1997 (2)

The Zimbabwe Law Reports 1997 [Part 2]

S v GAMBANGA 1997 (2) ZLR 1 (HC)

Court **High Court, Harare**

Mubako J & Assessors

Criminal trial

23 April 1997 Judgment No. HH-118-97

Flynote

Criminal law - defences - insanity - non-pathological incapacity of a temporary nature not amounting to a mental disorder - extent to which can be invoked as a defence to a charge of murder - diminished responsibility - whether applicable to sentence only

Headnote

A state of diminished responsibility may result in total mental incapacity and may prevent or reduce a person's legal as well as moral liability. It does not only affect sentence; it may prevent the formation of *mens rea*. It may reduce the crime of murder to one of culpable homicide, or alter murder with a direct intent to murder with a constructive intent. It may provide extenuating circumstances or merely reduce sentence.

A non-pathological temporary incapacity may be less than total and may result in various degrees of loss of self-control. The extent of diminished responsibility which may be taken into account thus depends on the facts of each case.

The accused was charged with the murder of his wife. He had quarrelled with her over his unfounded suspicions that she was being unfaithful to him. She had been involved in a number of women's organizations and her activities frequently took her away from home. He had seen her being picked up by a man whom he believed to be her lover. He believed he had contracted a venereal disease as a result of her unfaithfulness. The accused and his wife went into the garage at their home to avoid letting their children hear the quarrel. There he took a pistol out of a tool box. He held it to her head and demanded to know the name of his wife's supposed lover. She said that a certain man had proposed love to her, whereupon he pulled the trigger. She died instantly. He claimed that he did not have the requisite *mens rea* for murder because he was suffering from acute emotional distress as a result of his wife's infidelity and his own long history of emotional instability. He was thus, he claimed, in a state of diminished responsibility. In any event, although he was admittedly negligent, the shooting was accidental.

Medical evidence was given, to the effect that the accused was under some emotional stress amounting to diminished responsibility. However, he was not mentally disordered so that a special verdict would be appropriate.

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Held, that the circumstances were not such that the discharge of the pistol could be regarded as accidental.

Held, further, that whether or not the accused's suspicions were objectively correct, he subjectively believed them. Collectively they amounted to provocation, but not such as to wipe out his ability to control his actions. He knew what he was doing. Even though his ability to apply effective self-control was attenuated, he was still capable of forming *mens rea*. In any event, the defence of provocation could not succeed, because the court could not hold that a reasonable man in the same circumstances would have lost his self-control.

Held, further, that although the accused was suffering to some degree from diminished responsibility, it was a mild form which could not wipe out or reduce his legal responsibility.

Held, therefore, that the accused should be found guilty of murder with a constructive intent.

Cases cited:

S v Chin\'ono 1990 (1) ZLR 244 (H)

S v Chitiyo 1987 (1) ZLR 235 (S)

S v Chiwambutsa 1987 (2) ZLR 59 (S)

S v Chretien 1981 (1) SA 1097 (A)

S v Dzaro 1997 (2) ZLR 541 (H)

S v Laubscher 1988 (1) SA 163 (A)

S v Singwahla 1967 (4) SA 566

S v Stephen 1992 (1) ZLR 115 (H)

S v Sulpisio A-104-71

R v Tenganyika 1958 R & N 228 (FS)

Case Information

Miss M Gusha, for the State

M Chitapi, for the accused

Judgment

Mubako J: The accused shot his wife in the garage of their house in Marlborough, Harare, on 14 August 1996. The accused admits causing his wife's death, and tenders a plea of guilty of culpable homicide. He pleaded not guilty to the charge of murder because, he claims, he was suffering from acute mental stress and provocation which produced a condition of diminished

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responsibility.

The details of how the shooting occurred are common cause. The material facts were provided by the accused himself in his warned and cautioned statement and defence outline. There were no eye witnesses to the commission of the offence.

Briefly, the facts are these.

The accused is the general manager of a successful medium sized Harare company called Alpina (Pvt) Ltd and he owns a general dealer's shop in Musana. He has been with this company since 1989. Prior to that he had worked for several companies since he left school in 1972. He was unable to hold to any job for long.

The accused married the deceased in 1989 and the union was stable until about twelve months before the deceased met her death. Previously he had gone through four other marriages before he met his last wife, the now deceased. For six years the accused and the deceased were a happy couple, church going, and fairly affluent. Their problems surfaced in the second half of 1995. The accused became unhappy about his wife's frequent and long absences from home attending seminars and about her refusal to contribute her earning to home expenses. He suspected that she had love affairs with other men and he feared she had placed some "muti" under his pillow. He was

so troubled in his mind that he sought counselling from relations of the couple. However his wife persisted with her attendance of seminars for several organisations (Women's Action Group, Women's AIDS Network etc). His suspicion about his wife's infidelity grew into strong belief. One day he saw her being picked from his home by a car he could not identify, and, as the last straw, he believed that he contracted a STD on the last two occasions after sleeping with his wife. The last such occasion was on 13 August 1996 when he was compelled to consult Dr Chimbeu and received some medical treatment. All this made him extremely angry and agitated.

On 14 August 1996 the accused and his wife went home at night after attending a church service and retired to bed together. A bedroom quarrel erupted with the husband accusing his wife of infidelity and her protesting her innocence. He invited her to go to the garage with him and talk there because the children might overhear them quarrelling in the bedroom. The verbal fight resumed in the garage. The accused then took out a .32 Vzor Pistol from a tool box which was in the garage and held it to her head saying "Tell me whom you sleep with or I shoot you!" She continued to protest her innocence but said that men such as Isaac had proposed love to her. The accused still holding the gun at point blank range asked "Isaac who?" and thereupon he pulled the trigger and shot her.

He described how she fell and died instantly. The accused then wrapped up the body in a tent and loaded it onto a pick-up truck. He cleaned the garage floor to remove the blood, went back into the house to remove his blood stained clothes, took some spare clothes, locked up the house and drove the body some 90 km to Murehwa, to his in-laws' communal home. He

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dumped the body of the deceased outside the village gate at Chikowore village near Kambarami Secondary School. From there he drove off to his shop in Musana and took some $5 000 cash. He proceeded to look for ngangas and he travelled from Mashonaland Central to Plumtree evading arrest for about two weeks. The accused finally surrendered himself with his pistol to the police at Bulawayo Central on 29 August 1996. He had a valid firearm certificate issued on 2 June 1996, just over two months before the tragic events. So much for the facts as related by the accused.

The accused's defence is limited to his alleged state of mind at the time of committing the unlawful act. His contention is simply that he did not have the requisite *mens rea* for murder in that:

(a) he was suffering from acute emotional stress as a result of his wife's infidelity and his life long history of emotional instability. He was therefore in a state of diminished responsibility when he shot the deceased;

(b) the shooting was accidental, though admittedly negligent. He intended

only to threaten his wife in order to extract a confession from her, but he did not check or realise that the pistol was loaded and cocked.

ACCIDENTAL DISCHARGE

The accused claims that he did not intend to shoot his wife but only to scare her and that way extract a confession about her infidelity. We considered that claim against the facts as described by him. He told the court that he was holding the pistol about half a metre from his wife's head, with his index finger on the trigger, and that he remembers pulling the trigger when she said that Isaac had proposed love to her. It does not appear to us that such a sequence of events can realistically be described as accidental discharge. If anyone, whether a marksman or an amateur, pulls the trigger at such a close range the gun is bound to fire and the victim will be shot. It is not an excuse that the accused had not fired the weapon before. Since he certainly knew that it was a lethal weapon which would scare his wife, his inexpertise should have made him more cautious not to hold a lethal weapon which he knew he could not control against someone's head. Such brinkmanship would have been excusable only if he had taken all reasonable steps to ensure that the weapon could not fire. But he did not check to see that the weapon was not loaded and not cocked. He probably did not know how to check. He told the court that he had requested a friend to instruct him on how to use the pistol but never in fact received any lesson. His intended instructor once warned him that the pistol was cocked and unsafe.

In these circumstances, we cannot accept that the death of Sheila Gambanga was the result of an accident. Whatever might have been the primary objective, the death of the deceased was a distinct possibility and the accused took a chance, to say the very least. To have wished that accused's wife could survive this ordeal was to expect a miracle.

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PROVOCATION

We also considered the question of the provocation he was subjected to for a long while before the fateful day right up to the moment he pulled the trigger. He had endured his wife spending days and nights at numerous seminars in Chinhoyi, Kwekwe, Masvingo and Bulawayo. He had seen her being picked up by a man he believed to be her lover. He believed he had contracted venereal disease as a result of his wife's unfaithfulness which he was unable to stop. Finally, there was the heated trading of accusations of infidelity and his wife's mention that Isaac was one of the suitors who had proposed love to her. It matters not that some of his suspicions may have been objectively incorrect or naive. There is no doubt that he believed they were true and did so very firmly.

MUBAKO J

In our view, all this amounted to humiliation and gross provocation though Miss Gusha qualified it by saying that the accused had known for some time that his wife had a boyfriend. However, that does not necessarily diminish his anger - the cumulative effect of the provocation over many months may in fact enhance the anger. In our opinion there was a high degree of provocation but not such as to wipe out the ability to control his actions. He knew what he was doing and is able to recollect every step he took despite his anger. His ability to apply effective self-control may have been attenuated, but we think he was still capable of forming a *mens rea*.

The defence of provocation could not even be claimed on the strength of *R v Tenganyika* 1958 R&N 228 (FS), for if the court were to find that the accused had a subjective intention to kill, the court could not proceed to hold that "objectively considered, the provocation which the accused was subjected to was such that the hypothetical reasonable man placed in the same circumstances as the accused would have lost his self control and killed the deceased". For a criticism of the rule in Tenganyika see *S v Dzaro* 1996 (2) ZLR 541 (H) at 549-550.

DIMINISHED RESPONSIBILITY

The accused's principal defence was that at the time of committing the offence he was labouring from a condition of diminished responsibility as a result of a variety of factors. This line of defence was supported by Dr Chikara, a highly qualified Government psychiatrist who interviewed the accused on two occasions. He found no evidence of present mental illness although he noted that the accused's history was fraught with features of mental instability:

(i) unstable or short-lived marriages;

(ii) unstable work history with frequent job changes not necessarily a change for better jobs;

(iii) seeking psychiatric help and actually being put on medication and also receiving traditional treatment for suspected mental illness;

(iv) throwing his mother's property out of the house although he otherwise loved her and was the one caring for her materially;

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(v) a strong family history of mental illness;

(vi) suspiciousness about his brother bewitching him, refusing to attend one apparently "neutral" brother's funeral, suspiciousness about his wife's infidelity (probably reinforced by his former wife's actual unfaithfulness).

He concluded by saying:

> "In my opinion, Mr Gambanga probably was suffering from some emotional disorder amounting to diminished responsibility at the time of the alleged offence."

MUBAKO J

The court accepts Dr Chikara's overall conclusion that the accused killed his wife while he was under some emotional stress amounting to a level of diminished responsibility. These were the conclusions of an expert in the field of the human psyche and the court is grateful for the guidance.

It is left to this court to determine the impact which that stress may have had on the accused's actions.

From the doctor's findings, the accused does not suffer from any current mental illness which would bring him under the Mental Health Act [Chapter 15:06]. We also found the accused to be sane, intelligent, and with a good sense of humour even from the dock.

Without derogating from Dr Chikara's general conclusion, the court must record some reservations concerning some of the factors which the accused claimed constituted the conditions of diminished responsibility. The accused asked the court to consider almost every adversity that ever befell him in his life time. For example, we were told that as a young boy he fell off a moving bus. That unfortunate accident had no discernible effects on his academic career or on his work performance in later life and was disregarded as too remote. Similarly, we did not consider the accused's concerns about performing the last rites for his dead father or worries about finding "muti" under his pillow or his resort to "ngangas" in times of adversity as signs of mental instability. In this country such beliefs and practices are commonplace even among church-going Christians and among those possessed of a good formal education. They are in no way less responsible before the criminal law for their actions.

Finally, we do not attach much significance to the accused's succession of four short-lived marriages or to his unstable early work history. Such experiences are not uncommon in this day and age for a young man to go through. In any event, for seven years prior to the offence the accused had been cured of his instability for he lived with one wife, the now deceased, and he remains to this day in one and the same job. The court accepts the plea of diminished responsibility, but in our view the proximate cause of that condition was the accused's strong belief in his wife's infidelity, the provocation, fear, anger and stress this engendered in his mind.

We are dealing with a condition which has been termed a "non-pathological criminal incapacity of a temporary nature". The law recognises the general defence of mental incapacity even

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where there is no mental illness: S v Chretien 1981 (1) SA 1097 (A).

There can be degrees of mental incapacity, eg emotional stress, "emotional collapse", "emotional disturbance", "total disintegration of personality".

The causes may be varied, eg fear, shock, anger, tension, provocation, mental or physical exhaustion.

MUBAKO J

In the present case, we already pointed to provocation, fear and anger as some of the factors which operated on the accused's mind. Dr Chikara has suggested others which may have impacted with each other to produce a state of emotional disturbance or breakdown which rendered the accused incapable of directing his actions in accordance with his appreciation of what is right and what is wrong.

No one has suggested that the accused suffered a complete emotional collapse or total disintegration of his personality. His actions leading up to the shooting and immediately following the shooting at the most show mild confusion, but they were generally purposeful and consistent with the actions of a person who had a high degree of control over his faculties. Although his self-control was impaired he had not reached the level of total loss of self-control.

The criminal law attaches different consequences to three distinct stages of abnormality of the mind. In the first place, a person may be mentally diseased or pathologically disordered. If such a person commits an unlawful act which is otherwise punishable as an offence he must be dealt with under the Mental Health Act [Chapter 15:06]. The court is enjoined to pass what is known as a special verdict. This is not the condition we are dealing with here.

Secondly, a person may commit the same unlawful act while suffering from a non-pathological and temporary incapacity to control his action. If that incapacity is total, and this is possible, then the person is incapable of forming a *mens rea* and cannot be convicted of any offence: S v Chretien *supra*.

It is not a correct statement of the law to say that if a man is not certifiable under the Mental Health Act but suffers under some diminished sense of responsibility his condition is not relevant in considering a verdict but only in considering the level of sentence. The formulation of the law by Beadle CJ in S v Sulpisio A-104-71 is apt to be misconstrued. He said:

> "A man may not be certifiable under the Mental Disorders Act and he may not be mentally disordered within the meaning of the criminal law but, nevertheless his mentality may be that of a man who suffers from a diminished sense of responsibility and such a condition, while it may not be relevant in considering verdict, may be very relevant indeed in determining whether or not in a case such as this, a proper sentence should be the death sentence. If the court was satisfied that the appellant suffered from some unusual state of mind such as having a genuine persecution mania or that he was suffering from some diminished sense of responsibility at the time when he committed this offence, this would be a most important factor to be taken into consideration in deciding what appropriate sentence should be."

In a proper case, therefore, a state of diminished responsibility may result in total incapacity and may prevent or reduce the person's legal as well as moral liability. Mr *Chitapi* submitted that it is

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a wrong statement of the law

MUBAKO J

to say that a successful plea of diminished responsibility only affects sentence. I must agree. It may prevent the formation of a *mens rea* or it may reduce the crime of murder to one of culpable homicide, or reduce murder with a direct intent to murder with constructive intent, or provide extenuating circumstances, or merely reduce sentence. Accordingly, S v Sulpisio *supra* should be understood to apply to sentence only in relation to the defence. I also concur that *S v Chin\'ono* 1990 (1) ZLR 244 (H) overstates the dichotomy between legal and moral liability and must be restricted to its own facts. However, the statement which Mr Chitapi seeks to rely on that "in a murder trial a successful plea of diminished responsibility reduces the crime of murder to one of culpable homicide" is also not an accurate statement of the law. It may or it may not so reduce, depending on the degree of self-control the accused has lost. The statement by Dumbutshena CJ was in any case an obiter dictum in both *S v Chitiyo* 1987 (1) ZLR 235 (S) and *S v Chiwambutsa* 1987 (2) ZLR 59 (S).

In Chitiyo the learned Chief Justice was dealing with a case of ten counts of armed robbery and kidnapping, not with murder or culpable homicide.

However, the courts are reluctant to recognise a high degree of diminished responsibility bordering on temporary insanity. In *S v Chin\'ono* the accused's behaviour before he committed the murder of a man he called a wizard could only be described as bizarre. He assaulted the deceased's sister without cause and then his son. After that he stabbed the deceased at a funeral ceremony and boasted that he had killed a wizard. After the stabbing he hit one man with a dagger while asking for the names of three men. He also slapped his father across the face, then went off to sleep in his room. In spite of all this he was convicted of murder with a constructive intent because the accused did have a motive to kill. The claim for total non-pathological incapacity was rejected on the narrow ground that the accused had expressed a motive to kill a wizard.

Similarly, in *S v Stephen* 1992 (1) ZLR 115 (H) the accused woke up in the middle of the night and attempted to throttle his wife but she broke free and ran outside. He proceeded to stab himself as well as his two children who were sleeping in the same hut killing one of them and injuring the other. He claimed that he did not have any recollection of what he did that night. He was however found guilty of murder. His plea of the defence of diminished responsibility on the basis of total incapacity was rejected because it was found in evidence that before stabbing the children the accused closed and secured the door in order to prevent their escape like their mother had done or to prevent any one coming in from outside to save them. Although there was ample evidence of temporary incapacity or loss of self-control, the securing of the door was also a sign of purpose which shows a degree of appreciation of what he was doing.

MUBAKO J

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Chidyausiku J reasoned as follows at p 121:

> "In my view, once a person is capable of some control of his action he becomes capable of forming *mens rea* and therefore liable in law for his actions. The question of the extent of the self-control becomes only relevant for the purpose of sentence."

One cannot fault the logic behind that conclusion. By comparison it will readily appear that the facts of the two cases discussed above show that the accused persons had much less control of their actions than the accused person in the instant case. Mr Gambanga gave the court a detailed description of what he did before, during, and immediately after the shooting of his wife. Such a person cannot be said to have suffered from total incapacity to control his actions. Miss Gusha graphically described the accused's situation as follows:

> "He told the court how he woke up his wife; the subject matter of their argument; his suggesting that they go and argue in the garage where the children would not hear them; how he went and took the gun from the tool box; how he pointed the gun to the deceased who was a metre away with the intention of threatening her so that she could confess who her boyfriend was; that his finger was on the trigger for the deceased to realise that his threat was serious; the exact words that he uttered; how he consciously pulled the trigger and shot at the deceased; how she fell to the ground with blood gushing out. The accused went further to tell how he cried and later noticed that deceased had stopped breathing and he started cleaning the blood and later loaded the deceased's body into his truck and drove to Murehwa. Applying the law in the above quoted cases, this clear sequence of events is indicative of the fact that accused appreciated what he was doing and was, hence, capable of controlling his actions as each and every one of the moves had a purpose up to the time he pulled the trigger. Unlike the above quoted cases where some of the accused could not recall all or some of the events surrounding the killing, the accused person in the present case has a recollection of all the events in their correct sequence. The accused was therefore capable of forming the requisite *mens rea* for murder."

I fully concur with that submission. In fact, compared to a long list of authorities on the subject matter, the present accused person could only be said to have suffered, if at all, from a mild form of diminished responsibility arising from stress, which by itself cannot wipe out or reduce his legal responsibility.

Thirdly, the non-pathological temporary incapacity may be less than total and may result in various degrees of loss of self-control. In other words, the extent of diminished responsibility which may be taken into account depends on the facts of each case. In such a case, if the defence of diminished responsibility is found to exist, it will only go to reduce the sentence which the court can impose. Such a state of diminished responsibility reduces the moral, not the legal, liability of the accused for his action.

The legal position was aptly stated in the case of Sulpisio which I have already cited, and the relevant portion of the judgment reads as follows:

MUBAKO J

> "If the court was satisfied that the accused suffered from some unusual state of mind such as having a genuine persecution mania or that he was suffering from some diminished sense of responsibility at the time when he committed this offence, this would be a most important factor to be taken into consideration in deciding what the appropriate sentence should be."

(*per* Beadle CJ at p 4 of the cyclostyled judgment).

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In the instant case, we have already adverted to the expert opinion evidence by Dr Chikara that the accused was probably suffering from some emotional disorder amounting to diminished responsibility at the time he committed the offence. Various grounds were proffered. The court accepts that general conclusion although it has reservations about some factors taken individually. Specifically, we have made a finding that for some days before the shooting and more especially on the last day itself, the accused felt grossly provoked by what he believed was his wife's infidelity, and, finally, by her admission that Isaac was one of the many men who had proposed love to her.

All this, in our judgment, combined to produce a state of diminished responsibility on his mind which the court must take into account in assessing sentence.

The question then arises whether on the factors before the court the accused can be said to have directly intended to encompass the death of his wife. For some husbands a sincerely held belief in a wife's infidelity is a strong enough motive to want to see her die, and anger that she was the cause of one's sexually transmitted disease which might turn out to be AIDS would be yet another reason for wanting her demise. Nevertheless, it would have to be shown that the accused did seek to bring about the deceased death.

Counsel for the State has submitted that the accused's action was clearly premeditated. The court enquired whether the procurement of a weapon was in preparation for getting rid of an errant wife. Although the weapon was bought during the period when the accuse had started distrusting his wife, we found no evidence to suggest that he intended to use the gun on her at any time before the fateful day.

We also considered the possibility that when he invited his wife to the garage he had planned to kill her there knowing that he had hidden the pistol in the garage We think this to be a strong possibility. However, we also found the accused's averment that he did not think of the gun until they were in the garage - that his only reason for suggesting the move to the garage was to avoid waking the children - equally is plausible.

We have therefore resolved to give the benefit of the doubt to the accused. Similarly we also do not think that the accused's threat to shoot before he pulled the trigger inevitably leads to the conclusion that there was premeditation. His own explanation was that when he uttered the threat he did

not mean it, but simply wanted to extract a confession. That is not a preposterous account of the accused's action. It was proved to us beyond reasonable doubt that the accused set out deliberately to kill his wife.

We also considered whether the accused subjectively appreciated the possibility that threatening his wife with a pistol might have fatal consequences. He was no doubt aware that his wife perceived the pistol as a lethal weapon, hence his faith in its power to elicit a confession. However, his defence is that he subjectively did not realise that she would be killed. We cannot accept that excuse. We are unable to find any reason why a man who did not and

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probably could not render the weapon safe and secure (since he was a complete novice to firearms) would suppose that he was not endangering a person's life by holding the pistol against the person's cheeks and with his fingers on the trigger. In our view, the only inference which can reasonably be drawn in these circumstances is that he did have the subjective foresight that his actions were a danger to the life of the deceased. He cannot truthfully say it never crossed his mind: S v Singwahla 1967 (4) SA 566 at 570.

For that reason we find the accused guilty of the murder of his wife with a constructive intent. In addition, our finding that at the time of the shooting the accused suffered from a condition of diminished responsibility would in any case reduce what looked like a deliberate shooting to a causing of death with a constructive intent.

SENTENCE

Alfred Gambanga, you were convicted by this court of the serious offence of murder with constructive intent. This offence, as you must well know, is one of the most serious offences in our criminal book, most serious because it involves the taking of human life. The courts and other institutions of the State are there primarily to protect human life. To show the seriousness with which the State and the general public look at this offence, the punishment for the offence of murder can be death. It can also be life imprisonment or lesser punishments but it shows that the State takes this offence very seriously.

In your case the court found extenuating circumstances. You were greatly provoked and in fact all the circumstances show that you acted in a state of diminished responsibility. Nevertheless, it remains a serious offence. However, the court is well aware that you acted out of character. You have been a law abiding citizen up to that time. You have no criminal record and the court has received statements of support of good character from the minister of Kambuzuma Church of Christ and from your company.

I am also mindful of your personal circumstances. You are a family man with very important responsibilities. However, these are the sort of things

MUBAKO J

which one expects somebody like you to think about - "What will happen to my family if I do this kind of offence?" In this case you did not. You simply went ahead and gave in to the anger and provocation and all the disappointments you had, and did not control yourself sufficiently in order to avoid taking the life of your own wife.

As I have said, I am mindful of the fact that you are a first offender. I have also been very impressed by the level of co-operation which you have shown throughout the conduct of this case, throughout the investigations in fact as well as throughout the trial in court. You have been a most co-operative witness and the court found your testimony on the whole very truthful.

I have also considered cases to which I was referred by both counsel, S v Laubscher 1988 (1) SA 163 (A) and *S v Dube*, a case heard in this court. I also considered cases such as *S v Dzaro supra* and other similar kinds of cases. All the cases that I looked at, which would be in line with

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your type of offence, indicate that an offence such as yours has got to be punished severely. The Laubscher case is a bit out of line. It is a South African case, and although it is a persuasive authority, it has got to be restricted to its own facts; it is too lenient to be allowed to establish a general rule.

Nevertheless, in spite of all this, one is left with the feeling that you yourself must already have gone through a lot of excruciating experience about what you did, that you should have taken the life of your wife out of mere suspicion, grave suspicion no doubt, but in the end it is suspicion. There could have been many other types of punishments which you could have thought of which would have left your wife still alive. Whatever may have happened even if your suspicions were true, your wife was still capable of repenting and living a normal happy life with you. However, what was done in this case cannot be undone because your wife is no more.

I have also considered what you did after the killing of your wife and I came to the conclusion that most of what you did was a result of panic. One did not put any special blame on you, for example, for dumping the body of your wife in front of the gate and driving away, or for failing to call on the police or on anybody else for help when you realised that you had shot your wife. All these one took as signs of panic, as signs of confusion and I have given you full benefit of the doubt on all these, and indeed as I have said I commended you on your co-operation both with the police as well as with the court.

Having said all this, I return to the fact that you were convicted of a very serious offence and that it is the duty of the courts to protect the sanctity of life. In meting out punishment to you the court will bear in mind the fact that you have been a most co-operative and useful member of society and the court would like to reform you further. Nevertheless, the court also bears in mind the need to deter, not just you from repeating such an offence should

you get an opportunity, but any other person who might be minded to act in the way that you acted.

Accordingly, taking into account all the points I have stated, and taking into account the mitigating factors that have been urged in your favour and taking into account the gravity of the offence you committed and the circumstances in which you committed them, you are sentenced to 11 years' imprisonment with labour.

