his persistence. As an experienced legal

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practitioner the appellant must have been aware of the seriousness of falsifying court process. So why jeopardise his career and leave himself open to criminal proceedings, unless he was seeking to reap some benefit out of his unlawful conduct?

The complainant, to my mind, provided the answer. He deposed that the appellant was to obtain a fee from him once the debt had been recovered from Hunda. I have not overlooked that the complainant only mentioned this undertaking under cross-examination and did not reveal it to Mr Nyatanga, to the police or in his report to the Law Society. To him, this aspect of the incident merited little significance compared to the appellant's action in duping him with a false order of court. That deception was the cause of his wrath.

A feature strongly against the appellant's professed intention and corroborative of the truth of the complainant's assertion was the appellant's behaviour in relation to the $175 paid to him. Although he had not expended the sum on revenue stamps, he did not volunteer its return to the complainant. It was only

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when the complainant protested that the order of court had no stamps affixed to it that the appellant offered to reimburse him. The excuse, that he had not noticed that the document was unstamped, was absurd. In other words, but for the complainant's demand, the appellant would have retained the $175.

I conclude for these reasons that the appellant was guilty as charged. The appeal against the conviction must be dismissed.

The magistrate sentenced the appellant to twelve months' imprisonment with labour. Of this period, six months were conditionally suspended for five years and a further six months on condition that the appellant performs one hundred and eighty hours of community service at the Harare Central Hospital at the rate of seven hours *per* day from Monday to Friday until completion.

This punishment definitely errs on the side of leniency. For a legal practitioner to falsify an order of court is quite inexcusable. It is a serious offence and one that sullies the reputation for integrity and propriety that the legal profession is so anxious to maintain. Legal practitioners and members of the Attorney-General's Office have a bounden duty to uphold the law and by their demeanour set an example of impeccable trustworthiness and integrity. Any form of criminal dishonesty must be seen by the courts as abhorrent. It evokes public indignation and requires to be guarded against. Speaking for myself, I would not have been in the least bit disturbed if instead of community service the appellant had been ordered to serve an effective term of imprisonment. I think he deserved no less.

Subsequent to the hearing of the appeal, the court was informed that the Legal Resources Foundation is prepared to have the appellant perform the period of community service ordered at its Harare office. Though accepting that the appellant's knowledge and experience would be better suited to a legal environment, I am firmly of the opinion that such an alteration to the punishment would lighten its effect unwarrantedly. In the circumstances, the nature of the

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community service chosen by the magistrate will stand. It is to commence on 1 April 1997.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

Mutezo & Partners, appellant's legal practitioners

WESTWOOD v WESTWOOD 1997 (1) ZLR 295 (HC)

Court **High Court, Harare**

Robinson J

Chamber application

13 March 1997 Judgment No. HH-49-97

Flynote

Practice and procedure - summons - matrimonial matter -defendant abroad - service - method of serving summons - edictal citation - procedure abolished

Headnote

The former procedure of edictal citation as a method of serving a summons on a defendant who is outside the jurisdiction has been abolished. Where a spouse wishes to sue for divorce and the process has to be served on the other spouse who is in a country outside Zimbabwe other than South Africa or the neighbouring states of South Africa, the plaintiff must apply to a judge in chambers asking for leave to effect service on the defendant of a matrimonial summons in Form 30A.

If the defendant's address is known, the court's order will specify that service is to be effected by a qualified lawyer or person authorised to serve process in the area where service is effected. Proof of service must be established by an affidavit with the dependent's signature duly authenticated in accordance with the High Court (Authentication of Documents) Rules.

If the defendant's address is unknown, leave should be sought to effect service by way of publication in a newspaper circulating in the area where the defendant was last known to be. Proof of publication must be established by an affidavit from the person arranging for publication with his signature duly authenticated as aforesaid.

Finally, the order should specify the number of days within which the defendant is required to enter an appearance to defend. Thirty days

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would be more than fair, given the fact that the defendant is being required merely to enter an

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appearance to defend.

The following rules of court were considered by the court:

High Court Rules 1971 (RGN 1047 of 1971), r 44

High Court (Authentication of Documents) Rules 1971 (RGN 995 of 1971), s 3

Judgment

Robinson J: The chamber application filed in this matter seeking leave on behalf of the applicant ("the plaintiff") to sue his wife in the United States of America for a decree of divorce by way of edictal citation gives me the opportunity to dispel a state of confusion which seems to exist generally in this regard.

Although it is true that the words "Edictal Citation" still appear as the heading to r 44 in Order 6 of the High Court Rules, the procedure of edictal citation has clearly been abolished, as evidenced by the deletion by s 7(a)(i) of SI 43 of 1992 of the words "to proceed by way of edictal citation" which formerly appeared at the end of r 44(1) and by the repeal by s 18 (a) of SI 75 of 1993 of the form of edictal citation formerly prescribed in the First Schedule to the High Court Rules.

Consequently, where a spouse wishes to sue for a decree of divorce and the process commencing the proceedings has to be served on the other spouse in a country outside Zimbabwe, other than in a Province in South Africa or in Namibia, Lesotho, Swaziland or Botswana (for which situation specific provision regarding service of summons has been made in r 45), the way is now clear for the spouse initiating the proceedings, when making an application to a judge in chambers in terms of r 44(3) to adopt the more simplified procedure of asking for leave to effect service on the respondent ("the defendant") in the country concerned of a matrimonial summons in Form 30A. In this respect, it is vital to set out the grounds upon which the court has jurisdiction to entertain the proceedings.

If the address of the defendant is known to the plaintiff, then it should be provided in the order of court that service of the summons shall be effected on the defendant personally by a qualified lawyer or a person duly authorised to serve process who practises or operates within the area where service is effected. For the sake of certainty, the order should provide that the person so effecting service shall submit an affidavit of service with his signature duly authenticated as required by s 3 of the High Court (Authentication of

Documents) Rules 1971 (RGN 995 of 1971), which, to all intents and purposes, means authentication by a notary public.

If, however, the defendant's address is unknown, then leave should be sought for service to be effected by way of publication in a newspaper circulating in the area where the defendant was last known to be. Again, the person arranging for publication should submit an affidavit as to

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proof of publication with his signature duly authenticated as aforesaid.

Finally, the order should specify the number of days within which the defendant is required to enter an appearance to defend after service of the summons upon him or her. In this connection, it has been customary in the past to allow a defendant thirty days as the dies induciae within which to enter an appearance to defend, to which should be added a further twelve days, as provided in the notes at the foot of Form 30A. However, on reflection, I believe that a total of thirty days should be more than fair and sufficient to allow as the dies induciae, given the fact that the defendant is being required merely to enter an appearance to defend.

In employing and adapting the prescribed matrimonial summons Form 30A for this purpose, the following points should be noted:

(a) The words "To the Sheriff for Zimbabwe or his lawful Deputy" should be deleted.

(b) The plaintiff should indicate the nature of the matrimonial relief claimed, that is to say, a decree of divorce.

(c) When inserting the number of days as the dies induciae, it should be indicated that the reckoning of the dies induciae is exclusive of Saturdays, Sundays and public holidays in Zimbabwe.

(d) The date and time of the hearing should be inserted, allowing, of course, sufficient leeway for the dies induciae to have expired after service of the summons on the defendant.

I trust that in future this judgment will guide legal practitioners incorrectly actioning a matrimonial case such as this one, in which I have ordered as follows:

(1) That leave be and is hereby granted for service of matrimonial proceedings

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which the applicant intends to institute against the respondent ("the defendant") by way of a summons in Form 30A to be effected on the defendant in the United States of America.

(2) That service of the said proceedings shall be effected on the defendant personally by a qualified attorney practising in the area where service is effected, who shall submit an affidavit of service with his signature thereon duly authenticated as required by s 3 of the High Court (Authentication of Documents) Rules 1971 (RGN 995 of 1971).

(3) That the defendant shall be required to enter an appearance to defend within 42 days after the service of summons upon her.

I confirm that, after reconsidering the point, it is my belief that a total of thirty days is a sufficient period to allow as the dies induciae.

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I further believe that it is advisable and more expansive to provide in the order that service of the proceedings be effected on the defendant personally by a qualified lawyer or a person duly authorised to serve process who practises or operates within the area where service is effected.

Coghlan, Welsh & Guest, applicant/plaintiff's legal practitioners

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WAMAMBO v GENERAL ACCIDENT INSURANCE CO (ZIMBABWE) LTD 1997 (1) ZLR 299 (HC)

Court **High Court, Bulawayo**

Malaba J

Civil action

14 March 1997 Judgment No. HB-12-97

Flynote

Insurance - insured - duties - give notice of claim as soon as reasonably practicable - meaning - claim for loss due to fire made 6 days after event - insured using time to attend to family matters - notice not given as soon as practicable

Insurance - condition - breach - onus of establishing that breach has occurred - onus on insurer

Insurance - condition - breach - fraud - overvaluation of insured property - when may be indicative of fraud

Headnote

The defendant insured the plaintiff under a fire insurance policy against loss or damage to certain chemicals and equipment. The policy was effected in November 1993. In February 1994, the chemicals and equipment, which were being stored in the plaintiff's garage, were destroyed by fire. The plaintiff and another person were in the garage shortly before the fire broke out. Six days later the plaintiff gave written notice of the claim. The defendant repudiated liability on two grounds. The first was that the plaintiff had failed to give notice "as soon as practicable", as required by the policy. The second was that the claim was fraudulent, in that the goods were overvalued and false evidence was given by the plaintiff in support of the overvaluation.

Held, that the phrase "as soon as practicable", while not capable of a hard and fast meaning, did not permit the insured to act at his own convenience.

If the insured ought to have used the available opportunity to give notice and instead attended to family matters, he would not have acted as soon as practicable.

Held, further, that the onus was on the insurer to prove the breach of the condition, not on the insured to prove his compliance. The facts showed that the plaintiff could easily have given notice within a day or two of the event and that his explanation for why he did not do so was false. In any event, the reasons for the failure to comply with the condition were irrelevant. It

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was also irrelevant whether the breach prejudiced the insurer. The release of the insurer arose from the breach of the condition, not from the consequences of the breach.

Held, further, that while allowances for over-estimates of the actual value of the insured goods must be given, where the amount claimed grossly exceeds the actual and intrinsic value, a reasonable inference can be drawn that there was an intentional and wilful misrepresentation of the facts and the court would be justified in taking the overvaluation as evidence of fraud. The deciding factor, though, will be proof of the insured's state of mind when he made the claim. The onus of proving fraud was on the insurers.

Held, further, that the facts showed clearly that the plaintiff was not telling the truth about the value of the property, which was worth much less than the insured value.

Held, therefore, that judgment should be given for the defendant, with costs on the higher scale.

Cases cited:

Amod Cassim's Assigned Est v London Assurance Corp (1924) 45 NLR 6

Anglo-American Oil Co Ltd v Port of London Authority [1914] 1 KB 14

Britton v Royal Ins Co (1866) 4 F & F 905

Eagle Star Ins Co Ltd v Willey 1956 (1) SA 330 (A)

Morris v Northern Assurance Co Ltd 1911 CPD 293

Nafte v Atlas Assurance Co Ltd 1924 WLD 239

Nel v Santam Ins Co Ltd 1981 (2) SA 230 (T)

Rosseau NO v Federated Employers' Ins Co Ltd 1978 (1) PH A17 (C)

Royal Mutual Ins Co (Pvt) Ltd v Mubaiwa 1989 (1) ZLR 142 (H)

Union Guarantee & Ins Co Ltd v Potgieter 1959 (3) SA 881 (E)

Vink's Est v New Zealand Ins Co (1905) 22 SC 470

Case Information

W Sansole, for the plaintiff

J C Andersen SC, for the defendant

MALABA J

Judgment

Malaba J: This is an action for the recovery of certain sums of money on a policy of fire insurance effected between the parties on photographic laboratory equipment and chemicals.

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The action was commenced on 5 August 1994 by issue of summons by the plaintiff claiming from the defendant company payment of $500 000 for the loss of the photographic laboratory equipment and chemicals; interest thereon a *tempore morae* at the prescribed rate and costs of suit.

The declaration alleges that on 12 November 1993 the defendant company agreed to insure the plaintiff against loss or damage to the equipment and chemicals in a sum not exceeding $500 000. The policy was in full force and effect on 22 February 1994 when the equipment and chemicals were destroyed by fire that broke out in the garage where the property was stored at 28 Roger Road, Sunninghill, owned by the plaintiff.

It was not established by evidence why the plaintiff found it necessary to insure himself against the loss of the equipment and chemicals, by fire in particular, when they were not being used. The policy contained conditions for the exercise by the plaintiff of the right to recover the real value of the loss, and for the attachment of liability for the payment of the claim to the defendant company.

In its plea, the defendant company set up three defences to the claim based upon what it alleged were breaches of the conditions by the plaintiff. However, I need notice only two defences. The first one, is that the claim is not payable because the plaintiff failed to comply with condition 5 of the policy, requiring him to give notice in writing, of the claim, to the defendant company as soon as practicable after the happening of loss of the property by fire. The second defence which I will consider later in the judgment, relates to the alleged breach of condition 10.

In condition 5(a) the parties stipulated the requirements which a payable claim under the policy had to meet. They agreed that -

> "(a) On the happening of any event which may result in a claim under this policy, the insured shall at his own expense,
>
> (i) as soon as practicable notify the company in writing of any claim together with particulars of any other insurance covering loss, destruction, damage or liability hereby insured ..."

In condition 5(b), they excluded from payment claims that did not comply with the requirements stipulated in condition 5(a) by declaring that -

MALABA J

> "No claim under this policy shall be payable:
>
> (i) Unless the terms of this condition have been complied with ..."

It is the defendant company's contention that the claim against it is hit by condition 5(b). The evidence established that the photographic laboratory equipment and chemicals were imported by the plaintiff from Swaziland, towards the end of 1989. He leased premises from Haddon & Sly Stores from where he operated the equipment from 27 December 1990. The equipment and chemicals, were removed from Haddon & Sly Stores on 5 November 1993 and taken to No. 11 Gisborne Avenue, Northend where they were temporarily stored, before being transferred to 28

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Roger Road, Sunninghill.

It is common cause that on 22 February 1994, at about 11 am, the plaintiff, in the company of a Mr Sithare from Botswana, went into the garage where the insured property was stored. It is not in dispute that, soon after their arrival at the garage, fire broke out and destroyed the photographic laboratory equipment and chemicals.

The fire brigade was called in by the plaintiff's neighbour at 11.25 am. It arrived at the scene nine minutes later. It took the fire brigade sixteen minutes to put out the fire. It is also not in dispute that the plaintiff personally gave written notice of the claim to the defendant company at its offices in Bulawayo, at 9.45 am on 1 March 1994 - six days after the loss of the property by fire. The plaintiff did not deny the fact that the loss of the equipment and chemicals by fire was an event which could result in a claim under the policy, as contemplated by the parties in terms of condition 5(a). It was therefore not alleged that the plaintiff did not know immediately after the extinguishment of the fire, that the nature of the event imposed upon him the duty to notify the defendant company in writing of the claim as soon as practicable.

The plaintiff gave the defendant company written notice of the claim on 1 March 1994. The question is whether the notice was given "as soon as practicable" after the occurrence of the loss by fire for the claim to fall within the class of payable claims under condition 5(a) of the policy.

The question raised is a question of fact involving as it does the construction of the language used by the parties to express their intention. The expression "as soon as practicable" is unambiguous. It embodies the two concepts of time and feasibility of the performance of the act required to be done by the assured.

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It implies the need to do the stipulated act without further delay, the moment an opportunity or occasion arises for its performance. No hard and fast rule can be stated on the meaning of the phrase "as soon as practicable" to apply in all cases. It, however, does not mean that the assured should act at his own convenience, nor does it permit of the consideration of a written notice given by any one in the abstract. It requires the measuring of the failure, or success of the assured in giving written notice to the insurer, by reference to all the circumstances prevailing after the happening of the event which may result in a claim under the policy.

If, in the ordinary course of things, the assured ought to have used the available opportunity to give the insurer written notice of the claim, but instead used the time to attend to family matters, he will not have acted as soon as practicable in the circumstances should he later give the written notice.

There are not many decided cases in which the meaning of the phrase "as soon as practicable" has been considered. In Union Guarantee & Insurance Co Ltd v Potgieter 1959 (3) SA 881 (E) the expression "as soon as reasonably practicable" was used as a synonym to "as soon as possible". de Villiers JP said at 882D-E:

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"It has been held in many decided cases here and abroad that under the Insurance Act and in relation to other statutory and contractual provisions of a similar import where something has to be done 'as soon as may be', 'as soon as possible' or under similar terms, that performance of the stated duty must take place within a time which is as soon after the occurrence as is reasonably practicable in all the circumstances of each particular case. See for example Collen v AA Mutual Insurance Association Ltd 1954 (3) SA 625 (E) at 630; Verelst's Administratrix v Motor Union Insurance Co Ltd [1925] 2 KB 137."

The meaning of the expression was considered in Anglo-American Oil Co Ltd v Port of London Authority [1914] 1 KB 14. In order to be exempted from port rates under s 9 of the Port of London (Port Rates on Goods) Provisional Order Act 1910, the merchant who imported goods into the Port of London for purposes of transhipment only had to show that he shipped those goods out of the port as soon as practicable after importation . In considering whether the plaintiff had shipped a cargo of oil as soon as practicable, Pickford J said at pp 24-25:

"It seems to me, however, that the expression 'as soon as practicable' must

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mean in the ordinary course of navigation, and that it does not mean as soon as practicable for the convenience of the merchant's business. If the merchant has a steamer available to carry a cargo of oil and does not use her for that oil, but uses her to carry other oil to some other place and so delays the transhipment of the particular cargo it seems to me that he is not shipping it 'as soon as practicable'."

By parity of reasoning, if the plaintiff is shown to have had, in the ordinary course of events after the loss by fire, time and opportunity of giving the written notice of the claim to the defendant company but that he instead attended to the convenience of family business thereby delaying the time of giving notice, he will not have complied with condition 5(a). See also Rosseau NO v Federated Employers' Insurance Co Ltd 1978 (1) PH A17 (C) at 38.

The onus is on the defendant company to establish breach of condition 5(a). In Nel v Santam Insurance Co Ltd 1981 (2) SA 230, Nestadt J applied the test in Eagle Star Insurance Co Ltd v Willey 1956 (1) SA 330 (A) at 334 in deciding that the onus of proving the non-observance or breach of a condition lay on the insurer who relied on it as a defence to the claim by the assured. At p 237E of the judgment his Lordship said:

"This would be in conformity with what was stated in Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632(A) at 645 *per* Hoexter JA, namely:

'There are many cases in our reports in which it has been held or assumed that, if an insurer denies liability in a policy on the ground of a breach by the insured of one of the terms of the policy, the onus is on the insurer to plead and to prove such breach'."

In Halsbury's Laws of England 4 ed vol 25 para 439 it is also stated:

"As a general principle the onus is on the insurer to prove that a condition has been broken not on the assured to prove compliance on his part with each and every stipulation."

Now, has the defendant company proved that the plaintiff did not give the written notice of the claim to it as soon as practicable? The evidence established that the plaintiff was in the garage at the time the fire started. He remained at the scene and witnessed the fire consume the

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equipment and

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chemicals. He acquired personal knowledge of the circumstances of the loss and was aware of the existence of condition 5(a) in the policy. The circumstance of his presence at the scene of the fire saved him from the difficulties which normally affect those claimants who have to rely on information from other sources on the happening of the event which may result in a claim under the policy.

The plaintiff was doing nothing about the claim in the afternoon of 22 February 1994. The fire had been extinguished at 11.50 am. He was in Bulawayo the whole day on 23 and 24 February. Even if his explanation that he was shocked and tired immediately after the extinguishment of the fire to give the written notice of the claim to the defendant company on 22 February were to be accepted, there is no explanation for his inaction for the two subsequent days. There is no evidence of anything in the prevailing circumstances disabling him from writing the notice of claim and serving it on the defendant company during the two days. The evidence proved that he would easily have given the prescribed notice as soon as practicable, at any time between the afternoon on 22 and 24 February.

The written notice given by him to the defendant company had no urgency in it. It failed to take account of the fact that time was the essence of the requirement that it be given as soon as practicable. It was certainly no longer practicable to give the notice to the defendant company at the late hour when all traces of the fire had disappeared. The defendant company was no longer able to investigate the circumstances surrounding the happening of the loss by the fire.

The plaintiff said he received a message to the effect that his mentally disordered brother was threatening his mother with an axe at his communal land home in Masvingo. He however lied about when he received the message. In the evidence in chief, he said he received it in the afternoon on 22 February after the extinguishment of the fire.

When asked in cross examination, why he did not give the required notice to the defendant company in the morning of 23 February, he changed his story to say he received the message that morning.

He, however, said he did not go to his communal land home until in the morning of 25 February. The delay in responding to the message, suggests that he did not consider it as deserving of his urgent attention. Mr Sithare, who was with him on 22 February, said the plaintiff showed him a letter containing

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the message about his mother's life being in danger, in the morning on 22 February. Mr Sithare had no reason to lie against the plaintiff. He stuck to his story. He was called by the plaintiff. I

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accept his evidence on this aspect as representing the truth.

The effect of Mr Sithare's evidence is that, it shows that the explanation given by the plaintiff for having not given the written notice on 22 February, is false. It also shows that the plaintiff knew of the reason he would give for not complying with condition 5(a), before the happening of the loss by fire.

I have, however, found as a fact that the plaintiff did not give the written notice of the claim to the defendant company as soon as practicable after the happening of the loss by fire. The reasons for the failure to comply with condition 5(a) are irrelevant. A W Baker Welford in Welford's Accident Insurance 2 ed p 101 states:

> "The cause of the breach of condition is immaterial. The breach may be deliberately committed by the assured, or it may be due to his negligence, inadvertence, or error of judgment, or even to his ignorance of the facts bringing the condition into operation. There is equally a breach where the failure to fulfil the condition is due to circumstances beyond the assured's control, as, for instance, where a third person declines to do an act required by the condition; for the fact that in the events that happen fulfilment of the condition is rendered impossible does not excuse its non-fulfilment."

The fulfilment of condition 5(a) was made by the parties a condition precedent to the plaintiff's right to recover under the policy and to the liability of the defendant company to pay the claim. That fact is clear from the unambiguous language of the terms of condition 5(b), which declares that a claim not notified in compliance with condition 5(a) is not payable. The use of the word unless, instead of until in condition 5(b) shows also that the intention of the parties was to make the fulfilment of condition 5 (a) a condition precedent to the defendant company's liability for the payment of the claim.

In Porter's Laws of Insurance 2 ed at p 187, it is stated:

> "The legality of this condition is well established. It has long been the practice of companies insuring against fire, for the purpose of their own security to incorporate in their policies by reference to their proposals

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> various stipulations for matters to be done by the assured making a claim before the company is to pay him and (as the remedy by action for not complying with this stipulation could not afford them any protection) to make the fulfilment of those conditions a condition precedent to their obligation to pay. There was much controversy on the subject about a century ago, but since the case of Worsley v Wood (1796) 6 Term Rep 710 it has been settled law that this mode of protecting themselves is effectual: London Guarantee Co v Fearnley (1880) 5 App Cas 911 at 915."

The court must give effect to the intention of the parties. Taking into account the language in which the condition precedent is framed, the circumstances to which it was intended to apply, that not all that it actually required to be done has in fact been done, the condition must be treated as broken. S H Noakes in Welford & Otter-Barry's Fire Insurance 4 ed at p 123 states:

> "The breach of a stipulation which is a condition precedent only to the liability of the insurer does not affect the validity of the policy but prevents the assured, in case of loss from recovering anything under the policy, unless and until where it is still possible, the condition is performed. In such a case therefore, he is not entitled to any return of premium."

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Mr Sansole argued on behalf of the plaintiff that the defendant company had to show that it suffered prejudice as a result of the breach of the condition precedent, before it can avoid liability for the payment of the claim under the policy. Mr Andersen, on the other hand, argued that once the breach of the condition precedent is established, prejudice is irrelevant. I accept the force of the submission made by Mr Andersen.

The release of the defendant company from the obligation to pay the claim under the policy, arises from the breach itself. It does not arise from the consequences of the breach. Gordon & Getz *supra* state at p 286 that "the crucial factor in such a claim is speed of reporting and if the clause had been breached the question of prejudice to the insurer by reason of late notification is irrelevant, for the insurer has merely to prove the breach not the existence of prejudice."

The same view of the question was taken by Blackie J in *Royal Mutual Insurance Co \(Pvt\) Ltd v Mubaiwa* 1989 (1) ZLR 142 (H) at p 147C where his Lordship said that if the insured "is in breach of such a term the plaintiff is entitled to repudiate liability. Prejudice is irrelevant."

MALABA J

I therefore hold that the plaintiff must fail in the action on the first point taken by the defendant company in its defence to the claim. That really is the end of the case. I have, however, considered the second defence based on condition 10 of the policy, in case I am wrong in my finding on condition 5.

In condition 10 of the policy, the parties agreed that if the claim made for the recovery of the value of the loss by fire, be in any respect fraudulent or if any fraudulent means or devices be used by the insured or any one acting on his behalf to obtain any benefit under the policy ... all benefit under the policy shall be forfeited. The defendant company resisted the claim, on the ground that it was fraudulent and presented the particulars of the fraud, as being the over-valuation of the equipment and chemicals at the time of loss and the giving by the plaintiff of false evidence in support of the over-valuation.

Now, the policy is an indemnity policy on which the defendant company is bound to pay the plaintiff the amount representing the actual and intrinsic value of the goods at the time of loss by fire - not a cent more.

In ascertaining the real and intrinsic value of the insured property at the time of loss, measures such as the market value, re-instatement value or use value may be used. There is no hard and fast rule on the measure of the actual and intrinsic value of the loss at the time of fire. The market value of the property at the time and place of loss may and is usually used as the actual and intrinsic value.

The actual and intrinsic value of the insured property at the time of loss will therefore depend on the demand for the type of goods in the market at the time of its loss by fire. It is accepted in principle that the amount claimed by the assured may be higher or less than the actual and intrinsic value the insurer is in fact obliged to pay. An allowance is always given for some over-estimate of the actual value of the loss. Mistakes due to honest estimates will occur. Mere

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over-valuation of a claim is therefore not necessarily evidence of fraud.

But where the amount claimed is found to be so grossly excessive of the actual and intrinsic value that a reasonable inference can be drawn that it is a result of an intentional and wilful misrepresentation of facts, the court is justified in taking the over-valuation as evidence of fraud. These principles of approach to the question whether a claim is fraudulent by reason of over-valuation are stated by Gordon & Getz *supra* at 289-290 as follows:

> "Most policies contain a clause entitling the insurer to avoid liability on

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> the grounds of a fraudulent claim. If, for instance, the insured falsely pretends his goods have been destroyed by fire, or supports his claim with false evidence, his conduct is fraudulent. In SA Fire Insurance Co v Dunstan KotzŽ CJ said:
>
> > 'The fact that a claim is greater or lesser than the amount to which the plaintiff may be really entitled, affords *per* se no evidence of fraud, although an exceptional over-estimate coupled with other circumstances, as, for example, where the excessive claim has been designedly made, may well justify the conclusion that it has been done with the object of defrauding.'
>
> An honest claim is not, under the condition against fraud, invalidated on account of error, or even some degree of exaggeration or over-estimate, and, in such a case, the insured will be entitled to recover the actual loss he had sustained. If, however, the claim is wilfully and intentionally excessive, this will amount to fraud, and under the ordinary condition against fraud, invalidate the claim altogether. Whether a claim is excessive is a question of degree and, although a margin may be allowed, if it is grossly in excess of the true value, the court will be justified in saying it is fraudulent. Surrounding circumstances may also be taken into account."

See also Welford & Otter-Barry's Fire Insurance 4 ed p 291.

The deciding factor in considering the question whether over-valuation is evidence of a fraudulent claim, is proof of the state of mind of the assured at the time he made the claim. Where the claim is shown to have been wilfully over-valued with the intention of deceiving or misleading the insurer into believing that the amount claimed is the actual and intrinsic value of the insured property at the time of its loss when the assured knew that the information was false or he did not believe it to be true, a fraudulent claim will have been proved.

The onus is on the insurer who alleges fraud. In Nafte v Atlas Assurance Co Ltd 1924 WLD 239 Krause J said at p 241-242:

> "Now, he who alleges fraud and relies upon it as a defence, must prove it up to the hilt, and in this case it is necessary for the defendant company, not only to establish the facts alleged in the particulars given but also to bring home to the plaintiff a knowledge of these facts. For example, with

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> reference to particulars under (a) it was held in Park v Phoenix Insurance Co (1860) 19 QB 110 that the insurers must prove that the over-valuation by the insured was not due to a mistake. This, in my view, merely means that the insurers must produce evidence to show that there was an intentional and wilful over-valuation."

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The plaintiff said the photographic laboratory equipment and chemicals were new when he bought them in Swaziland at the end of 1989. He said he paid R220 000 for the property in Swaziland. He stated in the claim form that he bought the equipment and chemicals for R270 000. He stated therein that it was new. When asked for further particulars of the value of the equipment and chemicals, he replied on 25 August 1994 and said their "actual or market value" at the time of loss was $800 000.

When he gave evidence in court he was adamant that the amount of $500 000 was the "actual or market value" of the property at the time of loss. When asked during cross-examination to produce books of account, invoices and income tax returns to verify the claim, he said these documents were burnt in the fire. On being pressed, he changed the story, to say he never kept the records. He also refused to reveal the whereabouts of the person from whom he bought the equipment and chemicals.

Phillip Charles Steel is the person who sold the photographic laboratory equipment and chemicals to the plaintiff. He is a Zimbabwean citizen who operated businesses in Swaziland. Mr Steel said the equipment was second-hand when he sold it to the plaintiff. He had bought it new and used it for sometime until it became obsolete as new models of photographic machines came into the market. He sold the equipment and chemicals to the plaintiff for $80 000. The plaintiff paid him in Zimbabwe in local currency. He denied the allegation that he was paid R220 000 in Swaziland. Mr Steel's evidence was to the effect that the machine was obsolete and could not be sold for more than $100 000 at the time of its loss by fire in 1994.

The plaintiff gave his evidence in a truculent and evasive manner. He was badly shaken by the cross-examination and his demeanour was such as to convince me that he was not telling the truth. The evidence of Mr Steel, in so far as it affected the plaintiff's credibility, was of very strong weight. Mr Steel gave his evidence in a straightforward manner. He was not shaken by the cross-examination and his demeanour satisfied me that he was telling the truth. Mr Steel's evidence of the *market value* of the equipment and chemicals at the time of loss by fire receives support from the contents of a

letter written by Coghlan & Welsh on 23 February 1993 on instructions from the plaintiff.

What had happened is that the plaintiff owed Haddon & Sly Stores a sum of $5 098 in arrear rentals. His landlord had attached the equipment and chemicals as security for the payment of the arrear rentals. On 23 February 1993, Coghlan & Welsh wrote to Messrs Webb, Low & Barry, who represented Haddon & Sly Stores, saying:

> "Our client asks that you proceed to sell the machinery presently, stored in your client's premises. Our client instructs that the machinery in question be sold for not less than $100 000."

The letter is in clear and simple language. I did not therefore accept the attempt by the plaintiff to say the instructions were given by one Tapson Marufu who was using the equipment and chemicals at the time and that the sum of $100 000 related to the negative processor only. The letter does not refer to the negative processor. Its probative value lies in the fact that it

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corroborates Mr Steel's evidence, that the estimated market value of the property was not more than $100 000 at the time of loss. I accept the evidence of Mr Steel as the truth and reject that of the plaintiff for being false.

The following facts then emerge. The plaintiff knew that the photographic laboratory equipment was not new but second-hand at the time he bought it. He however lied to the court in saying it was new. It had become obsolete. He used it at Haddon & Sly Stores premises for about 2 years. He removed it and stored it unused for another 2 years. Not only had it suffered wear and tear, it did not appreciate any use value for him.

He personally paid Mr Steel $80 000 in local currency. This fact was known to him at the time he made the claim against the defendant company. Instead of stating that fact, he said he paid R220 000 to Mr Steel in foreign currency. He went on to hide information about the whereabouts of Mr Steel. When asked to produce records to establish the authenticity of the claim he claimed that the records were burnt in the fire.

If his later explanation that he never kept the records is anything to go by, he must be held to have deliberately lied about the fire destroying the records. Accepting, as I do, the evidence of Mr Steel that the actual or market value of the equipment and chemicals, at the time of loss, was not more than $100 000, the amount of $500 000 claimed by the plaintiff as the "actual

value" of the property at the time of loss, is grossly excessive of the real and intrinsic value. In my view, the excessive claim was designedly made. It is wilfully and intentionally excessive. There is no question of the over-valuation being regarded as an honest estimate of the actual and intrinsic value of the photographic laboratory equipment and chemicals at the time and place of loss by fire. The over-valuation is in itself evidence of a fraudulent claim. False evidence was led to support the fraudulent claim.

In Morris v Northern Assurance Co Ltd 1911 CPD 293 Buchanan J had to consider whether the plaintiff had wrongfully and fraudulently made wholly untrue and excessive claims in respect of his loss. His Lordship said at p 306:

> "The value of the property in the claim is put down at £450. The previous proposal by both parties before the divisions between them of the furniture was £350 for the whole. Now, an insurance is a contract of indemnity, and it has been shown that the claim made by the plaintiff is grossly in excess of the value of the property insured, take for instance, one out of several items, the sitting-room suite. The plaintiff bought this second-hand at auction for £8 10s, and he claims £35, a sum beyond the price of a new suite. Though this is a contract of indemnity, if a man bought property, say, at an auction at one price, it would not prevent him from claiming the true value of the property, even if greater than the price which he paid. Still at the same time he is entitled to claim only the actual value of the article destroyed. I think this is an example of an attempt to get more out of the insurance company than they were justly bound to pay. The question of the difference in the estimate of value and whether a laim is excessive or not, is one of degree, and although a margin may be allowed, still, if it is so grossly in excess of the true value, a jury would be justified in saying that that fact of framing an excessive value was a fraudulent claim."

MacGillivray & Parkington On Insurance Law 8 ed at para 1926 refer to the case of Britton v Royal Insurance Co (1866) 4 F & F 905 where Willes J is reported as saying:

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"That is, suppose the insured made a claim for twice the amount insured and lost, thus seeking to put the office off its guard, and in the result to recover more than he is entitled to, that would be a wilful fraud, and the consequence is that he could not recover anything. This is a defence quite different from that of wilful arson. It gives the go-by to the origin of the fire, and it amounts to this - that the assured took advantage of the fire

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to make a fraudulent claim. The law upon such a case is in accordance with justice and also with sound policy. The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is common practice to insert in fire-policies conditions that they shall be void in the event of a fraudulent claim and there was such a condition in the present case. Such a condition is only in accordance with legalprinciple and sound policy. It would be dangerous to permit parties to practice such frauds and then, notwithstanding their falsehood and fraud to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in claim the insured forfeits all claim whatever upon the policy."

The defendant company proved in this case that there was a falsehood and fraud in the claim. It is not necessary to consider other surrounding circumstances that prove the fraudulent claim. The plaintiff forfeits all benefits under the insurance policy and discharges the defendant company from any liability for the payment of the sum claimed. Mr Andersen asked the court to mark its disapproval of litigants, abusing its process to prosecute fraudulent claims, by ordering the plaintiff to pay costs on the legal practitioner and client scale. Mr Sansole said the order of costs on the punitive scale was unnecessary because the matters raised by the plaintiff could reasonably be raised by any insured claimant. The fact, however, is that the plaintiff knew, right from the time of issue of summons, that the claim was fraudulent.

In maintaining the fraudulent claim, he sought to deceive the court into granting the claim. He used false evidence to support it. As a result of his dishonest conduct, the defendant company was put into expense and the court's time wasted. I agree with Mr Andersen that the court must mark its disapproval of such conduct, by ordering the plaintiff to pay costs on the legal practitioner and client scale.

I have also considered whether to dismiss the action or grant judgment to the defendant company. Dismissal of an action is an absolution from the instance. In that case the plaintiff could take fresh proceedings without having to face the plea of lis finita. The defendant company bore the onus of proof on both issues that decided the matter. It successfully discharged the onus. More importantly the defendant company exposed the fraud in the plaintiff's claim. There are no prospects of another action being successfully sustained against the defendant in the circumstances. The plaintiff does not deserve a second bite at the cherry as it were. The proper judgment in this case

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ought to be judgment for the defendant with costs. See also Vink's Estate v New Zealand Insurance Co (1905) 22 SC 470 at 474; Assigned Estate Amod Cassim v London Assurance Corp (1924) 45 NLR 6; Morris v Northern Insurance Co Ltd *supra* p 306.

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Judgment is therefore granted to the defendant, with costs on the legal practitioner and client scale.

Sansole & Senda, plaintiff's legal practitioners

Coghlan & Welsh, defendant's legal practitioners

ELLIOTT v COMMISSIONER OF POLICE & ANOR 1997 (1) ZLR 315 (SC)

Court **Supreme Court, Harare**

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

Constitutional application

27 February & 17 March 1997 Judgment No. S-41-97

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 22(1) - right of freedom of movement - law making it an offence for a person to be found without his identity document on his person - whether such law affects mobility of persons within Zimbabwe

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - law affecting fundamental right or freedom - derogations allowed in interests of public order - meaning of public order - when an act can be said to affect public order as opposed to law and order

Interpretation of statutes - constitutional application - law attacked as contravening Declaration of Rights - effect of law upon fundamental rights must be looked at, not object or subject matter

Headnote

The applicant, a legal practitioner, was walking through Harare one lunch time on his way to the gymnasium which he attended. He deliberately left in his office his wallet which contained his metal identity card, issued in terms of s 7 of the National Registration Act [Chapter 10:17], fearing that the wallet and its contents might be stolen at the gym. He was stopped by police officers who demanded to see the identity card, arrested for being found without it on his person, and conveyed to the Harare Central Police Station. Shortly after his arrival, he managed to speak to a senior police officer and was allowed to go free without being charged. Other persons arrested at the same time were, however, fined.

He brought an application to the Supreme Court in terms of s 24 of the

Constitution, contending that s 10(1)(c) of the National Registration Act, which created the offence for which he had been arrested, restricted the constitutional freedom of movement of all persons who are obliged to have their identities registered in terms of the Act.

Held, that the offence created by s 10(1)(c) was not that of failing or neglecting to produce an identity document, but being found without the requisite document. The ability of a person to

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identify himself by other means was not defence, nor was the ready availability of the identity document.

Held, further, that the section was not contravened by persons engaged in sporting events or other activities which by their very nature disable the participants from carrying their identity documents. In such a situation the maxim lex non cogit ad impossibilia would apply.

Held, further, that in determining whether the section interfered with the constitutional freedom of movement, regard should be had to the effect on the fundamental freedom, not the object of the section or its subject matter.

Held, further, that the underlying objection to the provision was that it permitted the random stoppage of movement of a person for the purpose of a spot check to see whether an identity document was being carried. The stoppage was inevitably not based on a suspicion that the law was being breached. The utilisation of the discretion was purely arbitrary, there being no criteria which governed its exercise. The choice of who to stop was in the absolute discretion of the police officer. The discretion could be exercised capriciously.

Held, further, that a random stoppage, however brief it may be and for whatever purpose, is a detention and thus an interference with the right of freedom of movement. The random stoppage of motor vehicles can be justified in a free and democratic society, because of the importance of highway safety and the need to detect motor vehicle offences, but is nonetheless an arbitrary detention. A fortiori, the stoppage to which the applicant was subjected to was an arbitrary detention.

Held, further, that although derogations from the right of freedom of movement were permissible on grounds specified in the Constitution, the only ground that might be applicable to the present situation was "public order". "Public order" was something more than the maintenance of law and order. It was synonymous with public peace, safety and tranquillity; in other words, it implied an absence of public disorder. The test for whether an act affected public order or only law and order was whether the act would lead to disturbance of the life of the community rather than affect merely an individual. Every infraction of the law

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affects law and order, but does not necessarily affect public order. The breach of a law which permits person to be stopped arbitrarily and arrested if not carrying an identity document could not be found to have any potential effect upon the maintenance of public order in Zimbabwe.

Held, therefore, that the section was in contravention of s 22(1) of the Constitution and thus invalid.

Cases cited:

Brown v Texas 443 US 47 (1979)

Delaware v Prowse 440 US 648 (1979)

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Kanu Biswas v State of West Bengal [1973] 1 SCR 546

Kishori Mohan v State of West Bengal 1973 AIR 1749 (SC)

Montsisi v Min van Polisie 1984 (1) SA 619 (A)

In re Munhumeso & Ors 1994 (1) ZLR 49 (S); 1995 (1) SA 551 (ZS); 1995 (2) BCLR 125 (ZS)

Ncube en 'n Ander v Zikalala 1975 (4) SA 508 (A)

Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199 (S); 1996 (1) SA 847 (ZS); 1995 (9) BCLR 1262 (ZS)

R v Burke (1990) 43 CRR 10

R v Emke (1990) 42 CRR 201

R v Hufsky (1988) 32 CRR 103

R v Ladoucher (1990) 48 CRR 112

R v Mellenthin (1993) 12 CRR (2d) 65

US v Brignoni-Ponce 422 US 873 (1975)

Statutes referred to:

Constitution of Zimbabwe, s 22(1)

National Registration Act [Chapter 10:17], s 10(1)(c)

Case Information

A P de Bourbon, for the applicant

H Mukonoweshuro, for the respondents

Judgment

Gubbay CJ: At approximately 12.25 pm on 3 July 1995, the applicant departed from his law offices in central Harare to attend a lunch-time keep-fit class. The gymnasium he patronised was a twelve minute brisk walk away. The applicant, was carrying a small canvas bag in which was his athletic attire. Inside a pocket of his jacket, left behind in his private office, was a wallet. Apart from money, it contained the applicant's identity document, driver's licence and bank and medical-aid cards. The decision not to take his wallet to the gymnasium was deliberate. It was occasioned by a well grounded apprehension that to do so was to risk its valuable contents being stolen in the change rooms during the period he was exercising.

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As the applicant was nearing his destination, he was accosted by police officers who demanded

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that he produce to them his identity document. This takes the form of a small, thin piece of durable aluminium, measuring 8.5 centimetres by 5.5 centimetres. It bears on its face the photograph and personal particulars of the person to whom it has been issued in terms of s 7 of the National Registration Act [Chapter 10:17] ("the Act"). The applicant explained that his identity document was at his office a close distance away. He gave his name and occupation. All to no purpose. He was arrested for being found without his identity document on his person, in contravention of s 10(1)(c) of the Act.

The applicant was conveyed by police Landrover to Harare Central Police Station. He was in the company of eight other persons whom he discovered had been similarly arrested. Shortly upon arrival the applicant managed to speak to a senior police officer. He accepted the reason for the applicant not having his identity document on his person and allowed him to go free without being charged. Not so fortunate was a group of twenty people waiting to pay deposit fines of $20 for having committed the same offence.

The perceived injustice of the incident to which he and others had been subjected that afternoon rankled with the applicant. It led directly to the bringing of this application in terms of s 24(1) of the Constitution of Zimbabwe. The contention advanced is that s 10(1)(c) of the Act constitutes a restriction upon the constitutional right to freedom of movement of all persons who are obliged to have their identities registered pursuant to s 6 of the Act. The nature of the redress thus sought from this court, in the exercise of its powers under s 24(4) of the Constitution, is the grant of an order declaring s 10(1)(c) of the Act to be in contravention of s 22(1) of the Constitution and, accordingly, of no validity.

Section 10(1)(c) of the Act reads:

> "(1) Any person who -
>
> ...
>
> (c) having registered in terms of this Act and not having been exempted in terms of this Act from the requirement to carry his identity document on his person in the area concerned, is found without his identity document on his person;
>
> ...

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> shall be guilty of an offence and liable to a fine not exceeding five thousand dollars or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment."

It is apparent that the offence created is not that of failing or neglecting to produce a document of identification such as a driver's licence or passport. It is being found without the requisite identity document. The ability of a person to verify his identity by means of other authentic documents, or by the affirmations of those who may happen to be in his company, is no defence. Nor will the availability of the identity document within easy reach and a readiness to fetch it immediately, avail the person stopped; though probably it would upon a charge of contravening s 10(1)(d) of the Act. See Ncube en 'n Ander v Zikalala 1975 (4) SA 508 (A) at

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517A-F.

Nonetheless, I do not agree, as counsel for the applicant was prone to suggest, that s 10(1)(c) is offended against even by those engaging in sporting pursuits such as rugby, boxing or swimming, which by their very nature disable participants from carrying the identity document on their person. I place loss by theft or accident in the same class of impossibility. In such situations the principle lex non cogit ad impossibilia would apply. Objective impossibility of discharging a legal duty is always a defence when the type of the criminal conduct charged is an omission. See Montsisi v Min van Polisie 1984 (1) SA 619 (A) at 635 in fine - 636E; Snyman Criminal Law 2 ed at 52; South African Criminal Law 2 ed vol I at 351-352; Smith and Hogan Criminal Law 6 ed at 250.

In determining whether s 10(1)(c) interferes with the mobility rights of the general public of Zimbabwe, regard is to be had to its effect upon this fundamental freedom and not its object or subject matter. If the effect of the impugned legislation is to abridge a fundamental freedom, its object or subject matter will be irrelevant. See In re Munhumeso & Ors 1994 (1) ZLR 49 (S) at 62F, 1995 (1) SA 551 (ZS) at 561D-E, 1995 (2) BCLR 125 (ZS) at 134C; *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S) at 218E-F, 1996 (1) SA 847 (ZS) at 861H-J, 1995 (9) BCLR 1262 (ZS) at 1276G-H.

In my view, the underlying objection to s 10(1)(c) is that it permits the random stoppage of movement of a person for the purpose of a spot check for compliance with whether an identity document is being carried by him. It does not specify that there must be some ground or cause for stopping the person. Almost invariably, the stoppage is not based on any reasonable suspicion that the law is being breached. The utilisation of the discretion is

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entirely arbitrary. There are no criteria, express or implied, which govern its exercise. There are no criteria for the selection of persons to be stopped. The choice is in the absolute discretion of the police officer. He may act on his own notion, whim or caprice, without any adequate determining principle. Individual police officers will have different reasons. Some may tend to stop the young, others the elderly; some only men, others women; some the poorly attired, others those with the outward appearance of affluence; some those who are jacketless, others those withut handbags; and so on. Racial considerations may even be a factor. If it is unnecessary that the stoppage be based upon reasonable suspicion that the person is not carrying an identity document and that all the police officer need say is "I stopped him because I was seeking persons without identity documents", how many innocent persons will be so accosted to apprehend one without an identity document? The fact that the police officer is acting within the law does not mean that he is not doing so arbitrarily. There is no essential link between the two concepts.

There is respectable authority supportive of the proposition that a random stoppage of a person authorised by law, however brief it may be and for whatever purpose, is a detention. It is an interference with the right of freedom of movement.

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In R v Hufsky (1988) 32 CRR 103, the Supreme Court of Canada was confronted with the constitutional validity of an organised programme of routine stops ostensibly mandated by s 189a(1) of the Highway Traffic Act. The facts were that the appellant had been randomly stopped by a police officer while driving his motor vehicle in the city of Toronto. The officer demanded sight of his driver's licence and proof of insurance. While speaking to the appellant the officer smelt alcohol on his breath and noticed that his speech was slightly slurred. He asked the appellant to accompany him to his police vehicle to conduct a road side breath test. When the appellant declined to do so, he was arrested and informed that he would be charged with the offence of refusing to provide a sample of breath. At the trial that followed, the officer testified that the purpose of the spot check duty was to examine drivers' licences, insurance coverage, the mechanical fitness of vehicles and the sobriety of the drivers. There were no gude-lines or procedures to determine which vehicle should be stopped. It was left completely to the discretion of the police officer. Writing for a unanimous court Le Dain J at 202 remarked that although the police officer was clearly about the lawful execution of his duties under the statute, the spot check procedure nevertheless resulted in an arbitrary detention as there were no

criteria for the selection of the drivers to be stopped. The appellant, therefore, had been arbitrarily detained within the meaning of s 9 of the Charter of Rights and Freedoms. However, the learned judge of appeal went on to hold at 204-205 that, in terms of s 1 of the Charter, the infringement was reasonable and demonstrably justified in a free and democratic society. This was because of the importance of highway safety and the role to be played in relation to it by a random stop authority for the purpose of increasing the detection of motor vehicle offences, many of which were not detectable by observation alone. See also R v Emk (1990) 42 CRR 201 at 215 and R v Burke (1990) 43 CRR 10 at 21 (decisions of the Saskatchewan Court of Appeal); R v Ladoucher (1990) 48 CRR 112 at 121-122 and R v Mellenthin (1993) 12 CRR (2d) 65 at 70 (decisions of the Supreme Court of Canada).

Much the same persuasive rationale is discernible in the opinions of the United States Supreme Court. This is exemplified by the leading case of Delaware v Prouse 440 US 648 (1979). Dealing with the random spot checks of motor vehicles involving the unconstrained exercise of discretion on the part of a police officer, Justice White on behalf of the court, said at 663:

> "Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is unregistered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's licence and the registration of the automobile are unreasonable under the Fourth Amendment" (the right to be secure against unreasonable searches and seizures).

See also United States v Brignoni-Ponce 422 US 873 (1975) at 882; Brown v Texas 443 US 47 (1979) at 52.

To my mind, the unstructured random stopping of members of the public authorised under s 10(1)(c) of the Act is more intrusive and occasions a greater invasion of the right to freedom of movement protected under s 22(1) of the Constitution, than does the random stoppage of

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motorists in order to ascertain their legitimacy on the highway. For if not skilfully and cautiously driven, a motor vehicle is a lethal instrument. It is also a convenient means for the commission of a variety of crimes. Moreover, those who drive on public roads are allowed to do so only if they possess a licence for that purpose - such licensed activity being subject to regulation and control for the protection of life and property.

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Since the random stoppage of motor vehicles for the purpose of the spot-check procedure has been correctly held to be an arbitrary detention, in the sense that by his action the police officer assumes control over the freedom of the driver, a fortiori is the particular stoppage that the applicant was subjected to.

The conclusion that s 10(1)(c) of the Act falls foul of s 22(1) of the Constitution, is not, however, the end of the matter.

Section 22(3)(a) of the Constitution permits the enactment of any law or anything done under the authority thereof, which derogates from the right to freedom of movement of persons generally, or any class of persons, if required in the interests of defence, public safety, public order, public morality or public health.

It admits of no doubt that the requirement for a person registered under the Act to carry his identity document on his person cannot be in the interests of defence, public safety, public morality or public health. Only the phrase "public order" need be considered, even though the second respondent, the Minister of Home Affairs, did not rely upon this feature in his opposing affidavit.

"Public order" is something more than ordinary maintenance of law and order. It is synonymous with public peace, safety and tranquillity - an absence of public disorder. See In re Munhumeso & Ors *supra* at 64D (ZLR), 563G (SA), 135E (BCLR); Basu's Commentary on the Constitution of India 6 ed vol 9 at 135. The test for determining whether an act affects public order or law and order is to ask whether it leads to the disturbance of the life of the community; or whether it affects merely an individual, leaving the tranquillity of society undisturbed. See Kanu Biswas v State of West Bengal [1973] 1 SCR 546 at 549E-550B (Supreme Court of India). It is a question of degree and the extent of the reach of the act upon society. In Kishori Mohan v State of West Bengal 1973 AIR 1749 (SC), the Supreme Court of India stated that the difference between the three concepts of law and order, public order and the security of the State, could be explained by fictional concentric circles; the largest representing law and order, te next public order and the smallest the security of the State. It pointed out that every infraction of the law inevitably affects law and order but not necessarily public order; and an act may affect public order but not necessarily the security of the State. The critical factor is always the potentiality of the contentious act.

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Thus, communal disturbances, the creation of internal strife or rebellion and strikes promoted with the sole aim of causing unrest in the labour force, are obvious instances of acts impacting against public order. In short, public order implies an absence of violence and an orderly state of affairs in which people can pursue their normal avocation of life.

Against this understanding of the term "public order", the breach of a law which permits persons to be stopped arbitrarily and arrested if not carrying an identity document cannot, in my opinion, be found to have any potential effect upon the maintenance of public order in Zimbabwe. It follows, then, that the infringement of the right to freedom of movement by s 10(1)(c) of the Act is not saved by s 22(3)(a) of the Constitution.

This being so, it becomes unnecessary to examine whether s 10(1)(c), or what is being done under its authority, is reasonably justifiable in a democratic society.

In the result, it is ordered as follows:

1. The application is granted with costs against the second respondent.
2. Section 10(1)(c) of the National Registration Act [Chapter 10:17] is declared to be in contravention of s 22(1) of the Constitution of Zimbabwe and, accordingly, invalid.

McNALLY JA: I agree

KORSAH JA: I agree

EBRAHIM JA: I agree

MUCHECHETERE JA: I agree

Scanlen & Holderness, applicant's legal practitioners

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

S v SITINA 1997 (1) ZLR 324 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

19 March 1997 Judgment No. HH-46-97

Flynote

Criminal procedure (sentence) - suspended sentence - bringing into effect - suspension on condition that that accused does not commit offence involving dishonesty - meaning - whether includes loitering in a public place

Headnote

The accused was convicted of loitering in a public place in circumstances affording reasonable

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grounds for believing that he was about to commit an offence in contravention of s 6(b) of the Miscellaneous Offences Act [Chapter 9:15]. He had a previous conviction for theft of stock, for which a portion of the prison sentence imposed was suspended on condition that he did not commit an offence involving dishonesty during the period of suspension. The court convicting him of the loitering offence brought into effect the suspended sentence for stock theft.

On review:

Held, that the term "any offence involving dishonesty" applies only to those offences which are kindred in nature to theft. It would be unfair to an accused to expect him to be aware of any wider application of the condition than to theft and its generic offences unless the court passing sentence made it clear that it had such wider application. In the present case, the subsequent conviction relating to loitering in suspicious circumstances did not involve a breach of the condition. The essential elements do not involve dishonesty akin to theft.

Cases cited:

R v White 1968 (2) RLR 7 (A)

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S v Burke 1967 RLR 105 (G)

S v de Wet 1979 RLR 147 (A)

S v Ndhlovu 1979 RLR 236 (G)

S v Tshuma 1983 (1) ZLR 129 (H)

S v van Beek 1971 (1) RLR 75 (A)

Judgment

Gillespie J: The accused has been properly convicted and sentenced for a contravention of s 6(b) of the Miscellaneous Offences Act [Chapter 9:15], the offence of loitering in a public place in circumstances affording reasonable grounds for believing that he was about to commit an offence. He is not a first offender but has a criminal record. This record shows, amongst other previous convictions, that in September 1995, the accused was convicted of theft of stock and sentenced to 3 months imprisonment of which 1 month was suspended on condition that the accused did not, within a specified period, commit any offence involving dishonesty.

The magistrate in Marondera has, in sentencing the accused, brought this suspended sentence into effect. This is an error. The meaning of the condition of suspension of a period of imprisonment, which is customarily formulated as "on condition the accused does not within that period commit any offence involving dishonesty for which ... etc" was the subject of instructive judicial debate in the seventh and eighth decades of this century but does not appear to have attracted attention since 1983 and the decision of Gubbay J (as he then was) in the matter of *S*

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v Tshuma 1983 (1) ZLR 129 (H).

Prior to that decision, in R v Burke 1967 RLR 105 (G) an accused, who had previously suffered the imposition of a sentence of imprisonment, partially suspended on conditions relating to "any offence involving dishonesty", was subsequently convicted of subornation of perjury. Davies J (as he then was) said at 106F:

> "I think it is clear that, where a person is convicted of theft or some such similar offence, and a sentence is suspended on condition that the accused does not commit another offence involving dishonesty, the court has in mind offences of a kindred nature to theft."

The learned judge held that the condition had not been broken by the subsequent conviction relating to the due administraton of justice.

In *R v White* 1968 (2) RLR 7 (A) the applicability of this formulation to a subsequent conviction for making a false statement to police officers, in

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contravention of what was then s 11 of the Miscellaneous Offences Act, 1964, was under consideration. Jarvis AJA, setting aside the order of the magistrate bringing the suspended sentence into operation, found, at 9G, that it was -

> "most improbable that the magistrate, in using the form of words which he did, and which ... is in common use in the courts in suspending a sentence for theft or fraud, had in mind such an offence as that charged in the present case."

Conversely, in S v van Beek 1971 (1) RLR 75 (G) the question was whether a subsequent conviction relating to the unlawful use of a motor vehicle, in contravention of what was then s 231(2)(b) of the Road Traffic Act, triggered the sentence previously suspended on the condition involving the same phrase under present discussion. Beadle CJ, referring with approval to the dictum of Davies J in Burke, showed that the offence of unlawful use of a motor vehicle is an offence involving dishonesty and is in fact very close to the offence of theft.

> "Technically, it is furtum usus which, while it may not be an offence under common law, has, in effect, been made an offence by statute where the article involved is a motor-car. It is sui generis the crime of theft" (at 76F).

One is able to see, by a comparison of van Beek with Burke that it is most helpful to express the query, as did Davies J, by questioning whether the subsequent offence is one "of a kindred nature to theft". It is for theft and crimes related to theft that this formulation of a condition of suspension is used.

In S v de Wet 1979 RLR 147 (A), Davies JA reconsidered the point which he had already determined in Burke. In de Wet the accused was punished by the bringing into effect of a suspended sentence, the condition of which involved the use of the same common phrase now being addressed, upon his subsequent conviction in terms of the then Customs and Excise Act [Chapter 177] for having in his possession smuggled goods. The learned Judge of Appeal held at 152C-D that:

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"it cannot be said that the appellant's offence ..., which involves simply the receiving or possession of smuggled goods, is an offence of a kindred nature to theft or fraud or forgery or uttering, or that the magistrate would

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have had in mind such an offence when suspending the portion of the sentences imposed by him on condition that the appellant did not commit 'an offence of which dishonesty was an element'."

He therefore set aside the order bringing into effect the suspended sentence.

Finally, in Tshuma, Gubbay J (as he then was) referred with approval both to the test whether the subsequent conviction is of a kindred nature to theft and to the investigation as to that which the sentencing magistrate must have had in mind when imposing the condition. The issue was whether a condition referring generally to "any offence involving dishonesty" had been breached by a subsequent conviction for contravening s 48(1)(a) of the Road Traffic Act 1976, as that provision was then cited, that is, the offence of interfering with a motor vehicle. The learned judge said:

"The question is whether a contravention of s 48(1)(a) of the Road Traffic Act is an offence of a kindred nature to theft, for this is what the phrase 'any offence involving dishonesty' has been held to mean. See R v Burke 1967 (1) RLR 105 (G) at 106E-F *per* Davies J (as he then was). One may pose the question another way: when suspending the sentences of the accused upon the condition in question, did the magistrates have in mind the type of offence of which they have now been convicted?"

He made the further point concerning the expectation of the accused upon being punished when he observed:

"Quite apart then from doubt as to whether the magistrates who imposed the condition ever intended it to include the unlawful interference with a motor vehicle within its ambit, it cannot be inferred that the accused ought to have understood that if they were to commit that offence, they would be liable to have their suspended sentences activated."

The authority of these approaches and tests is undoubted. It may well be, however, if the present case is any indication, that the generality of the term "any offence involving dishonesty"is once again causing magistrates to conclude that the condition applies to any subsequent offence because it is dishonest to commit crimes. It must therefore be said that the term "any offence involving dishonesty" applies only to those offences which are kindred in nature to theft. This is the test which provides the proper guidance. The additional consideration concerning what the sentencing magistrate had in mind, in the way it has been formulated, might be thought to involve

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speculation as to the sentencing magistrate's motives or intention. If that were the true meaning, which it is not, it would be a most unhelpful inquiry. Indeed, it is not possible to visualise circumstances where, if the only condition expressed is that the accused should not commit any offence involving dishonesty, it would be proper to interpret his as applying to any offence other than one kindred in nature to theft. The true meaning of this added point is to emphasise the

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importance of finding the second offence to be of the same species of wrongdoing as theft. It is premised upon the supposition that if the sentencing magistrate had in mind applying the condition to a type of offence unrelated to theft he would have said so. This in turn is justified by considerations of fairness to the accused - he could not be expected to be aware of any wider application of the condition than to theft and its generic offences unless the magistrate had made clear just such an application.

In fact, the basis of the approach is perhaps more tellingly explained, again by Jarvis AJA, in *R v White supra*:

> "It was open to the magistrate to be more specific had he so wished, and, if there was any doubt in the matter, as I think there may well be, the narrower construction should be the construction which should be given to the meaning of the expression 'any offence involving dishonesty'."

I would suggest that any ambiguity in meaning of any condition of suspension is to be interpreted according to that which the judicial officer imposing the condition had intended and that which the accused would have understood as having been embraced by the condition. In particular, the phrase "any offence involving dishonesty" is one which, in the absence of any clear indication to the contrary by the original sentencing magistrate, is to be strictly construed as applying only to offences kindred in nature to theft.

It follows that in the present case, the subsequent conviction relating to loitering in suspicious circumstances, does not involve a breach of the condition. The essential elements do not involve dishonesty akin to theft. Even if a housebreaking were intended, that in itself is not necessarily an offence involving a theft. In *S v Ndhlovu* 1979 RLR 236 (G) at 239F, it was recognised that the offence of housebreaking with intent to commit a crime unknown is not one involving dishonesty, whereas housebreaking with intent to steal is. The determinative factor is, of course, the fact that the latter is kindred to theft whereas the former is not.

GILLESPIE J

I accordingly confirm the conviction and sentence but set aside the order which brings into effect the suspended sentence.

BARTLETT J agrees.

MUTASA v MAKOMBE NO 1997 (1) ZLR 330 (SC)

Court **Supreme Court, Harare**

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

Constitutional appeal

27 February & 24 March 1997 Judgment No. S-44-97

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Flynote

Constitutional law - Parliament - privilege - contempt of Parliament - proceedings of select committee to investigate alleged contempt by a member - whether court could decide that privileges and powers of Parliament were exercised in a manner that was in conflict with the fundamental rights and freedoms guaranteed by the Constitution - Constitution of Zimbabwe 1980 - whether procedures adopted by Parliament violated s 18(2) and 20(1) of the Constitution

Headnote

Addressing a seminar for senior public servants held outside parliament, the appellant, who at the time was a member of parliament, made remarks suggesting that members of Parliament were of poor calibre. These comments were prominently reported in the media.

Parliament appointed a Select Committee of Privileges to investigate whether the statement by the appellant amounted to contempt of Parliament. The Committee enquired into the matter. When the appellant appeared before the Committee he was not permitted to be legally represented and the Committee refused his request that the witnesses who had already appeared before the Committee be recalled so that he could further examine them. The Committee reported its findings to Parliament and Parliament decided that the appellant had been guilty of contempt of Parliament and decided that the appellant should appear in Parliament and receive a reprimand from the Speaker.

The appellant unsuccessfully sought to have these proceedings set aside on review in the High Court on two grounds, namely, that -

· the proceedings violated his right to a fair hearing enshrined in s 18

of the Constitution, in that the Committee had disallowed legal representation and had refused to allow him to examine the witnesses previously called; and

· his statement outside Parliament was protected under the freedom of expression guarantee contained in s 20(1) of the Constitution.

The appellant appealed against the decision of the High Court.

Acting in terms of s 6(1) of the Privileges, Immunities and Powers of Parliament Act [Chapter 2:08] the Speaker of Parliament issued a certificate that the proceedings instituted concerned matters of privilege.

Held, that the statement of the appellant clearly constituted the offence prescribed in item 16 of the Schedule to the Act. It is clearly contemptuous of Parliament to say that the overall calibre of Parliament is such as to render Parliament meaningless as an institution; that some members lacked intelligence and they made no effort to inform themselves about current affairs before attending Parliament; and that they diminish respect for the institution of Parliament.

As regards the contention that the proceedings violated the fair trial guarantee in s 18(2) of the Constitution:

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Held, that when Parliament utilises its powers to punish for contempt of Parliament, it is not exercising a criminal or civil jurisdiction but rather a sui generis jurisdiction expressly authorised by law. The offence of contempt of Parliament is not a crime in the conventional sense. When Parliament sits to decide such a case it sits as a court, but not a court of law. These proceedings are not in the nature of a public criminal trial as envisaged in s 18(2) of the Constitution. Parliament exercises its own jurisdiction and powers conferred by the Privileges, Immunities and Powers of Parliament Act. This power is provided for in the Constitution. For instance, in s 13(2)(b) a person may be deprived of his liberty in execution of the order of Parliament punishing him for contempt. Thus s 18(2) of the Constitution, which stipulates that every person charged with a criminal offence must be afforded a fair hearing by an independent and impartial court, is of no application as Parliament is not dealing with a criinal offence and is not sitting as a court of law. Nor does s 18(9) of the Constitution apply. This stipulates that when civil rights of a person are being determined a person is entitled to a fair hearing by an independent and impartial court or other adjudicating authority. Parliament is not a court or other adjudicating authority as envisaged in that provision.

Held, however, that Parliament must exercise its jurisdiction to deal with contempt of Parliament in a manner that is not inconsistent with or

offensive to the Declaration of Rights in the Constitution. For instance, the courts would not tolerate a situation in which the Speaker decreed that a member guilty of contempt was to stand before the House chained and gagged to receive his punishment.

As regards the contention that the proceedings violated the freedom of expression guarantee in s 20(1) of the Constitution:

Held, that s 20(2)(b)(iii) of the Constitution places a specific limitation on the right to freedom of expression, by providing that a law may make provision to maintain the authority and independence of Parliament. The Privileges, Immunities and Powers of Parliament Act has made such provision, by empowering Parliament to punish persons who are in contempt of Parliament. This power extends to statements made outside Parliament.

Held, further, that since the power of Parliament to regulate its own practices and procedures is accepted and sustained by all enlightened countries, any abridgement of the freedom of expression that permits Parliament to commit its members for contempt must be regarded as reasonably justifiable in a democratic society.

Cases cited:

Chikerema & Ors v United African National Council & Anor 1979 RLR 291 (A); 1979 (4) SA 258 (ZRA)

Nyambirai v National Social Security Authority \& Anor 1995 (2) ZLR 1 (S); 1996 (1) SA 636 (ZS); 1995 (9) BCLR 1221 (ZS)

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R v Metropolitan Police Commission, Ex p Blackburn (No 2) [1968] 2 All ER 319 (CA)

Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199 (S); 1996 (1) SA 847 (ZS); 1995 (9) BCLR 1262 (ZS)

Roost v Edwards [1990] 2 All ER 641 (QBD)

Smith v Mutasa NO \& Anor 1989 (3) ZLR 183 (S); 1990 (3) SA 756 (ZS)

Statutes referred to:

Constitution of Zimbabwe 1980, ss 13(2)(b), 16(7)(b), 18(2), 20(2)(b)(ii) and 49

Privileges, Immunities and Powers of Parliament Act [Chapter 2:08] ss 3, 6(1), 21 and 22; Schedule, item 16

Case Information

A P de Bourbon SC, for the appellant

J B Colegrave, for the respondent

Judgment

Gubbay CJ: For the first decade of this country's Independence, the

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appellant was the esteemed Speaker of the then House of Assembly. Thereafter, he became the Member of Parliament for the constituency of Makoni Central and the Senior Minister of National Affairs, Employment Creation and Co-operatives in the Government of Zimbabwe. At the present time, he holds office as the National Secretary of the political party ZANU-PF.

On 7 December 1992, the appellant addressed a seminar of senior public servants on the role of Ministers and Politicians in policy formulation, analysis and implementation. In the course of answering questions, he was recorded as having said:

> "I do not think the calibre of members is very good that is why Parliament is meaningless ... I wonder if some MP's read newspapers and books or even discuss with friends before coming to Parliament, thus demeaning the institution. Some MPs are unwitty."

Two days later, a motion was presented to Parliament that the appellant's utterances, which attracted prominence in the media, were *prima facie* in breach of Parliamentary privilege. It was said that the remarks constituted a contempt of Parliament, in contravention of item 16 of the Schedule to the Privileges, Immunities and Powers of Parliament Act [Chapter 2:08].

On 10 December 1992, the Speaker of Parliament ruled that a *prima facie* breach of Parliamentary privilege had been established against the appellant. Thereupon, a motion was carried by the House that a Select Committee of Privileges be appointed immediately to investigate the utterances by the appellant. And on 16 December 1992 the Standing Rules and

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Orders Committee assigned seven members of Parliament to the Select Committee of Privileges. The terms of reference of this Committee were, in the main:

(a) to investigate the utterances by the appellant at the meeting of 7 December 1992;

(b) to determine whether such utterances directly or indirectly were a contempt of Parliament;

(c) to report its findings to the House; and

(d) to recommend appropriate disciplinary action.

GUBBAY CJ

In due course, the Select Committee of Privileges proceeded with the enquiry. It took evidence from ten witnesses prior to directing the appellant to appear before it on 10 February 1993.

When the appellant attended before the Select Committee of Privileges he was not allowed to engage legal counsel. He was also refused the opportunity to recall for further examination the witnesses who had testified. He was questioned at length by the members of the committee, and later submitted an eight page memorandum for their consideration.

On 2 September 1993, the report of the Select Committee of Privileges was laid before Parliament. It recommended that the appellant be suspended from the service of Parliament for twelve months and that he not exercise his functions as a member during such period. However, following upon debate, over a few weeks, a motion was passed and subsequently carried that the appellant be ordered to attend the House, stand in his place and be reprimanded by the Speaker. A severe reprimand was given him on 12 October 1993.

The appellant was deeply aggrieved, so much so that on 10 January 1994 he brought the proceedings of Parliament before the High Court on judicial review. He maintained that the procedure adopted by the Select Committee of Privileges in taking evidence in his absence, in disallowing legal representation and in not permitting him to recall the witnesses for questioning, violated his fundamental right under section 18 of the Constitution of Zimbabwe, to be afforded a fair hearing. In addition he contended that his utterances outside Parliament were protected by his right to the enjoyment of freedom of expression as enshrined in s 20(1) of the Constitution. What the appellant sought therefore was an order setting aside the finding that he was guilty of contempt of Parliament. In effect, he wanted the punishment of the reprimand quashed.

The Speaker of Parliament, who was cited as the respondent in the proceedings, had recourse to s 6(1) of the Privileges, Immunities and Powers of Parliament Act, which in material part reads:

> "Upon the production, at any stage of proceedings instituted for or on account of or in respect of any matter of privilege, to the presiding officer by the person against whom the proceedings are instituted of a certificate by the Speaker ... the presiding officer shall immediately stay proceedings which shall thereupon be deemed to be finally determined."

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GUBBAY CJ

Ziyambi J, who presided, held that the certificate was conclusive of the matter. She stayed the proceedings and ordered the appellant to pay the costs. This appeal lies against that ruling.

It was stated by this court in the landmark case of *Smith v Mutasa NO \& Anor* 1989 (3) ZLR 183 (S) at 211H-212B, 1990 (3) SA 756 (ZS) at 775E-F, that provided:

(i) the certificate issued in terms of s 6(1) mentions in its body any matter of privilege known to the law; and

(ii) the proceedings instituted concern the privilege of Parliament;

the presiding judicial officer shall immediately stay such proceedings.

The issue of the certificate therefore constitutes the formal pronouncement of the Speaker according to law and a request to the court, upon it being satisfied as to the jurisdictional basis thereof, to honour the privilege so asserted.

The certificate produced to the learned judge mentioned in its body two Parliamentary privileges known to law. They were:

(a) The privilege of absolute control over matters affecting its internal administration. See Chikerema and Ors v United African National Council & Anor 1979 RLR 291 (A) at 303A-B, 1979 (4) SA 258 (ZRA) at 264E; *Smith v Mutasa NO \& Anor supra* at 192A-B (ZLR) and 761D-E (SA).

(b) The privilege of exclusive jurisdiction over a committal for contempt. See s 6 (1) of the Privileges, Immunities and Powers of Parliament Act; Smith v Mutasa NO *supra* at 200F-G and 202C-D (ZLR) and 767E and 768F-G (SA).

At issue in *Smith v Mutasa NO \& Anor* was whether the deprivation by the House of Assembly of a member's salary and allowances was a penalty authorised by law. Did such a power fall within the purview of the Privileges, Immunities and Powers of Parliament Act? This court held that the claim by the Speaker that the imposition of such a penalty was one of the privileges of the House was wrong. See at 203E (ZLR) and 769E-F (SA). It offended against the Parliamentary Salaries and Allowances Act [Chapter 2:03], for under that law the member was entitled to be paid his salary and allowances

GUBBAY CJ

during the time of his suspension from service of the House. The House was not empowered to impose an unlawful penalty in the name of Parliamentary privilege. It had exceeded its jurisdiction in doing so. Accordingly the Speaker's certificate could not oust the jurisdiction of the court. See at 212H-213C (ZLR) and 776B-D (SA).

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Is it open to argument that in one or other of the respects complained of by the appellant, the privileges and powers enjoyed by Parliament were exercised in conflict with the fundamental rights and freedoms guaranteed by the Constitution? That is the crux of the matter.

It was emphasised by Dumbutshena CJ in Smith v Mutasa NO and Anor *supra*, at 194C (ZLR) and 762J-763A (SA) that:

> "When construing the provisions of (the Act) the courts of justice cannot ignore any breaches of fundamental rights in order to rule in favour of Parliamentary privilege. To do so would be inconsistent with the provisions of the Constitution."

And later at 195B-C (ZLR) and 763F-G (SA):

> "When considering Parliamentary privileges in most Commonwealth countries, including Zimbabwe, it is important to remember that these countries have embodied in their Constitutions Declarations of Human Rights. The judiciary in countries like India, Zimbabwe and many others can lawfully strike down legislation passed by Parliament. This is why when privileges, immunities and powers claimed by the House of Assembly conflict with provisions of the Declaration of Rights in the Constitution the courts will resolve the conflict in favour of the fundamental rights of the citizen."

The Privileges, Immunities and Powers of Parliament Act derives its authority from s 49 of the Constitution. The Act states in s 3 that Parliament and its members and officers shall hold, exercise and enjoy:

(a) the privileges, immunities and powers conferred by the Act or any other law; and

(b) all other privileges, immunities and powers enjoyed by the House of Commons in the United Kingdom on 18 April 1980.

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Such privileges are to be judicially noticed in all courts (see s 4 of the Act).

In conferring upon Parliament the power to institute disciplinary proceedings, s 21 of the Privileges, Immunities and Powers of Parliament Act adopts the expedient of declaring those acts or conduct specified in the Schedule to be "contempts" which are offences. Such offences, being punishable by fairly severe penalties, have a dual nature. In one respect, they are regarded as contempts against the authority and integrity of Parliament; in another, as "public crimes", since if requested by resolution of Parliament, the Attorney-General may prosecute them before a court of competent jurisdiction (see s 22).

A finding of guilt by Parliament on a contempt-offence is not a crime in the conventional sense. When dealing with these contempt-offences Parliament, though sitting as a court, does not sit as a court of law. Its proceedings are not in the nature of a public criminal trial as envisaged in s 18(2) of the Constitution; for Parliament is not "an independent and impartial court established by law." It exercises its own jurisdiction and powers conferred upon it by the Privileges, Immunities and Powers of Parliament Act. That it does so is recognised in the Constitution. Section 13(2)(b) thereof provides that no person shall be deprived of his personal liberty save,

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inter alia, as may be authorised by law:

> "in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or in the execution of the order of Parliament punishing him for a contempt" (emphasis added).

And s 16(7)(b) of the Constitution prohibits the compulsory acquisition of property of any description or interest or right therein, but provides that it shall be lawful where such deprivation occurs:

> "by way of penalty for breach of any law whether under civil process or after conviction of an offence, or forfeiture in consequence of a breach of the law or in pursuance of any order referred to in s 13(2)(b)" (emphasis added).

The line drawn in the Constitution between punishment for contempt under an order of court or tribunal, and that imposed by Parliament, is significant and important. It indicates plainly, to my mind, that in utilising its powers under the Privileges, Immunities and Powers of Parliament Act in dealing with contempt-offences, Parliament is not exercising a criminal or civil

jurisdiction. Rather one sui generis, being the jurisdiction expressly authorised by law.

Thus in respect of contempt-offences s 18(2) of the Constitution, which stipulates that every person charged with a criminal offence is to be afforded a fair hearing by an independent and impartial court, is of no application. Nor is s 18(9). It concerns the determination of the existence of civil rights and obligations and provides that in respect thereto every person is entitled to be afforded a fair hearing by an independent and impartial court or other adjudicating authority. Parliament is not such a court or authority.

The power to regulate its internal proceedings is a traditional and acknowledged privilege enjoyed by Parliament. As Erskine May Parliamentary Practice 21 ed at 154 puts it:

> "The courts have recognised the need for an exclusive Parliamentary jurisdiction, as a necessary bulwark of the dignity and efficiency of either House."

Of course, in Zimbabwe, as already outlined, such a jurisdiction must be exercised in a manner not inconsistent with or offensive to the Declaration of Rights in the Constitution. For instance, the courts would not tolerate a situation in which the Speaker decreed that a member guilty of a contempt was to stand before the House chained and gagged to receive his punishment.

The procedure followed by the House of Commons of the Parliament of the United Kingdom on and after 18 April 1980 with regard to an allegation of contempt, is this:

(1) The complaint is referred for enquiry to a Select Committee of Parliamentary Privileges. See Erskine May op cit at 135; Griffith and Ryle Parliament - Functions, Practice and Procedures at 97. It does not appear that the enquiry must be held in public. See Erskine May op cit at 632.

(2) The member alleged to have committed a contempt is not as a rule allowed to be represented by a lawyer but, except for contempts committed in facie the House, he

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will be heard in his defence. See Erskine May op cit at 136; Griffith and Ryle op cit at 97.

(3) The Select Committee of Privileges will examine witnesses. See

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Erskine May op cit at 136; Griffith and Ryle op cit at 97. Only with leave of the Committee will a party be allowed to do so. See Erskine May op cit at 632.

(4) If the Select Committee of Privileges finds that a contempt of the House has been committed and recommends the punishment of the offender, it reports to the House. Thereupon the House, after debate, will take action upon it. See Erskine May op cit at 137; Griffith and Ryle op cit at 88.

The procedure now in contention is almost exactly the same as would have been adopted in the United Kingdom. In the discretion of the Select Committee of Privileges, the appellant was not permitted representation by counsel. See Select Committee Rules, Nos. 14 and 16. He was accorded the right to be heard. He was examined at length before the Committee and later submitted a memorandum to it. Although not given leave to recall the witnesses for questioning, he had ample opportunity to prepare his defence since he was well aware of the precise nature of the investigation referred to the Select Committee of Privileges. Finally, the suggestion of partiality of some of the members of the Committee was eventually disclaimed by the appellant in his answering affidavit.

In sum, Parliament has the undoubted privilege to punish a contempt. And it has been given express legislative power to sit as a court for that purpose (see ss 3(b) and 16 of the Act). When doing so it exercises jurisdiction and control over matters affecting its internal affairs. See *Smith v Mutasa NO \& Anor supra* at 192A (ZLR) and 761D-E (SA); Griffith and Ryle op cit at 88. Such management is susceptible of judicial interference only where it happens to be violative of the Declaration of Rights.

The basis of the charge of contempt levelled against the appellant was that the remarks he made on 7 December 1992 were insulting to members on account of their conduct in Parliament.

I entertain no doubt that the appellant's words fell within the offence prescribed in item 16 of the Schedule. To say publicly that the overall calibre of the members of Parliament is such as to render the body of Parliament meaningless; that some members are "unwitty", in the sense of lacking intelligence; that they make no effort to inform themselves of current affairs before attending sessions of the House; and that they demean and diminish respect for the institution of Parliament, was certainly contemptuous. See Griffith and Ryle op cit at 93; sub nom Constructive Contempts. Indeed, I did

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not understand counsel for the appellant to submit the contrary. His argument was grounded on the appellant's constitutional right not to be hindered in the enjoyment of freedom of expression - a right acknowledged to be one that lies at the foundation of a democratic society and always to be jealously guarded by the courts. See *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S) at 211A-C, 1996 (1) SA 847 (ZS) at 856EF, 1995 (9) BCLR 1262 (ZS) at 1271F-G.

In *Smith v Mutasa NO \& Anor supra* at 199G-H (ZLR) and 766H (SA), it was pointed out that:

> "... a matter is not removed from the jurisdiction of Parliament merely because it takes place outside the judicial confines of Parliament. It is, however, proper to say 'there must be some reasonable nexus between the acts and words and the business of the House so as to make them part of the proceedings' ... and it includes 'speaking reasoning or declaring of any matter or matters touching the Parliament or Parliament business'."

The learned Chief Justice then went on to pose the question whether there was some reasonable nexus between the speech Mr Smith delivered in South Africa and any matter of the House of Assembly or any of its business so as to make his words part of the proceedings of the House. He added that if so Mr Smith was in contempt. Of course in that case, it was not in dispute that what Mr Smith had said in South Africa amounted to a breach of Parliamentary privilege (see at 189C-D (ZLR) and 759F (SA)). In this it was argued with much force that even though what was spoken outside Parliament touched directly on its standing, reputation and dignity, nonetheless the appellant was protected by his fundamental right to freedom of expression. And the exercise and enjoyment of that undoubted right took precedence and saved him from being found guilty of a breach of Parliamentary privilege. Particular reference was made to the dicta of Lord Denning Mr in R v Metropolitan Police Commissioner, Ex p Blackburn (No. 2) [1968] 2 Al ER 319 (CA) at 320E-G. But that decision, and others cited, are not in point. They concern criticism of the judicial process and apply the test of whether the statements made create a clear and present danger to the administration of justice.

I am unable to accept the proposition advanced by counsel. Section 20(2)(b)(iii) of the Constitution places a specific limitation upon the protection of freedom of expression where there exists a law which makes provision for the purpose of:

> "Maintaining the authority and independence of the courts or tribunals or Parliament" (emphasis added).

The law in question is the Privileges, Immunities and Powers of Parliament Act. It provides in s 21 as read with item 16 of the Schedule that to insult a member on account of his conduct in Parliament is a contempt offence. The inclusion of all offences listed in the Schedule and any other act which is or may be adjudged by Parliament to be a contempt in terms of s 16 of the Act, is designed to ensure that the authority and independence of Parliament is maintained and not eroded; that the dignity of and respect for Parliament is preserved. This is not a situation therefore of a grey area between the courts and Parliament in which a court should not be too astute to find a reason for ousting its jurisdiction. See Rost v Edwards [1990] 2 All ER 641 (QBD) at 653a-c.

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It follows necessarily that the freedom guaranteed under s 20(1) of the Constitution is of no avail to the appellant; for what he said outside the confines of Parliament touched directly and contemptuously on its business.

Finally, since the power of Parliament to regulate its own practices and procedures is accepted and sustained by all enlightened countries, any abridgment of the freedom of expression that permits this legislative body to commit its members for contempt must be regarded as reasonably justifiable in a democratic society. See *Nyambirai v National Social Security Authority \& Anor* 1995 (2) ZLR 1 (S) at 15G-H, 1996 (1) SA 636 (ZS) at 649B, 1995 (9) BCLR 1221 (ZS) at 1233G.

In the result, I am of the opinion that in staying the proceedings the learned judge properly recognised and honoured the certificate issued by the Speaker.

Accordingly I would dismiss the appeal with costs.

McNALLY JA: I agree.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

ENHANCED COMMUNICATIONS NETWORK (PVT) LTD v MINISTER OF INFORMATION, POSTS & TELECOMMUNICATIONS 1997 (1) ZLR 342 (HC)

Court **High Court, Harare**

Adam J

Application for interim interdict

21, 25 & 26 March; 2 April 1997 Judgment No. HH-58-97

Flynote

Practice and procedure - interdict - interim - requirements for - court's discretion whether to grant or refuse even if requirements satisfied

Headnote

The applicant was a company that had been tendering for a licence to operate a cellular telephone network in Zimbabwe. After a licence had been issued by the respondent Minister to a rival contender, a company called Telecel, an article was published in the Financial Gazette, quoting the Minister as saying that the managing director of the applicant, Mr S Masiyiwa,

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should either sell his equipment to Telecel or surrender it to the Government. She was quoted as saying that Mr Masiyiwa might be arrested and jailed if he defied this order. There were further statements attributed to her, one where she was quoted as threatening to confiscate the equipment imported by another firm, Ericsson, and another where she suggested that Mr Masiyiwa might be arrested for illegally putting up and operating -highly sensitive instruments classified as a security risk'.

The applicant applied for an interdict restraining the Minister (who was cited in her official and personal capacity) from (a) confiscating or threatening to confiscate the applicant's equipment, (b) entering or threatening to enter the premises of the applicant or his suppliers, (c) making statements ordering the applicant to withdraw from any private agreements or to hand over its equipment to Telecel, (d) generally making statements likely to cause damage to the applicant's business standing and (e) acting

in an unlawful manner likely to cause damage to the applicant's business standing or to cause its suppliers to resile from contracts entered into with the applicant.

The Minister denied making the statements attributed to her. She accepted that she did not have any power to confiscate the equipment or to order the applicant to hand the equipment over to anyone else. She said that everything had been done in her official capacity and that she had no personal interest in the outcome of the tender.

Held, that for the grant of a temporary or interim interdict, the requisites are that -

(1) the right sought to be protected is clear; or

(2) (a) if it is not clear, it is *prima facie* established, even though open to doubt; and

(b) there is a well-grounded apprehension of irreparable harm if the relief is not granted and the applicant ultimately succeeds in establishing his right;

(3) the balance of convenience favours the grant of the relief; and

(4) there be no other satisfactory remedy.

Even where the requisites are established, the court has a discretion whether to grant or refuse the remedy.

Held, further, that the applicant should have preceded these proceedings by issuing a letter of demand to the Minister. Had it done so, no doubt it would have received a reply similar to that in the Minister's affidavit.

Held, further, that even assuming that the applicant had established a *prima facie* case, it could not, in the light of the averments by the Minister, be maintained that the applicant would suffer irreparable harm. The applicant had produced nothing to show that the Minister's assurances were not made in good faith.

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Held, further, that the applicant had not shown that the balance of justice favoured it.

Applicant dismissed.

Cases cited:

Cape Tex Eng Works (Pty) Ltd v S A B Lines (Pty) Ltd 1968 (2) SA 528 (C)

Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton & Anor 1973 (3) SA 685 (A)

Francome v Mirror Group Newspapers Ltd [1984] 2 All ER 408 (CA)

Knox D'Arcy Ltd v Jameson & Ors 1995 (2) SA 579 (W)

L F Boshoff Invstms (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C)

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Limbada v Dwarka 1957 (3) SA 60 (N)

S v Modus Publications (Pvt) Ltd 1996 (2) ZLR 553 (S)

Case Information

A P de Bourbon SC, for the applicant

J B Colegrave, for the respondent

Judgment

Adam J: This application in its amended form, brought on a certificate of urgency, is for a provisional order. The interim relief sought by the applicant is for a temporary or interim interdict that the first and second respondent (in her official and personal capacity) be interdicted and restrained from (1) confiscating and/or threatening to confiscate any of the applicant's telecommunications or other equipment; (2) entering and/or threatening to enter any of the applicant's premises or the premises of any of the applicant's suppliers of equipment, including Ericsson; (3) making or publishing any statements and/or orders to the applicant and/or its suppliers to resile from any private agreements and from ordering or directing that the applicant surrender any of its telecommunications equipment to Telecel Zimbabwe (Pvt) Ltd or the Government of Zimbabwe or any other entity; (4) generally making any statements likely to cause damage to the business standing of the applicant; and (5) generally acting in any unawful manner likely to cause damage to the business standing of the applicant and/or to induce its suppliers to resile from private contracts entered into with the applicant.

In the legal practitioner's certificate, Mr Hwacha gives various reasons in 8 paragraphs for the matter being urgent but paras 2, 3, 4, 6, 7 and 8 of those reasons are not supported in any way by the averments in the founding affidavit. Nonetheless it was conceded on behalf of the respondents that the matter was urgent.

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Also it has to be mentioned that the terms of the interim relief sought and the final order are identical. It has been stated that the proper approach in such matters is for the court to look at the substance rather than at the form of the application. Although here interim relief is prayed for which is to prevail pending the return day, in fact it would appear that the actual relief being sought is really in the nature of a final order Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd 1968 (2) SA 528 (C) at 529-30. Therefore, proceedings ought to have been commenced by way of a court application for a final or absolute interdict. Be that as it may, for a temporary or interim interdict the requisites are: (1) that the right which is sought to be protected is clear; or (2)(a) if it is not clear, it is *prima facie* established, though open to some doubt and (b) there is a well-grounded apprehension of irreparable

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harm if interim relief is not granted and the applicant ultimately succeeds in establishinghis right; (3) that the balance of convenience (-balance of justice' - Francome v Mirror Group Newspapers Ltd [1984] 2 All ER 408 (CA) at 413) favours the granting of interim relief; and (4) the absence of any other satisfactory remedy: LF Boshoff Invstms (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267. In that case, Corbett J (as he then was) said at 413:

> "Where the applicant cannot show a clear right, and more particularly where there are disputes of fact, the court's approach in determining whether the applicant's right is *prima facie* established, though open to some doubt, is to take facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action.'

But in Knox D'Arcy Ltd v Jameson & Ors 1995 (2) SA 579 (W) Stegmann J had this to say at 600-1:

> "To restate the approach, it requires that I should first consider the facts alleged by the applicants, as well as the facts alleged by the respondents which the applicants cannot or do not dispute. If, on that selection of alleged facts, having regard to the inherent probabilities, the applicants ought not to obtain final relief at trial, the application for interlocutory relief must fail. If, however, on that selection of alleged facts the applicants ought to succeed in obtaining final relief at a trial, the enquiry must proceed a further stage. Considerations must then be given to the facts set up in contradiction by the respondent. If they throw serious doubts upon the case of the applicants, the applicants can again not succeed in obtaining interlocutory relief. It is only if any doubt raised by the respondent's allegations of fact cannot be regarded as serious that the applicants will have satisfied the requirement that they should establish a *prima facie* case though open to some doubt.
>
> If the applicants have succeeded in establishing that requirement, I shall further have to consider the questions of whether the applicants have shown that the respondents' conduct has caused them actual loss, or that they have a well-grounded apprehension of irremediable loss; and that there is no other suitable remedy available to them; and that the balance of convenience favours them. To determine the balance of convenience,

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> I must consider the prospects of the prejudice which appears to threaten the applicants if at this stage I should refuse their claim for interlocutory interdict aimed at ' the respondents ' and if the applicants should ultimately prove at the trial that they have always been entitled to the claims which they now assert against the respondents. I must also consider the prospects of the prejudice which appears to threaten the respondents if I should at this

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stage grant ' the interdict sought by the applicants and if it should later appear at the trial that the defences which the respondets now assert against the applicants' claims have always been sound. I must form a view on the question as to which of the parties are liable to be the more seriously inconvenienced by the prospective prejudice.'

Also, in Limbada v Dwarka 1957 (3) SA 60 (N), when dealing with the situation where all the requisites of an interdict had been made out, Holmes J (as he then was) observed at 62:

"But that does not end the matter, for the court always has a discretion whether to grant or refuse the extraordinary remedy of an interdict ' This means that an applicant who establishes the requisites for an interdict is not necessarily entitled to that relief.'

It must be pointed out that in the present application the temporary interdict requested is couched in very wide terms, to the extent that the applicant's affidavits do not even support its entire claim.

It is averred on behalf of the applicant in the founding affidavit that what prompted this urgent application is the fact that the respondent has now taken it upon herself to literally destroy any possible opposition to Telecel and personally assist Telecel -procure' equipment. That affidavit draws attention to an article in the Financial Gazette of 20 March 1997 and to the following statements attributed to the respondent:

"(a) Masiyiwa should either sell his equipment to Telecel ' or surrender it to the Government for no compensation.

(b) We may arrest and jail Masiyiwa if he defies the Government's order (to relinquish equipment to Telecel).

(c) Ericsson must sell the equipment to Telecel or the Government will confiscate it.

(d) In fact Masiyiwa does not in fact own the equipment he claims to own.

(e) We have decided as government that they (Ericsson) will have to sell the equipment to the winning group or the Government will confiscate the equipment. We have made this clear to Ericsson.

(f) Mujuru threatened that if Masiyiwa persisted in defying the government order, the police or state security agents might be called in and arrest him for illegally 'putting up and operating highly sensitive' instruments classified as a security risk.'

In her opposing affidavit, the respondent in her official and personal capacity avers that she is not threatening to have the equipment removed or confiscated and she is not ordering that it be sold to Telecel. She does not recollect precisely what she said to the reporter of the Financial Gazette but feared that she has probably been quoted out of context. She probably did tell the reporter that the applicant and/or Ericsson would have to get rid of their equipment. She also probably did indicate that the equipment might be confiscated by the State as she is advised that this is a normal consequence of a criminal conviction for improperly importing, installing and/or using such equipment. She may have also stated that whoever owned the equipment should try to sell it to Telecel as the entity that has the licence, otherwise the owner would have to re-export it if it is not forfeited to the State. She did not, however, intend to direct the applicant or Ericsson to sell the equipment to Telecel. She accepts tha she has no right to direct the applicant as to what it must do with the equipment and she claimed no right to seize the equipment or to have it confiscated by the State. The applicant itself did not claim to have received any such threats or directions from her in her official or personal capacity. She did not

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have the power, nor did the Cabinet, and the Cabinet did not direct that the equipment be seized, uprooted or confiscated. No instructions have been issued by her to the applicant or to Ericsson as to the disposal of the equipment which the applicant is apparently using. What she has done is to urge the law enforcement agencies of Government to make strenuous efforts to establish whether the equipment was lawfully brought into Zimbabwe and whether it has unlawfully been used. She repeated her denial that she demanded that the applicant's equipment be handed free of charge to the Government or to Telecel. All that she has done in respect of the cellular licences has been done in her official capacity an she has no personal interest in the outcome of the tender nor in what Mr Masiyiwa and the applicant should be doing with the Ericsson equipment. Accordingly, the applicant has

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no good reason to involve her in this matter in her personal capacity, particularly in view of the provisions of the State Liabilities Act.

It would appear that there is nothing in the articles referred to in the Financial Gazette which would indicate that she was acting in any way in her personal capacity when responding to the reporter.

Mr de Bourbon submitted that the applicant has shown that it was entitled to interim relief. On the other hand, Mr Colegrave's contention was that the applicant had not established that interim relief should be granted, particularly as the matter was one in the discretion of the court.

I now propose to examine the various affidavits to ascertain if they satisfy the foregoing requisites. It was never suggested by Mr de Bourbon that the applicant had established a -clear right'. As I understand it, the gravamen of the claim made by the applicant is that the respondent was quoted as indicating that the Government had ordered that Ericsson will have to sell the equipment to Telecel or the Government will confiscate it and that if Mr Masiyiwa persisted in defying the Government order the respondent threatened that the police or state security agents might be called in to arrest Mr Masiyiwa for illegally -putting up and operating highly sensitive' instruments classified as security risks.

To this, the respondent has averred that she did not intend to direct Ericsson or the applicant to sell the equipment to Telecel; that she is not threatening to have it removed or confiscated; that she is not ordering that it be sold to Telecel; that the applicant did not claim that the applicant itself has received any such threats or directions from the respondent; that she accepts that the respondent has no right to direct the applicant about the equipment and that the respondent has no right to direct the applicant about the equipment and that the respondent claims no right to seize the equipment or to have it confiscated by the State.

As correctly pointed out by Mr Colegrave, before launching these proceedings the applicant should have preceded it with a letter of demand to the respondent. Had the applicant done so, it would no doubt have received a reply in similar vein as disclosed in the respondent's opposing affidavit.

I shall, however, assume without deciding that a *prima facie* case has been established by the

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applicant. But that is not the end of the matter. Since this court is obliged to consider the affidavits filed as a whole and the

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interrelationship of the various requisites - Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton & Anor 1973 (3) SA 685 (A) at 691 - it cannot, in light of the foregoing averments in the respondent's opposing affidavit, be maintained by the applicant that it has established that it will suffer irreparable harm. Also, the applicant has placed nothing from which this court can conclude that the first respondent's assurances given in her opposing affidavit are not *bona fide*. In this regard this court has to recognise, in the words of Gubbay CJ, that -

> "as a long-standing member of Parliament who, in addition has been a member of the Cabinet, the respondent's position in public life requires of her absolute integrity, credibility and total observance of the law.
>
> Without these essential attributes the respondent would not last long in her calling, and deservedly so' (S v Modus Publications (Pvt) Ltd 1996 (2) ZLR 553 (S)).

Clearly, the applicant cannot also be said to have shown that the -balance of justice' favours it. As so cogently asserted by Sir John Donaldson MR in Francome v Mirror Group Newspapers Ltd, *supra*, the court's business is to do justice and not convenience. In weighing the prejudice to one side or the other, the court is seeking a balance of justice.

Finally, the court always has a discretion to grant or refuse the extraordinary relief of an interdict. That discretion has been described as a judicial discretion. It follows in exercising that discretion this court cannot disregard the foregoing considerations. I am not satisfied that the applicant is entitled to an interim interdict. The application is accordingly dismissed. The applicant is to pay the respondent's costs.

Kantor & Immerman, applicant;'s legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

COMMISSIONER OF TAXES v FIRST MERCHANT BANK LTD 1997 (1) ZLR 350 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

17 March & 4 April 1997 Judgment No. S-51-97

Flynote

> Revenue and public finance - income tax - debt owed to taxpayer by Government - whether taxpayer entitled to set off the taxes due by it to Commissioner of Taxes against amount due to it by another ministry
>
> Interpretation of statutes - presumptions - presumption that legislature does not intend to alter existing law

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more than is necessary - intention to alter existing law must be declared in clear and unequivocal language

Set off - debt - debt owed by Government to taxpayer - whether taxpayer can set off taxes due by it to Government against such debt

Headnote

Under the common law, set-off cannot be raised against taxes due to the fiscus. This rule is grounded in public policy and utility and is designed to ensure the uninterrupted flow of tax revenues to the Treasury in the interests of good governance.

There is a presumption that the legislature does not intend to alter or modify the existing law more than is necessary. Any intention to do so must be declared in clear and unequivocal language or the inference from the legislation must be such that the inevitable conclusion is that the legislature did have such an intention.

On a proper construction of s 48 of the Audit and Exchequer Act [Chapter 22:03], it is clear that the legislature did not intend to alter the existing law regarding set-off. Section 48(1)(b) is confined to recovery of debts due to the State and one of the ways that the State can recover debts its by way of set-off. It was not intended to allow set-off to be claimed by

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private persons or companies against tax debts due to the State. The respondent bank was thus not entitled to set off the taxes due by it to Commissioner of Taxes against amount due to it by Ministry of Finance.

Cases cited:

Attorney-General, Transvaal v Botha 1994 (1) SA 306 (A)

Casserley v Stubbs 1916 TPD 310

Dhanabakium v Subramanian & Anor 1943 AD 160

First Merchant Bank of Zimbabwe Ltd v CoT 1996 (2) ZLR 171 (H); (1996) 58 SATC 298

Jaga v Dšnges NO & Anor 1950 (4) SA 653 (A)

Johannesburg Municipality v Cohen's Trustees 1909 TS 811

Pentecost & Co v Cape Meat Supply Co 1933 CPD 472

Schierhout v Union Govt 1926 AD 286

Seluka v Suskin & Salkow 1912 TPD 258

Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd & Anor 1962 (1) SA 458 (A)

Statutes referred to:

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Audit and Exchequer Act [Chapter 22:03], s 48(1)(b)

Income Tax Act [Chapter 23:06], s 77(1)

Case Information

B Patel, for the appellant

A P de Bourbon, for the respondent

Judgment

Gubbay CJ: This is an appeal against a decision of the High Court (Blackie J) declaring that the respondent was entitled to set-off the taxes due by it to the appellant ("the Commissioner") against the amount due to it by the Ministry of Finance, and that such set-off automatically discharged the respondent's liability to pay those taxes from the dates of set-off. The judgment has been reported under the name First Merchant Bank of Zimbabwe Ltd v CoT in 1996 (2) ZLR 171 (H); (1996) 58 SATC 298.

The respondent, as its name indicates, is a merchant bank. It agreed to grant overdraft facilities to a Government-owned company called Affretair (Pvt) Ltd on condition that the Ministry of Finance acted as guarantor. The monies were advanced once four guarantees, signed by the Senior Minister of Finance on 22 July 1992, 26 March 1993, 22 April 1993 and 1 July 1993, were furnished to the respondent. When Affretair defaulted in the repayment of the loans, the respondent called upon the Ministry of Finance to honour the guarantees. Several demands for payment went unheeded. After considerable

delay, the Senior Minister of Finance "irrevocably" undertook in writing to pay the respondent, on or before 31 October 1994, an amount of $47 749 106,40, plus accrued interest and bill charges at prevailing market rates. As the promised payment was not forthcoming, the respondent gave notice of an intention to institute proceedings for the recovery of the outstanding monies. In the event it did not do so. Eventually, on 2 November 1995, it received payment.

In the period between the demands and the making of payment by the Ministry of Finance, the respondent became liable for various amounts of income tax. It advised the Commissioner of its intention to set-off such amounts against whatever was owing to it by the Ministry. And as each individual payment of tax fell due, the respondent duly applied the appropriate set-off. The Commissioner objected strongly to the adoption of that course of action. He appointed the respondent's bankers as his agent for the collection of the tax. Only then did the respondent, under protest, make the required payments, albeit late.

In issue before the court *a quo* was whether the respondent was indebted to the Commissioner for interest that had accrued in consequence of alleged delays in the payment of the taxes. If the respondent was entitled to set off the taxes due by it, as it had sought to do, it had

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discharged its liability timeously and in full.

The learned judge held that the plain wording of s 48(1)(b) of the Audit and Exchequer Act [Chapter 22:03] permits a tax-payer to set off any tax payable against an amount due to him by the State (*supra* at 301). What this court is called upon to decide is whether that interpretation is correct.

Section 48 of the Act reads:

" (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 subsection (2), set-off against any amount due by the State to the person by whom the debt is due.

(2) In the case of a set off in terms of paragraph (b) of subsection (1) against a salary payable to a person who remains in the employment of

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the State or a pension, the debt may be recovered in full or in monthly instalments at a rate fixed by the Treasury."

Under s 77(1) of the Income Tax Act [Chapter 23:06] any tax, when it becomes due or is payable, is deemed to be a debt due to the State.

It was the argument of counsel for the Commissioner that s 48(1)(b) does not create a general right of set-off; that construed in its contextual setting this provision confers, not a right of recovery against the State, but an election upon the State to apply set-off.

At common law, set-off or compensatio is a method by which mutual debts, being liquidated and due, may be extinguished. It takes place ipso jure. If the debts are equal, both are extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced. There are, however, two important exceptions to the operation of the rule. A debt owed by one department of the State cannot be set off against a debt owed to another department. And set-off cannot be raised against taxes due to the fiscus or where goods are sold for the benefit of the State. See Schierhout v Union Government 1926 AD 286 at 291; Pentecost & Co v Cape Meat Supply Co 1933 CPD 472 at 479; Voet Commentarius ad Pandectus 16.2.16 (Gane's translation, Vol 3 at 166); van Leeuwen Censura Forensis 1.4.36.11 and 13 (Barber and Macfayden's translation); Wessels The Law of Contract in South Africa 2 ed vol II at paras 2567 and 2568; Wille's Principles of South African Law 8 ed at 483. Both these exceptions are grounded in public policy ad utility. The first is designed to avoid confusion in State accounts; the second to ensure the uninterrupted flow of tax revenues to the Treasury in the interests of good governance. In each instance, it is for the State to decide whether or not set-off should apply even though the debts co-exist.

It is a seminal presumption in statutory construction - indeed, the most fundamental of all the

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presumptions, often referred to as "a sound rule" - that the legislature does not intend to alter or modify the existing law more than is necessary. Thus any intention to do so must be declared in clear and unequivocal language; or the inference must be such that the inevitable conclusion is that the Legislature did have such an intention. See Johannesburg Municipality v Cohen's Trustees 1909 TS 811 at 818; Seluka v Suskin & Salkow 1912 TPD 258 at 265; Casserley v Stubbs 1916 TPD 310 at 312; Dhanabakium v Subramanian & Anor 1943 AD 160 at 167; Attorney-General, Transvaal v Botha 1994 (1) SA 306 (A) at 330I-J.

The interpretation of a provision of a statute should always be in contextual

harmony with both the letter and spirit of the whole body of law, statutory and common. Regard must be had therefore not only to the pervasive presumption referred to, but to the Act as a whole, to its preamble, general framework and antecedents. For it is very rare indeed that the true meaning of a particular provision can be ascertained simply by looking at the language used and nothing else. Certainly, I do not find that the wording of s 48(1)(b), taken in isolation, comes within this exceptional category. The well presented opposing contentions of counsel indicate the contrary. I can do no better than to repeat the warning of Wessels AJA in Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd & Anor 1962 (1) SA 458 (A) at 476E-F that -

> "... it is the duty of the court to read the section of the Act which requires interpretation sensibly, ie with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the
>
> > 'matter of the statute, its apparent scope and purpose and, within limits, its background'.
>
> In the ultimate result, the court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states the legal effect with reference to the facts of the particular case which is before it."

See also the remarks of Schreiner JA in Jaga v Dšnges NO & Anor 1950 (4) SA 653 (A) at 664E-F.

The primary object of the Audit and Exchequer Act, as expressed in the long title, is "to make provision for the management and control of public moneys and State property and the protection and recovery thereof" (emphasis added).

Within the framework of the Act, Parts II, III and IV provide, respectively, for the functions of the Comptroller and Auditor-General with respect to the examination and audit of State accounts, the raising of surcharges, and the furnishing of reports. Part V prescribes in detail the powers and duties of the Treasury as regards the management and control of public moneys and State property, including moneys payable to the State. Part VI is concerned with the regulation and control of designated corporate bodies. Finally, Part VII

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provides for various general matters relative to the implementation of the Act.

The one provision of the Act dealing with the recovery of moneys due to the State is s 48. Subsection (1)(a) refers to recovery by the State by court action, while subs (2) is concerned with recovery by the State by set-off against salaries of its employees or against pensions payable to former employees. The remaining provision is subs (1)(b). It refers to set-off generally.

Section 48 was formerly s 46 of the Audit and Exchequer Act 28 of 1967 [Chapter 168 of the Revised Edition 1974]. The precursor to that Act was Act 21 of 1948 [Chapter 144 of the Revised Edition 1963], in which the only sections dealing with the recovery of moneys owing to the State were those providing for the imposition and enforcement of surcharges. Section 13 stipulated that the amount of a surcharge constituted a debt due to the State. The recovery of any such amount was to be effected by court action under s 15, or by deductions from the salary of the responsible official pursuant to s 14. The proviso to s 14 imposed a maximum limit of one-fourth of monthly salary that could be deducted to satisfy the surcharge.

The introduction of s 46 in the 1967 Act brought about several important changes to the pre-existing position. First, the recovery of moneys was extended from surcharges to all debts due to the State. Second, express reference was made to set-off as a means available for the recovery of debts due to the State. Lastly, as regards recovery from salaries and pensions, it was provided that the debt in question could be recovered in full or in monthly instalments. The clear purpose of these changes was to facilitate and clarify the principal modes of recovery of debts due to the State.

An examination of s 48 as a coherent whole, and having regard as well to the general tenor and objects of the Act, to the legislative history of s 48 and to the presumption against an intention to alter the common law precluding set-off against tax debts due to the State, persuades me that subs (1)(b) is confined to the recovery of debts due to the State. For subs (1) prescribes by way of statutory direction two alternative methods of recovery of a particular debt; namely - by court action or by way of set-off. In both instances, what is envisaged is recovery by the State of a debt due to the State. Any interpretation allowing the operation of set-off against tax debts due to the State would be manifestly incompatible with the remainder of s 48 and with the other features mentioned. In short, the sole purpose of s 48, as foreshadowed in the

long title to the Act, is to provide for the recovery of public moneys which are outstanding as debts due to the State.

It is for these reasons, that I find myself in respectful disagreement with the interpretation ascribed to s 48(1)(b) by the learned judge.

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

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"The application is dismissed with costs."

KORSAH JA: I agree.

MUCHECHETERE JA: I agree.

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

Winterton, Holmes & Hill, respondent's legal practitioners

MURINGI v AIR ZIMBABWE CORPORATION & ORS 1997 (1) ZLR 357 (HC)

Court **High Court, Harare**

Robinson J

Civil application

26 March & 9 April 1997 Judgment No. HH-60-97

Flynote

Administrative law - bias - avoidance of - Minister having been member of Cabinet which approved termination of employment of general manager of a parastatal - same Minister subsequently being asked under labour legislation to approve termination - Minister disqualified on grounds of bias from dealing with matter

Aviation - Air Zimbabwe Corporation - general manager - whether Corporation's Board required to obtain approval of Minister of Transport to dismiss general manager

Employment - contract - termination - on notice - application to Minister for approval of termination - Minister obliged to observe rules of natural justice and give employee an opportunity to make representations - nature of representations that must be allowed

Employment - Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 - application to Minister for approval of termination of contract of employment - whether Minister may delegate power to grant approval

Employment - wrongful dismissal - reinstatement - court's discretion as to whether to order reinstatement - general manager of parastatal - Government and Board having lost confidence and trust in him - reinstatement wholly inappropriate

Headnote

The applicant had been employed by the respondent Corporation as its

managing director in November 1993. The appointment had been approved by the Minister of Transport and Energy, as required by s 20(1) of the Air Zimbabwe Corporation Act [Chapter 13:03]. The terms of his employment were not clear, as a written contract of employment was never entered into, although in practice the terms of an unsigned contract were followed.

After the applicant had been in employment for about two years, disputes arose between him

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and the Corporation's Board. In May 1996, the applicant was asked to go on leave for four weeks to enable investigations to be carried out into the allegations against him. The Board carried out an investigation into the allegations and held two meetings to do so. Minutes of the meetings were not given to the applicant, in spite of undertakings to do so. As a result of the Board's investigative meetings, which were attended with irregularities, the Chairman of the Board recommended to the Minister of Transport that the applicant's contract be terminated. In addition, an application was made to the Minister of the Public Service, Labour and Social Welfare in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 for approval to terminate the applicant's employment. The application was made on 6 December and approved on the same day. Not all the evidence was laid befoe the Minister, who before the application was made, had been, as a member of the Cabinet, party to a decision that the applicant's employment be terminated.

The applicant applied to the High Court for an order setting aside the decision of the Minister of Labour and for his reinstatement by the Corporation. He argued that the rules of natural justice had not been followed by the Minister.

Held, that although under the Air Zimbabwe Corporation Act [Chapter 13:03] the Corporation had to obtain the approval of the Minister of Transport to appoint a general manager, there was no legal requirement to obtain the Minister's approval to terminate that employment. The only legal requirement was to make an application to the Minister of Labour for approval.

Held, further, that an employee whose contract was to be terminated had a right to be protected by the rules of natural justice and to be given an opportunity to deal with the allegations against him. It was therefore incumbent on the Minister of Labour to carry out an independent and impartial inquiry, to conduct a proper inquiry by giving notice to the employee of the grounds upon which the employer's application was based and giving the employee the opportunity to make representations in response.

Held, further, that the Minister was not required to hold a full hearing in the presence of the employee. All the Minister was required to do was give the employee an opportunity to make written representations after he had been afforded sight of the documents supplied by the employer.

Held, further, that the Minister had failed, when considering whether it was necessary to terminate the applicant's contract of employment, to consider the relative interests of both the applicant and the Corporation. Only the Corporation's interests had been considered.

Held, further, that because the Minister had been a member of the Cabinet that approved the termination of the applicant's contract and was bound, on the basis of collective responsibility, by the Cabinet's decision, there was a real possibility of bias on the part of the Minister in approving the termination of the applicant's contract. The Minister should have delegated her power to an official in her Ministry. Whether in practice the official could have made a decision that flew in the face of the Cabinet decision was irrelevant; the legal point was that, as long as the official is seen not to have breached the rules of natural justice, his decision could not be

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impugned.

Held, further, that it would have been competent in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations for the Minister to have delegated her power of approval to an official in the Ministry.

Held, further, that although the Minister's decision had to be set aside, in the event of the Corporation's failing to terminate the applicant's contract of employment lawfully, this did not mean that the applicant necessarily had the inalienable right to an order for his reinstatement. Reinstatement was a matter for the court's discretion and in this case, where the applicant had lost the confidence and trust of the Government and the Corporation's Board, it would be wholly inappropriate to order his reinstatement. He and the Corporation were totally incompatible and there was no prospect of their being able to work together in harmony. To thrust him back at the Corporation would be sheer folly.

Cases cited:

Admin, Natal & Anor v Sibiya & Anor 1992 (4) SA 532 (A)

Admin, Tvl & Ors v Zenzile & Ors 1991 (1) SA 21 (A)

Appel v Leo & Anor 1947 (4) SA 766 (W)

Bailey v Health Professions Council 1993 (2) ZLR 17 (S)

Commercial Careers College \(1980\) \(Pvt\) Ltd v Jarvis 1989 (1) ZLR 344 (S)

Hama v NRZ 1996 (1) ZLR 664 (S)

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

Holland & Ors v Minister of the Public Svc, Labour & Social Welfare 1997 (1) ZLR 186 (S)

Leopard Rock Hotel Co \(Pvt\) Ltd \& Anor v Walenn Construction \(Pvt\) Ltd 1994 (1) ZLR 255 (S)

Minerals Marketing Corp v Mazvimavi 1995 (2) ZLR 353 (S)

R v Gough [1993] 2 All ER 724 (HL)

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

Winterton\, Holmes \& Hill v Paterson 1995 (2) ZLR 68 (S)

Statutes referred to:

Air Zimbabwe Corporation Act [Chapter 13:02], ss 5 and 20(1)

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Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), ss 2(2), 5 and 17(3)(q)

Case Information

J C Andersen SC, for the applicant

A P de Bourbon SC, for the first respondent

Miss Y Dondo, for the second and third respondents

Judgment

Robinson J: The applicant, Huttush Richard Muringi, seeks an order, inter alia, for the setting aside of the decision of the Minister of Public Service, Labour and Social Welfare ("the Labour Minister") approving the giving of six months' notice to him for the termination of his contract of employment with the Air Zimbabwe Corporation ("the Corporation") in terms of s 2(2) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985) ("SI 371 of 1985") and for his reinstatement by the Corporation as its general manager/managing director. (Both designations are variously used to refer to the post to which the applicant was appointed, although under the Air Zimbabwe Corporation Act [Chapter 13:02] ("the Corporation Act"), the correct designation of the post is that of general manager).

Section 2(2) of SI 371 of 1985 provides as follows:

> "The Minister may approve the giving of notice of termination to an employee in terms of paragraph (a) of subsection (1) if he is satisfied that the period of notice is in accordance with the contract of employment, and that it is necessary, for economic or other reasons, including the relative interests of the undertaking, trade or occupation, and the employee, to do so."

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The subsection referred to in s 2(2) of SI 371 of 1985, being subs 1(a), stipulates:

> "2(1) No employer shall, summarily or otherwise, terminate a contract of employment with an employee unless -
>
> (a) he has obtained the prior written approval of the Minister to do so."

The applicant contends that the rules of natural justice apply to s 2(2) of SI 371 of 1985 and that they were breached by the Labour Minister in that (a) she failed to comply with the audi alteram partem rule or to hold any independent inquiry; and (b) she should not have acted in the matter in any event, having already determined the issue as a party to the decision made by the Cabinet that the applicant's contract of employment with the Corporation be terminated in accordance with the Corporation's recommendation to the Minister of Transport and Energy ("the Transport Minister") to that effect. There was therefore a real danger of bias on the Labour Minister's part and consequently she was disqualified to deal with the matter

The application is opposed by the Corporation, the Transport Minister and the Labour Minister,

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who are cited as the first, second and third respondents respectively.

To show what is at stake as far as the applicant is concerned, I believe that it is appropriate to set out the financial terms and benefits of his contract of employment.

Before doing so, however, it is to be noted that the Corporation and the applicant never entered into a written contract of employment. However, the applicant alleges in his founding affidavit that the unsigned contract annexed to his affidavit as annexure A records the terms and conditions of his employment as orally agreed between him and the Corporation.

On the other hand, in his opposing affidavit, David Makhumbini Zamchiya, the Chairman of the Corporation's governing Board of members ("the Corporation Chairman"), while admitting that the applicant's appointment as general manager took effect from 1 November 1993, disputes that the unsigned contract represents the terms and conditions of the contract of employment as orally agreed between the parties, alleging that annexure A is only "a draft of the contract of employment which was being contemplated by the parties", which had to be approved by the Transport Minister.

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Although the Corporation Chairman states that as at the date when he signed his affidavit, being 19 December 1996, the Transport Minister's approval had not been given and that "therefore the document cannot be said to be the contract employment", he confirms that the document "does embody the general terms of (*sic*) conditions that would have been agreed to by the Board".

The Corporation Chairman asks the court particularly "to take special notice of Clause 2 of the document which contemplates termination of the contract by either party giving to the other six (6) calendar months' notice in writing".

I must say that I find it remarkable that, although the applicant was employed from 1 November 1993, the Corporation Chairman should unashamedly say that as at December 1996 the Transport Minister had not approved the contract of employment for the applicant as the Corporation's general manager and that he should have allowed this unsatisfactory state of affairs to have continued when, according to his version, he knew that there was no valid contract between the Corporation and the applicant. Indeed, if that was in fact the position, one wonders why the Corporation Chairman has acted on the basis that the terms and conditions recorded in annexure A to the applicant's founding affidavit did constitute the terms and conditions of the contract of employment between the Corporation and the applicant.

In any event, Samson Marume, who stated that, as the Acting Secretary for the Ministry of Transport and Energy, he was empowered to depose to the opposing affidavit on behalf of the Transport Minister, admits para 4 of the applicant's founding affidavit. This avers that on 22 October 1993, the Corporation appointed the applicant, with the Transport Minister's approval (my emphasis), as its general manage and that, although unsigned, the written contract of employment annexed to the applicant's founding affidavit as annexure A, records the terms and

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conditions of the applicant's contract of employment as orally agreed between the parties.

Furthermore, in the opposing affidavit signed by her, the Labour Minister also admits para 4 of the applicant's founding affidavit.

Accordingly, either the Corporation Chairman is not being frank with the court or it is a case of the left hand not knowing what the right hand is doing; in other words, the Corporation Chairman was ignorant of the facts relating to the conclusion of the applicant's contract of employment with the

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Corporation. If this is true, it is a sad reflection on the person supposedly at the helm of the Corporation's affairs.

I now revert to the subject of the applicant's financial terms and benefits under his contract of employment with the Corporation, which were as follows:

[The learned judge set them out and continued:]

I turn now to deal with the matter of the minutes of the two meetings specially called and held by the Corporation's Board on 18 September 1996 and 16 October 1996, which were attended by the applicant and his legal adviser, Mr C Dube. These meetings were intended to give the applicant the opportunity of responding to allegations affecting him which the Board was investigating in order to determine whether the applicant had, according to the minutes of the initial meeting, "exercised the functions delegated and conferred upon him within the scope of the delegation", with a view to the Board's making a recommendation to the Transport Minister on the basis of its determination. I shall refer to these two meetings as "the two investigative meetings".

In this regard, it is of significance to trace in detail the background to the preparation, completion and production of the minutes of the two investigative meetings.

The starting point is para 11(a) of the applicant's founding affidavit where the applicant alleges as follows:

> "First respondent (the Corporation) acted unfairly in making its recommendation to second respondent (the Transport Minister) and its application to third respondent (the Labour Minister) for the following reasons:
>
> (a) First respondent found me guilty of misconduct but gave me no reasons in support of this extremely adverse finding. Further, and notwithstanding repeated requests, first respondent has not furnished me with a record of the evidence adduced at the hearing when it inquired into the allegations made against me. In short, first respondent simply gave me a conclusion without reasons showing how that conclusion is justified and whether first respondent applied its mind to the evidence given at the hearing. I have been given an 'order' without a 'judgment'. *Much more importantly, I have been*

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denied an opportunity to peruse the record prepared for the inquiry done by first respondent's Board to check its accuracy and reliability, it being part of the basis upon which first respondent made the aforesaid recommendation and application" (my emphasis).

The applicant's complaints about not being furnished with a record of the proceedings of the two investigative meetings were recorded by the applicant on 16 December 1996, being the date on which he signed his founding affidavit.

In response, in para 6 of his opposing affidavit, which was signed by him on 19 December 1996, the Corporation Chairman states as follows:

"There is no verbatim report of the hearing, and as such there is no 'record'. In any event, the applicant has in his possession all the documents which the Board relied upon in order to arrive at its recommendation to the second respondent. Members of the first respondent Board took notes of the applicant's responses and were therefore able to apply their minds rationally and objectively to the matter at hand. A compilation of the relevant documents and a summary of the oral responses is in the process of being finalized and I hereby seek leave of the Court to file this document as soon as it is ready and in any event before the hearing of this matter. In seeking this authority, I recognize that the applicant may need to file his response, if any, thereto" (my emphasis).

In his answering affidavit, which he signed on 9 January 1997:

(a) The applicant states in para 2.4:

"*However, of concern to me is the fact that the minutes of the inquiry are not yet ready*. As stated in my Founding Affidavit, without the minutes, there is no way I could tell whether all the issues raised in support of my defence have been covered and considered. Much more importantly, without the minutes and first respondent's findings, I am denied the opportunity to evaluate the first respondent's reasoning leading to the conclusion it made. There is no way in which I can tell whether first respondent applied its mind to all the relevant issues raised and the evidence led at the hearing" (my emphasis).

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(b) The applicant states in para 2.6.2:

"Mr Zamchiya refers to what he terms ' ... totality of evidence'. I have no details of what this adds up to. I have not been given copies of the minutes, first respondent's findings and the reasons for the findings or to prove whether or not the minutes are a correct record of what was said and whether or not first respondent applied its mind to the issues raised at the inquiry" (my emphasis).

(c) The applicant states in para 2.7.6:

"I was not furnished with all the evidence at the hearing as alleged. I took issue with Mr Zamchiya's persistent refusal to give me access to the documents at the commencement of the hearing. The minutes should bear me out ... The first respondent's Corporation Secretary, Mr Rambayi Chingwena sat through the hearing taking copious notes of what was said. At some stage during the hearing, minutes of the early stages of the inquiry were made available to the Board members and not to me and my legal practitioner. I protested but to no avail. So, there should be a record for the hearing prepared by Mr Chingwena. It is not correct that members of the first respondent's Board took notes of what was said at the hearing. I know of one Board member who came half way through the first sitting and who did not attend the second sitting. I know of yet another Board member who came half way through the second sitting. Accordingly to say that all Board members took notes during the hearing is far from being true" (my emphasis)

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(d) The applicant states in para 2.7.7:

> "I note, with dismay (and it is the dismay of many Zimbabweans) that it has taken first respondent's Board in excess of four (4) months to prepare simple minutes for no more than 10 hours hearing. One would ask the reason why. True, I welcome Mr Zamchiya's offer to file the minutes as and when ready. I will of course seek this Honourable Court's leave to comment on their reliability and accuracy."

In the light of the statement of the Corporation Chairman in the final paragraph of para 6 of his opposing affidavit, signed on 19 December 1996, that a "compilation of the relevant documents and a summary of the oral responses is in the process of being finalised and I hereby seek leave of the

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Court to file this document as soon as it is ready and in any event before the hearing of this matter", I inquired of the Corporation's counsel, Mr de Bourbon, at the hearing, about the production of the minutes of the two investigative meetings ("the investigative minutes"). Mr de Bourbon handed in copies of the minutes of the two investigative meetings which he advised had been received by him from his instructing legal practitioner under cover of a letter dated 24 March 1997. Mr de Bourbon later apologized for the fact that the investigative minutes had not been filed of record.

Mr Andersen, who appeared as counsel for the applicant, informed the court that he had no objection to the court's looking at the investigative minutes, on the understanding that their accuracy was not admitted by the applicant.

It is to be noted that it is recorded in the investigative minutes of the Board's meeting held on 18 September 1996 that:

(i) the applicant "made a request that he be availed [of] a copy of the minutes of the hearing" and that the Chairman "agreed that the General Manager be availed [of] the minutes in due course";

(ii) after the applicant and his legal representative had left the meeting, the "Chairman advised that the record of the minutes of the proceedings be produced as quickly as possible at the latest by close of business the 19th September, 1996"; and

(iii) it "was resolved that the Board would resume its hearing as soon as the record was on paper".

It is to be further noted that the following statement is recorded at p 1 of the investigative minutes of the Board's meeting held on 16 October 1996:

> "The Chairman advised that Mr Muringi had phoned asking for minutes of the hearing. The Chairman advised that since the hearing was continuing, there were no minutes but notes as minutes would be availed (*sic*) after the hearing had been concluded."

In the light of the background as particularised above and of the investigative minutes, the court

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would observe as follows:

1. While, apart from the applicant, five members of the Board are recorded as having attended the investigative meeting of the Board held

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on 18 September 1996, only three members (being the Corporation Chairman, Mrs J Blanchfield and Mrs R Kupara) are recorded as having attended the second investigative meeting of the Board held on 16 October 1996, the one absent member, Mr TAG Sithole, being out of the country at that time.

I pause here to query on what basis the minutes of the special Board meeting held on 16 May 1996 (when the Board resolved that the applicant be asked to go on leave for four weeks with effect from 20 May 1996 to 16 June 1996 to facilitate investigations into allegations of mismanagement on his part) reflect that the meeting "was attended by all Board members", seven persons then being named, when s 5(1) of the Corporation Act expressly provides that the Board shall consist of six members, inclusive of the Board Chairman and the general manager.

If the seventh member attending the meeting was an alternate to an appointed member, then it should be noted that s 5(3)(a) of the Corporation Act provides that an alternate member "shall act as a member only when a member to whom he is alternate is unable to exercise his functions on the Board by reason of illness, absence from Zimbabwe or other cause".

2. Apart from the Corporation Chairman, the only members of the Board who, according to the investigative minutes, put questions to the applicant were Mrs Blanchfield and Mrs Kupara, who did so at the first investigative meeting of the Board held on 18 September 1996.

   Mrs Blanchfield "sought to know whether the $7 million for expenditure on refurbishing (the canteen) had been placed in the budget as a capital expenditure item or as a recurrent expenditure item and whether such an item had been brought to the Board for approval".

   Mrs Kupara wished to know "whether the expenditure of $7 million was meant to construct a new building or whether it was meant for something different on the canteen".

3. The Board Chairman was at fault in failing to ensure that the Corporation Secretary, Mr Chingwena, had prepared, completed and circulated to members of the Board and to the applicant the investigative minutes of the Board meeting held on 18 September 1996 in advance of the second

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investigative meeting of the Board held on 16 October 1996, the more so in view of -

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(a) the Corporation Chairman's agreement to furnish the applicant with a copy of those minutes;

(b) his direction that the minutes be produced "at the latest by close of business the 19th September 1996"; and

(c) the resolution "that the Board would resume its hearing as soon as the record was on paper". Accordingly, the reply given by the Corporation Chairman at the beginning of the second investigative meeting of the Board held on 16 October 1996 with regard to a telephonic request from the applicant for a copy of the minutes, that "since the hearing was continuing, there were no minutes but notes as minutes would be availed (*sic*) after the hearing had been concluded", was both a contradictory and lame explanation for the absence of the minutes of the previous investigative meeting held on 18 September 1996.

4. For the Corporation Chairman to have allowed a situation to continue after the holding of the second investigative meeting of the Board on 16 October 1996, to the extent that the minutes had not been prepared and completed and, therefore, could not be submitted with his application to the Labour Minister on 6 December 1996 when he applied for the Labour Minister's approval to terminate the applicant's contract of employment on notice in terms of s 2(2) of SI 371 of 1985, was highly irresponsible and irregular.

5. Furthermore, as a legal practitioner, the Corporation Chairman should have fully appreciated the fundamental importance of submitting the investigative minutes to the Labour Minister.

6. The Corporation Chairman's conduct in submitting the investigative minutes, through his counsel, to the court on the day of the hearing, without so much as a covering affidavit from him identifying the minutes and explaining the reasons for the Corporation's inordinate delay of over five months in having prepared the minutes and submitted them to the Court, smacks of a surprisingly casual and nonchalant attitude by the Corporation Chairman to this matter.

7. Given the circumstances under which the investigative minutes were

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produced and that the accuracy of the minutes has not been admitted by the applicant, it would not be proper for the court to place any significant reliance on them to the detriment of the applicant, quite apart from the fact that, in the absence of any explanation from the Corporation Chairman as to whether the investigative minutes have been confirmed by the Board and, if they have, when this was done, the court notes that its copy of the minutes of the Board meeting held on 18 September 1996 has not been signed but only initialled at the foot of each page by the Corporation Secretary and that its copy of the minutes of the Board meeting held on 16 October 1996 were ostensibly signed by the Corporation Chairman and the Corporation Secretary at Harare Airport in November 1996 when, on his

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own admission, the minutes of that meeting had not been prepared and completed then.

It is not understood on what basis the Corporation Chairman, when advising the applicant about the hearing in the penultimate paragraph of his letter to the applicant the day before the first investigative meeting held on 18 September 1996, stated that the "hearing, therefore, is the forum at which you will be afforded the opportunity to make any representations which the Board will consider before making its recommendations to the Minister (that is to say, the Transport Minister) in terms of the Act" (my emphasis).

Nor is it understood on what basis the Board Chairman stated in his opposing affidavit that the Corporation "made a recommendation to the second respondent (the Transport Minister) in compliance with the provisions of the Air Zimbabwe Corporation Act and having received the approval of the second respondent, it made the proper and correct application to the third respondent (the Labour Minister)" (my emphasis).

Although, under s 20(1) of the Corporation Act, the Corporation has to obtain the Transport Minister's approval of the appointment of a general manager, the Corporation is not legally obliged to obtain the Transport Minister's approval where it is desired to terminate a general manager's appointment.

Accordingly, there was no legal necessity for the Corporation to have approached the Transport Minister for his approval of the termination of the applicant's contract of employment. However, I agree with Mr de Bourbon's comment that, as a matter of political reality, it was only to be expected that the Corporation, as a parastatal owned by Government, would refer to the Transport Minister and seek his approval of the termination of the applicant's contract of employment and that the Transport Minister, in turn, would take

up the matter with the President and the Cabinet. Nevertheless, the legal reality, being, of course, the sole point of concern to the court, is that the Corporation was obliged to apply only to the Labour Minister, in terms of s 2(2) of SI 371 of 1985, for her approval of the termination of the applicant's contract of employment upon due notice given to him.

Mr Andersen readily conceded this point, as confirmed by the discerning manner in which this was the first point addressed by him in his heads of argument.

It follows that of the relief claimed by the applicant in his draft order (of which, I would hasten to add, Mr Andersen was not the author), the first two claims, being, firstly, that the first respondent's recommendation to the second respondent for the termination of the applicant's contract of employment be set aside and, secondly, that the second respondent's approval of the said recommendation be set aside, are ill-founded and irrelevant. The third claim that the first respondent's application to the third respondent for authority to terminate the applicant's contract of employment be set aside is misconceived and an inappropriate claim to make.

Accordingly, the first issue to be addressed is whether the requirements of natural justice apply when the Labour Minister is called upon to give her approval to the giving of notice to an

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employee in terms of s 2(2) of SI 371 of 1985.

Mr Andersen contended that the rules of natural justice did apply to s 2(2) of SI 371 of 1985. Mr de Bourbon did not dispute this in the light of the case of *Holland \& Ors v Minister of the Public Service\, Labour and Social Welfare* 1997 (1) ZLR 186 (S) ("Holland's case"). He properly conceded that an employee whose contract was to be terminated had a right to be protected by the rules of natural justice and to be given an opportunity to deal with the allegations against him. See Administrator, Transvaal & Ors v Zenzile & Ors 1991 (1) SA 21 (A) and Administrator, Natal & Anor v Sibiya & Anor 1992 (4) SA 532 (A).

On her side, Miss Dondo, who appeared for the Transport and Labour Ministers, contended that the Labour Minister had simply to ensure that the employer had acted fairly in arriving at his recommendation for the employee's dismissal and that it was not contemplated by s 2(2) of SI 371 of 1985 that the Labour Minister should hold a further inquiry, it being sufficient for the Minister to make a decision on the basis of the documents before her.

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There is no doubt, in my mind, that the requirements of natural justice apply to s 2(2) of SI 371 of 1985 and that, consequently, in dealing with an application under s 2(2) it is incumbent upon the Labour Minister to carry out an independent and impartial inquiry, to conduct a proper inquiry by giving notice to the employee of the grounds upon which the employer's application to her is based and by affording the employee the opportunity to make representations to the Minister in response to the application. See Holland's case.

In that case, Gubbay CJ stated as follows:

> "At the very least, there are three fundamental requirements of natural justice to which a person directly affected by an impending inquiry is entitled: The first is the right to have notice of the charge or complaint. The second is the right to be heard - to be given the opportunity to adequately state a case in answer to that charge or complaint. And the third, mentioned expressly in s 18(9) (of the Constitution of Zimbabwe), is the right to an impartial hearing. See Kanda v Government of the Federation of Malaya [1962] AC 322 (PC) at 337 *per* Lord Denning; Baxter Administrative Law at 543-544; de Smith's Judicial Review of Administrative Action 4 ed at 196."

More pertinently, Gubbay CJ highlighted the following point:

> "It is settled law that where a statute empowers a public official or body to give a decision which will prejudicially affect an individual in his liberty, property or existing rights, the right to a fair hearing is to be given effect to unless the statute expressly or by implication indicates the contrary. See Winter & Ors v Administrator-in-Executive Committee & Anor 1973 (1) SA 873 (A) at 889B-C; Administrator, Transvaal, & Ors v Traub & Ors 1989 (4) SA 731 (A) at 748G-H; Administrator, Transvaal, & Ors v Zenzile & Ors 1991 (1) SA 21(A) at 34H-35B; Transvaal Agricultural Union v Minister of Land Affairs & Anor 1996 (12) BCLR 1573 (CC) at paras 24-25."

In Holland's case the Supreme Court held that s 21 of the Private Voluntary Organisations Act [Chapter 17:05], in excluding by necessary implication the principle of the right to be heard, contravened s 18(9) of the Constitution of Zimbabwe, which provides in apposite part as follows:

> "Every person is entitled to be afforded a fair hearing, within a reasonable

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> time, by an independent and impartial adjudicating authority established by law, in the determination of the existence or extent of his civil rights and obligations."

The Court therefore ordered that s 21 of the Private Voluntary Organisations Act be struck down.

On a person's right to be heard, see also *Health Professions Council v McGown* 1994 (2) ZLR 329 (S) at 333-4A-D.

On the question of what represents a fair hearing, Gubbay CJ had this to say in Holland's case:

> "Next to consider is what constitutes a 'fair hearing'. Procedural fairness is, of course, an ambiguous concept. It varies according to context. Its breadth must be determined from the specific nature of the proceedings or inquiry in question. This emerges clearly from these oft-quoted remarks of Tucker LJ in Russell v Duke of Norfolk [1949] 1 All ER 109 (CA) at 118E:
>
> > 'The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'
>
> These words have been approved by South African courts. See, for instance, Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 646H; de la Rouviere v SA Medical & Dental Council 1977 (1) SA 85 (N) at 98G-H. And by Adam J in the Marumahoko case *supra* at 44E."

In the circumstances of the present case, I agree that the Labour Minister was not required to hold a full hearing in the presence of the applicant and that all she had to do was to give the applicant an opportunity to make written representations to her after he had been afforded sight of all the documents placed before the Labour Minister by the Corporation. See McGown's case *supra* at 333B.

Accordingly, I now proceed to consider whether the Labour Minister observed the requirements of natural justice in approving the termination, on notice, of the applicant's contract of employment in terms of s 2(2) of SI 371 of 1985.

It is Mr Andersen's contention that, in giving her approval, the Labour

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Minister breached the rules of natural justice, in that she failed to conduct an independent inquiry and to comply with the audi alteram partem rule by not affording the applicant an opportunity of making representations to her on the documents submitted to her by the Corporation and that, in any event, since there was a real danger of bias on her part on the ground that she had been a party to the Cabinet decision approving the termination of the applicant's contract of employment, she was disqualified to deal with the matter.

In the Corporation's heads of argument, it was submitted that up to the stage when the Labour Minister gave her approval for the termination on notice of the applicant's contract of

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employment, the applicant had had every conceivable opportunity, including the assistance of his legal practitioner, to deal with the matter.

However, at the hearing Mr de Bourbon said that he did not intend to argue the Labour Minister's case in that regard and astutely concentrated his argument on the matter of the applicant's claim for an order for his reinstatement in the event of the court's finding that the process leading to the termination on notice of the applicant's contract of employment was in some way flawed.

Miss Dondo, on her part, conceded that the rules of natural justice had not been fully complied with if the Labour Minister had not furnished the applicant with copies of all the documentary evidence submitted by the Corporation to the Labour Minister in support of the Corporation's application under s 2(2) of SI 371 of 1985.

I now turn to determine whether, on the facts before the court, the principles of natural justice were duly followed when the Labour Minister gave her approval in terms of s 2(2) of SI 371 of 1985.

1. In the first place, it is significant to note that in his letter to the Labour Minister dated 6 December 1996, the Corporation Chairman does not list or refer to the documentary evidence submitted in support of the Corporation's application for the Labour Minister's approval to terminate the applicant's contract of employment on notice.

   The letter does no more than mention the reports of the Parliamentary Committee on Parastatals, of the National Economic Conduct Inspectorate and of the Corporation's Board which it says were submitted to the Transport Minister and, through him, to Government.