NATIONAL FOODS LTD v J A MITCHELL (PVT) LTD T/A MITCHELL'S BAKERY 1997 (2) ZLR 14 (HC)

Court **High Court, Harare**

Adam J

Civil application

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11 February & 30 April 1997 Judgment No. HH-82-97

Flynote

Contract - restraint of trade - validity of - agreement by baker to buy flour only from applicant - whether an agreement in restraint of trade - whether agreement enforceable

Headnote

The respondent, a bakery, had entered into an agreement with the applicant, in terms of which the respondent undertook to purchase all its flour requirements from the applicant in return for the applicant surrendering a legal right, the surrender of which was beneficial to the respondent. The applicant applied for an interdict to prevent the respondent from buying flour from other suppliers in violation of the agreement. The respondent opposed the applicant on the grounds that the agreement was unreasonable and should not be enforced.

Held, that agreements in restraint of trade are *prima facie* legal and enforceable.

Held, further, that the onus is on the party seeking to avoid the restraint to establish that the restraint is unreasonable and contrary to public policy or to the public interest and should therefore not be enforced.

Held, further, that not all contractual provisions that inhibit another's freedom to trade are on that account covenants in restraint of trade. A solus agreement for exclusive purchase of a commodity, although an agreement that restrains a party's right to purchase that commodity from another party, must be treated as a normal commercial contract which is enforceable at law rather than a restraint which, if unreasonable, may be avoided. The respondent had not shown in the present case that the tie agreement should not be treated as a normal commercial transaction.

Held, further, that, in any event, the respondent had failed to establish that the tie agreement was unreasonable. The agreement had been freely negotiated on the basis of equality of bargaining power. The respondent had obtained a benefit from the agreement and the applicant had a legitimate and reasonable business purpose in obtaining the solus agreement.

Held, further, that if there had been any breach of the agreement in relation to the price charged for the flour, the respondent had a remedy by way of instituting legal proceedings for breach of the agreement.

Cases cited:

Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1985] 1 WLR 173; [1985] 1 All ER 303 (CA)

Bank of Lisbon & SA Ltd v de Ornelas 1988 (3) SA 580 (A)

Basson v Chilwan 1993 (3) SA 742 (A)

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Book v Davidson 1988 (1) ZLR 365 (S)

Esso Petroleum Co Ltd v Harpers Garage (Stourpourt) Ltd [1967] 1 All E R 699 (HL)

Herbert Morris Ltd v Saxelby [1916] 1 AC 688; [1916-17] All ER Rep 305 (HL)

Mangwana v Mparadzi 1989 (1) ZLR 79 (S)

Paterson v Pichanick & Ors HH-113-93

Printing & Numerical Registering Co v Simpson (1875) LR Eq 62

Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (2) RLR 145 (G)

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

Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 (HL)

Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A)

Case Information

J C Andersen SC, for the applicant

E Matinenga, for the respondent

Judgment

Adam J: In May 1962, the applicant in an agreement ("1962 Agreement") with the respondent (in consideration of certain financial and other services being made available to it by the applicant) agreed that no shares in the respondent held by the then current shareholders or their successors would be sold and no shares be issued to any other person than those current shareholders without the prior written consent of the applicant. In December 1986, the respondent, Blue Ribbon Foods Ltd and the shareholders entered into a "shareholders agreement" ("1986 Agreement"). In Case No. HC-701-87, this court in April 1987 issued an interdict pendente lite restraining The John Alexander Mitchell Trust and Kenneth McKenzie, as the then shareholders, from disposing the shares in the respondent to Blue Ribbon Foods Ltd in terms of the 1986 Agreement. In February 1990, the applicant, the respondent, the current shareholders in the respondent and Blue Ribbon Foods Ltd entered into an agreement ("1990 flour-tie Agreement") wherby, in consideration of the applicant abandoning the interict issued in April 1987 in Case No. HC-701-87 and the rights under the May 1962 Agreement and allowing shares to be sold to Blue Ribbon Foods, the respondent agreed to purchase flour from the applicant. During the currency of that agreement, which was to endure until 30 September 2001, the respondent agreed to purchase from the applicant, its successors, assignees or nominees, all such flour as shall be reasonably required by the respondent at a price equivalent to the normal list price of the applicant in respect of the grade of flour sold and delivered from time to time by the applicant to its customers, which price shall be paid in accordance with the normal terms and conditions determined by the applicant for its customers. There was a proviso that in the event of the applicant being prevented from supplying flour due to circumstances beyond its

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control the respondent would be entitled to purchase flour from other sources. The agreement also indicted that in the event of the respondent purchasing or attempting to purchase flour from any other source in breach

of the agreement the applicant shall be entitled at its option to apply for an interdict restraining the respondent from purchasing flour or using any flour so purchased and in any such application a copy of the agreement shall be good and sufficient evidence of the respondent's undertaking to purchase flour solely and excusively from the applicant and/or to recover from the respondent as and by way of pre-estimated and liquidated damages a sum calculated at 25% of the prevailing selling price of flour in respect of the flour so acquired in breach of the agreement. There were other provisions including the applicant having the right at all reasonable times to enter the respondent's premises to inspect all flour stored or being used.

In the founding affidavit, the applicant indicated that on 3 November 1995 their legal practitioners wrote to the respondent about receipt by it of two loads of 40 tonnes each of flour from Blue Ribbon Foods in breach of the 1990 flour-tie Agreement. In response on 9 November 1995 the respondent's legal practitioners wrote to the applicant's legal practitioners that the respondent's recently appointed manager, Mr Nyazika, had not been made aware of the 1990 flour-tie Agreement but had now been apprised of it and the respondent gave its assurance that the Blue Ribbon Foods flour would not be used or sold in any way in breach of the 1990 flour-tie Agreement. On 21 December 1995, the respondent's legal practitioners informed the applicant's legal practitioners about the use of 560 bags of the Blue Ribbon Foods flour before the situation was corrected. On 9 September 1996, the applicant's legal practitioner wrote again to the respondent about their applicant's Mr Lampitt's complaint made 3 weeks previously to Mr yazika which was completely denied by him, and in addition of another complaint of 9 September 1996 concerning the 6 September 1996 delivery which Mr Nyazika admitted by explaining that the reason for buying imported flour from another source was the applicant's price. In that 9 September 1996 letter, the applicant's legal practitioners once more reminded the respondent of the terms of para 5 of the 1990 flour-tie Agreement which entitled the applicant at its option to apply to the High Court for an order restraining the respondent from purchasing or using flour from another source. That letter was hand delivered on 10 September 1996. Mr Lampitt's visual estimate of the flour in respondent's stock from a source other than the applicant was approximately 4500 x 50 kg bags selling at the price of $250,24 *per* 50 kg bag which amounted to $1 126 080 and so the applicant was entitled to pre-estimated and liquidated damages of 25% of the prevailing selling price.

In the respondent's opposing affidavit, the respondent indicated that it accepted that it had acquired flour from a source other than the applicant since it was entitled to do so as the applicant had increased its price from $234,97 *per* 50 kg bag to $250,24 *per* kg bag after being given a week's notice, that

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Mr Lampitt was informed that the Master Bakers' Association had not yet agreed to an increase in the bread price to which Mr Lampitt suggested the respondent place a big order with the applicant, that the respondent placed an order of 6500 x 50 kg bags (their maximum storage capacity), that other bakers were buying flour from Blue Ribbon Foods which had not increased its price and were buying cheaper imported flour of better quality, that realising the availability of Blue Ribbon Foods flour and imported flour and that the Master Bakers Association had not increased the prices for bread the respondent had no option but to buy flour from Blue Ribbon Foods and imported flour since they would have been kickedout of business as their competitors had not increased their bread prices, that buying flour at that increased price from the respondent meant that they would have traded at a loss and that it was certainly an implied term of their 1990 flour-tie Agreement that the price should be reasonable and a price increased on a week's notice was unreasonable considering the fact that the bread price had not been increased. Mr Lampitt on 27 September 1996, informed the respondent that the applicant had reverted to the old price so the respondent on 30 September 1996 indicated to him that it was prepared to purchase flour at the old price from the applicant. It was averred that the applicant was not entitled to damages and that the respondent was entitled to get flour from other sources besides the applicant purely for the purpose of keeping itself in business so the application made by the applicant must be dismissed with costs.

In the answering affidavit, the applicant indicated that at the Millers' Association meeting it was resolved that the three millers (including Blue Ribbon Foods and the applicant) would increase the price of flour due to increased costs to millers arising from the increase in wheat price as well as a general increase in overheads relating to production of flour and that actual percentage increase agreed upon by the millers amounted to 6.5%. The price at which millers had from time to time sold flour to bakers had never been connected with or depended on in any way with the price of bread charged by bakers to their customers or to any agreed increase in the price of bread reached by the Master Bakers' Association. There was no fixed price for bread sold by the various and numerous bakers around Zimabwe and that bakers upon increase in flour price decide independently of other bakers as to the price at which bread was to be sold which was entirely a market-driven decision. The applicant's experience has been tht difference in the price of bread between bakers varied as much as 30 to 40 cents *per* loaf country-wide. The applicant was not paid for flour supplied to the respondent until 30 days after delivery so the respondent was not financially prejudiced and in fact gained financially by obtaining flour at the old price. Blue Ribbon Foods had

increased the flour price but according to their letter decided to revert back to the old price. On being questoned about this Blue Ribbon Foods replied that the price agreed upon would be increased in early September. But this had not been implemented by Blue Ribbon Foods which made it clear to the applicant that Blue Ribbon Foods had attempted to gain some market advantage by charging the old price. When the applicant realised what Blue Ribbon Foods had done it had no option but to revert to the old price. It averred that the increase of 6.5% in the

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price of flour was by no means an unjustified increase and that it was apparent that a trader had found a way around import reguations applying in Zimbabwe to bring in a small quantity of imported flour. Flour could be purchased from overseas at a cheaper price because foreign wheat growers were often subsidised by their governments. It was for that reason that Zimbabwe Government restricted importation of foreign flour. It was accepted that millers have had various problems from time to time about the quality of their flour and when this occurred the applicant had addressed them. There were many bakers with whom the applicant dealt throughout Zimbabwe who had paid the higher price for flour but who had not increased their price for bread. What the respondent stated was an exaggeration that as consequence of a reasonably moderate increase in the price of flour the respondent would go out of business. This did not accord with the experience of most bakers with whom the applicant had dealt. Notwithstanding the 30 September 1996 intimation that the respondent was prepared to purchase flour at the old price from the applicant, the respondnt continued to purchase flour from other sources in deliberate breach of the 1990 flour-tie Agreement. It averred that Mr Lampitt indicated that on 7 October 1996 there had been 2 x 30 tonnes of flour being off-loaded at the respondent's premises. It was absolutely clear to the applicant that the respondent's intention was to continue to breach the 1990 flour-tie Agreement and not to abide by it. The applicant therefore insisted on an order in terms of the draft.

The applicant filed its heads of argument on 11 December 1996. The respondent filed its heads of argument on 24 December 1996. In them it indicated that the respondent would seek this court's indulgence in filing a supplementary affidavit dealing with issues hitherto unraised in the applicant's answering affidavit. It is clear that the preferred procedure for such an application generally is to seek leave of this court by way of a chamber application to file a supplementary affidavit with such a chamber application being served on the other party in order to allow it an opportunity to respond - Paterson v Pichanick & Ors HH-113-93. Since the applicant has indicated that in so far as the supplementary affidavit is relevant to the applicant's cause of action its admissibility is not opposed, this court granted

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leave to the respondent to file its supplementary affidavit. In that supplementary affidavit, the respondent indicated that in the answering affidavit new issues had been raised, that the respondent denie that on 7 October 1996 2 x 30 tonnes were off loaded at the respondent's premises and that although the applicant had stated that it had not treated the respondent unfairly but the manner in which the applicant was enforcing the 1990 flour-tie Agreement was much to the prejudice of the respondent and that the 1990 flour-tie Agreement was unreasonable and should not be enforceable in this day and age. On 25 October 1996, the respondent phoned the applicant and asked to put aside a certain quantity of flour to be dlelivered on or after 2 November 1996 to the respondent. The applicant informed the respondent that delivery could be made by them on 25 October 1996 but the respondent did not have storage space. On 6 November 1996, the respondent wrote to the applicant that on 20 October 1996 the respondent was informed that it was not possible to effect the order of 25 October 1996 since all invoicing was computerised and everything was to be at the new price. The respondent hoped that the applicant would be more ccommodating in future. On 14

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November 1996, the applicant replied that as the respondent requested delivery on 2 November 1996 this made it impossible for the applicant to accommodate the respondent. The respondent had stated that despite the applicant having received the order before the price increase the applicant refused to invoice the respondent on the basis of the old prices. The applicant acted unreasonably and treated the respondent most unfairly. The respondent had nothing to gain from this 1990 flour-tie Agreement. That the 1990 flour-tie Agreement had been entered into under circumstances which were no longer applicable which was before the bread market had been deregulated. The bread market had been deregulated in 1992.

The Grain Marketing Board had been the sole supplier of both imported and local wheat. Each baker had been allocated its flour through a miller who in turn had been given wheat allocation from the Grain Marketing Board. From 1995 and early 1996 millers were no longer restricted to purchasing flour from the Grain Marketing Board as they could source their flour from anywhere. With the deregulation of the bread and flour markets it was no longer necessary for allocation of bakers to millers. There was therefore no need for this 1990 flour-tie Agreement now because changes had essentially introduced business to be transacted on the basis of willing seller and willing buyer and determined by market forces. A baker could only tie himself to a miller if some other form of support like assistance with packaging, bakery equipment, operational and marketing infrastructure and competitive prices were given, which the respondent did not enjoy any from the applicant and in fact the respondent was paying heavily for being restricted to purchasing

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flour from the applicant. The applicant was selling its flour at $250 *per* 50 kg bag but invoice dated 12 December 1996 from Pioneer Development for flour supplied to the respondent had disclosed the price was $200 *per* 5 kg bag. The respondent had been asked to pay heavily in complying with the 1990 flour-tie Agreement and in fact the applicant's prices were unreasonable in the circumstances. Therefore, the 1990 flour-tie Agreement was unreasonable and in addition the applicant's prices were unreasonable so the respondent was justified in disregarding the 1990 flour-tie Agreement.

In the applicant's supplementary heads of argument filed with leave of this court, Mr Andersen for the applicant submitted that on the facts there is no dispute as to the respondent's refusal to adhere to the 1990 flour-tie Agreement so there can be no material dispute of facts. It is not disputed that, however arrived at, the price of flour was that listed, and the listed price and the quality of the flour are not the reasons given by the respondent for refusing to abide by the 1990 flour-tie Agreement. Mr Andersen submitted that the real object of the respondent's Supplementary Affidavit is to support the respondent's claim that the 1990 flour-tie Agreement should be held to be unenforceable as an agreement in restraint of trade and contrary to public policy. In this regard, that claim by the respondent should have been by way of a counter-application and there is no explanation as to why the facts were not initially set out in the opposing affidavit and in any case are of little or no relevance. So far as he respondent's contention that the 1990 four-tie Agreement is not binding is concerned, Mr Andersen submitted that respondent has not established that the restraint was so wide as to be unreasonable and

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contrary to public policy. The onus is on the respondent to establish that the 1990 flour-tie Agreement should be held unreasonable. That the 1990 flour-tie Agreement is a solus agreement which is a common form of agreement that has been held to be enforceable in a number of cases - Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (2) RLR 145 (G) at 150-165I. Mr Andersen submitted that the above case should be followed since it was correctly decided. In addition, the applicant's listed price for flour applied to all its customers and are calculated to be competitive but for which the applicant would not remain in business. Furthermore, having regard to the circumstances in which the 1990 flour-tie Agreement was entered into and very real benefits obtained by the respondent's shareholders, there isall the more reason to hold the respondent to it.

Mr *Matinenga* conceded that there was no dispute about the respondent's refusal to abide by the 1990 flour-tie Agreement. In the respondent's heads of argument it was submitted by Mr Matinenga that the 1990 flour-tie Agreement was a contract in restraint of trade whose object was to eliminate

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other competitors in the supply of flour to the respondent and so unreasonable. Mr *Matinenga* submitted that this was unreasonable as the public would be denied competitive flour pricing. Mr Matinenga also submitted that the economy of this country had liberalised compared to when the contract was entered into at which time there were restrictions in the supply of wheat to Millers by the Grain Marketing Board. He further submitted that the unreasonableness of the restraint had to be assessed at the time the restraint was challenged - *Book v Davidson* 1988 (1) ZLR 365 (S) at 373.

It is quite clear that agreements in restraint of trade are *prima facie* legal and enforceable - *Mangwana v Mparadzi* 1989 (1) ZLR 79 (S) at 83; Basson v Chilwan 1993 (3) SA 742 (A) at 762. The party seeking to avoid the restraint must establish that it was unreasonable and so contrary to public policy or to the public interest - *Book v Davidson supra* at 385.

However, in Printing & Numerical Registering Co v Simpson (1875) LR 19 Eq 62 Sir George Jessell MR said at 465:

> "It must not be forgotten that ... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that there contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract."

In this connection Herbert Morris Ltd v Saxelby [1916-17] All ER Rep 305 (HL) Lord Shaw observed at 314:

> "The delicacy of the operation of law in settling the bounds of either freedom has long been familiar. In these cases, as I have pointed out, there are two freedoms to be considered, one the freedom of trade and the other the freedom of contract: and to that I will now again venture to add that it is a mistake to think that public interest is only concerned with one. It is concerned with both."

Further, it is important to remember that "not all contractual provisions which in some way or

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another might directly or indirectly have the effect of inhibiting another's freedom of trade are on that account 'covenants in restraint of trade'": Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 439; Esso Petroleum Co Ltd v Harpers Garage (Stourpourt) Ltd [1967] 1 All ER 699 (HL) at 704-705 (Lord Reid), 723 and 727 (Lord Pearce) and 729-730 (Lord Wilberforce).

In Esso case, when considering contracts of restraint which derogate from the right to freely trade or conduct business, Lord Reid said at 705:

> "... all contracts in restraint of trade involve such derogation but not all contracts involving such a derogation are contracts in restraint of trade. Whenever a man agrees to do something over a period he thereby puts it wholly or partly out of his power to 'exercise any trade or business he pleases', during that period. He may enter into a contract of service or may agree to give his exclusive services to another: then during the period of contract

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> he is not entitled to engage in other business activities. No one has ever suggested, however, that such contracts are in restraint of trade except in very unusual circumstances:"

Lord Pearce observed at 723 and 727:

> "If a man wishes to tie himself for his own good commercial reasons to a particular supplier or customer, it may be no kindness to him to subject his contract to the arbitrary rule that the court will always reserve to him a right to go back on his bargain if the court thiks fit ...
>
> The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract viewed as a whole is directed towards the absorption of the parties' services and not their sterilisation. Sole agencies are a normal and necessary incident of commerce,and those who desire the benefits of a sole agency must deny themselves opportunities of other agencies ... Moreover, partners habitually fetter themselves to one another.
>
> When a contract ties the parties only during the continuance of the contract, and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others, there is no restraint of trade within the meaning of the doctrine and no question of reasonableness arises. If, however, the contract ties the trading activities of either party after its determination, it is a question of restraint of trade, and the question of reasonableness arises. So, too, if during the contract one of the parties is too unilaterally fettered, so that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade ...
>
> The difficult question in this case ... is whether a contract regulating commercial dealings between parties has by its restraint exceeded the normal negative ties incidental to a commercial transaction and thus brought itself within the sphere to which the doctrine of restraint applies."

Lord Wilberforce said at 729-730:

> "The development of the law does seem to show, however, that judges have been able to dispense with the necessity for justification under a public policy test of reasonableness such contracts or provisions of contract as, under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations. That such contracts have done so may be taken to show with at least strong *prima facie* force that, moulded under the pressures of negotiation, competition and public opinion, they have assumed a form which satisfies the test of public policy as understood by the courts at the time."

In the Rhodesian Milling case *supra*, Goldin J (as he then was) adopted the approach advanced

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by Lord Reid above and came to the conclusion at 151 that:

> "... the agreement by respondent to purchase his requirements of flour from one supplier is an enforceable contractual obligation even if he thereby deprived himself of the right to exercise his trade or business as he pleases ... The provision to purchase all his flour from the applicant is an ordinary commercial transaction 'for the regulation and promotion of trade' and does not fall within the doctrine of restraint of trade.
>
> In my view, therefore a mere agreement for exclusive purchase of a commodity or to sell

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> only a particular commodity, though its restraints a party's right to buy or sell what he wishes, must be treated as a normal commercial contract which is enforceable by law. Such a solus agreement does not fall within the category of agreements in restraint of trade which require to be justified on grounds of reasonableness."

In *Mangwana v Mparadzi supra*, McNally JA said at 83 and 87:

> "The primary effect of Magna Alloys, as accepted in our law in *Book v Davidson*, was to determine that the principle that contracts are to be obeyed takes precedence over the principle of freedom of trade. Hence the shifting of onus from (in this case) the employer to the employee ...
>
> If he had given serious consideration to the lawfulness or morality of his decision to break the contract he might have been expected to look at the recent cases before reaching his decision ...
>
> The facts of this case, however, reveal the most flagrant and blatant and unrepentant rejection of the whole concept of the restraint clause, and of the sanctity of contracts."

In my view, Magna Alloy's case, as approved by the Supreme Court of Zimbabwe, indicates that a party that seeks to show that an agreement which restricts its "freedom of trade bears the burden of establishing that the public interest would be harmed" if such a contract of restraint was enforced. The court must look at all the circumstances prevailing at the time it has to make the decision whether the restraint in question is not enforceable.

In Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 (HL) Lord Reid said at 622:

> "Any contract by which a person engages to give his exclusive services to another for a period necessarily involves extensive restriction during that period of the common law right to exercise any lawful activity he chooses in such manner as he thinks best. Normally the doctrine of restraint has no application to such restrictions: they require no justification. But if contractual restrictions appear to be unnecessary or to be unreasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced."

Lord Diplock said at 624:

> "The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade ... If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable.
>
> The same presumption, however, does not apply to the other kind of ... contract [that] have not been subject of negotiation between parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by the party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: 'If you want these goods or services at all, these

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are the only terms on which they are obtainable. Take it or leave it.'

To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power ... The fact that the appellants' bargaining power *vis-à-vis* the respondent was

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strong enough to enable him to adopt this take-it-or-leave-it attitude raises no presumption that they used it to drive an unconscionable bargain with him, but in the field of restraint of trade it calls for vigilance on the part of the court to see to it that they did not."

This court is cognisant that freedom of contract and *pacta sunt servanda* are not absolute values and they have given way to other considerations (Bank of Lisbon & South Africa Ltd v de Ornelas 1988 (3) SA 580 (A) at 612-4).

In this matter, the applicant in its bargain with the respondent surrendered its subsisting interdict, gave its consent and allowed the shares in the respondent to be sold to the Blue Ribbon Foods that was beneficial to the respondent (Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1985] 1 WLR 173; [1985] 1 All ER 303 (CA)). Also, initially the respondent in November 1995 gave its assurance to abide by the 1990 flour-tie Agreement. Then in its opposing affidavit in this matter in October 1996 it justified the breach of the agreement because it alleged that it was entitled to obtain flour from other cheaper sources in order to keep itself in business. It was only in the supplementary affidavit in January 1997 that for the first time the respondent raised the point that the 1990 flour-tie Agreement was unreasonable and should now not be enforced. The respondent placed reliance on changed circumstances of deregulation of the bread market in 1992 and of wheat sourcing in 1995 but without providing any eplanation as to why this position was not asserted at those particular times.

It is also clear from the papers filed that the respondent had obtained flour from Blue Ribbon Foods, a shareholder in the respondent and one of the parties to the 1990 flour-tie Agreement. Further, the respondent has not shown why the presumption that in an ordinary commercial transaction reasonableness was not required should not apply to this solus agreement. Also, it has not been established in its affidavits in what way the restraint was harmful to the public interest to hold the respondent to the tie-agreement.

In order to succeed the respondent at least has to establish, when restraints are contained in commercial transactions, that such contractual restrictions are unnecessary; or that one of the parties used its superior bargaining power to extract from the other those exacting promises that were unfairly onerous or that one of the parties used its superior position to drive an unconscionable bargain; or that it would be most oppressive to enforce the restraint. It has not done so.

In Basson v Chilwan *supra*, Eksteen JA said at 762-763:

"The principle of *pacta sunt servanda*, particularly where parties contract on a basis of equality, is generally accepted as an important part of our Roman-Dutch law and stems from the basic requirement of good faith. It is grounded therefore not only in law but also in morality ...

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> Where parties to an agreement in restraint of trade contract on a basis of equality of bargaining power ... Courts, it has been held, will be less inclined to find that a clause, which may be considered to work unreasonably *inter partes*, is contrary to public policy and therefore unenforceable, than in the case where one of the parties may well be considered to have contracted from a position of inferiority...
>
> An agreement to protect one party from ordinary trade competition by the other is therefore not an illegitimate aim to pursue (Forman v Barnett 1941 WLD 54 at 60) and is not *per* se contrary to public policy."

Further, in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 9 Smallberger JA said:

> "The power to declare contracts contrary to public policy should be ... exercised sparingly and only in the clearest of cases."

It has not been suggested by the respondent that by including a restraint clause the applicant was not pursuing a reasonable and legitimate purpose. It was not sufficient for the respondent to allege that the price charged for flour by the applicant was higher than those of other suppliers since the price was that on the applicant's list price for all its customers. The respondent has a remedy by instituting proceedings for any breaches of the 1990 flour-tie Agreement by the applicant in the normal way without having to disregard its obligations freely negotiated on the basis of equality of bargaining power.

The respondent has not persuaded me that the enforcement of the restraint would be so unreasonable as to be harmful of the public interest.

The applicant has invoked the provisions of the 1990 flour-tie Agreement. The respondent has accepted that it has purchased flour from another source besides the applicant. This was contrary to the provisions of the 1990 flour-tie Agreement. It follows that the applicant has satisfied the requirements for the interdict sought in the draft order.