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It is by no means clear what the Corporation Chairman meant when he referred to the report of the Corporation's Board or to "the report of the investigation by the board including its findings and recommendations" since, when he wrote to the Labour Minister, the investigative minutes had not yet been prepared and completed. One is left completely in the dark in this regard and also in regard to what documentary evidence was actually submitted by the Corporation Chairman to the Labour Minister, the more so when the Minister, in her letter to the Corporation Chairman dated 6 December 1996, talks about having "carefully examined the submissions and reports by the Parliamentary Committee on Parastatals, the National Economic Conduct Inspectorate, the Board of the Airline and Muringi's replies to the reports".

What "submissions" or "replies" by the applicant "to the reports" is the Labour Minister referring to?

Indeed, looking at the Corporation Chairman's letter to the Labour Minister dated 6 December 1996 on its own, without reference to the Labour Minister's letter to the Corporation Chairman of the same date, it would appear that no documentary evidence

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was submitted with that letter.

2. In any event, whatever documentary evidence was before her, it was the duty of the Labour Minister, before she considered the application from the Corporation, both to have furnished the applicant with copies of that dcumentary evidence (see Minerals Marketing Corp v Mazvimavi 1995 (2) ZLR 353 (S) at 358D-E), and to have invited the applicant and allowed him to make written representations in response to the evidence before her, which she failed to do.

3. The investigative minutes were obviously material to the inquiry conducted by the Labour Minister under s 2(2) of SI 371 of 1985. As we have seen, though, those minutes had not yet been prepared and completed by the Corporation Secretary when the Corporation made its application to the Labour Minister on 6 December 1996. It would thus not have been possible for the Labour Minister, even if she had supplied the applicant with copies of the documentary evidence, to have included copies of the investigative minutes.

4. Finally, it would appear from the wording of the Labour Minister's letter to the Corporation Chairman dated 6 December 1996, that when

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considering whether it was "necessary, for economic or other reasons", to approve the termination of the applicant's contract of employment on notice, the Labour Minister failed to look at "the relative interests" of both the Corporation and the applicant and considered only the interests of the Corporation (my emphasis).

In the light of these facts, it is easily understood why, in the applicant's heads of argument, Mr Andersen should have submitted that "the application to the Labour Minister on 6 December 1996 and her disposal of it on the same day in no way complied with the requirements of fairness and constituted a procedural mockery carried out for the purposes of form only".

The applicant has further raised the allegation of bias against the Labour Minister on the ground that she was disqualified to deal with the Corporation's application to her under s 2(2) of SI 371 of 1985 because of her prior participation in the Cabinet decision that the applicant's contract of employment be terminated.

Although it is clear that the Labour Minister has breached the requirements of natural justice by failing to provide the applicant with the documentary evidence which has a bearing upon the Corporation's application and to invite and allow him to make written representations to her in response to that evidence and that, therefore, her decision approving the termination of the applicant's contract of employment on notice must be set aside on that account, I find it necessary also to address the accusation of bias against the Labour Minister.

The reason I find this necessary is in case, with the setting aside of the Labour Minister's decision, the Corporation should choose to persist in its application to the Labour Minister for her approval of the termination of the applicant's contract of employment on notice under s 2(2)

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of SI 371 of 1985.

In Bailey v Health Professions Council 1993 (2) ZLR 17 (S) at 22F, the Supreme Court held that the test for bias is whether there is a real danger of bias, in the sense of a real possibility rather than a real probability of bias.

In so holding, McNally JA relied on the case of R v Gough [1993] 2 All ER 724 (HL), a decision to which Mr de Bourbon referred the Supreme Court, stating at 22D-F:

> "In that matter, the test for bias was set out with persuasive clarity in the

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> speech of Lord Goff at pp 737-738. I do not propose to set out the whole of the relevant passage beginning at the letter 'g' on p 737. It is enough to set out his concluding words at the foot of that page:
>
> > 'Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.'
>
> He stressed that by 'real danger' he meant a real possibility rather than a real probability of bias."

In *Leopard Rock Hotel Co \(Pvt\) Ltd \& Anor v Walenn Construction \(Pvt\) Ltd* 1994 (1) ZLR 255 (S) the Supreme Court held that the test as to whether the person concerned was disqualified to act on the ground of bias was an objective one. In this respect, Korsah JA stated at 275A:

> "A common theme which runs through the authorities is, therefore, that the test to be applied is an objective one. One does not enquire into the mind of the person challenged to determine whether or not he was or would be actually biased. Thus the character, professionalism, experience or ability as to make it unlikely despite the existence of circumstances suggesting a possibility of bias arising out of some conflict of interest, that he would yield to infamy, do not fall for consideration."

At 275G Korsah JA referred to the conclusion reached by Clayden J (as he then was), after a careful perusal of relevant cases, in Appel v Leo & Anor 1947 (4) SA 766 (W) at 774, that "the test to be applied is an objective test, the possibility in fact of bias", and not actual bias.

In referring to the question of "whether, in determining the possibility of bias, one does so from the point of view of the court seized of the challenge or in the eyes of the reasonable litigant", Korsah JA concluded thus at 276H & 277A:

> "This difference, however, as Lord Goff himself points out immediately after, should not be productive of incongruity:
>
> > 'Since, however, the court investigates the actual circumstances,

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> > knowledge of such circumstances as are found by the court must be imputed to the reasonable man; and

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> in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed and the impression derived by the court, here personifying the reasonable man'."

On the facts of this case, I am firmly of the view that in having been a member of the Cabinet which approved the termination of the applicant's contract of employment and in being bound, on the basis of collective responsibility, by the Cabinet decision, as indicated by the manner in which she seemed merely to rubber-stamp the Cabinet decision on the very same day that the Corporation's application was submitted to her on 6 December 1996, it is to be reasonably inferred that there was a real possibility of bias on the part of the Labour Minister when she approved the termination, on notice, of the applicant's contract of employment.

I therefore also find that the Labour Minister was disqualified to deal with the Corporation's application under s 2(2) of SI 371 of 1985 on the ground of bias and that, in the circumstances, the Minister should have delegated her power to approve the termination, on notice, of the applicant's contract of employment to an official in her Ministry in terms of s 5 of SI 371 of 1985.

Of course, there will be those who say that this would have made no difference since there was little, if no, chance of an official in the Labour Ministry flying in the face of the President and the Cabinet. However, that is to miss the legal point, which is that as long as the official is seen not to have breached the principles of natural justice in arriving at his decision, the courts cannot impugn the decision.

On the question of delegation, Mr Andersen argued that it would not have been competent for the Labour Minister to have delegated or, if her decision was set aside and the matter sent back to her, to delegate her power to an official in her Ministry since to have done so or to do so would be ultra vires the Labour Relations Act [Chapter 28:01].

However, in the absence of any provision in the Labour Relations Act to the contrary, it would seem to me that insofar as the Labour Minister is empowered under s 17(3)(q) and (r) of the Act to make regulations providing for "regulating and restricting the circumstances in which employers may suspend or terminate the employment of any of their employees" and "specifying or otherwise restricting the circumstances in which contracts of

employment may be terminated summarily or otherwise", there could have been no legal objection to the Minister's providing in s 2(1)(a) and (2) of SI 371 of 1985 that an official in the Labour Ministry, instead of the Minister, was to act. That being the case, it is my belief that the Labour Minister may, in terms of s 5 of SI 371 of 1985, delegate her power of approval under s 2(2) of SI 371 of 1985 to such official in her Ministry as she deems fit.

The effect of the court's ruling to set aside the Labour Minister's decision is to nullify the notice of termination given by the Corporation to the applicant or its offer to pay the applicant cash in lieu of notice and to restore the status quo ante, which therefore means that the applicant's contract of employment continues to subsist.

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At the hearing, Mr Andersen appeared to take the stand that if the court set aside the Labour Minister's decision so that the notice of termination given by the Corporation to the applicant or its offer to pay the applicant cash in lieu of notice did not constitute a lawful termination of the applicant's contract of employment, the remaining issue for the court's determination was whether the applicant was entitled to an order for his reinstatement or, failing his reinstatement, to damages, in which latter event Mr Andersen asked the court to refer the applicant's claim for damages to trial on the basis of the present papers.

On his part, Mr de Bourbon opposed the applicant's claim for an order of reinstatement and submitted that if the termination of the applicant's contract of employment was unlawful, the applicant could pursue a claim for such damages as he might be able to sustain. See *Winterton\, Holmes \& Hill v Paterson* 1995 (2) ZLR 68 (S) at 78C *per* Gubbay CJ.

At this point let me say that I agree entirely with Mr de Bourbon that there can be no question of this court referring any claim for damages which the applicant might have against the Corporation to trial on the basis of the present papers since the issue of damages has not even been raised, let alone pleaded in his papers by the applicant, who must therefore institute proceedings by way of action against the Corporation for any damages which he may be advised to claim.

It is not clear to me whether Mr de Bourbon intended to signal to the court that if the court sets aside the Labour Minister's decision approving the termination, on notice, of the applicant's contract of employment, the

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Corporation was not interested in persisting in its application under s 2(2) of SI 371 of 1985 and would treat the applicant's contract of employment as at an end, albeit unlawfully.

In the circumstances, I propose to approach the applicant's claim for reinstatement on the basis that my decision is not to be taken as pre-empting the Corporation's right, should it so choose, to persist in its application under s 2(2) of SI 371 of 1985 for approval to terminate the applicant's contract of employment on notice. In that event the Labour Minister would have to delegate her power to entertain the application to an official in her Ministry in terms of s 5 of SI 371 of 1985. The applicant, in the meantime, would remain on leave on full pay and enjoy the benefits to which he is entitled under his contract of employment, as has been the position since the Corporation's Board sent the applicant on leave, initially for four weeks, in May 1996 because of the tardy and inefficient manner in which the Corporation has handled the issue of the termination of the applicant's contract of employment.

In other words, my intention in dealing with the applicant's claim for reinstatement is to enable the parties to know exactly where they stand on this matter in the event of the Corporation's electing not to persist in its application for approval to terminate the applicant's contract of employment on notice under s 2(2), as read with s 5, of SI 371 of 1985.

In *Commercial Careers College \(1980\) \(Pvt\) Ltd v Jarvis* 1989 (1) ZLR 344 (S), the employer failed to obtain the necessary approval of the Labour Minister under s 2(2), as read with s

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2(1)(a), of SI 371 of 1985, to terminate the employee's contract of employment on notice. The result was that the employee's dismissal was held to be not only unlawful but, because the provisions of the legislation had not been complied with, a nullity. Gubbay JA (as he then was) stated at 349E:

> "I propose to adopt the approach that even where the unlawful dismissal relates to an employee whose tenure of employment is protected by legislation the court retains a discretion to consider whether it is appropriate to order reinstatement. I do so for two reasons.
>
> It is easy to conceive of a situation in which, albeit no blame whatsoever attaches to the employee, the inescapable inference is that the personal relationship between him and the employer has broken down to the extent that trust in one another has been lost. For a court to order reinstatement against such a backdrop of animosity and ill-will, solely

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> because an employee unreasonably and out of wounded pride seeks it,would be to permit the continuation of an intolerable personal relationship - one which would make it impossible for the employee to perform his duties either to his own satisfaction or to that of his employer.
>
> Secondly, although the law-giver deemed it necessary to protect the position of the ordinary employee, by enacting s 110(2) and 111(2)(e) of the Labour Relations Act 1985, it nevertheless reposed in the 'determining authority' a discretion to order reinstatement in contrast to an obligation to do so. It appears therefore, that the law-giver did not envisage that an unlawful dismissal from employment would necessarily give rise to an inalienable right to reinstatement."

In the light of the remarks of Gubbay JA and the decision of the Supreme Court in Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S) that the decision of the Supreme Court in *United Bottlers \(Pvt\) Ltd v Murwisi* 1995 (1) ZLR 246 (S) should no longer be regarded as correctly enunciating the law in relation to the reinstatement of employees, it is clear that this court retains a discretion as to whether to order the reinstatement of the applicant in the event of his employment being unlawfully terminated by the Corporation.

Mr Andersen sought an order for the applicant's reinstatement on the ground that the relationship between the applicant and the Corporation had not soured to such an extent that reinstatement was not appropriate, echoing, to opposite effect, the words of Korsah JA in Hama's case, *supra*, at p 676.

It was Mr de Bourbon's contention that the relationship between a parastatal and its general manager was of vital concern to the proper functioning of the Corporation and to order the reinstatement of the applicant would not be appropriate in view of the Corporation's belief that the applicant was no longer suitable to lead the national airline as its general manager.

I do not find it necessary to refer to the areas of concern to the Corporation's Board and the applicant's response to them in order to determine the issue of reinstatement before me. Suffice it to say that on the papers, it is not difficult to understand the reasons why, on their side, the Government, which owns the Corporation and controls it through the Corporation's Board, and the Corporation's Board have lost confidence and trust in the applicant and no longer regard him as suited to head and manage the national airline as its general manager.

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In these circumstances it would be, in my view, wholly inappropriate to order the applicant's reinstatement as the Corporation's general manager. To adapt the words of Gubbay CJ in Paterson's case, *supra* at 77A-B, I have not the slightest doubt that the Corporation and the applicant are totally incompatible and that there is no prospect whatsoever of their being able to work in harmony. To thrust the applicant back at the Corporation would be sheer folly.

Consequently, the applicant's claim for an order reinstating him as the Corporation's general manager cannot succeed.

Finally, I address the issue of costs.

Mr de Bourbon submitted that as the Corporation had dealt with this matter in a full and proper way, it should not be visited with an order for costs.

On the other hand, Mr Andersen, while confirming that the applicant was not persisting in his claim for costs on the higher scale, contended that the Corporation should not be allowed to escape an order for costs since it had supported the Labour Minister's decision and had joined issue with the applicant thereon, having asked for the applicant's claim for the Minister's decision to be set aside to be dismissed with costs.

Since none of the respondents has dealt in the papers with the merits of the applicant's claim for an order for his reinstatement, confining themselves solely to opposing the applicant's claim for the Labour Minister's decision to be set aside, a claim on which the applicant has succeeded, I can see no reason for not awarding costs against all three respondents jointly and severally.

In the result it is ordered as follows:

1. That the third respondent's decision approving the termination, on notice, of the applicant's contract of employment with the first respondent under s 2(2) of SI 371 of 1985 be and is hereby set aside.

2. That in the event of the first respondent's electing not to persist in its application for approval to terminate the applicant's contract of employment with the first respondent on notice under s 2(2), as read with s 5 of SI 371 of 1985, the applicant's claim for an order for his

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reinstatement by the first respondent as its general manager be and is hereby dismissed.

3. That the applicant's costs shall be paid by the respondents jointly and severally, the one paying the others to be absolved.

Kantor & Immerman, applicant's legal practitioners

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Rainor Robinson, first respondent's legal practitioner

Civil Division of the Attorney General's Office, second and third respondents' legal practitioners

AITKEN v ZIMBABWE NEWSPAPERS (1980) (PVT) LTD 1997 (1) ZLR 383 (HC)

Court **High Court, Harare**

Blackie J

Civil action

13 November 1995 & 16 April 1997 Judgment No. HH-65-97

Flynote

Delict - actio injuriarum - defamation - defamatory nature - newspaper wrongly reporting that lawyer had been charged with stealing money from trust account whereas he had been charged with money laundering and illegal dealing in foreign currency - whether defamatory

Damages - amount - actio injuriarum - defamation - legal practitioner - incorrect report of criminal charges having been brought against legal practitioner

Headnote

The plaintiff, a legal practitioner, was indicted in the High Court on 7 charges under the exchange control legislation. 1(13) In reporting this case, a newspaper owned by the defendant erroneously reported that the plaintiff was facing charges involving "the siphoning off" of a large amount of money from his firm's trust funds. The plaintiff sued the defendant company for damages for defamation.

Held, that ordinary readers would have read the words "siphoning off" of trust funds to mean that the plaintiff had stolen the money from client trust funds or had defrauded clients of their money being held in the trust account. Such an allegation against a lawyer is highly defamatory as the practice of law requires professional honesty and integrity and theft of client's funds would entail a gross breach of the trust placed in the lawyer by the client.

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Held, further, that nonetheless the fact was that the plaintiff was facing serious criminal charges which had received considerable publicity and this would have taken its toll on the plaintiff's personal and professional integrity.

Held, further, that in all the circumstances an appropriate award was $14 000.

Case Information

A P de Bourbon SC, for the plaintiff

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L T Biti, for the respondent

Judgment

Blackie J: The plaintiff, at the relevant time, was a registered legal practitioner. The defendant is the owner and publisher of The Herald newspaper.

In April 1992, the plaintiff and another man appeared in the magistrates court charged with contravening the Exchange Control Act and regulations and the Serious Offences (Confiscation of Profits) Act. The Herald reported that "allegations of laundering at least $17 million, suspected to be part of tainted money earned as a result of shady foreign exchange deals (were) being levelled against Aitken ..." Thereafter, and until August 1992, The Herald reported the plaintiff's many remands and various applications and appeals in respect of bail. These reports always stated that the charges against the men related to money laundering and illegal dealing in foreign currency. Between August 1992 and July 1993 there were no reports in The Herald on the plaintiff or the charges against him. Then, on 2 July 1993, The Herald carried the headline "Aitken indicted to the High Court for trial". Under that headline the paper stated:

> "David William Aitken, the Harare Lawyer, facing allegations of syphoning off about $17 million from his trust funds, was yesterday indicted to the High Court for trial. Aitken was indicted out of custody to appear in the High Court on September 13, facing seven counts of contravening a section of the Exchange Control Act as read with a section of the Exchange Control Regulations ..."

The plaintiff's legal practitioners wrote to the editor of The Herald that same day stating that the words in the first paragraph "allegations of syphoning off $17 million from his trust account" were "grossly incorrect and, in fact, gives (*sic*) a slant to the allegations that he has been fraudulently or dishonestly removing trust money (ie money held on behalf of third parties) for his own use. The allegation clearly implies theft of the moneys in question." The letter went on to state that it had never been alleged by the State or any other person

that the plaintiff had been syphoning off any money from his trust account. The letter demanded of the editor that The Herald publish, on the front page of its edition for 3 July, "a correction to make it perfectly clear that there was an error in your report and that at no stage has it ever been alleged that [the plaintiff] has ever syphoned any money from his trust account and that this allegation was not made in the proceedings when [the plaintiff] was indictedfor trial. [The] report should also make it clear that there has [n]ever been any money missing from [the plaintiff's] trust account.

The next day, 3 July, The Herald published a front page article headed "No theft charges against Aitken". The article, inter alia, then stated:

> "Harare lawyer, David William Aitken, has been indicted to the High Court for trial on seven counts of contravening a section of the Exchange Control Act as read with a section of the Exchange Control Regulations. In yesterday's edition, we published that Aitken was facing allegations of siphoning off about $17 million from his trust funds. The impression that may have been created is that he has been fraudulently or dishonestly removing trust fund money held on behalf of third parties for his own use. In fact, the State has not preferred any theft charges against him but had told the court on initial remand that he laundered millions of dollars through his trust account. From the

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new charges he will face in the High Court, it seems the State is no longer pursuing the laundering allegations."

In this action, the plaintiff claims damages from the defendant for the defamation against him that he says is contained in the words "siphoning off ... from his trust account". Those words, says the plaintiff, mean and would have been understood to mean by readers of The Herald that the plaintiff was dishonest and was to be tried on an allegation that he had stolen $17 million from his trust account.

The defendant admits publication of the words but denies they are defamatory of the plaintiff *per* se or when read in the context of the article as a whole and the previous reports on the charges and proceedings against the plaintiff. It pleads in the alternative (in the event of the words being found to be defamatory) that the words published represent a fair and reasonable report of what took place in the magistrates court in relation to charges against the plaintiff in that court and that they were published in the exercise of a right to inform the public of court proceedings and the public had a corresponding right to be so informed.

BLACKIE J

The words "siphoning off" are colloquial English. I have no doubt that, in themselves, used in connection with an account, they ordinarily mean, and would be understood so to mean by the ordinary reader reading the article with reasonable care, but not undue precision, that it was alleged that there had been theft from or fraud, in relation to that account by the person named. Similarly, the whole sentence can only mean that the plaintiff was being indicted to the High Court on such allegations of theft or fraud. In fact, the plaintiff had never been charged with, and was not indicted to the High Court on, any charge of theft or fraud.

The defendant says, however, that the offending words and sentence must be read in the context of the previous reports which had appeared in The Herald concerning the proceedings against the plaintiff together with the whole of the report of 2 July. It points out that in all the previous reports on the plaintiff, the charges faced by him had been correctly set out and that these reports would have provided the background to and influenced the understanding of persons reading the article of 2 July. However, I do not think that those earlier reports help the defendant. Firstly, the charges are only referred to in very general terms. They are simply described as offences against the Exchange Control Act and regulations and the Serious Offences (Confiscation of Profits) Act. There is no indication as to the actual nature and substance of the charges, for example, whether any dishonesty or theft is involved in any of them. Secondly, and in any event, there is a break of almost a year between the last report of proeedings against the plaintiff and the report of 2 July 1993. The ordinary and reasonable reader of the article of the 2 July would not necessarily have had any knowledge or memory of the proceedings prior to that date.

In relation to the report of 2 July, the defendant says that the second paragraph of that report (which I have already quoted above) makes perfectly clear the nature of the charges for which the plaintiff has been indicted to the High Court, ie charges under the Exchange Control Act and regulations. Once again, I do not think that the second paragraph helps the defendant. The bald statement that the plaintiff faced charges under the Exchange Control Act and regulations

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in the second paragraph does not contradict the allegation of "siphoning off" in the first paragraph. The first paragraph of the article appears to provide substance of the charges, the second, the manner in which they were framed.

In the result, I am satisfied that the report of 2 July appeared to say that the plaintiff had been indicted to the High Court on charges of theft from his trust

account. It is common cause that that was not true. To say that a person is facing charges of theft or fraud when he is not is clearly defamatory.

The defendant's next defence is that its report was a fair and accurate report of what took place in the magistrates court. The defendant's reporter, who covered the proceedings and prepared the report to which the plaintiff objects, gave evidence for the defendant. He maintained that the expression to "siphon off" money from an account was synonymous or nearly synonymous with laundering money through that account. Unfortunately the expressions are not synonymous. They have completely different meanings and if used interchangeably are liable to give and did give an entirely wrong impression of the charges being faced by the plaintiff. It is clear from the evidence of the reporter that he made two mistakes: he did not fully understand the implications of the words he was using; and he saw the charges being levelled at the plaintiff as being part of a wider phenomenon, currently being reported by The Herald, of lawyers stealing from their trust accounts. The offences for which the plaintiff was indicted to the igh Court were indeed serious offences but there is difference, both in kind and in degree between those offences and that which I have found that the defendant said that the plaintiff was facing. In my view, the report as published was seriously inaccurate and was not fair.

I turn now to the question of damages.

The plaintiff was, at the time, a senior legal practitioner. He entered articles in 1972 and was admitted as a practitioner in 1976. Since that date he had been in private practice either on his own account or in partnership with others. His practice was large and successful.

The *Herald* is the only daily newspaper in Harare, where the plaintiff has practised. It is circulated throughout Zimbabwe. It has a wide general readership. The report was prominently displayed and must have been widely read.

To allege theft against any man is always a serious matter. An untrue allegation of theft is a very serious defamation. To make a general allegation of theft against a lawyer compounds the defamation because of the integrity and honesty demanded of a lawyer by the public and by his profession. An allegation of theft by a lawyer from his trust account, involving as it does the theft of money held for others and the concurrent abuse of the trust placed in the lawyer by his client and the commercial system which relies on that trust,

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BLACKIE J

further compounds the defamation. The report of siphoning off was thus highly defamatory. The potential damage to the plaintiff's reputation as a lawyer and as a person must have been very great.

Nevertheless, there are certain other factors which must be also taken into account. The plaintiff was at that time facing a number of serious criminal charges. The charges and the proceedings in connection with them had received much publicity. These would obviously have taken a toll on the plaintiff's personal and professional status by 1 July 1993.

Further, the plaintiff demanded that the impression created by the article of 2 July be corrected in the next edition of The Herald in a front page article. There was such an article. The headline of that article is clear enough. The body of the article makes no admission of error and gives no apology but it does correct the impression created by the article of the day before.

I have been referred to a number of cases concerning awards for damages and, in arriving at my decision in this matter I have taken those cases into account, together with the declining value of money. In my view, the two factors which I have mentioned in the last paragraph distinguish this case from the bulk of cases to which I have been referred. I have come to the conclusion that the appropriate award in this case is $14 000, together with interest thereon at the prescribed rate from the date of the defamation together with costs of suit and I order accordingly.

Atherstone & Cook, plaintiff's legal practitioners

Honey & Blanckenberg, defendant's legal practitioners

S v FAKU & ANOR 1997 (1) ZLR 389 (HC)

Court **High Court, Harare**

Chidyausiku J

Criminal review

16 April 1997 Judgment No. HH-64-97

Flynote

Criminal procedure (sentence) - multiple counts - corporal punishment - imposed in respect of more than one count - whether concurrent sentences of corporal punishment can be passed - counts treated as one for sentence - treating counts as one for sentence for one kind of sentence but separately for another not proper - suspended sentence - sentence being ordered to run consecutively with sentence imposed in another case - not competent

Headnote

The accused juveniles were convicted of two counts of housebreaking. They were both sentenced to corporal punishment and, in addition, to a separate sentence of one year's

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imprisonment in respect of each count, suspended on conditions. One of the accused had immediately before this trial been tried separately on five counts of housebreaking, for which he had been sentenced to corporal punishment and to one year's imprisonment on each count. The prison sentences were wholly suspended on conditions. The magistrate's method of dealing with this situation was to order that the corporal punishment in the later case would run concurrently with that imposed in the earlier one, and that the suspended sentences would run consecutively.

Held, that it was not competent to order sentences of corporal punishment run concurrently. Corporal punishment does not run at all. It is received.

Held, further, that it was irregular to treat the counts as one for sentence, for the purpose of imposing corporal punishment, but treat them separately, for the purpose of imposing a custodial sentence. The magistrate should

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either have treated each count individually for sentence or have treated them jointly for sentence. A hybrid approach was not permissible.

Held, further, that it was irregular to order that the suspended sentence in the later case should run consecutively to that imposed in the earlier case. This could have meant that the accused had a 7-year sentence hanging over him. In addition, it would tie the hands of a future trial court, which might not want to bring both sentences into effect.

Held, further, that the accused should have been tried separately, rather than jointly for some counts and separately for others.

Case cited:

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

The court referred to the following statutory provisions:

Criminal Procedure and Evidence Act [Chapter 9:07], s 353

Judgment

Chidyausiku J: The two accused in this case were charged with two counts of housebreaking with intent to steal and theft. Both accused pleaded guilty to the two counts. They were found guilty on both counts. The regional magistrate imposed a sentence that reads as follows:

> "Having said that, I wish to sentence you as follows:
>
> > "Each accused, you are sentenced to 6 cuts administered in private by a prison officer at Harare Remand Prison. In addition, count 1, 1 year's imprisonment with labour. Count 2, 1 year's imprisonment with labour wholly suspended for 5 years on condition accused does not, during that period, commit any offence involving dishonesty for which accused is sentenced to imprisonment without the option of a fine.'
> >
> > In the case of Tendai Elvis Faku, I have already sentenced you a few minutes ago to 6 cuts. Now if I give

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you another 6 cuts that will be 12 cuts and it will probably kill you. So your 6 cuts in this offence will run concurrently with CRB 1110/96, but your 5 years which I have suspended in CRB 1108 will run consecutively with 1110/96."

[Do] you understand? - Yes, your Worship."

I enquired of the trial regional magistrate:

(a) what authority she had for the proposition that she could treat two

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counts as one for the purpose of one type of sentence and treat the same counts separately for a different type of sentence;

(b) on what basis she considered it competent to make two sentences of cuts run concurrently;

(c) what was intended to be conveyed by making two suspended sentences run consecutively.

The following is the response I received from the regional magistrate.

"I thank you for the issues raised.

I stand corrected. If the issues raised are still relevant I have attached two records on the same child - those are my reasons for sentencing Tendai Faku the way I did. Perhaps with the two records put together the Honourable Judge will understand my sentence. Some of the offences committed by accused persons create the sort of misunderstanding raised by the Honourable Judge in R1100-1/96. Both records are now before you for any further comments."

With the greatest of respect the reply does not address the issues that I raised. However, what is apparent from the record of the proceedings in CRB 1110/96 is that the first accused, Faku, was in a separate trial charged with five separate counts of housebreaking with intent to steal and theft. He pleaded guilty and was found guilty. He was sentenced on the same day as the present proceedings, indeed a few minutes earlier. The proceedings were reviewed and confirmed by my brother Smith. The sentence imposed on Faku in those proceedings CRB 1110/96 reads as follows:

"6 cuts administered in private by a prison officer at Harare Remand Prison. In addition, count 1, 1 year's imprisonment with labour. Count 2, 1 year's imprisonment with labour. Count 3, 1 year's imprisonment with labour. Count 4, 1 year's imprisonment with labour. Count 5, 1 year's imprisonment with labour. And this is just because of your age that I have treated you in that fashion. The total 5 years' imprisonment with labour is wholly suspended for 5 years on condition accused does not, during that period, commit any offence involving dishonesty for which accused is sentenced to imprisonment without the option of a fine."

In my view, both sentences that is the sentence imposed on CRB 1110/96 and

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the sentence imposed in casu contain a number of irregularities. I will deal with each in turn.

The first irregularity in both sentences relates to the wording of the corporal punishment. In both sentences, the corporal punishment is wrongly worded. See *S v Butau* 1994 (1) ZLR 240 (H). That portion of the sentence should according to guidelines set out in Butau's case *supra* read as follows:

> "Each accused is to receive a moderate corporal punishment of 6 strokes with a rattan cane to be administered in private at Harare Remand Prison by a designated Prison Officer" (the emphasis is mine and its relevance relates to a point I will deal with next).

In brief, the wording of the sentence in regard to corporal punishment is wrong.

The second irregularity, apparent only in casu, is the making of two corporal punishments run concurrently. Section 343 of the Criminal Procedure and Evidence Act [Chapter 9:07] confers on a court authority to order that certain sentences shall run concurrently. Parliament, in my view, did not intend by the above provision to confer on the courts the power to do the absurd. Corporal punishment in the form of strokes does not run, let alone run concurrently. That is simply absurd. Strokes with a light cane are administered, inflicted or received. In Butau's case the word used is receive which I have emphasized. Indeed, the language of s 353 of Criminal Procedure and Evidence Act makes this point abundantly clear. The order making corporal punishment to run concurrently is not competent and will have to be deleted from the sentence. 1(14)

The third irregularity is apparent on both sentences. The trial regional magistrate treated multiple counts as one for the purpose of imposing corporal punishment and treated the same multiple counts separately for the purpose of imposing a custodial sentence. This she cannot do. When it comes to sentence the trial court has two options open to it. It should either treat each count separately for sentence or treat them jointly or together for the purpose of sentence. The two approaches should not be married to produce a hybrid approach as happened in this case.

The fourth irregularity is that the magistrate ordered that the suspended

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sentence in this case should run consecutively to the suspended sentence imposed in the other case CRB 1110/96. Thus, in the event of the accused breaching the condition of the suspension, he has to serve at least 7 years before starting to serve the sentence of the offence he will have been convicted. This is an inordinately long term of imprisonment to be hanging over a 16 year old boy. The accused has been sentenced in two separate trials and two separate sentences have been imposed. By ordering that the suspended sentences run consecutively the trial magistrate is tying the hands of the future trial court in as far as the suspended sentences are concerned. The order in effect binds the future court to impose both suspended sentences when it might only wish to bring into effect one of the present suspended sentences. Indeed, taking into account the length of the suspended terms in these two suspended sentences a future court is more ikely inclined to bring into effect one of these

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suspended sentences and not both in order to cushion the impact of the long suspended sentences hanging over the accused. The trial magistrate should not circumscribe the discretion of the future court in this regard.

I can appreciate the difficulty that the learned trial regional magistrate faced in sentencing the accused Faku. She should have imposed a lower sentence in the first case in order to give herself some leeway in the second case. Or, better still, the accused Faku should have been tried for all his counts in one trial ie charged with seven counts of housebreaking with intent to steal and theft instead of two separate trials of five counts and two counts. The other accused could have been tried separately on his two counts he committed with Faku. This approach would have made the sentencing easier. The above approaches could easily have been adopted because I notice from the record that the convictions were on the same date and the sentencing too took place within minutes of each other.

In the light of the above misdirections the sentence imposed by the trial court *a quo* is hereby set aside and the following sentence is substituted:

> Both counts are treated as one for sentence and the accused are sentenced as follows. Accused 1, Faku, is sentenced to 2 years' imprisonment with labour, all of which is suspended for 5 years on condition the accused does not during that period commit an offence involving dishonesty for which he is sentenced to a prison term in excess of one year without the option of a fine.
>
> Accused 2 Musarurwa is sentenced to receive moderate corporal

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> punishment of 6 strokes with a rattan cane to be administered in private at Harare Remand Prison by a designated Prison Officer. In addition, this accused is sentenced to 2 years' imprisonment with labour, all of which is suspended for 5 years on condition the accused does not during that period commit an offence involving dishonesty for which he is convicted and sentenced to a period of imprisonment without the option of a fine.

MUNGWIRA J agrees.

S v MUSINDO 1997 (1) ZLR 395 (HC)

Court **High Court, Harare**

Blackie J & Gillespie J

Criminal review

16 April 1997 Judgment No. HH-63-97

Flynote

> Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to trial within a reasonable time - lengthy delays in starting trial - unrepresented accused - entitled to look to court to ensure rights are not infringed - magistrate's failure to make adequate enquiries about lengthy delay - effect

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Court - judicial officers - duties - unrepresented accused - duty to ensure that accused's constitutional right to trial within reasonable time not infringed - duty to explain plea, accused's rights and other aspects of trial - explanation should be made by judicial officer himself, not by interpreter - integrity and impartiality - duty to maintain detached impartiality - undue tolerance for the prosecutor and unreasonable restriction of the accused

Criminal procedure - trial - conduct of - unrepresented accused - magistrate's duty towards - duty to explain plea, accused's rights and other aspects of trial - delegation of explanation to interpreter - effect - recording of explanation - what should be recorded - requirement for fair trial - court's duty to treat prosecutor and accused equally and even-handedly

Evidence - witness - examination - leading questions - reasons for avoiding - cross- examination - putting as fact a proposition without instructions or without having laid foundation in fact - desirability of refraining from such form of examination

1997 (1) ZLR p396

Headnote

The need for judicial officers to treat the prosecutor and unrepresented accused equally and even-handedly is so self-evident that it is dismaying to find that this requirement often needs restating. There are many pressures attendant upon the judicial function and many temptations to impatience and cynicism. Those who are charged with the burden of decision cannot always conceal their irritation with the incompetent or unprepared lawyer, with the idle submission or the ignoble stance. But judges and magistrates owe it to their own self-esteem; to the dignity of their office; to the credibility of the legal system; and most of all, to those who attend their judgment, to comport themselves in such a way as persuades all before them that a fair hearing was afforded and an honest and considered decision was handed down. Audience that is fairly given to both contending parties is most likely to result in a decision that not only commends itself as even-handed but is also just. An appearance of disfavour in the prceedings, conversely, is calculated to result in a decision which fails to command confidence and which is the more likely to be wrong.

The accused was charged with rape, the alleged offence having occurred almost 7 years before the trial began. The magistrate made little inquiry into the reasons for the delay, and the prosecutor offered little explanation. The accused, who was unrepresented, did not take the point about the delay. During the trial, the magistrate delegated his responsibilities of explaining the accused's rights and other aspects of the trial to the court interpreter. The interpreter's explanation was not recorded. During his examination of the complainant, the prosecutor put to her questions based on what the prosecutor assumed the defence would be.

When the accused indicated that he wanted to call a person who at been summoned as a State witness but not called by the State, the magistrate acted in so hectoring and minatory a fashion as to result in the accused failing to call the witness.

Held, that the delay in starting the trial was one that *prima facie* involved a breach of the accused's right to a fair trial within a reasonable time. While the accused took no point about the delay, he was unrepresented and entitled to look to the magistrate to ensure that his rights were not infringed by the machinery of the State. Just as the magistrate should take the initiative in protecting the accused from infractions of his rights, so too should the conscientious prosecutor

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be aware of any possible criticism which might be made of the State's conduct. He ought not to need formal notice to be given of an application concerning s 18 of the Constitution to be aware of any undue delay which might have occurred and to be in a position to give a reasonably considered explanation if

called on for one. In this case, the magistrate's inquiry and the prosecutor's explanation were brief and inadequate. A *prima facie* breach of the accused's constitutional rights was left unexplained and constituted an irregularit.

Held, further, that the accused's right to maintain his silence has been severely eroded by legislation. This inroad into the accused's age-old privilege can be justified only where there is the strictest of explanations to him of the extent of his rights and by the clearest of cautioning to him of the consequences of failure to give an explanation where an innocent person may be expected to do so. The only person who can ensure that the accused understands the choices open to him and the consequences of the choice he makes is the presiding officer. Where he abrogates his responsibility and leaves the function of explanation to an interpreter, a court on review cannot repose any confidence in that magistrate.

Held, further, that while an annotation in the record that the accused's rights were explained is usually accepted on the presumption that the judicial officer has discharged his function correctly, such a cursory assurance will count for nothing where there is reason to suppose that the explanation was inadequate or was not understood. Where the explanation does not come from the bench, however, there is no reason to accord any weight to the note. There is no warrant to infer that the explanation was heard by the magistrate and was acceptable. To delegate the responsibility to the interpreter was a gross irregularity.

Held, further, that credible and weighty evidence is evidence which is unprompted. That which has to be extracted by a form of verbal surgery is not particularly compelling. That which emerges only after a witness has been called upon to affirm or deny a proposition of fact not previously canvassed is almost valueless. The sort of examination the prosecutor had conducted should be avoided. Putting the defence is the function of the defence.

Held, further, that it is a salutary practice and properly professional for a legal practitioner to refrain in cross-examination from putting as a fact any proposition unless he has instructions to that effect or has laid a foundation in fact for drawing the conclusion which he put to the witness. Gratuitously to put the lie to a witness, when there is no basis upon which to contradict the witness, is misleading and unprofessional.

Held, further, that the occurrence of a miscarriage of justice could not be excluded and the proceedings should be quashed.

Cases cited:

S v Banga 1995 (2) ZLR 297 (S)

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BLACKIE J *et* GILLESPIE J

S v M & Ors 1975 (2) RLR 270 (A)

S v Mangezi 1985 (1) ZLR 272 (S)

R v Muchena 1966 RLR 731 (A)

S v Mutimhodyo 1973 (1) RLR 76 (A)

S v Ncube (2) 1989 (2) ZLR 232 (H)

S v Rall 1982 (1) SA 828 (A)

S v Tau 1997 (1) ZLR 93 (H)

Judgment

Blackie J et Gillespie J: This matter came before Gillespie J on automatic review from the decision of the Acting Regional Magistrate, Harare. It appeared to the learned judge on a perusal of the record that it was open to question whether the evidence were sufficient to sustain a conviction; there were in addition certain irregularities in procedure which might attract adverse comment. In view of the disquiet entertained, the papers were then placed before Blackie J for his views on the matter. The learned judge regarded the irregularities in procedure as potentially fatal, although the evidence was arguably sufficient. A synthesis of these two complementary views has led inevitably to the conclusion that these proceedings are afflicted by material irregularities of a nature which, when taken with the somewhat inconclusive weight of the evidence adduced, must be regarded as possibly having led to a miscarriage of justice.

The charge is one of rape. The allegation is that the accused, a member of the army, employed the complainant as a housemaid. At a time when the accused's wife was away from home, the accused duped the complainant to accompany him in a military vehicle under his control on the pretext that they were to clean a flat in town. Instead of completing any such chore, however, the accused drove to the outskirts of the city and on reaching a deserted country track he raped the complainant. The accused for his part presented a defence which was that he and the complainant had been carrying on an adulterous affair for some time. The liaison was known to the accused's wife, who had left home as a result. He admits driving with the complainant out of town and admits sexual intercourse with her on the date and at the place alleged, but claims that this was one of many consensual couplings between the two of them. He suggests that the motive for false incrimination was the belief by the complainant that the accused was abot to abandon her.

The first of the many causes for concern in the proceedings themselves is that the offence is alleged to have occurred on 14 November 1989. The trial, however, only commenced on 10 October 1996. This delay, in our judgment,

BLACKIE J *et* GILLESPIE J

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is one which *prima facie* involves a breach of the accused's right to a fair trial within a reasonable time. It is true that the accused took no point concerning the delay. One is aware of the decision of the Supreme Court in S v Banga 1995 (2) ZLR 297 (S) where it is stated that for the constitutional point concerning delay to be considered, there must be an assertion of the right within a reasonable time, and not an unexpected raising of the point at the last minute (at 301B-D); and that there must be evidence as to prejudice and the cause of the delay by the victim of that inaction (at 301E). Indeed, in that judgment the learned Chief Justice went so far as to suggest, without finding this to be the case, that notice ought to be given to the prosecutor prior to the taking of the point inorder that an investigation can be made by the State into the causes of delay.

All these points are, with respect, entirely uncontroversial when one is considering an application brought, as such applications invariably have been thus far, by a legal practitioner on behalf of his client. The decision of the Supreme Court in this matter (and in other similar matters) ought not, however, to be taken as imposing the same requirements on the ordinary unrepresented person who may be unaware of his rights and of decisions of the courts pertaining to the manner of enforcing them. Such a person is entitled to look to the magistrate to ensure that his rights are not infringed by the machinery of State. As Gillespie J observed recently in *S v Tau* 1997 (1) ZLR 93 (H) at 99F-100D:

> "The fact that [the accused] has not complained of his rights I cannot properly regard as constituting acquiescence in the wrong or waiver of his rights. The man was unrepresented. He is uneducated. He was entitled to rely upon the court to protect his rights and to ensure fair treatment of him. It was his privilege to expect that the magistrate would advise him of his rights and would scrupulously scrutinize the applications by the State for remand after remand; He received no such advice or protection. He evidently knew of no rights. He cannot have condoned his ill-treatment.
>
> The vast majority of criminal prosecutions are against unrepresented persons. The magistrate is the primary bulwark defending the ignorant or impoverished against the potential injustices wrought through an excess of zeal; pressure of work; administrative inefficiency or plain ineptitude in the investigation and prosecution of offences. Thankfully, most magistrates appear to be equal to this task; were they not, a judge's responsibilities on review would be unbearably burdensome. A major

> part of the magistrate's task has always been to refuse further remand where such is insupportable; to discharge for want of prosecution where this is indicated. He ought not need to be asked to do this but should where necessary intervene mero motu on behalf of an unrepresented accused ... I would venture to suggest that the scrupulous magistrate would in all cases be questioning the State very closely indeed on any application for further remand made after delays approaching a year."

Just as the magistrate should take the initiative in protecting the accused from infractions of his rights, so too should the conscientious prosecutor be aware of any possible criticism which might be made of the State's conduct. He ought not to need formal notice to be given of an application concerning s 18 of the Constitution to be cognizant of any undue delay which might have occurred and to be in a position to give a reasonably considered explanation should a magistrate question him on the point. It all comes down to thoroughness in preparation and professionalism in conduct - attributes one expects from officers of the court.

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In this case, the magistrate could scarcely have permitted the delays to pass unremarked. His investigation of the matter was, however, wholly inadequate. The record shows this exchange and this exchange alone:

> "BY THE COURT: (To Prosecutor)
>
> Madam, is there any special reason why this has taken so long to come? - No your worship, not that I know of but what I know is when I took over the docket the witnesses had changed addresses and the State was having problems in locating them but then again we also had a problem of some dockets which had been lying in the offices due to the high turnover of prosecutors which had not been attended to which were thus unearthed I think about a year ago. I really do not know why the matter has delayed to this extent."

The explanation, far from answering any question as to the cause or explanation for delay, rather raises potential causes for further question and criticism. Nevertheless the magistrate was willing to let the matter go at that.

The many recent cases concerning undue delay in bringing a matter to trial show that this delay of seven years was one which, as it is said, serves to trigger the enquiry. The unrepresented accused was entitled to look to the

magistrate to make the enquiry for him. The magistrate should have been assiduous in his investigation, and should have explained his rights to the accused. The prosecutor should have been diligent in her explanation. In the absence of a proper discharge of their functions by these officials a *prima facie* breach of the accused's constitutional right is left unexplained by the State. We consider that to have continued with the trial without an explanation to the accused of his rights and an ascertainment of his attitude; without an investigation into the cause of delay; and without an explanation from the State for the delay, constituted an irregularity. This conclusion appears to us irresistible: how can it be possibly be said that a *prima facie* breach of the Constitution is regular?

It is somewhat problematic to determine how to deal with this irregularity, for it is one which might have been explicable by an alert prosecutor. The problem, however, is overcome by the many other deficiencies in the proceedings which give ample other grounds for interference.

The next irregularity which causes disquiet again involves a failure by the magistrate to discharge his function towards an unrepresented accused. How frequently has the duty of a magistrate towards an unrepresented accused been stressed? In R v Muchena 1966 RLR 731 (A) at 736H-I it was put as follows by Beadle CJ:

> "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 to assist the accused in his defence, where that is required. There is also an obligation on the court to see that the prosecutor does not take any unfair advantage of the accused."

And again in S v Mutimhodyo 1973 (1) RLR 76 (A) at 80A-C by the same learned Chief Justice:

> "I want to repeat again what this court has said on a number of occasions, that when an accused is unrepresented and when he is not very well educated, not the sort of man who is likely to understand clearly all the intricacies of

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court procedure, it is very wrong for a trial court to hold against such an accused mistakes he might make such as failure to cross-examine; to hold against him, for instance, the fact that he has not cross-examined on a particular issue because one would have expected a

skilled lawyer to have done so. It is the court's duty to assist unrepresented accused of this description in their defence and not to take technical points against them because of mistakes the accused might make in procedure."

One need not cite authority to show how extensive is the magistrate's duty to explain the accused's rights to him. Where a plea of guilty is given without full comprehension by the accused of the nature of the charge or possible defences, subsequent conviction is unsound. Where the accused's opportunity to cross-examine is not explained; or where he is not, as in former procedure, told of the importance of giving evidence on oath; or where his duty, under present procedure, not to omit any material fact is not made clear to him, then one cannot justify the drawing of any inference against him. Any failure to give necessary explanation is an irregularity. Where an inference is drawn, or where it is clear that some defect in his evidence has affected the magistrate's assessment of the accused, then a resulting conviction may well reveal miscarriage of justice.

The record in this case betrays a deplorably lackadaisical approach by the magistrate to the vital function, proper to him alone, to ensure that the accused is fully cognisant of all that is expected of him. He did not advise the accused of his obligation to outline his defence nor of the consequences of failure or material omission. Instead, he delegated that function to the interpreter.

The record shows:

"BY THE COURT: (To Interpreter)

Would you explain to the accused person the provisions of section 180 of the Code.

LEGAL RIGHTS EXPLAINED TO THE ACCUSED BY THE INTERPRETER."

Section 180 of the Criminal Procedure and Evidence Act [Chapter 9:07] contains provisions relating to the different pleas or other answers to a charge that might be given, and as to whether more than one plea, or plea and exception can be taken together. It permits an accused to offer an explanation of his attitude or a statement of his defence, subject to s 188 of the Act. It provides that any such explanation becomes part of the record. It provides that once having pleaded he becomes entitled to demand a verdict, subject to

certain provisos. Which of these provisions, we wonder, did the interpreter explain? What expertise, we ask ourselves, did the interpreter possess?

The next call upon the magistrate's function to protect the accused and ensure that he

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understood the proceedings and his part in them was when he was about to cross-examine the first state witness. Once again we see:

> "BY THE COURT: (To Interpreter)
>
> Will you explain the purposes of cross-examination to the accused person.
>
> PURPOSES OF CROSS EXAMINATION EXPLAINED TO THE ACCUSED PERSON BY THE INTERPRETER"

The purposes of cross-examination frequently escape legal practitioners. What is it about cross-examination that is known to interpreters that qualifies them to explain the purposes to accused? Was the accused told that if he failed to ask questions so as to challenge any material part of the evidence, he might be taken to be admitting that unchallenged portion?

It evidently would be futile to hope that the magistrate himself would have attempted any explanation to the accused of his rights in presenting his defence. Sure enough, we read:

> "BY THE PROSECUTOR: (To Court)
>
> That is the State case, Your Worship, I will close the State case at this stage.
>
> By the Court (To Interpreter)
>
> Could you explain to the accused person the provision of s 188.
>
> LEGAL RIGHTS EXPLAINED TO THE ACCUSED PERSON BY THE INTERPRETER"

Did the interpreter tell the accused of the substance of s 188 of the Act, a section which refers to proceedings at the commencement of a trial? Did the interpreter explain to the accused that that section itself refers to two other provisions, ss 182 and 189? Did he tell the accused that s 189 provides for an

adverse inference to be drawn against him? Did the interpreter, to whose expertise the magistrate plainly defers, advise the accused, as the magistrate did not, of the provisions of subs (6) of s 198? This provision obliges the magistrate to ask the accused whether he will himself give or otherwise adduce evidence. It requires the magistrate to inform the accused of provisions of subsections (8) and (9) of s 198 and of subs (1) of s 199. These provisions allow for the questioning of the accused even if he declines to give evidence. They permit the drawing of adverse inference against the accused if he refuses to answer without just cause.

The accused's right to maintain his silence and to insist that the State prove its case is severely eroded by legislation. This inroad into the accused's age-old privilege can be justified, if justified it may be, only where there is the strictest of explanations to him of the extent of his rights and by the clearest of cautioning to him of the consequences of failure to give an explanation where an innocent person might be expected to do so. The only person who can ensure that the accused understands the choices open to him, and the consequences of any choice he might make, is the presiding officer. It may even be thought that it is only where his explanation is recorded that an appellate or reviewing court can be confident that his explanation was

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sufficient. Where he abrogates his responsibility and leaves the function of explanation of the accused's rights and interests to an interpreter, how can a court on review repose any confidence in that magistrate?

Before expressing these very strong criticisms, we have given careful thought to the following practical considerations. We are aware that in trials before magistrates, it frequently happens that the magistrate simply records at the various stages of the proceedings the terse note "legal rights explained to the accused" or some such pronouncement. This is generally accepted on the presumption that since it is the function of the judicial officer to make the explanation one might expect him to have discharged that function correctly. Misgiving over such a course has, however, been expressed before; for instance, in the matter of *S v M* & Ors 1975 (2) RLR 270 (A) at 280B, where a magistrate's note that the accused understood the import of a plea of guilty was contradicted by the evidence which clearly showed that he did not intend to admit the charge. Macdonald JP (as he then was) said:

> "In records of trials held in the magistrate's court, it is frequently noted that the accused person's rights under [the previous law relating to pleas of guilty] have been explained. The above passages indicate that complete

> reliance cannot be placed upon such statements, since clearly there is confusion as to what is actually required by [that law]."

In the present procedure relating to the confirmation of pleas of guilty, it is indeed a statutory requirement that any questions put to the accused by the bench, and answers given, must be recorded. There are in addition many decisions which show that fundamental to this procedure is the magistrate explaining the nature of the offence to the accused; ensuring his understanding of his position; and ascertaining his response. There is no short cut for the magistrate.

> "Clearly, there is no room for a cursory treatment of the matter, for that may lead to a grave miscarriage of justice. Thus the practice of cursorily putting down one-sentence entries in the record proclaiming compliance with the requirements of subs (2)(b) and (3) of s 271 cannot be condoned. This creates doubt in the mind of the reviewing court as to whether the accused understood the particulars, acts of omissions and elements of the offence."

Per Sansole J in *S v Ncube* (2) 1989 (2) ZLR 232 (H) at 237D, quoting Dumbutshena AJP (as he then was) in S v Murimwa (not reported).

These remarks apply with equal force to the various other stages of proceedings where the accused is entitled to look to the magistrate for explanation and protection. The fact that statute may not require the explanation to be recorded protects from irregularity the ipse dixit that an explanation has been given. That cursory assurance, however, will count for nothing where there is reason to suppose that the explanation was inadequate or was not understood. The reliance that is placed upon such brief notes ought to be, in our judgment, no more than a *prima facie* acceptance of the note and more importantly, the sufficiency of the explanation it records, subject to any point that might later be raised by the defence or might appear from the record.

Where the explanation does not come from the bench, however, there is no reason to accord

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any weight to the note. There is no warrant to infer that the substance of the explanation was audible to the magistrate, and therefore acceptable to him. We therefore consider that these features all reveal gross irregularities. Even if this were the only species of procedural wrong we might still have had to interfere. Unfortunately the irregularities do not stop with this.

The need for the magistrate to treat the prosecutor and unrepresented accused

equally and even-handedly is so self-evident that one is dismayed to find that this requirement often needs restating. The passages from Muchena's case and Mutimhodyo's case, which we have already cited above, suffice to state the need for the magistrate to avoid obstructing the accused, or giving the impression of doing so, with technical points of procedure. Where the accused deviates from acceptable procedure he may be fairly and properly corrected. Narrow constraints upon the accused's questioning are, however, quite inappropriate and more especially where extraordinary latitude is afforded the prosecution. As an example of the manner in which this magistrate indulged the prosecutor while interfering with the accused, we cite the magistrate's attitude to leading questions.

A leading question is one which suggests to the witness the answer required. It may do this by calling for a simple negative or affirmative response where one of those responses is obviously desired and the other not. It effectively puts into the witness's mouth words which he has not yet used. Credible and weighty evidence from a witness is evidence which is unprompted. That which has to be extracted by a form of verbal surgery is not particularly compelling. That which emerges only after a witness has been called upon to affirm or deny a proposition of fact not previously canvassed, is almost valueless. Leading questions are therefore not permitted to be put to one's own witness on any material point in issue.

A material point in issue in this case was patently whether or not the accused had raped the complainant. It was most important to the State case that a detailed description of the alleged assault should emerge, without coaching, from the complainant's own evidence. The complainant in this case gave a fairly detailed treatment of more or less undisputed events leading up to the alleged rape. Of the actual incident, however, this is all she said:

> "He parked the car and I said but you are parking here why are you parking here this is not our home. Are we not going back home? He kept quiet. He parked the car.
>
> Proceed - That is when he started holding me, pushed me down. When I tried what is happened now I was screaming.
>
> You tried to do what? - Now I was screaming trying to stand because he was trying to take me from the passenger seat to bring me on his seat. Now I was frightened. His power plus that fear but I tried I eventually lost my power.

> And he proceeded to have sexual intercourse with you twice? - Yes. Then he proceeded to have sexual intercourse with me and he rest. He took off the shirt because he was sweating, he took off the shirt. Complaining

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the truck was rough that even my back was now paining but he could not understand."

It is impossible to imagine any leading question of greater detriment to the case than this last. One is left with the impression that without having these words put in her mouth the witness might never have uttered them.

Another type of leading examination occurs when the prosecutor puts a series of questions along the lines:

"Now the accused will say in his defence that ... Is this the case?"

unmistakably inviting the answer, "No". This species of examination is particularly to be criticised where it is put to a witness who has not yet given evidence on the issues in his or her own words. In such a case it is a leading examination and must detract from the weight to be attached to evidence which it elicits. If the evidence has already been given in the witness's own words then it is frequently a repetitive exercise since the unsolicited words should already have traversed the anticipated defence. This sort of examination ought to be avoided. The putting of the defence is the function of the defence. If the accused is unrepresented and does not put all of the important points in his defence then the magistrate should traverse these points when the cross-examination is closed. This type of questioning formed almost half of the examination-in-chief of the complainant.

The magistrate permitted such leading questioning by the prosecutor without comment either during the course of evidence or in his judgment. By contrast, the very first question which the accused put to his own first defence witness was disallowed by the magistrate without any objection from the prosecutor. In disallowing the question he made scant effort to explain the reason for disallowing it. The rephrased question was similarly disallowed. The record shows the following:

"NGONI JEREMIAH MANHEMBO, sworn

BY THE COURT: (To Interpreter)

Would you explain to the accused person on how to get evidence from

this witness without giving him the answers to what he wants him to say. [Of course, this magistrate will not deign to explain the matter himself.]

EXAMINED BY THE ACCUSED:

Ngoni, were you not aware that I was in love with Charity?

BY THE COURT (To Accused)

It is very leading you are already telling him the answer.

BY THE ACCUSED (To Witness)

Now when I came to your place of residence when you were giving us the blankets and also a room to sleep

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whom was I in love with at that time?

BY THE COURT: (To Accused)

You are giving evidence. What you are telling him in the form of a question is really telling him to confirm that you went to his place and he gave you a place to sleep with of course you have already told him a girlfriend called Charity. That is all clear from the question you are making up.

- I have understood."

The lack of even-handedness is manifest. It suggests undue tolerance by the bench for the State and unreasonable restriction (in comparison) of the defence. We consider this to be a cause for concern.

The concern that is entertained is made the more pressing by certain remarks which the magistrate made. These remarks appear to disclose a most improper prejudging of certain issues of credibility and fact. At the close of the evidence of the first defence witness, who testified that he was aware of an intimate relationship between the accused and the complainant, the magistrate took the opportunity to put some questions of his own. This is what the record reveals:

"NO RE-EXAMINATION BY THE ACCUSED

BY THE COURT: (To witness)

BLACKIE J *et* GILLESPIE J

Ngoni?- Your Worship.

You say he is your friend and what you do is when you come to court you tell the truth. You come in and lie so patently, you sink him he goes down like that -I swear your Worship that I am telling the court the truth as to my knowledge. [The emphasis appears in the record.]

But can you give a reason why these two should be lying [presumably referring to the complainant and a woman who purportedly gave evidence of a complaint] - That much I do not know your Worship.

That is incredible, really incredible. You can go."

The next defence witness was the accused's wife who testified that she had been aware of an adulterous relationship between the accused and the complainant prior to the alleged offence and that her marriage had been severely strained by it. Without any possible foundation for putting the question, the prosecutor saw fit to put to the witness that she was not the accused's wife:

"But you are not the wife - I am the accused person's wife and I have the accused person's children."

It is a salutary practice, and properly professional, for a legal practitioner to refrain in cross-examination from putting as a fact any proposition unless he has instructions to that effect or has laid a foundation in fact for drawing the conclusion which he puts to the witness. Gratuitously to put the lie to a person in this manner, where there is no basis upon which to contradict the witness, is misleading and unprofessional. Far from uttering a mild word of admonition to the prosecutor, however, the magistrate made this point his own. His own

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questioning of the witness was directed solely to the issue whether or not the witness was in fact the accused's wife. Such was the effect of this unfounded attack that it had the magistrate making the following remarks in his judgment:

> "The two witnesses called by the accused person are such blatant liars that the court is in doubt as to whether they are who they said they were in this court."

This finding appears to us to be no more than an attitude borne solely of hardened incredulity and not from any evidence that had been led.

BLACKIE J *et* GILLESPIE J

The most grievously irregular conduct of all, however, has come from the magistrate himself and can only have served to persuade the accused that he was not enjoying an impartial hearing. After the second defence witness had been called, the accused was asked whether he had any further witnesses to call. The following exchange is recorded:

> "BY THE COURT: (To Accused)
>
> Who is the next witness? - The prosecutor denied my other witness to appear.
>
> What are you talking about? - The prosecutor refused to allow my witness to get in court.
>
> Were these two in court last time when we were dealing with this matter? - They were not in court.
>
> The witness should not be in court until it is the time for that witness to testify comes. The prosecutor does not determine who should come and testify on your behalf - The public prosecutor called my witness and spoke to the witness while he was seated there.
>
> The prosecutor may have many people who have got evidence in respect of an issue and then he or she can choose. He says well, I do not need this piece of evidence because what I have got it enough. It maybe that that witness had been called by the State and said no the evidence I have got is enough I have no need of your evidence you can go now. But that is not to say that you cannot call that same person. Who is that witness? - Lizzy Chirinda.
>
> BY THE PROSECUTOR: (To Court)
>
> I believe then your Worship the witness had been one of the State witnesses.
>
> BY THE COURT: (To Prosecutor)
>
> She testified? - I do not think so. She was supposed to have come in as a State witness. Yes then her evidence was not required by the State.
>
> BY THE ACCUSED: (To Court) I was not aware of that your Worship.

BLACKIE J *et* GILLESPIE J

> BY THE COURT: (To Accused)
>
> Good, when are you bringing that Lizzy? Let me warn you your wife and that other fellow who lied on your behalf they said you told them that they were required by the court. I am certainly going to make inquiries when you bring

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Lizzy. If you say that she is required without specifying that it is you who require her I am sure that I should put you in trouble - I have understood your Worship.

BY THE COURT: (To Prosecutor)

To what date Mr Prosecutor?

Evidence for the defence closed."

The magistrate then immediately heard argument and proceeded to give judgment.

We have set this passage out in extenso for a number of reasons. We first draw attention to the manner in which the court dealt with the accused's statements. It strikes us that upon the accused making a statement which might or might not have been intended as a complaint about the prosecutor's dealing with a person whom the accused might have regarded as his witness, the magistrate's instinctive reaction was the entirely unjudicial one of defending the actions of the prosecutor without even knowing the circumstances. He did not give the accused fair opportunity to explain himself. He did not ask the prosecutor for his comments. He spoke to the accused with a degree of acerbity which even lingers in the printed word. He assumed, first, that the accused had improperly had a defence witness in attendance in court whilst his other witnesses testified and implicitly criticised the accused for something he had not done. He then assumed that the accused was referring to someone subpoenaed by the State but not calle as a witness and justified the conduct of the State even though there was some explanation called for. We say that explanation was called for because where the State has witnesses available but chooses not to call them, those witnesses should be made available to the defence.

Worst of all, when the confusion was apparently cleared and the way open for the accused to call this person, the magistrate behaved in so apparently hectoring and minatory a fashion as seems to have persuaded the accused that it would be futile, if not counter-productive, to attempt to call the witness. We

cannot criticise too strongly the final remarks by the magistrate. Where he should, as is the accused's right under the Constitution, have been affording to the defence an opportunity equal to that enjoyed by the State to call witnesses - instead he threatens the accused with "trouble" should it be that the accused attempts to pray in aid any other power of securing the witness's attendance than his own persuasion. Even if that were not the intention, to the unrepresented accused, he makes it clear that the court does not want this witness. As for the remark about the previous two defence witnesses having lied: that just reveals so much of prejudging and hostility from the bench that it is no wonder that te accused, in an exchange which is not recorded, apparently decided not to call the witness and closed his case.

In *S v Mangezi* 1985 (1) ZLR 272 (S) Dumbutshena CJ had occasion to criticise with no little severity the proceedings of a magistrate who went beyond the stage "of giving guidance to an inexperienced prosecutor" (at 274E) "but who was more inclined to assist the prosecution and less inclined to help the appellant, who was unrepresented" (at 275A); who by his descent into the arena showed a favourable disposition to the prosecution case and deprived himself of the

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opportunity to make a balanced assessment of the evidence (at 177C-D). The learned Chief Justice cited the remarks of Trollip AJA in S v Rall 1982 (1) SA 828 (A) at 831-2:

> "[A judicial officer] should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused ... The Judge should consequently refrain from questioning any witness or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression ... A judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants."

This applies not only to questioning of witnesses by the bench, but to all the presiding officer's doings. We do not consider it possible that the accused could have thought that this magistrate was anything other than biased against his case.

No doubt there are many pressures attendant upon the judicial function, and many temptations to impatience and cynicism. We who are charged with the burden of decision cannot always conceal our irritation with the incompetent

or unprepared lawyer; with the idle submission or the ignoble stance. We, however, owe it to our own self-esteem; to the dignity of our office; to the credibility of the legal system; and most of all to those who attend our judgment, to comport ourselves in such a way as persuades all before us that a fair hearing was afforded and an honest and considered decision handed down. Audience that is fairly given to both contending parties is most likely to result in a decision that not only commends itself as even-handed but also is just. An appearance of disfavour in the proceedings, conversely, is calculated to result in a decision which fails to command confidence and which is the more likely to be wrong.

This magistrate has given no little appearance of disfavour in the many respects we have detailed. For this reason, not only do we have to find that there are many irregularities in the proceedings but also we are unable to place reliance on assessments of demeanour and credibility or findings of fact. Patently a cautious approach in assessing the evidence of the complainant was called for. Manifestly a decision on the credibility of the complainant and in her favour was reached before ever the judgment was considered. A scrupulous endeavour to eliminate the possibility of false incrimination should have been made. The chance that the accused was unjustly charged, however, had apparently been dispelled from the magistrate's mind prior to the accused leading his first defence witness. The likelihood that the defence witnesses were telling the truth was in the magistrate's mind stillborn, and was publicly buried when to their faces he called them liars. Any lingering impression that might still have remained tht the accused was enjoying a full hearing evaporated irrevocably when the magistrate told the accused not to bring any more liars to court. The magistrate had, before the evidence was concluded, disqualified himself from considering the reasonable possibility that the accused had engaged in sexual intercourse with the complainant with her consent. Without any evidence or justification for such an attitude, he was unprepared even to accept that the two defence witnesses were who they claimed to be, much less was he able to give dispassionate

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consideration as to whether they were possibly genuinely aware of an existing sexual relationship between the complainant and the accused. The cautionary rule is not even adverted to in the judgment.

Had proper consideration been given to correct procedure, and had scrupulous care been taken in receiving and assessing the evidence, it may well be that a court at first instance would have been able to produce a conviction that was unassailable. Where a trial is, however, so riven with irregularity and redolent of disfavour as is this one then a higher court is obliged to regard with

considerable mistrust whatever findings of demeanour or credibility are made. If, as is the case here, a conviction depends upon those findings of credibility and demeanour and upon a cautious assessment of the possibility of false incrimination, the absence of reliable findings leads inevitably to the conclusion that the occurrence of a miscarriage of justice cannot be excluded.

The evidence on record is not such that it excludes a miscarriage of justice. On the one hand, somewhat imperfect but relatively convincing evidence of complaint is given. On the other hand, a plausible defence is advanced. Though it is one not free from cause for criticism, it is nevertheless supported by two witnesses whose credibility has not been fairly assessed by the trial magistrate. A further witness was intended to be called but this intention was abandoned in circumstances suggesting some perception of constraint on the part of the accused. These are conditions calculated to breed a miscarriage of justice. In all the circumstances, we are impelled to quash the conviction and to set aside the sentence.

BOTHA v ZVADA & ANOR 1997 (1) ZLR 415 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

10 March & 24 April 1997 Judgment No. S-62-97

Flynote

Delict - actio injuriarum - false arrest and detention - reasonable grounds for arrest - whether such grounds existed - discretion as to whether or not to arrest - whether discretion exercised reasonably

Damages - delict - actio injuriarum - false arrest and detention - elderly man arrested and detained when arrest and detention neither justified nor necessary - appropriate damages

Headnote

A seventy-one year old man was arrested by the police on suspicion that he had committed

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murder. He was held in custody for six days in a crowded cell. He sued for unlawful arrest and detention. The High Court rejected his claim, finding that the arrest was lawful as the arresting officer had had reasonable grounds for the arrest. He appealed against this decision.

Held, that for an arrest to be lawful the arresting officer has first to establish that he had reasonable grounds for suspecting that the appellant had committed the murder. But even where there are reasonable grounds for suspecting that a First Schedule offence has been committed, the power of arrest, which is a discretionary power, has to be exercised reasonably. Where a person is arrested when it is not reasonable to so arrest him, the arrest will still be unlawful.

Held, that in the circumstances the arresting officer had no reasonable grounds for suspecting that the appellant had committed the murder in question.

Held, further, that even if there had been reasonable grounds for arrest, the decision to arrest and hold the appellant in custody was unreasonable as

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there was no reason to believe that he would try to escape if he was not detained and neither was the arrest necessary to prevent further crime or to prevent interference with police enquiries.

Held, further, that the arrest and detention were therefore unlawful and that the appellant was entitled to damages for the interference with his liberty. Interference with liberty is a serious matter and in the circumstances an amount of $20 000 would be an appropriate award.

Cases cited:

Allan v Min of Home Affairs 1985 (1) ZLR 339 (H)

CCSU v Min for the Civil Service [1984] 3 All ER 935 (HL)

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

Holgate-Mohammed v Duke [1984] 1 All ER 1054 (HL)

Muzonda v Min of Home Affairs & Anor 1993 (1) ZLR 92 (S)

Rosseau v Boshoff 1945 CPD 135

Shaaban Bin Hussein & Ors v Chong Fook Kam & Anor [1969] 3 All ER 1626 (PC)

Sigaba v Min of Police & Anor 1980 (3) SA 535 (T)

Judgment

Korsah JA: This is an appeal in an action for wrongful arrest and detention. It highlights the conflict between two fundamental principles: (i) the liberty of the individual subject; and (ii) the

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protection of the public.

Drummond Farm is in Somabhula. The appellant, the owner thereof, was, at the time of these presents, seventy-one years of age, and resident on the farm. Apart from being of advanced age, he is encumbered with an artificial leg, hard of hearing and suffers impaired vision.

The farmhouse in which he dwells is surrounded by a security fence with three gates. These are all normally locked at night. The appellant's workers occupy houses scattered around his homestead within a radius of two kilometres.