Accordingly, it is ordered that -

1. The respondent be interdicted

   (a) from using flour purchased from any other source other than the applicant during the period 1st January 1996 to date of service of this order; and

   (b) from purchasing any flour after the date of service of this order from any source other than the applicant save in terms of the memorandum of agreement entered into in February 1990 between the applicant and the respondent and others attached to the applicant's founding affidavit.

2. The respondent forthwith deliver to the applicant copies of all invoices and other documents reflecting the quantity of flour purchased by the respondent from any source other than the applicant from 1 January 1996 to date of service of this order.

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3. The respondent pay the costs of this application.

Kantor & Immerman, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

S v DZIMURI & ORS 1997 (2) ZLR 27 (HC)

Court **High Court, Harare**

Smith J & Gillespie J

Criminal review

4 June 1997*(1) Judgment No. HH-94-97

Flynote

Criminal law - common law offences - kidnapping - what is - deprivation of liberty - relevance of length of time during which person is deprived of liberty - accused forcing driver of bus to take them on a short detour - motive unclear - whether kidnapping of driver proved - element of "evil intent" - meaning and relevance of - charge - use of word *plagium* - not likely to be understood by the common person - use of word "kidnapping" preferable - need in charge to allege intention of depriving person of his liberty

Criminal law - defences - de minimis non curat lex - application - principles relevance - effect of conduct upon the community's interests

Criminal procedure - charge - splitting - two offences forming part of single course of conduct - evidence required to prove essential elements of each not the same - general criminality of conduct being adequately punished on one count - may be taken into account in determining whether to regard other count as requiring separate conviction or punishment

Headnote

The thirteen accused were passengers on a country bus. When they were getting off, one of them got into a dispute with the conductor who said that he had not paid for the carriage of a bicycle on the bus. Members of the group were angered by this accusation. They put rocks across the road to prevent the bus continuing. They got on board, assaulted the conductor and the loader. The conductor fled. Members of the group broke two windows on the bus. They then forced the driver to take them to a place called Chereya, instead of to the bus's destination, Gokwe. The driver was thus forced to go some 20 km out of his way. On these facts the accused were charged with public violence and kidnapping. They all pleaded guilty and were sentenced to terms of imprisonment, of which portions were suspended.

The main issue on review was the propriety of the conviction for kidnapping. In particular, the questions of the length of time during which the victim was deprived of his liberty and the accused's intent were considered.

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Per Smith J:

Held , that the length of time for which a person is deprived of his liberty or removed from his parental control is immaterial. The only relevance it may have, apart from affecting sentence, is in distinguishing kidnapping from cases of assault involving only a transient and incidental seizure of a person for a short period, that is, where the principle of de minimis non curat lex applies. In such cases, the court should have regard to the accused's "evil intent". If the "evil intent" was in order to extort a ransom or other benefit, a very short period would suffice. If there were no such "evil intent", a longer period would be necessary. In this case, there was no evidence of how long to took for the driver to go the extra 20 km, though it would not have taken him long. But the accused had not carried off the driver or seized the bus with any "evil intent". Their reasons for making the driver take them to Chereya were unclear. Consequently, the convictions for kidnapping should be set aside.

Per Gillespie J:

Held, that the use of the word *plagium* to describe the offence with which the accused were charged, though recommended in *R v Long* 1970 RLR 1 (A), betrayed much arcane learning and was food too rich for ordinary people. The word "kidnapping" was one generally and reasonably accurately understood by the common person and is the accepted term in South Africa.

Held, further, that the use by Macdonald JA in *R v Long* of the term "evil intent" was not meant to elevate whatever varying motive there may be for the offence into an additional requirement of the necessary element of intention. It was rather an intimation that, although one may be unable in any particular case to ascertain an intention to deprive a person of his liberty for more than a short period of time, an offence will nevertheless be disclosed where the alleged wrong is committed in circumstances (which include consideration of the motive behind the restraint upon the victim) which ought in principle to be regarded as subject to penal sanction.

Held, further, that the application of the de minimis principle is a value judgment. Crimes affect the interests of the community as a whole, not merely those of the individual complainant. If the harm done is very trifling, the community is not really affected. In determining the application of the principle, the judicial officer is charged with a policy decision to be exercised according to all the relevant circumstances of the case. In the case of a charge of kidnapping, where all the circumstances, including the short period of time involved or the absence of any ulterior motive, are such that it might be considered as a matter of policy that the wrongdoing ought not to attract conviction as kidnapping, then an acquittal should follow.

Held, further, that there was not an improper duplication or splitting of charges in this case. Although the two charges formed part of one continuous expression of public and violent dissatisfaction with the bus conductor, the legal intent required for each of the two charges was technically quite different from the other. Nevertheless, the fact that the general criminality of the conduct was adequately punished on another count was a factor to take into account in determining whether or not to regard the kidnapping as a triviality not requiring separate

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conviction or punishment.

Held, further, that the charge should allege an intention to deprive the victim of his liberty and if the accused pleads guilty that intention should be admitted.

Cases cited:

R v Adams & Ibrahim 1911 CPD 863

S v Blanche & Anor 1969 (2) SA 359 (W)

R v Dane 1957 (2) SA 472 (N)

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S v F 1983 (1) SA 747 (O)

R v Ferreira 1968 (2) RLR 218 (A)

R v Gordon 1909 EDC 254

S v Grobler & Anor 1966 (1) SA 507 (A)

R v Jackson 1957 (4) SA 636 (SR)

S v Kgogong 1980 (3) SA 600 (A)

S v Levy 1967 (1) SA 351 (W)

R v Long 1970 RLR 1 (A); 1970 (2) SA 153 (RA)

R v Mabrida 1959 (1) R & N 186

R v Maguire 1969 (2) RLR 341 (A); 1969 (4) SA 191 (RA)

S v Masuku & Anor 1989 (3) ZLR 33 (S)

S v Mellors 1990 (1) SACR 347 (W)

R v Mncwango 1955 (1) PH H2 (N)

R v Motali; R v Buchenroeder (1896) 13 SC 173

R v Peterson & Ors 1970 (1) RLR 49 (G)

Judgment

Smith J: The thirteen accused were passengers on a Chitombo bus. When they got off the bus, the conductor had a dispute with accused No. 5 because he claimed that that accused had not paid the fare for a cycle which had been carried on the bus. This annoyed the accused. They put rocks across the road in order to block the passage of the Chitombe bus. When the bus

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stopped the accused clambered on board and started to assault the conductor and the loader. They broke two windowpanes on the bus, causing damage valued at $l 040. The conductor jumped off the bus and fled. The accused then ordered the driver to drive the bus to a place called Chereya, instead of going on to Gokwe as he had intended. The driver was forced to go 20 kilometres out of his way. The accused were charged with public violence and with kidnapping. They pleaded guilty and were convicted. They were sentenced to 8 months' imprisonment on the first count and 6 month's imprisonment on the second count. Of the total of 14 months' imprisonment, 2 mnths were suspended on condition each paid $80 compensation and 4 months were suspended on condition of good conduct.

The conviction on the first count is in order but that on the second count is not. The charge on the second count was framed as follows:

> "kidnapping: unlawfully and intentionally applied force to the body of Martin the Chitombo bus driver causing Martin to drive to a destination of their will, that is to say caused the driver by force to turn back to Chereya Mission."

In Hunt's South African Criminal Law and Procedure vol II the definition of kidnapping is given as "unlawfully and intentionally depriving a person of liberty of movement and/or his custodians of control", Although these elements were not set out in the charge put to the accused, the accused undoubtedly deprived the bus driver of his liberty of movement in that he wanted to drive to Gokwe whereas they forced him to drive to Chereya

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Mission. Can it be said, however, that they kidnapped the bus driver and, presumably, the passengers in the bus?

In *R v Long* 1970 RLR 1 (A); 1970 (2) SA 153 (RA) the court heard an appeal from a decision of the court *a quo* that the crime of kidnapping was not committed unless the kidnapper intended to deprive the kidnapped person of his liberty for "more than a very short period". Macdonald JA, who delivered the judgment of the court, said that the offence of kidnapping is undoubtedly founded on the lex Fabia de plagiariis of the Roman law. At p 155 he said:

> "In the Digest, 48. 15. 6, the crime is defined as follows:
>
> > 'A freeman who conceals one who is freeborn or a freedman, against his will; or has kept him in fetters, and has knowingly and fraudulently purchased him; or has been associated with anyone in a transaction of this kind; or has persuaded the male or female slave of another to run away from his or her master or mistress; or has concealed such a slave without the knowledge or consent of his or her master or mistress; or has kept him or her chained, or knowingly and fraudulently has purchased the slave, or has been implicated in any of these crimes, shall suffer the penalty of the law.' (Scott's translation).
>
> It deals not only with interference with the personal liberty of freemen and freemen but also with interference with rights of ownership over slaves. The fact that in its original form it protected not only personal liberty but also proprietary rights has, I venture to suggest, been responsible for much of the uncertainty which surrounds the crime at the present time."

The learned Judge of Appeal then went on at p 156 to set out the definition given by Voet. He

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said:

> "Voet 48. 15 defines *plagium* as follows (save for the retention of the name '*plagium*', I am using Gane's translation):
>
> > 'Plagium defined: Plagium is the thieving of a free human being or of the slave of another, when a person knowingly and with evil intent buys, sells, exchanges, makes a gift of or receives as a donation, carries off, seizes or hides such human being or slave, though not also when he does it incautiously because of a mistake,'
>
> Mr Justice Gane's comment on this title is as follows:
>
> > 'This title of a single unnumbered section of 52 lines of Latin may fairly be said to be the foundation of our law on this subject, though in the case mentioned in note (b) a large number of other authorities was also considered. The crime has been rare in South Africa, but its principles are well settled'."

As mentioned in the judgment, in the leading cases of R v Motali; R v Buchenroeder (1896) 13 SC 173 De Villiers CJ stated the law in the following terms at p 178:

> "Man-stealing (*plagium*): that is, the stealing of a human being: is undoubtedly a punishable offence, and consists in the wrongful and unlawful carrying away or concealing of a human being with a view to depriving him of his liberty".

In Long's case *supra*, at pp 156-7, Macdonald JA went on to say:

> "Stripped of references to slavery and the theft of a human being - aspects of the Roman

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> and Roman-Dutch law abrogated by changes in our social system - Voet's definition would read:
>
> > 'Plagium' is committed when a person knowingly and with evil intent ... carries off, seizes or hides a human being although not also when he does so because of mistake.'
>
> The main difference between this definition and de Villiers CJ's is, first, that the latter makes no reference to 'seizing' and secondly, that Voet defines the requisite intent as any 'evil intent' and not merely as an intent to deprive the victim of his liberty. In stating that justus error is a defence, Voet relied no doubt on the Code 9.2.14.
>
> De Villiers CJ's view of the requisite intent has not been accepted in more recent cases which tend to support Voet's view that any 'evil intent' is sufficient. Seldom will a person who 'carries away, seizes or hides' another intend simply to deprive the victim of his liberty. Almost invariably his intention will be to derive some benefit from his actions and any deprivation of liberty which may occur will usually be an incident of the crime and not its object. Freedom from unlawful physical interference is, perhaps, the most important of the various freedoms the law endeavours to protect and, in my judgment, there is no reason why such protection should only be afforded under the criminal law when the 'evil intent' is the intention to deprive the victim of liberty."

Maasdorp JP in R v Adams & Ibrahim 1911 CPD 863 at 866 dealt with the relevance of the time element in a case of abduction as follows:

> "It was argued that there must at least be the intention permanently to remove the girl from the custody of her father. Now, the length of time for which a girl may be removed in a case of this kind may be of importance as showing the intention of the parties. A very short time may be sufficient to show that there was the intention of removing the girl out of the custody of her father. It may be very difficult, if the time is very short, to say what was actually the intention, but here the intention was not only to take the girl to the house where she was kept for a considerable period: some hours: but after that she was to be further conveyed to Port Elizabeth. That intention

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was only frustrated by the girl being followed up by her relatives. The word 'permanently' is, I take it, used by counsel to mean only this: that it must be for some substantial period. It need not necessarily mean for good. Removing the girl from out of the custody of her parents, with the intention of keeping her out of that custody i, to my mind, removing her for a substantial time out of the custody of her parents, and amounts to the crime of abduction."

In the Long's case *supra*, the accused had kidnapped a young girl for a period of two hours and demanded a ransom from her parents. At the trial, exception was taken to the charge on the grounds that the parents of the girl were not deprived of their custody and control "for more than a very short period". Beadle CJ, who was presiding in the court *a quo*, upheld the exception, saying that the intention of the kidnapper must be to deprive the kidnapped person of his or her liberty or its parent or custodian of their custody and possession of the child for more than a very short period. On appeal, the court held that the exception should not have been allowed. It concluded that, as stated in the Adams & Ibrahim case *supra*, the length of time was not an essential element but may be of importance as providing evidence of the accused's intention.

In *S v F* l983 (1) SA 747 (O), the judgment of which is in Afrikaans, the headnote reads as follows:

SMITH J

"In regard to the crime of manstealing (kidnapping) of a young child, as soon as there is an intention to violate the parental authority and effect is given to that intention by removing the child, with or without the consent of the child, the offence is committed and the period of time for which the kidnapper plans to remove the child from the parental authority is not relevant except in cases where the de minimis non curat lex principle is applicable."

The relevance of the period of detention was questioned in S v Mellors l990 (l) SACR 347 (W) at 351 where Goldstone J said:

"The appellant argues that because the detention only lasted about 21_2 hours the appellant should have been reasonably found to be guilty of a lesser offence. This time element argument is based on the appellant's interpretation of the following passage in the judgment in *R v Long* l970 (2) SA 153 (RA) at 161:

> 'The relevance of the time element is in my judgment correctly stated in the first part of the passage from the judgment of Maasdorp JP cited above (in R v Adams & Ibrahim 1911 CPD 863): the length of time may be of importance as providing evidence of the accused's intentions'.

In that passage Macdonald JA emphasized the word 'may', indicating that while this factor may be important in some cases, this is not a general rule to be applied in all cases.

In addition it is important that this proposition be read in its proper context. The three cases cited discuss the use of the time factor as an indicator of intention; all address the issue with respect to the kidnapping of a child. This is important because in such cases the essence of the offence under the lex Fabia is the deprivation of the parents of the custody and control over the child. That statement of Maasdorp JP in R v Adams & Ibrahim to the effect that the time element may be of importance in determining the intention of the parties, is an obiter dictum, and was stated in response to counsel's proposition that there must be the intention to permanently remove a child from the parent's custody to sustain a conviction for abduction. He also stated in the same paragraph, that a very short time may be sufficient to show that there was the intention of moving the child out of the custody of its parents. There is no authority for the argument that the time factor introduced to provide evidence of intenton in one type of kidnapping, namely child stealing, is appropriately applied in this case or has been previously applied

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to a case of this nature.

It is certainly not the case that the lower court was required to deduce the intention of the appellant for the amount of time that Miss Fasser was deprived of her liberty. Even if this factor is to be taken into account, the evidence clearly shows that Miss Fasser was confined in the same room with the appellant for 21/2 hours while he held a gun in his hand the entire time, and while he gave her orders to call various people. This cannot be considered deprivation of liberty for a 'very short time'. In fact, in the Adams & Ibrahim case the time, period involved in that case was 'some hours' and was held to be 'a considerable time period' (see at 867)."

In Chapter XVIII of Snyman Criminal Law 2 ed the crime of kidnapping, which is defined as being unlawfully and intentionally depriving a person of his freedom of movement and/or, if such person is a child, his custodians of their control over him, is dealt with. The learned author states at p 463 that it is still not perfectly clear whether deprivation of freedom or control must last for a specific period of time and, if so, how long this period must be. He points out that in some cases the duration of the deprivation has been regarded

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as a material element of the crime (R v Mncwango l955 (l) PH H2 (N); *R v Jackson* l957 (4) SA 636 (SR) where overnight detention was held to be too short; R v Mabrida l959 (l) R & N 186 where detention of 24 hours "at the most" was held to be too short), whilst in others it has been rejected (S v Blanche & Anor l969 (2) SA 359 (W) where the fact that the deprivation lasted only 8 hours was held to be immaterial; Long's case *supra*, where a girl aged 2 years and l0 months was remoed from her parent's care for a period of only 40 minutes; *S v Levy* l967 (l) SA 351 (W)). He concludes that the weight of authority seems to favour the view that the time factor is immaterial which, in his opinion, is the correct view. Finally, he submits that the only relevance the time factor may have, apart from affecting sentence, is in distinguishing kidnapping from some cases of assault involving only a "transient and incidental seizure" of a person for a short period, i.e. where the principle of de minimis non curat lex applies: see the case of F *supra* at p 752B-C. The "time element" may sometimes be of importance in providing evidence of the accused's intention.

In the present case, there is no evidence of the time it took the bus driver to driver the additional 20 kilometers he was required to do by the accused. If he drove at the speed at which most bus drivers drive on the roads in this country, it would not have taken long for him to have done so, especially if he had the element of fear to spur him on. Usually bus drivers do not require any sort of spur. Be that as it may, I agree with Macdonald JA that the length of time the bus driver and his passengers were deprived of their liberty is not an essential element in determining whether or not the crime of kidnapping or *plagium* was determining the intention of the accused. The accused got onto the bus and told the driver to take them to Chereya Mission, a few kilometers away. They did not, in my opinion, have any intention to deprive the bus driver of his liberty. As Macdonald JA pointed out in Long's case *supra*, a person who "carries off or seizes" another seldom does so in order simply to deprive the victim of is liberty. Almost invariably the intention is to deprive some benefit from his actions and the deprivation of liberty which occurs is usually an incident of the crime and not its object.

As I have said earlier, the "time element" is irrelevant unless the principle of de minimis non

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curat lex might become relevant. In such cases one should, I consider, have regard to the "evil intent" referred to by Macdonald JA in Long's case *supra*. If the kidnapping was in order to extort a ransom or other benefit or for the purposes of threatening some person or persons, then a very short period of deprivation would suffice. If there were no such "evil intent" then a longer period would be necessary. The accused, in this case, merely wanted the driver to take them on a short detour, a little frolic. I do not consider that the accused carried off or seized the bus driver with any "evil

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intent". I might have come to a different conclusion if the accused had wanted the bus driver to take them a considerable distance and they seized him with the deliberate intention of depriving him of his liberty so that he could do so. In his reasons for sentence the magistrate said that it was not clear why the accused orderd the driver to drive them back to Chereya and he continued "It seems that it was now confusion reigning" (*sic*). In those circumstances I do not think it can be said that the accused seized the bus driver with evil intent.

I cannot refrain from criticizing the manner in which the charge on the second count was framed. It refers to the application of force to the body of the bus driver. Not only is that not an essential element of the crime of kidnapping, it is not consistent with the State case. The State's case was that the accused assaulted the conductor and the loader and it was that which inspired fear in the driver. In addition, the charge did not allege that the accused unlawfully and intentionally deprived the driver of liberty of movement, which are essential elements of the crime.

For the reasons set out above, the conviction and sentence imposed on the second count must be set aside. The result is that the total sentence imposed on the accused is 8 months', not l4 months', imprisonment. The suspension of 2 months' imprisonment on condition that the accused each paid $80 compensation on or before 30 June 1997 is appropriate. However, the suspension of 4 months imprisonment on condition of good conduct is connected with the conviction for kidnapping and needs to be amended.

The convictions on the first count (public violence) are confirmed and the convictions on the second count (kidnapping) are set aside. Each accused is sentenced to 8 months' imprisonment of which:

(a) 2 months' imprisonment is suspended on condition the accused person concerned pays $80 to the complainant through the clerk of court, Gokwe, on or before 30 June l997.

(b) 3 months' imprisonment is suspended for 5 years on condition the accused does not, within that period, commit any offence of which public violence or malicious injury to property is an element and for which he is sentenced to imprisonment without the option of a fine.

Gillespie J: I respectfully concur in the conclusion of my learned brother Smith. I would,

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however, like to state my own additional reasons for doing so.

The offence of which the accused have been convicted on the second count is charged *sub nomine* "kidnapping". This is in fact a departure from the recommended terminology in the leading case on the offence in this jurisdiction. In *R v Long* 1970 RLR 1 (A) (also reported as 1970 (2) SA 153 (RA)) Macdonald JA (as he then was) suggested, at 11F:

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> "Throughout this judgment I have used the word '*plagium*' to describe the crime. Words suggesting that 'theft' is an element convey, in my view, a wrong impression of the nature of the crime, and the term 'kidnapping' is also unsatisfactory, since it is not, in its ordinary meaning, understood as including crimes which, in English law, amount to no more than false imprisonment. The word '*plagium*' has none of these disadvantages. Its use has never been abandoned, and to use it in preference to less suitable alternatives does not, therefore, involve a departure from practice."

While the term "*plagium*" has its undoubted attractions for the jurist, reflecting as it does the origins of the offence in the Roman Law, and betraying much of arcane learning, I rather fear that it is food too rich for ordinary people.

In "Plain Speaking in the Law", his inaugural lecture as Professor of Law at the University College of Rhodesia and Nyasaland - now the University of Zimbabwe - delivered on 21 September 1967 and published by the University under that title, Professor R H Christie wrote:

> "A few months ago we organised a short refresher course for magistrates here in the Department [of Law]. Amongst those who spoke was Qu net JP on the judicial function. In the course of discussion, which followed his address, a question was asked about the form that a judgment should take. He replied in words that made a great impression on me:
>
> > 'The best judgment is one which is completely clear and understandable, because, after all, judgments are not simply for the esoteric few. By that I mean not just for the profession which has a knowledge of the law. A judgment ought to be understandable by the public because it is the public, in the end, with which we are concerned.'
>
> I have quoted those words as they were spoken. A regard for truth compels me to disclose that in editing them for publication Sir Vincent deleted the words 'esoteric few' and substituted the word 'initiated'. No doubt he felt that 'esoteric' was the sort of word that would only be understood by the esoteric few. Whichever version you prefer, the meaning is the same. Magistrates always, and judges most of the time, address their judgments not to posterity but to the public - the public that sits in court or reads the next morning's newspaper. If the public cannot understand what their judgments are all about, the effort put into composing them has been wasted. It needs only a slightly increased effort to reduce the length and complexity of any judgment so that the message it conveys is clear to all."

I recount the anecdote in order to reinforce the notion that the law must strive to be comprehensible to as many people as can be.

All the South African texts now describe the crime as kidnapping. Judicial precedent in South Africa and Zimbabwe makes use of that nomenclature. The Specimen Indictment Handbook used in the lower courts in this country adopts the common description. The term "kidnapping" is one which is generally, and I would venture to suggest reasonably accurately, understood by the common person. It has a meaning sufficiently clear to all. The word "*plagium*" I think

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commends itself only to antiquarians; it conveys to the man in the street nothing other than that the law is a particularly obstinate beast. I suppose that euphemism is itself grounds for criticizing an apparent judicial pedantry in the reluctance to call an ass an ass. That pedantry need no longer extend to calling kidnapping *plagium*.

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As kidnapping, the form of summary jurisdiction charged the offence in these terms:

> "[The accused] unlawfully and intentionally applied force to the body of Martin the Chitombo bus driver causing Martin to drive to a destination of their will that is to say caused the driver by force to turn back to Chereya Mission."

Smith J has already identified a deficiency in this formulation. The error pointed out is the allegation that force was applied to the person of the complainant. This is at variance with the facts. One can identify the source of this anomaly. It arises from the fact that the Specimen Indictment Handbook, which I have already referred to, gives the following as the recommended averments in the case of the kidnapping of an adult:

> "In that on the ... and at ... A unlawfully and intentionally applied force to the body of B, by causing B to be handcuffed and secured to a tree for a period of four days, thereby depriving B of his liberty and causing him injuries."

This is plainly formulated with reference to a specific factual situation. The application of force to the person of the complainant is by no means an essential element of the offence. Even shorn of its reference to individual facts, this is nevertheless not the most desirable method of proffering the averment. I consider at the close of this judgment a preferable form of specimen charge. The major defect in the present charge, however, is a failure clearly to allege the element of intention.

In Long *supra* at 6D-I, Macdonald JA considered a definition of the offence advanced by de Villiers CJ in R v Motati; R v Buchenroder (1896) 13 SC 173 at 178. The Old Chief opined that the intention involved was "a view to depriving [the complainant] of his liberty". The learned Judge of Appeal compared this with a definition derived from Voet, namely that:

> "Plagium is committed when a person knowingly and with evil intent ... carries off, seizes or hides a human being ... "

Macdonald JA regarded the definition of de Villiers JA as inadequate to the extent it dealt with the question of *mens rea*, saying:

> "Seldom will a person who 'carries away, seizes or hides' another intend simply to deprive the victim of his liberty. Almost invariably, his intention will be to derive some benefit from his actions; and any deprivation of liberty which may occur will usually be an incident of the crime and not its object. Freedom from unlawful physical interference is, perhaps, the most important of the various freedoms the law endeavours to protect; and, in my judgment there is no reason why such protection should only be afforded under the criminal law when the 'evil intent' is the intention to deprive the victim of liberty."

The learned Judge of Appeal went on to show that one other possible "evil intent" would be an

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intention to deprive the guardians of a kidnapped minor of custody of the minor.

Modern South African authority now recognises that the intent involved in kidnapping may be said to differ according to whether the victim is an adult or a child. Thus in Hunt South African Criminal Law and Procedure vol II, 3 ed by Milton, at p 547, it is said that:

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> "X must intend (actually or legally) to deprive Y of liberty or his custodian of control."

The definition of the offence which appears in Milton's edition of Hunt as:

> "Kidnapping consists in unlawfully and intentionally depriving a person of liberty or movement and/or his custodians of control"

similarly acknowledges both species of the offence and has been cited with approval in numerous South African and Zimbabwean cases, for instance in S v Mellor 1990 (1) SACR 347 (W) at 351I and in S v Masuku & Anor 1989 (3) ZLR 33 (S) at 37G, and has been adopted in both jurisdictions.

This leaves one rather querying the position of the reference by Macdonald JA to an "evil intent" in the passage cited above. It has not, as far as I can determine, been considered in any subsequent judgment. The concept was referred to in passing in Masuku *supra* at 37H-38A, where Korsah JA wrote:

> "Clearly then, the nature of the offence is an attack on, and the infringement of, the personal liberty of the individual. The law is concerned with two things: the protection of personal liberty (a) from any interference and (b) from any restraints upon freedom of movement. So that the relevant ingredient of the crime is the absence of consent of the person who is taken, even where that person is a child. A seizure of a person with evil intent without his consent, however transient, is an interference with his personal liberty."