On the night of 20 July 1990, one of the gates in the security fence was inadvertently left open. Richard Moyo, one of the appellant's employees, who had used that gate to facilitate access and ingress to the compound to accomplish a task assigned to him, was the culprit.

During the course of the night from 20 July to the morning of 21 July, an explosion like the discharge of a gun was heard by some of the appellant's workers in their homes. The sound appeared to have emanated from the

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general direction of the appellant's farmhouse. On the morning of 21 July 1990, Richard Moyo discovered the dead body of a woman near the gate which he had forgotten to lock the previous evening. He alerted the appellant who immediately caused the police to be summoned.

The deceased lived with her son, Enock Nyoni, another employee of the appellant, in one of the houses scattered within the two kilometre range of the appellant's homestead. She was afflicted with a mental disability and was prone to visit the homestead about twice a week during the daytime to borrow sugar. She was therefore no stranger to the appellant.

The first respondent, Sergeant Zvada ("Zvada"), who was then based at Gweru Central Police Station, arrived at the scene at around 3 pm. He was shown the body of the deceased at the site of death. He described the body as being in a cross-legged sitting position with the head leaning forward and the hands touching the ground. There was a pool of blood near the body and to the front. There was a gunshot wound to the head. The entry wound was small, but the exit wound in the temporal area was very large. He could not recall whether the exit wound was in the left or right temporal region. He observed that there were blood splashes on the nearby fence. Struggle marks in the vicinity of the body were non-existent. There was no trail of blood from outside the gate leading to where the deceased's body was found. He therefore concluded that the deceased had died on the spot at which her body had been found. He gathered from his enquiries that the sound of gunfire had been heard coming from the general direction of th farmhouse the previous night.

The appellant was the only person who possessed firearms at his farm. However, a few months before the death of the deceased in these bizarre circumstances, a neighbouring farmer had lost his gun to a thief who had not been apprehended at the time of the deceased's death. Nor had the stolen gun been recovered. Zvada took possession of the appellant's rifles - a .303 and a .22. The appellant assured Zvada that those two were the only weapons owned by him.

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Whereupon Zvada arrested the appellant on an allegation that he had murdered the deceased. He had the appellant detained at Gweru Police Station with fourteen people in a cell. The appellant appeared in court for remand on Monday 23 July 1990 and was transferred to Wha Wha Prison, where he stayed until he was granted bail by the High Court at the behest of his legal practitioners on 27 July 1990.

While the appellant was at Wha Wha Prison, Zvada visited the appellant to

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question him about a .22 rifle which, having been borrowed by the appellant's son some time ago, the appellant forgot to disclose to Zvada as being in his possession during the relevant period.

On 6 August 1990, the appellant was remanded to appear in court on 20 August 1990. On that day, the presiding magistrate ruled that no evidence had been led by the State to indicate that there was a reasonable suspicion that the appellant had committed the offence, and discharged the appellant from the charge preferred against him.

Upon these facts, the appellant instituted his action for damages in the sum of $20 000 for wrongful arrest and false imprisonment. The respondents contended that the first respondent had reasonable grounds to suspect that the appellant had committed the offence of murder. The trial court agreed with the respondents that Zvada had had reasonable grounds to suspect the appellant had committed murder and, on 23 June 1995, dismissed the appellant's claim with costs. It is against that determination that the appellant now appeals.

In terms of s 25(1)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07], any peace officer may arrest, without a warrant, "any person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in the First Schedule".

There is no doubt that both murder and culpable homicide are "First Schedule" offences. It is not in dispute that Zvada arrested the appellant for an arrestable offence. It cannot be gainsaid that Zvada suspected the appellant. But did he have reasonable grounds to suspect that the appellant had committed the offence? That is the point with which both the trial court was, and this court is, here concerned.

Additionally, in issue is the point that it must be reasonable to exercise the power thus made available by the subsection. To put it in the form of a question: even assuming that Zvada had reasonable grounds for suspicion, was it reasonable to exercise the power in this case? The relevant section grants the power to arrest, but leaves it to the discretion of the arresting detail to determine whether the exercise of the power is reasonable in the circumstances.

Mr Nherere submitted that Zvada's grounds for suspicion must have been justifiable from an objective point of view. In other words, a reasonable

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person placed in the position of Zvada must be able to conclude that they were indeed reasonable grounds or, as Gubbay CJ stated in Feldman v Min of Home Affairs 1992 (2) ZLR 304 (S) at 309C-D:

> "... the circumstances giving rise to the suspicion (must be) such as would ordinarily lead a reasonable man to form the suspicion that the arrestee had committed an offence mentioned in the First Schedule to the Criminal Procedure and Evidence Act."

The onus is on the person who effected the arrest without a warrant to show that his suspicion was reasonably grounded. Rosseau v Boshoff 1945 CPD 135; Sugaba v Min of Defence & Police & Anor 1980 (3) SA 535 (TkS). As was observed by Lord Diplock in Holgate-Mohammed v Duke [1984] 1 All ER 1054 at 1057:

> "... since the wording of the subsection under which he acted is 'may arrest without warrant', this left him with an executive discretion whether to arrest or not. Since this is an executive discretion expressly conferred by statute on a public officer, the constable making the arrest, the lawfulness in the way in which he has exercised it in a particular case cannot be questioned in any court of law except on those principles laid down by Lord Greene Mr in Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, that have become too familiar to call for repetitious citation. The Wednesbury principles, as they are usually referred to, are applicable to determine the lawfulness of the exercise of the statutory discretion of a constable under s 2(4) of the 1967 Act, not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for damages for the species of trespass to the person known as false imprisonment, for which the acion in the instant case is brought."

It is, of course, accepted that all too often the police resort to the practice of interrogating persons under arrest for the purpose of obtaining confessions, under the stress and pressure of arrest, which they would not otherwise procure. It is an entirely permissible practice once the police have reasonable grounds to suspect that a First Schedule offence has been committed by the arrestee. But, in my view, the grounds for the suspicion must be those which would induce a reasonable man to harbour that suspicion.

It is true that reasonable suspicion is not to be equated with *prima facie* proof, but there is, or may be, a wide gap between mere suspicion and having

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reasonable grounds for suspicion: Shaaban Bin Hussein & Ors v Chong Fook Kam & Anor [1969] 3 All ER 1626 at 1630. If a constable honestly and upon reasonable grounds arrests, without a warrant, a person whom he believes to be guilty of a First Schedule offence, no action will lie, provided the exercise of the executive discretion to arrest does not fall foul of the Wednesbury principles. Reasonable grounds to suspect imply reasonable grounds as a basis for such suspicion; not a blind or frivolous suspicion.

In considering the reasonableness or otherwise of Zvada's suspicions the learned trial judge directed attention to the following factors:

(a) that Zvada noticed that the nearby fence was splashed with blood;

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(b) that Zvada looked for struggle marks in the vicinity and found none;

(c) that there was an absence of any trail of blood leading to where the deceased was found;

(d) that the sound of gunfire had been heard from the general direction of the appellant's house the previous night;

(e) that the appellant had in his possession two guns which he surrendered to Zvada.

Mr Nherere submitted that the foregoing factors warrant the suspicion that the deceased had been shot dead where her body was found, and not that the appellant was the culprit. Indeed, if the two last-mentioned factors had excited any suspicion in Zvada's mind, he only had to examine the guns and smell them for the scent of cordite to ascertain whether they had been in recent use. After all, he was a sergeant of police who, by training, is acquainted with guns and the smell of guns that have been fired recently; and it is elementary knowledge in his field of work that a recently fired gun will exude the smell of cordite.

Mr Nherere further submitted that a different result would have been reached had the learned trial judge given greater weight to the following factors:

1. It had not been established that the fatal bullet might have been fired from either of the appellant's guns which he surrendered that day;

2. Indeed, though evidence was not inaccessible, it had not been established that either gun had been in recent use;

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3. A gun had been stolen by a felon from a neighbouring farmer in the preceding weeks, which had not been recovered;

4. The appellant, as stated earlier, was a septuagenarian, dim of eyes, hard of hearing and handicapped by an artificial leg;

5. The shooting occurred at night, when keen eyesight is required to hit a target, if one is steady of gait; and

6. The appellant's house was over fifty metres from where the body of the deceased was found.

In short, Zvada had no reason to suspect the appellant in particular, and not anyone else.

There was, in my view, on the evidence at hand when Zvada effected the arrest no reasonable grounds for suspecting that the appellant had shot and killed the deceased. As Gubbay CJ remarked in the Feldman case *supra* at 312D:

> "... the condition precedent to the taking of the appellant into custody was not fulfilled. As was pertinently

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remarked by Justice Frankfurter in Mallory v United States of America 354 US 449 (1957) at 456:

> 'Presumably, whoever the Police arrest, they must arrest on "probable cause". It is not the function of the Police to arrest, as it were, at large, and to use the interrogatory process at Police Headquarters in order to determine whom they should charge before a committing magistrate on "probable cause".'"

The fact that the appellant did not disclose the existence of the third firearm, I agree with Mr Nherere, could not render Zvada's suspicions, at the time of the arrest, reasonable. The reasonableness or otherwise of his suspicions must be determined by placing oneself in Zvada's shoes and having regard to the information available to him at the relevant time. As Mr Nherere rightly submitted, a suspicion cannot be based on unknown information. One of the rationales of the "reasonable grounds" requirement in the Criminal Procedure and Evidence Act is to avoid situations where law enforcement agencies take people into custody for interrogation, hoping to procure convictions on the basis of confessions. To hold, as the learned trial judge did, that information coming to light after an arrest could render an otherwise unlawful arrest lawful, retroactively, would run counter to this rationale.

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Even assuming Zvada did have reasonable grounds to suspect the appellant of being the culprit, he was obliged to exercise his discretion to arrest and detain without flouting the Wednesbury principles: CCSU v Min for the Public Service [1984] 3 All ER 935 (HL) at 951. In the exercise of that discretion, submitted Mr Nherere, Zvada should have taken the following factors into account:

(a) the possibility of escape;

(b) the prevention of further crime; and

(c) obstruction of police enquiries.

Having due regard to the appellant's age and condition, Zvada had no reason to believe that the appellant would, if not detained, escape. The appellant having been dispossessed of all guns available to him, the danger of his committing a similar crime had effectively been curtailed. All the evidence to be garnered from his employees was already at hand and there was not the remotest possibility that he could obstruct police investigations, especially as the instrument which Zvada believed was used in the perpetration of the offence was already in police custody. In the circumstances, no sensible person, who had addressed his mind to the question whether or not to arrest and detain the appellant, could have arrived at the decision reached by Zvada. It follows that the trial court fell into error when it ruled that the discretion reposed in Zvada to arrest the appellant was exercised reasonably.

As regards the quantum of damages, an action for false imprisonment is one of the forms of actio iniurarum, and so proof of actual damage is not necessary to support such an action. Even if no pecuniary damage has been suffered, the court will not award a contemptuous figure for the infringement of the right to liberty. Our courts have quite properly taken the stance that deprivation of liberty is a very serious infraction of fundamental rights: Allen v Min of Home

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Affairs 1985 (1) ZLR 339 (H) at 346.

In Feldman v Min of Home Affairs *supra* this court awarded a sum of $2 500 for a detention overnight. In Muzonda v Min of Home Affairs & Anor 1993 (1) ZLR 92 (S) at 101 this court, after observing that awards of damages made in recent decisions provide only general guidance, remarked that:

> "Each case is in a sense without parallel, having individual subjective aspects to it",

KORSAH JA

and awarded damages of $3 000 for a detention lasting twenty-one hours.

In the instant case, the appellant was an old man of seventy-one years of age. He was in custody for a total of six days. At Gweru Central Police Station he had to share a cell with fourteen other persons. No pecuniary damages were suffered, save the very precious right of liberty. I think that the sum of $20 000 which he seeks, and against which there has been no submission in opposition, is a fair figure which will vindicate the appellant's rights without amounting to a vindictive award.

The appeal is accordingly allowed with costs. The judgment of the trial court is hereby set aside and the order made by the court is altered to read:

> "1. The plaintiff's action succeeds with costs.
>
> " 2. The defendants are liable to the plaintiff, jointly and severally, the one paying the other to be absolved, in the sum of $20 000."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Danziger & Partners, appellant's legal practitioners

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

S v MIRASONI 1997 (1) ZLR 424 (HC)

Court **High Court, Harare**

Adam J

Criminal review

25 April 1997 Judgment No. HH-78-97

Flynote

Criminal law - common law offences - housebreaking and theft - evidence - money stolen from a store during a

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housebreaking - accused shortly afterwards being found in possession of large sum of money whose origin he could not satisfactorily explain - not enough to conclude that accused had stolen the money from the store

Headnote

Shortly after a country store had been broken into and $3000 in cash stolen, the accused was seen at a flea market buying a large quantity of clothing. The amount being spent by him was unusually high. His explanation for the source of the money was contradicted by reliable witnesses. The magistrate convicted him of the housebreaking and theft.

Held, it could not be asserted with certainty that the inference to be drawn was that the accused had committed the housebreaking and theft. The possibility that someone else had stolen the money could not be excluded. The accused should have been convicted of contravening s 12(2)(a) of the Miscellaneous Offences Act [Chapter 9:15], that is, being found in possession of goods (money) in regard to which there is a reasonable suspicion that it was stolen and being unable to give a satisfactory account of his possession.

Cases cited:

R v Blom 1939 AD 188

S v Ganyu 1977 (2) RLR 97 (A)

ADAM J

S v Mkize 1961 (4) SA 77 (N)

Judgment

Adam J: The accused, aged 22, was convicted of housebreaking with intent to steal and theft. He was sentenced to 18 months' imprisonment with labour of which 4 months was suspended for 5 years on condition that he does not within that period commit any offence involving dishonesty for which he was sentenced to imprisonment with the option of a fine or to a fine in excess of $150. A further 5 months were suspended on condition he made restitution in the amount of $3 000 to the complainant.

It was established by the State that there had been a breaking and entering of the complainant's store on or about 7 July 1996 and theft of the sum of $3 000 by an unknown intruder. The brother of the accused's friend testified that sometime in July 1996 the accused sought his assistance to break into the complainant's store. This was challenged by the accused who denied enlisting that witness's services. Another witness indicated that a day after the offence, in his presence, the accused bought at the flea market at Karoi 2 pairs of shoes, 3 pairs of trousers, 3 T-shirts, 2 shirts, a jacket and a bag. According to this witness he was astounded by the sudden riches befallen on this unemployed young village person. These goods had been recovered by the police on the accused's arrest. They were valued by them as being over $824. The accused was not able to give the police a satisfactory explanation about the origin of how he got these goods. The accused maintained to the police that he had bought these new clotes with his own money. In his warned and cautioned statement the accused did not admit to

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the store breaking and said that he never went to the complainant's store. In his evidence in court he denied the charge of housebreaking with intent to steal and theft and said he had no knowledge of the offence at all. Under cross-examination he answered that he had got the money to buy the clothes by the sale of his maize. The magistrate asked him if he was going to call his father as a witness who would exonerate him and he declined to do so. The magistrate called the accused's father who testified that the accused never cultivated any maize crop of his own, that the accused had never sold any maize to anyone and that the father had not sent the accused to buy clothes.

In the absence of direct evidence, an offence may be proved by inference, but in such event the -

> "... inference sought to be drawn must be consistent with all the proved facts ... [which] ... proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether

ADAM J

> the inference sought to be drawn is correct." - *per* Watermeyer JA in R v Blom 1939 AD 188 at 202-203.

In this case, it cannot be asserted with certainty that the inference sought to be drawn - the accused committed the offence of housebreaking in question - is consistent with the proved facts, which proved facts were such as to exclude every other reasonable inference except that the accused committed the offence. The proved facts do not exclude the possibility that some other person besides the accused could have committed the offence.

The trial magistrate erred in convicting the accused with the offence in question. He should instead have convicted the accused on the competent verdict available to him, of contravening s 12(2)(a) of the Miscellaneous Offences Act [Chapter 9:15]. That section covers the offence of being found in possession of goods (in the present case, money - *S v Ganyu* 1977 (2) RLR 97 (A) at 103-104) in regard to which there is reasonable suspicion that they had been stolen and not being able to give a satisfactory account of such possession: S v Mkize 1961 (4) SA 77 (N) at 787-79.

There was certainly evidence before the magistrate from which he could have concluded that the accused was found in possession of money utilized by him in circumstances that gave rise to a reasonable suspicion that such money was stolen. The explanation he gave to the police for this money was not satisfactory. As for his explanation during the trial, this was found to be untrue. It follows that elements of that offence had been established giving rise to a conviction.

Accordingly the conviction is set aside and substituted with a conviction of contravening s 12(2)(a) of the Miscellaneous Offences Act. The sentence is also altered to 9 months' imprisonment with labour, of which 4 months' imprisonment with labour are suspended for 5 years on condition the accused does not during that period commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

CHIDYAUSIKU J agrees.

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CROUCH v DUBE 1997 (1) ZLR 427 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

13 March & 29 April 1997 Judgment No. S-68-97

Judgment

Appeal - court's powers on appeal - interference with exercise of discretionary powers by lower court - nature of such powers - when appeal court may interfere

Practice and procedure - execution - sale - immovable property - application to set aside sale - who may make application - any person "having an interest" - not limited to persons having real as opposed to personal rights - grounds for setting aside sale - court may take into account equitable considerations

Headnote

The respondent bought a house under a deed of sale from one Cheryl Latimer. The agreed price was $640 000. $111 212 was paid as a deposit, with the balance to be paid in monthly instalments. The property was already mortgaged to a building society and the respondent agreed to pay the seller's monthly payments to the society. No caveat was registered against the property by the seller. However, Gold Travel (Pvt) Ltd, a judgment creditor of the seller, had registered a caveat, claiming some $72 000.

The respondent fell into arrears in her payments to the building society. This led to the building society issuing a writ of execution against the seller. The respondent's legal practitioners asked Gold Travel's practitioners whether Gold Travel would allow the respondent to pay the debt by 31 July 1995. Gold Travel's legal practitioners replied that they would hold legal action in abeyance until the building society instructed the sheriff to proceed with the sale. Thereafter the building society and another

creditor of the seller intimated that the sale in execution, scheduled for 4 August 1995, should be cancelled because they accepted the arrangements made with the respondent. However, Gold Travel, through the appellant, its managing director, insisted that the sale should go ahead. The winning bid of $620 000 was made by the appellant, who was 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 respodent'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 respondent had paid $311 000 towards the purchase of the house, as well as some $57 000 on renovation.

An application was made for the sale to be set aside on the grounds that the failure to place the

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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 appellant had shown a conflict of interest and a lack of good faith.

The High Court (Adam J) granted the application. 1(15) The appellant appealed on the ground that the court erred in finding that (a) the respondent was a person having an interest in the sale and (b) the equities favoured the respondent.

Held, that although the transaction entered into by the appellant could only be impugned by Gold Travel, its directors or shareholders, this did not detract from the unconscionable behaviour of the appellant. This unconscionableness was made more poignant by the fact that the seller owned a half share in another house and it was apparent that the appellant's bid would not be sufficient for any amount to be received by his principal. It was clear that he did not accept the offer from the respondent because he intended to bid for the house himself.

Held, further, that while the persons "having an interest in the sale", who might apply under r 359 of the High Court Rules to have a sale in execution set aside, would normally be creditors, and while normally a right to have property sold could not be defeated by a person who only had a personal right to claim transfer of the property, this did not mean that the category of persons stated in the rule was limited. Any person adversely affected by a judicial decision may petition the courts for redress, provided that he establishes that he has a real, direct and

substantial interest in the subject matter and the outcome of the application. The respondent had such an interest in this case; the appellant, on the other hand, was not a judgment creditor of the seller, but simply a purchaser at a public auction.

Held, further, that where a lower court exercises a discretionary power, an appeal court has to decide firstly what was the nature of the discretionary power. There are two categories of such powers. The first relates to matters having the character of being so essentially for the determination by the lower court that it would ordinarily be inappropriate for an appeal court to substitute its own discretion. The second relates to matters having the character of being equally appropriately determinable by either court. Where the discretionary power is of the first kind, the appeal court has no jurisdiction to substitute its own discretion unless the lower court's exercise of its power was not judicial.

Held, further, that the power exercised under r 359 fell into the first category. The fact that the sale had been confirmed did not mean that it could not be set aside, and there was no ground for finding that the lower court's discretion was not properly and judicially exercised.

Appeal dismissed.

Cases cited:

Aberdeen Rly Co v Blaikie Bros [1843-60] All ER Rep 249 (HL)

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Bhura v Lalla 1974 (1) RLR 31 (A)

Chasfre Invstms (Pty) Ltd v Majavie & Ors 1971 (1) SA 219 (C)

Mapedzamombe v Commercial Bank of Zimbabwe & Anor 1996 (1) ZLR 257 (S)

Naran v Midlands Chemical Industries (Pvt) Ltd S-220-91

Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd 1989 (4) SA 31 (T)

Morfopoulos v Zimbabwe Banking Corp 1996 (1) ZLR 626 (H)

Zimbabwe Teachers' Assn & Ors v Min of Education 1990 (2) ZLR 48 (H)

The court referred to the following rules of court:

High Court Rules 1971 (RGN 1047/71), r 359

Case Information

R Y Phillips, for the appellant

J C Andersen SC, for the respondent

Judgment

Korsah JA: This is an appeal from the judgment of the High Court, Harare (Adam J), handed down on 21 August 1996. The appellant originally opined that the trial court erred in finding that the respondent was a person having

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an interest in the sale in terms of r 359 of the High Court Rules, more particularly in that -

> "(a) the respondent was neither a judgment creditor nor a judgment debtor;
>
> (b) the sale in execution was a direct result of the respondent's failure to meet her own obligations to the judgment debtor."

Mr Phillips, for the appellant, at the hearing of the appeal applied to amend the grounds of appeal with the following additional ground to accommodate part of the appellant's heads of argument:

> "2. The court *a quo* erred in finding that the equities favoured the respondent."

Mr Andersen intimated that he was not opposed to the amendment, and leave to amend was duly granted.

The respondent was the applicant in motion proceedings before the High Court. In those proceedings, she sought and was granted the following order:

1. The sale in execution of Stand 353, Glen Lorne Township, 130 of Lot 38, Glen Lorne

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(Township) held on 4 August 1995 be and is hereby set aside;

2. The confirmation of that sale by the fourth respondent be and is hereby set aside;

3. The applicant pay to the first respondent within thirty days of this order the outstanding judgment debt under case No. HC-8121-93; and

4. The first and seventh respondents pay the costs of the application.

The facts are succinctly set out in the judgment appealed against. Of the seven respondents to the application, only the seventh respondent has appealed against the order made by the High Court. The dispute arose in this way:

The respondent purchased the above mentioned immovable property by deed of sale on 12 November 1993 from Cheryl Latimer (the second respondent in the court of first instance) for $640 000. She paid a deposit of $111 212,77 and contracted to pay the balance of the purchase price in equal monthly instalments of $8 925,87.

KORSAH JA

The respondent's legal practitioners sought to have the deed of sale registered against the title deeds but were not able to do so as the seller was no longer resident in Zimbabwe and difficulties arose with the seller's agent. In the result, no caveat against the immovable property, which was mortgaged to Beverley Building Society ("Beverley") (the third respondent in the court of first instance) to whom monthly instalments were being paid by the respondent on behalf of Cheryl Latimer, was registered on behalf of the respondent.

Gold Travel (Pvt) Ltd ("Gold Travel") (the first respondent in the court of first instance) and Stanbic Bank Zimbabwe Ltd ("Stanbic") (the sixth respondent in the court of first instance) were also judgment creditors of Cheryl Latimer, through no fault of the respondent.

Gold Travel had registered a caveat against the immovable property, the subject herein, for an amount of $72 443,30 together with interest and taxed costs of $1 246,22.

The respondent fell into arrears in her payments of the contracted instalments to Beverley. This led to Beverley issuing a writ of execution against Cheryl Latimer. In the result the respondent's legal practitioners wrote to the legal practitioners of Gold Travel on 4 May 1994 to enquire whether Gold Travel would accord the respondent the indulgence of paying all the arrears due by 31 July 1995. The legal practitioners of Gold Travel replied that they would "hold legal action in abeyance" until Beverley instructed the Sheriff to proceed with the sale, in which case Gold Travel would participate in the same - presumably the legal action.

Thereafter, Beverley and Stanbic intimated through their attorneys that the sale by public auction of the property herein, scheduled for 4 August 1995, in execution for the debts due to them by Cheryl Latimer should be cancelled because of their acceptance of the arrangements made with the respondent. Contrary to the promise contained in its legal practitioner's letter "to hold legal action in abeyance until Beverley instructed the Sheriff to proceed with the sale", Gold Travel, with full knowledge that Beverley had instructed otherwise, insisted, through its

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managing director, that the sale by public auction should proceed on 4 August 1995. At that auction, the appellant (the seventh respondent in the trial court), who was the managing director of Gold Travel and, as such, the mouthpiece, trustee and agent of the company, put in the highest bid of $620 000 for the immovable property.

On 14 August 1995, that bid was accepted by the Sheriff (the fourth respondent in the trial court). On 15 August 1995, the respondent's legal

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practitioners telephoned the Sheriff and were advised that the sale had not yet been confirmed and that the respondent was at liberty to lodge an objection in terms of rr 359 and 360 of the High Court Rules, which read:

> "359. Any person having an interest in the sale may make a court application to have it set aside on the ground that the sale was improperly conducted or the property was sold for an unreasonably low sum or any other good ground. Any such person shall give due notice to the Sheriff of the application stating the grounds of his objection to confirmation of the sale. On the hearing of the application, the court may make such order as it deems just.
>
> 360. If no objection is made to the court within seven days from the date that the Sheriff declares the highest bidder to be the purchaser in terms of rule 356 ... the Sheriff shall confirm the sale."

On 16 August 1995, the respondent's legal practitioners' letter objecting to the sale in execution by public auction was delivered by hand to the office of the Sheriff. That letter, somehow, was not brought to the attention of the Sheriff timeously. Consequently, the Sheriff confirmed the sale on 24 August 1995, without having had sight of the letter of objection. The letter of objection was brought to the Sheriff's notice no earlier than 4 September 1995. There is no gainsaying that had the Sheriff received the letter of objection at the appropriate time he would have had no option other than to await the outcome of the court proceedings. I am of the view that this irregularity, occurring through no fault of the respondent, renders the Sheriff's confirmation of the sale a nullity.

It was also contended on behalf of the respondent at the proceedings in the court of first instance that the immovable property was sold at a value far less than its actual market price. In substantiation of this assertion the respondent exhibited valuation reports for the property, dated 5 September 1995, prepared by Redfern Mullet Abacus Valuation Services (Pvt) Ltd, Chartered Surveyors, stating that after an inspection of the said property and "following careful investigations and consideration thereof", they were "of the opinion that the market value of the land and permanent improvements erected thereon is the sum of $750 000" and "the forced sale value (of the same property) is the sum of $675 000". Thus the bid of $620 000 made by the appellant at the auction was, in any case, $55 000 below the forced sale value. On that same day, 5 September 1995, the respondent was apprised of the Sheriff's confirmation of the sale and launched proceedings to have the sale set aside.

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As stated earlier, prior to the sale by public auction on 4 August 1995, Beverley and Stanbic had agreed to the sale being deferred, but Gold Travel, despite the respondent's offer to pay the amount in excess of $72 000 due to it by Cheryl Latimer and the promise contained in its legal practitioner's letter, opposed a postponement of the sale. No explanation was proffered by Gold Travel for its refusal to accept the respondent's offer, save for the cryptic statement contained in an affidavit deposed to on behalf of Gold Travel by the appellant as its managing director that:

> "The first respondent (Gold Travel) was entitled to refuse the offers of the applicant to liquidate the indebtedness due to it from the owner of the property."

This is suggestive of a sinister motive on the part of the appellant.

The appellant unashamedly admitted in his affidavit that from the inception he participated in the auction on his own behalf and not on behalf of his principal. He stated in para 21(f) of his affidavit:

> "Having authorised on behalf of the first respondent the sale to proceed I decided to bid for the property in my own name. I was keen to purchase a property in the area concerned ... I had in mind that if the property was sold for a price much more than I could afford and for a price that would benefit the first respondent (Gold Travel), then I would be delighted that the first respondent's (Gold Travel's) interest in the property and the indebtedness of the owner to the first respondent (Gold Travel) would be satisfied. However, as events unfolded I believe it was my good fortune to experience other bidders withdrawing from making further bids prior to me making the final highest bid of $620 000" (emphasis added).

It was apparent to all that that final bid would be insufficient for any amount to be received by his principal (Gold Travel). This he stated was his "good fortune" and, as pointed out by Mr Andersen, obviously his principal's bad fortune. One cannot help but recall the sanguine advice of Lord Cranworth LC in Aberdeen Rlwy Co v Blaikie Bros [1843-60] All ER Rep 249 at 252H-I that:

> "The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such

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> an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no-one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interest of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."

I do appreciate the fact that Gold Travel or its directors or shareholders alone may impugn the transaction thus entered into by the appellant, but this does not detract from the unconscionable behaviour of the appellant. Such unconscionableness is made more poignant by the fact that Cheryl Latimer, who was indebted to Gold Travel and Stanbic, through no fault of the respondent, owned a half share in 8 Grosvenor Road, Highlands, Harare, and it was apparent that the appellant's bid would not be sufficient for any amount to be received by his

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principal (Gold Travel).

To my mind, Mr Andersen's submissions that the appellant did not accept the respondent's offer to liquidate the indebtedness of Cheryl Latimer to Gold Travel because he intended to bid for the immovable property himself, and participated in the auction, not on behalf of his principal but on his own behalf, are unexceptionable.

As stated earlier, the appellant originally appealed against the judgment solely on the ground that the respondent did not have an interest in the sale and accordingly had no locus standi. Mr Phillips submitted that while he had no mandate to abandon the ground of appeal on the locus standi of the respondent, he would offer no argument in support of it save what was stated in the heads of argument.

In the appellant's heads of argument, it was contended that the commencing words of r 359: "Any person having an interest in the sale", delimit the persons who may make a court application to have a sale set aside, and should be given a restricted meaning instead of their ordinary meaning.

The argument in support of this contention was that the only persons having an interest in the sale to the extent that they might impeach it on the grounds set out in r 359 are the judgment debtor and the judgment creditors and any other creditors wishing to participate in the sale. The respondent only has a legal relationship with the judgment debtor. Since she enjoys a personal right against Cheryl Latimer only, she had no right to bring inter-pleader proceedings

KORSAH JA

to contest the attachment. She had no right to commence proceedings to stay the execution. The sale is not subject to her rights and she has no interest in the sale or its conduct.

Reliance was also placed for the above contention on the decision in Chasfre Investments (Pty) Ltd v Majavie & Ors 1971 (1) SA 219 (C), where the purchaser of immovable property sought to have its sale in execution at the instance of a bondholder set aside and Watermeyer J at p 221F-G said:

> "... 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* to claim transfer of the property in terms of the disputed sale" (emphasis added).

Mr Andersen rightly pointed out, and it was readily conceded by Mr Phillips, that the above cited passage is not to the effect that the right could never be defeated.

Another passage in the said judgment relied upon by the appellant is at 222G-H, which reads:

> "... 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" (emphasis added).

It is pertinent, submitted Mr Andersen, that the above passage does not state that other persons could not also be interested; and Mr Phillips again readily conceded that the categories of

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persons therein stated is not, and was not meant to be, exhaustive of "persons having an interest in".

In my view, there is no warrant for not according the commencing words of r 359 their ordinary meaning in conformity with the basic rule of interpretation of statutes.

Generally speaking, any person adversely affected by a judicial decision may petition the courts for redress, but to exercise that right the petitioner must establish that he or she has a real, direct and substantial interest in the subject matter and the outcome of the application: Zimbabwe Teachers Association & Ors v Min of Education 1990 (2) ZLR 48 (H).

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In the instant matter, the appellant was not a judgment creditor. He was a mere purchaser at a public auction and did not rank in priority to the respondent. If the property was sold, the respondent did not only stand to lose her deposit, but also her legal right to complete the permanent acquisition of the property. As the purchaser of the property by deed of sale, there can be no doubt that the respondent stood to lose a substantial interest; and such interest was adversely affected by the decision to confirm the sale of the property in execution of a judgment debt due, not to the appellant, but to third parties by Cheryl Latimer. As such, she had a real interest in the subject matter of the action and the relief sought, and is therefore clad with the necessary locus standi to bring an application of this nature under r 359.

Mr Andersen submitted, rightly in my view, that the respondent clearly had an interest in both retaining the property and ensuring that, if sold, the best price would be obtained, having regard to the price paid, the improvements effected, and the extent to which property values have escalated.

Learned counsel were in agreement that the remedy provided under r 359 was of a discretionary nature, but they differed as to the category of the discretion which the court of first instance exercised under r 359. The reason for their disagreement is exemplified in the following statement by Stegman J in Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd 1989 (4) SA 31 (T) at 35I-36H:

> "... when the exercise of a discretionary power by a court of first instance is taken on appeal, the court of appeal is faced with at least two distinct tasks. The first task relates to the general characterisation of the discretionary power in question in the case. The purpose is to determine whether the function of the court of appeal is to re-examine any aspect which the parties may seek to re-argue on the existing record; or whether such court's function is limited to an enquiry into the question whether the court below exercised its discretion judicially. When that task of characterisation has been performed, the second task (if it arises at all) relates to the examination of the particular exercise of the discretionary power by the court of first instance, and the decision whether or not to interfere with it. The nature of such second task varies according to the characterisation of the discretionary power in terms of the first task.
>
> There are at least two categories to one or other of which the discretionary powers exercisable by courts of first instance may be assigned. The first of such categories relates to matters having the character of being so

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> essentially for determination by the court of first instance that it would ordinarily be inappropriate for a court of appeal to substitute its exercise of the discretionary power for the exercise thereof decided on by the court of first instance. The first matters identified as falling within this category were those discretionary powers that related to a judge's control of the conduct of the business in his own court. Later the first category was broadened to include certain other discretionary powers.
>
> The second category relates to matters having the character of being equally appropriately determinable by the court of first instance and the court of appeal.
>
> When a particular discretionary power has been found to be of the character which places it in the first category, the court of appeal has no jurisdiction to substitute its own exercise of discretionary power for that decided upon at first instance unless it has been made to appear that the exercise of the power at first instance was not judicial. That can be done by showing that the court of first instance exercised the power capriciously or upon a wrong principle or with bias or without substantial reasons.
>
> When a particular discretionary power has been found to be of the character which places it in the second category, the court of appeal has jurisdiction to substitute its own exercise of the discretion for that decided upon at first instance without first having to find that the court of first instance did not act judicially. Sufficient reason for the court of appeal to do so must be shown, but the reason need not reflect on the judiciality of the decision at first instance. The court of appeal may interfere on the simple basis that it considers its own exercise of the discretionary power to be wiser or more appropriate in the circumstances" (emphasis added).

Mr Phillips urged us to adopt the approach that the discretion exercisable by virtue of r 359 is of the second category and that this court is in as good a position as the court of first instance, after taking cognisance of all the circumstances, to exercise the discretion in question. Mr Andersen, on the other hand, referring to the last sentence in r 359, which reads:

> "On the hearing of the application the court may make such order as it deems just",

contended that the discretion is that of the trial court alone and falls within

the first category; therefore this court has no jurisdiction to interfere with its exercise unless it is shown that the trial court did not act judicially.

Mr Andersen's submission derives considerable support from the following statement by Beadle CJ in Bhura v Lala 1974 (1) RLR 31 (A) at 37B that -

> "I also point out that the court *a quo*, in deciding whether or not a particular ground is a good one, is given a wide discretion with which a court of appeal will not lightly interfere, unless it is satisfied that no reasonable court could have reached the same conclusion, or as is sometimes said, unless it is satisfied that the discretion was not properly and judicially exercised. See, for example, such cases as Ex p Neethling & Ors 1951 (4) SA 331 (A) at 335."

It seems to me settled that the discretion exercisable by virtue of r 359 falls within the first category and that this court has no jurisdiction to interfere with its exercise unless it is established that the trial court did not act judicially.

Mr Phillips next contended that where confirmation of the sale has been made by the Sheriff, as

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it was here, the courts are more reluctant to interfere with the sale: Naran v Midlands Chemical Industries (Pvt) Ltd S-220-91 at pp 6 and 7; Mapedzamombe v Commercial Bank of Zimbabwe & Anor 1996 (1) ZLR 257 (S). But, as Gillespie J was quick to point out in Morfopoulos v Zimbabwe Banking Corp & Ors 1996 (1) ZLR 626 (H) at 632:

> "There is, nevertheless, no time limit for the bringing of an application in terms of r 359, see Mbewe v Central Africa Building Society HH-83-92, provided, of course, that it comes before transfer. The fact of the confirmation, moreover, does not prevent an application being made in terms of r 359, nor does it prevent an application under the common law. Where the application is made in terms of r 359 after confirmation then the fact of the confirmation, and its effect upon the contractual status of the sale, and any action taken by the purchaser to his potential prejudice in consequence of the confirmation, is a further circumstance to be taken into account in the determination as to whether good cause has been shown."

As hereinbefore stated, on the facts it is patent that the appellant acted unconscionably in bidding against the interest of his principal, Gold Travel. It is true that it was the respondent's failure to service Cheryl Latimer's bond

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KORSAH JA

with Beverley which precipitated the sale. But Beverley had come to an accommodation with the respondent and was agreeable to having the sale postponed. Furthermore, the respondent's offer to pay Gold Travel what Cheryl Latimer owed it was refused by the appellant acting as the agent of Gold Travel. Even if the respondent's failure to service Cheryl Latimer's bond had brought about her problem, but for the recalcitrance of the appellant she had taken all necessary steps to address the problem efficiently at an early stage - before the date set for the auction. Had the appellant accepted the respondent's offer to extinguish Cheryl Latimer's debt to his principal, Gold Travel would have been fully compensated and the respondent would not have lost her house because there would have been no real need to sell the property.

As things stand, Gold Travel, Beverley and Stanbic, who had acquired real interests in the property, do not stand to lose anything if the sale in execution is set aside. Indeed, only the appellant, who manoeuvred to have the sale in execution conducted for his own benefit, stands to lose anything, and it is not surprising that he alone claims to be aggrieved and dissatisfied with the decision of the trial court to set aside the sale.

In my view, the trial court, in coming to the conclusion that the equities favour the respondent, did not arrive at a decision insupportable by the evidence before it. I am not satisfied that the discretion reposed in the trial court was not properly and judicially exercised.

In the result, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

I E G Musimbe & Associates, respondent's legal practitioners

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COUTTS & CO v FORD & ANOR 1997 (1) ZLR 440 (HC)

Court **High Court, Harare**

Chidyausiku J

Civil action

23 May & 30 April 1997 Judgment No. HH-71-97

Flynote

Conflict of laws - law to be applied - prescription - civil claim in Zimbabwe for debt owed in England - debtors claiming that claim prescribed - whether English or Zimbabwean law of prescription applies

Headnote

The defendants owed money to the plaintiff, a bank operating in England. When the plaintiff brought a claim in Zimbabwe for this debt, the defendants pleaded that the claim had prescribed. Under the Zimbabwean law relating to prescription, the claim would have been prescribed but under the English law it would not.

Held, that in terms of s 14 of the Zimbabwean Prescription Act [Chapter 8:11] the legislature has clearly expressed its intention to make prescription a matter of substantive law and not a matter of procedural law. This provision lays down that the debt is extinguished by prescription rather than the remedy merely being barred. In England, on the other hand, prescription is a matter of procedure and not of substantive law and under that system the remedy, not the right, is barred.

Held, further, that in terms of principles of private international law the lex causae (English law in the present case) governs matters of substance while questions of procedure are governed by the lex fori (Zimbabwean law in the present case). This creates a problem, because, according to the lex causa, prescription is classified as procedural law, whereas according to the lex fori it is a matter of substantive law.

Held, further, the traditional approach in private international law is for the lex fori to characterise according to its own law and not the lex causa.

CHIDYAUSIKU J

The better approach, however, in a case like the present one is to apply a via media approach which allows the court to exercise judicial discretion in relation to choice of law, taking into account the consequences of deciding the case one way or the other. This enables the court to decide the case with a view to achieving international comity and a balance of justice and convenience.

Held, further, as the policy behind prescription is to penalise the tardy litigant, in the present case the foreign litigant should not be precluded from claiming when his claim is sustainable in

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his system of law, he having brought his claim within the period laid down by his law. Considerations of international comity are better served by our courts recognising as valid and effective this debt which is recognised as valid under the lex causa.

Held, therefore, that English law applied in the present case and that the plaintiff's case has not prescribed.

Cases cited:

Laurens NO v von Hšhne 1993 (2) SA 104 (W)

Sperling v Sperling 1975 (3) SA 707 (A)

Statutes referred to:

Limitation Act 1980 (England), s 5

Prescription Act [Chapter 8:11], s 14

Case Information

M J Gillespie, for the plaintiff

E W W Morris, for the defendants

Judgment

Chidyausiku J: The defendants in this case except to the plaintiff's claim on the basis that it has prescribed. The plaintiff contends the action has not prescribed. The facts as set out by the plaintiff in its declaration are as follows. The plaintiff is a duly registered company according to the laws of England and is a bank authorised to operate as such by the Bank of England under the Banking Act of 1987. The defendants presently live and work in Zimbabwe. Since 1987 the defendants have maintained a current account in their names in the books of the plaintiff. The account was always operated in overdraft. Notwithstanding undertakings by the defendants to replace the overdraft with their own funds, the overdraft was never repaid. On 12 February 1990, formal demand was made upon the defendants for payment for the balance. On 11 June 1993, summons was issued out of this court and served on the defendants on 2 October 1993.

The second defendant filed a special plea. The special plea was that ex facie

the declaration, formal demand in respect of the alleged debt was made on 2 February 1990. The summons and declaration were served on the second defendant after 12 February 1993. Accordingly the claim is prescribed in terms of s 14 of the Prescription Act [Chapter 8:11]. On this basis, the defendant prayed that the plaintiff's action be dismissed with costs.

The plaintiff replied to the second defendant's special plea. The plaintiff avers that the proper law to be applied in the adjudication of the rights and obligations of the parties in this matter is

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that of the lex causae. The lex causae is English law. In terms of English law the plaintiff's claim was not prescribed at the time of the service of the summons on the second defendant and accordingly the plaintiff's claim is not prescribed. It is accepted that according to English law prescription runs only after 6 years; therefore, if English law applies, then the plaintiff's claim is not prescribed. The cause of action arose in England and proceedings are taking place in Zimbabwe. The court therefore has to resort to private international law to resolve this issue.

It is a well established principle of private international law that the lex causae governs matters of substance while questions of procedure are governed by the lex fori. Thus in the present case the English law would be the lex causae and Zimbabwe would be the lex fori. See C F Forsythe Private International Law 2 ed p 17.

The next question that falls for determination is whether prescription is a matter of substantive law or procedural law. Section 14 of the Prescription Act [Chapter 8:11] reads as follows:

> "(1) Subject to this Part and Part V, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant enactment applies in respect of the prescription of such debt.
>
> (2) A subsidiary debt which arose from a principal debt or a debt which is dependent upon a principal debt shall be extinguished by the prescription of the principal debt.
>
> (3) Notwithstanding subsections (1) and (2) -
>
> (a) payment by the debtor of a debt after it has been extinguished by prescription in terms of this section shall be deemed to be payment of the debt;

CHIDYAUSIKU J

> (b) an agreement made by the debtor to pay a debt after the debt has been extinguished by prescription shall be enforceable;
>
> whether or not the debtor knew at the time that he made the payment or the agreement that the debt had been extinguished by prescription."

Thus the clear intention of the legislature as expressed in the above provision is to make prescription a matter of substantive law as opposed to procedural law. The above provision clearly extinguishes the debt as opposed to merely barring the remedy. The wording of the exception to the provisions, namely subs (3), puts the above interpretation beyond doubt.

It is common cause that according to English law prescription is a matter of procedure and not substance. Thus s 5 of the (English) Limitation Act 1980 provides as follows:

> "5. An action founded on a simple contract shall not be brought after the expiration of six years from the date on which the cause of action arose."

The language of the above section explicitly bars the remedy not the right.

Thus on the facts of this present case, Zimbabwe is the lex fori. According to the lex fori, namely s 14 of the Prescription Act, prescription can only be classified as substantive law. Private international law, provides that matters of substantive law are governed by the lex causa, which in this case is the English law. However, according to the lex causae or English law, prescription

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is classified as procedural law and not substantive law, which in terms of private international law is governed by the lex fori, namely Zimbabwe law which as I have already observed, refers the classification back to the English law thus creating a gap or a vicious circle. How then should the gap be filled or the vicious circle be broken?

The traditional approach in private international law is that when it comes to classification the lex fori characterizes according to its own law without looking at the lex causae: Laurens NO v von Hšhne 1993 (2) SA 104 (W). If I adopt this approach the Zimbabwean law as the lex fori classifies prescription and it classifies prescription as substantive law. According to the traditional approach that is the end of the matter. On this approach, English law would govern the question of prescription and accordingly the debt is not prescribed. On this approach, the exception would not succeed.

CHIDYAUSIKU J

Mr Gillespie has urged the court to dismiss the exception on the via media approach. The via media approach was summarised by Schutz J in Laurens' case *supra* at pp 116H-117C as follows:

> "The traditional rule has been that the lex fori characterises accordingly to its own law without looking further. In some cases, this can lead to unfortunate results and because of that various writers, Falconbridge being an important early one, have much stirred the question. Falconbridge's approach is a via media according to which the court has regard to both lex fori and the lex causae before determining the characterisation.
>
> According to him, although the matter is one for the law of the forum, the conflict rules of the forum should be construed 'sub specie orbis' that if from a cosmopolitan or world-wide point of view, so as to be susceptible of application to foreign domestic rules (Turpin op cit at 223).
>
> In doing so, it will pay full attention to the 'nature, scope and purpose' of the foreign rule in its context of foreign law. What the forum should do, so it is contended, is to make a provisional characterisation having regard to both systems of law applicable, followed by a final account policy considerations.
>
> The via media approach, it is contended, serves a particularly useful purpose where a foreign institution is not known to the lex fori. If no regard is had to foreign law, what is likely to ensue is that the nearest analogue of the lex fori is laid on a procrustean bed and subjected to a process of chopping off or stretching. (See (1987) 104 SALJ at 9 above). It is also contended for the via media that it tends to create international harmony and leads to the decision of cases in the same way regardless of which country's decide them. If one does not adopt this approach further evils may ensue, so argues Mr du Plessis, namely forum shopping and even a defendant choosing a forum whose laws best suit him."

Mr Gillespie also argued that the via media approach allows for judicial discretion on the question of choice of law leading to greater justice. In this regard he referred the court to the following remarks of Corbett JA (as he then was) in Sperling v Sperling 1975 (3) SA 707 (A) at 772C-E:

> "It is undoubtedly true that public policy operates generally as an overriding check upon the application in our courts of rules of a foreign

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CHIDYAUSIKU J

> lex causae (see eg Weartherley v Weartherley 1879 Kotzè 66 at pp 83-5; Seedat's Executors v The Master 1917 AD 302 at pp 307-8); and there is no reason why this should not be the case where the choice of law rule of the forum points to the law of a foreign matrimonial domicile. In my view, however, public policy is not the only restricting criterion. Where, as in this case, there is no clear authority upon the point, it is, I consider, proper to have regard to the consequences of deciding the issue the one way or the other and to take into account which course appears to have in its favour 'the balance of justice and convenience' (cf Starkowski's case *supra* at p 172; see also Frankel's Estate & Anor v The Master *supra* at pp 221, 239)."

I find myself in agreement with the via media approach. It appears to me to be more enlightened and likely to achieve international comity. It is more amenable to the achievement of the balance of convenience and justice on the facts of any individual case.

Applying this approach to facts of the present case, the court is persuaded by Mr Gillespie's submission that this court, conclude that the debt in the present case has not prescribed for reasons that he advances in para 17 of his heads of argument. In particular, on the facts of this case it is common cause that the legal systems of both the lex fori and the lex causae deny the applicability of their rules of prescription to this case.

The lex causae does not regard the debt as extinguished. In my view, it would be invidious were Zimbabwe the lex fori applying the provisions of the Prescription Act to pronounce the debt extinguished despite its stance that the issue is for the lex causae which in turn does not pronounce the debt as prescribed.

The lex causae or the English law allows for both the natural obligation of the indebtness to remain intact and indeed allows a remedy. It would be most invidious were the lex fori, which according to its own internal rules is not applicable, to subvert that obligation and that remedy.

The policy underlining the law of prescription is that there should be finality to litigation and that the law should not assist the tardy litigant. In my view, this same policy does not demand the non-suiting of a foreign litigant approaching our court on a cause which his law regards as good and sustainable and who according to his own law is acting expeditiously and within the prescribed period for acting.

CHIDYAUSIKU J

Finally, considerations of international comity are better served by our courts recognising as valid and effective this debt which is recognised as such by the lex causae as opposed to applying substantive rules of the lex fori which themselves deny their own applicability.

For the foregoing reasons, the court has come to the conclusion that English law of prescription applies to this case and the plaintiff's claim has not prescribed. The exception is dismissed. Costs will be costs in the cause.

Coghlan, Welsh & Guest, plaintiff's legal practitioners

Gollop & Blank, defendants' legal practitioners

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FOROMA v MINISTER OF PUBLIC CONSTRUCTION & NATIONAL HOUSING & ANOR 1997 (1) ZLR 447 (HC)

Court **High Court, Harare**

Smith J

Civil action

7 May 1997 Judgment No. HH-85-97

Flynote

Administrative law - illegal exercise of power - whether Ministry of Public Construction and Housing was authorised by legislation to operate VIP Housing Scheme - whether estoppel applies when public moneys have been paid out illegally

Constitutional law - Constitution of Zimbabwe 1980 - public finance - withdrawal of monies from public funds - withdrawal not authorised by Act of Parliament - effect

Revenue and public finance - expenditure - VIP housing scheme - legality of expenditure on VIP housing scheme

Headnote

A so-called "VIP Housing Scheme" was established by the Ministry of Public Construction and National Housing. The Ministry purported to operate this scheme under the Housing and Building Act [Chapter 22:07]. Large amounts of public moneys were expended on this scheme. Civil servants, Ministers and even some well-connected members of the public benefited. Funds were used not only to pay for the construction of luxury houses, but also to pay for extensions or repairs and such items as swimming pools. The Housing and Guarantee Fund established under the Act was used to finance the scheme and money was diverted into this scheme from funds in the National Housing Fund, a fund to finance construction of housing for lower-paid persons.

Held, that s 102(1) of the Constitution provides that no moneys shall be

withdrawn for the Consolidated Revenue Fund except to meet expenditure charged thereon by the Constitution or by an Act of Parliament or where the issue of those moneys has been authorised by an Appropriation Act or other Act of Parliament. Section 102(3) of the Constitution provides that no moneys shall be withdrawn from any fund, other than the Consolidated Revenue Fund, unless the issue of those moneys has been authorised by or under an Act of Parliament. The Housing and Guarantee Fund is a fund referred to in s 102(3) of the Constitution.

Held, further, it was clear to anyone of even the meanest intelligence that the Housing and Building Act had no provisions that would allow for the operation of the VIP Housing Scheme and the withdrawal of money from the Housing and Guarantee Fund was clearly illegal. The

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testimony by the Permanent Secretary that he and the Minister thought that the Housing and Building Act authorised the operation of the scheme could not be believed.

Held, further, that the scheme was corrupt. The very name of the scheme shows that it was formulated to help those who held high office or had the right contacts. The Minister of Public Construction and Housing and the Permanent Secretary in the Ministry at that time had abused their positions in Government in order to grant improper favours and assist cronies. Under the VIP Housing Scheme public moneys had been grossly misused on a substantial scale. Not only had many people profited unjustly from the abuse, but substantially greater numbers had suffered because their housing needs had not been met. The moneys which should have been available to provide housing for the lower-paid members of the public and for the homeless were used to provide luxury houses for, or to improve the houses of, the privileged few.

Held, further, that the VIP Housing Scheme was illegal and all the contracts purportedly entered into in terms of the VIP Housing Scheme were illegal, contrary to public policy and of no force and effect. No estoppel can be claimed where public funds are paid out illegally, even where payments are made with ostensible authority and the beneficiaries act in good faith.

Held, further, that the Ministry had a duty to ensure that all moneys improperly spent are recovered as soon as possible and applied to their proper and legitimate purpose.

Held, further, that it was strongly recommended that the Public Service Commission should investigate the administration of the Ministry in question, weed out the corrupt, the inefficient and the incompetent officials and give the Ministry all the assistance it required to recover as soon as possible the moneys unlawfully spent.

SMITH J

Cases cited:

Acting Min of Industry & Anor v Tanaka Power (Pvt) Ltd 1990 (2) ZLR 208 (S)

Auckland Harbour Bd v R [1924] AC 318

Collector of Customs v Cape Central Railways Ltd (1888) 6 SC 402

CIR v The Master & Anor 1957 (3) SA 693 (C)

Ritch and Bhyat v Union Government (Min of Justice) 1912 AD 719

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)

SAR & H v Tvl Consol Land & Exploration Co Ltd 1961 (2) SA 467 (A)

Statutes referred to:

Constitution of Zimbabwe 1980, s 102(1)

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Housing and Building Act [Chapter 22:07], ss 4 & 5

Case Information

E Matinenga, for the plaintiff

Mrs J Zindi, for the defendants

Judgment

Smith J: The plaintiff (hereinafter referred to as "Foroma") had a residential stand in Mount Pleasant and wanted to build a house. He bought some building materials and then heard that the Ministry of Public Construction and National Housing (hereinafter referred to as "the Ministry") was building houses for members of the public. In July 1995, he met the then Permanent Secretary of the Ministry (hereinafter referred to as "Kodzwa") and entered into an agreement with him in terms of which the Ministry would build a house on his stand at an estimated cost of $743 560,40. Part of the agreement was oral and part was in writing. The oral terms were that it would take about three months to build the house, Foroma would contribute half the cost of construction (either in money or in the form of materials) and the other half of the cost would be met by the Ministry as a loan repayable over 25 years with interest payable thereon at the rate of 13% *per* annum, which rate would be reviewed from time to time. Constructin of the house started in July 1995 and Foroma agreed to pay the Ministry $12 000 a month until construction had been completed, at which stage the project would be costed and Foroma's liability would be quantified. Foroma would then be allowed to take occupation and would commence paying his monthly instalments to repay the loan. Although the house was virtually completed by the end of June 1996, the second defendant (hereinafter referred to as "Zamchiya") who had by then take over from Kodzwa as Permanent Secretary of the Ministry, refused to have over occupation until the final costing had been done. Foroma made strenuous efforts to get occupation but to no avail. Eventually, he made an application to the High Court for an order that he be given occupation. The

SMITH J

defendants opposed the application. Bartlett J ordered that the matter be referred to trial and issued an interim order that Foroma be given occupation of the house and that he should pay $12 000 a month until the matter was determined.

Foroma gave evidence as to the contract he had entered into with Kodzwa. His evidence was as follows. He had learnt that the Ministry was building houses for members of the public and so be approached Kodzwa. Kodzwa had considered his application and agreed that the Ministry would build a house for him on the terms set out earlier in this judgment. Kodzwa had given him a form to complete and sign. The form states that Foroma had contracted the Ministry's Construction Unit to construct a house according to a specified drawing "all in the sum of, a guarantee 10% loan of not more than $743 560,44". According to Foroma, that was the estimated cost of the project, not a maximum cost.

The Construction Unit started building in July 1995 but did not finish the project until June 1996.

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He was told that he would be given occupation on 28 June 1996. On 27 June, however, he was told that the new Permanent Secretary, Zamchiya, had instructed that the house was not to be handed over until he gave permission therefor. He then spoke to Zamchiya on 28 June and followed up his conversation with a letter of the same date expressing his concern and the financial prejudice he was being caused. These approaches were fruitless.

He was told by Miss Maboreke, a Deputy Secretary in the Ministry, that the house would not be handed over to him until the costing exercise had been completed. Miss Maboreke then accused him, saying that it was people like him who had had their houses built using public funds which had not been authorised for that purpose who were causing problems for officials in the Ministry. He was puzzled by the suggestion that funds had not been properly authorised for the building of his house. When he had approached Kodzwa he had not thought that the scheme was illegal. His was not the only house that had been build by the Ministry. Before 1995 the Ministry had built a house in Belvedere for a relative of the President and that had been reported in the Press. He had filed a list of 86 projects which the Ministry had undertaken for members of the public. He had then spoken to the Minister who said he could see no problem and referred him to Zamchiya. He saw Zamchiya who had mentioned certain problems they were having inthe Ministry and then said that he was having a letter typed which would authorise the handing over of the house. The letter was never received.

SMITH J

In cross-examination, Foroma said that he had approached Kodzwa because he had been told that only the Permanent Secretary could give approval for the building of his house. He had signed a form of agreement with the Ministry. It was his understanding that when the final costing of the project had been completed, he would be required to sign another agreement setting out the amount he had to pay the Ministry, the monthly instalments and other details relating to payment for the building of the house. He thought that the scheme was legitimate.

Kodzwa's evidence was as follows. He had been Permanent Secretary in the Ministry for four and a half years. In 1991-2 there was a serious shortage of money for building houses. The Minister was getting a lot of requests for assistance. The Minister asked him to come up with a scheme to help those in need. He studied the Housing and Building Act [Chapter 22:07] (hereinafter referred to as "Chapter 22:07") and was satisfied that Part IV for that category of people i.e. those coming to the Minister for assistance because of the shortage of money on the money market. At the directive of the Minister, he devised the scheme in terms of which Foroma's house, amongst others, was built (hereinafter referred to as the "VIP Housing Scheme").

Generally, the conditions of the scheme were as follows. Each applicant would be required to put down half the estimated cost of the project but exceptions were made for some because of "pressures" and in fact only a few paid the full half of the cost of their project. He would consult the Minister who would ask if the applicant could pay the monthly instalments and if the applicant could then assistance granted. Participants would be given 25 years to pay off the amount they owed to the Ministry depending on the circumstances. A standard form of contract was devised and participants would be obliged to sign the form. After the project was

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completed, it would be sent to the participant setting out the costing, extras asked during construction, the monthly instalments, and the period of repayment.

He, Kodzwa, left the Ministry on transfer in July 1995. No one had suggested to him that the VIP Housing Scheme was illegal. The Ministry was getting many request for assistance under that scheme when he left. No one raised the objection that public moneys were being put to unauthorised uses. The Minister was fully aware of what was being done. In Foroma's case, Foroma had not been able to pay the 50% deposit so he suggested to Foroma that he should pay $12 000 a month so that by the time the house was completed he would have paid the 50% deposit. Unfortunately he forgot to tell his staff

SMITH J

about the agreement he had reached with Foroma and so the relevant portion of the written contract form had been left blank.

The Housing and Guarantee Fund which was established in terms of Part II of Chapter 22:07 was used to finance the VIP Housing Scheme. Houses were built under the VIP Housing Scheme in Harare, Bulawayo, Chinhoyi, Mutare and other centres. The National Housing Fund, which was established in terms of Part IV of Chapter 22:07, was used to finance the construction of houses for the lower-paid. All the projects under the VIP Housing Scheme were above board. He personally looked at the plans for each project and advised on the estimated cost thereof. He would travel to each site to watch progress because he wanted to ensure quality. The VIP Housing Scheme was to help middle class people with problems. Before that scheme was started, it had been discussed at length in the Ministry. It was not a personal decision of his but a team effort involving all senior officials in the Ministry. Projects were audited by the Internal Audit Department of the Ministry. The principle of the scheme was never questioned. If it had bee, he would have stopped the scheme.

Kodzwa was subjected to a lengthy cross-examination in the course of which he said the following. The VIP Housing Scheme had been started by him in 1993-94. At that time he considered that ss 4 and 5 of Chapter 22:07 authorised such a scheme. Scheme 4(a) said that the Minister could guarantee the repayment of certain classes of loans but there were no loans to guarantee because of the shortage of money so it was decided to start the Construction Unit in order to assist. The provisions of the Act were "turned around" in order to meet the needs of the people. The top officials of the Ministry, as a team, after analysing the provisions of s 4 of Chapter 22:07, agreed that it enabled the Minister to grant loans to build houses. Although subs (2) of s 4 provides that no guarantee could be given for an amount exceeding that fixed by the Minister with the approval of the Minister of Finance, the Minister had not fixed a maximum amount and no approach had been made to the Treasury. Under the VIP Scheme, the Ministry ad to finish the house as long as the applicant committed himself to pay. Projects costing $1 million were acceptable if the applicant could pay the necessary instalments from his or her salary. Kodzwa said that, on reconsideration, he agreed that s 4 did not authorise the VIP Housing Scheme but possibly s 5(1)(a) did. They in the Ministry, rightly or wrongly, decided to use para (a) of s 5(1) to cover the scheme that it was devised to help people. On reflection he agreed that para (a) of s 5(1) did not cover the VIP Housing Scheme but he suggested that

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possibly para (b) thereof did. That paragraph

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provided that the Minister could make advances to any person for buying land and erecting dwellings thereon. Admittedly the paragraph referred to the making of such advances for the aged, the handicapped, etc, but the Ministry decided to ignore those qualifications. Kodzwa then suggested that para (g) of s 5(1) of Chapter 22:07 might cover the scheme. On reflection, however, he agreed that their interpretations of he various provisions of the Act were wrong and he accepted that Part II of Chapter 22:07 did not cover the VIP Housing Scheme. He said that at the time, however, people were desperate for houses and he introduced the scheme to assist them. He did not seek the advice of the Attorney-General because he assumed that their interpretation of Chapter 22:07 was correct. In retrospect, he agreed that he should have sought legal advice.

People wanted assistance under the VIP Housing Scheme came to see either him or the Minister. Details of the scheme were never publicised. Each application was carefully analysed and those who could not pay were turned down.

With regard to Foroma's case, the amount of $743 560,40 set out in the contract was an estimated of the cost based on the initial costing. He now accepted that Chapter 22:07 did not allow the Minister to grant loans repayable over 25 years with interest at 13% *per* annum. He had not sought Treasury approval of the scheme because he had thought, at the time, that Chapter 22:07 covered it.

The VIP Housing Scheme arose out of concern for those who could not get loans from building societies. However, some people came to the Minister because they did not want to stand in queues. They had given up on the building societies. Building societies did not offer similar loans carrying an interest rate of 13%. He had fixed the rate of 13% for the VIP Housing Scheme because that was the "Government set prime rate". Loans were made under the scheme for extensions and repairs. There were no limit to the maximum cost of any project. It depended on each individual case and what the individual wanted. The scheme was not for everybody. He was not aware that money from the National Housing Fund and other schemes had been diverted to the VIP Housing Scheme, neither was he aware that the Ministry owed $90 million in outstanding credits because of that VIP Housing Scheme. The thrust of the Ministry was to provide for all people. In using public funds to provided luxury houses they had misinterpreted Chapter 22:07. t was not their intention to abuse public funds.

SMITH J

Kodzwa said that the Pay for Your House Scheme had also been started by the Ministry. Individuals made monthly payments to the Ministry which then built houses for them. The Ministry collected the moneys, waited for funds and then started to build. That scheme, too, was not provided for in Chapter 22:07. It had been launched by the President when he opened a

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housing project in Mabvuku.

After the close of the plaintiff's case, Zamchiya, the second defendant, then gave evidence to the following effect. He was appointed Permanent Secretary of the Ministry on 4 October 1995. In June 1996, he saw Foroma who had been referred to him by the Minister. Foroma told him that he wanted to move into his house that the Ministry had built for him. He telephone a member in his Ministry to find out what the position was in relation to Foroma's house and was told that the costing had not been completed. He advised Foroma accordingly and thereafter all calls from Foroma were referred to the Deputy Secretary, Miss Maboreke. When he took office as Permanent Secretary the Ministry was inundated with creditors who had not been paid for work done or materials supplied to the Ministry for projects under the VIP Housing Scheme. He asked his officials whether Treasury authority for the scheme had been obtained and was told that there was no such authority. Furthermore there was no constitution for the scheme setting ut how the scheme was to be operated, although Treasury Instructions required that a constitution should be drawn up.

In November 1995, Treasury cut the allocations to all Ministries. These cuts had a disastrous effect on the Ministry because it had overspent its budget and could not pay its creditors. The VIP Housing Scheme was funded from the Housing and Guarantee Fund. When he took office that fund was in a deficit situation to the extent of approximately $80 million. The National Housing Fund was also in a chaotic position. It too was in deficit to the tune of approximately $120 million, but the figures varied because proper records had not been kept and suppliers had supplied materials without first receiving requisitions. When he tried to investigate the cause of the deficits he found many irregularities in the ordering of materials and equipment for housing. No budgeting had been done for the different projects. At one site he would find window and door frames but no bricks, at another site there would be a large quantity of bricks but no cement, and at another there would be window panes and plumbing material but no ricks. There was no logical ordering of materials required at each of the various sites and no costing were done for particular schemes. Houses were being built at various places under the Pay for Your House Scheme and the VIP Housing Scheme. No-one in the

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Ministry knew the cost of the project on each particular site and yet materials and equipment were ordered for the projects.

The Housing and Guarantee Fund was intended to guarantee portion of the loans made by building societies to civil servants or to members of the public who were not Government employees. The maximum amount of any loan that could be guaranteed was $160 000. That Fund could not be used to make loans, it was only for guaranteeing loans. It was a revolving fund. Moneys were taken from the Pay for Your House Scheme and from the National Housing Fund to finance the VIP Housing Scheme. Government loans that were repaid by local authorities through the Ministry were also diverted to the VIP Housing Scheme of being sent to Treasury.

When he first became aware of the VIP Housing Scheme, he looked at the standard form of

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contract that was used under the scheme and it did not make sense. Many details that one would expect to find in such an agreement were not included. He had since devised a new form of contract in terms of which the Ministry was the contractor and the client had to make payments at set stages. No guarantee or loan was involved. Initially, he had refused on the basis that public money had been used for the project without Treasury authority. He had since insisted that all who benefited from the VIP Housing Scheme had to pay in full. He considered that the use of public funds for that scheme was illegal.

Zamchiya, too, was subjected to a searching cross-examination in the course of which he said the following. He was in the process of trying to regularise the Pay for Your House Scheme. Some members of that scheme were still paying-in money whilst others had withdrawn their money. At the end of 1995 and the beginning of 1996, the Ministry had built a double garage at his residence. He had told his officials that proper parking facilities were to be constructed at the Ministry's offices and to his utter surprise he found that work had been started on garages at his house as well as at this office. He asked the official concerned why the garage was being built at his house and he suspended the officer-in-charge. He had not made any approach to have the garage built at his house. It was not uncommon for the Ministry to do such things before he became Permanent Secretary; in fact that had been the practice. He told them to stop building the garage but that was after it had been completed, because he wanted to "faclitate first-hand information as to how things were done in the Ministry". He had never instructed the officials to build the garage at his house. He had told the officials where to site the garage but in fact it could not have been built at any other place on the stand. The

officials said he had a Government vehicle which should be properly protected. He did not know the cost of the garage because he had not been sent an account. He had not asked for an account since March 1996 when the garage was completed. However, he had told his officials to write to all those for whom the Ministry had built VIP houses which had been finally costed to tell them what they had to pay. The officials were in the process of doing that. He agreed that it had taken 14 months to cost his garage and write to him but that had been the case with the houses under the VIP Housing Scheme. Costing exercises had only started in May 1996. Zamchiya agreed that Foroma could have taken occupation of his house without affecting the final cosing which could have been done later. The labour force had been removed from Foroma's property by 28 June 1996 and guards had been stationed there until December to look after the property.

The Deputy Secretary, Miss Maboreke, and the Construction Officer, Miss Chabuka, also gave evidence which did not add materially to the evidence before the court.

Kodzwa was not a good witness. I do not believe him when he said that when he introduced the VIP Housing Scheme he genuinely believed that it was authorised in terms of Chapter 22:07. He said that the Minister told him to come up with a scheme to help people to build houses. He and his senior officials pondered over the interpretation of the various provisions of Chapter 22:07 for some weeks before they decided that the provisions would cover the VIP Housing Scheme. Why should they go to all that trouble when they could have referred the matter to the

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Attorney-General's office and obtained expert advice? Furthermore, no evidence was produced that there was a scheme as such. There was no constitution setting out who would be eligible and the criteria that would be adopted. There was no ceiling to the amount that would be made available. Applicants for assistance were interviewed by the Minister or Kodzwa personally, who then decided whether the applicant was "suitable". One wonders why the Minister and the Peranent Secretary had to interview the applicants personally. Ordinarily, they should have set the parameters and left it to their officials to handle the details.

Foroma filed a list of projects for individuals which were funded by loans from the Housing and Guarantee Fund and the defendants filed another. The first (hereinafter referrred to as "List A") was the debtors' analysis as at 10 November 1995 and the second (hereinafter referred to as "List B") showed completed and current projects as at 2 May 1996. For many of the projects

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on the two lists there are no figures showing project costs or estimates or how much had been paid by the individual concerned. From the figures that do appear on the two lists, however, a number of anomalies appear.