It seems to me that reference to "evil intent" may be susceptible of misunderstanding - it may be thought to suggest that an intent, in vacuo as it were, to deprive an adult of his liberty is insufficient: that there must be some evil design behind it.

This is not a correct understanding of the matter. Macdonald JA, in referring to an "evil intent", was unarguably intending to enlarge, and not to restrict, the concept of *mens rea* for kidnapping. He was rather concerned with extending broader protection to liberty than with circumscribing the offence. This appears from his reference to the need for wider protection of that freedom. It must be remembered that he was writing at a time when, and in a context where, the persuasive text on the subject suggested that, in order for an offence to be disclosed, it was necessary for the curtailment of liberty to last for more than a very short time. Indeed, the *ratio decidendi* in the judgment is that a time element in respect of the deprivation of liberty is not an essential element of the offence but may be of importance as providing evidence of the accused's intention. Seen in this light, his reference to a deprivation of liberty being frequently an incident of the offence rather than its object, and to an "evil intnt", can be understood as not intending to elevate whatever varying motive there might be for the offence into an additional requirement of the necessary element of intention. It is rather an intimation that, although one may be unable in any particular case to ascertain an intention to deprive a

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person of liberty for more than a short period of time,

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nevertheless an offence will be disclosed where the alleged wrong is committed in circumstances (which circumstances include consideration of the motive behind the restraint upon the victim) which ought in principle to be regarded as subject to penal sanction.

This same idea is propounded, although in terms less susceptible of misinterpretation, by Professor P M A Hunt in (1967) 84 SALJ 276. The notion is repeated in the first and second editions of Hunt's opus on criminal law and procedure and is presently in the third edition, Milton's Hunt, expressed as follows:

> "In principle, there seems no reason to require that the deprivation of liberty or custody should endure for any length of time. Recent decisions justify the view that there is a deprivation of liberty or custody when there is any substantial interference with freedom of movement, what is 'substantial' being treated by the de minimis principle and relating not only to matter of time but also of space and other factors."

The concept of praying in aid the principle de minimis non curat lex in order to determine whether any alleged kidnapping ought in law to be visited with criminality has been referred to, although apparently not examined in any great depth, in the cases of *S v F* 1983(1) SA 747 (O) and S v Masuku & Anor *supra*.

Korsah JA in Masuku, at 38F, cites with apparent approval the foregoing citation originally coming from Hunt. In *S v F* at 752B-C the following appears in the judgment of Smuts J, who was writing in the particular context of the kidnapping of a child but expressing a principle which must be applicable to all kidnappings:

> "Sodra daar 'n bedoeling is om inbreuk te maak op die ouerlike gesag en uitvoering gegee word aan daardie bedoeling deur die kind te verwyder, met of sonder die toestemming van die kind, is die misdaad gepleeg en ek kan geen rede insien waarom die tydperk wat die ontvoerder van plan is om die kind uit die ouerlike gesag te verwyder ter sake is nie behalwe in gevalle waar die beginsel de minimis non curat lex van toepassing is."

I translate this as follows:

> "As soon as there is disclosed an intention to infringe the parental authority and effect is given to that intention through the removal of the child, with or without the child's consent, the crime is committed and I can perceive no reason why the period of time for which the kidnapper contrives to remove the child from the parental authority is relevant save in cases where the principle de minimis non curat lex is applicable."

The de minimis principle is recognized as part of the criminal law. It applies to its fullest extent to permit of an acquittal where such is the triviality of the alleged offence that it ought not to have been prosecuted. Thus, speaking in the context of the applicability of the rule to a charge of theft, Trollip JA said in S v Kgogong 1980 (3) SA 600 (A) at 603 in fine-604:

> "Hence, in my view, where the offence alleged is a simple theft of an article of trivial or no value, the accused should not be prosecuted therefor, but if he is, he should generally

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> be acquitted. For, in the contemplation of the law, because of the de minimis rule, the offence must be regarded as not having been committed."

Whether or not to allow an acquittal on the grounds of the triviality of the alleged offence is a value judgment. As is said in Burchell and Hunt South African Criminal Law and Procedure vol I at 321:

> "It is true that a crime affects the interests of the community as a whole and not merely the individual complainant. But if the harm done is of a very trifling nature the community is not really affected and would not be prejudiced if the accused were acquitted."

The same balance is reflected by Trollip JA in Kgogong *supra* at 603:

> "That is a practical approach to the problem and better serves the administration of justice in our busy courts - they should not be concerned with such trivialities - while at the same time it does not adversely affect the interests of the community as a whole (cf Burchell and Hunt South African Criminal Law and Procedure vol 1 at 321; van der Keessel (*ibid* 47.1.5 at 321)."

In determining the application of the de minimis principle, the judicial officer is charged with a policy decision to be exercised according to all the relevant circumstances of the case. In the words of Beadle CJ in *R v Maguire* 1969 (2) RLR 341 (A) at 343B-E; 1969 (4) SA 191 (RA):

> "It seems to me that, wherever the defence of de minimis non curat lex is raised, the court has to consider all the circumstances under which the blow which is said to be trivial was delivered. In some circumstances, a blow may be considered so trivial as to justify the court ignoring it altogether; in different circumstances, a similar blow might be a relatively serious assault; for example, slaps delivered by fishwives to each other during a drunken brawl might well be ignored on the principle of de minimis non curat lex whereas an unprovoked slap delivered to the face of a lady, say at a garden party, could not be similarly ignored.
>
> I intend to approach this case on the basis of examining all the circumstances under which this blow was delivered and decide whether or not, in those circumstances, it would be proper for a court to come to the conclusion that the assault is of such a trivial nature as to warrant the court ignoring it altogether."

(See also the comment on this case in Burchell and Hunt op cit at 321n 13). In addition, as is pointed out in Snyman Criminal Law 3 ed p 128:

> "Whether the trifling nature of the act or of the infringement of the law should be regarded as a complete defence or merely a ground for mitigation of punishment, depends upon the circumstances of each individual case."

The extent of the applicability of the principle is, on the authorities, very limited. Examples that are commonly given are, for instance, the theft of something having absolutely no monetary value, such as a pin. I regard such statements as this not intended to be determinative of the ambit of the rule. They are, I consider, intended as illustrative, perhaps by reductio ad absurdum, of the narrow limits of its sphere of operation. The short concurring judgment of Holmes J, as he then was, in R v Dane 1957 (2) SA 472 (N) at 473, is perhaps as telling as any learned comment on how to determine whether the

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triviality of circumstance of anti-social behaviour warrants criminal prosecution and conviction:

> "I agree. I think the Crown has made a mountain out of a mole-hill. The appeal is allowed and the conviction and sentence are set aside."

One has reached the stage in this judgment, therefore, where one can hold that the offence of kidnapping is one which involves the deprivation of liberty of a person, or the deprivation of a minor's guardian of the custody of that minor. The *mens rea* for such an offence is actual or constructive intent to bring about the deprivation of liberty or of custody. There is no requirement that the deprivation last for more than a short period of time, nor that there be any evil intent or motive attending the deprivation. Where, however, all the circumstances of any alleged offence, including the short period of time involved or the absence of any ulterior motive, are such that it might be considered as a matter of policy that the wrongdoing ought not to attract conviction as kidnapping, then according to the principle de minimis non curat lex an acquittal might follow despite the apparent presence of a wrongful deprivation of liberty and a constructive intent at least to bring that about. To this extent at least I a in full and respectful agreement with the judgment of Smith J.

I must, however, confess some uncertainty as to whether in this particular case it is proper to regard the accuseds' treatment of the unfortunate bus driver as so trivial as not to warrant criminal sanction. These, in my view, are the factors suggestive of the correctness of such an approach. First, any deprivation of liberty that was perpetrated was, in terms of space and time, very circumscribed. Before, during and after the supposed deprivation of liberty, the alleged victim was sitting in his seat behind his steering wheel driving his bus. The period during which he might have been under any constraint could not have been long. Second, there was no force applied to him, neither to restrain him nor to compel to go where he would not, nor is there any evidence of threats uttered against the driver. One cannot ignore the likelihood that in the circumstances of violence attending the whole affair there might have been no little affright generated in the minds of all, nevertheless there is nothing on the agree facts, other than supposition, to show that the driver was not free to refuse to drive the accused if he did not wish to drive out of his way. Third, there is nothing to suggest a positive intent to deprive the bus driver of his liberty; although it may be that a constructive intent is theoretically a possible inference, given that logically a temporary deprivation of liberty to go to point A is a necessary consequence of being obliged to travel to point B. Fourth, there is no evidence of any motive to exploit the alleged deprivation of liberty - no question of hostage taking, ransom demand, instilling terror or any other such object. Finally, the alleged

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kidnapping may be seen as but one aspect of the whole course of conduct which has been charged as public violence on count one.

On this last feature, I have given some consideration to the question of the principle against the splitting of charges or duplication of convictions.

> "We profess to follow the rule that where the act or offence is in substance the same, a multiplicity of charges is

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not to be allowed."

Per KotzŽ JP in R v Gordon 1909 EDC 254 at 268. In S v Grobler & Anor 1966 (1) SA 507 (A) at 523F Wessels JA said at 523F that:

> "The test or combination of tests to be applied are those which are on a common sense view best calculated to achieve the object of the rule. In so far as the 'single intent' and 'continuous transaction' test is concerned, the distinction between motive and intent and the different intents inherent in different offences must not be overlooked."

As far as common sense might be concerned, one is attracted to the notion that the accuseds' activities here all form one continuous expression of public and violent dissatisfaction against the relevant bus company. On the authority of many cases, therefore, it might be said that the conviction on both counts is inappropriate and the kidnapping, being in its circumstances the less serious of the two, should be quashed; see for instance R v Ferreira 1968 (2) RLR 218 (A) at 270B-F. As Wessels JA pointed out, however, in terms approved by Beadle CJ in R v Peterson & Ors 1970 (1) RLR 50 (G), the distinction between motive and intention must be maintained.

The kidnapping, if kidnapping it was, was committed with a motive similar to that affecting the public violence but the intent, in the sense of the requisite *mens rea*, was technically quite different. Further, although the two separate activities are part of a single course of conduct, the evidence required to prove the essentials of each is not the same. Hence one does not need the evidence of public violence to establish any part of the kidnapping, and vice versa. As Beadle CJ said in Peterson *supra* at 52F-G:

> "It is true that both these crimes were related, in the sense that they formed part of one continuous transaction. That is a matter which may properly be taken into account ... in dealing with the question of sentence; but because criminal acts all form part of one related transaction, it does not mean that separate crimes are not committed."

It cannot therefore be said that there was an improper duplication of convictions in this case. Nevertheless, the fact that the general criminality of the conduct, apart from any technical kidnapping which may be established, is adequately punished on another count is a factor to take into account in determining whether or not to regard the kidnapping as a triviality not requiring separate conviction or punishment.

After giving full consideration to these various principles, it appears to me undoubtedly that the circumstances operate in the accuseds' favour at least to the extent of justifying both counts being treated as one for sentence. Yet,

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I confess I remain plagued with some hesitation as to whether it can be said that the alleged kidnapping, assuming it to have been established, is amenable to so favourable an application of the de minimis rule as to warrant the acquittal of the accused. I do not wish to suggest in any way that the decision of Smith J on the issue is incorrect, merely that I experience some difficulty in arriving at the same result. Fortunately, I am spared the task of having to resolve that difficulty because I consider that there is an additional basis upon which the conviction for

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kidnapping is vulnerable to interference.

I have already intimated dissatisfaction with the manner in which the charge was framed, in particular with its averment as to intention. I have in addition referred to the absence of any evidence of positive intent to kidnap. It is true that the accused pleaded guilty to the offence of kidnapping. It is, however, fundamental to the acceptance of, and proper conviction on, any plea of guilty which requires confirmation, as does the present, that the essential elements of the offence, to which a purported admission is offered, be properly explained to the accused. The generally accepted, although by no means exclusively correct, manner of effecting this explanation is in the form of a series of questions put by the court and designed to elicit an admission as to each of the essential elements of the offence. The magistrate purported to put such questions. The record reveals the following exchange of questions and answers in connection with the count of kidnapping:

"X - Count 2

X - Later the driver was forced to drive to Chereya Mission?

- 1 - yes 2 - yes 3 - yes 4 - yes 5 - yes 6 - yes 7 - yes 8 - yes 9 - yes 10 - yes 11 - yes 12 - yes 13 - yes.

X - And he drove 20 km back against his will?

- 1 - yes 2 - yes 3 - yes 4 - yes 5 - yes 6 - yes 7 - yes 8 - yes 9 - yes 10 - yes 11 - yes 12 - yes 13 - yes.

X - On the day in question did anyone have the right in both matters [ie counts] to behave in this manner?

- 1 - no 2 - no 3 - no 4 - no 5 - no 6 - no 7 - no 8 - no 9 - no 10 - no 11 - no 12 - no 13 - no.

X - And you knew it was unlawful to do so in both matters?

- 1 - yes 2 - yes 3 - yes 4 - yes 5 - yes 6 - yes 7 - yes 8 - yes 9 - yes 10 - yes 11 - yes 12 - yes 13 - yes.

X - Any defences to these matters?

- 1 - no 2 - no 3 - no 4 - no 5 - no 6 - no 7 - no 8 - no 9 - no 10 - no 11 - no 12 - no 13 - no."

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If, as all the authorities show, the *mens rea* for this offence is the intent to deprive the victim of his liberty, this questioning is deficient since it does not address the issue of intent at all.

Had the charge been more felicitously formulated, the magistrate would no doubt himself have been alerted to the need to explain the element of intention. In order to avoid similar future failures, I suggest that the specimen charge in the Specimen Indictment Handbook, upon which this charge was based, should not be used. In preference I would recommend the specimen indictment proposed in Milton's Hunt (*supra*) at 549. However, the charge may be worded, in this case the plea of guilt, in my view has not been properly confirmed. The essential element of intention has not been explained to the accused. They have not admitted an intention to deprive the victim of his liberty. They should not have been convicted on their pleas as they were.

If the conviction is quashed on this basis, the question of remittal for trial de novo would

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theoretically arise. In all the circumstances of this case, however, I am satisfied that a remittal is not appropriate. In the result, I concur in the order made by SMITH J.

MUNGADZE v MURAMBIWA 1997 (2) ZLR 44 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

8 June 1997 Judgment No. S-95-97

Flynote

Landlord and tenant - lease - termination - fixed term lease - whether landlord may terminate lease because he requires premises for his own use

Headnote

The parties entered into a written agreement of lease, in pursuance of which the respondent let to the appellant commercial premises in Harare for a fixed period of five years. Before the expiry of the period, the respondent gave notice of cancellation of the lease, on the genuine grounds that she required the premises to conduct a business of her own, for which she had obtained the necessary licence. In the magistrates court, her action for ejectment was successful, the magistrate holding that she had "good and sufficient grounds" for requiring recovery of the premises.

Held, that the concept of "good and sufficient grounds" is applicable to statutory tenancies, which come into being on the expiration of the lease, either by effluxion of time or in consequence of notice having been duly given. The appellant did not fit into this category of lessee.

Held, further, that though Roman law allowed a lessor to eject a lessee without consent if he required the premises for his own use or purposes, this rule was never received as legal principle in Holland and is not part of our law. It is contrary to all the basic principles of the law of contract. A landlord and tenant are bound by the terms of their contract and a fixed term contract may not be terminated early unless there has been a breach by the tenant. Notice to quit early may not otherwise be given unless the premises have become dangerous or urgently in need of repair and vacation is necessary for that purpose. Even then, the lessee would ordinarily be permitted to resume occupation upon completion of the repairs.

Cases cited:

Boka Entrprs (Pvt) Ltd v Joowalay & Anor 1988 (1) ZLR 107 (S)

S Goulding (Pvt) Ltd v A & L Hldgs (Pvt) Ltd S-233-91

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Mobil Oil Zimbawe (Pvt) Ltd v Chisipite Svc Station (Pvt) Ltd 1991 (2) ZLR 82 (S)

Moffat Outfitters \(Pvt\) Ltd v Hoosein \& Ors 1986 (2) ZLR 148 (S)

Case Information

D P Drury, for the appellant

No appearance for the respondent

Judgment

Gubbay CJ: On 1 January 1991, the parties to this appeal entered into a written agreement of lease. In pursuance thereof the respondent let to the

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GUBBAY CJ

appellant the commercial premises owned by her, known as Stand No. 9439, Glen View Township of Glen View, Harare, for a fixed duration of five years, to terminate on 31 January 1996.

Nonetheless, prior to the specified date of expiry, the respondent gave notice of cancellation of the lease with effect from 1 May 1995, requiring the appellant to vacate the premises on or before 30 April 1995. The right to prematurely terminate the lease and evict the appellant was founded on the respondent's genuine desire to assume occupation of the premises herself in order to conduct thereon the business of a bottle store - the necessary liquor licence having been granted.

The appellant's refusal to accede to the demand to vacate led to proceedings being instituted against her in the magistrate's court. Her resistance to the action proved unsuccessful. The magistrate held that in terms of s 22(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) ("the Regulations"), he was satisfied that the respondent had "good and sufficient grounds" for requiring the recovery of possession of the commercial premises and, consequently, the ejectment of the appellant. Reliance was placed for this conclusion upon such decisions as Boka Entprs (Pvt) Ltd v Joowalay & Anor 1988 (1) ZLR 107 (S), Mobil Oil Zimbabwe (Pvt) Ltd v Chisipite Service Station (Pvt) Ltd 1991 (2) ZLR 82 (S) and S Goulding (Pvt) Ltd v A & L Hldgs (Pvt) Ltd S-233-91 (not reported).

An examination of these cases reveals that in each the lessee was a statutory tenant. There is no suggestion that any of them were occupied under a written lease, for a fixed period which had not expired. A statutory tenancy of commercial premises is one which comes into being upon expiration of the lease either by effluxion of time or in consequence of notice duly given by the lessor; and the lessee remains in personal occupation by virtue of the provisions of s 22 of the Regulations. Plainly, the appellant did not fit into this category of lessee.

But did the respondent. who admittedly required the premises for her own use, derive the right to expel the appellant under the common law?

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According to Wille's Landlord and Tenant in South Africa 5 ed at 145, Roman law allowed a lessor to eject the lessee without consent if he required the premises for his own use or purposes (Codex Justinianus 4:65:3); and that all the eminent Roman-Dutch jurists supported this rule with the qualification that the landlord must require the premises nova causa - for some reason of necessity which did not exist at the time the lease was entered into. Only van der Keessel disagreed, observing that:

> "Such a rule is hardly consistent with the spirit of our laws by which a lease is of greater force than a sale" (Theses Selectae 675).

Wille goes on to say at 146:

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> "The question arises whether our common law recognises this rule or not. If it does, it is evident that the landlord's covenant not to interfere with the tenant's enjoyment is so whittled down as to leave it practically nugatory; further, how can a lease in such circumstances be said to confer a real right? The fact that the overwhelming majority of the Roman-Dutch jurists recognised the rule would seem to show that it was accepted in Holland, and yet the Hon Melius de Villiers (1919 SALJ 234 at 236) says 'It may safely be concluded from the fact of the lessee's greater rights under Roman-Dutch law than under Roman law that this rule was never received as a legal principle in Holland'. It is submitted that in the Transvaal and Natal today, the rule, if it was ever recognised, has been abrogated by disuse."

The exclusion by the learned author of the Cape Colony and Orange Free State was because the legislation specifically declared that "no lease of land shall become void or voidable on the ground that the lessor himself had absolute need of the land or other property leased".

Cooper Landlord and Tenant 3 ed at 322 excludes the rule in even stronger language:

> "(It) seems contrary to the basic principles of the law of contract and there can be no doubt that it is not part of South African law."

Insofar as the law of this country is concerned, I conceive of no basis upon which to hold that the rule - even assuming it was received as a legal principle in Holland - is applicable today. The position is simply that a landlord and his tenant are bound by the terms of their contract. If a fixed period is agreed, earlier termination will not be possible unless there has been a breach by the tenant. Notice to quit cannot be given before the expiry of the lease, save where the premises have become dangerous or urgently in need of repair and vacation becomes necessary for that purpose. Even in that situation, the lessee would ordinarily be permitted to resume occupation upon completion of the repairs. See *Moffat Outfitters \(Pvt\) Ltd v Hoosein \& Ors* 1986 (2) ZLR 148 (S) at 153A-F.

It was essentially for these reasons that at the hearing of the matter it was ordered that:

1. The appeal is allowed with costs.

2. The order of the court *a quo* is set aside and substituted by the following: "The plaintiff's claim for the ejectment of the defendant from Stand No. 9439, Glen View Township, is dismissed with costs."

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McNALLY JA: I agree.

EBRAHIM JA: I agree.

Gollop & Blank, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

DEWERAS FARM (PVT) LTD & ORS v ZIMBABWE BANKING CORP 1997 (2) ZLR 47 (HC)

Court **High Court, Harare**

Gillespie J

Application for rescission of default judgment

3 December 1996 & 2 July 1997 Judgment No. HH-112-97

Flynote

Bank - statements - sending of statements regularly - whether customer who does not object should be held tacitly to agree with practice disclosed by statements - implied terms - whether a trade usage exists as to charging of interest on overdrawn accounts, etc - bank's discretion

Practice and procedure - default judgment - rescission - applicant previously in "wilful default" - meaning of wilful default - effect of such default - whether relief must inevitably be refused - deliberate default because of mistaken belief that no legal basis existed for resisting claim - such a default not necessarily disqualifying - finality in litigation - desirability of

Headnote

The respondent bank had in December 1995 obtained default judgment against the applicants. The applicants' liability arose out of an agreement of loan, in particular an overdraft in the name of the first applicant, secured by the personal sureties of the second and third applicants. The summons was in the same form as that used at that time and subsequently criticised in Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd 1996 (2) ZLR 420 (H). It had averred the existence of the agreement and the amount outstanding on the overdraft, without any particularity as to such material facts as the amount of the capital advanced, the amount of interest accrued, and the amount of appropriation of any repayments.

In their application for rescission of the default judgment, the applicants averred that they relied on the bank's expertise in calculating the indebtedness and that the decision not to contest the claim was made in the honest and reasonable belief that the bank had correctly calculated the amount outstanding and interest thereon. At that time they confined their endeavours to negotiating a manner of payment of the amount claimed and believed to be owing. In their application for rescission, however, they relied on the decision in Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd, claiming that they were unable to calculate the capital sum owed, suggesting that the interest rates were not agreed upon and had never been stated and that there had been an appropriation of interest contrary to the manner approved in the MM Builders case. The question arose whether the applicants' deliberate failure

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to oppose the summons constituted "wilful default" and whether wilful default necessarily disqualiied them from relief.

Held, that the traditional perception of wilful default is that it occurs when a party, with full

knowledge of the service or set-down of the matter and the risks attendant on default, freely takes a decision to refrain from appearing. But the wilfulness of a default is seldom, if ever, clear cut. There is almost always an element of negligence, and there is a certain weighing of the extent of the negligence and the merits of the defence.

Held, further, that the High Court Rules, unlike the Magistrates Court (Civil) Rules, make no provision for the concept of wilful default. All that is required for rescission is that there be "good and sufficient cause" for it. Even where gross negligence is revealed, it is not inevitable that relief must be refused; consideration must also be given to the other factors in the case. While wilful default will normally be a bar to success, there may still be situations where good and sufficient cause might be found to be shown. The court is entitled, if it considers it fair and just to do so, to consider whether the circumstances, in spite of the default, warrant consideration of the merits of the defence and, if these are satisfactory, the extension of the indulgence sought. In this case, the explanation was that the deliberate decision not to contest was based upon a genuine belief that the debt was due and that no defence existed, but that acquiescence in the judgment would not have been given if the availablity of the defence had been known to the applicants. In this situation, the default would have been wilful, but satisfactorily explicable.

Held, further, that the applicants had to show good and sufficient cause for rescission. The default judgment was an existing finding that a certain amount was owed by them. They had to establish a *prima facie* defence to that judgment debt; this they could not do by bald averments or denial. They had failed to establish a minimum undisputed debt and to proffer provisional calculations and firm supportable averments in defence of the claim for the balance. Although their explanation was acceptable in principle, it was entirely outweighed by the unacceptable lack of support for a defence which is equivocally advanced.

Held, therefore, that the application should be dismissed.

Cases cited:

Absa Bank Bpk v Saunders 1997 (2) SA 192 (NC)

Arab v Arab 1976 (2) RLR 166 (A)

Cobra and the Wild Cat (Pvt) Ltd v Tundu Distributors (Pvt) Ltd 1990 (1) ZLR 133 (H)

Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd 1996 (2) ZLR 420 (H)

du Preez v Hughes NO 1957 R & N 706 (SR)

Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)

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GD Haulage (Pvt) Ltd v Mumurgwi Bus Svcs (Pvt) Ltd 1979 RLR 447 (A); 1980 (1) SA 729 (ZA)

GM Refridgeration & Air Conditioning (Pvt) Ltd & Ors v Commercial Bank of Zimbabwe Ltd & Anor HH-68-97

Gollub v Trotter HB-95-82

Gondo & Aor v Syfrets Merchant Bank Ltd 1997 (1) ZLR 201 (H)

Gundani v Kanyemba 1988 (1) ZLR 226 (S)

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

Mdokwani v Shoniwa 1992 (1) ZLR 269 (S)

Munhira v Phiri S-52-84

Mvaami (Pvt) Ltd v Standard Finance Ltd 1976 (2) RLR 257 (G); 1977 (1) SA 861 (R)

Ndebele v Ncube 1992 (1) ZLR 288 (S)

Neuman \(Pvt\) Ltd v Marks 1960 R & N 166 (SR)

Senekal v Trust Bank of Africa Ltd 1978 (3) SA 375 (A)

Shinga Express \(Pvt\) Ltd v Hubert Davies \(Pvt\) Ltd 1989 (2) ZLR 45 (H)

GILLESPIE J

Songore v Olivine Industries \(Pvt\) Ltd 1988 (2) ZLR 210 (S)

Zimbabwe Banking Corp v Masendeke 1995 (2) ZLR 400 (S)

Case Information

T Nyambirai, for the applicants

A P de Bourbon S, for the respondent

Judgment

Gillespie J: On 1 December 1995, the Zimbabwe Banking Corp Ltd (Zimbank), obtained judgment against the applicants in default of appearance to defend being entered by any of them. The cause of action was an agreement of loan, in particular a bank overdraft in the name of the first applicant, Deweras Farm (Pvt) Ltd, secured by the personal sureties of Mr and Mrs du Toit. The judgment ordered was in the sum of $2 316 493 together with interest thereon from 1 July l995. The summons instituting action averred merely the existence of the agreement and the amount outstanding on the overdraft without any particularity as to such material facts as the amount of capital advanced; the amount of interest accrued and the amount and appropriation of any repayments.

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In fact the summons is in precisely the same inadequate form as caused me, in the matter of Commercial Bank of Zimbabwe Ltd v M M Builders & Suppliers (Pvt) Ltd 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (ZH), to investigate the question of the applicability of the *in duplum* rule and which led to the formulation of directions as to the proper averments to be made in cases such as this. Had the present case been brought after the decision in the MM Builders case there is no doubt that judgment would properly have been withheld, despite absence of opposition, because of the inadequate formulation of the claim. In consequence of that decision, then, the applicants have sought to have rescinded the judgment given against them in default.

The application for rescission was preceded by an urgent chamber application for stay of execution. It is common cause that following the judgment, the parties entered into negotiations attempting to agree terms upon which the amount of the judgment debt could be paid. These negotiations were somewhat protracted and it was only on 12 January 1996 that a writ of execution was sued out and property of the applicants, including a farm, was placed under attachment. Even then, further negotiations and correspondence occurred until late in September 1996 when Zimbank finally ran out of patience and caused the Deputy Sheriff to issue a notice of removal and to schedule a sale in execution for 1 October 1996. The application for stay of execution was instituted on 30 September 1996. It came before me. I entertained argument from all parties in chambers and gave an order staying execution pending the institution of proceedings for the rescission of the default judgment, which proceedings I directed were to be instituted within

10 days of the date of the order of stay of execution. The application for rescission of judgment was instituted on the 11 October 1996.

In the application for stay of execution, the applicants made the following points:

- That at all times prior to the taking of the judgment they had reposed complete confidence in the bank as far as computation of the amount of indebtedness were concerned.
- That, as a result of advice received from attorneys during the course of the negotiations as to payment of the judgment debt, they only became aware in the month of September 1996 of a substantial overcharge of interest by the bank.
- That, notwithstanding that the summons alleges the indebtedness merely as the balance outstanding on an overdrawn account, in fact the indebtedness of the applicants sprang from three causes, a current account, a soft loan and another loan, the total indebtedness on which, properly calculated, was the sum of $1 872 251,95.
- In the application for stay of execution, a promise of payment of this amount was expressly held out but the balance of the judgment debt in excess of this amount was placed in dispute.

The papers for rescission are considerably more equivocal. The explanation for the default remains the same; namely, that the applicants relied on Zimbank's expertise in calculating the

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indebtedness and the decision not to contest the claim was made in the honest and reasonable belief that the bank had correctly calculated the amount outstanding and interest thereon. Their endeavours throughout were directed solely to making arrangements to pay the indebtedness rather than vexatiously, as they then thought it, to challenge it.

As to the defence they proffer, it is disclosed that the first applicant maintained a current account which was permitted to be overdrawn and upon the overdrawn balance of which interest would accrue at an agreed rate. It is averred that to this account was debited withdrawals against that account. In addition, a loan at a very favourable rate of interest, no greater than 10%, was granted by the bank in accordance with an official scheme for drought relief. The full amount of this loan was drawn down and interest accruing on this loan was debited by the bank to the overdrawn current account and itself thereafter was charged with interest at the rates applied by the bank to the overdrawn account. A third loan was also taken out and accounted in a separate account but at some stage, in circumstances not disclosed by either party, was apparently combined with the overdraft. This amalgamation of the various causes of indebtedness is reflected in the summons which claims payment on these various causes under the sngle formulation as "the amount

due and owing ... in terms of an agreement of overdraft". In addition to these complaints, the applicants aver that the rates of interest charged on the overdraft are rates which were never agreed by them and of which they were never advised. Finally, the applicants claim that they are unaware of and unable to calculate the capital sum owing and suspect that there has been an appropriation of interest contrary to the manner approved in the MM Builders case *supra*. It is not stated specifically that interest in excess of the double has been charged, but the suggestion is left hanging. The applicants conclude:

> "We believe that if the default judgment obtained by the respondent against us is rescinded and the respondent co-operates with our legal practitioners in providing them with any information on our accounts which they may require, we shall be in a position to tender payment of the correct amount due by us to the respondent, if any."

The applicants thus claim rescission of the judgment in its entirety. They make no offer of any admitted amount of indebtedness. Indeed, by the closing words "if any" in the quotation above, they place in issue that any amount is owing at all.

The respondent admits that the indebtedness claimed arose in the circumstances set out by the applicants. It sets out in detail the rates of interest charged and claims the applicants -

> "Must have been aware of the fact that the respondent charged interest on overdrawn accounts and that the respondent had the right to change the applicable rate when necessary due to changing market conditions. I draw attention to the fact that copies of the first applicant's bank statements have the following note printed below the account number: Please examine this statement. If no error is reported to us within 15 days after receipt, the statement will be considered correct. The applicants should have been aware of the applicable interest rates. If they were not they should have taken the trouble to request this information."

As to the soft loan, the applicant admits that it treated the interest as claimed. Indeed, it appears that capital repayments, when they became due, were also debited to the current account. It

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claims that it was entitled to debit the current account with the interest and other charges accruing on the soft loan as and when such charges became due and payable. It avers that by failing to keep the current account in credit, and thus ensuring payment of the soft loan, and all charges thereon as and when due, the applicants have effectively lost much the benefit of the lower rates of interest applicable thereto. A similar response is given in respect of the third loan. It is admitted that all outstanding amounts were prior to seeking judgment incorporated into one. It is also stated that on the alleged globular indebtedness interest was, as a matter of grace and discretion, charged at only 35,5% instead of the 43% claimable. The full set of ledger sheets relating to the current account is attached to the opposingaffidavit.

In order to succeed, the applicants must, of course, first give a satisfactory

GILLESPIE J

explanation for their default. That explanation, as I have already said, is that the applicants, people of the soil, relied on the bank for accuracy and fairness in the running of the account and calculation of the indebtedness and honestly believed that the amount claimed in the summons was correct. They therefore had no wish to challenge this but rather, before and after judgment, confined their endeavours to negotiating a manner of payment of the amount claimed and believed to be owing.

Mr *de Bourbon* for the respondents submits that this explanation "shows that the applicants deliberately decided not to oppose the summons issued against them. Their claim that they relied on the integrity of the respondent is irrelevant. They did not take legal advice at the time, and acknowledged by their inaction that they were truly indebted to the respondent. The decision not to oppose the claim was one taken with knowledge of the service of the summons, and of the consequences that would ensue if judgment were given against them. They freely took the decision to refrain from opposing the summons." He accordingly submits that the applicants were in wilful default.

In the case of Zimbabwe Banking Corp v Masendeke 1995 (2) ZLR 400 (S), McNally JA wrote, at 402D:

> "Wilful default occurs when a party, with the full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing: *Neuman \(Pvt\) Ltd v Marks* 1960 R & N 166 (SR) at 169; 1960 (2) SA 170 (SR) at 173; Simbi v Simbi S-164-90 at p 6; *Mdokwani v Shoniwa* 1992 (1) ZLR 269 (S) at 271."

This indeed is the traditional perception of the concept of wilful default. If this is a full exposition of the meaning of the expression, then it is undoubtedly support for Mr de Bourbon's proposition. In the same judgment, however, the same learned Judge of Appeal said something else about the concept of wilful default, something that suggests that the conventional understanding of wilful default may not be accurate. He wrote (at 403A):

> "The wilfulness of a default is seldom, if ever, clear-cut. There is almost always an element of negligence, and the question arises whether it was gross negligence and whether it was so gross as to amount to wilfulness. And in coming to a conclusion there is a certain weighing of the balance between the extent of the negligence and the merits of the defence. See *Songore v Olivine Industries \(Pvt\) Ltd* 1988 (2) ZLR 210 (S); Stockil v Griffiths 1992

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ZLR 172 ; and *Mdokwani v Shoniwa supra*."

This passage suggests that in the very determination as to whether a default is wilful, there is the discretionary weighing of competing considerations.

The conventional understanding of the notion of wilful default is one which holds that in any application, brought in terms of the rules of court, for the rescission of a default judgment one exercises a judicial discretion after weighing all relevant circumstances and then grants and withholds judgment according to whether good and sufficient cause may be said to have been established. Where the default, however, is wilful, then it is said rescission

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must be refused. I am obliged to enquire whether this perception of the law is correct.

It must be said that the rules of court make no provision for the concept of wilful default. All that is required for rescission in terms of r 63 of the High Court Rules 1971 is that the court be satisfied that there is "good and sufficient cause" to rescind the judgment. Even in terms of the common law, there is no specific mention of a requirement that default be not wilful. The principles of the common law, for the purposes of this judgment, are sufficiently set out in the decision of Blackie J in *Shinga Express \(Pvt\) Ltd v Hubert Davies \(Pvt\) Ltd* 1989 (2) ZLR 45 (H) at 47D-H where the learned judge refers to the authoritative decisions of the South African Appellate Division in de Wet & Ors v Western Bank Ltd 1979 (2) SA 1031(A) at 1042F and Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764. Whence does the stricture regarding wilful default originate? The locus classicus in this court concerning the approach to an application for rescission of judgment is the decision of Beadle J (as he then was in the case of du Preez v Hughes NO 1957 R & N 706 (SR). In that matter at 707 et seq the learned judge said:

> "[T]here are three broad considerations which the court will always take into account: First, the explanation given by the applicant for his default; second, the *bona fides* of the application made to rescind the judgment; and third, the *bona fides* of the applicant's defence on the merits of the case ... [at 708]. [T]he court has a very wide discretion in deciding what is, or what is not, sufficient cause for relief. But as I have said, the circumstances already set out are considerations which are generally taken into account in all applications such as this. Too much emphasis should, however, not be laid on any one of these considerations individually. They should be regarded in conjunction with each other and with the application as a whole. An unsatisfactory explanation for the default may be strengthened by a very strong defence on the merits ... "

The learned judge went on to consider whether an explanation for delay which revealed gross negligence necessarily disqualified the applicant from relief without further examination of the merits of the cause. After citing certain relevant authorities, he wrote (at 710H):

> "If these statements in Hay-Buchanan's case and Grant's case purport to lay down that relief must inevitably be refused if the applicant's default is due to gross negligence, no matter how strong the defence on the merits may be, or no matter what other considerations there may be in the applicant's favour, then with great respect I think that these statements go too far ... To lay down that where the negligence is gross, relief must inevitably be refused seems to me to be an interference with the court's discretion which in the circumstances is not justified."

It was therefore held that gross negligence itself was no ground for an automatic refusal of relief

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without consideration of the other factors. The learned judge was not concerned with wilful default in that case, but he nevertheless wrote (at pp 711G):

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> "If the applicant's culpability amounts to a recklessness akin to wilfulness, then different considerations might apply, as it might be said then that, in effect, he had acquiesced in the judgment."

By so writing, he effectively explains that only where it may be said that an applicant for rescission of judgment has acquiesced in the giving of judgment might he be denied relief without examination of the merits of his proposed defence.

In many cases since, it has been accepted that wilful default may disqualify an applicant from the indulgence he seeks. One, and one frequently relied upon although, as I shall show, wrongly so, is a dictum of Murray CJ in *Neuman \(Pvt\) Ltd v Marks* 1960 R & N 166 (SR) at 168:

> "It is indisputable that thought the court has a discretion to rescind in the absence of proof of wilful default (a discretion which the authorities indicate should generally be exercised in the applicant's favour) there is no such discretion, and rescission cannot be directed, if the applicant's default is proved by the respondent to have been wilful."

This pronouncement is of no application to an application for the rescission of a judgment given by this court, because it relates solely to an application to a magistrate for rescission of the judgment of a magistrate. The relevant magistrates court rule expressly provided that a magistrate had no power to rescind where the default was wilful.1(2) Nevertheless, one suspects that much anxiety in this court concerning the question of wilful default may find its origin in the magistrates court rule pertaining to that subject. In Arab v Arab 1976 (2) RLR 166 (A) a portion of the headnote reads:

> "There is no rule of 'thumb' to be applied where an applicant seeks rescission of a judgment in terms of r 63 of the High Court (General Division) Rules, 1971. All that can be said is that the applicant must show something which entitles him to ask for the indulgence of the court ... Such indulgence will, however, not be granted where the default of the applicant may be classed as wilful."

This has frequently been cited. The actual judgment shows that Lewis JP did indeed hold the applicant for rescission to have been in wilful default and did refuse the relief on that basis. His own words, however, show that he was by no means unaware of the fact that what he was determining was whether or not "good and sufficient cause" had been shown. The learned Judge President said at 173F-H:

> "I am quite satisfied in this case that the applicant deliberately refrained from opposing the divorce and the other orders sought against him before Macaulay J. This is not a case of someone who intended to defend the action but, either through negligence or, as in the case of du Preez v Hughes (*supra*), mental instability and alcoholism, did not get around to doing so. This was a deliberate decision made by the applicant not to oppose these

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> proceedings. On the facts which I have outlined, it does not seem to me that he has come anywhere near discharging the onus resting on him of showing good and sufficient cause for the rescission of this judgment."

Since the learned Judge President did not investigate the merits of the defence asserted, this decision is authority for the proposition that where the default is wilful, in the sense of constituting a deliberate acquiescence in the granting of judgment, that rescission may be refused for that reason alone without any examination of the merits. Whatever the headnote might say, the judgment itself, however, does not suggest that wilful default must always and inevitably have that consequence.

In Mvaami (Pvt) Ltd v Standard Finance Ltd 1976 (2) RLR 257 (G); 1977 (1) SA 861 (R), the situation was expressed thus by Davies J (as he then was) at p 862:

> "Wilful default amounting to acquiescence would, however, normally bar success, and in this connection it is to be noted that 'wilful' merely means 'deliberate'."

The use of the word "normally", which I emphasise, is significant because it shows that wilful default is not always and necessarily a bar.

There are two judgments, regrettably unreported, which usefully illustrate the point I am making. The first is a decision of Gubbay J (as he then was) in Gollub v Trotter HB-95-82. In that matter the learned judge wrote:

> "In the GD Haulage case (*supra*) at 735H Davies JA approved of the proposition that the court's indulgence will not be granted where the default of the applicant may be classed as wilful. There is a dictum to the same effect in the judgment of Lewis JP in Arab v Arab 1976 (2) RLR 166 at 173F-H. (See also du Preez v Hughes 1957 R & N 706 at 711G-H). This approach is based on public policy which dictates that as far as possible there should be finality in litigation. My conclusion that the defendant was wilful really resolves the application against him. I propose nonetheless to consider the other two factors relevant to an application of this nature."

This shows that despite acceptance of the principle that wilful default in itself might justify refusal of rescission without consideration of the merits, the learned judge was unwilling to base his decision on a finding of wilful default without any consideration of the merits of the defence.

This caution, if I might so suggest with respect, was well-founded since the passage from the case of GD Haulage (Pvt) Ltd v Mumurgwi Bus Services (Pvt) Ltd 1979 RLR 447 (A) at 455E; 1980 (1) SA 729 (ZA) at 735H, upon which the learned judge relied, did not in fact consist of an approval of the proposition that a wilful default is always to be visited by refusal of rescission. The passage in question reads:

> "The matter was also dealt with by this court in the case of Arab v Arab 1976 (2) RLR 166 ... "

The matter to which Davies JA was referring was the approach as set out in du Preez v Hughes in applications not involving wilful default. He went

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on to cite the headnote from Arab, which, as I have shown, misleadingly presents the actual words of Lewis JP on the subject of wilful default. It appears then, that Gubbay J, despite his reference to GD Haulage was not misled into considering that wilful default necessarily requires

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rejection of the application for rescission without consideration of the merits.

The second unreported decision I wish to cite is a judgment of Waddington JA in Munhira v Phiri S-52-84. The learned Judge of Appeal, after citing the words of Gubbay J in Gollub (*supra*), said:

> "I respectfully associate myself with the conclusion of the learned judge that where wilfulness is present the indulgence of rescission will not ordinarily be granted by the court."

I emphasise the use of the word "ordinarily" because it shows inescapably that the situation might arise where, despite a wilful default, good and sufficient cause for rescission might be found to have been shown.

Other cases, such as *Gundani v Kanyemba* 1988 (1) ZLR 226 (S), *Mdokwani v Shoniwa* 1992 (1) ZLR 269 (S) and *Karimazondo v Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S) contain apparently clear statements that wilful default necessarily involves refusal of the indulgence without further enquiry. These, however, like Neuman v Marks (*supra*) involve applications subject to the rules of the magistrate's court, which expressly leave no discretion in the case of wilful default.

On the proper approach to the concept of wilful default in High Court matters, it should be seen that the expression refers to that extreme of circumstance where the explanation for default reveals that the applicant for rescission knowingly and deliberately refrained from opposing the relief sought. He acquiesced in the judgment being taken against him. In the face of such prior acquiescence it is scarcely surprising that the courts may be inclined to deny him the opportunity to reconsider that decision without scrutiny of the supposed merits of the defence now belatedly proposed. In this respect, the situation of wilful default is no different from other extreme instances where a similar approach might be taken. For instance, where no explanation or a false explanation of the default is given then it has been said that:

> "In Muller v Braes S-51-86 (not reported), Gubbay JA stated at p 5 thereof:
>
> > 'Once the explanation for the default is found to be unacceptable, as it is in this case, a disdain of the Rules is the inevitable inference. In other words the default is classed as wilful in the sense of a deliberate acquiescence, thereby barring the indulgence of rescission (See Barclays Bank case *supra*). This conclusion resolved the appeal.'
>
> I regard this matter as one clearly falling for determination in accordance with the Rules where the court has a wider discretion and the onus of proving wilful default rests on the respondent (see *Brnic v Stuttaford* 1956 R & N 171 (SR) at p 172-3). I have already observed above that the application has not given a *bona fide* explanation for its default ie

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> its failure to comply with the court order compelling discovery. The reason given that the applicant received that order very late ie when default judgment had already been entered is worthy of no credence in the absence of a supporting affidavit from the legal practitioners that it seeks to blame.
>
> There is not even an explanation why such an affidavit could not be obtained. In these circumstances the ipse dixit of applicant is not an acceptable explanation or such as would cast the burden of proof of wilfulness on the

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respondent, because in the first place the default has not been satisfactorily explained."

Per Mtambanengwe J in Cobra and the Wild Cat (Pvt) Ltd v Tundu Distributors (Pvt) Ltd 1990 (1) ZLR 133 (H) at 137D-F.

The fact that this wilful default might justify the court in refusing the application for rescission without further ado does not mean that in a proper case the court will not be entitled, if it considers it fair and just to do so, to consider whether circumstances nevertheless warrant consideration of the merits of the defence, and if these are satisfactory, the extension of the indulgence sought. The point made by Beadle J in du Preez v Hughes NO (*supra*) concerning the undesirability of fettering the court's discretion in any way is a telling point.

Thus in this case, it is explained that the deliberate decision not to contest was based upon a genuine belief that the debt was due and no defence existed. That is an explanation which I find perfectly acceptable, given the relationship of the parties. It persuades me that the acquiescence in the judgment would not have been given if the availability of the defence had been known to the applicant. In such a circumstance, if the purported defence is arguably available, then it may be that good and sufficient cause for the relief sought could be established.

I therefore hold that, in any application for rescission of a judgment given in default in the High Court, the wilful default of the applicant for rescission may well justify the court in refusing rescission of judgment without further consideration of the matter. It will not necessarily always have this effect, however, since the grant of the indulgence is a discretion to be extended or refused according to all the circumstances and it is undesirable to impose any restrictions on that discretion. If, therefore, even in the case of a wilful default, a satisfactory explanation for that acquiescence in a judgment can be given, and other circumstances, including the merits of the defence, justify such a conclusion, good and sufficient cause might in the proper case be established.

I am fortified in my conclusion by the knowledge that in recent similar cases involving applications for rescission of default judgments, where it was claimed that the judgments breached the *in duplum* rule, of which rights the applicants were unaware when the failed to oppose the claims, Devittie J did not disqualify any of the applicants solely on the grounds of wilful default.

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I refer to the decisions in Gondo & Anor v Syfrets Merchants Bank Ltd and three other cases 1997 (1) ZLR 201 (H) and GM Refrigeration & Air Conditioning (Pvt) Ltd & Ors v Commercial Bank of Zimbabwe Ltd & Anor HH-68-97. In those cases the learned judge appeared to hold that because of their belief the applicants were not in wilful default. I suggest, however, that the better view is that their defaults were wilful, which is to say deliberate, but nevertheless satisfactorily explicable.

Having thus expressed my decision that the default is not such as in itself to disqualify the applicants from further consideration, I proceed to examine the merits of the defence. The first

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point is that the bank has applied rates of interest to which it was not entitled. That is an averment which, if established, would no doubt serve to decrease somewhat the amount of the claim. It is an averment, however, which is made in a most unsatisfactory manner. There is no attempt by the applicants to show the rate of interest which could properly be charged nor to refer to any contractual term relating to interest. In short, this proposed defence is little more than a bare denial. For its part, the bank points to the frequent and regular statements sent to the applicants and the lack of protest or query from that source.

The bank's position is supported by authority to the following effect (although it was not cited to me):

> "Ordinarily, the customer is probably aware of the bank's practice of periodically debiting, as money due and payable, interest to an overdrawn current account and, if the customer may have been unaware of that practice at the time of his seeking and obtaining overdraft facilities, he must needs have become aware of it where periodical statements of account were rendered to him by the bank, showing that interest had been periodically charged and added to his current capital account. It appears to me that a customer who receives such periodical statements without protest or objection acquiesces in the system and thereby tacitly agrees to be bound thereby. This view has been taken by courts in England. (See Paget The Law of Banking 8 ed at 132-4 and the cases there referred to). Another approach, leading to the same result, is that, in the absence of any express agreement on the point, the customer, when seeking and obtaining overdraft facilities from his banker, tacitly agrees to be bound by the practice of th bank in regard to the debiting of accrued but unpaid interest to capital account. The evidence of Burger clearly reveals that the respondent's practice was to debit unpaid interest to the current account at periodical intervals of approximately one month and, indeed, he testified that that is and has for very many years been the common practice of commercial banks in South Africa."

Per Miller JA in Senekal v Trust Bank of Africa Ltd 1978 (3) SA 375 (A) at 384 in fine. This was followed in the matter of Absa Bank Bpk v Saunders 1997 (2) SA 192 (NC) at 196J-197A, where it was held that:

> "Op grond van Mnr Fourie se getuienis is die Hof van mening dat daar 'n geykte gebruik by handelsbanke bestaan om rentekoerse op oortrokkefasiliteite te verhaal en dat sulke rentekoerse binne die diskresie van die bankbestuurder of die bank se hoofkantoor, na gelang van omstandighede."

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Translated:

> "On the basis of Mr Fourie's evidence, this court is of the opinion that there is a longstanding usage of commercial banks to charge interest on overdraft facilities and that the rates of such interest are within the discretion of the bank manager or its head office, according to the circumstances."

I am not of a mind, without argument or evidence on the point, to make a finding as to implied terms in banking practice. These dicta, together with what must be the general understanding of the manner in which banks extend overdraft facilities, are nevertheless persuasively suggestive of a contractual relationship between the parties which would justify the bank's position. Prima facie, it would appear, the regular charging of interest on an overdraft, at rates within the bank's discretion, is permissible: the failure to challenge any such action despite regular statements being rendered is significant. This *prima facie* position of the bank is such that it would perhaps take rather more than the superficial challenge by the applicants to displace it.

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The second and third rungs of the defence relate to the dealings with the interest on the soft loan and the third loan. For reasons similar to those set out above, it seems to me that the *prima facie* position of the bank is again such that one would expect its contractual entitlement to be that it may debit the operating account of its customer with payment of amounts due on any individual loan account as and when those amounts should become due. Should the operating account not be in credit then naturally interest on the debit balance at the rates applicable to the operating account would accrue. Whether this is, of course, the situation in any case would depend upon the terms of the various loans and facilities. In the situation of an application for rescission of default judgment, one would expect from the applicant considerably more in the way of averment and evidence, including documentation, to displace what would appear to be the validity of the bank's conduct. An unsubstantiated averment that the bankhad no right to act as it did, without any attempt to allege, far less establish, the terms of contract, does not suffice a *prima facie* defence to the judgment debt.

I consider next the fact that the bank's summons may be thought to be defective. It is undoubtedly to be regarded as inadequate in the light of my decision in the MM Builders case. At the time of the summonns and the judgment, however, the summons was in the form generally regarded as acceptable. It disclosed a *prima facie* claim degree of detail held to be sufficiently particular for many years. No doubt a judgment given on such a summons so particularised will be rescinded in a proper case. The proper case, however, will be one where the applicant shows that the amount of the judgment debt may well not be due. It is here that lies one of the greatest causes for criticism in the applicants' papers.

GILLESPIE J

I have said earlier that the suggestion that interest beyond the double was claimed and ordered has been left hanging. That the insinuation is intended is clear both from the application for a stay of execution and from the application for rescission. Mr de Bourbon for the respondent, with commendable thoroughness, has submitted with his heads of argument a spread sheet of calculations based upon the full set of ledger cards on the current account which were filed with the papers. These calculations show that on the current account, excluding the third loan, the outstanding balance at the close of the relevant period was some $1 978 731,36. Of this, $554 016,81 was accrued interest. The amount of the third loan was, as the papers disclose, $350 000. There is no averment that any of this has been repaid. That amount, added to the outstanding balance on the current account, leaves a figure of $2 328 731,36. That is not exactly the amount of the judgment debt, being some $12 000 more than that. It is sufficient,however, to dispel the fear of an award including interest beyond the double. In preparing his calculations, Mr de Bourbon wrote in his heads of argument:

> "The applicants' legal practitioner is specifically invited to challenge the accuracy of the schedule if he so wishes based on the evidence before this Honourable Court. Indeed that applicants bear the onus of showing that the document is wrong since the applicants must show they have a *bona fide* defence to the claim set out in the judgment."