Kodzwa said that no maximum loan was fixed but an application would be approved if he or the Minister was satisfied that the applicant could make the monthly repayments from his or her salary. One of the beneficiaries was Miss Marufu who wanted a house built inn Quinnington. List A showed that the project estimate was $1,97 million and that a down payment of $500 000 was made. However, List B showed that the estimate for building a main house, swimming pool, outbuildings and roads was $3,97 million and that the actual expenditure was $5,89 million. In addition List B showed five beneficiaries for whom actual expenditures exceeded $1 million. These were A Chihuri $1,129 million for a house, outbuildings, driveway and bridge - with $46 000 having been paid), Mr Justice P Garwe ($1,07 million for a house - with $150 000 having been paid), Mrs James ($1,25 million for a house - with $150 000 having been paid), M Majoni ($1 million for a house, outbuildings and garage - with $500 000 having been paid) and Mr & MrsMupenzi ($1,27 million for a main house, cottage, outbuildings, driveway - with $450 000 having been paid). It is, indeed, highly unlikely that the salaries of these people were sufficient to satisfy the Minister or Permanent Secretary that they could pay the monthly instalments.

In many cases, the final cost of the project was much greater than the initial estimate. In the case of Mr Jokonya, the estimate was just over $190 000 but the final cost was almost $789 000 and in the case of Mr Kajese the estimate was just over $300 000 whereas the final cost was over $500 000. In the case of Mr B K Chakaodza the estimate was about $265 000 and the final cost was $543 000. If their ability to repay was assessed on the estimated cost of the project, what happened when the final cost turned to be so much greater?

Although Kodzwa said that the scheme was to provide houses, in many cases loans were advanced for the purposes of repairs and extensions, as in the cases of Miss V Chisikiembu, Mr R Hove, Mrs S L Kachingwe, Dr Katsambe and Dr Malianga amongst others. In the case of Miss Garankanga, not only was a house built for her but repairs and plumbing work were done to her "In Touch" hair salon. In the case of Mrs J V Pratt, a house was built for her in

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Marlborough and at her farm at Goromonzi the house was repaired and redecorated and the dairy extended. Work was done at the Umtegesa farm of Mr P M Kodzwa. Although, according to List B, houses were built for V Chikowore and W A Chiwewe, the amount shown as having been spent in

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each case is either grossly inaccurate or else only extensions or repairs were effected. In the case of a Mr Gumbochuma, houses were built in Marondera and Masvingo and a houses in Marlborough was extended. In the case of Mr T T Zinyandu (a former Deputy Secretary in the Ministry), not only was hs house in Pomona repaired and redecorated but also a cottage and staff quarters were constructed and work was also done on his Mara Farm in Beatrice. Work (unspecified and unquantified) was also done for a Mr Zinyandu at Hair Park. In the case of Mr S R Mudenge work was done on one house in Borrowdale and on another in Colne Valley. In the case of Mr Justice P Garwe one house was built in Queensdale and another in Gunhill.

Although Kodzwa said that in terms of the VIP Housing Scheme the applicant was expected to pay at least half the cost of the project, according to List A in at least 14 cases no deposit at all was made and in very few cases did the applicant pay half the cost of the project.

To my mind, the above-mentioned examples clearly show that the VIP Housing Scheme, whatever its original intention, was not a *bona fide* scheme to assist people who wanted houses. It was used for many other purposes, such as building a swimming pool, extensions or repairs to existing houses and work on farms. A number of people who were given assistance had two or more houses. It is clear from Kodzwa's evidence that very few of the terms normally found in construction or building society contracts were included in the contracts concluded under the VIP Housing Scheme. There was no mandatory substantial fixed deposit. No payments were required at different stages of construction. In addition, there were apparently few, if any, controls on expenditure on the various projects and the accounting for the issue of materials and construction costs was minimal. Clearly, many beneficiaries will be under-charged. Furthermore, the interest rate of 13% *per* annum was substantially lower than current market rates and it woul appear that the Minister and the Permanent Secretary did not necessarily fix that rate in all cases. Also the period for the repayment of the loan was flexible, being up to 25 years, depending on the circumstances of the case. Finally, there was no requiment that the beneficiary had to enter into a mortgage bond which would give the State some security that the loan would be repaid.

Before dealing with the legal aspects, I will deal with the position of Foroma. He is a senior legal practitioner with many years in practice. Although he signed the contract form that Kodzwa gave him, he did not check to see if it complied with the requirements of Chapter 22:07. The project involved the expenditure of a considerable amount of money and yet he was prepared to

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accept the word of Kodzwa that the agreement was legal and above-board. The wording of the

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contract document that he signed does not make sense, yet he did not query it and he did not think it necessary that the additional terms and conditions agreed with Kodzwa should be reduced to writing. The attitude of Foroma in regard to these matters is surprising. In my view, what happened was the Foroma realised that he being offered a bargain and he jumped at it. He saw that many others were on the gravy train and he wanted to join them. He was not concerned about the legal niceties and the technicalities. In fairness, it cannot be said that hemust have known or even suspected that the scheme was illegal. The same cannot, I am sure, be said of other beneficiaries who were Government employees. They must have realised that the legality of the scheme was suspect.

Whilst Zamchiya was a good witness in many respects, I cannot accept his evidence that he did not order or authorise the building of the double garage at his house. It is difficult to believe that officials would have commenced construction without first discussing the designing, siting, etc, of the garage with him. However, even if Zamchiya were to be given the benefit of the doubt on that aspect, his failure to halt construction as soon as he became aware of it amounts to constructive authorisation. I consider that his conduct in having a garage built at his home at public expense using moneys from the VIP Housing Scheme is most reprehensible. His failure to repay the moneys spent by the Ministry more than a year after the completion of the project aggravates his wrongful act. One expects greater integrity from the Accounting Officer of the Ministry. He is expected to safeguard the moneys of the Ministry, not allow them to be spent on improving his own personal property.

My conclusion is that the Minister and Kodzwa abused their positions in Government in order to grant improper favours and to assist cronies. The very name given to the scheme, the VIP Housing Scheme, shows that it was formulated to help those who held high offices or had the right contacts. The scheme was corrupt.

Section 102(1) of the Constitution of Zimbabwe provides that no moneys shall be withdrawn from the Consolidated Revenue Fund except to meet expenditure charged thereon by the Constitution or by an Act of Parliament or where the issue of those moneys has been authorised by an Appropriation Act or other Act of Parliament. Subsection (3) of s 102 provides that no moneys shall be withdrawn from any fund, other than the Consolidated Revenue Fund, unless the issue of those moneys has been authorised by or under an Act of Parliament. The Housing and Guarantee Fund is a fund

referred to in s 102(3). Although Kodzwa said that when the assistance was granted, he and the Minister genuinely believed that the use of moneys in Housing and Guarantee Fund to build houses for VIPs was authorised by Chapter 22:07, I do not believe him. If that had been his genuine belief he would not have said, when giving evidence, that if anyone had told him that the scheme was illegal he would have stopped it. He knew that the Attorney-Geneal's Office was available to give expert advice, as was the Treasury, yet he refrained from asking for it.

The contract form used does not make sense. It talks about the Ministry contracting to construct a house "all in the sum of, a guarantee 100% loan of not more than (an amount to be specified)"

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(*sic*). The amount specified was not in fact a maximum amount but merely an estimate.

Furthermore, if Kodzwa did hold that belief genuinely, one would have expected him to have defended himself much more vigorously under cross-examination. As Mrs Zindi said, it took her less than 3 minutes to get him to concede that he was wrong in his interpretation of the relevant, and sometimes irrelevant, provisions of Chapter 22:07, and that Chapter 22:07 did not authorise the VIP Housing Scheme.

It should be clear to anyone of even the meanest intelligence that Chapter 22:07 does not authorise the VIP Housing Scheme. Foroma did not suggest that it did. Zamchiya said that it did not and even Kodzwa agreed that it did not. Mr Matinenga did not try to argue that it did. He argued that Kodzwa had ostensible authority to commit the Ministry in terms of that scheme and therefore the contracts he entered into with the beneficiaries under that scheme were binding on Government.

Even if the requirements of estoppel could be established, that would not assist Foroma. In Auckland Harbour Board v R [1924] AC 318 326-7 Viscount Haldane said:

> "The payment was accordingly an illegal one, which no merely executive ratification, even with the concurrence of the Controller and Auditor-General, could divest of its illegal character. For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships under to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the Consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament

> itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorisation or ratify an improper payment. Any payment out of the Consolidated Fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced."

In The Law of Restitution by Goff & Jones, 3 ed at 133-4, the learned authors, after citing the above, say:

> "This right, which has never been questioned in any common law jurisdiction, is so extensive that it has been, perhaps surprisingly, held that the recipient cannot plead that he changed his position in reliance on any representation that he was entitled to the money, on the grounds that a 'party cannot be assumed by the doctrine of estoppel to have lawfully done that which the law says he shall not do'."

In Liability of the Crown by Peter Hogg at 144-5 the learned author says:

> "In quasi-contractual claims by the Crown, there is one special advantage enjoyed by the Crown. A payment out of the consolidated revenue without parliamentary appropriation, or without compliance with a statutory condition precedent, may be recovered by the Crown, whether or not the payment would be recoverable under the general rules of quasi-contract. For example, a payment made under a mistake of law is generally irrecoverable; but such a payment is recoverable by the Crown if it were made without parliamentary appropriation or without compliance with a statutory condition precedent. The reason for this rule is the constitutional principle that public funds may only be disbursed under parliamentary authority. To apply the ordinary rules of quasi-contract or of estoppel so as to render an unauthorised payment irrecoverable would in effect permit Crown servants to dispense with an important constitutional safeguard."

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I am satisfied that the principle enunciated by Viscount Haldane in the Auckland Harbour Board case *supra* applies in Zimbabwe and the views expressed by the authors in the works cited above are equally applicable here. Roman-Dutch law recognises the principle that the Treasury has special rights which are necessary to protect public funds. The position of the Treasury (or Fiscus) was fully canvassed and dealt with by the full bench of the Cape Supreme Court in Collector of Customs v Cape Central Railways Ltd (1888) 6 SC 402. At 407 de Villiers CJ said:

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> "There is abundant authority in the civil law for the proposition that the State is entitled to the same measure of relief as minors who have suffered lesion."

and went on to say:

> "In the Netherlands, this rule of the civil law was fully adopted and according to Matthaeus de Auct 1.16.29 and 30, and Voet Comm 3.3.55 was extended to the fiscus as the custodian of the public treasury."

In Comr for Inland Revenue v The Master 1957 (3) SA 693 (C) at 701-2 de Villiers JP, when discussing the Collector of Customs case *supra*, said:

> "The learned Chief Justice made it clear that in the case before him the duty had not been paid to the customs collector nor had it been refunded to the defendant and the collector illegally allowed the importation of the cement without payment of the duty, consequently the liability to pay the duty still attached to the defendant, notwithstanding the previous permission given by the Premier. He went on to say:
>
> > 'It is not alleged that this permission was given by way of compromise of a doubtful question of law, for it is admitted that the law is perfectly clear and unambiguous ... It might at first sight appear to be an injustice that the Government should not be bound by its abandonment of all claim to the duty, but it should be borne in mind that the rights of Government exist for the public good and not for the personal advantage or convenience of members of the Government ...'."
>
> Matthaeus, as will be seen, fully supports Voet.
>
> Voet puts the matter thus in 4.4.55, Sampson's translation, p 94:
>
> > 'And although minors, an ecclesiastical body, the poor, the Treasury, a State, or a municipality, do not enjoy the same rights in every respect; nor is an analogy drawn from the case of a minor to be applied to that of an ecclesiastical body or to the Treasury, or vice versa, as will be shown in their places, yet, in regard to restitution the Treasury, municipality, etc, do not appear to be separable from the case of minors; so that they can obtain restitution on the same grounds and against the same transactions that a minor can. For their position in regard to the fact that their affairs are to be administered by others, is

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> > identical with that of minors, and hence it is equally possible for them to be ignorant of what has been done by their administrators; nor is it just that the imprudence of the latter should be visited on bodies which, properly speaking, not being persons at all, cannot administer their own affairs ...'
>
> Applying the principle discussed by the Chief Justice in terms of which the rights of the fiscus, including restitutio in integrum, were equated with those of minors, the statement of the law in the Collector of Customs v Cape

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Central Railways Ltd *supra* is wide enough to cover the present case.

The failure by the applicant's officials to lodge a claim in respect of the 1952 and 1953 taxes and the failure of the applicant to lodge an objection to the account at any relevant stage, indicated that the procedure of the applicant's officials amounted to an illegal abandonment of these taxes. Not only was this position fully dealt with by the Chief Justice but the position was crisply put by Buchanan J in the following terms:

> 'Yet to hold that the Collector of Customs is barred from recovering the duty fixed by law in consequence of the representatives of the Government having illegally abandoned the payment of such duty before the goods imported were landed, would be to enable Government officials to render the Act of Parliament nugatory'."

In Acting Min of Industry & Anor v Tanaka Power (Pvt) Ltd 1990 (2) ZLR 208 (S) at 219 McNally said:

> "... promises, incompetently made and unfeelingly withdrawn, cannot bind the Treasury or the Government."

The moneys withdrawn from the Housing and Guarantee Fund were withdrawn unlawfully. It may be that some of the beneficiaries under the VIP Housing Scheme would be able to show that they genuinely believed that that scheme was legitimate and that the Minister or the Permanent Secretary was duly authorised to distribute largesse in the manner in which they did. On the other hand, the likelihood is that many must have know or suspected that they were being given undue advantages because of their position, influence or contacts. The manner in which the scheme was administered, the clear lack of transparancy and the generosity of the terms under which the assistance was granted must have made that evident.

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However, irrespective of the *bona fides* or lack thereof on the part of the beneficiaries and despite the ostensible authority exhibited by the Minister and the then Permanent Secretary, the law is clear. It is the duty of Zamchiya, the Permanent Secretary of the Ministry and the Accounting Officer thereof, to collect, as soon as possible, all moneys paid out on behalf of the beneficiaries of the VIP Housing Scheme. That includes the moneys expended on constructing the garage at his residence.

In a letter dated 3 March 1997, from the Director of the Civil Division of the Attorney-General's Office to Foroma's legal practitioners, it was admitted that the Minister permitted some of the beneficiaries under the VIP Housing Scheme to repay their debts over periods ranging up to 25 years. On the other hand, in at least two case Secretary to the Ministry v S G Chigwedere HC-5258-96 and Minister v Richard Shambambeva Nyandoro HC-9681-96, default judgment has been obtained against the beneficiaries mentioned and writs of execution have been issued.

In my view, the agreements to permit beneficiaries to repay their debts over an extended period are illegal because they have the effect of nullfying the specific requirements of s 102 of the Constitution. In Ritch & Bhyat v Union Government (Minister of Justice) 1912 AD 719 at 735 Innes ACJ, after stating the rule that no-one can renounce a right contrary to law, or a right introduced not only for his own benefit but in the interests of the public as well, went on to say:

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"Cases in which the result of the renunciation or waiver would be to effect something either expressly forbidden by statute or absolutely illegal by common law of course present no difficulty. But the same principle must necessarily apply where the result of a renunciation by an individual would be to abrogate the terms of a statute which in their nature are mandatory and not merely directory (see Craies p 83). Because otherwise the result would be not merely to destroy private rights, but to defeat the provisions of an enactment intended on general and public grounds to be peremptory and binding on all concerned."

Styen CJ in SAR & H v Transvaal Consolidated Land & Exploration Co Ltd 1961 (2) SA 467 at 481 referred to that citation and then said:

"In the present case, there is the further consideration that the executive authority cannot renounce a peremptory statutory obligation imposed upon it by the legislature for the conservation of public moneys."

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For the reasons set above, I consider that the agreement entered into between Kodzwa and Foroma has no legal effect insofar as the State is concerned. To regard that correct as legally binding on the State would mean that Kodzwa and the Minister would be able to dispose of State moneys with complete disregard for the provisions of s 102 of the Constitution. Similar considerations would apply to other agreements entered into by the Minister or the Permanent Secretary with other beneficiaries under the VIP Housing Scheme. In addition it appears to me that such contracts are contrary to public policy and therefore should not be recognised. In Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 7-8, Smalberger JA said:

"Our common law does not recognised agreements that are contary to public policy (Magna Alloys & Research SA (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 891G). This immediately raises the question what is meant by public policy, and when can it be said an agreement is contrary to public policy. Public policy is an expression of 'vague import' (*per* Innes CJ in Law Union & Rock Insurance Co Ltd v Carmichael's Executor 1917 AD 593 at 598), and what the requirement of public policy are must needs often be a difficult and contentious matter. Wessels Law of Contract in South Africa 2 ed vol 1 para 480 states that '(a)n act which is contrary to the interests of the community is said to be an act contrary to public policy'. Wessels goes on the state that such acts may also be regard as contrary to the common law, and in some cases contrary to the moral sense of the community. The learned author 'Aquilius' in one of a series of articles on 'Immorality and Illegality in Contract' in 1941, 1942 and 1943 SalJ defines a contrct aginst public policy as -

> 'One stipulating performance which is not *per* se illegal or immoral but which the courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interest of the community' (1941 SALJ 346). Wille in his Principles of South African Law 7 ed at 324 speaks of an agreement being contrary to public policy 'if it is opposed to the interests of the State, or of justice, or of the public'. The interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced'."

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At p 9 he went on to say:

"No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and

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only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."

There is no doubt in my mind that the granting or lending of State moneys to beneficiaries under the VIP Housing Scheme is opposed to the interest of the State and of the public. I have no hesitation in declaring the contracts entered into in relation to that scheme are contrary to public policy.

Under the VIP Housing Scheme public moneys have been grossly misused on a substantial scale. Not only have many people unjustly profited from the abuse but substantially greater numbers have suffered because their housing needs have not been met. The moneys which should have been available to provide housing for the lower-paid members of the public and for the homeless have been used to provide luxury houses or additional houses for, or to improve the house of, the privileged few. Many who contributed to the Pay for Your House Scheme did not get their houses because the moneys they paid were, according to Zamchiya, directed to the VIP Housing Scheme.

As I have said earlier, it is the duty of Zamchiya to ensure that the moneys improperly spent are recovered as soon as possible and applied to their proper and legitimate purposes. Zamchiya, in giving evidence, said that the records in Housing and Guarantee Fund and the National Housing Fund and in the other schemes are chaotic. It is obvious that there were no controls over materials and that there was no financial discipline. It is a disgrace that the administration of such an important Ministry has been allowed to degenerate to such an extent. It seems that even if matters have improved since Zamchiya took office, there is still much room for improvement.

The status of the Pay for Your House Scheme has still not been regularised some 15 months after its illegality was established. Zamchiya himself has not received an account for the construction of his garage more than a year ago. The Permanent Secretary must ensure that all moneys owed to the State by

beneficiaries under VIP Housing Scheme are recoved forthwith, together with interest thereon at the current prescribed rate of 25% *per* annum.

I strongly recommend that the Public Service Commission investigates the administration of the Ministry, weeds out the corrupt, the inefficient and the incompetent officials and gives the Ministry all the assistance it requires to recover as soon as possible the moneys unlawfully spent. Since public moneys are involved I consider that the Treasury has a duty to ensure that all the moneys are recovered. It must ensure that strenuous measures are taken to recover the moneys due to the State and that it concurs with the steps taken by the Ministry to do so.

For the reasons set out above, the plaintiff's claim must be dismissed. However, I consider that it would be unjust to deprive Foroma of the right to occupy his house until the extent of his liability has yet to be ascertained. The defendants have submitted that he should be required to

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continue paying the $12 000 a month he is currently obliged to pay in terms of the interim order granted by Bartlett J and that as soon as his liability is established then the Ministry can take steps to recover the debt due.

It is ordered that:

1. The plaintiff's claim is dismissed with costs;

2. The agreement reached between the plaintiff and the first defendant is declared to be of no force or effect as against the State;

3. The plaintiff is entitled to remain in occupation of his house, on condition he pays the Ministry $12 000 a month, subject to the right of the State to take such action as it thinks fit to recover the moneys owed to it by the plaintiff.

Sawyer & Mkushi, plaintiff's legal practitioners

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

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S v CHITOFU 1997 (1) ZLR 468 (HC)

Court **High Court, Harare**

Adam J

Criminal review

7 May 1997 Judgment No. HH-86-97

Flynote

Criminal procedure (sentence) - common law offences - theft - irrigation pipes stolen from a farm - appropriate sentence

Headnote

The accused and an accomplice went from their village in a communal area into a sugar estate near Chiredzi and there stolen 6 lengths of irrigation piping, worth $3600. The piping was not recovered. The accused was 45 years old and a first offender. The magistrate sentenced him to 4 months' imprisonment with labour. The scrutinising regional magistrate considered that the sentence was inadequate and referred the matter to the High Court for review.

Held, in the light of numerous precedents, that the trial magistrate failed to give proper weight to the aggravating features, which were that the offence was well planned and executed. Moral blameworthiness is often one of the most important aggravating features. Such crimes, too, are difficult to detect. It was wrong to categorise this as an "ordinary" theft case.

Cases cited:

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S v Bandira S-6-89

R v David & Anor 1964 RLR 2 (G)

S v Dube HB-87-90

S v Hwemba HH-16-94

S v Jaya HH-271-89

S v Makuyana HB-117-89

S v Mangwende S-12-87

ADAM J

S v Masvosve HB-83-90

S v Mohamed HB-71-88

S v Mpofu & Anor HB-69-90

S v Mutengwe S-179-80

S v Tshuma HB-107-91

S v Wabatagore HH-253-89

Judgment

Adam J: The accused, aged 45 years, was convicted upon his guilty plea of theft from a farm of 6 aluminium irrigation pipes (not recovered), valued at $3 600. The trial magistrate sentenced him as a first offender to 4 months' imprisonment with labour. The record of proceedings shows that the accused and is accomplice on 19 June 1996 travelled from Vanyu village in Zaka district in a bus and at night proceeded to Mkwasine Estate in Chiredzi where the pipes were stolen after they lit a fire in order to make the pipes easy to cut and transport. On 9 July 1996, the police, acting on information, arrested the accused at his homestead where they learnt that the accused had made pots from the aluminium pipes and sold them. His accomplice fled into the bush when he observed the police escorting the accused to his accomplice's homestead.

In response to a query from the regional magistrate about the adequacy of the sentence, the trial magistrate wrote that the accused was aged 45 years, staying in the rural areas, who had admitted the offence and as such was contrite; that he assisted the police in identifying his accomplice; that he had made indications to the police where the offence was committed; that he was an unemployed married person with an unemployed wife and with 6 children; that he had no savings and no assets of value. The trial magistrate said that in his view circumstances lean favourably for him to impose a lenient sentence; that whilst accepting that conditions under which the offence was committed called for a severe punishment, it had often been held by the Supreme Court that too severe a punishment was unjust; that punishment to meet all desired

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expectations has to be short and sharp and that emphasis should not only be placed on punishment but the trial magistrate has also to look at the tremendous hardship caused on his lage family by incarceration as the accused fended for his family painfully. He tried to distinguish the cases cited to him by the regional magistrate. He regarded S v Mohammed HB-71-88 as a more serious theft since a 20 year old student (along with his fellow 19 year old student) stole two guitars valued together at $3 000 from a motor vehicle. The sentence was altered on appeal to 18 months' imprisonment with labour, of which 12 months' imprisonment with labour was suspended for 5 years on appropriate conditions. The other case,

ADAM J

S v Mutengwe S-179-90, according to him involved a Government employee. In that case, there was theft of irrigation pipes and sprinklers valued at $4 500 belonging to the Government by the accused. His sentence of 18 months' imprisonment with labour, of which 8 months' imprisonment with labour was suspended for 5 years on appropriate conditions, was upheld by the Supreme Court.

The regional magistrate has now written to this court disagreeing with the trial magistrate. He pointed out that the crime was carefully planned and executed by more than one person; that irrigation equipment was very vulnerable to theft and generally of considerable value, and that the offence was committed with the purpose of commercial gain. He felt that the sentence imposed was most lenient. I agree.

In addition to the cases cited to him by the regional magistrate there were many others. In S v Mangwende S-12-87, an acting headmaster's sentence for theft of about $5 000 of 3 years' imprisonment with labour, suspended for 5 years on appropriate conditions, was upheld by the Supreme Court. In S v Wabatagore HH-253-89, an acting headmaster who was convicted of theft by conversion of $2 606,05 had his sentence altered by this court on appeal to 3 years' imprisonment with labour, of which 8 months' imprisonment with labour was suspended on condition of restitution and a further 12 months' imprisonment with labour was suspended for 5 years on the usual conditions of "good behaviour". In S v Jaya HH-271-89, a 26 year old female with a child convicted of theft by conversion of $1 470 received a sentence, upheld on appeal by this court, of 12 months' imprisonment with labour of which 7 months' imprisonment with labour was suspended for 5 years on appropriate conditions. In S v Bandira S-6-89 an employee of a bus cmpany was convicted of theft by conversion of $4 000. His sentence was altered by the Supreme Court to 2 years' imprisonment with labour, of which 15 months' imprisonment with labour was suspended for 5 years on appropriate conditions. In S v Masvosve HB-83-90 a 35 year old with 6 children and a wife expecting another child was convicted of theft from his employer of goods valued at $1 300 which was recovered. His sentence of 12 months' imprisonment with labour, of which 4 months' imprisonment with labour was suspended for 5 years on appropriate conditions, was upheld by this court on appeal. In *S v Dube* HB-87-90 the magistrate's sentence of 24 months' imprisonment with labour of which 9 months' imprisonment with labour was suspended, for theft of a radio valued at $2 500 from his employer, was on appeal altered to 12 months' imprisonment with labour of which 5 months' imprisonment with labour was suspended for 5 years on appropriate conditions.

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ADAM J

In *S v Tshuma* HB-107-91 a 19 year old was convicted of theft by onversion of goods valued at $2 300. His sentence on appeal was altered by this court to 24 months' imprisonment with labour of which 6 months' imprisonment with labour was suspended on appropriate conditions. In that case this court referred to *S v Mpofu* HB-69-90 and S v Makuyana HB-117-89. In S v Hwemba HH-16-94, for theft of welding equipment valued at $3 000 this court altered the sentence imposed by the trial magistrate to 15 months' imprisonment with labour of which 9 months' imprisonment with labour was suspended for 5 years on appropriate conditions.

In *R v David* & Anor 1964 RLR 2 (G) Beadle CJ observed at 6:

> "It may be of assistance to magistrates if I indicate some of the factors which I think might be taken into account in assessing moral blameworthiness:
>
> 1. The value of the thing stolen, so far as the accused himself is aware of this value.
>
> 2. The possibility of the accused's yielding to sudden temptation.
>
> 3. The degree of premeditation or planning which preceded the crime. For example, if the accused was found in possession of some special apparatus ...
>
> I stress, however, that the above factors are the ones to be taken into account only for assessing moral blameworthiness. In assessing punishment generally, however, there are often many other factors to be taken into account as well, though moral blameworthiness is often one of the most important."

In the present case, the trial magistrate failed to give proper weight to the aggravating features, which were that the offence was well planned and executed at night by the two of them travelling some distance away from their homestead. Such crimes are very difficult to detect had not the police been tipped off about this one. The trial magistrate was entitled to take into account the hardship a custodial term may cause an accused and his family. But this must be viewed in the context that a large number of cases come before the courts where hardship will be caused to an accused's family. So this in itself should not be treated as something out of the ordinary. However, there seemed to be contradiction in the trial magistrate's approach. He felt a short

ADAM J

sharp custodial punishment was called for but in any case incarceration would have caused hardship. In his zeal to respond to the regional magistrate's legitimate criticism, his logic (perhaps more accurately lack of logic) failed him, since surely 4 months' mprisonment with labour would have caused the accused's large family hardship as they would be without him for that period of time "painfully fending for themselves".

It is clear that the sentence imposed by the trial magistrate trivialized a serious offence in this case that had been committed by the accused and his accomplice. To regard this as "an ordinary theft case" in contradistinction to theft from a motor vehicle; or theft by employees from

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their employer or theft by Government employees reveals the trial magistrate's failure to appreciate the true nature of this offence and the exact circumstances under which it was committed. His duty was to carefully consider the factors in mitigation as well as the features in aggravation, not forgetting that "moral blameworthiness is often one of the most important". He should have sought guidance from the sentences imposed in cases of somewhat similar nature by this court and the Supreme Court.

It is for the foregoing reasons that I decline to certify the proceedings as being in accordance with real and substantial justice.

ZIMBABWE NEWSPAPERS (1980) LTD & ANOR v BLOCH 1997 (1) ZLR 473 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

11 March & 13 May 1997 Judgment No. S-72-97

Flynote

Delict - actio injuriarum - defamation - defamatory statement - what is - accusation of racism, hypocrisy, insanity and fuelling tribal conflicts - whether such statements can be construed as comment

Damages - defamation - amount - series of newspaper articles accusing prominent economist of racism, hypocrisy, insanity and fuelling tribal conflicts - articles published in pursuit of a vendetta and showing publisher to be prepared to make wild allegations without any basis in fact

Interest - damages - delict - date from which interest to run - interest to run from date on which cause of action arose

Headnote

In October 1993, the respondent, a well-respected economist, addressed a conference dealing with regional wealth and development. In answer to a question about the water problems of Bulawayo, he said that nothing would be done "until 3 million Shonas, or the President, are relocated to Bulawayo". The reaction of the appellants was to publish, mostly in The Sunday Mail, a series of articles condemning the respondent. The articles, published over a 4 week period, accused the respondent, among other things, of being a "latent racist, if not worse", of attempting to whip up tribal emotions, of being insane, of playing a dangerous game and of being a hypocrite. The respondent sued the appellants for defamation in respect of each of the articles. The trial was held on 16 February 1996. The judge *a quo* (Cheda J) found for the respondent and awarded

globular damages of $45 000 against the first appellant, the publisher, and $40 000 against the second respondent, the editor of The Sunday Mail. He ordered that interestshould run from "the

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date of publication".

The appellants appealed on three grounds. The first was that the judge should have found that the statements were fair comment. The second attacked the quantum of the damages; and the third ground was that the judge erred in ordering interest to run from the date of publication.

Held, that it was clear, when regard to what the respondent had said and the circumstances in which he said it, the statement was meant to be light-hearted, jocular and humorous. It was not to be taken literally or seriously. That the second appellant took it seriously was either a sad reflection on his sense of humour or simply a dislike for the respondent and the message he was conveying.

Held, further, that the statements about the respondent were all clearly statements of fact, not of comment, so the defence of fair comment was not available. But even if they could have been regarded as comment, the appellants had failed to establish that the facts upon which the comment were based were true. On the contrary, the statement by the respondent was made clearly and honestly. It did not in any way establish that the respondent was a racist or someone intent on causing tribal problems or afford any basis for questioning his sanity. The attack on the respondent was vitriolic and unreasonable. It could not possibly have been said to be in the public interest.

Held, further, that the judge *a quo* had a discretion in respect of the damages and the way in which he exercised it did not result in over-compensation of the respondent. It had to be borne in mind that each publication constituted a separate cause of action and the articles were published in the newspapers with the largest circulation in the country. The defamation was serious and the articles were published in pursuit of some vendetta. The language used was in the highest degree offensive, insulting and abusive. The second appellant had shown himself to be a political creature prepared to make wild allegations without any basis in fact and without any real attempt to substantiate his allegations. The allegation of racism was particularly harmful.

Held, further, that although the provisions of s 6(1) of the Prescribed Rate of Interest Act [Chapter 8:10] came into effect after the cause of action arose, it was clear that the court *a quo* was correct in ordering that the interest should run from the date on which the statements were published. The date was fixed by the section, not by the court. However, because a globular sum was awarded in respect of the various defamations, it was appropriate that the interest should run from the date of final publication.

MUCHECHETERE JA

Cases cited:

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

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

Crawford v Albu 1917 AD 102

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Marais v Richard & Anor 1981 (1) SA 1157 (A)

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

SA Associated Newspapers Ltd & Anor v Samuels 1980 (1) SA 24 (A)

SA Associated Newspapers Ltd & Anor v Yutar 1969 (2) SA 442 (A)

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

Zimbabwe Banking Corp v Mashamhanda 1995 (2) ZLR 417 (S)

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

The court considered the following statutory provisions:

Prescribed Rate of Interest Act [Chapter 8:10], s 6(1)

Case Information

P Nherere, for the appellants

A P de Bourbon SC, for the respondent

Judgment

Muchechetere JA: This is an appeal against the judgment of the High Court, Bulawayo (Cheda J), on 16 February 1996, in which the appellants were ordered to pay damages to the respondent as follows:

> "(1) As against the first defendant (the first appellant) $45 000.
>
> (2) As against the second defendant (the second appellant) $40 000.
>
> (3) As against both defendants (the appellants), interest on damages are awarded at the prescribed rate of interest from date of publication to date of payment.
>
> (4) As against both defendants (the appellants), jointly and severally, the one paying the other to be absolved, costs of suit."

The facts in the matter are that on 13 October 1993 the respondent addressed a conference organised by the Confederation of Zimbabwe Industries under the sponsorship of the Friedrich Naumann Foundation. The conference was focussing on regional wealth and development. During the course of the address he gave an oral answer to one of the questions to the effect that nothing would be done about the (water) problems of Bulawayo "until three million Shonas, or the President, are relocated to Bulawayo".

MUCHECHETERE JA

The reaction of the appellants to the above was to publish a series of articles condemning the respondent.

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The first article appeared some ten days later, that is, on 24 October 1993 in The Sunday Mail, a newspaper published by the first appellant. It was admitted that it was written by the second appellant, who is the editor of The Sunday Mail. The article reads:

> "FOUL-MOUTHING
>
> MR ERIC BLOCH thinks he is witty. He is not. He just a liberal who if scratched will leave revealed a latent racist if not something worse. The times we are going through appear to allow all kinds of rats and reptiles to crawl from their holes of hibernation exuding all kinds of harmful odours ... Mr Bloch's utterance ... is nothing but foul-mouthing ... It (the utterance) emanates from a fraternity of white liberals who in the context of the African political scene represent patronising and camouflaged racists who indulge in divide and rule games, playing on tribal and regional sentiments. They are poisonous vipers ... The camouflaged white racists masquerading as so-called liberals such as Mr Bloch ... The open white racist and the camouflaged one have the same objective, which is to divide the people ...
>
> We are sure both the Shonas and Ndebeles along with all other patriots will put their heads together to solve this problem just as they fought shoulder to shoulder to liberate the country from both the open racists and the camouflaged ones of the Eric Bloch school of thought."

The second article was in the form of a letter to The Herald, a newspaper also published by the first appellant, of 26 October 1993. In the letter, it was stated that the respondent's "outbursts" were :

> "... all in an attempt to whip up tribal emotions. Such arrogance is typical of colonial and imperialist perceptions of the African people, tribalistic; whose world view does not transcend tribal boundaries and is therefore not capable of looking at issues in a nationalistic perspective ...
>
> This is not only a clear manifestation of a dirty and poisonous mentality but also flies in the face of such practical considerations as the interests of other countries with whom we share the Zambezi river ...

MUCHECHETERE JA

> Furthermore, such a foul utterance is not only an act of gross mischief but is also in clear contempt of our leadership and consequently a serious blow to the spirit of reconciliation that has enabled even racists of Mr Bloch's mould to enjoy and bask under the Zimbabwean sun ..."

The third article was published in The Sunday Mail on 31 October 1993. It was in the form of a response by the second appellant to a letter published on the same day. The letter was in response to the first article and the writer was protesting the fact that the article had accused the respondent of being a "camouflaged racist". The writer considered the article "unfair, bigoted and scurrilous", because he never "encountered anyone more devoid of racism than Eric Bloch". In response to the letter the second appellant stated the following:

> "We are pleased you were 'moved' by our editorial. Now for the rest just tell your client, Mr Eric Bloch, if he is as sane as you profess, to stop playing the Shona/Ndebele card in this country. He apologised in The Herald for his utterances on Thursday and repeated them in another publication on the same day and you will vouch for his sanity. He is playing a dangerous game, which should not be played by anyone with the universal interests of the people of Zimbabwe at heart."

The fourth and fifth articles were published in The Sunday Mail of 14 November 1993. The former was in the form of an editorial by the second appellant, wherein he repeated the allegations that the respondent was a racist and that he was a hypocrite who wished to provoke

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conflict amongst the black people of Zimbabwe. The latter was an article published in the "As I see it" column of the newspaper. The article also accused the respondent of fuelling tribal conflicts.

At the commencement of the appeal hearing, Mr Nherere for the appellants informed the court that the appellants were abandoning grounds one and two in their notice of appeal. Ground one was to the effect that the learned judge in the court *a quo* erred in finding that the above statements complained of were defamatory. And ground two was to the effect that the learned judge erred in failing to distinguish between defamation and meaningless abuse resulting in his holding that the publications complained of were defamatory.

In the result, the appeal against the judgment now rests on grounds three, four and five of the notice of appeal. Ground three is to the effect that the learned judge erred in holding that the statements complained of were not fair

MUCHECHETERE JA

comment. Ground four attacks the learned judge's assessment and award of damages. And ground five is to the effect that the learned judge erred in awarding interest on the damages from the publication of the statements complained of.

The withdrawal of the first two grounds of appeal was proper and understandable in the circumstances. It would, in my view, have been futile to submit and argue that it is not defamatory to call someone either a latent racist, if not something worse, or a camouflaged white racist who is more dangerous because he attempts to divide the people along ethnic and tribal lines, or a person belonging to a group of white liberals who are poisonous vipers, and thereafter to compare him to rats and reptiles exuding harmful odours. It is also clearly defamatory, as was admitted during the trial, to state that someone has a dirty and poisonous mind and that he intends to whip up tribal emotions. And further to call him a hypocrite, question his sanity and accuse him of trying to provoke conflict amongst the black people of Zimbabwe. All the above statements also go beyond meaningless abuse. And, in any event, the second appellant did not in his defence suggest that any of the statements were meaningless abuse. There is terefore no doubt that all the above statements were defamatory in that they lowered the respondent's esteem amongst right-thinking people.

Before dealing with the defence of fair comment, it would be proper to look at the statement by the respondent. The respondent testified that he did not intend it to be taken seriously. His explanation is as follows:

> "Q. Now, the allegation for the defendants you heard yesterday from the reporter that you made this observation that three million Shona and the President at the very beginning of your answer and thereafter gave some background to it. Can you comment on whether that is correct?
>
> A. (Respondent) I am totally satisfied, my lord, that that was incorrect mostly because of my recollection of it, the fact that it was a concluding remark and which resulted in reactions from the audience and also because of my speaking style, when I do give a lengthy answer to try to end on a punch line or on a lightened note and that would be exactly how I would have normally ended such an answer.

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Q. You say on a lightened note, what do you mean by that Mr Bloch?

MUCHECHETERE JA

A. Once I have given a long answer, in order to emphasise the content of that answer I would try to make my point but make my point in either a jocular form, facetious, or with an apposite or pertinent joke, whatever will lend itself to the occasion but which may not have the intensity of the detailed answer.

Q. Was it ever your firmly held view that three million Shona persons should be relocated to Bulawayo?

A. Never at all.

Q. What was your purpose in making that observation?

A. Part of my answer had to address the fact that there was in my perception a high sense of frustration amongst the populace of Bulawayo at not only the lack of resolution of Bulawayo's water crisis but that when citizens of the city embark upon a self-help programme to resolve the problem and set up their own trust that too had been frustrated. There was a very deep seed of frustration which had been voiced by people as prominent as the Governor of Matabeleland North, Welshman Mabena, and the mayor of Bulawayo, Councillor Mabinga, and what I was trying to put across [was that] the frustration that exists in Bulawayo was provoking many to believe that there was an underlying reason for the inactivity and that that underlying reason lay in Government's hands and it was Government's perception that it did not wish to support this part of the country.

Q. In making the observation that perhaps the President should be relocated to Bulawayo, were you intending to be taken seriously?

A. Of this certainly not. What I was intending was on the one hand [to] focus on the desirability [of] decentralisation on the other hand and to suggest that yet again it needed something dramatic to make Government act.

Q. What [do] you recall now Mr Bloch to have been the audience reaction to the answer that you gave and to the comment regarding the relocation?

A. There was a fairly extensive applause, my lord, that approximately twenty percent of the audience actually stood to give their applause.

MUCHECHETERE JA

Q. Do you recall if there was any specific reaction to the observation about the three million Shona or the President?

A. I thought he was not conscious of one but bearing in mind it was the end of my answer so the applause was either the applause to the answer as a whole or to the comment, it was not possible for me to differentiate.

Q. In making those observations, were you intending in any way to stir up tribal sentiments in this country?

A. Not in the slightest. I was placing on record a perception that exists.

Q. Were you trying to be a racist Mr Bloch?

A. No, certainly not, it will be contrary to my character ..."

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A Mr Sibanda, who gave evidence for the respondent in the matter, also thought the statement by the respondent was a joke when he read it. Mr Sibanda is a professional chartered accountant who has in the past worked for the Government and private sectors. He is also a director of companies and a prominent member of the civic society in Matabeleland and in particular the Matabeleland Zambezi Water Trust. He has known the respondent and worked with him on various company boards and projects. He had nothing but praise for the respondent's professionalism, honesty, and concern about Bulawayo and Matabeleland's problems, especially water problems. According to Mr Sibanda, the respondent has always socialised, worked professionally with and assisted people of all races and tribes in Zimbabwe. Mr Sibanda's reactions to questions in connection with the statement were as follows:

"Q. Knowing Mr Bloch as you do, you know he has made this comment about until three million Shonas are relocated to Bulawayo or until the President moves to Bulawayo the water problems in Bulawayo will not be given serious attention by the Government, I am paraphrasing. What was your reaction to hearing Mr Bloch having made that observation?

A. My initial reaction actually when I read it, because we pick [up] our Gazette from the Gazette offices in town, and when I opened it and I read that you know, sorry my immediate reaction was to laugh.

MUCHECHETERE JA

Q. Do you think he was being serious, that he really wanted to translocate people or the President?

A. Not really, I thought it was just a joke that he was cracking in that discussion. I mean as I said I have attended dinners where he has officiated and normally he cracks quite a number of fairly interesting jokes which I always treat as jokes.

Q. Would you regard Mr Bloch as a racist?

A. Certainly not.

Q. From your dealings with Mr Bloch, how firm are his feelings for what is going on in Bulawayo and the problems that are happening with Bulawayo, lack of development, the water problems, and the like, and what is your perception of Mr Bloch's involvement in those problems?

A. I think he is putting a lot more time than probably some of us have done in terms of debating and trying to facilitate the solving of the water problem which we have gone for quite some time. I think he has devoted a lot more time than I myself am able to do. I am not able to devote as much time as he has done. Actually I have wondered to some extent where he gets time to write and debate and deal with all the issues. I can only say I envy him, I wish I had the time to also contribute but I have not got it."

Under cross-examination, Mr Sibanda maintained that the statement must have been meant to be a joke, "you know, to get people to sit up and listen to what he had to say". He went on to say that in his view most literate people and those of above average education would have probably laughed on reading or hearing of the statement.

I agree with the submission and contention that when regard is had to what was said and the circumstances in which it was said, there is no doubt that the statement was meant to be a light-hearted, jocular or humorous way of conveying a matter of great concern to the people of Bulawayo. As Mr Sibanda put it, it was meant to get people to sit up and listen to the message behind, which in this case was that the Government should seriously solve Bulawayo's water

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problems. It was in the nature of a cartoon. And I observe that The Sunday Mail and The Herald regularly use cartoons to convey

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serious and sometimes non-serious messages. Indeed there were such cartoons printed in *The Sunday Mail* issues of 24 October 1993, 31 October 1993 (about the respondent) and 14 November 1993.

It cannot be seriously contended that the respondent meant that three million Shonas and the President should be relocated to Bulawayo. That is clearly improbable and should not have been taken seriously. I am certain that most people who read and heard the statement would have reacted in the manner that Mr Sibanda did. That the second appellant and a few others did take it seriously is either a sad reflection on their sense of humour or is simply a dislike of the respondent and the serious message he intended to convey. To his credit, Mr Nherere did not seek to argue that the statement was to be taken seriously.

On the defence of fair comment, both counsel were agreed on the law applicable. It is to the effect that for one to successfully raise the defence the following must be established:

"(a) the allegation in question must amount to comment, and not a statement of fact;

(b) the comment must be fair;

(c) the facts upon which the comment is made must be true; and

(d) the comment must relate to a matter of public interest."

See Tekere v Zimbabwe Newspapers (1980) Ltd 1986 (1) ZLR 275 (H) at 286-7; *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H) at 321-322; Chinamasa v Jongwe P & P Co (Pvt) Ltd 1994 (1) ZLR 133 (H) at 161-162; Crawford v Albu 1917 AD 102 at 114; Marais v Richard & Anor 1981 (1) SA 1157 (A) at 1167; and South African Associated Newspapers Ltd & Anor v Yutar 1969 (2) SA 442 (A) at 453H-454B.

I agree with Mr de Bourbon's submissions on the defence of fair comment. It is, in my view, clear that the statements, that the respondent was revealed as "a latent racist if not something worse", was a "camouflaged white racist", and emanates from a group of white liberals who are "poisonous vipers", can by no stretch of the imagination be said to be comment. Nor can the statements referring to rats and reptiles crawling from their holes of hibernation exuding all kinds of harmful odours and being intent on dividing the people

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along ethnic and tribal lines be so regarded. Similarly, in the second article the statement to the effect that "even white racists of Mr Bloch's mould" cannot be said to be comment. In the third article, the putting into question of the sanity of the respondent can also not be said to be comment. And, as has been pointed out by Mr de Bourbon, the second appellant was forced to

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concede that there was no basis for this. All the above are clearly statements of fact.

Again, in the fourth article the second appellant repeated the above statement of fact that the respondent was a racist. The article was written in a mocking manner of the respondent and there was no attempt to retract from the previous articles. Clearly there is no question of it being comment. The same can also be said of the fifth article, which persists with the statement that the respondent was fuelling tribal conflicts and attempting to divide tribes.

After holding that the above statements were statements of fact and not comment, that should be the end of the matter on the defence of fair comment. However, even if I had held that they were comment, I would have gone further to agree with Mr de Bourbon's submission that the appellants had also failed to establish that the facts upon which the comment was based were true. The comment would have been based solely on the statement the respondent made at the conference. In the first instance, the statement, as already indicated above, was intended in a jocular manner. Secondly, it was clearly and honestly intended to highlight the water problems of Bulawayo. Thirdly, it does not in any way establish that the respondent is either a racist or someone intent on causing tribal problems in the country. And fourthly, it affords no basis for questioning the respondent's sanity.

I would also have been of the view that the appellants had failed to establish that the comment was fair. I agree that the vitriolic attack on the respondent in the above articles, making baseless allegations that he was a racist, that he wished to divide tribes, that he was a hypocrite, that his sanity must be questioned, and that he had wicked and dishonourable motives, cannot be said to have been reasonable. Nor can it be said to have been a fair inference from the facts.

Further, I would also have agreed with the submission that the comment could not possibly have been in the public interest. The approach of the second appellant to the matter was to perceive some dishonesty in the actions of the respondent, yet dishonesty was not pleaded. His concept of what constitutes a racist is unacceptable and was properly rejected by the learned trial judge.

MUCHECHETERE JA

In the result, the appellants' defence of fair comment is on all the above factors untenable.

The next matter to deal with is the question of damages. Mr de Bourbon submitted that the amount of damages awarded by the court *a quo* is not so disparate from awards in like cases that it should be interfered with by this court. He cited the case of S A Associated Newspapers Ltd & Anor v Samuels 1980 (1) SA 24 (A). It was stated as follows by Kotze JA at p 11 of the translation:

> "In the determination of the amount of compensation in a defamation action, a trial court exercises a discretionary function with which the appellate court will not easily interfere. However, a duty to interfere does arise, inter alia, in the case where the trial court took into account a factor in favour of the plaintiff which should have been left out of account. Where that is the case, the court of appeal is at liberty to exercise its own discretion."

See also Zimbabwe Banking Corp v Mashamhanda 1995 (2) ZLR 417 (S). He went on to submit

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that the awards in this case are in keeping with the award of $45 000 which was approved in the Mashamhanda case *supra*. There, defamatory material had been advertised in four major publications - The Herald, The Sunday Mail, The Gazette and The Chronicle.

It has not been submitted that the learned trial judge took into account in favour of the respondent something which should have been left out. All that was submitted was that the learned judge should have assessed the respondent's loss in respect of each of the articles and awarded damages separately. And that his failure to do so resulted in the respondent being over-compensated.

I do not consider that the learned judge acted improperly in the manner he went about assessing damages in the matter in the circumstances. It must be borne in mind that he had a discretion in the matter. I also do not consider that the manner he exercised his discretion resulted in over-compensating the respondent. I am certain that if he had adopted the method suggested by Mr Nherere larger amounts would have been awarded. It should also be borne in mind that each publication of a defamatory matter constitutes a separate cause of action. And in this case the articles were published in the newspapers with the largest circulation in the country - it was conceded that nearly one million people read The Sunday Mail each week.

And, after considering all the factors generally taken into account in the

quantification of damages in cases of this nature, it cannot be said that the damages awarded in this case were too high. Compare Tekere's case *supra*, Zvobgo's case *supra*, Chinamasa's case *supra*, Chinengundu v Modus Publications (Pvt) Ltd HH-135-92, and Shamuyarira v Zimbabwe Newspapers (1980) Ltd 1994 (1) ZLR 445 (H). The defamation in this case is, in my view, more serious than that in the Mashamhanda case *supra*. This is because in this case it appears that the second appellant must have published the articles in pursuance of some vendetta. The language used in some of the articles was in the highest degree offensive, insulting and abusive. I also agree that the second appellant had also shown himself to be to a great extent a political creature prepared to make wild allegations without any basis in fact and without any real attempt to substantiate those allegations.

The allegation that a person is a racist and that he seeks to divide people on tribal lines is a particularly harmful allegation anywhere and more so in Zimbabwe with its present political and social climate. To repeat the allegations on a number of occasions makes the damage much more serious. The appellants persisted in their allegations throughout the trial even though it was clear that there was no basis for them. And the second appellant also added the complaint that the respondent was dishonest, also without any basis for it. The respondent, as was conceded, is a widely known and respected person.

In the circumstances, I cannot find any rational ground for interfering with the awards.

The last matter to deal with is whether the learned trial judge erred in ordering interest on the damages awarded from the date of publication of the defamatory articles in terms of s 6(1) of the Prescribed Rate of Interest Act [Chapter 8:10]. In my view, although the provisions of the

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said section came into effect some six months after the defamatory statements were published, that is, on 20 May 1994, the relevant and important date on the question of interest is when the trial court adjudicated on the matter. Summons in the matter was issued on 8 December 1993, but the trial was commenced on 16 February 1996 and judgment was given later. When the trial began the said section had become operative. The learned judge was therefore obliged to apply the law as it stood on the day he was called upon to adjudicate on the matter. This simply stated that:

> "6(1) Subject to this section and unless otherwise agreed, every debt arising out of an unliquidated claim shall bear interest calculated at the

MUCHECHETERE JA

> prescribed rate on the amount of debt from the date when the cause of action arose, whether or not the amount of debt is fixed by agreement between the parties, by arbitration or by judgment of the court."

There was no provision that the section was not to apply in cases where the cause of action arose before the section had become operative. It cannot therefore be said that the learned trial judge erred in ordering interest in this matter from the date the defamatory statements were published.

I therefore agree with Mr de Bourbon's submission that the section is not retrospective but prospective. The court does not backdate the interest: the date upon which interest becomes payable is fixed by the section itself. See Maxwell on The Interpretation of Statutes 12 ed at p 320, where the learned author says:

> "Enactments regulating the procedure in court are usually construed as imperative even where the observance of the formalities in question is not a condition exacted from the party seeking the benefit of the statute, but a duty imposed on a court or public officer when no general inconvenience or injustice seems to call for a different construction."

The order by the learned trial judge was therefore proper.

I also consider that the concession made by Mr de Bourbon on the actual date the interest ought to commence is proper in the circumstances Ð the date of the final publication, which is 14 November 1993. This is because although a separate claim was made in respect of each publication the learned trial judge, nevertheless, awarded a single globular sum in respect of the various defamations against each appellant. He did not specify the date of publication he had in mind. In view of the fact that globular awards were made, the only appropriate date of publication should be the date of final publication.

In the result, the appeal is dismissed with costs. Interest on the awards is however to commence on the date of final publication, 14 November 1993.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

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Joel Pincus, Konson & Wolhuter, respondent's legal practitioners

S v SIDAT 1997 (1) ZLR 487 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Criminal appeal

27 March & 13 May 1997 Judgment No. S-59-97

Flynote

Criminal procedure (sentence) - appeal - sentence - alteration on appeal - appeal court finding itself "at large" on sentence because of a misdirection - not in any way bound by sentence passed in the lower court

Headnote

An appeal court may interfere with the sentence imposed in a lower court only if it considers that a substantial miscarriage of justice has occurred. The appeal court's approach will vary, depending on whether or not there has been a misdirection by the lower court.

If the appeal court decides that there has been a material misdirection in relation to sentence, there has been a substantial miscarriage of justice. The appeal court is then "at large" to consider, on the right facts, what an appropriate sentence should be. In so doing, it is not fettered by a consideration of the sentence imposed by the lower court. It ignores the sentence imposed, and initiates the sentencing process afresh. It is not bound to reduce the sentence imposed. It may even increase it. If the appeal court's own independent conclusion results in a sentence closely approximate to that imposed by the lower court, it may well not alter the sentence. This will not be because there is no sense of shock at the lower court's decision, but because the appropriateness of a sentence is always a matter of approximation, and tinkering with sentences is both undesirable and administratively confusing.

On the other hand, if there has not been a misdirection, the court will not be "at large". There can only have been a substantial miscarriage of justice

McNALLY JA

entitling the appeal court to interfere if the sentence is "disturbingly inappropriate" or "so severe as to induce a sense of shock".

Cases cited:

S v Choto S-12-89

S v Dube HB-223-86

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S v Fusirayi 1981 ZLR 56 (A)

R v Hartley 1966 RLR 522 (A); 1966 (4) SA 219 (RA)

S v Moyo HB-33-88

S v Moyo S-141-89

S v Ndebele HB-156-88

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

R v Owen 1942 AD 389

S v Powell 1981 ZLR 508 (S)

S v Strydom & Ors 1980 ZLR 364 (A)

S v Tapfuma HH-271-91

The court considered the following statutory provisions:

High Court Act [Chapter 7:06], s 38(2)

Supreme Court Act [Chapter 7:13], s 12 (2)

Case Information

J C Andersen SC, for the appellant

M Majuru, for the respondent

Judgment

McNally JA: This is an appeal against a sentence of imprisonment (forty-two months, of which twenty-four were suspended) imposed by the regional magistrate, Bulawayo, and approved on appeal by two judges of the High Court in Bulawayo.

The appellant had pleaded guilty to receiving stolen property knowing it to have been stolen. On eight occasions between 29 August and 30 October 1994, he had received goods stolen by a thief from a wholesaler and had added these goods to his stock in his retail outlet. The goods were valued at $33 593,27 of which goods worth $4 493,42 were recovered. It appears that he had paid the thief half the value of the goods stolen. In addition, and before trial, the appellant had repaid $32 152,03 to the complainant, which, on the face of it, is some $3 052,18 more than he need have done.

The learned judges in the High Court found that the regional magistrate had misdirected himself in that he rejected evidence in mitigation which had not been questioned by the prosecution and which he, the magistrate, had not queried at the time when it was placed before the court.

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McNALLY JA

In this conclusion, the learned judges were undoubtedly correct. As long ago as 1966 Beadle CJ, relying on his then thirty-five years of experience in the courts, laid it down that where facts in mitigation are set out by defence counsel, and accepted by the prosecutor:

> "if a court is not going to accept these facts, as outlined, it is the duty of the court to inform the parties of that fact before it pronounces its sentence; otherwise the defence is lulled into a false sense of security in believing that the facts which have been put before the court are acceptable to the court."

(*R v Hartley* 1966 RLR 522 (A) at 526A-C).

See also *S v Fusirayi* 1981 ZLR 56 (S); S v Powell 1981 ZLR 508 (A); *S v Dube* HC-B-223-86; *S v Moyo* HB-33-88; *S v Ndebele* HB-156-88; S v Tapfuma & Chitsa HH-271-91.

In his judgment (HB-70-95), the learned judge then went on to say:

> "In view of this misdirection on the part of the magistrate, we are at large on the question of sentence. This notwithstanding, the sentence can only be interfered with if it appears to us that a substantial miscarriage of justice has resulted from the misdirection - vide s 38(2) of the High Court of Zimbabwe Act 1981" (now s 38(2) of Chapter 7:06).

Mr Andersen makes the point that this statement is inherently self-contradictory. To say that a court is "at large" on sentence is to say that it is free to decide an appropriate sentence without regard to the sentence imposed by the lower court. To go on then to say that it must have regard to the sentence imposed and may only alter it if it appears that there has been a substantial miscarriage of justice, is to say something entirely different. It renders meaningless the phrase "at large". A court does not have to be "at large" to interfere with a sentence which amounts to a substantial miscarriage of justice. The point about being "at large" in relation to sentence is that the question of "interfering" with the existing sentence does not arise. The court simply ignores the sentence imposed, and initiates the sentencing process afresh. It decides, not whether the sentence of the lower court was proper, but what a proper sentence should be.

An exaggerated example may help to illustrate the point. An appeal court could never say "The fine of $100 is so high as to amount to a substantial

McNALLY JA

miscarriage of justice (or, as it is commonly expressed, to induce a sense of shock). I will reduce it to $99." The reason is plain. There is no substantial difference between $100 and $99. But an appeal court could, at least in theory, say "The fine of $100 was imposed as a result of a serious misdirection by the trial court. I propose to re-assess sentence, taking account of the facts properly. I conclude that an appropriate sentence would be a fine of $99."

The conclusion of the court *a quo* which effectively eliminates the concept of a court being "at large" in relation to sentence, was based upon its interpretation of s 38(2) of the Act, which reads:

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> "Notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be set aside or altered unless the High Court considers that a substantial miscarriage of justice has actually occurred."

(Section 12(2) of the Supreme Court Act [Chapter 7:13] is effectively identical).

This section, or its similar predecessors, has often been considered in relation to conviction. See, for example, R v Owen 1942 AD 389 (an appeal from the High Court of Southern Rhodesia); S v Strydom & Ors 1980 ZLR 364 (A); *S v Ngara* 1987 (1) ZLR 91 (S) at 97B-C; S v Choto S-12-89; *S v Moyo* S-141-89.

It has not been considered in relation to sentence except in passing, as for example in *S v Dube supra*, where Korsah J (as he then was) said that, as a result of a misdirection, the court was at large and -

> "When an appellate court is at large to consider afresh the sentence to impose, its powers are not fettered by the sentence imposed by the trial court. It is not bound to reduce the sentence because of the misdirection. It may even increase the sentence imposed if it is of opinion that, on the agreed facts, this is warranted."

His Lordship went on to consider s 38(4)(a).

Section 38(2) of the High Court Act and s 12(2) of the Supreme Court Act have remained in substantially the same form since they formed s 19(2) of Chapter 14 of the 1974 Edition of the Statute Law of Rhodesia. It has never

been suggested that the effect of the provision was to eliminate the concept of a court being "at large in relation to sentence". In relation to conviction, the interpretation has indeed always been that the court was at large. If there was a misdirection, the court did not simply set aside the conviction. It reassessed the evidence afresh, avoiding the misdirection, and came to its own conclusion as to guilt or otherwise. That indeed was the essence of the decision in R v Owen *supra*.

It must be exactly the same in relation to sentence. Once it is decided that there has been a material misdirection in relation to sentence, then there has been a substantial miscarriage of justice. The appellate court is then at large to consider, on the right facts, what an appropriate sentence should be. In so considering, it is not fettered by a consideration of the sentence imposed by the lower court.

If, on the other hand, there has not been a misdirection by the lower court, then there can only have been a substantial miscarriage of justice if the sentence is "disturbingly inappropriate" or "so severe as to induce a sense of shock". Lacking a misdirection, in other words, the court will not be "at large", and will only be able to interfere if the severity of the sentence amounts to a substantial miscarriage of justice.

Since this approach to the interpretation of the two sections is of considerable practical importance, I have discussed the content of this judgment with the Chief Justice, who has

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authorised me to say that he is in agreement with it.

The result is that the court *a quo* misdirected itself, and improperly fettered it own discretion, by deciding that it was, in effect, at large and yet not at large; that somehow it was entitled to come to its own decision on sentence, yet unable to intervene unless it considered the magistrate's sentence disturbingly inappropriate.

What it should have done was, first, to reject the improper considerations taken into account by the magistrate, and then, assessing the proper considerations, to come to its own conclusion as to an appropriate sentence.

In practice, and as a final step in its thinking, the appellate court may well not alter the sentence if its own independent conclusion approximates closely to the sentence actually imposed by the magistrate. But this will not be because there is no sense of shock at the magistrate's sentence. It will be because the appropriateness of a sentence is always a matter of approximation, and

McNALLY JA

because tinkering with sentences is both undesirable and administratively confusing.

Given the misdirection in the High Court, this court is at large. I propose therefore to assemble the facts which are mitigatory and those which are aggravating, and to come to an independent conclusion as to what is an appropriate sentence.

In doing so, I will bear in mind, as I am entitled to do in terms of s 12(4)(a) of the Supreme Court Act, that after the date of sentence in both courts the appellant was granted bail after serving five months and ten days in prison. That is almost exactly equivalent to serving an eight month sentence with normal remission.

The first important fact is that the appellant stole (I use the word as a convenient shorthand description of his crime which was technically receiving) large quantities of goods from his supplier on no less than eight occasions over a period of two months. The wholesale value of these goods was $33 593,27, a sum large enough to warrant a sentence of imprisonment.

The cases cited before the High Court indicated that an overall sentence of forty-two months was not out of the ordinary run of sentences in cases involving that amount of money. However, the mitigatory features were considerable. In the first place he has repaid all the money, and in fact over paid. This means that he is very much worse off than if he had bought the goods legally, because he has paid the complainant the full wholesale price and the thief half of that price. So the goods have cost him 50% more than they would have if he had bought them in the ordinary course of trade.

It seems to have been thought by the learned judge that he should be criticised because he presumably sold most of the goods at a profit. But he was in business to sell goods at a profit. And the great probability is that he made less profit on these goods than he would have if he had purchased them legitimately. I do not think this is a factor which can properly be taken into account against him. The important fact is that he has not benefited from his wrongdoing, he

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has repaid his victim, and the goods have in the event cost him some $16 500 more than they would have in the normal course of business.

We usually suspend a significant portion of a prison sentence on condition of repayment. He has gone one stage better, by repaying. So he must benefit

McNALLY JA

at least by the amount we would have suspended to induce him to repay. I bear in mind that I have remarked that offenders must not be allowed to buy themselves out of prison completely. But they must certainly be rewarded for making restitution. Otherwise, why should they bother to do so?

Similarly, a plea of guilty must be recognised for what it is - a valuable contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. Otherwise, again, why plead guilty?

It seems to me that these three facts - the fact that he has lost on the transaction, that he has repaid his victim, and that he pleaded guilty - are very significant elements in mitigation. I add to those the further facts pointed out by Mr Andersen - that on the evidence which was not disputed the appellant was in financial trouble at the time because of the expense of his father's illness, and that he was persuaded by the thief against his initial reluctance to become involved - the thief being an invoice clerk for the complainant wholesaler.

All of these factors, suggest to me that the period of actual imprisonment should properly be greatly reduced. Whether, if he had not already served the equivalent of an eight month effective sentence and been released almost two years ago, I would have considered less than twelve months effective is academic. We have always been reluctant to send someone back to serve a second smaller instalment of a prison sentence after a long interval.

I should add, as a final point, that in the particular circumstances of this case, and without wishing to create a precedent, Mr Majuru has conceded that he does not ask that the appellant be sent back to prison.

In the circumstances, therefore, I am satisfied that nothing is to be achieved by sending the appellant back to prison to serve another short term of imprisonment.

Accordingly, the appeal against sentence is allowed. The appellant is sentenced to twenty-four months' imprisonment with labour, of which sixteen months will be suspended for three years on condition that he is not convicted of an offence, committed during that period, involving theft or receiving stolen property knowing it to have been stolen, for which he is sentenced to a term of imprisonment.

McNALLY JA

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For the avoidance of doubt it is directed that:

a. the period of suspension shall run from 22 June 1995, the date of his release;

b. the appellant shall be deemed to have already served the effective period of imprisonment of eight months.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Gollop & Blank, appellant's legal practitioners

RUSIKE v TENDA TRANSPORT (PVT) LTD & ANOR 1997 (1) ZLR 495 (HC)

Court **High Court, Harare**

Bartlett J

Civil action

5,6,7 & 13 May 1997 Judgment No. HH-89-97

Flynote

Damages - loss of earnings - assessment of future earning capacity - use of actuarial calculations - assessment of earning capacity when plaintiff's means of earning a living uncertain

Headnote

The plaintiff had suffered serious injuries in a motor accident that had been entirely the fault of the other driver. The injuries were such that he would be unable to continue to work as a motor mechanic (he had been an apprentice motor mechanic) but that he would be able to move into some other type of employment provided that it was of a sedentary nature. As regards the plaintiff's claim for loss of future earning capacity:

Held, that wherever possible the loss of future earning capacity should be assessed on the basis of an arithmetical, actuarial basis and not on the basis of a "gut feeling" basis. However, whilst the court should be guided by actuarial calculations, it is not completely bound by them and must arrive at an award that is fair and just in the particular circumstances of the case.

Held, further, that although the court had evidence before it of what the plaintiff would have earned in the future as a motor mechanic, it had absolutely no evidence as to what he might earn in an alternative career. In a case where there has been pecuniary loss but the court has no evidence on the basis of which an actuarial assessment can be made, the court must nonetheless still make an award of an amount that seems to the court to be fair and reasonable, even though this award is little more than an informed guess.

Held, further, that to make the exercise of making such an award somewhat

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less arbitrary in the circumstances of the present case, the court should use the approach of applying actuarial formulae to establish what the plaintiff would have earned as a qualified journeyman over a limited number of years from the trial date, to make a deduction for contingencies, and to award that amount. The rationale behind this approach is to give the plaintiff a lump sum which, together with the lump sum for past loss of earnings, he could use either to retrain himself and establish an alternative income earning capacity or to provide himself with the capital to set up a business venture. This approach also recognises a definite limit to the defendant's liability and requires the plaintiff to develop an alternative earning capacity within a reasonable period of time. Another approach would have been to have taken the full figure claimed by the plaintiff and to then have imposed a contingency factor sufficiently large to takeaccount of the fact that his future alternative earning capacity could be close to or even exceed the income earned as a journeyman. If this second approach had been applied the figure that would have been arrived at would not have been significantly different from that arrived at by using the first approach.

Cases cited:

Carstens NO v Southern Ins Assn Ltd 1985 (3) SA 1010 (C)

Gillbanks v Sigournay 1959 (2) SA 11 (N)

Griffiths v Mutual Federal Ins Co Ltd 1994 (1) SA 535 (A)

Marufu v Mawona *& Ors* 1996 (1) ZLR 593 (H)

Minister of Defence v Jackson 1990 (2) ZLR 1 (S)

Nhlumayo v General Accident Insurance Co of SA Ltd 1986 (3) SA 859 (D)

Pamuli v Rupende & Anor HH-288-87

Santam Ins Co Ltd v Paget (1) 1981 ZLR 73 (A)

Southern Ins Assn Ltd v Bailey NO 1984 (1) SA 98 (A)

[*Editor's note:*

The plaintiff was injured in a collision between a bus and his own vehicle. The court found that the bus driver was entirely responsible for the accident and that there was no contributory negligence on the part of the plaintiff. The plaintiff sued the owner and insurers of the bus for damages.

The only portion of this judgment that is reported is the portion of the judgment dealing with the assessment of the future earning capacity of the plaintiff.]

BARTLETT J

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Judgment

Bartlett J:

INTRODUCTION

Late on the evening of Christmas Eve in 1992 an accident occurred at the 62 km peg of the Zvishavane/Masvingo Road. It was a dark and rainy night. The accident involved a collision between a Peugeot 504 and a bus. The vehicles had been travelling in opposite directions. The Peugeot 504 was driven by the plaintiff, the bus by the first defendant's driver. The second defendant is the first defendant's insurer.

This accident on that unhappy Christmas Eve has led to a damages claim by the plaintiff for shock, pain, suffering, loss of amenities, loss of earnings to the trial date and for lost earning capacity into the future. There are also claims for past medical expenses and, in effect, for future medical expenses. The basis for all these claims are the injuries suffered by the plaintiff in the accident - which accident the plaintiff alleges was caused entirely by the negligence of the first defendant's driver. The defendants for their part maintain that the accident was completely the fault of the plaintiff and not of the first defendant's driver.