This submission is justified.

The applicants must show good and sufficient cause for rescission. The judgment is an existing

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finding that so much is owed by them. They must establish a *prima facie* defence to that judgment debt. They cannot do so in any case by bald averments or denial. As was said by McNally JA in *Songore v Olivine Industries \(Pvt\) Ltd* 1988 (2) ZLR 210 (S) at 213F:

> "It is dangerous to generalise, and each case differs from others, but nonetheless I think it must be said that bald general allegations of fact may not be enough in every case to show *bona fides*. It might be argued that 'I do not owe the money' is 'an averment which, if established at the trial, would entitle him to relief asked for'. In most cases, and particularly where there is a suspicion that the defence is not *bona fide*, more specific allegations will be required."

In like vein, and dealing precisely with an application for rescission of judgment on the ground of a belated awareness of breach of the *in duplum* rule, Devittie J has written in GM Refrigeration (*supra*):

> "I have difficulty in accepting that an applicant who relies on a breach of the *in duplum* rule can show a *prima facie* defence without showing in an intelligible manner the extent to which it is alleged that the interest claimed exceeds that capital outstanding. This may in some instances be a time consuming and costly exercise, and the constraints of time within which an application for rescission must be made may not permit a sufficiently detailed analysis. The obvious recourse in such a situation is to seek an extension of time."

In this case, the information on the papers was sufficient to enable counsel

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GILLESPIE J

for the bank to prepare his own schedule. There is no excuse for the failure of the applicants, or their legal praetitioners from undertaking a similar exercise in rebuttal.

In addition, there is in this case reason to suppose that the application is not *bona fide*. In the application for stay of execution there was an unequivocal acknowledgement of indebtedness in the sum of $1 872 251,95. Had that position been maintained in the present applications and fortified with acceptable averments and evidence to establish that figure, I would have had little or no hesitation in granting rescission of the judgment to the extent that it exceeded that admitted figure. The judgment of Devittie J in Gondo's case (*supra*) shows that partial rescission is permissible. The purported retraction of that admission, on the entirely unconvincing pretext that it has been impossible to determine the amount owing, is quite unacceptable. The added rider, to which I drew attention earlier, suggesting that there is dispute as to whether any amount is due at all, simply cannot be made in good faith. The applicants have, since at least the papers were ready for set down if not before, had all the informationthey needed to establish a minimum undisputed debt and to proffer provisional calculations and firm supportable averments in defence of the claim for the balance. Their failure to have attempted to do so weighs very heavily against them.

The attempt to have the whole judgment set aside on so flimsy basis would wreak considerable prejudice upon the bank were it to succeed. My judgment in the MM Builders case (*supra*) shows that obtaining an early judgment is considerably to the interest of a creditor since even when accrued interest has reached the double before judgment, interest commences to run afresh on the judgment debt. If a judgment should be rescinded, then it is potentially the case that a considerable amount of interest accrued since the date of judgment may be lost to the

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creditor.

The closer the accrued interest were to the double at the time of taking judgment, the greater the loss of interest to the creditor should that judgment be rescinded. This potential loss to the creditor must be a considerable factor in determining whether to permit rescission in whole, in part or at all, of a default judgment, particularly where the defence is that interest may have been wrongly claimed.

A final point seals my conclusion that the applicants have failed to show good and sufficient cause for the relief sought. It is the principle of finality in litigation. Most of the decisions which I have cited above make the point that the desideratum of finality in litigation is one that ought not to be readily departed from. I add to those the following observations:

> "... public policy demands that the principle of finality in litigation should generally be preserved rather than eroded: interest *reipublicae ut sit finis litium*."

GILLESPIE J

Per Trollip JA in Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 309A. On the subject of multidinous applications for rescission of judgment, McNally JA complains in *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290:

> "It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years, applications for rescissions for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers.
>
> We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute."

Receptive as I might be inclined to be to a complaint of the nature advanced in this case by the applicants, where that is reasonably well explained and the defence moderately well supported, I cannot extend relief to the applicants here. The acceptability in principal of the explanation for their defaults, wilful though it may have been, is entirely outweighed by the unacceptable lack of support for a defence which is equivocally advanced. In addition, the potential harm to the respondent, should I accede to the applicants' prayer, far outweighs what must, on the case put forward, be a rather remote prospect of establishing an undefined but limited degree of prejudice to the applicants should I permit the judgment to stand. In these circumstances, the policy of finality in litigation must dictate that the application should fail.

I therefore dismiss the application with costs, which costs are to include the costs of the urgent chamher application for a stay of execution in Case No. HC-8388-96.

Kantor & Immerman, applicants' legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

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CHIMPHONDA v RODRIQUES & ORS 1997 (2) ZLR 63 (HC)

Court **High Court, Harare**

Robinson J

Civil trial

10, 11 & 12 June; 2 July 1997 Judgment No. HH-113-97

Flynote

Sale - immovable property - property sold to two different buyers - second buyer having notice of prior sale at time it took transfer - first owner entitled to recover property in absence of special circumstances disqualifying him from such relief

Headnote

The seller had fraudulently sold her immovable property to two different buyers. Both buyers paid the full purchase price for the property. The second buyer had obtained transfer of the property to it. The first buyer sought an order that the second buyer tranfer the property to him on the grounds that the second buyer had knowledge of the first sale before transfer of the property was registered in the second buyer's name.

Held, that if in a double sale situation the second buyer has knowledge of the first sale of the property, either at the time of the sale or at the time it took transfer of the property, then, unless there are special circumstances affecting the balance of equities, the first buyer can recover the property from the second buyer. In such an instance, the second buyer's only remedy is an action for damages against the seller. In deciding whether there are special circumstances affecting the balance of equities, the court must bear in mind that the primary right of the wronged buyer is the remedy of specific performance which will be granted unless there is some equitable reason disqualifying him from obtaining such relief.

Held, further, that in the present case there were no special circumstances affecting the balance of equities disqualifying the first buyer from being granted his primary right of specific performance.

Cases cited:

BP Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd & Anor 1964 RLR 7 (G); 1964 (2) SA 21 (SR)

Crundall Bros \(Pvt\) Ltd v Lazarus NO \& Anor 1991 (2) ZLR 125 (S)

Intercontinental Trading (Pvt) Ltd v NestlŽ Zimbabwe (Pvt) Ltd 1993 (1) ZLR 21 (H)

Case Information

H Simpson, for the plaintiff

First defendant in default

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L T Biti, for the second and third defendants

Fourth defendant barred

Judgment

Robinson J: This is one of those unfortunate cases of a double sale of immovable property.

ROBINSON J

The property in question, being Lot 2 of Stand 68 of Prospect situate in the District of Harare measuring 5468 square metres (to which I shall refer as "the property"), more commonly known as 84B Seaward Close, Prospect, Harare, was first purchased by the plaintiff, Gideon Justas Chimphonda (to whom I shall refer as "the first purchaser") from the first defendant, Junia Patricia Rodriques (to whom I shall refer as "the seller"), a married woman, who then deceitfully sold the property to the third defendant, Prompt Builders Company (Pvt) Ltd (to which I shall refer as "the second purchaser"), represented by its managing director, Betty Felicity Barros (to whom I shall refer as "Mrs Barros"), being the second defendant.

Both the first and second purchasers paid the seller the full purchase price for which they purchased the property, being the sums of $150 000, together with interest, and $135 000 respectively, the first purchaser claiming that he had paid the total sum of $190 000.

At the time Mrs Barros purchased the property on behalf of the second purchaser from the seller, she was unaware that the property had already been sold to the first purchaser but very shortly thereafter Mrs Barros became aware that the seller had sold the property to the first purchaser but was led to believe by the seller, in the presence of the seller's legal representative, that the first purchaser did not wish to proceed with the sale, which had been cancelled by her.

After paying the balance of the purchase price and the costs of transfer, Mrs Barros was informed by the first purchaser's agent, Gladys Ntombizandile Masunda (to whom I shall refer as "Miss Masunda") over the telephone, when transfer of the property to the second purchaser was imminent, that the first purchaser had purchased the property from the seller and had paid the purchase price of the property. Transfer of the property was registered in the second purchaser's name twelve days after this telephone conversation.

The first purchaser seeks an order in effect that the second purchaser transfer the property to him because of the second purchaser's knowledge of the prior sale of the property to the first purchaser before transfer of the property was registered in the second purchaser's name. On its part, the second purchaser filed a claim in reconvention that the first purchaser and all those claiming the right of occupation through him be evicted from the property.

Mr *Simpson* appeared for the first purchaser and Mr Biti for Mrs Barros and the second purchaser. The Registrar of Deeds did not respond to the proceedings served upon him.

There was no appearance by or on behalf of the seller who the court was given to understand

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was in prison as a result of a fraud committed by her in respect of another person.

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The slight delay in the handing down of this judgment is due to the court's wish, after the conclusion of the trial, to learn whether the first and second purchasers had decided to pursue a possible settlement based on an equitable sharing of the property between them in order to avoid the extreme all or nothing consequence of a court judgment. However, as I was later advised that no settlement had eventuated, it became necessary for the court to give judgment in this matter.

The proceedings in this case were commenced by way of a chamber application filed by the first purchaser but after the seller, Mrs Barros and the second purchaser had filed opposing affidavits and the first purchaser an answering affidavit, Bartlett J, when the matter came before him, ordered that the matter be referred to trial with the papers filed of record standing as the pleadings. The learned judge further ordered that Mrs Barros and the second purchaser were not to sell or otherwise alienate the property in the meantime and that costs were to be costs in the cause.

I would highlight that before the trial commenced, I called the parties and their legal practitioners to my chambers and clarified that the crux of this matter was not whether the first purchaser could prove that the second purchaser had acted fraudulently in regard to its purchase of the property but whether, after agreeing to purchase the property but before the property was transferred to it, the second purchaser had notice or knowledge of the prior existing sale of the property to the first purchaser; and that if the first purchaser was able to prove that the second purchaser had such notice or knowledge, then this would favour the first purchaser's claim to the property in the absence of special circumstances affecting the balance of equities. See *Crundall Brothers \(Pvt\) Ltd v Lazarus NO \& Anor* 1991 (2) ZLR 125 (S) at 133A-B (hereinafter referred to as "Crundall Brothers' case").

[The learned judge then dealt with the evidence and continued:]

The approach to be adopted by a court in the case of a double sale of immovable property where a second purchaser had notice or knowledge of the prior sale of the property to the first purchaser at the time the second purchaser took transfer of the property, as was the position in this case, was confirmed in Crundall Brothers' case. In that case, the Supreme Court, in a full bench decision, in quoting at 132G and 133A-B the approach set out by Professor McKerron in (1935) 4 SA Law Times 178 and repeated with approval by Professor Burchell in (1974) 91 SALJ 40, accepted that if the second purchaser had knowledge, either at the time of sale or at the time he took transfer, of the prior sale to the first purchaser, then the first purchaser, *in the absence of special circumstances affecting the balance of equities* (the court's emphasis), could recover the property from the second purchaser, in

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which event the second purchaser's only remedy was an action for damages against the seller.

The Supreme Court pointed out, at p 133E, that in determining whether there are special circumstances affecting the balance of equities, one has to bear in mind that the primary right of the wronged purchaser is to the remedy of specific performance which will be granted unless there is some equitable reason disqualifying him from obtaining such relief. See also Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd 1993 (l) ZLR 21 (H) at 25B-28D.

I now proceed to consider whether there are special circumstances affecting the balance of equities which would make it inappropriate for me to grant the first purchaser's right to specific performance in this case.

In the first place, Mr Biti contends that, as in the Crundall Brothers' case, there was no deliberate deceit or mala fides on the part of the second purchaser.

However, while it appears true that at the time the second purchaser entered into the second sale in November 1995, it was unaware of the first sale and that in December 1995 and later, when it became aware that there had been a prior sale of the property, it was led by the seller to believe that that sale was off and that the first purchaser did not want to proceed with the sale, the second purchaser's belief was overridden by the telephone conversation which took place between its Mrs Barros and Miss Masunda in the evening of Saturday, 1 June 1996.

In the course of this telephone conversation, it is significant that when warned by Miss Masunda that if, as Miss Masunda understood, Mrs Barros wanted to buy the property, she should not make any further payments to the seller because, as Miss Masunda told her, the property had been bought by the first purchaser, who was in Malawi and who had paid for it, Mrs Barros did not make any comment about her information and belief that the prior sale between the first purchaser and the seller had been cancelled; or that she did not tell Miss Masunda that she had, in fact, paid the seller the purchase price in full, together with the transfer fees, so as to disabuse Miss Masunda of her understanding that Mrs Barros had only paid some monies to the seller.

While it is true that Miss Masunda testified that Mrs Barros told her she had bought the property legally and had all the papers relating to the property, that she was going ahead with the sale, that she was going to demolish "the place" and put in a new structure and that if Miss Masunda or the first purchaser's brother had any problems, they should speak to the seller, it is again significant that Mrs Barros, knowing full well at that time that the seller's conveyancers held the title deeds to the property and that she had paid the costs of transfer, saw fit not to put Miss Masunda fully in the picture that

transfer of the property to the second purchaser was imminent; and that Miss Barros should not have been concerned enough, after hearing from Miss Masunda that the first purchaser had bought and paid for the property, to approach Mr Paul immediately about the position, as Mr Paul had testified he was sure Mrs Barros would have done in the circumstances.

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Again, although in answer to a question from the court, Mrs Barros said that the warning from Miss Masunda had come too late because she had already paid all the money, including the transfer fees, the fact is that she did not tell Miss Masunda that.

In all the circumstances, Mrs Barros's reaction to Miss Masunda's telephone call points to her having wanted to leave matters as they were in the knowledge that the property was about to be registered in the second purchaser's name, hardly the behaviour of a person who was acting in good faith, thereby distinguishing her conduct from that of the respondents in *Crundall Brothers'* case.

Furthermore, unlike *Crundall Brothers'* case, the first purchaser's claim to the property in this case is clearly "a prior claim".

Again, unlike *Crundall Brothers'* case, there would be no problem in this case in "unscrambling" matters since, as indicated by the report which I caused to be obtained from the Registrar of Deeds, there are no mortgage bonds or other encumbrances over the property, so that it would be straightforward to order that the property be transferred by the second purchaser to the first purchaser.

The final consideration raised in *Crundall Brothers'* case was the failure of *Crundall Brothers'* legal adviser to obtain an interdict restraining the transfer of the shares in question. However, the facts in this case are very different from those in *Crundall Brothers'* case, where the matter was in the hands of the aggrieved party's legal practitioner but the legal practitioner, being well positioned to obtain an interdict, failed to do so to prevent the transfer of the shares in question.

In this case, the matter was in the hands of the first purchaser's agents, being his brother and Miss Masunda, and, as has been noted, had Mrs Barros put Miss Masunda fully in the picture as to the position on her side at the time she spoke to Miss Masunda over the telephone on 1 June l996, Miss Masunda would have appreciated the urgency of the situation and, presumably, advised the first purchaser's brother to consult the first purchaser's legal adviser immediately. Furthermore, upon being confronted by Miss Masunda and the first purchaser's brother after the former's telephone conversation with Mrs Barros, the seller again denied that she had sold the property to Mrs Barros.

Another consideration which Mr Simpson asked to be reckoned in the first

purchaser's favour was that the first purchaser had paid more than the second purchaser for the property, claiming that, taking into account overpayments he had made in addition to payment of the purchase price and interest, he had paid the total sum of $190 000. On the other hand, the second purchaser claimed that in addition to payment of the purchase price of $135 000, it had effected improvements to the property to the total value of around $30 000.

I do not consider that if the first purchaser was so careless as to overpay the seller by a large amount, this is a factor which should receive sympathetic consideration from the court. Equally, if the second purchaser saw fit to make improvements to the property before it took transfer

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thereof, then it did so at its own risk and I do not intend to concern myself with the issue of whether the second purchaser would be entitled to claim compensation from the seller or the first purchaser in respect of the improvements effected to the property since this would depend on a number of things. At the end of the day, therefore, if one has regard only to the purchase price of the property, with interest, it will be seen that the first purchaser paid considerably more for the property than the second purchaser did.

Mr Biti submitted that the court should view with disfavour the first purchaser's failure to press for transfer of the property since purchasing it in March, l994. However, the seller did not cross-examine Miss Masunda on this aspect and, in any event, if one has regard to the affidavits filed of record constituting the pleadings in this case, it will be noted, as submitted by Mr Simpson, that there was a dispute between the first purchaser and the seller on whether the first purchaser had paid what he was due to pay under his agreement of sale with the seller. This, no doubt, suited the seller's purpose in staving off transfer to the first purchaser while she achieved her fraudulent purpose in selling the property, for the second time, to the second purchaser.

Next I turn to consider what importance, if any, should be attached to the failure to have the first purchaser's instalment sale agreement endorsed against the title deeds of the property under s 64 of the Deeds Registries Act [Chapter 20:05]. Certainly, had the first purchaser's instalment sale agreement been so endorsed against the title deeds, the property could not have been transferred to the second purchaser unless the first purchaser had consented to the removal of the endorsement which, obviously, the first purchaser would not have done.

In the agreement of sale between the seller and the first purchaser, clause 20 provided that the parties consented to the registration of the agreement in terms of the Deeds Registries Act and to the endorsement on the title deeds to the effect that the property would be subject to the agreement.

However, a purchaser is not likely to understand the significance of having the title deeds of the property endorsed under s 64 of the Deeds Registries

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Act, which is further compounded by the fact that if, as in this case, the purchaser is not legally represented at the time the sale agreement is signed by him, then it is probable that the purchaser will do nothing about the matter unless the seller's legal practitioner takes it upon himself to advise the purchaser to have the title deeds endorsed under s 64 of the Deeds Registries Act. Accordingly, in the absence of evidence that the first purchaser was so advised in this matter - in fact, it can be argued that it was the duty of the seller's conveyancers to have given effect to the provisions of clause 20 of the sale agreement - I do not think it can be regarded as a major consideration that the first purchaser was at fault in not causing his instalment sale agreement to be endorsed against the title deeds of the property.

In any event, in my view, having regard to the provisions of s 64 of the Deeds Registries Act, the primary object behind s 64 is to protect the position of a purchaser under an instalment sale

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agreement in the event of the seller's insolvency and not to prevent the property which is the subject of the instalment sale agreement from being transferred to a third party pending the transfer of the property to the purchaser.

Finally, a possible further equity favouring the first purchaser is that the tenants at the property regard themselves as the tenants of the first purchaser and not of the second purchaser.

In the result, in the exercise of my judicial discretion, I find that on the evidence before me there are no special circumstances affecting the balance of equities which disqualify the first purchaser from being granted his primary right of specific performance.

This result coincides with the view expressed by Macdonald J (as he then was) in B P Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd & Anor 1964 RLR 7 (G) at 11G-H that there is a compelling and persuasive natural equity for preferring a purchaser who has had the good fortune to contract with a *bona fide* seller to a purchaser who has had the misfortune to contract for the purchase of the same property with a mala fide seller. The learned judge did not agree that they were equally wronged.

He added, at p 11I, that, in his view, the policy of the law to uphold the sanctity of contracts would best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract. He did not suggest that this should be the invariable rule but agreed that except in special circumstances the first purchaser was to be preferred.

On the issue of costs, there was no good reason for the first purchaser to have cited Mrs Barros as a party to the proceedings seeing that she was not acting in a personal capacity but only as the second purchaser's representative in regard to the purchase of the property by the second purchaser. However,

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since Mrs Barros did not take this point but descended into the arena, the court, in ordering costs to follow the cause, has seen fit to include Mrs Barros in its order.

I have made no order for the costs in regard to the claim in reconvention abandoned by the second purchaser since no order was claimed or sought by the first purchaser in that regard.

Accordingly, to give effect to my judgment, I make the following order.

1. That within 14 days after being required by the conveyancers nominated by the plaintiff so to do, the third defendant shall sign all necessary documents submitted to it and do all necessary things to cause transfer of the property registered in its name, being Lot 2 of Stand 68 of Prospect situate in the District of Harare measuring 5468 square metres ("the property"), to be registered, at the plaintiff's cost, in the name of the plaintiff.

2. That should the third defendant fail to comply with the provisions of para 1, the Deputy Sheriff or his Assistant is hereby authorised and directed, at the instance of the plaintiff, to sign all necessary documents and to do all necessary things on behalf of the third

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defendant to enable transfer of the property to be registered in the plaintiff's name.

3. That the plaintiff's costs of suit, including the costs referred to in the order made by Bartlett J on 12 November l996, shall be paid by the first, second and third defendants jointly and severally, the one paying the others to be absolved.

Mushonga & Associates, plaintiff's legal practitioners

Honey & Blanckenberg, second and third defendants' legal practitioners

PTC v MAHACHI 1997 (2) ZLR 71 (HC)

Court **High Court, Harare**

Chatikobo J

Application for summary judgment

27 May & 9 July 1997 Judgment No. HH-114-97

Flynote

Appeal - noting of - effect - appeal against decision of Labour Relations Tribunal - whether noting of appeal suspends operation of judgment of Tribunal

Employment - Labour Relations Tribunal - decision of - appeal against - whether operation of decision suspended by noting of appeal

Headnote

The plaintiff sought an order for the eviction of the defendant from a dwelling house, on the grounds of failure to pay the rent. The defendant claimed that he occupied the house by virtue of his employment by the plaintiff and that the terms of employment were that he was entitled to live in the house as long as he remained in employment. He said that although the plaintiff had applied for and obtained an order authorising his dismissal, and although the order was upheld by the Labour Relations Tribunal, he remained an employee because he had noted an appeal to the Supreme Court against the Tribunal's decision. The question for decision was whether the noting of the appeal suspended the decision appealed against.

Held, that the common law rule of practice is that generally the operation of a judgment is suspended on the noting of an appeal, except with the leave of the court which granted the judgment. The Labour Relations Tribunal, though, was a creature of statute and whether the common law rule applied depended on the construction to be placed on the statute which created it.

Held, further, that there was a presumption that the common law rule applied. The Labour Relations Act was silent as to whether the noting of an appeal to the Supreme Court suspended the operation of the Tribunal's judgment. There is also a presumption in the interpretation of statutes that Parliament does not intend to alter the common law unless it does so expressly or by necessary implication. There was nothing in the Act to suggest such an

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intent. In addition, the provision that the Tribunal was a court of record indicated that Parliament intended to bring it into line with other courts and to confer on it the trappings of a court of justice. Consequently, the decision of the Tribunal was suspended by the noting of the appeal.

Cases cited:

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

Phiri & Ors v Industrial Steel & Pipe (Pvt) Ltd S-242-95

Chatizembwa v Circle Cement Ltd HH-121-94

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

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The court considered the following statutory provisions:

Labour Relations Act [Chapter 28:01], ss 83(1), 92 (2) and 97

Case Information

G S Wernberg, for the plaintiff

C Sithole, for the defendant

Judgment

Chatikobo J: This is an application for summary judgment which arises in this way.

On 27 September 1996, the plaintiff issued summons against the defendant, praying against the latter for an order of eviction from a house owned by the plaintiff, described in the summons as Stand No. 6, Beatrice Township. An order for costs was also sought against the defendant. The defendant requested for and was furnished with further particulars after which a plea was filed on his behalf on 21 January 1997.

It was averred in the declaration that the defendant occupied the house in question by virtue of a lease which required him, among other things, to pay rent to the plaintiff on a monthly basis. The plaintiff contends that the defendant has, in breach of the said lease, failed to pay the required rentals, thus entitling the plaintiff to seek the eviction of the defendant. The defendant's plea, on the other hand, proclaims that he occupied the house in question by virtue of his employment with plaintiff as Postmaster in Beatrice. He claims that it was a condition of his employment that he would remain in occupation as long as he remained in the plaintiff's employment. In this regard he states that although the Labour Relations Tribunal (the Tribunal) has upheld a decision of a senior labour relations officer authorising his dismissal, he still considers himself an employee of the plaintiff because he has noted an appeal against the Tribunal's decision to the Supreme Court. The question of his dismissal has therfore not been finally determined.

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After this plea was filed, the plaintiff then applied for summary judgment contending that defendant has no *bona fide* defence for two reasons, namely, (a) that even as an employee of the plaintiff, the defendant was obliged to pay rent, and his failure to pay such rent entitles the plaintiff to sue for eviction; and (b) that even if the appeal noted by the defendant to the Supreme Court has the effect of restoring the status quo ante the parties would revert to the scenario where, pending the outcome of the appeal, the defendant remains suspended without pay and benefits, and, as the house in question is part of such benefits, the defendant is not entitled to occupy the house while he is on suspension. There may be merit in this latter argument but not enough evidence has been put before me to enable me to decide the case on this basis. The grounds upon which the defendant was suspended and subsequently dismissed are not before me. I should therefore assume in favour of the defendant that this ground has not een established. I therefore cannot say if

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indeed the defendant was suspended without pay and benefits. I prefer to decide the matter on the basis of the defence put forward by the defendant himself, which in essence was that, while the appeal is pending in the Supreme Court, he remains an employee of the plaintiff. The issue which falls for consideration is therefore whether the noting of an appeal against the decision of the Tribunal suspends the decision appealed against.

It is now trite that, at common law, an appeal suspends the operation of the judgment appealed against. It suffices to refer to the dictum of Corbett JA (as he was then) in South Cape Corp (Pty) Ltd v Engineering Mgmt Svcs (Pty) Ltd 1977 (3) SA 534 (A) at 544H-545A:

> "Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see Ruby's Cash Store (Pty) Ltd v Estate Marks & Anor, 1961 (2) SA 118 (T) at pp 120-3), it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application."

To me this statement is no more than an exposŽ of the time honoured rule of practice that the court has an inherent jurisdiction to control the operation of its own judgments.

The Tribunal was established by s 83(1) of the Labour Relations Act [Chapter 28:01] (the Act). Being a creature of statute, the Tribunal has no powers other than those conferred upon it by the legislature either expressly or by necessary implication. Whether the common law rule, whereby an appeal suspends the operation of a judgment, applies to judgments of the Tribunal must depend on the construction to be placed on the relevant provisions of the Act.