The spirit of Christmas was sadly not present on the Zvishavane/Masvingo Road on that night 41/2 years ago. It has been equally sadly absent on the road to litigation with confrontation as opposed to any meaningful attempt at conciliation and settlement being the order of the day.

I turn now to summarize the evidence before assessing probabilities and credibility and making findings of fact.

[The learned judge then considered the evidence, made his findings, and continued:]

LOSS OF FUTURE EARNING CAPACITY

I must proceed to the final aspect of the matter and deal with damages for the loss of future earning capacity. Here to a substantial extent I move into the territory used by persons who work with crystal balls as opposed to legal texts. But I must endeavour to approach the matter in accordance with the guidelines as laid down in various relevant authorities.

As a starting point it is important, wherever possible, to deal with the matter

BARTLETT J

on an arithmetical, actuarial basis as opposed to a "gut feeling" basis - to use a word often referred to in the authorities. The basic approach is as referred to in Corbett Buchanan and Gauntlett, 3 ed p 60-61, where the learned authors quote at length the observations made by Nicholas JA in Southern Ins Assn v Bailey NO 1984 (1) SA 98 (A) at 113F to 114E. I must also, I feel, take account of the observations made in Carstens NO v Southern Ins Assn Ltd 1985 (3) SA 1010 (C) where, referring to the headnote, it is stated:

> "While the court will generally have a regard to arithmetical calculations and to actuarial evidence of probabilities

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> to assist it in its assessment, ultimately it must decide whether the results of such calculations and evidence accord with what is a fair and just award in each particular case."

That approach I believe was underlined and emphasised in the case of Nhlumayo v General Accident Ins Co of South Africa Ltd 1986 (3) SA 859 (D) at 863F-G where Leon ADJP said:

> "In my view, the court has a discretion to do what it considers is right in all the circumstances and is certainly not bound by inexorable actuarial calculations. This was the view taken by the court in a dependent's action in Legal Ins Co Ltd v Botes 1963 (1) SA 608 at 614F-G but that approach was also applied by the Appellate Division in a claim for loss of earning capacity in Southern Ins Assn Ltd v Bailey NO 1984 (1) SA 98 (A) at 116G-H."

I should emphasise the approach in Southern Ins Assn Ltd v Bailey NO *supra* received approval from this court by Sansole J in Pamuli v Rupende & Anor HH-288-87.

I also need to look carefully at the evidence of the plaintiff and the evidence of his medical disability to make an assessment of his ability to establish an alternative future income. The evidence of the plaintiff on this aspect was not in as much detail or clarity as might have been hoped for or expected. I do not think it unfair, looking at the medical reports, to suggest that the painful and harrowing injuries suffered by the plaintiff caused their worst physical and psychological effect in the first 18 months after the accident. Thereafter and from about May 1994 the plaintiff reached what appears to be a generally stabilised physical condition. This would have enabled him to face the unfortunate fact of his accident and physical injuries and start to look to the future.

BARTLETT J

There appears, however, to have been no serious effort by the plaintiff in the last 3 years up to the trial to address the future, to face up to his disabilities, and seek something other than what Mr Wernberg described as a "meal ticket" for life from the accident. That, however, is a sword which cuts both ways. If the defendants are of the view that the plaintiff should have done something to prepare himself for an alternative future career, the defendants need to realise that it is very difficult for a man with a badly injured elbow, no meaningful qualifications and no financial resources, to seek to find an alternative career. I have indicated that the plaintiff does seem to come from a fairly secure family financial background. I reiterate that there is no legal obligation for the family to provide the financial support necessary for the adult plaintiff to seek an alternative mode of income.

It is, however, clear from Mr Ncube's evidence that the plaintiff should be able to move into alternative avenues of employment - though those avenues would need to be sedentary. I emphasise that it is my view that there is no realistic prospect of him being able to continue as a motor mechanic. It seems to me to be obvious that a motor mechanic's job by its very nature is one which requires dexterity and strength of arm and hand - both arms and both hands. But clearly, the plaintiff is not an unintelligent man. He should, given the opportunity, be able to train in an alternative career.

Accordingly, the aspect which I have to try and assess as best as I am able is his future loss of earning capacity in that alternative career (whatever it is) against what his earning capacity would have been as a journeyman. The difficulty I have in making that assessment is that I have

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various figures in terms of the appropriate formulae as to what the award should be if the plaintiff had carried on as a motor mechanic - but I have absolutely no evidence before me as to what he might earn in an alternative career. Accordingly, I have precise figures on the one side of the equation and sheer speculation on the other.

In deciding the approach I should adopt to take proper account of this particular situation I think I can gain assistance from a case which, funnily enough, involved the loss of a lawyer's earning capacity. The facts are obviously not relevant to this case but in Griffiths v Mutual Federal Ins Co (Pvt) Ltd 1994 (1) SA 535 (A) at 546F-G Vivier JA stated:

> "In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award

> of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess."

Support for this sort of approach is, I believe, found in Zimbabwe in the approach laid down, or referred to, by Fieldsend CJ in Santam Ins Co Ltd v Paget (1) 1981 ZLR 73 (A) where it is stated in the first paragraph of the headnote that:

> "A court should make some award in cases where damages are claimed for loss of future earning capacity if it is satisfied that the plaintiff has suffered such a loss, even where there is insufficient information to assess the loss accurately and the court has to pluck a figure out of the air."

Based on this approach, I emphasise that the figure I need to pluck out of the air relates to an assessment as to the alternative earning capacity of the plaintiff. Before reaching into the air, however, I refer to Koch Damages for Loss of Income (1 ed) in the hope that with the assistance of the learned author my lunge might not be into completely thin air. At p 164 Koch states:

> "In many cases, the disablement is partial and the plaintiff retains a residual earning capacity."

He carries on:

> "If the plaintiff submits acceptable evidence of a career path by which to mitigate his damages the onus rests on the defendant to prove that this allegation is unreasonable (see van Almelo v Shield Ins Co Ltd 1980 (2) SA 411 (C))."

Koch adds:

> "... as a general rule the new career path will not be as remunerative as that which has been foregone. It is not unknown, however, that an injury dislodges the plaintiff from a career path with poor potential into one with significantly better prospects."

Where an alternative earning capacity is known, Koch lays down a formula for balancing past earning capacity against future earning capacity - arriving at a figure taking into account contingencies and equaling the net

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BARTLETT J

value of the reduction of earning capacity. That of course does not help in this case as I have no idea as to what figure to put into the calculation as regards the alternative earning capacity.

Apart from learning how to write with his partially disabled right hand the plaintiff has not provided any meaningful indication as to what his future plans or what the prospects of putting those plans into effect are. It would seem, however, from the plaintiff's evidence that he would like a capital base from which to establish a motor vehicle spare parts business. It would be totally speculative to try and guess how such a business may, or may not, succeed. If it succeeded it could well earn the plaintiff more than he would have earned as a mechanic. If it failed, it would earn him substantially less.

I reiterate that the plaintiff has not gone as far as one would have hoped or expected him to have gone, given the passage of time, to provide a basis on which to assess his future earnings prospects. He has instead, on the basis of his amended declaration, simply suggested that he should receive a discounted figure of some $97 000 or thirty years of future earnings as a mechanic, further reduced by a contingency of 20% to some $77 000.

Faced with the situation I am in this matter, Koch (at p 167) offers the following suggestion which is in effect a restatement of the "pluck it out of the air" approach:

> "Circumstances may arise which, due to the imponderabilities, lead the court to the conclusion that any attempt to perform a calculation is futile. This is commonly so when the plaintiff retains an undefined residual earning capacity. A general assessment (somehow-or-other method) is then adopted."

The learned author then makes reference to perhaps using national average earnings statistics as a basis. I do not, however, consider that that would be of particular assistance in the Zimbabwean context.

I turn then to somehow or other pluck a figure from the air. I need in so doing to use my discretion and to endeavour to be fair to both the plaintiff and the defendant. It seems to me that there are two alternative ways of so doing and in my view either way would at the end of the day arrive at roughly the same result.

The first approach would be to apply actuarial formulae to establish what the

BARTLETT J

plaintiff would have earned over a limited number of years from the trial date as a qualified journeyman, to make a deduction for contingencies, and to award that amount.

The rationale behind this approach is, taking an overall view, it would give the plaintiff a lump sum which, together with the lump sum from past loss of earnings, he could use either to retrain himself and establish an alternative income earning capacity or to provide himself with the capital to set up his wished for spare parts business. This approach would also recognise a definite limit to the defendant's liability and require the plaintiff to develop an alternative earning capacity within a reasonable time - something he should be capable of doing exercising

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appropriate determination.

I would consider that a three year future period for loss of earning capacity strikes a fair balance - and also takes account of the past three years for which the plaintiff is receiving an amount and during which time he could have done something to seek an alternative income earning ability.

I would consider Mr Wernberg's suggested figures for loss of earning capacity for the next three years to be the appropriate figures to use and I agree that a contingency factor of 25% should be deducted from those figures. This, using Mr Wernberg's document, gives figures for the three years of $15 895,97, $15 006,83 and $13 933,45, adding up to a total, if my arithmetic is correct, of $44 836,25.

The second approach would be to take the full figure for future earning capacity claimed by the plaintiff in the amended declaration ($97 085,55) and impose a contingency factor sufficiently large to take account of the fact that there could well be a future alternative income which might be close to or possibly even exceed the income earned by a journeyman. In view of the absence of any evidence as to the alternative earning capacity the contingency factor would have to be substantial. In my view, the contingency factor of 50% imposed in Gillbanks v Sigournay 1959 (2) SA 11 (N) would be appropriate. So if this approach were adopted the ultimate figure awarded would be in the vicinity of $48 500 - which is not significantly different from the figure arrived at on the first approach.

I consider that the first approach is the more appropriate somehow or other method of plucking a figure out of the air and I adopt that approach. This means that an award of $44 836,25 is made for loss of earning capacity.

BARTLETT J

AWARDS AND DATES FROM WHICH INTEREST TO RUN ON AMOUNTS AWARDED

As regards interest in respect of the award for shock, pain, suffering and loss of amenities, my brother Smith in *Marufu v Mawona \& Ors* 1996 (1) ZLR 593 (H) indicates that in matters of this nature a court has a discretion but it is ordinarily appropriate to order interest to run from the date of service of the summons. This is because if interest is ordered to run from the date the injury was suffered a court should really apply its mind to assessing the appropriate amount of damages as at that date. Obviously quantum changes in terms of the criteria laid down by Gubbay CJ in Min of Defence v Jackson 1990 (2) ZLR 1 (S) at 7-8. If, however, there is a substantial time gap between the date of service of the summons and the trial date, a court would need to consider ordering interest to run from a date closer to the trial date. I have considered that option. But in the exercise of my discretion I am of the view that in this matter interest from the date of service of the summons is appropriate. The closest dateI can see in the papers to the date of service of the summons is 1 October 1994. So in respect of the amount of $20 000 for shock, pain and suffering and loss of amenities judgment is given against the first and second defendants in the sum of $20 000 with interest at the prescribed rate from the 1 October 1994 to date of payment.

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As regards the past medical expenses the amount agreed is $8 308,40. The award is made against both defendants, with interest at the prescribed rate from 19 April 1993 - which is the date of the last invoice. That seems to me a reasonable date for interest to run from. In respect of the claim for the elbow replacement operation, the amount I award is $30 249,60, against the first and second defendants with interest at the prescribed rate from 13 May 1997 to the date of payment.

Similarly, in respect of past earnings, I am satisfied that the appropriate date for interest to run from is the date of judgment. Judgment is given against the first and second defendants in the sum of $43 464,97 with interest at the prescribed rate from 13 May 1997 to the date of payment.

The same applies in respect of the loss of earning capacity. Judgment is given against the first and second defendants in the sum of $44 836,25 with interest at the prescribed rate from 13 May 1997 to the date of payment.

All the orders are made against the first and second defendant jointly and

severally with the one paying the other to be absolved. The plaintiff is also awarded costs of suit.

Scanlen & Holderness, plaintiff's legal practitioners

Atherstone & Cook, defendants' legal practitioners

FLACK v FLACK 1997 (1) ZLR 505 (HC)

Court **High Court, Harare**

Robinson J

Chamber application

23 May 1997 Judgment No. HH-97-97

Flynote

Family law - maintenance - divorce - application for maintenance and contribution to costs - correct procedure

Headnote

The applicant had obtained a divorce from the respondent, her former husband. She thereafter filed an urgent chamber application seeking an order for payment of monthly maintenance, payment of medical aid contributions and a contribution towards her legal costs.

Held, that the claim for an initial contribution towards costs was not maintainable because it is

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only a spouse who can make such an application. This is because of the duty of support that spouses owe each other, a duty which is terminated on the dissolution of marriage.

Held, further, that as maintenance had not been claimed in the action for divorce, the urgent situation was of the applicant's own making. She should have proceeded by way of a court application so that the respondent would be afforded the opportunity of responding fully to her claim.

Case cited:

Chiviya v Chiviya 1995 (1) ZLR 210 (H)

Case Information

R M Passaportis, for the applicant

C Venturas, for the respondent

Judgment

Robinson J: On 26 March 1997, Chidyausiku J entertained an action for divorce and ancillary relief instituted by the applicant, Ann Elizabeth

ROBINSON J

Flack, against the respondent, Peter John Flack, on an uncontested basis and granted the applicant a decree of divorce, with costs.

The learned judge further ordered that the respondent disclose the full nature and extent of the matrimonial estate, of which it was ordered that, in terms of s 7(1) of the Matrimonial Causes Act [Chapter 5:13], the applicant was to receive not less than 50% thereof in value.

The applicant, who was married to the respondent for over thirty-five years, has now filed an urgent chamber application in which she seeks a provisional order calling upon the respondent to show cause why an order should not be made in the following terms:

"1. The respondent be ordered to pay monthly maintenance with effect from 25 April 1997 and thereafter on the last business day of each succeeding month in the sum of $19 800.

2. The respondent continue to retain applicant on his medical and dental aid scheme and pay her contributions thereto until the matrimonial estate has been divided and apportioned in terms of the order of court dated 26 March 1997.

3. The respondent pay an amount of $10 000 to the applicant's legal practitioners, Messrs Winterton, Holmes and Hill, as and by way of an initial contribution towards legal costs.

4. The respondent pay the costs of this application."

Pending the confirmation or discharge of the provisional order, the applicant seeks an interim order that the respondent pay the applicant, with immediate effect, monthly maintenance in the

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sum of $19 800.

At the hearing of the application, which was opposed by the respondent, I advised that the applicant's claim for $10 000 as an initial contribution towards the applicant's legal costs was not maintainable for the reason I explained in *Chiviya v Chiviya* 1995 (1) ZLR 210 (H) at 214F where I observed that the grant of a decree of divorce -

> "would have put paid to the respondent's application for maintenance pendente lite and a contribution towards the costs of her defence since, in terms of r 274(1) of the High Court Rules, it is only a spouse who may

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> make such an application. The basis of the rule derives from the common law duty of support which spouses owe each other, a duty which is, of course, terminated upon the dissolution of the marriage. See Hahlo The South African Law of Husband and Wife 5 ed pp 424 and 432."

I asked Mr Passaportis why the applicant had not claimed maintenance for herself in her action for divorce and on what basis the applicant had filed her present urgent chamber application for interim maintenance. Mr Passaportis advised that no maintenance had been claimed for the applicant in her divorce action since it had been assumed that the respondent would, after the divorce, continue maintaining the applicant on the same basis as he had been doing before the divorce was granted until the matter of the division of the matrimonial estate had been resolved in terms of the order of divorce.

However, I held that as the urgent situation in which the applicant now found herself as regards the provision of maintenance for herself was a situation of her own creation, the applicant could not expect a judge to grant her immediate interim relief through the back door by way of a provisional order and that she should have proceeded by way of a court application so that the respondent was afforded the opportunity of responding fully, through an opposing affidavit, to her claim for maintenance in terms of s 7(1)(b) of the Matrimonial Causes Act [Chapter 5:13].

In the circumstances, I dismissed the application, with costs.

Winterton, Holmes & Hill, applicant's legal practitioners

Byron Venturas & Partners, respondent's legal practitioners

S v MUJATI 1997 (1) ZLR 508 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

28 May 1997 Judgment No. HH-92-97

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Flynote

Criminal procedure (sentence) - motoring offences - cancellation of driver's licence - when licence may be cancelled following driving offence

Headnote

A court that has convicted a motorist of a driving offence cannot cancel his driver's licence unless that cancellation is specifically provided for in the penalty section relating to the offence for which the motorist has been convicted. In particular, no cancellation can be ordered in respect of a conviction for contravening s 54 (2) of the Road Traffic Act [Chapter 13:11] (driving with the blood/alcohol level over 80 mg *per* 100 ml) unless the conviction is one which relates to the driving of an omnibus or is a second or subsequent conviction in connection with the driving of any vehicle.

In addition to dealing with this specific point, the court provided general guidance on the motoring offences in respect of which there is power to cancel the licence of the person convicted. In essence, cancellation of a driver's licence is only provided in those cases where prohibition from driving is a mandatory penalty. Cancellation is these cases is then itself mandatory; it is never discretionary.

Statutes referred to:

Road Traffic Act [Chapter 13:11], ss 48(1), 49(2), 50(1), 51(1), 52(2), 52(4), 53(2), 53(4), 54(2), 54(5), 55(2), 55(5), 64, 65 and 78(2)

Judgment

Gillespie J: The magistrate in Harare has caused this matter to be placed before me with the following comments:

1997 (1) ZLR p509

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> "I convicted the accused on his own plea of contravening s 54(2) of the Road Traffic Act [Chapter 13:11]. The accused has 2 previous convictions - the pertinent one, for sentence purposes, being less than 10 years old. Section 54(4)(b)(i)A of the Act provides for the prohibition from driving of 'a motorist with a less than ten years old similar conviction' but is silent as regards cancellation of such a convicted motorist's driving licence. I felt the accused in this case, given his bad driving conducted, needed to be 'taken off the road' and relied on s 65(5)(a) in cancelling his driver's licence. The question of whether a court can properly cancel a licence of a driver convicted under s 54(2) (as opposed to s 55(2) of the Act) has arisen in my court more than once. I have not been able to enjoy the benefit of case authority on this point. If indeed there is none, maybe this case has just provided the opportunity for us to have one that courts can rely on every now and then.
>
> This record could easily have been filed away in the Clerk of Court's office bearing in mind that the fine imposed is neither 'scrutinable' or 'reviewable'. Because I felt the legal question the sentence raises is important, I decided to refer the record for review and guidance. Also refer to my reasons for sentence."

The magistrate is to be commended for his willingness to enquire and for his initiative. It can be rather discouraging for a judge to write minute after minute and judgment after judgment and still to read record after record where the same mistake after mistake is made. That

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fellow-feeling with Sisyphus which these never-ending labours engender is pleasantly alleviated when one is actually asked for direction and assistance by another who evinces dedication to duty. In the words of W S Gilbert's Judge, "You asked for my guidance, This is my reply." 1(16)

Neither a prohibition from driving nor the cancellation of a driver's licence is a punishment which is provided for in general terms anywhere in the body of the law. Rather, they are enacted only in special instances for breaches of specific provisions of Parts VIII and IX of the Road Traffic Act [ChapterÊ13:11]. The instances where the punishment of prohibition from driving is permitted are breaches of ss 48(1), 49(2), 50(1), 51(1), 52(2), 53(2), 54(2), 55(2) and 78(2). Prohibition is mandatory (subject to a finding of the existence of special circumstances surrounding the offence) for any offence committed in circumstances provided in ss 52(4)(b), 53(2),

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54(4)(a)(ii)B, 54(4)(b), 55 and 78(2). In all other circumstances, the punishment of prohibition from driving is discretionary. In addition, in order to eliminate the possible anomaly arising from a charge of an offence in connection with the driving of a motor vehicle and brought under any other law which does not provide for a prohibition from driving, s 4 of the Act provides a general discretionary power to prohibit the convicted person from driving as well as an obligation to order such a prohibition where the driver is convicted of:

> "murder, attempted murder, culpable homicide assault or any other similar offence by or in connection with the driving of a motor vehicle ..."

and which discloses a contravention of an offence under the Act for which prohibition from driving is required.

The power to order the cancellation of the licence of a person convicted of an offence involving driving is given in the following provisions of the Act: ss 52(4)(b), 53(4), 54(5), 55(5) and 78(2). Section 64 of the Act dealing with offences involving driving committed under any other law has no provision giving a general discretionary power to cancel a licence but does oblige a court to cancel the licence of a driver where he is convicted of -

> "murder, attempted murder, culpable homicide assault or any other similar offence by or in connection with the driving of a motor vehicle ..."

and which discloses a contravention of an offence under the Act for which cancellation of the licence is required. Finally, s 65 of the Act makes certain general provisions relating to prohibition from driving. One of these provisions is subs (5):

> "If a person who has been prohibited from driving -
>
> (a) for a period of 12 months or more or for consecutive periods which together amount to 12 months or more is the holder of a licence, the magistrate or court prohibiting such person from driving shall, subject to the provisions of sections fifty-two, fifty-three, fifty-four, fifty-five and seventy-eight, cancel the licence in respect of all classes of motor vehicle to which such prohibition extends."

The clear wording of this provision shows that it is intended to and does compel cancellation of

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a driver's licence, where cancellation is not otherwise

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made compulsory, if the driver convicted is prohibited from driving for a period or aggregate consecutive periods of twelve months or more.

Study of these provisions shows that, with the exception of the provisions of s 65(5), cancellation of a driver's licence is only provided for in cases where prohibition from driving is mandatory. In all circumstances where the power to cancel a licence is given, that punishment is itself compulsory. It is never provided as a discretionary punishment. It ought not to be thought that any permissible construction of the statute could lead to an interpretation in terms of which a discretionary power to cancel is bestowed in cases where that cancellation is not expressly provided for.

To begin with, no problem of interpretation arises since the meaning of the words in the various provisions is quite clear. The legislature has provided a carefully graded system of punishments and has unequivocally allowed for the discretionary prohibition from driving in certain less serious cases and for the compulsory prohibition from driving and cancellation of any licence in others. Even if it were wrongly to be thought that there were any ambiguity, the principle of interpretation encapsulated in the maxim expressio unius est exclusio alterius is applicable here. The express provision of the punishment of cancellation in an exhaustive set of carefully defined circumstances must imply the absence of power to impose that punishment in any other circumstances. To the same effect is the well-known presumption of strict construction of penal statutes. A penalty is only to be held to be enacted where that is expressly provided or is a matter of necessary intendment. No necessary implication here arises.

The guidance which I give to the magistrate, therefore, is this. A court cannot cancel a driver's licence unless that cancellation is specifically provided for in the penalty section relating to the offence for which an accused has been convicted. In particular, no cancellation can be ordered in respect of a conviction for contravening s 54(2) of the Act unless the conviction is one which relates to the driving of an omnibus or is a second or subsequent conviction in connection with the driving of any vehicle.

This being understood it can be seen that the magistrate was in fact in error in believing that he faced any difficulty in cancelling the licence of this accused. His minute to me discloses (as indeed does the record of the case) that the accused has within the previous ten years been convicted of contravening the same section of the Act. In terms of s 54(4)(b) of the Act prohibition is mandatory; concomitant with that order of prohibition too, by

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subs (5), is the compulsory cancellation of the licence. The magistrate had no need to resort to the device of relying, as he says he did, upon s 65 of the Act.

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This brings me finally to a comment which I must make upon this device. In his reasons for sentence the magistrate remarked as follows:

> "Section 54(4)(b)(i)A of the Road Traffic Act [Chapter 13:11] makes it mandatory that I prohibit you from driving for a period I deem fit. This is because your 1988 conviction is less than 10 years old. It is my firm view that given your bad (indeed terrible) driving record, you need to be taken off the road for some time. My understanding of this section however is that it does not give me the authority to cancel your driver's licence - it only provides for prohibition. Section 65(5)(c) however provides that where a motorist has been prohibited from driving for 12 months or more his licence shall be cancelled. If I were to cancel your licence, I would have to rely on this particular section - meaning I would have to prohibit you from driving for 12 months. Usually, courts prohibit a convicted motorist for a period of 6 months. In this regard therefore, I am of the view that a prohibition of 12 months is a bit long and on the harsh side. I have decided to 'strike a compromise' so to speak. Ordinarily I would hve imposed a fine of $600 or so for this offence. Because I will have to prohibit you from driving for an 'excess' 6 months to make it 12 months and also to make it possible for me to cancel your driver's licence, I will deliberately scale down the fine to half of the $600 I would ordinarily have imposed - ie to $300."

The sentence arrived at was thus a fine of $300 together with a prohibition from driving for 12 months and the cancellation of the accused's driving licence.

It is true that the accused has a "terrible" driving record. In addition to his previous conviction for the identical offence, he has a recent (1994) conviction for reckless driving. That conviction should have been examined closely, for if any element of recklessness had involved the consumption of alcohol, then this would constitute a "similar offence" for the purposes of s 54 of the Act and the latest conviction would have been a third conviction - necessitating the accused being prohibited from driving for life. Since the State did not choose to aver such relevance or the applicability of the relevant sentence I see no cause at this late stage to investigate the matter further. In any event the existence of a previous conviction for reckless driving demonstrates just how serious a menace this man is on the roads.

1997 (1) ZLR p513

GILLESPIE J

It should now be apparent that the magistrate's belief that he was not empowered to cancel the licence for this repeat offence was misdirected. He was not only empowered to, he was obliged to. Even had he not been so obliged, it would have been most inappropriate for the learned magistrate to resort, as he did, to the provisions of section 65(5)(c) of the Act.

In effect, the magistrate, because he wrongly believed that he had no power to cancel the licence, imposed a sentence which he did not consider appropriate for the offence in order to manufacture a situation where the provisions of that section would apply so as to give him a jurisdiction which he would not otherwise enjoy. One cannot play fast and loose with the law like this. That itself was a misdirection which would have obliged me to interfere with the prohibition if I did not consider it in fact to be an appropriate one.

The further effect of this device is that it caused the magistrate, fair-minded as he was attempting to be, to reduce the fine which he would otherwise have imposed to counterbalance the prohibition. This was a third misdirection. The total effect of this approach was to impose a fine considered inadequate, in order to justify a prohibition considered excessive, so as to permit a cancellation believed not to have been provided for! I hope by this judgment to

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preserve other magistrates from feeling they have to indulge in similar jurisprudential gymnastics.

In fact, I would have thought that the circumstances of this case did in any event warrant a fine of at least $750, possibly $1000, together with prohibition for 12 months and cancellation of the driver's licence. In my view, therefore, despite the various errors of approach which I have (I hope sympathetically) described, the sentence remains lenient. It is not so lenient, however, that I would have thought it necessary to withhold a certificate. I consider substantial justice to have been done.

S v BOURNE 1997 (1) ZLR 514 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Constitutional application

27 & 29 May 1997 Judgment No. S-77-97

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - s 18(2) - right to trial within a reasonable period - when violated - accused summoned to appear in court over five years after a traffic accident - constitutional point raised but nothing done by prosecutor - trial finally starting a further year on - permanent stay granted

Headnote

The applicant had been charged with a traffic offence which took place in March 1990. Nothing happened until he was summoned to appear in court in December 1995, at which time his lawyer warned the prosecutor that the constitutional point would be raised. The proceedings were postponed indefinitely because no witnesses were present. The applicant was summoned to appear again in February 1996, which he did. Again, the constitutional point was raised. Again the proceedings were postponed because the witnesses were not present. The applicant and the witnesses were finally brought to court together in December 1996, when the magistrate referred the application for a stay of proceedings to the Supreme Court.

Held, that the applicant was entitled in terms of s 24(2) of the Constitution to raise the matter "in the proceedings", even if he could have made the application without waiting for the proceedings in court.

Held, further, that he could not be accused of bringing the application "as a last line of defence". He had twice given a warning and the prosecutor chose to do nothing.

Held, further, that where, as here, the applicant was not on remand with constant opportunities to raise the constitutional point, no duty could be

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imposed on him to take the initiative before he was summoned to court. He took the point as soon as he first appeared in court, and that was an adequate assertion of his rights.

Held, further, that there was prejudice to the applicant, both because the case was one where everything depended on credibility, which would be very hard to assess after 7 years, and because the case involved not wickedness or *dolus*, but mere negligence or *culpa*.

Application granted.

Cases cited:

S v Banga 1995 (2) ZLR 297 (S)

S v Chirere S-5-96

S v Simbarasi S-187-95

The court considered the following statutory provisions:

Constitution of Zimbabwe 1980, s 24

Case Information

P Nherere, for the applicant

M Majuru, for the respondent

Judgment

McNally JA: This is a matter referred to this court, in terms of s 24(2) of the Constitution of Zimbabwe, by reason of an allegation that the applicant has been denied a fair trial within a reasonable time as guaranteed by s 18(2) of the Declaration of Rights contained in Chapter III of the Constitution.

The essential facts to be gleaned from the papers before us are that the applicant was involved in a collision with a cyclist at a robot-controlled intersection in Harare on the morning of 19 March 1990. His car hit the cyclist's front wheel, resulting in the cyclist falling down and becoming unconscious. The allegation is that the applicant was, in common parlance, "jumping the lights". He was charged with contravening s 43(1) of the Road Traffic Act (now s 52(2) of Chapter 13:11). He denied the charge.

The applicant was first arraigned (which I take to mean "charged" in terms of what is now s 139 of Chapter 9:07) on 23 April 1990. Nothing then happened until he was summoned to appear in court on 1 December 1995. He appeared. There were no witnesses. His lawyer advised the court that he would raise the constitutional point. The matter was postponed indefinitely. He was summoned, or warned, to appear again on 20 February 1996. He did so. Again, there were no State witnesses. Again, his lawyer indicated that in accepting a postponement he was not waiving his constitutional rights. Again, apparently, the prosecutor did not give any thought to

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the warning.

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Finally, on 9 December 1996, the applicant was brought to court, and both State witnesses were present. Whereupon an application was made to the magistrate to have the matter referred to this court. The prosecutor did not object or oppose. The application was duly referred. One wonders why the witnesses were thus inconvenienced.

This court has previously made the point that it is unfortunate that only when the State has managed at last to get its case together does the defence "triumphantly throw the constitutional spanner into the works" (S v Chirere S-5-96). See also the comments of the Chief Justice in S v Banga 1995 (2) ZLR 297, and S v Simbarasi S-187-95.

But in the present case, it does seem that it is the State which was at fault. The prosecution had been advised twice that the point would be taken. The prosecutor should then have considered his position. Did he have a reasonable explanation for the delay? It was a simple traffic case involving a complainant and an investigating officer with his notebook. How could it have taken five years and seven months to come to court? Why did it then come to court when the witnesses were not available? Why were they not present again on 20 February 1996? How was he going to justify a delay of almost seven years between the accident and the first appearance of the witnesses in court?

Mr Nherere, who appeared for the applicant, made a further submission on this aspect which, to my mind, has substance. Section 24 of the Constitution provides two ways of bringing an application like this before the Supreme Court. Subsection (1) allows his client to apply without waiting for the proceedings in court. But if he had made such an application in, say, June 1996, he would have incurred the costs of the application perhaps needlessly. The State might never have proceeded in consequence of the previous warning. Was he not entitled to wait until the proceedings were actually instituted? Indeed, did not subs (2) specifically give him the right to raise the matter "in the proceedings"?

I do not consider, in all these circumstances, that the applicant can be accused of bringing the application "as a last line of defence" (see Chirere *supra*). He had twice given a warning. Ideally (and I draw attention to the Chief Justice's remarks in Banga *supra*), it should have been in writing. But it was the prosecutor's duty there to decide what course to take. He chose to do nothing, to waste the time of his witnesses, and then to concede the reference.

As a result, Mr Majuru, for the State, has had to admit that there is no

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explanation for the delay, which is clearly inordinate. Nor is there any suggestion that the delay was the fault of, or at the instance of, the applicant.

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The applicant gave evidence before the magistrate, in compliance with the procedure proposed in Banga *supra*. However, on the facts of this case, his evidence added little. It was undisputed that the delay was not of his making. And the prejudice he suffered was fairly intangible - the long drawn-out uncertainty, and the possible dimming of memory over so long a period.

There are four criteria commonly applied in these cases:

1. The length of the delay;

2. The explanation for the delay;

3. The assertion of his right by the accused; and

4. The prejudice to him.

Mr Majuru has conceded total failure on the first two criteria, but fights back on the latter two. He argues that the applicant was content to let matters lie until the trial, and that the prejudice to him is negligible.

It is true we have often spoken of the importance of an accused person asserting his rights to an early trial. Usually, however, this arises when there have been constant remands providing an opportunity for the point to be made. I am not convinced in this case, where the applicant was simply waiting to be called, that we can impose on him a duty to take the initiative. He did take it, as soon as he was summoned to court on 1 December 1995, and again on the next occasion, 20 February 1996. That, in my view, was an adequate assertion of his rights.

As to prejudice, one must accept that the case for the applicant is not very strong. But, as I noted earlier, the State witnesses were two - the complainant and the investigating officer. There is no impartial bystander to support the version of either the complainant or the applicant. Everything hangs on credibility. Seven years after the event it is likely to be very difficult to assess credibility. To that extent there is prejudice.

Each case in an application of this nature depends on its own peculiar facts. In my view, the overwhelming factor is the excessive and unexplained delay

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GILLESPIE J

in bringing a simple case to court. I am also influenced, to a small degree, by the fact that the case involves not wickedness or *dolus*, but mere negligence or *culpa*. It is a relatively minor traffic case. It is not in the interests of the administration of justice that such cases be so delayed.

In the event, the application is granted, with costs. It is ordered that the proceedings in the magistrate's court, Harare, in case No. 3491/96, *S v Bourne*, be and are hereby permanently stayed.

KORSAH JA: I agree.

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MUCHECHETERE JA: I agree.

Gill, Godlonton & Gerrans, applicant's legal practitioners

A L MILLAR & SONS (PVT) LTD v CHIKWETE 1997 (1) ZLR 519 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Civil appeal

29 May 1997 Judgment No. S-79-97

Flynote

Legal practitioner - renunciation of agency - renunciation after civil appeal set down for hearing - duty to advise client of date of hearing

Headnote

On the date on which a civil appeal had been set down for hearing, the respondent was in default. His legal practitioners had renounced agency nine days before the date of hearing because of the respondent's failure to pay his bills. The registrar was advised accordingly. A letter had, after a query by the registrar, been sent by the practitioners to the respondent, but there was no evidence that he had received it.

Held, that while late renunciation of agency by an appellant's legal practitioner is forbidden unless leave is granted, there is no such restriction on a respondent's practitioner.

Held, further, that the major share of the blame for wasting the time of the court and the costs of the appellant must fall on the respondent's former legal representative. He had a duty to his client, despite the non-payment of fees, to advise him of the date of hearing. That was also his duty to the court. His failure to advise his client effectively sabotaged the hearing of the appeal.

Held, further, that the appellant's wasted costs should be borne by the respondent's former legal practitioner.

Case Information

G S Wernberg, for the appellant

The respondent in default

S Nduna, at the request of the court

McNALLY JA

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Judgment

McNally JA: When this civil appeal was called the appellant was represented but the respondent (Mr Chikwete) was in default.

The court noted that Nduna and Partners, legal practitioners, who had been acting for Mr Chikwete, had renounced agency in a document lodged with the Registrar on 20 May 1997, nine days before the hearing. The court had earlier enquired, through the Registrar, whether Nduna and Partners had advised their client of the date of hearing. The information received was that they had not done so, but would do so at once. At the hearing Mr Nduna showed us his file copy of a letter to his former client dated 21 May 1997, which contained the terse instruction:

> "Ensure you attend at the Supreme Court on 29 May 1997 at 9.30 am in person to argue your case."

We cannot be sure when that letter was posted or whether it had been received. We had therefore no option but to postpone the matter. The question of the appellant's wasted costs then arose.

It seems beyond dispute that the appellant is entitled to his wasted costs. But from whom?

Mr Chikwete can to some extent be blamed because he was told that the matter had been set down, and because he did not pay what he owed to Nduna and Partners. On the other hand, he was not told timeously of the date of set down and so cannot be blamed for not appearing.

From the information given to us by Mr Nduna, it is apparent that something in the region of $1 300 was outstanding on Mr Chikwete's account. He had been asked a number of times to pay, and had not done so. The phrase "respondent withdrew his instructions from us" appears to be a euphemism for "respondent has not paid us, so we are renouncing agency."

That is all very well, but a renunciation of agency at this late stage causes chaos in the administration of justice. Not only is the time spent on preparing for the hearing by the members of the court wasted, but also a slot later in the year, which could have been allocated to another case, will have to be given to this one. When this happens frequently the court programme is set back by several months each year.

It was for this reason (among others) that r 12A was introduced into the Supreme Court Rules in 1991, forbidding the late renunciation of agency

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McNALLY JA

unless leave is granted. But I note that r 12A speaks consistently of "an appellant's legal practitioner" and not of a respondent's legal practitioner. Whether that is an oversight I do not know. It does not seem to me that we can read in the words "or respondent's" after the word "appellant's" throughout the Rule. Different considerations apply certainly in criminal appeals. A criminal appellant may not appear in person without leave. I draw the point to the attention of the Rules Committee. But meanwhile I do not consider we can apply the rule in the present case.

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It does seem to me that the major share of the blame for wasting the time of the court and the costs of the appellant must fall on the respondent's former legal representative. It was for this reason that we invited Mr Nduna to appear and debate the question of who should pay those wasted costs.

It seems that Mr Nduna had two problems with his client. One was that he was not paying his account. The other was that he was apparently consulting another firm of lawyers. In regard to this latter problem, Mr Nduna was declining, as he was entitled to do, to surrender his file of papers to the other legal practitioner until his fees were paid.

But what he also did was to keep from his client the information that the appeal was set down for hearing on 29 May 1997. This he was not entitled to do. He had a duty towards his client, despite the non-payment of fees. That duty included the obligation to advise him of the date of hearing. It was also, of course, his duty to the court. His failure to advise his client timeously of the date of hearing effectively sabotaged the hearing of the appeal.

I am satisfied that Mr Nduna did not appreciate the full consequences of his action. Nonetheless, he should have realised that if his former client did not know of the date of hearing the case could not be heard. The postponement is a direct consequence of his failure to advise Mr Chikwete.

In the circumstances, the appeal is postponed to a date to be fixed by the Registrar. The appellant's wasted costs in relation to the abortive hearing on 29 May 1997 are to be borne by the firm of Nduna and Partners.

KORSAH JA: I agree.

MUCHECHETERE JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

NYANDORO v KAMCHIRA 1997 (1) ZLR 522 (HC)

Court **High Court, Harare**

Smith J

Civil trial

24 & 25 March & 4 June 1997 Judgment No. HH-91-97

Flynote

Delict - actio injuriarum - defamation - defences - qualified privilege - malicious reports of sexual harassment made against fellow employee - defence not available

Headnote

The defendant and the plaintiff, who worked together in the same Ministry, had a poor working

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relationship. The defendant sent a report to the Ministry's head office in which she made four complaints against the plaintiff, three of which the court found to be of a defamatory nature. One of the three complaints was found to be substantially true, that relating to the plaintiff's poor leadership qualities, but the other two, namely, allegations that (a) the plaintiff had sexually harassed the defendant and (b) he had caused someone to lie in order to be able to try to obtain occupation of a Ministry house, were not proved to be true.

Held, that although the report was made to the head office in circumstances that were privileged, the defendant had abused the privilege by setting out deliberately to injure the plaintiff. The defence of qualified privilege therefore did not avail the defendant. The defendant was liable for defamation and an appropriate amount of damages in the circumstances was $7 000.

Cases cited:

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

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

de Waal v Ziervogel 1938 AD 112

Ehmke v Grunewald 1921 AD 575

SMITH J

Masawi v Chabata 1991 (1) ZLR 148 (H); 1991 (4) SA 764 (ZH)

Nydoo & Ors v Vengtas 1965 (1) SA 1 (A)

Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (VS)

Thandani v Min of Law & Order 1991 (1) SA 702 (E)

Case Information

Plaintiff in person

A Machuwaire, for defendant

Judgment

Smith J: The plaintiff (hereinafter referred to as "Nyandoro") and the defendant (hereinafter referred to as "Kamchira") are both employed in the Ministry of Industry and Commerce (hereinafter referred to as "the Ministry"). In 1995, they were both employed in the Gweru Regional Office of the Ministry. Kamchira, who held the rank of Senior Administrative Officer, was Acting Regional Officer in Gweru. She held that post from 3 January 1992 until May 1995 when Nyandoro, who held the rank of Assistant Secretary, arrived in Gweru to take the post of Regional Officer. In September 1995, Kamchira sent a report to Head Office (Exhibit 1) making a number of complaints against Nyandoro. Nyandoro claimed that several of the complaints in

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the report were defamatory and damaged his career prospects in the Ministry. He therefore issued summons against Kamchira claiming damages in the sum of $50 000. In his particulars of claim he said that Kamchira falsely incriminated him by alleging that he intended to have an affair wih her. He also said that she falsely alleged that he was victimising her, that he was trying to evict her from a Government house, that he sexually harassed her and that he did not conduct any interviews during an official visit to Gokwe, thereby misusing Government funds. Kamchira opposed the claims by Nyandoro on the grounds that what she said in her report was true and that her remarks were not defamatory.

Nyandoro gave evidence as follows. When he arrived in Gweru to take up his post as Regional Officer, Kamchira was living in the Government house at 55 Kopje Road. He stayed at a local hotel for two weeks. He went to the Ministry of National Housing and put his name down for a Government house. He also mentioned to the Provincial Governor and other Government officials, to whom he was introduced by Kamchira, that he had a housing problem. He managed to lease a house for a few months from a local estate agent.

On 4 September 1995, he went to see an official in the Ministry of National Housing (Mrs Mungani), and she gave him the keys for a house in the Old Prison Complex. She then told him that the house was not really suitable for

a man in his position and that he should swop houses with Kamchira who was living in the house which was reserved for the Regional Officer. This was the first time he had heard that the house at 55 Kopje Road was reserved for the Regional Officer. Kamchira had not mentioned that to him. Mrs Mungani said that the Ministry of National Housing had reserved houses in prime areas for the Provincial Governor, the Provincial Magistrate and other senior Government officials. She also said that the Ministry of National Housing had written to the Ministry the previous year to say that the house had been reserved for the Regional Officer of the Ministry. He asked her to put that in writing. He then collected the letter from the Ministry of National Housing, dated 5 September 1995, addressed to the Rgional Officer in which the writer confirmed that the house at 55 Kopje Road was reserved for the Regional Officer of the Ministry "as *per* our minute dated 3 November 1994". He gave the letter to Kamchira and asked for her comments but she refused to comment, despite his reminders, until about two weeks later when she responded by writing memoranda accusing him of sexual harassment, cruelty, etc. He then wrote to the Permanent Secretary of the Ministry setting out his complaints and enclosing a copy of the letter from the Ministry of National Housing. Kamchira became totally insubordinate and she even attacked him in his office. The police were called to his office twice. She refused to do the work he allocated to her.

In her report to Head Office, Kamchira said that he had defrauded the Government and the report contained a number of other falsehoods. As a result of her report, a board of inquiry was convened by the Permanent Secretary of the Ministry. The board set in Gweru from 1 to 3 November 1995. He was charged with misconduct and then transferred to Harare. As a result of the false allegations made in her report, Kamchira had done irreparable damage to his

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character and destroyed whatever hope he had had of a diplomatic posting.

Nyandoro was subjected to a lengthy cross-examination in the course of which he said the following. He did not agree with some of the evidence given to the board of inquiry and some of the findings of that board as shown in Exhibit 3. Kamchira would have had the right to report to the Permanent Secretary if he did something wrong but her allegations were false. He was not happy with Kamchira because she had not told him that the house she was occupying was reserved for the Regional Officer. He had gone personally to the Ministry of National Housing to collect the letter in which it was said that the house was reserved for the Regional Officer and had then asked her for her comments. Relations between the two of them had been good initially but

SMITH J

became very strained after he heard that the house was reserved for him. He had written to the Permanent Secretary asking him to charge Kamchira with misconduct but the former had done nothing. He had also written to the Public Service Commission and to the Ombudsman, wthout result. He had become completely frustrated and eventually had had recourse to the courts.

The report that Kamchira made to the Head Office was put to him. With regard to the official visit to Kadoma, he denied that he had asked her to come to his room after dinner. He also denied that he had told her that two men who were sitting in the dinning room might have been sent by her husband to spy on them. She lied about him and wanted to stir up trouble because of the house. When he was absent from the office he appointed Mrs Nhemachena to act for him, even though she was junior to Kamchira. That was because Kamchira did not come to work on time and also refused to do her work.

After the close of the plaintiff's case, Kamchira gave evidence. She said that when she first went to Gweru she, too, had had difficulty in getting a house. She had only got the house in 55 Kopje Road because she had spoken to the Governor who had helped her. The previous tenant in that house had been an official in the Ministry of National Affairs. After Nyandoro's arrival, she had introduced him to many people in Gweru and gone with him on courtesy visits. He kept saying what a good woman she was and how lucky her husband was to have her as a wife. This made her suspicious of his intentions. He drew up an itinerary for them to visit Kadoma, staying at a local motel overnight, and then Gokwe. When at the motel, he invited her to join him for supper and they discussed the visits that were planned for the following day. During supper, two men entered the dinning-room and sat at the next table. Nyandoro said that the two men seemed suspicious and might be dangerous. After they finished their meal, Nyandoro aske if she would come to his room so that they could discuss their itinerary and watch television. She refused and went to her own room. The next day they went to Gokwe and where they spoke to only one person. She felt that the journey was rather a waste of time and money because they interviewed so few people. She and Nyandoro had had a good working relationship from the time of his arrival in May until the visit to Kadoma at the end of August. After the issue about the house arose in early September, their working relationship became very strained. He used to appoint Mrs Nhemachena to act when he was away from the office and this upset her greatly because Mrs Nhemachena was junior to her. She wrote her report to Head Office about three

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weeks after the visit to Kadoma. In that report, she had said that Nyandoro had sexually

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abused her. She had used the wrong word. She meant that he had sexually harassed her. Everything she said in her report was true. She had no reason to lie about Nyandoro.

Kamchira, under cross-examination, said the following. When Nyandoro asked her to come to his room at the Kadoma motel she thought that he wanted to sleep with him. They had no further business to discuss because they had finished their official business over dinner.

The final witness was Zabelis Matshiya, who in 1995 was an Under Secretary in the Ministry in charge of personnel and finance. He was the chairman of the board of inquiry that was appointed to look into the allegations made by Kamchira and Nyandoro against each other. The board had found that there were personality clashes and that the two parties could not work together. The board decided that the two should be separated. Before the board was appointed, he was continually getting telephone calls from each of the two parties complaining about the other. Sometimes they both phoned him at the same time to complain. The board felt that both were to blame for the situation that had developed and both were recalled to Harare. Both parties had phoned him to complain about the other and he had advised them to put their complaints in writing.

Matshiya was cross-examined. He said that the officials at Head Office were not aware that the house at 55 Kopje Road had been reserved for the Regional Officer of the Ministry. When Kamchira was asked by the board of inquiry why she thought that Nyandoro was after her, she said that she needed counselling. She told the board that she regretted the use of some abusive language in her report to the Permanent Secretary and that she had intended to withdrew the allegation of sexual abuse. She had said that Nyandoro had asked her to come to his room, which was a form of sexual harassment, rather than sexual abuse. The members of the board had told her that they did not feel that the inference she had drawn was justified. They had told her that the allegations she made in that regard were serious and she then said that she would withdraw them. He said that no charges of misconduct had been preferred against either party. The board had been appointed to investigate the allegations made by both parties in order to etablish whether either had committed misconduct and to try to resolve the impasse which had developed at the Gweru office. The two parties were fighting each other, instead of working together, which was disrupting the work at the office.

Both Nyandoro and Kamchira gave their evidence well. Neither was shaken

SMITH J

under cross-examination. Nyandoro did not call any witness to support or corroborate his testimony. The documentary evidence he produced consisted mainly of memoranda he or Kamchira wrote to each other or to Head Office. Likewise, Kamchira called no witness, other than Matshiya, the then Under Secretary in the Ministry, to corroborate her evidence. Matshiya's

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evidence, together with the numerous memoranda and reports that were produced, showed that Nyandoro and Kamchira had personality clashes which resulted in each loathing the other and making it impossible for them to work together. The reports they sent to Head Office resulted in a board of inquiry being appointed to find out whether either had committed misconduct. The board did not find it necessary to charge either with misconduct. It recommended that both should be transferred to Head Office in Harare so that neither could be seen to have won the battle. The board found that the mjor problem between the two parties stemmed from the manner in which the Ministry of National Housing handled the issue of the house at 55 Kopje Road. The board did not find that Nyandoro had forced the official concerned to write the letter dated 5 September 1995 concerning the reservation of 55 Kopje Road for the Regional Officer. The board concluded that the housing issue "appeared to be a factor that sparked the allegations of sex harassment" and noted that when Kamchira was asked to verify the allegations, she could not and "merely suggested that the intention was to be counselled".

Nyandoro was a self-actor. He has clearly done a lot of research into the rules of court and the legal aspects and he handled his case reasonably well, albeit that he was very emotional at some stages. He obviously feels very deeply that his promotion prospects have been damaged by the allegations made by Kamchira. In the summons, he particularised a number of allegedly defamatory statements made by Kamchira, without detailing how the $50 000 damages he claimed related to each. Then on 2 August 1986, he apportioned his claim under five separate heads. Finally, when the trial commenced, he said that his claim was based on four statements made by Kamchira in her report to Head Office which were defamatory and that he claimed $12 500 damages in respect of each. The allegedly defamatory statements were:

1. (first complaint) - that he had drafted the letter dated 5 September 1995 from the Ministry of National Housing saying that the house at 55 Kopje Road was reserved to the Regional Officer and had forced the official, Miss Dzingai, to sign it;

2. (second complaint) - that he was guilty of sexual abuse or harassment and was cruel;

3. (third complaint) - that he had defrauded Government when he went on the official visit to Gokwe because he had not interviewed as many people as he should have; and

4. (fourth complaint) - that he was promoting fights at the Gweru office and was a hopeless leader.

With regard to the first complaint, in her report to Head Office, Kamchira said that she had learnt that Nyandoro had drafted the letter himself and forced Miss Dzingai to sign it. Nyandoro denied that he had done so. Kamchira affirmed that that is what she had been told by an employee in the Ministry of National Housing. I consider that the allegation is defamatory in that it portrays Nyandoro as a scheming, devious person who would compel a fellow civil servant to write lies in order to further Nyandoro's attempts to get a house. It reflects badly on his character. Kamchira has not established that her allegation is true.

With regard to the second complaint, Kamchira said in her report to Head Office that her sixth

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sense told her that Nyandoro "was after me (sexual abuse)" and that when she got into her room, after locking the outside door, she locked the bedroom door "with a sigh of relief that she was safe from him". She also said that Nyandoro started showing up his true character/behaviour towards her because she refused his sexual advances at the motel in Kadoma. Although Kamchira, when giving evidence to the board of inquiry, withdrew her allegations of sexual abuse, she persisted in her allegations that Nyandoro had sexually harassed her. She cannot deny, however, that in her report she said that Nyandoro had sexually abused her. She may have merely used the wrong word but the use of the word "abuse", coupled with her description of the state of fear she was in, would give readers of the report the impression that Nyandoro had acted improperly. The allegations are clearly defamatory. Kamchira has persistently claimed tht Nyandoro sexually harassed her. Nyandoro denied any sexual harassment.

Kamchira did not produce any evidence to corroborate her testimony. The board of inquiry, which interviewed a number of Ministry employees at the Gweru office, found that she could not verify her allegations.

With regard to the third complaint, I do not consider that the claim by Kamchira that the visit they made to Gokwe was fruitless carries the sting, alleged by Nyandoro, that he had defrauded Government. I do not consider that her remarks in connection with the visit are defamatory.

SMITH J

With regard to the fourth complaint, Kamchira in her report to Head Office said that Nyandoro enticed members of staff to fight and gossip and that there was a lot of witch-hunting and that Nyandoro had a long way to go to become a good leader and that his leadership abilities and qualities were very poor to say the least. These allegations are undoubtedly defamatory. However, the board of inquiry, after hearing evidence from a number of people at Gweru, concluded that Nyandoro had not developed the managerial skills necessary to run an office on his own. As a result of its recommendations, Nyandoro was removed from Gweru. It seems therefore that the allegations made by Kamchira about Nyandoro's poor leadership qualities are substantially true.

Kamchira claimed that her report to Head Office was privileged. It has been stated in the Appellate Division in South Africa that:

> "Where a person publishing a defamatory matter is under a legal, moral of social duty to do so or has legitimate interest in so doing and the person to whom it is published has a similar duty or interest to receive it, then the occasion of the publication would be privileged."

See Ehmke v Grunewald 1921 AD 575 at 581, de Waal v Ziervogel 1938 AD 112 at 121 and Benson v Robinson & Co (Pty) Ltd & Anor 1967 (1) SA 420 (A) at 432.

As observed by Watermeyer AJ in the de Waal case in this connection, not only must the occasion be privileged but also the communication must fall within the privilege i.e. be germane and reasonably appropriate to the occasion. In my view, Kamchira had a legitimate interest in the manner in which Nyandoro was running the Gweru office of the Ministry and treating her and

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other members of staff. The report she sent to Head Office was undoubtedly made to protect her interests. Accordingly, I find that her report to Head Office was made in circumstances which were privileged. However, can her allegations that Nyandoro had forced an official in the Ministry of National Housing to write the letter dated 5 September 1995 and that he had sexually abused or harassed her, be protected by her plea of qualified privilege? In Nydoo & Ors v Vengtas 1965 (1) SA 1 (A) at 20-21 Holmes JA said:

> "The publication and its defamatory nature having been admitted, the law presumed the existence of *animus* injuriandi; see Wyndham v Wallach's P & P Co Ltd 1906 TS 385 at p 386; Tromp v McDonald 1920 AD 1 at p 2; Kleinhans v Usmar 1929 AD 121 at p 126. And the onus of proving

> the contrary, upon a balance of probability, is on the defendant. Voet 47.10.20 puts it thus (translation by de Vos):
>
> > '... But, if the words spoken are such, that they, *per* se and according to their natural meaning, import contumely, then an injurious intent is presumed in the speaker on whom lies the burden of proof that there was no malicious intent.'
>
> And in Tromp's case *supra*, Innes CJ said, at p 2, that it is for the defendant to rebut the presumption if he desires to escape the consequences. See also Craig's case *supra* at p 156H-157A.
>
> I agree with de Villiers AJ in Maisel v van Naeren 1960 (4) SA 836 (C) at p 841, that the circumstances mentioned by Voet in s 20, *supra*, are exemplary but not exhaustive of the ways in which a defendant may seek to rebut the presumption. He may, for example, wish to rely on a set of circumstances commonly called a privileged occasion, as in the present case. According to the practice in defamation suits, he must plead the relevant facts. And the onus of proving the facts and establishing such defence is on him. In McLean v Murray 1923 AD 406, Solomon JA dealing with a defence of privilege, said at p 414:
>
> > 'in my opinion, the words complained of ... are defamatory, and the onus is therefore upon the defendant to prove that they are privileged.'
>
> Upon proof of a privileged occasion, the onus is 'shifted back on to the plaintiff to prove affirmatively the existence of *animus* injuriandi': Young v Kemsley & Ors 1940 AD 258 at p 277. 'And he cannot succeed unless he discharges that onus': de Waal v Ziervogel 1938 AD 112 at p 120. 'This he can do by proving that the defendant published not in good faith but mala fide, thus exceeding the limit of his privilege and indicating that he was actuated by that *animus* injuriandi which is an essential element in actions for verbal or literal injury'."

In Benson's case *supra* at p 431, Holmes JA said:

> "When a defendant admits publication, denies *animus* injuriandi, and pleads that the words were uttered on a privileged occasion of which he gives particulars, he has done all that is required of a pleader. Upon proof of such occasion on a balance of probabilities, which is an objective matter, the law presumes the absence of *animus* injuriandi. It is for the

> plaintiff to rebut that presumption by proving that the defendant abused injure him, i.e. animo injuriandi."

In this case, I find that -

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(i) Nyandoro discharged the onus of proving the defamatory nature of the two statements and so the law imputes *animus* injuriandi to Kamchira;

(ii) Kamchira proved that the report to Head Office was made on a privileged occasion and therefore, since the law, in such circumstances presumes the absence of *animus* injuriandi, the onus shifted back to Nyandoro to prove *animus* injuriandi;

(iii) Nyandoro rebutted that presumption by proving that Kamchira abused the privileged occasion with subjective intent to injure him. Kamchira obviously wanted to discredit the letter of 5 September 1995 from the Ministry of National Housing, because she did not want to admit that she had been advised the previous year that the house she was occupying at 55 Kopje Road was reserved for the Regional Officer. Her allegations of sexual abuse and harassment were clearly intended to discredit Nyandoro.

Having found that Kamchira, in her report to Head Office, made two defamatory statements concerning Nyandoro that are not protected as having been made on a privileged occasion, the court must decide what damages are appropriate. In Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (VS) at 847 van der Spuy AJ said:

> "When researching the case law on the quantum of damages, I took note with some surprise of the comparatively low and sometimes almost insignificant awards made in Southern African courts for infringements of personal safety, dignity, honour, self-esteem and reputation. It is my respectful opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual, especially in group-orientated societies where there appears to be an almost imperceptible but inexorable decline in individual standards and values."

See also Masawi v Chabata 1991 (1) ZLR 148 (H); 1991 (4) SA 764 (ZH) and Thandani v Min of Law & Order 1991 (1) SA 702 (E) at 707. However, in Argus P & P Co Ltd v Inkatha Freedom Party 1992 (3) SA 579 (A) at 590 the Appellate Division said:

SMITH J

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

I concur with the views so expressed by the Appellate Division in South Africa. In assessing the appropriate amount to be awarded, the court must have regard to the character of the plaintiff and his position and status in society and also to the nature and extent of the publication. The wider the publication, the heavier the damages will be. The reverse also applies. Defamation which received minimal publication and which was read by few people will merit a smaller amount. The court cannot, however, merely have regard to the number of persons who read the defamatory report. Regard must also be had to the people who in fact read the report and their status. In this case, although the report by Kamchira was presumably read by only a few people in Head Office, they were very important figures in the careers of Nyandoro because they exercised considerable influence in the determination of his career prospects. Regard must also be had to the fact that the people who read the report were in a position to be able t appoint a board of inquiry to investigate the allegations and that the board so appointed found that the defamatory allegations were not substantiated. The main grievance voiced by Nyandoro was

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that his promotion prospects, and more specifically his appointment to a diplomatic post abroad, were severely prejudiced by the allegations made by Kamchira. I accept that her report probably did have that effect but that was because her report resulted in the appointment of a board of inquiry which showed up his limitations as a leader and head of office. It was not any defamatory statement of hers which produced that result.

Having regard to the above considerations, I consider that an appropriate award as solatium would be $7 000.

It is ordered that the defendant pay the plaintiff:

(a) $7 000, with interest thereon at the rate of 25% *per* annum from the date of judgment to the date of payment;

(b) costs of suit.

Chambakare & Partners, legal practitioners for the defendant

S v CHIMUKUCHE 1997 (1) ZLR 533 (HC)

Court **High Court, Harare**

Blackie J

Criminal review

4 June 1997 Judgment No. HH-95-97

Flynote

Roads and road traffic - sentence - prohibition from driving - special circumstances justifying not ordering prohibition - wide meaning to be given to phrase - whether finding of special circumstances may be recalled

Criminal procedure - scrutiny by regional magistrate - regional power's powers on review - no power to order magistrate to reconsider a decision made

Headnote

The accused, the manager of a bank, had been convicted on his plea of guilty to driving under the influence of alcohol. It was accepted that he had been drinking at home and an emergency had occurred at the bank, with which only he could deal. There being no-one available to drive him, he drove himself and was stopped by the police. His blood/alcohol level was 266 mg *per* 100 ml. The trial magistrate considered that there were special circumstances justifying him in declining to prohibit the accused from driving.

The matter came before a regional magistrate for scrutiny. The regional magistrate considered that there were no special circumstances and wrote to the trial magistrate, directing him to issue a notice to the accused to show cause why prohibition and cancellation should not be imposed. The magistrate obeyed this directive, but came to the same conclusion about the existence of special circumstances. The regional magistrate referred the case to the High Court,

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querying whether the elements of the offence had been properly explained.

BLACKIE J

Held, that the regional magistrate had misunderstood the meaning of "special circumstances" in s 55(5) of the Road Traffic Act. The phrase used is "special circumstances of the case", which is wider in concept than "special circumstances surrounding the commission of the offence". While there was no doubt that the accused's evidence on this subject should have been investigated more thoroughly, it had to accepted, not having been challenged by the prosecutor. The circumstances described by the accused were circumstances of the case and undoubtedly "special".

Held, further, that a regional magistrate has no power to direct a trial magistrate to reconsider a decision already made. The regional magistrate's only power is, if he considers that the proceedings were not in accordance with real and substantial justice, to submit the record to the High Court for review.

Held, further, that the s 65 of the Road Traffic Act, under which the regional magistrate purportedly acted, did not give a trial magistrate authority to reconsider and overrule or alter a decision made by him in respect of special circumstances. Section 65 deals with the situation where the trial court omitted to order prohibition in a case where it should have done so.

Held, further, that in explaining the elements of the offence, the magistrate did not ask the accused whether he was under the influence of alcohol to such an extent as to be incapable of having proper control of his vehicle. Although the accused's blood/alcohol level was such that there was a presumption that he was so incapable, the magistrate should have advised the accused of the presumption and asked whether he accepted it or whether he wished to rebut it.

Held, further, that in the circumstances it was not desirable to remit the case for trial de novo and a verdict of driving with a blood/alcohol level in excess of the permitted amount would be substituted.

The court considered the following statutory provisions:

Criminal Procedure and Evidence Act [Chapter 9:07], s 271(2)

Road Traffic Act [Chapter 13:11], ss 55(5) and 65(6)

Judgment

Blackie J: The accused was charged with contravening section 55(2) of the Road Traffic Act [Chapter 13:11], (driving under the influence of alcohol or a drug). He appeared before a magistrate on trial. He was not represented. He pleaded guilty to the offence charged. He was convicted and sentenced to pay a fine of $600, or, in default of payment, to serve 2 months' imprisonment with labour. The trial magistrate considered that there were special circumstances in the case, in terms of the proviso to s 55(5), which justified him in declining to prohibit the accused from driving and to cancel

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his licence to drive and he declined to do so. He endorsed the special circumstances and his decision on the record.

The matter came before a regional magistrate for scrutiny. The regional magistrate considered that there were no special circumstances and wrote to the trial magistrate directing that -

> "In terms of s 65(6) of the Road Traffic Act ... the learned trial magistrate is ordered to serve notice on the accused person to appear before the court at the time and place specified by the court why the prohibition or cancellation should not be imposed."

The trial magistrate followed this directive and issued a notice in terms of section 65(6) of the Road Traffic Act. He heard further submissions from the accused on the question of special circumstances. He recorded those submissions. He determined, once again, that special circumstances existed and he declined to suspend the accused from driving or to cancel his licence.

The record returned to the regional magistrate for further scrutiny. This time the regional magistrate noticed that, in canvassing the elements of the offence with the accused in terms of s 271(2) of the Criminal Procedure and Evidence Act [Chapter 9:07], the trial magistrate did not ask the accused whether he was under the influence of alcohol or a drug to such an extent that he was incapable of having proper control of the vehicle. The regional magistrate, considering "that the essential elements for the offence had not been properly canvassed" with the accused as required by the section, has submitted the case to this court for review asking that the conviction and sentence to be set aside and that the matter be remitted for trial de novo before another magistrate.

Before dealing with the point of whether the essential elements of the offence have been properly canvassed with the accused, it is necessary to deal with a number of other mistakes and problems which appear in the papers. These relate to the proviso to s 55(5), to s 65(6) and to the powers of a regional magistrate when a record is sent to him for scrutiny. These mistakes and problems fall under three headings:

(a) the regional magistrate's understanding of the meaning of "special circumstances in the case" in the proviso to s 55(5) of the Road Traffic Act;

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(b) whether the regional magistrate has the power to issue the directive given by him to the trial magistrate to recall the accused in terms of s 65(6) of the Road Traffic Act and reconsider his decision not to suspend the accused from driving and not to cancel his licence; and

(c) whether, in any event, s 65(6) gives a judicial officer the authority to reconsider a

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decision already made by him in terms of the proviso to s 55(5).

The undisputed evidence was that the accused was a bank manager; that he had been drinking at home late at night; and that he had received a telephone call from his head office to say that the computers at his branch were on and must be switched off. He alone had the keys to the bank. There was nobody who could drive him to the bank. No member of the accused's staff was available to open the bank. He got into his car to drive to the bank and was stopped by the police on the way there. Blood samples were taken from him. Those samples, when tested, showed that there was a concentration of alcohol in the accused's blood of not less than 266 milligrams *per* 100 millilitres of blood at the relevant time. The trial magistrate, found that the accused's need to drive to the bank on the instructions from his head office, combined with the absence any other person to drive him there or to open the bank, constituted the special circumstances in the case in terms of the proviso to s 55(5), which justified him in declining to prohibit the accused from driving and to cancel his licence to drive. The regional magistrate's attitude to this evidence and to the trial magistrate's finding was that "what the trial magistrate considered to be special circumstances are not in accordance with the law. There are just no special circumstances surrounding the commission of the offence concerned".

In regard to the regional magistrate understanding of special circumstances, he has misquoted the wording of the proviso to s 55(5). The wording is "special circumstances in the case" and not "special circumstances surrounding the commission of the offence". Although the difference does not affect the position in this case, it is important to remember that there is a difference between the two definitions. The former is wider in scope than the latter.

There is no doubt that the accused's evidence on special circumstances should have been looked at more critically and investigated more thoroughly at his trial. There are a number of unanswered questions and unjustified assumptions in relation to it. However, that evidence was not challenged by the prosecutor, nor did the trial magistrate indicate to the accused that his

evidence could not be accepted on its face value. The evidence must, therefore, be accepted as it stands for the purposes of determining the issue relevant to s 55(5). On that evidence, I have difficulty with the regional magistrate's reasoning and conclusion as to special circumstances. The accused was alleging that he was obliged to drive because of the circumstances in which he found himself. If established, these were undoubtedly circumstances in the case and undoubtedly special in terms of the above definition. As it stands, the evidence clearly, so it seems to me, establishes special circumstances in the case.

The second point relates to the regional magistrates directive to the trial magistrate to issue a notice in terms of s 65(6) of the Road Traffic Act to recall the accused and reconsider the question of suspension from driving and cancellation of the accused's licence. A regional magistrate, has no power, on scrutiny, to direct a trial magistrate to reconsider a decision already made by him and, if need be, alter or reverse that decision. If a regional magistrate considers that any proceedings placed before him for scrutiny are not in accordance with real and substantial justice, he is required to submit the record to the High Court for review in

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accordance with the High Court Act (See s 58(3)(b) of the Magistrates Court Act [Chapter 7:10].

The third point relates to trial magistrate's compliance with the regional magistrate's directive to proceed in terms of s 65(6). Section 65(6) does not give a trial magistrate authority to reconsider and overrule or alter a decision made by him in terms of 55(5). Section 65(6) is only concerned with the position where the prohibition from driving or the cancellation of a licence "is required to be imposed in terms of (the) Act and the court for any reason does not" prohibit the accused person from driving or cancel his licence. It is concerned solely with an omission to make the requisite decision to suspend from driving and to cancel the licence. It is not concerned with a wrong decision made by a judicial officer and it does not give that officer the power to reconsider and alter a wrong decision made by him. Where the decision is made and it is wrong, the matter must be to be dealt with on appeal or review by a superior court.

I turn now to the question raised by the regional magistrate as to whether the essential elements of the offence were properly put to the accused by the trial magistrate in terms of s 271 of the Criminal Procedure and Evidence Act. There are two essential elements in the offence of which the accused was charged: that he drove a vehicle on a road and that, while he did so, he was under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle. The trial magistrate did not ask the accused

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whether he was so under the influence of alcohol as to be incapable of having proper control over his vehicle on a road. Although s 55(3)(a) of the Road Traffic Act provides that, if it is proved that there is a concentration of alcohol in an accused's blood of not less than 150 milligrams *per* 100 millilitres, it is presumed that the accused was under the influence of alcohol to the extent of being incapable of having proper control of his vehicle, it was still necessary for the tria magistrate to warn the accused of the presumption and to enquire from him whether he accepted the presumption or whether he wished to rebut it. The trial magistrate did not put any of these points to the accused. The regional magistrate is, therefore, correct when he says that the elements of the offence were not properly canvassed with the accused at the trial.