In Chatizembwa v Circle Cement Ltd HH-121-94 (not reported) Smith J was asked to consider the same problem in a slightly different context. In that case, the applicant's contract of employment was terminated in accordance with the applicable code of conduct. The applicant, who had noted an appeal to the Tribunal, contended that the noting of the appeal suspended the operation of the decision to dismiss him until the determination of the appeal. At p 4 of the cyclostyled judgment, Smith J held:

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> "If the legislature had intended that the decision of the body concerned under the code of conduct should be suspended pending an appeal, it would have said so as is done in s 113(3). In addition it would have inserted a power enabling the Labour Relations Tribunal to declare otherwise in appropriate circumstances. The fact that it did not make a specific provision to that effect is a clear indication that it did not intend the noting of an appeal to suspend the decision appealed against. The introduction of the concept of registered codes of conduct which are binding on employers and employees is, to my mind, consistent with

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> the principle that determinations made in accordance with the provisions of a registered code should have effect until such time as any appeal is determined."

I think that it is important at all times to bear in mind the fact that the question to be decided in each case is whether the common law presumption against the interim operation of judgments pending appeal is of any application to administrative decisions made by statutory functionaries or quasi-judicial bodies. As Baxter Administrative Law p 381, puts it:

> "In the case of an appeal, the issues are somewhat different. The validity of the decision may not be under challenge at all. Hence the same principle is not necessarily applicable. In the case of private disputes, the effect at common law of noting an appeal is to suspend the operation of the decision appealed against. But the right of appeal against decisions taken in terms of statutory powers is dependent upon the enabling statute. The common law principle can constitute no more than a presumption in the case of administrative decisions and this presumption may well be negatived by the implications of the statute."

I understand this statement to mean that there is a presumption that the common law rule that the noting of an appeal suspends the operation of a judgment applies to administrative decisions unless the enabling statute provides otherwise. This view finds support in the judgment of Greenland J in *Mushaishi v Lifeline Syndicate \& Anor* 1990 (1) ZLR 284 (H) at 287D:

> "To my mind, it would be anomalous if an administrative decision of a quasi-judicial nature, as is the case here, were to be put on a different footing from court judgments and orders. In the absence of anything provided to the contrary in the relevant Act such decisions must be treated as suspended pending appeal."

I must then turn to examine the relevant provisions of the Act in order to discover if there is anything within its four corners which either expressly or by necessary implication negatives the common law presumption. It is provided in s 93(5) of the Act that any party who is aggrieved by a determination made by a labour relations officer may apply for the dispute to be referred to a senior labour relations officer. There is no right of appeal to a senior labour relations officer. What there is, however, is a right to apply for a reference of the dispute to a senior labour relations officer. That being so, the question of the suspension of the decision of a labour relations officer does not arise, hence the absence of a provision to that effect. A right of appeal lies to the Tribunal from a decision of a senior labour relations officer in terms of s 97(1 of the Act. Where an appeal is noted to the Tribunal in terms of this section, the determination or decision appealed against is suspended because s 97(3) maes provision to that effect. In s 92(2) it is provided that an appeal on a question of law shall lie to the Supreme Court from a decision of the Tribunal. It can be seen that it is only in respect of the first appeal permissible under the Act where there is a specific provision which suspends the operation of the decision appealed against. The Act is silent on whether the noting of an appeal to the Supreme Court

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suspends the decision of the

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Tribunal. What Smith J held in *Chatizembwa supra* was that this legislative silence, if I may call it so, is an indication that Parliament did not intend that an appeal would suspend the operation of the judgment. Of course, in that case Smith J was concerned with an appeal to the Tribunal from a decision made in terms of a registered code, whereas I am concerned with an appeal from the Tribunal to the Supreme Court. The decision of Smith J must therefore be regarded as one peculiar to its own facts, especially in view of the fact that the decision appealed against in Chatiembwa was not one made by a statutory functionary or a quasi-judicial body.

I am concerned with proceedings conducted in the public law domain under the provisions of the Act. In this domain the common law presumption against the operation of judgments which have been appealed against applies unless the Act provides to the contrary. In this case, the Act is silent on the issue. But does this silence mean that Parliament intended to alter the common law position? In Phiri & Ors v Industrial Steel & Pipe (Pvt) Ltd S-242-95 (not reported) Korsah JA said:

> "There is a presumption, in the interpretation of statutes, that Parliament does not intend a change in the common law, unless it expresses its intention with irresistible clearness, or, it follows by necessary implication from the language of the statute in question, that it intended to effect such alteration in the common law; for 'construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction ...'
>
> *per* Lord Halsbury LC in Bank of England v Vagliani [1891] AC 107 at 120.
>
> I am of the persuasion that, in the absence of a clear indication by the law giver to the contrary, the common law position that the execution of all judgments is suspended upon the noting of an appeal, is not ousted by the silence of the statutory instrument, in terms of which the respondent's appeal to the Tribunal was lodged upon the effect of such appeal against the order made by the Minister."

My considered view is that the construction of the relevant provisions of the Act cannot be aided by the fact that in the case of an appeal to the Tribunal from a senior labour relations officer, there is a specific provision staying execution of the decision of a senior labour relations officer. That provision was inserted because the form of appeal which is open to a party who is aggrieved by a decision of a labour relations officer is in hybrid form, because in terms of s 97(2) of the Act, such appeal may either address the merits of the decision or seek a review of such decision on any grounds upon which the High Court may exercise review jurisdiction. Section 97(1) as read with s 97(2) gives to the aggrieved party not only a right of appeal but also a ground of review. These provisions give to the Tribunal appellate as well as review jurisdiction. It is for this reason, in my view, that the law giver made specific provision for the suspension of a decision of a senior labour

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relations officer while an apeal to the Tribunal was pending. It was not intended to be a

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restatement of the common law position. In the case of an appeal from the Tribunal to the Supreme Court, in respect of which the Act is silent, the intendment of the law giver must have been to retain the common law principle that an appeal suspends the operation of the judgment.

I am fortified in this view by the provisions of s 83(1) of the Act by which the Tribunal was established. The section says:

> "There is hereby established a tribunal to be known as the Labour Relations Tribunal which shall be a court of record."

By providing that the Tribunal shall be a court of record Parliament must have intended to bring it in line with other courts of the land and to confer upon it the trappings of a court of justice such as the power to control the operation of its own judgments.

I have therefore come to the conclusion that the noting of an appeal to the Supreme Court has the effect of suspending the decision of the Tribunal.

The application for summary judgment is therefore refused. Costs are reserved for determination at the trial.

Coghlan Welsh & Guest, legal practitioners for the plaintiff

Manase & Manase, legal practitioners for the defendant

AMI ZIMBABWE (PVT) LTD v CASALEE HLDGS (SUCCESSORS) (PVT) LTD 1997 (2) ZLR 77 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

16 June & 9 July 1997 Judgment No. S-91-97

Flynote

Carrier - liability - goods carried by land - goods destroyed due to gross negligence of carrier - whether carrier liable to Zimbabwean company which engaged carrier on behalf of foreign company

Interest - rate - debt expressed in foreign currency - rate should be that appropriate to the foreign currency in question

Headnote

A Zimbabwean tobacco company (CasZim) sold tobacco to an international tobacco company (CasInt) of which the Zimbabwean company was a subsidiary. CasInt in turn sold the tobacco to a Zairean company. CasInt instructed CasZim to to consign the tobacco to the Zairean company. CasZim contracted with a transport company (AMI, the appellant) to transport the tobacco. AMI subcontracted the transportation work to another transport company (Dalrita). Due

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to the gross negligence of Dalrita, half of the tobacco was destroyed before delivery to the consignee. Before this was known, CasInt paid the full purchase price to CasZim. CasInt reinbursed the Zairean company for the part of the consignment that had not arrived. CasInt in turn demanded reinbursement from CasZim. Unable to pay, CasZim agreed with CasInt that it would claim damages from AMI and Dalrita and pass on the proceeds to CasInt. CasZim obtained judgment against AMI. Judgment was given in United States dollars. AMI appealed against that judgment.

It was argued that ownership and risk had passed to the Zairean company and that the Zairean company was the proper claimant. It was also argued that CasZim had suffered no loss and thus had no claim and that the standard terms of trading excluded liability on the part of AMI.

Held, that benefit and risk pass to the buyer when the sale is perfecta. As AMI had failed to raise the issue of ownership earlier the onus was on AMI to show that the ownership had passed from CasZim. The failure to raise the issue of ownership properly and the flimsy nature of the evidence relating to the exact nature of the contract left the court with no option but to accept that the delivery of the tobacco by CasZim to AMI did not indicate an intention to transfer ownership either to CasInt or to the Zairean company.

Held, further, that as CasZim had an obligation to repay the price paid by CasInt and as it was only because of the benevolence of CasInt that the money still remained with CasZim until it recovered from AMI, CasZim had suffered a loss such that it was entitled to claim.

Held, further, that, apart from the fact that the standard terms were never brought to the attention of CasZim, AMI's agent was in any event guilty of gross negligence and it was not possible to contract out of liability for gross negligence.

Held, further, that it was proper to give judgment in a foreign currency coupled with the standard

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order that interest on the amount be payable a *tempore morae* at the rate applicable to the currency in question.

Cases cited:

Botha v Rondalia Verskekeringkorporasie van SA 1978 (1) SA 996 (T)

Diepenaar v Shield Ins Co Ltd 1979 (2) SA 904 (A)

Gehring v Unie Nasionaal Suid-Britse Versekering 1983 (2) SA 266 (C)

Grobbelaar v van Heerden 1906 EDC 229

Industrial Equity Ltd v Walker 1996 (1) ZLR 269 (H)

Keavney & Anor v Msabaeka Bus Svc (Pvt) Ltd 1996 (1) ZLR 605 (S)

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Lehmbeckers Transport (Pty) Ltd v Rennies Finance (Pty) Ltd 1994 (3) SA 727 (C)

Lendalease Finance (Pty) Ltd v Corporacion de Mercedeo Agricola & Ors 1976 (4) SA 464 (A)

Makwindi Oil Procurement (Pvt) Ltd v Noczim 1988 (2) ZLR 482 (S)

Nichols v Pearl General Ins Co & Anor 1994 (1) ZLR 193 (H)

Rondalia Finansieringkorporasie van SA Bpk v Hanekom 1972 (2) SA 114 (T)

Saflec Security Systems v Group Five Building (East Cape) 1990 (4) SA 626 (E)

Santam Versekeringmaatskappy v Byleveldt 1973 (2) SA 146 (A)

Smit v Saipem 1974 (4) SA 918 (A)

SWA Amalgameerde Afslaers (Edms) Bpk v Louw 1956 (1) SA 346 (A)

van Dyk v Cordier 1965 (3) SA 723 (O)

van Wyk v Herbst 1954 (2) SA 571 (T)

Case Information

H Simpson, for the appellant

F Girach, for the respondent

Judgment

McNally JA: This case concerns a relatively straight forward transaction involving five parties. But, as will appear from what follows, there were complex legal issues which were not adequately addressed. In some instances they were not addressed at all.

I will speak of the appellant as AMI, and of the respondent as Casalee Zim. The other parties to the transaction were the international company of which Casalee Zim is a subsidiary, which I will call Casalee Belgium; a Zairean company which I will call Tabazaire; and a local Zimbabwean carrier Dalrita Haulage. Events developed as follows:

1. Casalee Zim in October 1989 sold a large consignment of tobacco to Casalee Belgium, who then sold it to Tabazaire.

2. Casalee Belgium instructed Casalee Zim to consign the tobacco direct to Tabazaire.

3. Casalee Zim contracted with AMI to carry the goods. AMI subcontracted the work to Dalrita Haulage.

4. Casalee Zim delivered the tobacco to Dalrita Haulage, who conveyed about half of it successfully to Tabazaire.

5. Casalee Belgium paid Casalee Zim in US dollars for the full amount, before realising that something had gone wrong.

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6. Enquiries then revealed that the second half of the consignment had, owing to gross negligence on the part of Dalrita Haulage, been left to rot at the latter's premises after they had failed to clear customs at the Zambian border.

7. Casalee Belgium, reimbursed Tabazaire whatever amount the latter had paid it, and reclaimed what it had paid Casalee Zim.

8. Casalee Zim was unable to pay, but agreed with Casalee Belgium that it would claim damages from AMI and Dalrita Haulage and pass the proceeds to Casalee Belgium.

9. Casalee Zim sued AMI and Dalrita Haulage. In 1993, before the present action was heard, Casalee Zim had obtained judgment (in Zimbabwe dollars) for $106 425 and costs against Dalrita Haulage. That judgment has however not been satisfied.

10. When the present action was heard, Dalrita Haulage, who had been cited and joined as a third party by AMI in 1991, were no longer party to the proceedings. It was conceded they had been grossly negligent. The claim was defended on two bases only:

    a. The quantum was put in issue;

    b. It was contended that the Standard Conditions of Trading at AMI excluded its liability in that the carriage and possession of the tobacco was at the risk of the plaintiff ie Casalee Zim.

11. The learned judge gave judgment for Casalee Zim in US dollars as prayed, with interest at the prescribed rate from the date of summons and costs of suit.

12. The notice of appeal raised (somewhat obscurely, it must be said) the following grounds of appeal:

    a. Ownership and risk in the consignment had passed to Tabazaire, who was the proper claimant;

    b. Casalee Zim had suffered no loss;

    c. The Standard Conditions of Trading should have excluded liability on the part of AMI;

    d. The award should not have been expressed in US dollars.

This court is now required to deal with those four grounds of appeal. I shall deal with them in the order in which they are listed.

1. TABAZAIRE RATHER THAN CASALEE ZIM SHOULD HAVE BEEN THE PLAINTIFF

It was argued that ownership and risk had passed to Tabazaire and that therefore it rather than

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Casalee Zim should have been the plaintiff. It may be

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noted that in its amended plea, p 7, AMI asserted that "the carriage and possession of the tobacco was at the risk of the plaintiff". However, this was an alternative submission, and I accept that it does not bar AMI's counsel from raising the point.

Benefit and risk pass to the buyer when a sale is *"perfecta*" - see generally Kerr *The Law of Sale and Lease* 2 ed pp 214-215.

A sale is "perfecta" when the contract is entered into, in the case of a specific thing, but in the case of goods sold by weight, number or measure, only when the particular goods are weighed, numbered or measured, as the case may be - see Kerr op cit, and his reference to Pothier at p 217. Clearly, in this case, the sale was "perfecta". I speak now of the sale to Casalee Belgium. We have no details of the further sale by Casalee Belgium to Tabazaire.

Grobbelaar v van Heerden 1906 EDC 229 is a case whose authority has stood unchallenged for 90 years. It involved ostriches sold to van Heerden by a third party but not yet delivered. Ownership had not yet passed, because the sale was for cash on delivery. Yet even so, the court held that the contract was "perfecta". But van Heerden could not sue Grobbelaar, who had injured the ostriches. He should have obtained cession of action from the seller before suing. This, of course, was because van Heerden was not the owner. Ownership or dominion in goods sold for cash on delivery passes normally on delivery.

In the present case, and as between the seller and the carrier, the contract between these parties was a contract in terms of which the carrier (or his agent) took possession of the goods from the seller, took its instructions from the seller, looked to the seller for payment of its charges as a carrier, and undertook to the seller to deliver the goods to Labumbashi. It was irrelevant to it who the owner was. But clearly, the carrier dealt with Casalee Zim as principal.

Nonetheless, to cite Kerr again at p 215:

> "... our rule is the Roman one: the benefit of advantages and the risk of loss pass to the buyer as soon as the sale is perfecta. The most important consequence is that the full price has to be paid even though the thing sold is damaged or destroyed before it is handed over."

But the cases are clear that the true owner has a sustainable action for damage to his property even if he has a contract with some third party in terms of which the risk in the property has passed to that third party. See Grobbelaar's case *supra* and also van Wyk v Herbst 1954 (2) SA 571 (T); Botha v Rondalia Versekeringskorporasie van SA 1978 (1) SA 996 (T), especially at 999C et seq, and Lehmbeckers Transport (Pty) Ltd v Rennies Finance (Pty) Ltd 1994 (3) SA 727 (C) at 731H et seq.

So it becomes important to decide whether ownership in the tobacco had passed when it perished, and, if so, to whom had it passed?

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McNALLY JA

The importance of this point does not appear to have been appreciated in the court *a quo*. One reason for that was that it was never raised. AMI should have raised it, by seeking further particulars and then excepting to the declaration. They did not do so.

The need to raise issues clearly in the pleadings has recently been stressed by this court in Keavney & Anor v Msabaeka Bus Service (Pvt) Ltd 1996 (1) ZLR 605 (S) (not yet reported). It is unnecessary to repeat what was said there.

Suffice it to say that in the present case, the failure by AMI to raise the issue of ownership, or of Casalee Zim's capacity to sue, must mean that there is an onus on AMI to show that ownership in the tobacco, which clearly originally vested in Casalee Zim, had passed either to Casalee Belgium or to Tabazaire at the time the gross negligence occurred which resulted in the loss of the tobacco.

Not only was the issue not raised in the pleadings. It was not raised either in cross-examination. It was raised only in argument. So we do not know whether there was an express agreement as to the transfer of ownership (compare Saflec Security Systems v Group Five Building (East Cape) 1990 (4) SA 626 (E) at 630A-D). It does not appear that it was a CIF contract, in terms of which ownership passes normally on delivery of the bill of lading (compare Lendalease Finance (Pty) Ltd v Corporacion de Mercedeo Agricola & Ors 1976 (4) SA 464 (A) at 491H-492D). Nor do we know when the bill of lading (or its equivalent in this case, the road consignment note) was delivered.

All that we can glean from the evidence of Mr Seys (or Sayce) for Casalee Zim is that the contract with Casalee Belgium was FOB (or FOT - Free on Truck?) Harare, which suggests that ownership might have passed; that Casalee Zim had insurance cover for the tobacco while in transit, which suggests that ownership had not passed; and finally that the tobacco was not insured by Casalee Zim but that the contract was a C and F contract, not a CIF contract, which would suggest that ownership might have passed. However, since none of the questions were put to him in the context of the passing of ownership, we do not know whether or not there was any special agreement as to the passing of ownership.

The only relevant documents produced were a Form of Application to Export Goods from Zimbabwe (Exh. 2) and an invoice from Casalee Belgium to Tabazaire. The former is one of those copies, all too frequently encountered, where the typist has not bothered to align the carbon copies. Thus in answer to the question:

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"Are goods being exported in pursuance of a contract of sale? YES/NO" the deletion marks intended either for the YES or the NO appear over the word "exported". In answer to the next question: "If a contract: (1) is the sale FOR, FOB, C & F, or CIF?" the deletion marks appear

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over the next question.

I am not prepared to base weighty legal conclusions on such flimsy foundations. Finally, the invoice (Exh. 3) is in French.

In all the circumstances, the failure to raise the issue properly leaves this Court with no option but to accept that the delivery of the tobacco by Casalee Zim to its own carrier does not indicate an intention to transfer ownership either to Casalee Belgium or to Tabazaire at that point. There are certainly indications that ownership might have passed. But AMI has failed to plead or to prove it. Accordingly we must proceed on the basis that Casalee Zim were the owners of the tobacco when it was rendered unfit for use.

That being so, in the light of the cases cited above, Casalee Zim had locus standi to sue, based on their dominium in the tobacco, regardless of the fact that the risk in the tobacco had passed to the purchaser. That disposes of the first argument.

2. CASALEE ZIM HAS SUFFERED NO LOSS

This again is a point which should have been pleaded but was not. To put the quantum in issue is one thing; to allege that the plaintiff has suffered no loss because it has been paid for the goods allegedly destroyed is quite another thing.

Nonetheless, the fact is that Casalee Zim has been paid for the tobacco which is the subject of this claim. So prima facie it has suffered no loss, and thus has no claim.

The answer provided by the lawyers acting for Casalee Zim, when this issue was raised, again very vaguely, in cross-examination, was that Casalee Zim had an obligation to repay the price which it had been paid by Casalee Belgium. Because that price had been paid in US dollars, it, Casalee Zim, had to repay the price in US dollars. That is why it had amended its prayer to seek judgment not in Zimbabwe dollars but in US dollars.

Casalee Zim was permitted, because this matter had been raised so late, to re-open its case to deal with the point. It did so by calling a Mr Strong, who, at the material time, had been chairman both of the local company of which Casalee Zim was a subsidiary, and of the international company, Casalee Belgium.

Mr Strong testified that the tobacco in question had been sold by Casalee Zim to Casalee Belgium who then sold it to Tabazaire. Casalee Zim, acting "effectively" as Casalee Belgium's agent, (for the purpose of delivery, I assume), arranged to deliver the tobacco to Tabazaire.

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When it became known that part of the shipment had not arrived Tabazaire demanded reimbursement from Casalee Belgium. Casalee Belgium complied with the demand, and in turn demanded a refund from Casalee Zim. The latter were unable to pay, but acknowledged the debt, and undertook to repay it after recovering the amount from AMI. He produced a letter from Casalee Belgium, dated 23 May 1996 which confirmed that situation and repeated the demand for repayment. The letter had clearly been written for purposes of the hearing, but was patently

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reliable despite that.

It seems to me with respect that the legal advisers of Casalee Zim have failed to come to grips with the legal issues involved. The argument against them runs thus: Casalee Zim has not suffered a loss. Casalee Belgium had suffered a loss. It has paid for tobacco which it has not received. It, not Casalee Zim, in the circumstances has a claim against AMI, on the basis that the risk in the consignment has passed to it. In terms of the passage from Kerr p 215 cited above, "the full price has to be paid even though the thing sold is destroyed."

It has paid the price. Now it has a right to sue AMI for the loss it has suffered. It must cede that right to Casalee Zim (in exchange no doubt for a suitable undertaking by the latter to pass on any damages recovered).

Without such a cession of action Casalee Zim cannot sue AMI on behalf of Casalee Belgium because an agent cannot sue on behalf of its principal - see SWA Amalgameerde Afslaers (Edms) Bpk v Louw 1956 (1) SA 346 (A) at 355C:

> "... the auctioneer can sue for the purchase price without cession of action from the seller only if in the transaction he sold as principal."

There has been no cession of action, and it may be that by now there is a problem of prescription. So if Casalee Zim is suing as agent it is out of court.

The argument in favour of Casalee Zim might run as follows: Casalee Zim contracted as principal when it dealt with AMI. There was no suggestion that it claimed to be an agent. It held itself responsible to pay for the transport, in Zimbabwe dollars. As principal it is entitled to claim against AMI for any loss suffered as a result of the gross negligence of AMI or its agent.

On that basis, how does one deal with the contention that Casalee Zim has suffered no loss? It seems to me that it can rely on the doctrine of res inter alios acta. In other words the fact that it has been paid by Casalee Belgium is irrelevant. The latter clearly has a right, under the *condictio causa data causa non secuta*, to claim repayment from the former, as it has done. The claim is admitted and accepted. It is simply because of the benevolence of Casalee Belgium that the money still remains with Casalee Zim.

There is a passage in the (translated) remarks of Jansen JA in Smit v Saipem 1974 (4) SA 918 (A) at 926-927 which supports the proposition that

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in this situation the money in Casalee Zim's hands is not to be regarded as an asset for the purposes of determining whether it has suffered a loss. In that case a hire-purchaser of land sued for damage to the property and was met with the argument "you are not the owner. He is the one who has suffered the loss.

Jansen JA, with whom the majority of the court agreed, said:

> "Although the erven are still the property of the seller, they are as such (and the value which they have) not an asset to him in the economic sense. Their value is to be substituted by the purchase price, and the right to claim

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the purchase price is the seller's real asset."

To fit the facts of the present case we might say:

"Although the money is the property of Casalee Zim, it is not an asset of Casalee Zim in the economic sense. Its value is to be substituted by the claim against AMI, and that claim is Casalee Zim's real asset."

This reasoning was adopted and developed by Thring J in Lehmbeckers Transport (Pty) Ltd v Rennies Finance (Pty) Ltd *supra* at 729B:

"... the sole issue on appeal is whether the plaintiff satisfactorily established at the trial that it had suffered the damages claimed by it ... Mr Snyman, who appeared for the defendants, contended, that it was not the plaintiff but Fidelity Guards which had suffered the damage flowing from the collision. The plaintiff had suffered no reduction in its patrimony ... since (it) could recover its loss in full from Fidelity Guards in terms of the lease. If anyone had a claim against the defendants it was accordingly, not the plaintiff, but Fidelity Guards."

Thring J rejected this argument. He relied on a number of cases, among them Rondalia Finansieringkorporasie van SA Bpk v Hanekom 1972 (2) SA 114 (T) where Colman J said at 116E-H:

"It is a familiar situation that a plaintiff whose property has wrongfully been damaged has a contractual right to be indemnified for that loss by his insurer; but it is well recognised that that does not prevent the owner from suing the wrongdoer, in his own name and without cession of action from the insurer, for the damage to his property, and from recovering such damage."

See also van Dyk v Cordier 1965 (3) SA 723 (O) at 725B.

Finally, he relies on the judgment of Nestadt J in Botha v Rondalia Versekerings Korporasie van SA Bpk 1978 (1) SA 996 (T) where there is reference to the:

"so-called 'collateral source rule' ie the rule that generally any compensation ... that the injured party receives from a collateral source, wholly independent of the wrongdoer or his insurer, does not operate to reduce the damages recoverable by him."

This rule was recognised by the Appellate Division in Santam Versekeringsmaatskappy v Byleveldt 1973 (2) SA 146 (A) in the judgments of Rumpff, Wessels and Trollip JJA. Some hesitation lingers as to its scope and extent - see Gehring v Unie Nasionaal Suid-Britse Versekering 1983 (2) SA 266 (C) at 269 in fine.

Although these cases are different on the facts, it seems to me that the

present case is a fortiori. Casalee Zim is not ultimately to benefit twice. It is only because of the benevolence of Casalee Belgium that it has been allowed to retain the money wrongly paid to it until it recovers from AMI. But it will then have to reimburse Casalee Belgium.

Accordingly, I conclude that Casalee Zim has suffered a loss despite the fact that it holds the purchase price of the tobacco.