The regional magistrate has asked for the conviction and sentence to be set aside and for the matter to be remitted back to the magistrates court for trial de novo. The conviction and sentence must be set aside, but I do not think that is necessary in principle or desirable in practice to send this case back for trial de novo. This is particulary so in the light of the history of the matter and the length of time since the accused's conviction. The trial magistrate put to the accused, and the accused said he understood and admitted, that he drove his motor vehicle on a road, that he had blood samples taken from him, and that those samples showed that he had a blood/alcohol concentration of 226 milligrams *per* 100 millilitres at the relevant time. These are the essential elements of the offence under s 54(2) of the Road Traffic Act (driving with a blood/alcohol concentration in the blood in excess of the permitted amount). A conviction under that section is a competent verdict on a charge under s 55(2) (see s 5(4)). It is altogether more appropriate that there should be a substitution of a conviction under s 54(2) for that under s 55(2) than that the matter should be remitted for trial de novo.

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In the result, therefore, the conviction of the accused on the charge of contravening s 55(2) of the Road Traffic Act, and the sentence imposed on him for that conviction, are set aside. There is substituted therefore a conviction under s 54(2) of the same act. The sentence imposed on the accused in respect of the conviction, which has now been set aside, is competent and appropriate for the conviction, which has been substituted by this review. The accused is sentenced, therefore, to pay a fine of $600 (or in default of payment, to serve two months' imprisonment with labour). For the reasons which are set out in this judgment, the order made by the trial magistrate in terms of the proviso to s 55(5) is to stand.

SMITH J agrees.

S v ZARANYIKA 1997 (1) ZLR 539 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

4 June 1997 Judgment No. HH-93-97

Flynote

Criminal procedure - trial - conduct of - rape cases - need to ensure that rules of procedure and evidence followed carefully, particularly in view of prevalence of the offence and public indignation and demand for severe punishments

Criminal procedure - trial - conduct of - unrepresented accused - duty on court to explain rights and proceedings to accused

Evidence - extra-curial statements by accused - when admissible - undue influence - what is

Evidence - sexual offences - cautionary rule - need to observe - witness a very young child - requirement for greater caution

Evidence - sexual offences - complaint - when admissible - complaint induced by threats or questioning - effect

Evidence - witness - child - admonition of - need for court to ensure that child understands difference between truth and falsehood and admonition to tell the truth - inadmissibility of child's evidence unless court satisfied that child has that understanding

Evidence - witness - exclusion from court before giving evidence - court's duty to explain to unrepresented accused need for witnesses to be excluded

Headnote

It is the duty of a magistrate to ensure that an unrepresented accused has the necessary knowledge to equip himself to conduct his own defence. That knowledge can only come from careful and diligent explanation by the magistrate. It is an irregularity for a magistrate not to give all the necessary explanation; or to leave the explanation to an interpreter. It is desirable,

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though not a strict requirement, that the explanation given should be recorded.

While it is no doubt correct to hold in judgment that the weight of a witness's evidence may be adversely affected where the witness has been in court in circumstances which suggest that his evidence may be coloured to reflect what he has heard, it is quite another thing to say or suggest to an accused before he even tenders the desired witness that the witness's evidence is unlikely to be believed. A competent magistrate would avoid the difficulty by explaining to the unrepresented accused the requirements about the presence of witnesses in the court, at a time when any potential witnesses should be removing themselves from court. If the record shows that the accused may well have been hindered in his defence by not having this rule explained in advance, or by the uttering by the magistrate of a prejudicial and premature announcement that the evidence will not be given weight, that is an irregularity. In this case, the statement was all the more inappropriate because the proposed witness was the complainant' father, who would not be expected to give evidence in favour of the accused unless it were true.

The fundamental rule is that evidence must be given on oath. One cannot purport to administer an oath unless one is satisfied that the person sought to be constrained by this invocation of the Almighty is aware of the nature of this solemn obligation. A child of four years cannot possibly be assumed to understand the significance of any such adjuration. An admonition to tell the truth and the reception of unsworn evidence can only be undertaken after an investigation by the magistrate into whether the person so admonished is able to appreciate the distinction between truth and falsehood and is able to comprehend an admonition to tell the truth. Unless the court is satisfied that the child has this ability, the child is not a competent witness. It would, even if the child was competent, be an irregularity for the child to give his or her evidence through another witness.

It is no doubt to be expected that a child of tender years has not the vocabulary or the knowledge to use precise terms to describe a molestation to which she might be subjected. Allowance must be made for the possibility that she may use wholly inappropriate words to describe acts and bodily parts which are beyond her comprehension. If the court considers that she is

speaking inexactly out of ignorance and inexperience, that very vagueness is a reason for caution in assessing her evidence. A cautious approach is always required in sexual cases and is all the more indicated where the complainant is a very young child.

With regard to evidence of complaint, both the promptness and spontaneous or voluntary nature of the complaint are important elements in rendering a complaint admissible. Where the complaint is induced by a threat or by inducement by questioning of a leading or suggestive nature, its voluntary nature is destroyed and it becomes inadmissible.

A confession or statement of an accused person is only admissible if it is proved to have been freely and voluntarily made, without the accused having been unduly influenced thereto. It is for the State to establish the conditions of admissibility. The statement can only be said to have been made without undue influence where the making of the statement is a voluntary exercise of the accused's power to choose between silence and speech. An influence is undue where the

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exercise of that external influence, if introduced in a court of law, would be repugnant to the principles upon which the criminal law is based.

The manner in which contested rape trials are being determined in the regional magistrates courts is a matter for concern. Regional magistrates are senior judicial officers and wield a very great jurisdiction. They exercise solely a criminal function and a greater part of their work is occupied by rape trials. One would expect a considerable degree of expertise. However, many convictions for rape are being set aside on review. It is not outdated, misguided or inadequate legal procedures that have led to these results, but inadequate investigation, prosecution and adjudication in the lower courts. The incidence of rape is such that it causes public comment and anger, with calls for drastic punishments. The way to maintain the proper balance between righteous public indignation and thirst for punishment, on the one hand, and the inviolable need to ensure that only the guilty receive that punishment, on the the other, is not to change the rules of evidence; it is to improve investigative methods. It is not to aler legal procedures; it is ensure that the procedures take due account of the rights of the victim by using victim-friendly facilities at all stages of the proceedings. It is not to impose mandatory sentences, but for the courts to ensure fair punishment. It is not to increase the jurisdiction of magistrates, but to ensure that where a sentence in excess of the magistrate's jurisdiction is needed, to indict the matter to the High Court or transfer it to the High Court for sentence. In short, one ought not to jettison the accumulated legal wisdom of the ages, but to ensure that

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those charged with applying that wisdom do so with the expertise and professionalism required of them.

Cases cited:

R v Becker 1929 AD 167

S v Brown 1984 (3) SA 399 (O)

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

S v Chitiyo 1989 (2) ZLR 144 (S)

R v Gannon 1906 TS 114

R v Gittleson 1938 SR 161

R v Hackwell & Ors 1965 RLR 1 (A)

R v James 1958 R & N 462; 1958 (3) SA 699 (SR)

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

S v Magaya HH-75-97

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S v Makanyanga 1996 (2) ZLR 231 (H)

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

S v Musindo 1997 (1) ZLR 395 (H)

S v Mzo 1980 (1) SA 538 (O)

S v Raphatle 1995 (2) SACR 452 (T)

S v T 1973 (3) SA 794 (A)

S v Tungumi HH-150-96

The court considered the following statutory provisions:

Criminal Procedure and Evidence Act [Chapter 9:07], ss 251 and 256(1)

Judgment

Gillespie J: The accused has been convicted by the senior regional magistrate of the offence of rape. The sentence imposed was 10 years' imprisonment, of which 18 months was suspended on conditions of good behaviour. There are serious doubts attendant upon the verdict of the court and I am obliged because of these doubts to interfere in the proceedings.

When first arraigned, the accused apparently pleaded guilty to the charge. The learned magistrate proceeded to confirm the plea as provided by law and upon being satisfied that the plea was genuine he entered a conviction. During the course of pleading in mitigation, the accused said:

> "What was read was not correct, your Worship.
>
> What was read where? - From the facts.
>
> I just asked you whether this is correct and you agreed? - I had admitted

> because I was told that if I admitted to something I did not do and would discuss it within the family.
>
> Sorry, you admitted because of what? - I had been told that if I had admitted to something that I did not do, we would discuss it within the family.
>
> So in other words you are saying you did not rape the complainant? - Yes."

The magistrate thereupon altered the plea to one of not guilty and a trial followed on the basis of that denial.

Evidence for the State was led from Maria Kapombe, the grandmother of the complainant; from the complainant's aunt, Helen Kapombe; from the accused's mother, Rita Tafirenyika; from the complainant herself, a small child aged four years; and from her step-mother, Charity Chikuse. The evidence of the grandmother established that the little girl, who had been in the care of the

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accused during part of the day, arrived at her house on a Friday evening appearing more tired than usual. She complained of stomach pains the following Saturday and again on Sunday was asking to be taken to the toilet and complaining of pain. It was assumed she was suffering from a digestive ailment. On Monday, she was taken to the doctor for treatment of an ear infection (unrelated to the allegations) and on Tuesday was still crying, shivering and wishing to be assisted at the toilet. The grandmother questioned her more closely, and asked what had happened to the child. The record reads:

> "That was when I asked the child what was wrong with her and what had happened. In response she said that she had been injured by Jerry [the accused]. I asked her how he had injured her. That was when she said he had injured her with his finger that she had been pricked by a nail. I took the child into the house, collected a lamp and examined the child and discovered that the child was swollen. The child cried for the whole night and she did not eat anything on that day."

The little girl was examined by the doctor the following day.

The girl's aunt said that on 1 November 1996 she met the accused who arranged to deliver the child to the aunt's home that evening and said that he would give her $600 to take the child to a doctor since she was ill. He did leave

GILLESPIE J

the child with her, but there is no suggestion that he did pay any money. The child refused to eat that evening, complaining of stomach pains. The leading of the evidence is deplorably vague, but it would seem that this 1 November is the Friday of which the grandmother spoke. The aunt took the child to the doctor the following Monday for the ear infection. On the Tuesday, the aunt received a report from the grandmother as a result of which she herself questioned the complainant.

This is what she learned from the child:

> "I then asked Tina what it was and she said that she had been injured by Gerald who had sat on top of her. I asked her to explain what he had done when she said that he had sat on top of her and injured her and in response she said that he had inserted his finger in her anus after which he then pricked her with a nail."

A little later she said:

> "When the complainant told you that the accused had used a nail did you actually try to enquire what she meant by that? - I asked but the child said it was a real nail."

Under cross-examination the following emerged:

> "Since it is being alleged that the child was raped, why is it now being said that she was pricked by a nail? - The child said that she had been pricked with a nail by you ...
>
> Do you not think that the child could have mentioned that she had been pricked without mentioning my name? - That is what she said and she later mentioned your name Jerry."

The accused's mother gave evidence next. The sole purpose of her evidence was to establish that the accused had confessed to the crime. She testified that on the Thursday immediately following the events recounted above she visited the accused frequently in gaol. She brought

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him food and:

> "... asked him to tell the truth, telling him that he was my child and the complainant was my brother's child, which meant she was his aunt. But he continued denying ..."

The next day, Friday morning, similarly:

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> "I asked him to tell the truth. I repeated to him what I had told him the previous day that the complainant was his relative. At that time he refused to say the truth to me and continued denying. The police officer then told me that I was to leave."

Nothing daunted, the mother came back that same afternoon with some food for the accused and the following occurred:

> "I went to see Gerald. I asked him again to tell me but he denied at that time. He appeared to be someone who wanted to cry and at that time he bent down saying he was feeling dizzy. That is when I asked him to be strong and eat."

A third visit the same day yielded the following:

> "I then told him that he was supposed to admit not deny because he was the one accompanying the child to the creche. Even if he was not the one who had done it it was being said that he was the one since he used to walk with the child. At first he denied saying I was forcing him. After a short time I then asked him again saying that he was the one accompanying the child to creche and taking her back ... I asked him as to when it had happened but he said he did not know anything. I then told him that he was not supposed to deny. There was no way he could deny since he used to bring the child to Marondera and wherever we saw him he was with the child.
>
> And what was his response? - He did not respond at that time. After I had told him that he was supposed to admit his response was Uh-huh.
>
> Can you clarify what you mean by that? - He did not say any word when he admitted, he only made a sound of Uh-huh and because that sound means someone is admitting. I then called the police officer who was standing there and I then told the police officer that the child had made a sound which means that he was admitting. In response the police officer said that I was not supposed to admit on his behalf. He was to do so on his own. Gerald was then asked by the police officer and his response was yes. I then bade farewell to the police officer telling him that I was leaving."

The accused did not challenge this, saying he agreed with everything his mother had said.

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The complainant then told her story. I do not say "gave evidence" advisedly. The record, by the notation after her name, "Sworn states", discloses that an oath was purportedly administered in the normal terms and she proceeded to answer questions. This is all she said:

> "EXAMINATION BY PROSECUTOR:
>
> What meals do you like best? - Ice cream.

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What about sadza? - Yes.

What do you do at creche? - I play.

Who is your mistress at creche? - Melani.

Do you know the accused person, that man seated in the dock? - His name is Jerry.

Where does he stay? - He stays at a police station.

Who goes with you to creche? - My mother.

What about Gerald? - Nothing.

Did he do anything to you? - He pricked me with a nail. He then sat on top of me.

Where did he prick you with the nail? - In my bottom (the witness indicates).

Did you see where he took the nail from? - He took it from a drawer.

Did you feel any pain as a result of that? - Yes.

Where was the pain? - On my back (the witness indicates).

Did you tell anyone? - Yes.

Who did you tell? - I told my father.

Where were you when he pricked you with a nail? - I was inside the house.

1997 (1) ZLR p547

GILLESPIE J

Was there any other person other than you and Gerald? - No.

Other than pricking you with that nail what did you, what did he do next? - No.

Would you go to the toilet easily? - Yes.

No further questions.

By the court: (to Accused)

Accused put the questions if you have any?

Cross-examination by Accused:

When we arrived home from creche is it not correct that we found your father around and he had bought a doll for you? - Yes.

Did you tell your father that I had pricked you with a nail? - Yes.

No further questions.

No re-examination."

This, as the main evidence against the accused on a charge of rape, is manifestly and seriously

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inadequate.

The final witness for the State was the complainant's step-mother who testified that the accused generally accompanied the child to and from creche; that he used to assist in bathing her; and that on the relevant Friday, she observed the child to be having difficulty and straining at stool. The State case was completed by the production of a report of an examination performed on the person of the complainant by a medical doctor.

This report contains the following notes of injuries or abnormalities seen. Genital injuries were: "injury to vagina and infection, hymen not broken". Extra-genital injuries are stated as: "injury to anus". The labia majora were said to be inflamed and the vestibule is described by the comment, "inflamed and discharge". Under the heading "abrasions" is the note, "nil on vagina positive on anus". The heading "anus" attracts the comment: "swollen and cuts". The general comment given is: "injury to anus - vaginal infection but penetration not complete". Unaccountably satisfied with this evidence, the prosecutor closed his case and the accused was put on his defence.

1997 (1) ZLR p548

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The accused's defence is effectively a denial of any wrongdoing at all. He gave a fairly detailed account of his movements with the child up to the Friday in question when he finally brought her back from creche, which account contains nothing material, save for a suggestion that he left the child unattended by himself at a home in a place known as Chance, at some stage on the Friday. He claimed to have made admissions as a result of undue influence, duress, as it was interpreted, brought to bear by his mother, and said the following:

> "My mother had told me that she had discussed with my uncle, my grandmother, the other uncle and they had agreed that if I admitted the charges would be withdrawn and the case discussed within the family."

The only question put to the accused concerning the actual content of the complainant's evidence was this:

> "Did you at any time injure the child with a nail? - I did not."

No attempt was made to pursue this line of enquiry, the prosecutor being content with putting it to the accused that he raped the complainant.

A witness, the accused's uncle and the complainant's father, was tendered by the defence, but his evidence took the matter no further. The point upon which he was called was not pursued. The point arose from the following statement by the accused:

> "When I came to this court the police officer asked me not to change my story. He also said that during trial my uncle will be called and will be asked.
>
> BY THE COURT: (to witness)
>
> Just a minute. He also said? - He also said that during trial my uncle will be called to court and asked if he wanted the case to be discussed within the family. That is all."

The reason why this point was not pursued appears from this exchange shortly after the witness

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was sworn in:

" BY THE COURT: (To Accused)

This is your witness, you see unfortunately you have let him sit through

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so whatever he is going to say really cannot attach much weight because he knows what your defence is, he knows what has been said and there is little point in his evidence but if you want you can lead whatever evidence you want but as I said this court is unlikely to attach any weight to what he is going to say. A witness must always sit out of court so that they can come and give us what they know not what has been influenced in their mind by evidence of the court. You can go ahead? - It is of no use he can sit down, your Worship."

This exposition of the salient parts of the record and of the evidence shows that the following issues ought to have commended themselves to the senior regional magistrate and arise for decision by myself:

(1) whether the complainant was raped;

(2) whether the evidence of complaint is admissible;

(3) whether evidence of any extra-curial admission by the accused is admissible;

(4) whether the accused perpetrated the rape. In addition, there appear on the record certain irregularities upon which I must comment.

The first of these is the lamentable failure of the magistrate to ensure that the accused's rights and obligations in connection with the proceedings and his defence were properly explained to him. At every juncture where some such explanation should have been made, there is nothing to suggest that this protection was properly extended. One finds either that there is no record of an explanation having been given; or that the court was content to leave the explanation to an interpreter with the off-hand injunction to that officer to explain the accused's rights to him; or the unsatisfactory note, "legal rights explained to the accused".

In the recent case of *S v Musindo*, 1(17) the court (Blackie J and myself) was particularly critical of an acting regional magistrate who had left to the interpreter the task of explaining to an accused his rights. It is written:

"The only person who can ensure that the accused understands the choices open to him, and the consequences of any choice he might make, is the presiding officer. It may even be thought that it is only where his

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explanation is recorded that an appellate or reviewing court can be confident that his explanation was sufficient. Where he abrogates his responsibilities and leaves the function of explanation of the accused's rights and interests to an interpreter, how can a court on review repose any confidence in that magistrate?"

This observation is in addition supported by certain South African authority, namely the case of

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S v Mzo. 2(18) I had assumed that that occurrence of irregularity by that magistrate was possibly a mark of personal inexperience in his new acting position of regional magistrate. To my considerable dismay, I now find that this slipshod and slapdash way of going about things is an example presented by the senior regional magistrate. I say it again. It is the duty of a magistrate to ensure that the unrepresented accused has the necessary knowledge to equip himself to conduct his own defence. That knowledge can only come from careful and diligent explanation by the bench. It is obviously monstrously unfair to hold against an accused failures to put questions or failures to call witnesses or failures to mention salient points or any other procedural deficiency if the magistrate has not done his utmost to ensure that the accused is well aware of all that will be expected of him. It is an irregularity for a magistrate not o give all the necessary explanation; it is an irregularity to leave that explanation to an interpreter; it is desirable, though no strict requirement, that the explanation given should be recorded.

The next irregularity stems from the manner in which the accused was evidently discouraged from leading his defence witness. This too is a defect which I was obliged to criticise in *Musindo supra*. 3(19) No doubt it is correct to hold in judgment that the weight of a witness's evidence may be adversely affected where that witness has been present in court in circumstances suggesting that the testimony he gives may be coloured to reflect what he has heard rather than being his own genuine and independent recollection. It is quite another thing, however, to say or to suggest to an accused before even he tenders the desired evidence, that that evidence is unlikely to be believed because of the possibility of fabrication. The competent magistrate avoids the difficulty by explaining the requirements regarding the presence of witnesses to unrepresented parties at the time when any potential witnesses should be removing themselves from court, that is to say, when the witness still has the option of abiding by those requirments. He does not effectively disqualify a witness or hinder the accused's defence by springing this

unexpected rule upon a surprised and disheartened accused after the damage has already been done. Where the record shows that an accused may well have been hindered in his defence by not having this rule explained in advance, or by the uttering by the magistrate of a prejudicial and premature pronouncement that the evidence will not be accorded weight, then that is an irregularity.

The statement by the magistrate, and the excessive emphasis with which he made it, was all the more inappropriate in this case because the witness was the complainant's father. He naturally would be expected to incline towards ensuring that the accused was brought to book. He was such a witness as would not be expected to give evidence in favour of the accused unless it was true. The magistrate should have placed some degree of trust in the natural inclinations of a father to ensure that a person who had wronged his daughter should be punished. The irregularity is therefore all the more glaring because of the failure of the magistrate to give due regard to this factor.

A third irregularity subsists in the manner in which the evidence of the complainant was led. The complainant is a small child of four years. The record of evidence, which I quoted in extenso above, shows that absolutely nothing was done in order to determine whether or not this toddler

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is a competent witness. The fundamental rule is that evidence must be given by a witness on oath. 4(20) It follows that one cannot purport to administer an oath unless one is satisfied that the person sought to be constrained by this invocation of the Almighty is aware of the nature of this solemn obligation. A child of four years cannot possibly be assumed to understand the significance of any such adjuration. This child, who by the magistrate was formally put on her oath to tell the truth, is one who at law is presumed not to know right from wrong. How vain an exercise that was! In order to provide for the case of children giving evidence, the law states that:

> "Any person produced for the purpose of giving evidence who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature or to recognize the religious obligation of an oath or affirmation may be admitted to give evidence in any court or on a preparatory examination without being sworn or being upon oath or affirmation:
>
> Provided that -

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> (i) before any such person proceeds to give evidence, the judge or magistrate before whom he is called as a witness shall admonish him to speak the truth, the whole truth and nothing but the truth, and shall further administer or cause to be administered to him any form of admonition which appears, either from his own statement or from any other source of information, to be calculated to impress his mind and bind his conscience, and which is not, as being of an inhuman, immoral or irreligious nature, obviously unfit to be administered ... " 5(21)

Without such a provision a child who did not understand the nature of an oath simply could not give evidence. I would expect it to go without saying that this admonition to tell the truth and the reception of unsworn evidence can only be undertaken after an investigation by the magistrate into whether the person so admonished is able to appreciate the distinction between truth and falsehood and is able to comprehend an admonition to tell the truth. Hoffmann and Zeffertt 6(22) have written:

> "The vital enquiry is whether the child is old enough to give evidence at all. If, therefore, the judge is not satisfied that the child understands the nature of the oath, he must go on to inquire whether he is competent to give unsworn evidence. Again there is no fixed age at which children become competent witnesses. In each case the judge or magistrate must satisfy himself that the child understands what it means to speak the truth. If the child does not have the intelligence to distinguish between what is true and false, and to recognise the danger and wickedness of lying, he cannot be admonished to tell the truth - he is an incompetent witness."

I respectfully agree with this statement of the law. It is entirely in accordance with the legislation I have cited 7(23) and with decided cases on the point.

Of these I mention only the decision of the South African Appellate Division in *S v T*. 8(24) In that matter, the record reveals an attempt by the learned judge in the court *a quo* to admonish the five-year-old complainant not to lie but to speak only of what she knew and had seen. There was no response from the little girl either to this admonition or to his enquiries as to

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whether she had understood what was being put to her by the court. On appeal Botha JA said:

> "Dit is hieruit duidelik dat die geleerde Regter hoegenaamd nie oortuig was dat die klaagster die vermo' gehad het om tussen waarheid en onwaarheid te onderskei nie. Sy was dus geen bevoegde getuie nie." 9(25)

In the face of the child's obvious fear and unwillingness to speak, the child was allowed to whisper to her mother answers to questions put through the mother, who herself was a witness in the case. Since the child was not a competent witness, she should not have testified at all. It was an irregularity to receive her statements. Even if she had been competent to give unsworn testimony, speaking through her mother, herself a witness with an interest, would itself have been an irregularity.

In the present case, the complete inadvertance of the magistrate to the question of the competence of the child as a witness, his failure to investigate either whether she could understand an oath or whether she would be comprehending of and amenable to an admonition to tell the truth, was a serious oversight and one not to be expected from any judicial officer, far less a senior regional magistrate. There is nothing to show that the little girl was a competent witness. Administering the oath without questioning her understanding was an irregularity. Failing to inquire into her ability to distinguish truth from falsehood was an irregularity. Adducing her evidence was an irregularity. The irregularity is not cured, even if it could theoretically be cured, by any statement in the judgment showing a considered finding that the girl is a competent, not to mention trustworthy, witness. On the contrary, the magistrate writes:

> "[T]he complainant gave evidence herself. As I said she is aged 4 years. She had difficulty in verbalising the events leading to the injuries that she sustained. That is understandable in view of her age at 4, but what is important in her evidence is that she says the accused is known to her and that he did something to her. She said that accused had pricked her with a nail whilst he was sitting on top of her and she indicated her pubic area as the place where he had pricked her and she said that she felt pain and that she had also told her father about it."

This is so glaringly inadequate an examination of the issue of her competence as a witness (I deal below with the question of the content of her evidence and its reliability for a conviction of rape) as to induce that fabled sense of shock which a sentence manifestly excessive is said to bring about. I have no alternative but to hold the girl to be an incompetent witness and her purported evidence to have been inadmissible. Since it is on that statement that the conviction depends, that in itself is sufficient to cause the conviction to be set aside.

I do not wish, however, to determine this case on the basis of this type of procedural irregularity. The issues which I have identified above provide ample grounds in themselves for interference. First, as to whether the complainant was raped. There is every reason to doubt this allegation. The content both of the complainant's statement and of the medical report is worlds away from establishing rape. The possibility of penetration of her anus is suggested by abrasions to that orifice. The remote possibility of penetration of the vagina is hypothesized from the inflammation of the labia majora. The absence of any injury to the labia minora and the hymen and the equivocality of any suggestion of injury to the vagina itself leaves utterly inconclusive any

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allegation of even partial penetration of that organ. The child's statement simply cannot fill that lacuna.

I am aghast that anyone, particularly a senior regional magistrate, should conclude that her tale discloses rape. Accepting it at face value, it discloses an indecent assault by the use of an instrument. It does not even show whether that instrument was used on the anus or the vagina. Where the child has said that she was hurt on her bottom, the record discloses that she made an indication. Another failing of the magistrate was his omission to describe for the record the precise indication made. Even if one could accept the magistrate's summary, in the judgment, that the indication was of the pubic area, the evidence (if so it may be called) goes nowhere towards suggesting the partial penetration of the female organ by the male member.

It is no doubt to be expected that a child of tender years has not the vocabulary nor the knowledge to use precise terms to describe a molestation to which she might be subjected. Allowance must be made for the possibility that she may use wholly inappropriate words in order to describe acts and bodily parts that are entirely beyond her comprehension. Where a court considers that such deficiencies in description and nomenclature are so explicable, it must be able to show reasons for such a conclusion. Here, such reasons could only be disclosed by a careful examination of the child herself in an effort to

determine whether she intends to convey something other than that which she has described or whether she means exactly what she says. If it is considered that she is speaking in exactly because of her ignorance and inexperience then that very vagueness is a reason, quite apart from any other reason, for caution in assessing her evidence. The supposed meaning can only be acted upon if there is extraneous evidece, if not actual corroboration, which supports that meaning. This is the very essence of the cautionary rule.

The magistrate, as I have shown, did not even advert to a need for caution. He did not consider the possibility of false incrimination. He showed no awareness whatsoever of the well-known and long-standing decisions in R v Judson, 10(26) *S v Mupfudza*, 11(27) S v Chatiyo 12(28) or S v Chigova. 13(29) He plainly has not read my recent attempt, in S v Makanyanga, 14(30) to restate the principles surrounding the cautious approach in sexual offences. In this case a cautious approach is indicated all the more by the fact that the complainant is such a young child. As Young J said in R v James: 15(31)

> "The imaginativeness and suggestibility of a little child of four is so great, and the tendency of him or her to romance is so marked, that corroboration (except perhaps on a simple fact safely within the child's testimonial competence) is in practice essential. Here the circumstances deposed to were not simple but such as to give ample scope for suggestion and romancing."

In that matter, the learned judge set aside on review the conviction of a domestic worker for an indecent assault upon his employer's four-year-old daughter in circumstances where the conviction depended solely upon the evidence of that small girl and the supposed corroboration by her eight year old elder sister. In the circumstances of the present case, the apparent, and unexplained, willingness of the magistrate to treat the complainant's account as allegorical

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rather than literal; to accept it on that basis as disclosing rape; to do so without any advertence to the need for caution; and to fail to make the most elementary inquiry into the danger of false incrimination or the need for corroboration is a gross misdirection.

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In the circumstances it is scarcely necessary to address the next issue which I have identified, the question whether the evidence of complaint was admissible. In Makanyanga 16(32) I wrote:

> "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. In particular, the complaint must have been made at the first opportunity after the commission of 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 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.' 17(33)
>
> In the absence of compelling reasons to the contrary, I would have thought that generally 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."

In the case of so young a person as the complainant one would naturally be far more indulgent towards her in the determination of whether the complaint were made with reasonable promptness. What might be undue and questionable delay on the part of a mature woman may be no more than ignorance or innocence on the part of a child. I confess that I would generally regard it as perfectly acceptable for a little child such as this to say nothing until upon examination by a parent of some injury caused by the alleged abusive behaviour.

There is, however, a peculiar feature about this case. It is that the child claims to have reported the molestation she describes to her father on the same day as the event itself. This is the one point upon which the accused actually challenged her. It is also a claim which is quite inconsistent with the evidence of the child's grandmother and aunt. What is one to make of this circumstance? First of all, it seems most unlikely to be true that such an early complaint was made and was not followed up nor adduced in evidence. If it was made,

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however, it is that complaint which is admissible and not the later complaint to the grandmother. Secondly, if the complaint was not made to the father then that is added reason, completely overlooked by the magistrate, to treat the little girl's evidence with caution.

Even ignoring this unsatisfactory aspect of the matter, and accepting for the purposes of argument that the complaint was first made to the grandmother in the circumstances outlined earlier in this judgment, there remains doubt about the admissibility of the evidence. This doubt arises not because the complaint ought to be held to have been made unreasonably late but

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because it appears to have been elicited as a result of questioning that may render it a most unreliable complaint.

> "Both the promptitude and spontaneous or voluntary nature of the complaint are important elements in rendering such a complaint admissible. Where any threat or any inducement by question of a leading or suggestive nature precedes and procures the making of the complaint its voluntary nature is destroyed and the evidence of the complaint becomes inadmissible." 18(34)

The magistrate has given no thought whatsoever to the criteria for admissibility of the alleged complaint. The evidence as it stands shows that there was no little questioning of the child before the full extent of the alleged complaint was revealed. The very identity of the alleged assailant was itself not given save under questioning. Had this been examined it may well have been shown that the questioning was of a nature as to render the alleged complaint unsafe. It ought to be remembered that it is for the State to prove that the conditions of admissibility of any such evidence of prior complaint are fulfilled. If they are not, then the prosecution, and the prosecution alone, is at fault if the evidence is excluded. Where the evidence is admitted without consideration as to whether it be admissible, then the magistrate is at fault. He should ensure that the essential requirements are satisfied. He cannot rely upon lack of challenge by an unrepresented accused. One cannot expect an unrepresented accused to now the niceties of the law on this (or any other) point. Particularly where the sole effective source of legal advice and protection available to the accused rests in the court interpreter to whom the magistrate has purported to delegate that function!

In short, I am not satisfied that this prior complaint has been shown to be

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admissible. It was an irregularity for the magistrate to have admitted the evidence without considering the basis upon which the evidence could be held to be admissible.

Since, as I have shown, there has been insufficient evidence to prove rape, the accused should not have been convicted. I do not wish, however, to end my judgment here. I would reveal the full extent of the miscarriage of justice which has been perpetrated in this case by the complete failure to apply proper legal principles and judicial methods to the issues that arose.

The next issue I identified was the question whether the extra-curial statement of the accused is admissible. The law provides that:

> "Any confession of the commission of an offence and any statement which is proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto shall be admissible in evidence against such accused person if tendered by the prosecutor, whether such confession or statement was made before or after his arrest, during a preparatory examination or after committal and whether reduced into writing or not ..." 19(35)

The extra-curial utterance of the accused in this case was by no means a confession. A confession is:

> "An unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law." 20(36)

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The reluctant grunt of the accused in the face of his mother's exhortations and the monosyllable directed to the policeman thereafter is anything but such a clear and undeniable admission. The grudging sounds he made can, I consider, scarcely be called a statement, but even if they do constitute a statement the question remains whether it is a statement made freely and voluntarily and without undue influence.

It must be remembered that anything which the accused is alleged to have admitted or said concerning an alleged offence is only admissible in evidence if the State proves that the conditions of admissibility set out in

s 256 have been established. Whenever it is intended to adduce evidence of such a confession or statement the prosecutor should without prompting be sufficiently competent and aware to set about proving those requirements. If he does not, then the court ought not to receive the evidence without first insisting that its admissibility be proven or satisfying itself that the admissibility is not in issue. Here neither the prosecutor nor the magistrate paid the slightest heed to the question of admissibility. The evidence was received and relied upon in judgment without any consideration as to whether it were properly adduced. This itself was a misdirection. The misdirection is aggravated by the fact that on the face of it the evidence was inadmissible. The mother's insistence that the accused shoud admit, and her refusal to accept his repeated denials, undoubtedly led to the accused making the apparent acquiescence that is alleged. The influence of the mother over her imprisoned son of twenty years was clearly great. No doubt the mother believed she was acting for the best and in pursuit of the truth but that cannot justify the apparent overbearing of the accused's own freedom of volition in finally yielding in so unconvincing a way to the older woman's constant appeals to him not to deny any longer.

A confession or statement of an accused person can only be held to have been made without undue influence where the making of that statement is a voluntary exercise of the accused's power to choose between silence or speech. If any factor external to that exercise of free will influence the making of the statement, the question immediately arises whether that influence is undue. Previous decisions in this jurisdiction show that influence will be undue where the exercise of that external influence, if introduced in a court of law, would be repugnant to the principles upon which the criminal law is based. 21(37) It is for the State to prove beyond reasonable doubt that any confession or statement tendered in evidence was not tainted by lack of freedom of volition or by any external influence other than that which in principle is regarded as proper. 22(38) It is ludicrous to suppose that the persistent calls for truthfulness from an accused's mother would be regarded as regular practice in a court of law. I have no doubtthat this influence was used unduly in order to obtain the alleged acknowledgement. Not only, therefore, was the reception of the statement without consideration of the principle of admissibility a misdirection, but a proper advertence to that issue ought to have caused a court to hold inadmissible the evidence tendered.

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The final issue I have identified is whether the accused perpetrated the rape. As I have already shown, there is serious doubt as to whether a rape occurred. The complainant does not claim one; the medical evidence does not disclose one. The complainant's initial report is not proven to have been admissible, but even if it were, it does not disclose a rape. The accused's alleged admission is not proven to have been admissible, but even if it were, it cannot possibly be held to be genuine since it is no more than a meaningless grunt and since the evidence does not disclose any rape to which it could be an admission.

Before commencing this judgment, I sought the views of another judge, as is required by law. My brother Chinhengo, after perusing the record, favoured me with this summary of his views:

> "I have some doubt as to the propriety of the conviction in this case. The magistrate appears to me to have based this conviction mainly on his admission. That admission, however, is not a safe basis for conviction in view of the pressure brought to bear on the accused by his mother over a period of three days. Corroborative evidence is rather thin. Overall, I think the magistrate excessively relied on the accused's admission of guilt. It is not safe to convict."

It must now be seen that the accused cannot possibly be held to have committed a rape. The conviction is accordingly quashed and the sentence set aside.

Before concluding this judgment I find myself moved to express my increasing concern with the manner in which contested rape trials are being determined in the court of the regional magistrate. Regional magistrates are the senior judicial officers in the employment of the State. They wield a jurisdiction which is very great indeed; they have the power to imprison a man for up to ten years or more depending on the number of counts. They exercise solely a criminal function and the greater part of their work, I believe, is occupied by trials on charges of rape. Many of these judicial officers possess the minimum academic qualifications for appointment to this Bench. One would expect, therefore, a considerable expertise from the regional bench on rape trials. Exemplary court-room procedures; exhaustive factual analysis and rigorous legal knowledge, both as to adjective and substantive law can and must be expected from persons occupying this position. It is therefore a cause of considerable concern to myself and t others of my Brethren that so many convictions for rape, after contested

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trials, must be set aside on review. 23(39) It is not outdated, misguided or inadequate legal procedures that have led to such results. Rather, where those results have led to the acquittal of the guilty (and one can never know that this has been the case) it is inadequate investigation, prosecution and adjudication in the court at first instance that has brought about such a result. To the extent that any such reversals have preserved the innocent from conviction (as seems almost certain in this case), it is thanks to the existence of equitable procedures that a miscarriage of justice has been avoided.

The incidence of rape in this country is such that it understandably causes considerable public comment, and indeed anger. The prevalence of the offence is such that the public perception exists that the system of justice is failing - this perception is abundantly manifested in the press.

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Clamant demands exist for the punishment of offenders to the full extent of the law. The more emotive members of our society even demand the mutilation by castration of offenders as the only fit punishment. Unfortunately, the situation seems to be developing where the desire for prosecution and chastisement of offenders is leading to a falling off in the necessary standards of fairness and objectivity in the trial of those accused. This is a very damaging circumstance, since as often as alleged offenders are acquitted of such charges as this, so often the feeling increases that the law favours the offender rather than the victim. This is anything but the truth. If the system of justice is to operate as it demands it must balnce the righteous public indignation and thirst for punishment against the inviolable need to ensure that only the guilty receive that punishment. That punishment when imposed must constitute just retribution on the guilty person, without degenerating to inhumane barbarity. The role of the regional magistrate becomes all the more crucial to dispel the public perception to which I have adverted. The regional magistrate must therefore ensure that the adjudication process is free from all criticism.

I suggest that the way to ensure that the proper balance is maintained is not to change rules of evidence. It is to improve investigative methods. It is not to alter legal procedures. It is to ensure that those procedures take due account of the rights of the victim by ensuring victim-friendly facilities for all stages of the proceedings, from report through investigations to trial. It is not to impose mandatory sentences. It is to leave to the courts, receptive as they are to the mood of the public, to ensure fair punishment in each case. It is not to

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increase the jurisdiction of the magistrates, but to ensure that, where a jurisdiction in excess of the magistrate's is required, to indict the matter in this court or to transfer the matter to this court for sentence. In short, one ought not to jettison the accumulated legal wisdom of the ages but to ensure that those charged with applying that wisdom do so with the expertise and professionalism required of them.

CHINHENGO J: I agree.

ZAMBEZI PROTEINS (PVT) LTD & ORS v MIN OF ENVIRONMENT & TOURISM & ANOR 1997 (1) ZLR 563 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

5 & 12 June 1997 Judgment No. S-84-97

Flynote

Statutes - regulations - validity - regulations made under Parks and Wild Life Act - power of Director of National

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Parks to fix fees - when Director empowered to fix different fees for same kind of permit

Headnote

The second respondent, the Acting Director of National Parks, introduced a sliding scale of fees for holders of kapenta fishing permits. The more permits held by any particular permit holder, the more each permit would cost. The question arose whether the fixing of fees by the Acting Director was permissible at all and whether he could fix fees at different rates for the same sort of permit.

Held, that there was nothing in the language of the enabling section of the Parks and Wild Life Act which showed that the Minister must fix or alter the appropriate fees himself. All he is obliged to do with regard to the fixing or altering of fees is to make regulations. It was within his power to delegate the fixing or altering of fees to the Director, as such a function concerns an administrative detail.

Held, further, that while it would have been permissible for the Minister to make regulations which would have allowed the differentiation of fees on criteria other than the place of residence of the permit holder, the regulations merely empowered the Director to fix a differentiation based on the residence of the person concerned. It was incompetent for him to introduce a sliding scale of fees on other grounds.

Cases cited:

Commrs of C & E v Cure & Deeley Ltd [1961] 3 All ER 641 (QBD)

1997 (1) ZLR p564

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Kensington Ests (Pvt) Ltd v Min of Justice & Internal Affairs 1957 R & N 92; 1956 (3) SA 468 (SR)

The court considered the following statutory provisions:

Parks and Wild Life Act [Chapter 20:14], s 129

Parks and Wild Life (General) Regulations 1990 (SI 362 of 1990), s 97(1)(d)

Case Information

A P de Bourbon SC, for the appellants

J Musimbe, for the respondents

Judgment

Gubbay CJ: For almost two decades the appellant companies have conducted the business of kapenta fisheries and distributors at Kariba. Over that period, they have established large and complex operations, entailing very considerable capital expenditure. A large number of persons

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are employed by them.

The first three appellants are the holders, respectively, of ten, nine and thirteen kapenta fishing permits issued to them by the first respondent, the Minister of Environment and Tourism ("the Minister"), pursuant to s 94 of the Parks and Wild Life Act [Chapter 20:14] ("the Act"). All three are members of the fourth appellant, which is an association of commercial fishing operators.

In the past, all existing kapenta fishing permits were renewed annually. On 10 May 1995, however, the second respondent, the Acting Director of National Parks and Wildlife Management ("the Acting Director"), circulated a notice to all operators stating that, with effect from 1 January 1996, the Minister intended to withdraw and terminate all current commercial fishing permits; and that information with regard to their reissue would be made available at a future date. Receipt of this notice caused much concern amongst the operators, but a week or so later the Minister made it clear in a press interview that it was not the intention to terminate the kapenta fishing permits completely.

On 5 December 1995, the Acting Director forwarded a second notice to all operators. It advised that as of 1 January 1996 there was to be a reduction in the number of kapenta fishing permits held by each. The permits previously issued to the first and second appellants were to be reduced in number by three to seven and six respectively, while the third appellant's permits were to be reduced by four to nine. The notice also stated that fees on a sliding scale

were to be introduced for the coming year, ranging from $5 000 for the holder of one to two permits, to $15 000 for the holder of nine to ten permits. This scale was to replace the current fee of $2 500 *per* permit.

The appellants did not take kindly to these changes, though they accepted as justified an increase in the fee *per* individual kapenta fishing permit to $5 000 *per* annum.

On 15 January and 2 February 1996, the appellants were granted provisional orders by the High Court authorising them to continue exercising their rights in respect of the fishing permits until 29 February 1996. These orders were later extended to the date when the High Court was to deliver its judgment upon the urgent joint application for review brought by the appellants.

On 24 April 1996, confirmation of the provisional orders was refused with costs. Thereafter, the High Court allowed an application for interim relief, pending the determination of the present appeal.

The record of the proceedings before the lower court was only received by the registrar of this court on 10 December 1996. The appeal was then set down for hearing on 5 June 1997, after an extension of time to file heads of argument had been permitted. In the event, the appellants continued to operate their businesses for the whole of 1996 with the same number of kapenta fishing permits as they did during 1995. Furthermore, we were informed by Mr de Bourbon, who appeared for the appellants, that for the current year all operators maintain the same number of

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fishing permits.

Clearly, the dispute over the number of kapenta fishing permits to be issued for 1996 is no longer of any relevance. It is now solely of academic interest whether that decision of the Minister was, as the appellants claimed it to be, "grossly unreasonable, illogical and misinformed"; or was beyond interference, as held by the learned judge *a quo*. Not surprisingly, both counsel were in agreement that the only issue they required this court to adjudicate upon was whether the change of fees notified in the letter of 5 December 1995 was in compliance with the law.

It was Mr de Bourbon's contention that the fees sought to be charged for 1996 were invalid. They had not been fixed by the Minister and were not contained in Regulations published in the Gazette. Second, and in any event, the Acting Director was not empowered to set a sliding scale of fees dependent upon the number of fishing permits granted or issued.

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Subsection (1) of s 129 of the Act vests in the Minister broad powers to make regulations providing for all matters which are required or permitted to be prescribed by the Act, "or which, in his opinion, are necessary or convenient to be prescribed for carrying out or giving effect to this Act" (emphasis added). Subsection (2) details the types of matters that regulations made in terms of subs (1) may provide for. The list, though extensive, is not exhaustive. The Minister may be of the opinion that there are additional matters which, in order to give proper effect to the Act, it is necessary to prescribe by regulation.

Paragraph (a) to s 129(2) of the Act is one of the matters which regulation may provide for, namely:

> "the fixing and altering of fees to be paid for any authority, permit or licence granted or issued in terms of this Act, including the fixing of different fees to be paid by persons resident in Zimbabwe and persons not so resident."

On 23 November 1990, the Parks and Wild Life (General) Regulations 1990 (SI 362 of 1990) ("the Regulations"), made by the Minister, were published in the Gazette and became operative as at that date (see s 20(1) of the Interpretation Act [Chapter 1:01]). Section 97(1)(d) thereof reads:

> "With the approval of the Minister, the Director may fix the appropriate fees to be paid for -
>
> ...
>
> (d) any authority, permit, licence, register or return granted, issued or supplied in terms of the Act or any regulations made thereunder."

and may in like manner alter such appropriate fee.

There is nothing in the language of ss 129(1) or 129(2)(u) or, indeed, anywhere else in the Act, which shows that the Minister must fix or alter the appropriate fees himself. All he is obliged to do with regard to the fixing or altering of fees is to make regulations. This, of course, he did. It was within the Minister's powers, in making such regulations, to delegate the fixing or altering of

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appropriate fees to be paid to the Director of National Parks and Wild Life Management. Such function concerns an administrative detail, as do virtually all of the provisions of the Regulations. See Kensington Estates (Pvt) Ltd v Min of Justice & Internal Affairs 1956 (3) SA 468 (SR) at

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471C-F; 1957 R & N 92 (SR) at 96B-F; Commissioners of Customs & Excise v Cure & Deeley Ltd [1961] 3 All ER 641 (QBD) at 660B-C.

I hold accordingly, that it is competent for the Acting Director to fix appropriate fees himself with the approval of the Minister. And as authority to do so is reposed in him by s 97(1) of the Regulations, to notify such fixing by circular letter.

Finally, it remains for me to consider whether in terms of the Regulations it was permissible for the Acting Director, in fixing such fees, to differentiate on the basis of the number of fishing permits to be granted or issued to local operators.

The argument advanced was that as s 129(2)(u) of the Act allows the fixing of different fees to be paid by persons resident in Zimbabwe and those not so resident, it was not the intention of the lawmaker to sanction differentiation upon other criteria. I am unable to agree. As I have already said, the purport of subs (1) of s 129 of the Act is not to restrict the Minister in the making of regulations to the matters listed in subs (2). He is at liberty to make regulations with regard to any other matter he deems necessary in order to give effect to the Act. He has a wide discretion.

But what regulation did the Minister make with regard to the fixing of different levels of fees by the Director? Section 97(2) of the Regulations gives the answer. The Director is merely empowered to fix a differentiation dependent upon the residence of the person concerned. That is all.

The conclusion is thus inevitable that the sliding scale of annual fees for kapenta fishing permits, particularised by the Acting Director in the letter of 5 December 1995, to take effect on 1 January 1996, was invalid. As a corollary, the publication of 12 July 1996, in Government Notice 355 of 1996, of the list of fees to be paid in respect of fishing permits for 1996, in the same form and amounts as set out in the letter of 5 December 1995, similarly lacked validity. It ought to have been made the subject of a statutory instrument.

It is upon this ground that the appeal must be allowed with costs payable by the respondents jointly and severally, the one paying the other to be absolved.

Counsel were agreed that in the event of the appeal succeeding, it was appropriate that the respondents be ordered to pay one-half of the costs

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incurred by the appellants in the proceedings below. I share that view. The order of the court *a*

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quo is therefore altered to read:

1. The provisional orders granted by this court on 15 January and 2 February 1996 are hereby confirmed;

2. The respondents are to pay jointly and severally, the one paying the other to be absolved, one-half of the applicants' costs.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

Coghlan, Welsh & Guest, appellants' legal practitioners

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

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NISSAN ZIMBABWE (PVT) LTD v HOPITT (PVT) LTD 1997 (1) ZLR 569 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

5 May & 16 June 1997 Judgment No. S-85-97

Flynote

Appeal - grounds - not raised in court *a quo* - point of law raised for first time on appeal - point may be raised if it goes to substance of dispute

Damages - amount - delict - repairs to motor car not properly carried out - further repairs necessary - claim should be for cost of putting car into a serviceable condition, not wasted costs of earlier repairs

Headnote

It is permissible to raise a point of law for the first time on appeal, where the issue raised goes to jurisdiction rather than discretion. An example of a point of law going to discretion is where, if the point had been raised in the court below, further evidence would have been introduced. But where the point is one that is fundamental to the issues between the parties, an appeal court can hardly ignore that point and only decide secondary and dependent issues. That would be a fruitless exercise, divorced from reality.

The appellant had agreed to effect certain repairs to the respondent's vehicle. For these repairs it charged some $11 000. A short time afterwards, the vehicle's engine seized up. Another company undertook the repairs. There was no evidence as to the cost of the second repairs. The respondent claimed from the appellant, as damages, the cost of the repairs effected by the appellant.

Held, that the respondent was entitled to claim damages occasioned to it as a result of the

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alleged negligence of the appellant, not the cost of the repairs. As the injured party, it was entitled to be put back in the same position as it would have been in had it not been for the appellant's

KORSAH JA

wrongful act. There must be a factual basis for the assessment of what this would cost; this would be what it would have cost to put the car back in a serviceable condition after it seized up, not what the respondent considered to be the wasted amount paid to the appellant for the earlier repairs. Without any evidence of the cost of the later repairs, the respondent was not entitled to judgment.

Cases cited:

Banbury v Bank of Montreal [1918] AC 626 (HL)

Cole v Union Govt 1910 AD 263

Monumental Art Co v Kenston Pharmacy (Pvt) Ltd 1976 (2) SA 111 (C)

Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A)

Case Information

D M Foroma, for the appellant

A J Dyke, for the respondent

Judgment

Korsah JA: The parties are both limited liability companies carrying on business in Zimbabwe.

The respondent claimed and was awarded delictual damages of $11 276,63, with interest at the rate of 12% from the date of judgment to date of payment, and costs of suit. The appellant appealed against the judgment on the findings of negligence by the trial court on the part of the appellant, and the absence of contributory negligence on the part of the respondent.

The gist of the claim is as follows. In or about May 1991, in terms of an oral agreement between the parties, the appellant agreed to effect certain repairs to the respondent's motor vehicle for reward. On or about 20 June 1991, the vehicle was returned duly repaired, and the appellant charged the respondent and received $11 276,63 for the cost of such repairs. The appellant gave the respondent a warranty of 3 000 kilometres or three months for the repairs effected, presumably, whichever should first occur.

Some time in July/August 1991, Mrs Hopgood, who is a director of the respondent, was driving the vehicle from Ruwa to Marondera when she became aware of the smell of something burning. She noticed smoke coming from the bonnet of the vehicle. She stopped. She checked the temperature gauge, either before or immediately after switching off the ignition, and noted

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that the gauge read normal.

It was common cause that the engine had seized as a result of overheating of

KORSAH JA

the motor vehicle due to the escape of water from a leak in the by-pass hose. The motor vehicle was towed by the appellant, who refused to undertake the repairs at no cost on the basis that, as the vehicle had travelled approximately 4 000 kilometres, the damage occurred outside the period of warranty. Eventually, the repairs on the vehicle were undertaken by Duly's (Pvt) Ltd ("Duly's"). No evidence of the total cost of such repairs by Duly's is in the record. And in any case, the respondent was not claiming such an amount as delictual damages. The amount claimed by the respondent as delictual damages, and for which judgment was granted in its favour, was the cost of repairs effected earlier by the appellant and for which the respondent had paid.

Upon reading the record of appeal, it became clear to me that the basis of the respondent's claim was untenable and insupportable in law. The damage the respondent suffered as a result of the engine seizing up, if such seizing up of the engine were attributable to the appellant's negligence, would be what it cost to put the vehicle back in a serviceable condition after the engine had seized up, and not what the respondent considered to be the wasted amount which it had paid to the appellant for the earlier repairs.

This being a point of law which was not taken in the court below and, by the proviso to r 32(2) of the Supreme Court Rules, this court cannot rest its decision on any other ground unless the parties have had sufficient opportunity to contest the case on that ground, I informed both counsel before the date set for the hearing of the appeal that the court would desire them to address that issue. After entertaining arguments on the date of hearing, I further invited Mr Dyke, if he so desired, to file additional heads of argument by 12 May 1997, and Mr Foroma, if he found it necessary, to reply to those additional heads of arguments by 19 May 1997. No further heads of argument were filed.

Raising the point of law at this stage does not introduce any new matter into the case; the legal objection to the claim arose upon the matter which was before the court below, though this particular argument upon that matter was not there presented for consideration and, consequently, did not fall for determination.

In Banbury v Bank of Montreal [1918] AC 626 (HL), where Lord Atkinson, Lord Parker and Lord Wrenbury expressed the opinion that "the question whether the Court of Appeal should allow a point of law not raised in the court of first instance to be raised on appeal goes, not to jurisdiction,

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but to discretion", Lord Parker of Waddington expressed himself thus at p 705 of the report:

> "There are no doubt cases in which the Court of Appeal have refused to allow points of law not taken in the court of first instance to be raised on appeal. But these cases do not go to jurisdiction, but to discretion. It may be that if a point of law had been taken below further evidence would have been adduced, or a further or different question left to the jury. In such cases, it would be manifestly unfair and unjust to allow the point to be raised for the first time in the Court of Appeal. In the present case there is no such element of unfairness or injustice. It is not suggested that had the point been taken below any further evidence could have been adduced, or any further or different question left to the jury. Why, then, should not the Court of Appeal have felt itself at liberty to do complete justice between the parties on the evidence before them? I can see no reason at all."

See also Cole v Govt of the Union of South Africa 1910 AD 263 *per* Innes J at pp 272-3, cited with approval by Jansen JA in Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at 23D-H. And I most respectfully agree with the observation of Jansen JA at p 24B of the report that -

> "If for example, the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discussed and stated, the court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision."

Not only was the basis of the delictual damage claimed and awarded bad in law, the claim was not maintainable as the respondent had enjoyed the benefit of the repairs effected by the appellant by using the vehicle consequent upon those repairs being effected.

The respondent was entitled to claim damages occasioned to it as a result of the alleged negligence of the appellant, and not the cost of repairs. The basis of the respondent's claim for delictual damage is to be compensated for any loss sustained as a consequence of the alleged wrongful act of the appellant. The determining principle for assessing damage to a motor vehicle is either the cost of the repairs plus hire charges, or the pre-accident market value of the vehicle together with hire charges until replaced, less scrap value. Whether the wrongful act arises out of contract or tort, where there has been

actual pecuniary loss which is capable of precise quantification, the rule which the law adopts is restitutio in integrum - the injured party is entitled to claim to be placed back in the same position as he would have been in had it not been for the defendant's wrongful act. The law in this regard was aptly stated by Rose Innes AJ in Monumental Art Co v Kenston Pharmacy (Pty) Ltd 1976 (2) SA 111 (C) at 18 as follows:

> "Damages claimed in delictual actions for injury to a thing are to be assessed on the principle that the plaintiff must by monetary compensation be placed in as good a position financially as he would have been had the damage not been inflicted. The damage to be compensated is the patrimonial loss of the injured plaintiff. Whether there has been such a loss and what the amount of that loss is, are questions of fact to be decided on the evidence. The measure of the loss and the evidence proving the loss may vary according to the circumstances of each case. A formalistic approach is to be avoided. The methods which can be employed to determine the extent of damage suffered may differ from case to case and there may in a particular case be more than one method which can appropriately be applied. The method which is ordinarily applied in the case of damage to a thing is to calculate the difference between the market value of the thing before it was damaged and the market value thereafter. But that is not the only ethod. Erasmus v Davis 1969 (2) SA 1 (A) at pp 9, 17. Shunning a formalistic

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approach as to the methods and the evidence by which the quantum of damages may be assessed and proved, a court must, furthermore, where there has been proof of damage to property, make an assessment of the quantum of damages on the material placed in evidence before it even if on that evidence it is not possible to compute the amount of damages precisely. Turkstra Ltd v Richards 1926 TPD 276. The last-mentioned principle is subject to the proviso that it is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made. Mkwanazi v van der Merwe & Anor 1970 (1) SA 609 (AD) at p 630. If there is no or an insufficient evidential basis upon hich the loss can be assessed on the probabilities, then no assessment of damages can be made for lack of proof of the quantum of those damages. Enslin v Meyer 1960 (4) SA 520 (T) at pp 523-4; Lazarus v Rand Steam Laundries (1946) (Pty) Ltd 1952 (3) SA 49 (T) at p 51" (emphasis added).

KORSAH JA

There is no basis in law for the claim made by the respondent, and there is no evidence on record disclosing what it cost to put the vehicle back on the road. It follows that the respondent obtained judgment for something to which it was not entitled.

Accordingly, the appeal is allowed with costs, and the judgment of the High Court is set aside and in its place is substituted the following:

"The plaintiff's claim is dismissed with costs."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Sawyer & Mkushi, appellant's legal practitioners

Lofty & Fraser, respondent's legal practitioners

ATTORNEY-GENERAL v TARWIREI 1997 (1) ZLR 575 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Criminal appeal

29 May & 19 June 1997 Judgment No. S-83-97

Flynote

Criminal procedure - discharge at end of State case - when should be ordered - magistrate deciding that State witnesses not worthy of belief - accepting version put by accused in cross-examination - fundamental misdirection

Headnote

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The accused, who was charged with rape, was acquitted at the end of the State case. The magistrate decided that the evidence of the complainant and the other State witnesses was not worthy of belief. He preferred the accused's version, which was put to the State witnesses in cross-examination and denied by them. The Attorney-General appealed.

Held, that while it is true that a court may acquit at the end of the State case where the evidence of the prosecution witnesses has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict, such cases will be rare. It would be quite exceptional for the credibility of a witness to be so utterly destroyed that no part of his material evidence could possibly be believed.

Held, further, that it was a fundamental misdirection for the magistrate to treat the assertions made by the accused during cross-examination as though they were evidence by the accused. The magistrate was not in a position to decide on the veracity of the two versions until he had heard both versions. He should not have passed final judgment on their relative credibility when he had not yet heard the accused's version.

Matter remitted for trial de novo before a different magistrate.

1997 (1) ZLR p576

McNALLY JA

Cases cited:

A-G v Bvuma & Anor 1987 (2) ZLR 96 (S)

R v Newcastle-upon-Tyne Justices, ex p Hindle [1984] 1All ER 770 (QBD)

Practice Note [1962] 1 All ER 448

S v Moringer 1993 (4) SA 452 (W)

S v Mpetha & Ors 1983 (4) SA 262 (C)

Case Information

Miss B Hammond, for the appellant

Respondent in person

Judgment

McNally JA: This is an appeal against the acquittal, at the end of the State case, of the respondent by the magistrate, on a charge of eleven counts of rape on an eight year old girl. The appeal is specifically provided for in s 198(4) of the Criminal Procedure and Evidence Act [Chapter 9:07]. I will refer to the respondent, for convenience, as the accused.

The criterion for acquittal at the end of the State case, as laid down in s 198(3) is that:

> "If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be

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convicted thereon, it shall return a verdict of not guilty.'

In this case, there was certainly evidence given by the complainant child, and evidence of complaint by her sister, by her mother who examined her, by her 14-year-old brother who spoke of what he saw, and by a doctor in the form of a medical report. The magistrate, however, decided that the evidence was not worthy of belief. He considered it was manufactured, it was improbable, and -so bad that the court should not have spent much time on it'.

Now, it is true that a court may acquit at the end of the State case where the evidence by the prosecution witnesses -has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it' (*per* Lord Parker CJ, cited with approval by Dumbutshena CJ in *Attorney-General v Bvuma \& Anor* 1987 (2) ZLR 96 (S) at 102-103).

But such cases will be rare. In S v Mpetha & Ors 1983 (4) SA 262 at 265E-F, Williamson J said:

McNALLY JA

> "This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed' (See also S v Moringer 1993 (4) SA 452 (W)).

I respectfully agree. In the present case, it seems to me that the magistrate made the same error as was made at first instance in R v Newcastle-upon-Tyne Justices, Ex p Hindle [1984] 1 All ER 770 (QBD) at 777j-778b. He believed the cross-examiner as against the witnesses being cross-examined. The cross-examiner happened to be the accused in person. But the error was to believe what he said while putting his case to the witnesses. This was not evidence. It was not adopted and accepted by the witnesses. It was denied by them. So it could only become evidence when the accused took the oath and made the statements under oath.

The defence case, as put in cross-examination, was that the mother had a grudge against the accused. He was a lodger whom she wanted to evict. So in order to get rid of her lodger she went to the extent of injuring her eight year old child's private parts with a cooking stick, severely enough to cause bruising. She then laid the blame for those injuries on the accused, and persuaded the injured child and her siblings to lie accordingly.

This version was treated by the magistrate as if it had been given in evidence by the accused. Thus in his judgment he writes:

> "*The accused person says* that the complainant's mother said she would use a cooking stick on the complainant to prove sexual interference on the complainant by the accused person.'

This is a fundamental misdirection. The accused did not make that statement on oath. He was not cross-examined on it. He simply put it in cross-examination, and it was denied. The magistrate could not decide the relative veracity of the two versions until he had heard both versions. I note in any event that the accused does not even say the mother caused the injuries. He says she threatened to do so.

The magistrate also misdirected himself in his next sentence on the question of onus. He wrote:

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"The complainant's mother hates the accused person and has lied in her evidence. Although she denied it, the court is not convinced that she did not cause the bruises on the complainant in order to get at the accused person.'

McNALLY JA

In order to acquit at that stage, it was not enough that he was not convinced. Only if he had been convinced that she did cause the bruises could he acquit at that stage. And how could he have been convinced of that?

It is not appropriate for this court to pass judgment at this stage on the relative credibility of the two versions. It is sufficient to say that the magistrate erred in passing final judgment on their relative credibility when he had not yet heard the accused's version. There was nothing inherently incredible about the State version.

Miss Hammond has argued strenuously that the State witnesses were in fact good witnesses. I prefer to leave that for decision by the trial court in due course. She has also argued that if the evidence does not support a charge of rape, it does at least support a lesser charge of attempted rape or indecent assault. That also will be for the future trial court to decide.

Clearly, we cannot remit this matter to the same magistrate. Section 198(5)(b)(ii) allows us to remit it for trial de novo before a different presiding officer. Unhappily this will mean that the child may have to face the ordeal of testifying again. We have no option in the circumstances.

Accordingly, the appeal is allowed. The acquittal of the respondent (accused) at the close of the State case is set aside. The case is remitted for trial de novo before a different presiding officer.

KORSAH JA: I agree.

MUCHECHETERE JA: I agree.

S v MBIRE 1997 (1) ZLR 579 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Ebrahim JA & Muchechetere JA

Criminal appeal

10 & 16 June 1997 Judgment No. S-86-97

Flynote

Appeal - constitutional matter - stage at which person may appeal to Supreme Court against ruling by lower court not to refer matter to Supreme Court

Constitutional law - Constitution of Zimbabwe 1980 - s 24(4) - application for permanent stay of criminal prosecution on basis of violation of constitutional right to trial within a reasonable time - whether magistrate

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has jurisdiction to order stay

Court - magistrates court - jurisdiction - whether magistrate has jurisdiction to order permanent stay of prosecution because of violation of constitutional right

Headnote

At a criminal trial in the regional magistrates court it was contended that the appellant's right in terms of s 18(8) of the Constitution to a fair trial withina reasonable time had been violated as a result of long delay in bringing the matter to trial. The appellant's legal practitioner therefore applied for an order permanently staying the prosecution or, alternatively, for a referral of the proceedings to the Supreme Court in terms of s 24(2) of the Constitution. The magistrate ruled that he had no jurisdiction to stay the proceedings and that he would not refer the matter to the Supreme Court because the application was frivolous or vexatious. The appellant immediately noted an appeal to the Supreme Court against the magistrate's ruling, seeking a permanent stay of the prosecution.

Held, that the magistrate was correct in ruling that he had no jurisdiction to

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grant a permanent stay of the criminal proceedings based upon the alleged violation of the accused person's constitutional right. Only the Supreme Court is empowered to make such an order under the authority of s 24(4) of the Constitution when an application or referral comes before it pursuant to s 24(1) or (2) of the Constitution.

Held, further, that in terms of s 24(3) of the Constitution a person can only appeal to the Supreme Court against a ruling by a lower court not to refer the constitutional question to the Supreme Court after there has been a determination of the proceedings in the lower court. In a criminal case, the stage of determination of the proceedings is when the accused person is convicted and final sentence is delivered. This stage had not been reached before the present appeal was brought. There is no provision in the Constitution or any other enactment for a right of appeal to the Supreme Court against a refusal to refer a question raised under s 24(2) of the Constitution. It is only in a rare and special situation, such as that in the case of *Martin v Attorney-General \& Anor* 1993 (1) ZLR 153 (S), that an application under s 24(1) of the Constitution will be entertained against a refusal to refer the case under s 24(2).

Cases cited:

Martin v A-G & Anor 1993 (1) ZLR 153 (S)

National Telephone Co Ltd v HM Postmaster-General [1913] 2 KB 614 (CA)

R v Mhosva 1980 ZLR 74 (G)

S v Morrisby 1995 (2) ZLR 270 (S)

Statutes considered:

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Constitution of Zimbabwe 1980, s 24(2)

Case Information

B Kaseke, for the appellant

M Majuru, for the respondent

Judgment

Gubbay CJ: The appellant was charged in a regional magistrate's court with a contravention of s 3(1)(a) of the Prevention of Corruption Act [Chapter 9:16]. The trial was eventually set down for 23 September 1996. On that day, the appellant's legal practitioner, as foreshadowed in a notice lodged with the court a week earlier, moved an application for an order permanently staying the prosecution; or, alternatively, for a referral of the proceedings to the Supreme Court in terms of s 24(2) of the Constitution of Zimbabwe. The complaint addressed was that by virtue of the long delay on the part of the State in bringing the case to trial, the appellant's right to be

afforded a fair hearing within a reasonable time, as protected by s 18(2) of the Constitution, had been infringed.

Having heard argument from both defence counsel and the prosecutor, the regional magistrate held that the magistrates court had no jurisdiction to stay criminal proceedings upon the constitutional violation contended for. I consider that decision to be correct. It is only the Supreme Court that is empowered to make such an order under the authority of s 24(4) of the Constitution when an application or a referral comes before it pursuant to subs (1) or (2).

After reserving consideration on the alternative request for a referral, the regional magistrate declined to accede to it. He ruled, in effect, that in his opinion the constitutional question raised on the appellant's behalf was, as characterised in s 24(2) of the Constitution, "merely frivolous or vexatious".

The appellant felt aggrieved. He noted an appeal to this court upon grounds which challenged the legitimacy of the opinion expressed by the regional magistrate. The redress sought was an order permanently staying the prosecution against him, with costs.

At the inception of the hearing before this court, Mr Majuru, who appeared for the respondent, took a point in limine. It was that only in the event of the regional court determining the proceedings against the appellant, would an appeal lie against the refusal to refer the question of the alleged delay.

In my view, the objection to the procedure adopted by the appellant is valid.

Section 24(3) of the Constitution reads:

> "Where in any proceedings such as one mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from

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> the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1)" (emphasis added).

It is clear from the wording of this provision that where a referral has been refused by the High Court or by any court subordinate to it, albeit the opinion that the raising of the constitutional question was merely frivolous or vexatious was manifestly erroneous, there is to be no interruption in the

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proceedings. They are to continue to the stage of determination, which in a criminal case is when the accused is convicted and the final sentence delivered. See *R v Mhosva* 1980 ZLR 74 (G) at 75C; *S v Morrisby* 1995 (2) ZLR 270 (S) at 271C. Thereafter, the right to raise the constitutional question as a ground of appeal against such determination becomes permissible.

Quite apart from there being no provision in the Constitution permitting an appeal to the Supreme Court against a refusal to refer to it a question raised under s 24(2) thereof, there is no right of appeal given in either the Magistrates Court Act [Chapter 7:10] or the Supreme Court Act [Chapter 7:13] against such a ruling. To repeat the self-evident words of Kennedy LJ in National Telephone Co Ltd v His Majesty's Postmaster-General [1913] 2 KB 614 (CA) at 621:

> "The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal nor both combined can create such a right, it being essentially one of the limitation and of the extension of jurisdiction."

Indeed, it is only in a rare and special situation, such as was considered by this court in *Martin v Attorney-General \& Anor* 1993 (1) ZLR 153 (S) at 157G-158A, that an application under s 24(1) of the Constitution will be entertained against a refusal to refer under s 24(2).

It follows that this matter was wrongly enrolled as an appeal. It is struck off. The criminal trial in case No. R 1114-5/96 must proceed with expedition.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Chinamasa, Mudimu & Chinogwenya, for the appellant

GAUNTLET SECURITY SERVICES (PVT) LTD v LEONARD 1997 (1) ZLR 583 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Appeal from Labour Relations Tribunal

12 & 19 June 1997 Judgment No. S-88-97

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Flynote

Employment - wrongful dismissal - damages for - assessment - delictual damages not included - employee injured in accident and thereafter wrongfully dismissed not entitled to include damages arising out of the injury in calculation of damages for wrongful dismissal

Headnote

The respondent was a security guard employed by the appellant. He was injured in a motor-cycle accident during the course of duty. When he objected to returning to work when still feeling pain from the injury, he was suspended from duty without pay on the grounds of disobedience to a lawful order. A labour relations officer granted the appellant's application for permission to dismiss the respondent. The Labour Relations Tribunal found that his dismissal was unlawful and ordered damages to be awarded. It calculated the damages on the basis of the salary he would have earned, less what he actually earned as a self-employed vendor, together with loss of future earnings arising out of the injury.

Held, that an employee whose contract of employment is wrongfully terminated is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach. But the employee must mitigate his loss. He must look for and accept any reasonable offer of alternative employment. He cannot just do nothing. If he fails to take employment when it would have been reasonable for him to do so, a deduction will be made in respect of the

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remuneration he would have earned from the substituted employment.

Held, further, that the Tribunal should have called for evidence as to the reasonable period it would taken a person in the position of the respondent (disregarding the injury) to obtain similar employment and then to have deducted from the wages paid by the appellant the amount which the respondent actually earned or could have earned during that period.

Held, further, that the Tribunal erred in basing the respondent's loss of earnings on the injury sustained. The respondent's cause of action for loss of earning capacity arising from the injury lay in negligence against the appellant or the motor-cyclist or both.

Cases cited:

Admin, Natal v Edouard 1990 (3) SA 581 (A)

Beeton v Peninsula Tpt Co (Pty) Ltd 1934 CPD 53

Brown v Sessell 1908 TS 1137

Bulmer v Woollens Ltd (in liq) 1926 CPD 459

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Faberlan v McKay & Fraser 1920 WLD 23

Hama v NRZ 1996 (1) ZLR 664 (S)

Myers v Abramson 1952 (3) SA 121 (C)

Santam Ins Co Ltd v Paget (1) 1981 ZLR 73 (A)

Willenburg v Pickstone & Brother Ltd 1922 CPD 13

Case Information

F Girach, for the appellant

F H C Mazando, for the respondent

Judgment

Gubbay CJ: On 31 August 1988, the respondent, a security guard in the employ of the appellant, was injured in the course of his duty. He fell from a motor cycle while being conveyed as a pillion passenger by a fellow employee. The accident was caused by the absence of foot-rests fitted to the motor cycle owned by the appellant. The respondent sustained a badly twisted left hip. He was treated by a doctor and did not return to work until 2 September 1988.

During the course of that day, the respondent complained that he was feeling unwell. His manager believed that he was malingering. He ordered the respondent to remain on duty. The respondent refused to do so. He was suffering considerable pain from the twisted hip.

On 8 September 1988, the appellant suspended the respondent from employment, without pay, on the ground of wilful disobedience to the lawful order given that he resume work. Simultaneously it lodged an application in terms of s 3(1)(a) of the Labour Relations (General Conditions of Employment)

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(Termination of Employment) Regulations 1985 (SI 371 of 1985), for permission to terminate the respondent's employment.

At previous hearings, the labour relations officer and the acting regional hearing officer sanctioned the dismissal of the respondent. The Labour Relations Tribunal ("the Tribunal"), however, reversed those determinations. It held that the respondent's refusal to work was not wilful, being justified by incapacity due to injury. Accepting the respondent's word that he continued to remain unfit for the duties he previously performed, the Tribunal did not order the appellant to reinstate him in employment. It merely specified an amount of damages to be awarded to the respondent in terms of s 96(1)(c) of the Labour Relations Act [Chapter 28:01] ("the Act"). That, of course, it was obliged to do. Yet even though reinstatement did not appear to be a viable option, I think the proper order to make was "reinstatement or employment in a job, or the payment of $x as damages" - thereby affording the appellant the choice. See *Hama v*

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National Railways of Zimbabwe 1996 (1) ZLR 664 (S).

But it is at the nature and extent of the award of damages that this appeal is directed. The Tribunal assessed the damages at $30 400, made up as follows:

(1) Back pay for the period extending from 17 November 1988 (the day after the determination by the acting regional hearing officer) to 2 February 1995 (the day the Tribunal held that the suspension and subsequent dismissal were not justified), in an amount of $6 400; being $178 *per* month paid by the appellant, less $78 earned by the respondent as a self-employed vendor.

(2) Loss of future earnings over a period of twenty years, in an amount of $24 000.

The argument advanced on behalf of the appellant was that the Tribunal had committed a fundamental error in linking the damages to be awarded to the respondent's injury, and not to the unlawful termination of his contract of employment.

Section 96(1)(c) of the Act recites that:

> "Without derogation from the generality of sections ninety-three and ninety-five, a determination made in terms of those sections may provide for -
>
> ...

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> (c) reinstatement or employment in a job;
>
> Provided that any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment."

By its very wording, as well as read in the context of the section as a whole, it is implicit that the alternative award of damages relates solely to the unlawful termination of the contract of employment. The damages so specified must arise ex contractu.

Thus the general rule governing the measure of damages is applicable. The employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract by the employer. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach. See Willenburg v Pickstone & Brother Ltd 1922 CPD 13 at 14. But the employee must mitigate his loss. He must look for and accept any reasonable offer of alternative employment. He cannot just do nothing. See Faberlan v McKay & Fraser 1920 WLD 23 at 32; Bulmer v Woollens Ltd (in liquidation) 1926 CPD 459 at 467-468; Beeton v Peninsula Transport Co (Pty) Ltd 1934 CPD 53 at 59. If he fails to take other employment when it would have been reasonable for him to do so, a deduction will be made in respect of the remuneration he would have earned from the substituted employment.

In Myers v Abramson 1952 (3) SA 121 (C) at 127C-E van Winsen J (as he then was) encapsulated the principles in these words:

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"What is the measure of such damages? Mr Bloch contends that he is entitled to surrogate damages, ie damages which are substitutional for specific performance and which in the circumstances of this case would amount to the same sum as would be awarded on a claim for specific performance. I have found no precedent for awarding surrogate damages to a wrongfully dismissed employee. The measure of damages accorded such employee is, both in our law and in English law, the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment."

See also Brown v Sessell 1908 TS 1137 at 1143 in fine- 1144; Riekert's

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Basic Employment Law 2 ed at 79; Visser and Potgieter Law of Damages at 315-316.

The conclusion is inevitable that the Tribunal wrongly based the respondent's loss of earnings, in the sum of $24 000, upon the injury sustained on 31 August 1988. This is evident from the reliance placed by it upon the decision in *Santam Insurance Co Ltd v Paget* (1) 1981 ZLR 73 (A) at 77C-D. The following recorded exchanges between the Chairman and the respondent's legal practitioner are also revealing:

" Chairman: Are you not in the area of delict?

Mr Gijima: Yes, we are in that area.

Chairman: Do we have jurisdiction?

Mr Gijima: This delict was caused by his employer ...

Chairman: No, my question is: does the Labour Tribunal have jurisdiction to deal with the issue - the question of delictual damages?

Mr Gijima: Not exactly, but it has jurisdiction to deal with employment relations and, as I was saying, these damages arose because of the employment that my client was in.

Chairman: The cause of action - is it really injuries or unlawful dismissal? What is the cause of action?

Mr Gijima: The injuries. I would have to admit that they were the injuries that occurred to him."

The doubt expressed by the Chairman as to the jurisdiction and competence of the Tribunal to award damages ex delicto was well founded. Certainly, the appellant's counsel was at pains to point out that what was to be calculated were the damages flowing from wrongful dismissal and not any other damages the respondent may have suffered as a result of any alleged negligence on the part of the appellant. It is difficult therefore to understand what in the end persuaded the Tribunal to award the respondent damages rooted in delict.

The many differences between contractual and delictual claims for damages - between patrimonial and non-patrimonial loss - are dealt with in *Law of*

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Damages supra at 264-265. One of the most far-reaching of those alluded to by the learned authors is that contributory negligence is a defence against delictual claims only. See also Admin, Natal v Edouard 1990 (3) SA 581 (A) at 597E-G.

It is self-evident that the respondent's cause of action for any loss of earning capacity resulting from his injury lay under the common law, in negligence, against the appellant and/or the third party motor cyclist. Nor was he precluded from seeking compensation in terms of the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice 1990 (SI 68 of 1990).

I am left in no doubt that in measuring the actual loss suffered by the respondent, the Tribunal ought to have utilised the formula in Myers v Abramson *supra*.

Since the respondent's contract of employment was not one of fixed duration or terminable by the appellant upon notice given, I consider it was incumbent upon the Tribunal to call for evidence as to the reasonable period it would take a person in the position of the respondent (disregarding the injury) to obtain similar employment. And having made the necessary finding, then to deduct from the monthly wages paid by the appellant, the amount the respondent actually earned or could reasonably have earned during such period.

It follows that the Tribunal's calculation of the damages suffered was badly flawed. Even the award of back pay as a separate item was wrong. Only a single indivisible sum was to be specified as damages.

Accordingly, I would allow the appeal in which costs were not sought by the appellant. The award of damages in the amount of $30 400 together with the order for costs is set aside. The case is remitted to the Tribunal to specify the amount of damages to be awarded after the requisite evidence has been adduced before it.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

SHUMBA v ATTORNEY-GENERAL 1997 (1) ZLR 589 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Application for permanent stay of criminal proceedings

12 & 23 June 1997 Judgment No. S-89-97

Flynote

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Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to trial within a reasonable time - right arising out of having been charged with criminal offence - when person may be said to have been "charged"

Headnote

In June 1992 the applicant, a police officer, was told by his superior that he was under investigation on an allegation of rape. A docket was opened. The applicant was invited to make a statement, which he did, denying the allegation. He was not formally arrested, taken into custody, remanded in court or summoned. The investigation was discontinued, as it was considered that there was insufficient evidence.

In June 1994, a new docket was opened, the complainant having made representations to the Attorney-General's Office. The applicant was confined to camp. On 8 June 1994, he was formally charged by the police and made two warned and cautioned statements. He was served with a summons on a charge of rape in October 1994. Postponements were made by consent and the trial finally set down for 11 September 1995. On that date an application was made for the matter to be referred to the Supreme Court. It was argued that the applicant was first "charged" in June 1992 and there had thus been an unreasonable delay.

Held, that a broad general meaning must be given to the word "charged". The word corresponds to the start of the impairment of the individual's interests in the liberty and security of his person. A period during which the person is merely under suspicion does not start the clock ticking against the State. The police are obliged to investigate a complaint that

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a crime has been committed. As part of that investigation they may, and often do, legitimately afford the accused person the opportunity to give his own account. This account may result in a decision not to prosecute. While it is true that being the subject of a police investigation causes anguish and anxiety, an investigation is not the same thing as a charge. In this case, the applicant was charged for the first time in June 1994 and the delay of 6 months until the first date of set-down was insufficient to trigger the enquiry into whether the applicant's constitutional rights had been contravened.

Application refused.

Cases cited:

Bate v Regional Magistrate, Randburg & Anor 1996 (7) BCLR 974 (W)

du Preez v A-G, Eastern Cape 1997 (3) BCLR 329 (E)

Eckle v Germany (Federal Republic) (1983) 5 EHRR 1

Foti & Ors v Italy (1983) 5 EHRR 313

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

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Moeketsi v A-G, Bophuthatswana & Anor 1996 (7) BCLR 947 (B)

The court considered the following statutory provisions:

Constitution of Zimbabwe 1980, s 18(2)

Case Information

F Girach, for the applicant

M Majuru, for the respondent

Judgment

Gubbay CJ: Pursuant to a referral by a regional magistrate under s 24(2) of the Constitution of Zimbabwe, the applicant sought to obtain from this court an order for a permanent stay of his prosecution on a charge of rape. The complaint addressed was that, having been "charged with a criminal offence", his fundamental right enshrined in s 18(2) of the Constitution was violated by the long delay on the part of the State in bringing the matter to trial.

The substantive points argued by counsel, which fall to be decided, concern:

(i) the meaning to be given to the word "charged" in s 18(2) of the Constitution;

(ii) whether the time frame involved in bringing the applicant to trial was sufficiently long to trigger the enquiry mechanism into whether his right to a fair trial within a reasonable time has been infringed;

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(iii) and, if so, whether such delay as there was resulted in prejudice to the applicant.

The factual background can be stated fairly briefly as follows.

On 19 January 1992, the applicant, a constable in the Zimbabwe Republic Police, was informed by a superior officer that he was under investigation on an allegation of having raped one Greta, on 7 January 1992, in his quarters at Zvishavane Police Camp. A criminal docket was opened. The applicant, the pregnant complainant and her husband, were medically examined. All were found to be suffering from sexually transmitted diseases. The applicant was also asked to make a written statement. This he did, denying the allegation. He was not formally arrested, taken into custody, remanded in court, or summoned on the charge. The investigation was soon discontinued as it was considered that there was insufficient evidence warranting the laying of a charge of rape. Instead, the applicant was summoned to appear before a Police Disciplinary Board on a contravention of para 35 of the Schedule to the Police Act [Chapter 11:10]. It was alleged that he had fraternised with a member of the public, the complainant, in a manner ubecoming of a police officer. To this, the applicant pleaded guilty on a statement of agreed facts. He was fined $30.

Consequent upon an approach made by the complainant, or her husband on her behalf, to the

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Attorney-General's Office in early June 1994, investigations into the rape allegation were reopened under a new criminal docket. The applicant, while not being placed under arrest, was confined to the Police Camp.

On 8 June 1994, the applicant was formally charged by the police with rape. He made two written statements under warn and caution. In each he protested innocence of the offence.

Towards the end of October 1994, the applicant was served with a summons on a charge of rape, the trial date being set for 1 December 1994. A few days later, the legal practitioner engaged by the applicant advised that he could not be ready for trial by the date specified. A request was made to be furnished with copies of the medical reports, extra-curial statements, proofs of the persons the prosecutor did not intend to call as witnesses, and the outline of the State's case. Thereafter, numerous postponements were agreed to until, eventually, the trial was set down by consent for 11 September 1995. It was on that day that the referral to this court was applied for and granted.

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It was the submission of Mr Girach that the applicant was "charged" on 19 January 1992 when informed by the police that an allegation of rape against him was under investigation. Not so, contended Mr Majuru on behalf of the respondent; the applicant was not "charged" until 8 June 1994 when under warn and caution by the police the charge of rape was put to him and his reply recorded.

The question of when an accused is "charged" for the purposes of s 18(2) of the Constitution was examined in the case of In re Mlambo 1991 (2) ZLR 339 (S) where, at 346E-H, I said:

> "The time frame to be considered starts to run from the moment a person is charged. The key word is 'charged'. What does it mean in the context of s 18(2)? Does the provision envisage only the situation where the accused is called upon in court to plead to a formal charge? To my mind, such a restrictive construction has the effect of rendering the protection almost nugatory. It squares more with an arraignment. And, of course, it would be susceptible to untold abuse, permitting the State to delay inordinately before bringing a person before the trial court, happy in the knowledge that by so doing there had been no violation of a constitutional right.
>
> I have no hesitation in holding that the time frame is designed to relate far more to the period prior to the commencement of the hearing or trial than to whatever period may elapse after the accused has tendered a plea. This meaning is wholly consonant with the rationale of s 18(2) - that the charge from which the reasonable time enquiry begins, must correspond with the start of the impairment of the individual's interests in the liberty and security of his person. The concept of 'security' is not restricted to physical integrity, but includes stigmatization, loss of privacy, anxiety, disruption of family, social life and work."

I went on, at 347A-E, to approve the proposition enunciated by the European Court of Human Rights in Eckle v Germany (Federal Republic) (1983) 5 EHRR 1 at 31 and in Foti & Ors v Italy (1983) 5 EHRR 313 at 326 that "charge" may be defined as "the official notification given to an individual by the (appropriate) competent authority of an allegation that he has committed a criminal offence". And added that it is at this stage that the concept of "security", which the Constitution seeks to protect in providing for a speedy trial, is affected.

The judgment does not purport to provide an exhaustive definition of when an accused is

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"charged". Rather, it stresses the desirability of flexibility by

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giving a broad general meaning to the word "charged". Upon an application of that meaning to the facts, it was held that Mlambo was "charged" upon his arrest; and that the period of delay in trying him, and its reasonableness or otherwise, was to be measured from that date.

The approach outlined in In re Mlambo has found favour in the South African courts. See Moeketsi v Attorney-General, Bophuthatswana & Anor 1996 (7) BCLR 947 (B) at 963H-964E; Bate v Regional Magistrate, Randberg & Anor 1996 (7) BCLR 974 (W) at 990C-J; and du Preez v Attorney-General, Eastern Cape 1997 (3) BCLR 329 (E) at 336B-C, 338C and 341B-E.

The judgment in the second cited case is instructive. The applicant had in October 1992 fired a shot which struck one John Sithole. The following day he made a sworn statement to the police in response to a request that he offer an explanation for his conduct. On 28 November 1994, a summons was issued requiring the applicant to appear in the regional court on 10 January 1995. It was argued on his behalf that he had been charged in October 1992. The court granted a temporary stay of prosecution in order to allow the applicant to supplement his papers and thereafter re-apply for a permanent stay. It seemed then to be of the opinion that if the police had told the applicant in October 1992 that Sithole had laid a charge of attempted murder against him, and that they were investigating whether to prosecute him on that charge, this would have amounted to a "charge" in terms of s 25(3)(a) of the Interim Constitution (a provision which approximates most closely to s 18(2) of our Constitution). See at 992D-J. However when the matter came before the court again, a permanent stay of prosecution was refused. It was held that the applicant had failed to show that he was "charged" prior to service of the summons on him in November 1994. See the unreported judgment dated 13 May 1996.

In Antonie v Die Prokureur-Generaal van die Witwatersrand Plaaslike Afdeling (an unreported judgment dated 1 March 1996) the court expressed the view that the period during which the applicant was merely under suspicion did not start the clock ticking against the State.

Lastly, in du Preez v Attorney-General, Eastern Cape *supra* Zietsman JP held at 338D-E that the applicant had not been "charged" when the initial investigation was carried out and his premises searched on 22 June 1993. Nor was he "charged" in December 1994 when offered the opportunity to give an explanation concerning the allegations of fraud and theft made against him. He was only "charged" in August 1996 when told he was to be prosecuted.

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These decisions, like In re Mlambo, apply the meaning of "charged" to their particular facts. In the present case, I am unable to conclude, within the interpretation of that word, that the applicant has shown that he was notified by the police, either expressly or by implication, that a criminal charge was to be brought against him prior to 8 June 1994. I regard what occurred

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during January 1992 as no more than an investigation into suspected criminal conduct by him.

The police are obliged to investigate a complaint that a crime has been committed. As part of that investigation they may legitimately afford the person accused, and often do, the opportunity to give his own account of the incident. And if satisfied with the explanation - as they must have been with that proffered initially by the applicant - decide not to prosecute.

It is true that being the subject of a police investigation causes anguish and anxiety to the person suspected. This is regrettable. Nonetheless, as so pertinently observed by Jones J in a concurring judgment in du Preez v Attorney-General, Eastern Cape *supra* at 342J-343A:

> "... an investigation cannot become a charge because the same kind of personal stress may result from both or because one of the objects of the Constitution is to protect against this kind of undue personal hardship if caused by delay."

Counsel for the applicant was not constrained to argue that if 8 June 1994 was the earliest date upon which the applicant was "charged", the resultant delay of six months to the first set down for trial in the regional court, was still sufficiently long enough to trigger the enquiry into whether his constitutional right under s 18(2) of the Constitution had been contravened. Clearly, it was not.

It follows that the drastic remedy of a permanent stay of prosecution must be refused. An order for costs in respect of these proceedings was not sought by the respondent. The trial of the applicant should now take place as expeditiously as possible.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

Shireen Ahmed & Associates, applicant's legal practitioners

JIAH & ORS v PUBLIC SERVICE COMMISSION & ANOR 1997 (1) ZLR 595 (HC)

Court **High Court, Harare**

Adam J

Civil application

6 May & 25 June 1997 Judgment No. HH-107-97

Flynote

Administrative law - natural justice - applicability to dismissals made under the Public Service (Maintenance of Services) Regulations 1990 - public servants taking part in a strike being summarily dismissed without being given opportunity to make individual representations before dismissal

Public service - Public Service Commission - disciplinary powers - fair hearing - constitutional right to - not applicable to dismissal of striking public servant in terms of Public Service (Maintenance of Services) Regulations 1990

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Headnote

The applicants were junior doctors and nurses employed in the public service. In August 1996, along with numerous other public servants, they had taken part in a strike. On October 1996 the junior doctors and nurses employed in the Pubic Service again went on strike. After a few days, the Acting Minister for the Public Service issued a statement, warning all those on strike to return to work. If they did not, he said, they would be dismissed and not permitted to apply for re-employment. Thereafter a form letter was sent to each of the applicants, telling them that the Commission had dismissed them from the Public Service. Each then wrote a letter in identical terms, applying for reinstatement. Two received replies, saying that they would be reappointed as from the date on which they resumed duty; the others were told that their applications were unsuccessful.

The applicants sought a review of the decision. The grounds for review were

that the Commission had purported to summarily dismiss the applicants en masse, without considering the case of each individual; that none had had an opportunity to present his or her side of the story; and that since s 25 of the Public Service Act [Chapter 16:04] incorporates the principles of natural justice, the provisions of ss 5, 6 and 8 of the Public Service (Maintenance of Services) Regulations 1990 (SI 258 of 1990), which purported to exclude those principles, were ultra vires. The respondents argued that since the statutory instrument was made in terms of s 75 of the Constitution, which at the time permitted the Commission to make regulations, they were not contrary to s 18 of the Constitution. It was argued that the right to be heard can be lawfully excluded by legislation.

Held, that the forms that natural justice takes under s 18 of the Constitution varies. Advance disclosure and an opportunity to make representations will be required very often, but not always, in the interests both of fairness and informed decision making. But not every instance where a statutory provision excludes an opportunity to make regulations will be in violation of s 18, unless it can be shown that the context within which the decision is to be made is unfair to the aggrieved person. Where a statute authorises emergency ex parte action, it might be implicit in the statute that a hearing need only be given after the decision is made. If there is no urgency, the court will require natural justice to be observed beforehand. A hearing held after the decision can only be acceptable if, in all the circumstances, it was sufficiently fair as to have the effect of curing the failure to hold one before.

Held, further, that advance notification was given to the strikers about the action that would be taken if they did not return to work. The Commission had reason to believe that the applicants had taken part in the strike. The provision in the Regulations allowing for written representations to be made mitigated the exclusion of a right to be heard.

Held, further, that the Regulations were saved by s 33 of the Act, which provided that any regulations lawfully made by the Commission before the coming into effect of the Act would continue to have legal effect.

Cases cited:

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Admin, Tvl v Zenzile 1991 (1) SA 21 (A)

Breen v Amal Eng Union & Ors [1971] 1 All ER 1148 (CA)

Chrmn, PSC v Zimbabwe Teachers' Assn 1996 (1) ZLR 637 (S); 1997 (1) SA 209 (ZS)

Doody v Sec of State for the Home Dept [1993] 3 All ER 92 (HL)

Dube v Chrmn, PSC 1990 (2) ZLR 181 (H)

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du Preez v Truth & Reconcilation Commission 1997 (3) SA 204; [1997] 2 All SA 1 (A)

Embling v Headmaster, St Andrew's College (Grahamstown) 1991 (4) SA 458 (E)

GrŸndling v Beyers 1967 (2) SA 131 (W)

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

Holland & Ors v Min of Public Service 1997 (1) ZLR 186 (S)

Lunt v University of Cape Town 1989 (2) SA 438 (C)

Marumahoko v Chrmn, PSC 1991 (1) ZLR 27 (H)

Mkize v Rector, University of Zululand 1986 (1) SA 901 (D)

Momoniat v Min of Law & Order 1986 (2) SA 264 (W)

National Foods Ltd v Masukusa 1994 (1) ZLR 66 (S)

Omar v Min of Law & Order 1987 (3) SA 859 (A)

Sachs v Min of Justice 1934 AD 11

Sibanyoni v University of Fort Hare 1985 (1) SA 19 (Ck)

SA Roads Bd v Johannesburg City Council 1991 (4) SA 1 (A)

Taylor v Min of Higher Education 1996 (2) ZLR 772 (S)

Zimbabwe Teachers' Assn v Min of Education 1990 (2) ZLR 48 (H)

The court considered the following statutory provisions:

Constitution of Zimbabwe 1980, s 18(1)

Public Service Act [Chapter 16:04], ss 25, 33(1)

Public Service (Maintenance of Services) Regulations 1990 (SI 258 of 1990), ss 2, 5, 7 and 8

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Case Information

L T Biti, for the applicants

I E G Musimbe, for the respondents

Judgment

Adam J: The first two applicants, junior medical practitioners, and the other applicants, nurses, employed in the Public Service answerable to the second respondent, on l9 August l996 went with most of the civil servants on a "general strike". A few weeks later everyone returned to work. On 21 October l996, the junior doctors and nurses again went on "strike". On 23 October l996, the first two applicants, as part of the civil service representatives, took part in negotiations with government representatives. On 26 October l996, the Acting Minister of Public Service, Labour and Social Welfare issued this statement:

> "The few nurses and junior doctors who have been on strike should now return to work. If they do not do this, they will face the serious consequences that must follow".

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On 29 October l996, he issued a further statement:

> "Those who do not return to work on Wednesday will be dismissed forthwith and dismissed permanently. They will not be allowed to reapply."

The reference to Wednesday was to 30 October l996. Both statements were published in the press and carried in the electronic media. In a form letter from the first respondent it was indicated as follows:

" Ref: D.162

30 October l996

SUMMARY DISMISSAL IN TERMS OF THE PUBLIC SERVICE (MAINTENANCE OF SERVICE) REGULATIONS, l990

You ... currently employed in the Ministry of Health and Child Welfare are hereby notified that the Commission has summarily dismissed you from the Public Service with effect from 31 October l996 in terms of s 5(l)(c)(iii) of the Public Service (Maintenance of Service) Regulations, l990.

The grounds upon which you have been dismissed are that you were not at your place of work at ... between 21-30 October l996 and that during the period declared or took part in or advised, aided or procured another person to declare or take part in a work stoppage or the continuation of a work stoppage.

You are hereby notified that you are entitled to make written representation to the Commission in connection with your dismissal within one month after being informed of your dismissal in terms of s 7(2) of the said Regulations.

You shall not be paid any remuneration for the period during which you took part in the work stoppage."

This form letter addressed appropriately to each of the applicants was received by the first applicant on 11 November l996; by the second applicant on 12 November l996; by the third

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applicant on 27 November l996; by the fourth applicant on l8 November l996 and by the fifth, sixth and seventh applicants on 5 December l996.

ADAM J

The first and second applicants on 6 December, l996 and the other applicants on 5 December, l996 wrote a form letter to the Medical Superintendent of their respective institutions as follows:

> "RE: APPEAL FOR REINSTATEMENT IN RESPONSE TO LETTER REFERENCE D.162
>
> I ... would like to appeal for reinstatement with the Public Service Commission in response to letter of dismissal received on ... l996. It is my hope that I will be reinstated at my old grade and salary without prejudice to my benefits."

The first, second, fifth, sixth and seventh applicants received letters dated l6 December, l996 headed "Representations submitted in terms of sECTION 7(2) of the public service (maintenance of service) regulations 1990 (SI 258 OF 1990)" from the first respondent who informed them that their application for reinstatement into the service had been unsuccessful. The third and fourth applicants, in a letter also dated l6 December l996, were informed that in terms of s 7(3)(b) of those Regulations their summary dismissal had been confirmed but that they had been reappointed to the service with effect from the date they assumed duty, that they retained their former grade and salary and would not be paid for the period between their dismissal and re-appointment and would not be entitled to payment of annual bonus for l996. Their re-appointment was subject to their assumption of duty before or on l8 December l996 and that if they did not assume duty on that date their re-appointment was null and void.

In their founding affidavit, the applicants spoke of the first respondent failing to deal adequately with the conditions of service for civil servants; that in October l996 the junior doctors and nurses went on strike, that what the first respondent was purporting to do was to summarily dismiss the applicants en masse; that no investigation of each employee's position was ever considered, that none of them were ever offered an opportunity to present her or his side of the story before the adverse decision was taken, and that since s 25 of the Public Service Act [Chapter 16:04] incorporates the principles of natural justice the provisions of SI 280 of l990 were ultra vires that section. Further, it was averred that this application was a combined one for review in terms of ss 27 and 28 of the High Court Act and a declaration in terms of s 14 of the High Court Act and that the applicants' dismissals were null and void on the grounds of gross irregularity in the proceedings in that they were denied the right to e heard before the adverse decision was made against them. In the

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first respondent's opposing affidavit, it was averred that the applicants led another illegal strike of junior doctors and nurses. In the applicants' answering affidavit it was averred that medical personnel went on strike on 21 October l996 but that it was unfair, in the absence of investigation, for the first respondent to allege that the applicants led the strike. It is clear from the foregoing that none of the applicants deny taking part in a "strike" (work stoppage as

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defined in the Act).

At the commencement of the hearing of this matter, the proceedings had to be adjourned so that the provisions of r 260 of the High Court Rules could be complied with by the first respondent. It should be mentioned that this is not the first time that the first respondent has failed to comply with r 260. It appears to be the position that compliance is rather the exception on the part of the first respondent. In specific terms, r 260 provides that the tribunal, board or officer whose proceedings are being brought on review shall within 12 days of the date of the application for review lodge with the registrar of this court the original record, together with two copies which must be certified as true and correct copies. The Chairman of the first respondent or the relevant official must surely know that without an original record before it there cannot be a review by this court. Unnecessary litigation costs are being incurred as a result of the non-compliance of r 260 by the first respondent. It is hoped that boh the Public Service Commission and the Civil Division of the Attorney General's Office will take note of this.

The Public Service (Maintenance of Services) Regulations l990 (SI 258 of l990) that were made in terms of s 75 of the Constitution of Zimbabwe provide in the relevant sections as follows:

" 2.(l) In these regulations -

...

'member' means any person employed in the Public Service, whether as officer, employee or person under contract;

'work stoppage' means any one or more of the following acts or omissions on the part of a member -

(a) a refusal or failure to continue to work, whether the discontinuance is complete or partial;

(b) a wilful retardation of the progress of work or a wilful obstruction

ADAM J

of work, including a boycott, lock-out, sit-in, sit-out or other such concerted act or series of acts;

(c) a breach or unlawful termination of his conditions or contract of employment; if the refusal, failure, retardation, obstruction, boycott, lock-out, sit-in, sit-out, breach or termination, as the case may be, is or may reasonably be construed as being -

(i) in consequence of a dispute regarding conditions of employment or other matters, and in pursuance of any combination, agreement or understanding, whether expressed or not, entered into between the member concerned and any other person; and

(ii) intended to induce or compel the Commission or the State or any other person to agree to or comply with any demand made by or on behalf of the member concerned or any other person in connection with conditions of employment or re-employment or in connection with any other matter whatsoever;

...

Suspension or dismissal of members

5.(l) Notwithstanding any other regulations made in terms of s 75 of the Constitution but

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subject to this section, if the Commission or head of Ministry, head of department or designated officer has reason to believe that a member -

...

(c) has declared or taken part in or has advised, encouraged, incited, commanded, aided or procured another person to declare or take part in, a work stoppage or the continuation of a work stoppage;

the Commission, head of Ministry ... as the case may be, may -

(ii) suspend the member from duty for a period not exceeding three months; or

(iii) in the case of the Commission, summarily dismiss the member from the Public Service.

ADAM J

(2) The Commission ... may take action in terms of paragraph (iii) of subsection (l) notwithstanding that the conduct giving rise to the action has already ceased.

...

6. ...

Representations by members concerning ... summary dismissal.

7.(l) Notwithstanding any other law, the fact that the Commission or a head of Ministry ... did not give a member an opportunity to make representations in the matter before prohibiting, suspending or summarily dismissing him in terms of section 5 shall not serve to invalidate the prohibition, suspension or dismissal.

(2) Any member or former member who is aggrieved at having been prohibited, suspended or summarily dismissed in terms of section 5 may, within one month of being notified of the prohibition, suspension or summary dismissal, make written representations in the matter to the Commission.

(3) The Commission shall consider any representations made in terms of subsection (2) and, after causing such investigations to be made into the matter as it considers necessary or appropriate may -

(a) ...

(b) confirm the summary dismissal or reinstate the former member concerned in the Public Service with effect from such date and subject to such conditions as the Commission may determine; or

(c) give such other order or direction in the matter as the Commission thinks fit.

Charges of misconduct against ... suspended or reinstated members

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8. Nothing in these regulations shall prevent proceedings for misconduct being instituted against a member who has been prohibited or suspended, or who has been reinstated in the Public Service following summary dismissal, in terms of these regulations."

ADAM J

In the applicant's heads of argument, Mr Biti submitted that two issues were raised:

(i) whether ss 5 and 7 of SI 258 of l990 were ultra vires s 25 of the Public Service Act [Chapter 16:04]; and

(ii) whether those same ss 5 and 7 were ultra vires the provisions of ss 11 and l8 of the Constitution of Zimbabwe.

He argued that SI 258 of l990, in terms of s 33(l) of the Public Service Act, is now deemed to have been made by the Public Service Commission under ss 31 or 32 of the Act and therefore now must be regarded as subordinate legislation. The Public Service Commission's function shall be, under s 8(l)(e) of that Act, subject to Part V, to exercise disciplinary powers in relation to members of the Public Service. It follows from this that s 25(l) in Part V of the Act requires that cases involving misconduct be investigated, adjudicated upon and punished in terms of service regulations. To the extent that SI 258 of l990 does not provide for investigation, adjudication and punishment it is ultra vires s 25 of that Act. He further argued that the contention that since the applicants were given an opportunity to make written representations after their summary dismissal, this did not suffice: *Health Professions Council v McGown* l994(2) ZLR 329 (S) at 337.

Mr Biti made submissions on ss 11 and 18 of the Constitution of Zimbabwe and referred to s 5(l) of the Emergency Powers (Maintenance of Essential Services) Regulations SI 160A of l980 and Zimbabwe Teachers Association v Min of Education l990(2) ZLR 48 (H). He argued that the phrase "the protection of the law" in s l8(l) of the Constitution of Zimbabwe is similar in content to "due process of the law" defined in the 14th Amendment to the American Constitution, as well as to the phrase "principle of fundamental justice" in the Canadian Charter of Rights and Freedoms. He asserted that the principles of procedural fairness require (a) the right to a notice of the charge and (b) the right to be heard by an impartial person or body: Holland v Min of Public Service, Labour & Social Welfare 1997 (1) ZLR 186 (S) and Taylor v Min of Higher Education 1996 (2) ZLR 772 (S). He submitted, further, that ss 5 and 7 of SI 258 of l990 did not allow a fair hearing and so infringed s l8(a) of the Constitution.

In the respondent's heads of argument, Mr Musimbe submitted that SI 258 of l990 was made in terms of s 75 of the Constitution, which permitted the

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Public Service Commission to make regulations and therefore were not contrary to the Constitution - Chairman Public Service Commission v Zimbabwe Teachers Association 1996

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(1) ZLR 637 (S); 1997 (1) SA 209 (ZS). In enacting SI 258 of l990, the Public Service Commission was merely re-stating the common law position on summary dismissal: *National Foods Ltd v Masukusa* l994 (l) ZLR 266 (S). Since SI 258 of l990 permitted instant or summary dismissal, to afford an employee the right first to be heard would be effectively denying the Public Service Commission the right to summary dismissal. Also, the right to be heard can be excluded lawfully by legislation: Dube v Chairman, Public Service Commission l990 (2) ZLR l8l (H) at l90-l9l. Reasons for this exclusion to be heard were generally rooted in policy or practicality: Sachs v Min of Justice l934 AD 11 at 38. He also argud that in terms of s 33(2) of the Public Service Act all regulations made by the Public Service Commission prior to 15 March l996 remained in full force and effect. He submitted that s 25 of the Public Service Act did not oust the common law position embodied in SI 258 of l990, which is protected by s 113(l), the definition of "law" in the Constitution. He also submitted that there was an urgent necessity to address the disastrous situation caused by the illegal strike and so it was reasonable for the Public Service to resort to SI 258 of l990 rather than Public Service (Disciplinary) Regulations l992 SI 65 of l992, since the illegal strike was not an ordinary form of misconduct.

It should be mentioned that SI 65 of l992 was also made under s 75 of the Constitution, (as were the repealed Public Service (Officers) (Misconduct and Discharge) Regulations l986 (SI 129 of l986). As for SI 160A of l980, those Regulations were made in terms of the Emergency Powers Act and depended on a declaration of a state of emergency by the President under the Constitution. In Zimbabwe Teachers Association v Min of Education *supra* s 5(l) of SI 160A of l989 was being interpreted by this court.

In Marumahoko v Chairman, Public Service Commission l99l (l) ZLR 27 (H) at 44, I accepted that under s l8 of the Constitution "fair hearing" included "procedural fairness" with a duty to act fairly and that the form natural justice - audi alteram partem and nemo judex in causa sua - took under s l8 of the Constitution varied. In South African Roads Board v Johannesburg City Council l99l (4) SA 1 (A) at l0 Milne JA emphasised certain recent developments in their law and said:

> "... this court has expressed a preference for the view which regards the audi principle as a rule of natural justice which comes into play whenever

ADAM J

> a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary; as opposed to the view which requires the audi principle, if it is to apply, to be impliedly incorporated."

In du Preez v Truth & Reconciliation Commission 1997 (3) SA 204 (A) at 231; [l997] 2 All SA 1 (A) at 11, after referring to the South African Roads Board case, *supra* Corbett CJ, in determining what the duty to act fairly demanded derived useful guidance from Lord Mustill's speech in Doody v Secretary of State for the Home Department [l993] 3 All ER 92 (H) at 106-7. Lord Mustill said:

> "... I prefer to go directly to the opposite end of the process to consider the prisoner's rights in relation to the decision of the Home Secretary ... The only issue is whether the way in which the scheme is administered falls

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below the minimum standard of fairness.

What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well-known. From them, I derive the following:

(l) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances;

(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type;

(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects;

(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken;

(5) Fairness will very often require that a person who may be adversely

ADAM J

affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both; and

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

... the respondents acknowledge that it is not enough for them to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather they must show that the procedure is actually unfair. The court must constantly bear in mind that it is the decision-maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as how the decision is made ...

Accordingly, I prefer to begin by looking at the question in the round, and inquiring what requirements of fairness, germane to the present appeal, attach to the Home Secretary's fixing of the penal element. As a general background to this task, I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon 'transparency', in the making of administrative decisions".

Corbett CJ was right in treating Lord Mustill's statement to be of general application. I am of the view that the guidance provided above adequately encapsulates the scope of the entitlement envisaged under s l8 of the Constitution.

It follows, absent countervailing powerful considerations, advance disclosure and an opportunity to make representations will be required very often, but not always, in the interests both of fairness and informed decision-making. Without this, such a decision may not be right and even if it is, it will clearly not be fair. But this does not mean that, in every instance, the mere enactment of a statutory provision that excludes an opportunity to make representations will make it in violation of s l8 unless it can be shown that the context within which the decision is to be made under such a statutory provision is unfair to the aggrieved person.

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In the present matter, it is not disputed by the applicants that advance

ADAM J

notification was given about the action that would be taken should the "striking" nurses and doctors not return to work. It would have been unfair if an employee in the second respondent's Ministry who had been absent from work but who in fact had not taken part in "a work stoppage" were to have been suspended or summarily dismissed simply on the grounds that the Public Service Commission or the head of Ministry had reason to believe that he had taken part "in a work stoppage" without more. In the case of such an employee, the Public Service Commission's or the head of Ministry's reason to believe must be based on the fact that such an employee had really taken part in "a work stoppage" and prior notification had been given to him about the action that would be taken should he or she not return to work. Anything less than this will not suffice to make a suspension or summary dismissal in terms of s 5(l) of SI 258 of l990 in accordance wih natural justice. To the extent that s 5(l) has the potential of summarily dismissing a person who really has done nothing wrong, it would be contrary to the principles of fundamental justice. In such a situation, reliance on s 5(l) of SI 258 of l990 by the Public Service Commission for summarily dismissing such an employee would be in violation of s l8 of the Constitution. However, in this matter this does not arise.

In *Health Professions Council v McGown* l994 (2) ZLR 329 (S), Gubbay CJ spoke about the general rule that once a decision has been made a subsequent hearing will be no real substitute. He then cited the exceptions to that rule set out by Professor Baxter as follows:

" (i) Where a statute authorizes emergency, ex parte action, it might be implicit in the statute that, unless natural justice is excluded altogether, a hearing need only be given after the decision is taken. If there is no urgency, however, the court will require natural justice to be observed beforehand.

(ii) A court may accept as sufficient compliance with natural justice a hearing held after the decision has been taken where

- there is sufficient interval between the taking of the decision and its implementation to allow for a fair hearing;
- the decision-maker retains a sufficiently open mind to allow himself to be persuaded that he should change his decision; and
- the affected individual has not already suffered prejudice.

ADAM J

These are concessions to the demands of administrative efficiency, but they are limited. A hearing held after the decision can only be acceptable if, in all the circumstances, it was sufficiently fair as to have the effect of 'curing' the failure to hold one before."

Reference was made to Momoniat v Min of Law & Order l986 (2) SA 264 (W) at 275 and Omar v Min of Law & Order l987 (3) SA 859 (A) at 906. In Momoniat's case Goldstone J held that, having regard to both the terms of the Act and the practical difficulties of observing the audi

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alteram partem rule, of the exclusion of the right to notice and the right to be heard prior to the decision was acceptable since that Act authorised emergency, ex parte action in relation to which a hearing need only be given after the decision had been taken.

It follows that the exclusion by s 7(l) of a prior hearing or representation has been mitigated by s 7(2) which authorised written representations subsequently in the matter. In the present case, it cannot be maintained by the applicants that s 7 was prejudicial, since the third and fourth applicants were reinstated after their written representations in terms of s 7(2).

It was argued by Mr Biti that SI 258 of l990, considered as subordinate legislation, was ultra vires s 25 of the Public Service Act. In so doing, he did not appreciate that for purposes of s 25 "service regulations" under s 31 included, in terms of s 33(l), all those regulations made by the Public Service Commission under s 75 of the Constitution before l5 March l996, when the Public Service Act came into force. Further, s 33(2) specifically indicated that anything which was lawfully made by the Public Service Commission before 15 March l996 in relation to the Public Service which immediately before that date had legal effect shall continue to have legal effect. To put it another way, both SI 258 of l990 and SI 65 of l992 were for purposes of s 31 "service regulations" that were saved by s 33 and so were intra vires the enabling legislation, the Public Service Act. To subject regulations that have been approved by one section of the Act, to scrutiny against another section of the same Act in order to see wheter they were intra vires the latter section, would be tantamount to determining if the former section was intra vires the latter section.

To construe the Public Service Act in that manner would be illogical. In other words, the validity of the provisions of SI 258 of l990 is dependent on s 33(2) and not on s 25.

Mr Musimbe argued that since the common law allowed summary dismissal

ADAM J

SI 258 of l990 was merely re-stating that position. It is by no means accepted that in every case of summary dismissal under common law the affected person does not have the right to be heard before such a decision is made: Lunt v University of Cape Town l989 (2) SA 438 (C). In that case, reference was made to Breen v Amalgamated Engineering Union [l97l] 1 All ER 1148 (CA) at ll54 where Lord Denning Mr said:

> "Then comes the problem: ought such a body, statutory or domestic, to give reasons for its decision or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given ... But, if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand."

In GrŸndling v Beyers l967 (2) SA 131 (W) at 141D Trollip J (as he then was) said:

> "In a statute empowering an official to give a decision, adversely affecting a right of liberty or property of an individual a legal presumption usually operates that the audi alteram partem rule has to be observed. There is no

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such presumption in a contract. The obligation to afford a hearing according to natural justice must be an expressed or necessarily implied term of the contract".

It is true that in Sibanyoni v University of Fort Hare l985 (1) SA 19 (Ck), Mkize v Rector, University of Zululand l986 (l) SA 90l (D) and Embling v Headmaster, St Andrew's College (Grahamstown) l99l (4) SA 458 (E) it was held that the rules of natural justice had no application in the field of contracts. However, in Admin, Transvaal v Zenzile l99l (l) SA 21 (A) this was disapproved. Hoexter JA observed at 35-36:

"In my view, it is logically unsound and wrong in principle to postulate that the audi principle has no application to 'purely contractual relations' ... and to require that the statute concerned should incorporate the *audi*

ADAM J

principle, either expressly or implicitly. It seems to me that so to approach the problem is to put the cart before the horse. The existence of a contractual relationship cannot alter the essential nature of the inquiry. With reference to any particular provision of a statute ... the questions to be answered are, as always: (i) is a public official empowered to give a decision affecting the existing rights of an individual? And, if so, (ii) is the right of the individual to be heard before the decision is taken excluded either expressly or impliedly?

... Craig Administrative Law 2 ed (l980), in discussing the availability of natural justice in England in the area of employment remarks (at 225):

> 'The incidence of procedural protection in this area is less than satisfactory. Distinctions are drawn which when examined have little to recommend them. first, the line between what is regarded as an office and what is construed as a pure master-servant relationship can be very fine, thereby rendering the applicability of natural justice difficult to predict and producing divisions which are capricious. Secondly, the line between officers dismissable for cause and those dismissable at pleasure can also be hard to draw' ...

One is here concerned with separate and logically discrete inquiries. The fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not, for the purposes of administrative law, mean that the requirements of natural justice can have no application in relation to the actual exercise of such right. And when, as here, the exercise of the right to dismiss is disciplinary, the requirements of natural justice are claimant."

He then referred to Mureinik (l985) 1 SAJHR 48 at 50-51 who indicated:

"Where the power is disciplinary, all the usual reasons for importing natural justice generally apply, and generally apply with more than the usual vigour: the gravity of the consequences for the individual, consequences both concrete and such as affect his reputation; the invasion of the individual's rights; that fairness postulates inquiry; and so on. But more than this, there is a reason of principle peculiar to disciplinary or punitive proceedings: that even if the offence cannot be disputed, there is almost always something that can be said about sentence. And if there is something that can be said about it, there is something that should be heard ..."

ADAM J

Mr Musimbe also submitted that the adjudication envisaged by s 25 of the Public Service Act is where a person is facing disciplinary proceedings in terms of regulations like SI 65 of l992 and not where summary dismissal is warranted. It is not necessary for purposes of this matter for this court to decide whether s 25 should be construed in that manner. Also, I have found it unnecessary to consider the arguments addressed on s 75 of the Constitution and Chairman,

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Public Service Commission v Zimbabwe Teachers Association *supra*. I am bound by the decision in that matter.

For the foregoing reasons, the applicants have not established that ss 5 and 7 of SI 258 of l990 were ultra vires s 25 of the Public Service Act. Nor have they established that ss 5 and 7 of SI 258 of l990 as applied to the applicants were in violation of s l8 of the Constitution.

In the result, the application is dismissed with costs.

Honey & Blanckenberg, applicants' legal practitioners

S v BURGER 1997 (1) ZLR 612 (HC)

Court **High Court, Harare**

Smith J & Chinhengo J

Criminal appeal

25 June 1997 Judgment No. HH-103-97

Flynote

Immigration - Immigration Regulations 1979 - s 10(4) - visitor engaging in employment without a permit - does not cover person who enters country on a business visa and purchases local products for sale outside the country

Headnote

The appellant, a resident of South Africa, had entered Zimbabwe on a business visa. He intended to buy items of traditional craft and sell them in South Africa. He created workshop facilities where local artists could produce wooden carvings, some of which he would buy and export to South Africa. Later his practice was to buy carvings from craft centres. He obtained an export permit from the Reserve Bank. He was arrested at the behest of the Immigration Department on an allegation of contravening s 10(4) of the Immigration Regulations 1979 (SI 373 of 1979), which provides that no visitor shall engage in any employment unless he has been issued with a permit authorising such employment.

Held, that the word "employment" as used in s 10(4) must be given a narrow meaning, which would require that there is some element of control by an "employer" over the activities of the visitor. The appellant clearly did not engage in any employment, even if he carried on a business.

Case cited:

Sec for Inland Revenue v Somers Vine 1968 (2) SA 138 (A)

The court considered the following statutory provisions:

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Immigration Regulations 1979 (SI 373 of 1979), ss 10(4) and 10A

SMITH J

Case Information

J Samkange, for the appellant

M T Maredza, for the respondent

Judgment

Smith J: The appellant was charged with contravening s 10(4) of the Immigration Regulations 1979 (SI 373 of 1979) (hereinafter referred to as "the Regulations"). He pleaded guilty and was convicted and sentenced to a fine of $1 000, which is the maximum fine prescribed by s 26(1)(h) of the Immigration Act [Chapter 4:02]. He appealed against the sentence as being excessive and inducing a sense of shock.

The events leading up to the appellant's prosecution are as follows. He entered the country as a visitor in or about January 1995, intending to buy items of traditional craft and sell them in South Africa. He was told by an immigration officer stationed at Chiredzi that he needed a business visa to authorize him to conduct such a business. He duly obtained a business visa and the visa stamp in his passport was endorsed with the letters B.V. to denote that is a business visa. Between January 1995 and February 1996, he created workshop facilities at three places in Masvingo where local artists could produce wooden carvings. He did not employ the artists. He bought those carvings which he thought had merit. He stopped providing the workshop facilities in February 1996. Thereafter, he bought carvings from craft centres between Beitbridge and Chivhu. He exported the carvings to South Africa. In about September 1995, he was told by a customs officer that he needed an export permit because of the number of carvings e was exporting. He obtained the requisite permit from the Reserve Bank. He alleges that from September 1995, he repatriated to this country the proceeds from the sale of the carvings he exported, as required by the permit from the Reserve Bank. As the magistrate pointed out in his reasons for sentence, however, there is no proof that the monies deposited in the appellant's bank account were from such sales or whether they were the entire proceeds. The appellant was arrested on 9 December 1996 for contravening s 10(4) of the Regulations and his visa was canceled by the Immigration Department.

Section 10(4) of the Regulations provides that no visitor shall engage in any employment unless he has been issued with a permit authorising such employment. The word "employment" was defined in s 2(1) of the Regulations as meaning engagement in any occupation, whether the person concerned was employed by another or not. That definition gave a very wide meaning to the term "employment" and would no doubt have embraced the business activities of the accused. However, that definition was repealed by

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SMITH J

SI 74 of 1983 and was not replaced. That statutory instrument added a new s 10A dealing with the employment of visitors. It provides that no person shall employ a visitor to carry on any occupation unless the visitor has been issued with a permit authorising such employment. A definition of the word "occupation" was also inserted by that statutory instrument. In terms of that definition, "occupation" means any work or other activity for gain or any regular work, not for gain or any regular work, not for gain but in he interests of any business undertaking operating in Zimbabwe.

In Secretary for Inland Revenue v Somers Vine 1968 (2) SA 138 (A), the court was required to determine whether the respondent in that case, who was an attorney, had received income in respect of the termination of an office or appointment. After dealing with the meaning of the word "office", it considered what meaning should be given to the word "employment". Ogilvie-Thompson JA said that the word may, according to its context, bear either a wide or narrow meaning. After analysing the context in which the word occurred, he concluded that the circumstances weighed slightly in favour of the narrower construction. At p 158C-D, he said:

> "In several decisions (see 15 SATC 247 and Joffe v CIR 1950 (3) SA 309 (C) and cases there cited), it was held by the Special Court that 'employment' must be construed
>
> > 'in the narrower sense of the term to signify the case where an employee is employed by an employer, analogous to but not necessarily coinciding with the position of master and servant.'
>
> Without unreservedly approving this definition in toto, it suffices to say that in all such decisions of the Special Court the element of control was, either expressly or by implication, regarded as being the criterion distinguishing 'employment'."

At p 158H-159, he continued:

> "In my view, the word 'employment' includes not only employees in the ordinary sense of that term, but, depending upon the facts of the case, it may also embrace a person who is more appropriately designated as the holder of a 'post'. Thus in McCusker v CIR 1947 (3) SA 190 (A), where the enquiry mainly revolved around the question of whether a district surgeon, who was paid a salary and certain fees, and who also enjoyed

> the right of private practice, had derived portion of his income from 'employment in the public service', it was held, having regard to the facts detailed in the report, that the district surgeon's contract with the Government was 'clearly one of employment'. In determining whether or not a person is in a legal - as distinct from a colloquial - sense a servant, the dominant criterion is, as is well known, that of control."

As I have pointed out above, when the Regulations were promulgated in 1979 they contained a definition of the word "employment" which clearly gave the word a very wide meaning. That definition was repealed in 1983 and was not replaced. That is a clear indication that it was intended that the word should thereafter not bear the wide meaning formerly given to it. In 1983 s 10A was inserted in the Regulations. That section prohibits persons from employing visitors in any occupation (which is widely defined) unless the visitors hold a visa authorising such employment. Clearly, in that section, the word "employment" is given a wide meaning because it is linked with the word "occupation" which is, as I have said, defined and embraces a wide

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range of activities. In s 10(4) of the Regulations, however, the word "employment" is used without being linked to the word "occupation" or any other word - it forbids a visitor from entering any employment unless he has the necessary permit. Clearly, in that context, the word mst be given a narrow meaning which would require that there is some element of control by an "employer" over the activities of the visitor. In this case, clearly the appellant did not engage in any employment. It appears that the trial magistrate also felt that the appellant was carrying on a business rather than being employed. In his reasons for sentence he said that "the accused engaged in the business of wood carving" in contravention of the Regulations and then went on to say, quite rightly, that a business visa and an employment permit are "two different things with different purposes". The magistrate said that the marriage the appellant had a licence for was a "typical marriage of convenience". It is difficult to see how the magistrate came to that conclusion on the meagre evidence before him. His statement that the appellant had flouted the law since 1995 was also wrong.

At the hearing of the appeal against sentence, Mr Maredza conceded that the State could not support the conviction. Accordingly, exercising the powers of review conferred by the High Court Act [Chapter 7:06], the conviction is set aside and the sentence imposed is quashed.

In passing, I would mention that in my view, had the conviction been in order,

SMITH J

the sentence, being the maximum that could have been imposed, was excessive.

Furthermore, I deprecate the fact that the accused was arrested when he had not committed any offence.

CHINHENGO J: I agree.

Byron Venturas & Partners, appellant's legal practitioners

Attorney-General's Office, for the respondent

INDUSTRIAL STEEL & PIPE LTD v MOODIE 1997 (1) ZLR 617 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

23 & 30 June 1997 Judgment No. S-90-97

Flynote

Contract - penalty - contract of employment - term providing for payment in event of termination of contract other than in event of breach by employer - not a penalty or pre-estimated damages - employee not bound to

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mitigate loss

Headnote

One of the clauses in the respondent's employment contract with the appellant company provided that in the event of the contract being terminated by the company for any reason whatsoever, other than a breach by the respondent of the terms of the contract, the respondent would be paid compensation equal to a minimum of two years of emoluments, together with benefits. The company terminated the contract after 3 months, without having established any material breach by the respondent. The trial judge (Gibson J) understood the clause to provide for damages, and awarded 50% of the sum claimed by the respondent, because he failed to mitigate his loss after the expiry of one year. She ordered interest to run from the date of the termination of the contract. The company appealed, arguing that the interest should have run from the date of judgment and that the judge should not have included a monthly entertainment allowance of $600. The respondent cross-appealed, arguing that the amount stipulated in the contract was ot damages but the payment of a contractual obligation.

Held, that the clause permitted the company to buy itself out of the contract at will, but at a cost not contingent on a breach of contract between the parties. The amount was not a penalty or liquidated damages, but was simply the amount payable to the respondent in the event of the company

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GUBBAY CJ

exercising its right to resile from the contract prematurely, other than on a breach of the contract. This was a term in a contract for the payment of a calculable amount in a certain event. That event having occurred, the sum became payable. Consequently, there was no obligation on the respondent to mitigate his loss.

Held, further, that the moment the company terminated the contract, mora interest began to run on the amount payable to the respondent.

Held, further, that the contract provided that the entertainment allowance was "unaccountable", which meant that the respondent did not have to reveal how it was spent; he could spend it as he pleased, and it was payable even during his annual leave. Accordingly, it should be regarded as one of the benefits payable to the respondent.

Cases cited:

de Klerk v Old Mutual Ins Co Ltd 1990 (3) SA 34 (E)

de Pinto & Anor v Rensea Invstms (Pty) Ltd 1977 (2) SA 1000 (A); 1977 (4) SA 529 (A)

Export Credit Guarantee Dept v Universal Oil Products Co & Ors [1983] 2 All ER 222 (HL)

Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A)

Vreulink v Sun Packaging (Pty) Ltd 1995 (2) SA 326 (C)

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Case Information

E W W Morris, for the appellant

D P Carter, for the respondent

Judgment

Gubbay CJ: On 3 March 1989, the parties to this appeal entered into a written contract pursuant to which the appellant employed the respondent as managing director of its manufacturing division. The appointment was for a period of five years, with the respondent being afforded the option to renew for further periods of five years, provided that he did not commit a material breach of the terms of the contract. In the event of any such breach the appellant was given the right under clause 7 of the contract:

> "forthwith to terminate his services without prejudice to any claims for damages which may have been occasioned by the said breach."

On 26 June 1989, the appellant effectively terminated the contract of employment. It is not now in contention that the appellant failed to establish any material breach by the respondent. The sole issue between the parties turns upon the meaning to be given to clause 8 of the contract. It reads:

> "In the event of the employee's contract being terminated *by the company*

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> *for any reason whatsoever*, other than in terms of clause seven (7) of this Agreement, the employee shall be paid compensation equal to a minimum of two (2) years of emoluments including all benefits as specified in Annexure A" (emphasis added).

This clause was understood by Gibson J, who presided at the trial, to provide for the payment to the respondent of damages upon termination of the contract by the appellant. In accord with that interpretation, he was awarded $185 616,66 with interest thereon from 26 June 1989. The sum comprised the net remuneration and benefits specified in Annexure A to the contract, totalling $371 233,32 less an amount of $185 616,66 representing a deduction of fifty *per* centum on account of the respondent's failure to mitigate his loss after the expiration of one year.

The learned judge also ordered the appellant to pay the respondent the sum of $25 300, being salary and bonuses due in respect of work performed by him prior to the conclusion of the contract, together with interest from 31 January 1989. The respondent's entitlement to this amount is accepted by the appellant.

While supporting Gibson J's construction of clause 8, the appellant nonetheless complained to this court that Her Ladyship had erred in two respects. First, in awarding interest on the damages from 26 June 1989 and not from the date of judgment. And second, in including in the total amount of $371 233,32, an entertainment allowance of $600 *per* month described as "unaccountable". In short, the appellant contended that the correct award was fifty *per* centum

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of $364 033,32, namely $182 016,66.

The respondent, too, was dissatisfied with the judgment. He noted a cross-appeal on the ground that the learned judge had erred in holding that the amount stipulated under clause 8 constituted damages and not a payment in terms of a contractual obligation.

Thus the conflicting contentions make it necessary to decide whether clause 8, taken in conjunction with the extent of the emoluments and benefits detailed in the annexure, has a penal or compensatory (in the sense of liquidated damages) connotation, even though not formulated with reference to a breach of contract.

As I read clause 8, what it gave the appellant was an incontestable right to terminate the respondent's employment, not on the ground of material

breach, but for any other reason whatsoever, whether morally warranted or not. It permitted the appellant to buy itself out of the employment contract at will; but at a cost not contingent upon a breach of contract as between the parties. It cannot be categorised as a penalty or liquidated damages. It was simply the amount payable to the respondent upon the appellant exercising its right to resile from the contract prematurely, other than on a breach of the appellant's contractual duty to the respondent.

The effect of the decision in de Pinto & Anor v Rensea Invstms (Pty) Ltd 1977 (2) SA 1000 (A) (read with 1977 (4) SA 529-530 where the earlier report was supplemented) is that unless the payment provision came into operation upon a breach of contract, it cannot qualify as a penalty or pre-estimated damages. The South African Appellate Division refused to regard as a penalty stipulation a contractual term which provided for payment in the event of premature termination of the contract and which became enforceable incidentally as a result of a breach of contract. de Villiers JA, who delivered the judgment of the court, spoke of the stipulation in the lease in these words, at 1007F-H:

> "It was rather inserted, as conferring a discount in favour of the appellants on the admitted current market rental, on condition that the contract was not terminated prematurely at any time or for any reason, including e.g. termination by mutual consent or termination as a result of destruction or serious damage of the premises as provided for in clauses 19(a) and 19(b) of the original lease. The fact that it might also become operative, as happened in the instant case, upon a breach of contract is not sufficient to constitute it a penalty stipulation ... nor the fact that the sum of money recoverable thereunder might bear no relation to damage ordinarily recoverable by a lessor for breach of contract."

See, in relation to an employment contract, de Klerk v Old Mutual Ins Co Ltd 1990 (3) SA 34 (E) at 42D-E; and also, Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 438 in fine- 439A; Vreulink v Sun Packaging (Pty) Ltd 1995 (2) SA 326 (C) at 328D-E; van der Merwe et al Contract - General Principles at 317; Joubert General Principles of Contract at 269.

The rule in England is to the same effect. In Export Credit Guarantee Department v Universal Oil Products Co & Ors [1983] 2 All ER 222 (H), an unsuccessful attempt was made to extend the law as to penalties to a wider sphere so as to include money payable upon a contingent

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right to terminate

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at will and not upon breach. The House of Lords refused to be swayed. The facts were these. The defendant had contracted to construct an oil refinery for a group of Newfoundland companies. Bankers had provided the financing of this project in return for the issue of promissory notes by the companies and for the plaintiff's guarantee of the promissory notes. By a further contract between the plaintiff and the defendant, the latter was required, in the event of default in its performance of the construction contract, to indemnify the plaintiff against any liability that might occur under the contract of guarantee. Some promissory notes were dishonoured. The plaintiff duly indemnified the bankers under the contract of guaranee and then claimed indemnity for itself against the defendant, which it alleged to be in default under the construction contract. The defendant's argument that the sum claimed constituted penal damages was firmly rejected. Their Lordships were satisfied that the sum in question could not be so characterised as it became payable in the event of breach by the defendant of contractual obligations owed not to the plaintiff but to third parties (see at 223f *per* Lord Roskill). See also Chitty on Contracts - General Principles 26 ed at para 1832; Anson's Law of Contract 26 ed at 512; Cheshire, Fifoot and Furmston's Law of Contract 11 ed at 608.

In the light of the authorities referred to, I consider that the learned judge was mistaken in regarding the respondent's claim as one for damages and in placing an obligation upon him to mitigate his loss. This was a term in a contract for the payment of a calculable amount in a certain event and that event having happened, the sum became payable.

In the absence of an agreement to the contrary, it follows that the moment the appellant terminated the contract of employment on 26 June 1989, mora interest commenced to run on the amount payable to the respondent.

I would add that it is not for the courts to relieve a party from the consequences of what in the result may prove to be an onerous or commercially imprudent contractual obligation. So the fact that the respondent is to receive payment in an amount greater than the damages he actually sustained is of no import.

It remains for me to deal with the contention advanced on behalf of the appellant that the provision for "an entertainment allowance of $600 *per* month (unaccountable)" was not a benefit within the ambit of clause 8.

The phrase "entertainment allowance" is unquestionably ambiguous. Yet it

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must be considered in the context of a contract in which the employee is to use his best endeavours to promote the business of the employer. Thus the term comprehends the expenditure of monies by the employee upon his business associates and himself for the

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purpose of enjoying themselves at a meal, public performance, show, etcetera. In casu, however, much turns on the emphasis that there was no requirement on the part of the respondent to reveal the manner in which the allowance was utilised every month. It was unaccountable. He was free to spend it however he pleased. And, most importantly, there was no provision that the allowance was to cease during the thirty days' annual leave the respondent was entitled to under the contract.

I am not persuaded therefore that the entertainment allowance was not one of the benefits the appellant was to continue to pay upon exercising its right of termination under clause 8.

For these reasons the appeal must be dismissed with costs and the cross-appeal allowed with costs. The order of the court *a quo* is altered to read:

"1. The defendant is to pay the plaintiff -

(a) the sum of $371 233,32 with interest from 26 June 1989 to date of judgment; and, thereafter, with interest to date of payment;

(b) the sum of $25 300 with interest from 31 January 1989 to date of judgment; and thereafter with interest to date of payment.

2. The plaintiff is awarded the costs of suit."

KORSAH JA: I agree.

EBRAHIM JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

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Endnotes

1 (Popup - Popup)

Editor's Note: Following the decision of DEVITTIE J in *S v Sithole* 1996 (2) ZLR S 575 (H),the Attorney-General issued a circular to his staff instructing that prosecutors should, at the request of the accused or the accused's representative, provide facilities to enable the accused or his lawyer to read and, at the accused's expense, to reproduce the full statement of every witness whose evidence will be led in trial against the accused. He set out some expectations to this ruling, such as where disclosure of the statement might place the witness at physical risk.

2 (Popup - Popup)

See *ante* at p 93 of this volume - *Editor.*

3 (Popup - Popup)

The date is that on which the learned judge gave the decision in this matter. He was asked for his reasons much later. - *Editor.*

4 (Popup - Popup)

This judgment has been shortened.

5 (Popup - Popup)

The reference is to former President C S Banana. It was the accused's case that in the 1980's when he was employed as aide-de-damp to the Presidnet, President Banana on various occassions committed homosexual acts on him against his will. Much of the evidence which has been omitted from this report deals with this subject - *Editor.*

6 (Popup - Popup)

EM Burchell and JRL Milton "Criminal Law" 1981 *Annual Survey of South African Law* 424.

7 (Popup - Popup)

J R du Plessis "*Chritien:* Guest uninvited, geographer extraordinary, witness first class" (1982) 99 *SALJ* 189.

8 (Popup - Popup)

A St Q Skeen *Chretien:* a riposte and certain tentative suggestions for reform" (1982) 99 *SALJ* 547.

9 (Popup - Popup)

J M Burchell " Intoxication and the criminal law" (1981) 98 *SALJ* 177.

10 (Popup - Popup)

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J R du Plessis "The extension of the ambit of *ontoerekeningsvatbaarheid* to the defence of provacation - a *strafregwetenskaplike* development of doubtful practical value" (1987) 104 *SALJ* 539.

11 (Popup - Popup)

C R Snyman "Is there such a defence in our criminal law as 'emotional stress'?" (1985) 102 *SALJ* 240.

12 (Popup - Popup)

See *Moyo v Forestry Commission* 996 (1) ZLR 173 (H). - *Editor*

13 (Popup - Popup)

The charges on which the plaintiff was actually indicted and the full facts of the case are set out in *S v Aitken* 1993 (2) ZLR 336 (S), *Aitken v Law Society* 1995 (2) ZLR 383 (S) and *S v Aitken* 1995 (2) ZR 395 (S). - *Editor.*

14 (Popup - Popup)

See in this conncetion *R v Aliazimba* 1939 SR 182, where the same point was considered. - *Editor.*

15 (Popup - Popup)

See *Dube v Gold Travel \(Pvt\) Ltd \& Ors* 1996 (2) ZLR 175 (H) - *Editor.*

16 (Popup - Popup)

Trial by jury. - Editor.

17 (Popup - Popup)

See above at p 395. - *Editor.*

18 (Popup - Popup)

1980 (1) SA 538 (O). See also *S v Brown* 1984 (3) SA 399 (O) and *S v Raphatle* 1995 (2) SACR 452 (T).

19 (Popup - Popup)

At pp 411-412 above.

20 (Popup - Popup)

Section 249 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

21 (Popup - Popup)

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Section 251 [*Chapter 9:07*].

22 (Popup - Popup)

The South African Law of Evidence 4 ed at 376.

23 (Popup - Popup)

The South African and Zimbabwean enactments are to precisely the same effect.

24 (Popup - Popup)

1973 (3) SA 794 (A).

25 (Popup - Popup)

"From this it is clear that the learned Judge was quite unconvinced that the complainant had the ability to tell the difference between truth and falsehood. She was therefore not a competent witness". At 796D.

26 (Popup - Popup)

1965 RLR 501 (A); 1996 (1) SA 88 (RA)

27 (Popup - Popup)

1982 (1) ZLR 271 (S).

28 (Popup - Popup)

1989 (2) ZLR 144 (S).

29 (Popup - Popup)

1992 (2) ZLR 206 (S).

30 (Popup - Popup)

1996 (2) ZLR 231 (H).

31 (Popup - Popup)

1958 R&N 462; 1958 (3) SA 699 (SR).

32 (Popup - Popup)

Supra at p 242.

33 (Popup - Popup)

Citin *R v Gannon* 1906 TS 114 at 116.

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34 (Popup - Popup)

Per LEWIS J (as he then was) in *R v Gittleson* 1938 SR 161 at 165.

35 (Popup - Popup)

Section 256(1) [*Chapter 9:07*].

36 (Popup - Popup)

Per DE VILLIERS ACJ in *R v Becker* 1928 AD 167 at 171.

37 (Popup - Popup)

Cf *R v Hackwell & Ors* 1965 RLR 1 (A) at 17C.

38 (Popup - Popup)

Hackwell supra at 30.

39 (Popup - Popup)

I myself have been obliged recently to write four fairly lengthy judgments reversing errors made by regional magistrates similar to those in the present case: *S v Makanyanga supra*: S v Tungumi HH-150-96; *S v Musindo supra* and *S v Magaya* HH-75-97.

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