3. THE STANDARD CONDITIONS OF TRADING SHOULD HAVE EXCLUDED LIABILITY ON

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THE PART OF AMI

I do not think it necessary to dwell on this submission which Mr Simpson argued but faintly. The evidence established, in the view of the learned trial judge with which I respectfully agree, that the Standard Conditions of Trading were never brought to the attention of Casalee Zim. Secondly it is common cause that there was gross negligence on the part of AMI's agent, and qui facit *per* alium facit *per* se. One cannot contract out of gross negligence.

4. THE AWARD SHOULD NOT HAVE BEEN EXPRESSED IN US DOLLARS

This court established in Zimbabwe for the first time in Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of Zimbabwe 1988 (2) ZLR 482 (S) that in a proper case a court order might be expressed in foreign currency. In addition, it laid down that the amount of foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment.

In the present case, the claim was originally made in Zimbabwe dollars. It was for Z$106 425. It was at that time the equivalent of US$42 750. Today, some eight years later, US$42 750 is worth approximately Z$487 300. The claim was amended and judgment was given in US dollars. The learned judge simply said that he was satisfied "that this is a proper case in which the plaintiff can claim judgment in foreign currency as representing its loss". (I should say here in parenthesis that there seems to be total confusion in the papers as to whether the US dollars figure is $42 570 or $42 750. It seems to stem from the figures in Exh. 10 which contain a manifest error in arithmetic. I assume that is why the final judgment is for US$42 750. I have not therefore altered that figure).

In submitting that it was wrong to make the award in US dollars, Mr Simpson said no more than that in the declaration the plaintiff made its claim in Zimbabwe dollars, and that AMI's invoices to Casalee Zim for transport charges are in Zimbabwe dollars.

But the declaration was formally amended, and the invoices were for

carriage charges. Had the claim been for refund of the carriage charges there would have been substance in the submission. But the claim is for the value of tobacco sold for US dollars. Moreover, one presumes that Casalee Belgium will want back the US dollars price they paid. I do not consider there is substance in either submission.

No point was made of the fact that judgment has been given separately against Dalrita Haulage in Zimbabwe dollars. Nor have we been asked to give judgment against AMI jointly and severally with Dalrita Haulage, the one paying the other to be absolved. If that had been the case, it might be difficult to do so since the judgments would be in different currencies and thus effectively for different amounts in Zimbabwe currency.

Perhaps the issue should have been raised. But it was not. So we will ignore it. In the circumstances, the appeal on this aspect also fails.

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5. INTEREST ON AN AWARD IN A FOREIGN CURRENCY

There is one final point which was not considered by either party, but was raised by this court on appeal. The point is whether it is proper to give judgment in a foreign currency coupled with the standard order that interest on the amount be payable at the statutory rate a *tempore morae*.

The question has arisen before, not in this court but in the High Court. It was raised first by Bartlett J in Nichols v Pearl General Ins Co & Anor 1994 (1) ZLR 193 (H) at 211. He expressed the view that interest on a judgment in pounds sterling should run "at the rate of interest prevailing at any particular time at the Bank of England". He left it open for counsel to negotiate the details and if necessary to come back to court. History does not relate what happened.

The same judge followed the same approach in *Industrial Equity Ltd v Walker* 1996 (1) ZLR 269 (H). And finally, the point was raised by Robinson J in chambers in another matter, Samir Shasha t/a Shasha & Asscs v Zimasaza (Pvt) Ltd. The matter was finally heard, I understand, by another judge, who decided to follow the other line of allowing interest in terms of the Prescribed Rate of Interest Act 1985, now Chapter 8:10.

It is desirable that this policy question be decided. To illustrate the importance of such a decision it is necessary only to look at the facts of the present case. If the judgment debt were to be Z$106 425 and interest were to run at the statutory rate from, say 1 January 1990 to say 31 December 1997, the interest would be 10% *per* annum up to 5 September 1991 (SI 146/86);121/2% *per* annum up to 9 September 1993 (SI 251/91); and 25% *per* annum thereafter (SI 273/93). That gives a rough total owing of about Z$264 732. But if one starts with a figure in US dollars of US$42 750 and applies the same interest rates, one comes to a figure of US$106 340 which at today's

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exchange rate is roughly Z$1 212 283. The one figure is four and a half times the other. The difference is enormous.

It might be argued that the whole point of the Act is to lay down a rate which will apply in the absence of agreement. But the Act gives a discretion in s 4 ("unless that judgment or order provides otherwise") and a judge must use that discretion.

If the debt in this case is looked at as payable ultimately in US dollars to Casalee Belgium, then one reasons as follows:

Suppose the US$42 750 had been paid to them on 1 January 1990. Suppose they invested it at the appropriate bank interest rate. Suppose, as I would guess, that that rate was in the region of 3%. In eight years they would have, in capital plus simple interest, US$53 010. Yet, as I have shown, if we calculate using the prescribed rate, they will get US$106 340. Twice as much. I cannot see any possible justification for that. See Dippenaar v Shield Ins Co Ltd 1979 (2) SA 904 (A) at 917B-C.

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Accordingly, it seems to me that the approach of Bartlett J is the correct one. It is difficult to say, and may be a matter for argument, what the proper rate is, and which country's rate is appropriate. In this case, do we use the rate prevailing in Belgium or in the US? But the principle must prevail that the creditor must receive his award in the appropriate currency with a rate of interest appropriate to that currency in the circumstances. Since this is a matter of practice I have shown this judgment to the Chief Justice, who authorises me to say that he agrees with this approach to the question of interest.

This alteration will cause a major reduction in the amount of money finally recovered by Casalee Zim. Yet on all the points actually raised on appeal, the appellant has lost. Had this point been raised, it might have been conceded. Accordingly, I do not propose to allow the appellant any concession on costs.

It will be necessary to vary the order of the High Court in relation to interest. In the result the order of this court is as follows:

1. The appeal is dismissed with costs;

2. The order of the court *a quo* is varied by the deletion of the words "at the prescribed rate" and the substitution of the following -

   "at a rate a *tempore morae* to be agreed between the parties in the light of this judgment, failing which leave is granted to either party to set the matter down for further argument in the Supreme Court on the question of interest only."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

MARAVANYIKA v HOVE 1997 (2) ZLR 88 (HC)

Court **High Court, Bulawayo**

Malaba J

Application for maintenance order

11 July 1997 Judgment No. HB-28-97

Flynote

Costs - scale - amount awarded falling within jurisdiction of magistrates court - when costs may be awarded on High Court scale

Court - jurisdiction - High Court - maintenance claim - whether fact that magistrates court is designated as a maintenance court precludes the High Court from dealing with such a claim

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Family law - maintenance - child - payment by one spouse in excess of that spouse's obligation - creates debt by other spouse to first spouse - amount - calculation - remarriage of spouse and establishment of another family - effect

Prescription - debt - arrears of maintenance - constitute a debt which is subject to prescription

Headnote

In December 1995, the applicant sought an order that, with effect from January 1996, the respondent pay a monthly sum as maintenance in respect of her child, who was born in December 1984. She also sought a lump sum payment as arrear maintenance. The respondent offered a lesser sum as monthly maintenance. He also claimed that the matter should have been heard in the magistrates court, the magistrates court having been designated as a maintenance court in terms of s 3 of the Maintenance Act [Chapter 5:09]. As to the claim for arrear maintenance, he contended that it was not claimable; the applicant, he said, was seeking reimbursement of expenditure already made. Such a claim was for a "debt" which had been extinguished by prescription.

In respect of the amounts claimed, the applicant had produced pay slips to prove her income, as well as a statement regarding her expenditure. The respondent had not produced any pay slips, nor had he disclosed all the allowances he received as a member of Parliament. He had produced only a schedule of expenditure and income, which purported to show that his expenditure exceeded his income. In spite of this, he was paying for the education of three children at foreign universities.

It was finally argued that if the applicant were successful costs should be awarded on the magistrates court scale, as the relief sought was within the jurisdiction of the magistrates court.

Held, that while the magistrates court is designated as a maintenance court, such a designation

is necessary as the court is a creature of statute and cannot exercise powers not specifically given to it. On the other hand, the High Court has full original civil jurisdiction over all persons and matters within Zimbabwe. The designation of the magistrates court did not exclude the jurisdiction of the High Court, although it is desirable and cheaper to bring maintenance matters before the magistrates court.

Held, further, that as there was no previous court order, the claim for "arrear maintenance" was in fact one for a "debt" in its wide and general meaning. If the debt was due to the child, prescription would not run until three years after the child's eighteenth birthday.

Held, further, that the respondent had incurred a liability to reimburse the applicant the amount she spent in excess of her proportion of their joint duty as parents to maintain the child. The "debt" was, however, owed to the applicant in her personal capacity, not to the child, and was thus subject to extinctive prescription. There was no policy reason why such a debt should not be subject to prescription.

Held, further, that the applicant acquired a complete cause of action each time she paid in excess of her proportionate share of the joint liability to maintain the child and had three years

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from the date of each such payment within which to enforce her rights. Consequently, the debts in respect of any amounts paid more than 3 years before December 1995 were prescribed.

Held, further, that the court should be reluctant to demand the same standard of accounting in a maintenance case as it would in a commercial case. Although the evidence submitted by the applicant was rather scant, the respondent did not argue that she had incurred no expense at all.

Held, further, that the probabilities were that the respondent could afford to pay more than the sum he had offered to pay.

Held, further, that there is no definite line prescribing when costs should be awarded on the magistrates court scale rather than the High Court scale. The judge has a discretion. If the plaintiff shows that it was reasonable to bring the matter before the High Court, costs at the higher scale may be awarded. One special reason for bringing the case before the High Court is that it presents questions of fact or law of extraordinary difficulty or complexity. Another is where the speediness of the relief is important. In this case, the legal question was of some public importance and the remedy of a court application was quicker than proceedings in the magistrates court would have been. It was therefore not unreasonable for the case to have been brought to the High Court and costs would be awarded on the High Court scale.

Cases cited:

Ansell v Ansell 1980 ZLR 416 (G)

Chituku v Chituku HH-308-88

de Winter v Ajmeri Properties & Invstms 1957 (2) SA 297 (D)

Gwachiwa v Gwachiwa S-134-86

Harwood v Harwood 1976 (4) SA 586 (C)

Hora v Tafamba 1992 (2) ZLR 348 (S)

Hunt & Ors v Campbell 1945 WLD 1

Koch v Realty Corp SA 1918 TPD 356

Kotzé v Ongeskiktheidsfords van die Universiteit van Stellenbosch 1996 (3) SA 252 (C)

Muzondo v Muzondo 1985 (2) ZLR 240 (S)

Ramsuran v Yorkshire Ins Co Ltd 1965 (2) SA 263 (D)

S v Frieslaar 1990 (4) SA 437 (C)

Sewera v Maparanyanga S-88-88

White v Saker & Co 1938 WLD 173

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Williams v Shub 1976 (4) SA 567 (C)

Woodhead v Woodhead 1955 SR 70; 1955 (3) SA 138 (SR)

The court referred to the following statutory provisions:

High Court Act [Chapter 7:06], s 13

Maintenance Act [Chapter 5:09], s 3

Case Information

J K N Stirling, for the applicant

S J C Moyo, for the respondent

Judgment

Malaba J: This is an application, made on 11 December 1995 for an order against the respondent in these terms.

" 1. That the respondent pay maintenance to the applicant in respect of Yevai Amy Maravanyika, born on 25 December 1984, in the sum of $1 300 *per* month with effect from January 1996.

2. That the respondent pay applicant arrear maintenance in respect of the aforesaid Yevai Amy Maravanyika in the sum of $52 800.

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

At the hearing of the application on 9 May 1997, Mr Stirling applied for and was granted an unopposed amendment to the draft order to include the following paragraph:

"That respondent pay the paternity test costs of $2 595."

The applicant, who works for the National Railways of Zimbabwe as a service manageress, is the mother of the child for whom maintenance is applied. She alleged in the founding affidavit that the respondent, who is a Planning Commissioner in the President's Office, is the putative father of her daughter born out of wedlock on 25 December 1984.

The child, who is doing grade seven at a local primary school, has always been in the applicant's custody and resides with her at a house owned by the applicant in an up-market suburb. The respondent, who is ordinarily resident in Harare, is a married man with nine other children. He is the Member of Parliament for Gweru Central constituency where he owns a second house.

It is not in dispute that the applicant has maintained the child since its birth single handedly, without any contribution from the respondent.

Prior to the institution of these proceedings, the respondent seems to have found solace in the

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belief that he was not the father of the child.

The respondent's first line of defence to the claim by the applicant for the maintenance for the minor was, therefore, the denial of paternity. The applicant, however, arranged for a blood test to be conducted on all three parties and the results proved to the respondent's satisfaction that he was the putative father of her daughter.

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In the founding affidavit, the applicant said the cost of maintaining the child *per* month was $1 996.70 and claimed from the respondent a contribution of $1 300 *per* month. She said her income was insufficient to meet the maintenance needs of the child. Her payslip for the month of October 1995, which she attached to the founding affidavit, showed that her gross salary was then $8 629.58 *per* month with a net pay of $4 467.67. Against the income, she set up a schedule of expenditure drawn up in January 1996. Apart from the deductions for such things as income tax, medical aid, pension and National Social Security, the schedule contains amounts of money she said she spends a month towards the maintenance of the child. These include expenses towards the child's food (meat, milk. vegetables, bread), medical treatment, education and transport. Included in the list of expenditure, on which she calculated the figure of $1 996.70, are also costs of things like rates, maintenance of the house, plumbing, telephone, elecricity, water and the services of a domestic worker.

At the time of instituting the proceedings, she did not know how much the respondent earned *per* month but contended, nonetheless, that considering the fact that his position in Government was equivalent to that of a Cabinet Minister, he earned twice her salary. She maintained that he was able to pay maintenance of $1 300 *per* month for the child.

She also claimed what she called "arrear maintenance" for the child. She said she had paid $400 *per* month towards the maintenance of the child from January 1985 to December 1995. The sum of $400 *per* month was the reasonable amount the respondent ought to have paid towards the maintenance of his child.

As already stated above, the respondent had denied paternity but withdrew this particular defence when the results of the blood test proved him to be the father of the child. He, however, challenged the jurisdiction of this court to hear the application. His contention was that the High Court had power to hear any application for maintenance where it is ancillary to an action based on a matrimonial cause.

It was said the magistrate's court was designated a maintenance court in s 3 of the Maintenance Act [Chapter 5:09]. The magistrates court therefore, was the forum with the power to entertain an action for maintenance for an illegitimate child.

Nonetheless, the respondent offered to pay $438.11 *per* month for the maintenance of the child. He said he could not afford the amount of $1 300 *per* month claimed by the applicant. In that regard he disclosed that he earned a net salary of $12 561.57, against which he set up the following schedule of expenditure.

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Food (2 adults & 9 children)	$4 550.00
School fees for children	2 192.50
Telephone charges	900.00
Electricity charges	891.35
House main, gardener and petrol	750.00
Maintenance of family vehicle	400.00
Family clothes	400.00
Municipal rates	391.00
Sundries (4 x 30 + 9 x 30)	390.00
School uniforms	375.00
Water charges	217.00
Swimming pool	200.00
Balance credited to me	904.72
	$12 561.57

He said he spent the $904.72 credited to him meeting expenses relating to his house in Gweru. The expenses related to food ($800), telephone charges ($750), gardener cum-house keeper ($375), municipal rates ($250) and water ($200). The expenditure exceeded income by about $1 470.28 which he said he raised from an overdraft of $10 000 that he ran with his bankers. He said he also pays tuition fees for three of his children who are at universities in Britain, South Africa and Zambia.

Whilst acknowledging that the child needs maintenance, the respondent said it should be for necessaries, such as food, clothes, medical treatment, education and sundries. On the applicant's figures, these necessaries cost $1 165.19 *per* month. On his own figures, they cost $485 *per* month. He also charged that some of the items of expenditure on which the amount of $1 300 was calculated related to her own needs, not those of the child. These were costs of things like rates, house maintenance and plumbing, petrol and vehicle expenses.

On "arrear maintenance", the respondent contended that it was not claimable. He said the applicant, was in fact, claiming re-imbursement for the money she spent towards the maintenance of the child. The claim was therefore for a "debt" that had been extinguished by

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prescription. He raised the special defence of extinctive prescription against the claim for "arrear maintenance".

I consider first the question of jurisdiction. It is true that in terms of s 3 of the Maintenance Act [Chapter 5:09] every magistrates court is designated a maintenance court. Being a creature of statute, a magistrates court cannot exercise powers which are not given to it by either an Act of Parliament or the rules. The designation of the magistrates court as a maintenance court was, therefore, necessary for the purposes of conferring on magistrates express jurisdiction over maintenance matters.

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On the other hand, s 13 of the High Court Act [Chapter 7:06] provides that "subject to the Act or any other law the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe."

In designating every magistrates court a maintenance court, s 3 of the Maintenance Act did not exclude the wide jurisdiction of the High Court over maintenance matters. It is of course, desirable and cheaper to have such matters brought before the magistrates court which has inquisitorial powers when hearing complaints in maintenance cases. In appropriate cases, the High Court will, therefore, award successful applicants who bring these cases to it costs on the lower court scale to discourage forum jumping.

I consider next the question of "arrear maintenance". It is trite that "arrear maintenance", in the sense of unpaid maintenance, is claimable in three instances, namely, (1) where there is an existing court order, (2) where there is an agreement between the parties; and (3) where the claim is by the minor against a parent for unsatisfied needs.

In this case, there was no court order or agreement and the claim for what is called "arrear maintenance" was not by the child for unsatisfied needs. The claim is undoubtedly for a "debt" in its "wide and general meaning" of being any "obligation which one person has to honour against another" (KotzŽ v Ongeskiktheidsfords van die Universiteit van Stellenbosch 1996 (3) SA 252 (C)).

It is the "debt" which defines the rights and duties between the parties. If the minor is the creditor, as contended by the applicant, then, in terms of s 6(1)(a) of the Prescription Act [Chapter 8:11] (the Act), prescription does not begin to run until three years after the child's eighteenth birthday.

I am however of the view that the "debt" is owed to the applicant in her personal capacity and is subject to the extinctive prescription period of three years (s 14(1) as read with s 15(d) and subject to s 16).

She claimed $400 *per* month, which is in respect of money she actually spent in maintaining the child, in excess of her proportionate share of their joint duty as parents to maintain the child. Had she not paid that amount of money on behalf of the respondent, his obligation to the child, measured at the rate of $400 *per* month, would have remained owing and due to the minor. In

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so far as the maintenance needs of the child, which were satisfied by the payment of $400 *per* month by her, on behalf of the respondent are concerned, the child ceased being his creditor. The debt is no longer owing and due to the child. The applicant cannot, in that respect, enforce for the child rights it no longer has against the respondent.

In her personal capacity, the applicant acquired rights against the respondent, who sustained the liability to re-imburse her of the expenses she incurred towards the maintenance of the child, in excess of her proportion of their joint

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duty as parents to maintain the child. Roman-Dutch authorities state that a parent who overpays towards the maintenance of the child has a right to be re-imbursed by the underpaying parent according to his means. The rights and duties of the parents inter se are founded on the law of joint obligations or on negotiorum gestio: *Muzondo v Muzondo* 1985 (2) ZLR 240 (S) at 243E-244C, 247C.

The claim by the applicant is therefore for a debt which is owed to her: Sewera v Maparanyanga S-88-88 at p 4. In S v Frieslaar 1990 (4) SA 437 (C) Conradie J said at 438E-439D:

> "It goes without saying that a child has a claim for maintenance against each of his parents. His entitlement to maintenance is not circumscribed by an order of court that one or other of his parents should contribute stated amounts to his support. Such an order, having regard to the needs of the child, merely apportions the obligation between the parents according to the ability of each to contribute. Herfst v Herfst 1964 (4) SA 127 (W) at 130C-D.
>
> Since the parents' obligation is joint, the ordinary principles with regard to joint liability govern the contribution made by each to the child's maintenance. Where one parent makes a contribution in excess of his share, a claim lies against the other parent, but this claim, as Trollip J explained in Herfst v Herfst (*supra* at 130F),
>
> > 'is not strictly for arrear maintenance, but for the indemnification by one joint debtor for the expenditure or indebtedness actually incurred at the time the need therefor arose by the other joint debtor'."

This statement of the law accords with what was said in Farrel v Hankey 1921 TPD 590 at 596:

> "The Roman-Dutch authorities are quite clear that the burden of supporting the children, whether before or after a divorce, is a burden common to the spouses, the only qualification being that it is distributable between them according to their means.
>
> An order of court determines that distribution, but, where there is no order, it seems to me that the usual principles of joint obligations apply. If one of the spouses contributes more than his or her share - at any rate where they are divorced - that spouse is entitled to recover the proportion due by the other spouse according to their means. To hold that there can be no recovery unless a prior order of court has been obtained would mean that the spouse really prepared to perform the natural obligation of supporting the children is to be penalised."

These dicta were relied upon in *Woodhead v Woodhead* 1955 SR 70; 1955 (3) SA 138 (SR) which together with Herfst's case *supra* formed the basis of the decision in Williams v Shub 1976 (4) SA 567 (C) and Harwood v Harwood 1976 (4) SA 586 (C). In neither case was the distinction between joint debtors, uppermost in the learned judge's mind. Neither case had to do with the definition of "maintenance" in s 1 or the terms of s 5(4) of the Act, and the question whether a claim by an overpaying parent against an underpaying parent for recovery of excess contributions for the benefit of a child is to be regarded as a claim for maintenance under the

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Act did not arise.

The debt was owed to the applicant in her personal capacity and she alone

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had the right to approach the court to be afforded the right to recover the debt from the respondent by process of execution.

She had to exercise her right of action for the recovery of the debt within three years of the debt becoming "due". There is no good policy consideration for not subjecting such a claim to extinctive prescription. In *Woodhead v Woodhead* (*supra* at 73; 140H) Beadle J (as he then was) acknowledged the right of the overpaying parent to claim the debt from the underpaying parent as long as he or she made "a timeous claim".

His Lordship would not have found it necessary to mention the requirement of the timeous institution of the action, if he was not thinking of the legal consequences of extinctive prescription. It was assumed in Woodhead's case that extinctive prescription applied to a debt claimable by the overpaying parent from the underpaying one.

That is as it should be. There should be legal certainty and finality in the relationship between parties, after a lapse of a period of time. It would be against public interest for a person who holds a complete cause of action against his or her debtor to refrain from exercising the right of action indefinitely.

Wessels The Law of Contract in South Africa Vol 11 para 2766 says:

> "Creditors should not be allowed to permit claims to grow stale because thereby they embarrass the debtor in his proof of payment and because it is upsetting to the social order that the financial relations of the debtor towards third parties should suddenly be disturbed by the demanding from him payment of forgotten claims."

The next question to decide is when the prescription period of three years began to run against the applicant. Section 16(1) of the Act provides that prescription shall commence to run as soon as the debt is due. For a debt that does not arise from contract, prescription does not begin to run until the creditor has knowledge of the identity of the debtor and of the facts giving rise to the debt. In other words, a creditor must have a complete cause of action before prescription commences to run against him.

Joubert The Law of South Africa Vol 21 para 99 states that:

> "Prescription begins to run as soon as the debt is due ... The date on which a debt becomes due usually coincides with the date on which a debt arises but this is not always the case. The difference relates to the coming into existence of the debt on the one hand and its recoverability on the other. In its ordinary meaning, therefore, a debt is only 'due' when it is immediately claimable by the creditor and as its correlative it is immediately payable by the debtor.
>
> A debt can only be said to be claimable immediately if the creditor has the right immediately to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt the creditor must have a complete cause of action in respect of it at the stage when the summons is issued or at least when the summons

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is served."

In this case, the applicant acquired a complete cause of action at the time

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she paid each of the $400 *per* month for the maintenance of the child in excess of her proportionate share of their joint duty to maintain the minor. It is the payment of that amount that created the debt for the respondent to pay to her. She had knowledge of the identity of the debtor and of the facts giving rise to the debt. The respondent, by implication, admitted that the debt became due at the time the expense which created it was incurred by the applicant. By raising the defence of extinctive prescription against the claim, he acknowledged the specific amount of each debt and that it was payable by him.

The applicant had a period of three years from the date she paid each amount of $400 within which to enforce her right but did nothing until eleven years after the first payment in January 1985. Three years was a long enough time for her to enforce her rights. The law assists the vigilant and not the sluggard. It is clear, therefore, that the debts that became payable on dates more than three years prior to the institution of the action on 11 December 1995 were extinguished by prescription in terms of section 16 of the Act.

That leaves debts, which amount to $14 400, that fell within the three year period from January 1993. There was no documentary evidence to support the expenditure but the applicant declared in her founding affidavit that she spent $400 *per* month maintaining the child, in excess of her proportionate share of their joint duty to maintain the minor. A court must endeavour to do the best it can to determine the quantum of maintenance on the scant information presented by the parties. Unless there is no evidence of expenditure at all, a court should be loath to dismiss the claim for reimbursement by one parent against the other for the provision of maintenance for their children over his or legal obligation.

In *Muzondo v Muzondo* (*supra* at 245D) McNally JA said:

> "I do not think that the High Court sitting as it was in this case as a family court should be required to demand the same standard of accurate accounting as it might do in a commercial case. The court, in a proper case, is entitled, I would think, to use its general knowledge based on the many similar applications made to it each week. Obviously, if evidence is lacking, it will have to err on the side of caution, and it may be that in some cases absolution from the instance may be fairer to an applicant than a low award."

In light of the passage of time, the applicant is, in any case, unlikely to produce documentary evidence to support her claim. The respondent did not on the other hand, say that she did not spend each of the amounts of money she claimed in respect of each month from January 1993 to December 1995.

In pleading the defence of extinctive prescription in respect of the bulk of similar amounts, the respondent accepted that they were accurate measures of his indebtedness to the applicant. It was common cause that the applicant had provided for the maintenance needs of the child during the relevant

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period. In the absence of any evidence to the contrary, it remains an undisputed fact that she incurred the expenses she claims from the respondent.

The respondent did not, in fact, say he was unable at the time to pay $400 *per* month for the child's maintenance. A perusal of maintenance cases decided during the relevant period shows that $400 *per* month for the maintenance of a child at that time was not unreasonable. In any case, equity demands that, in the interests of the child, the respondent should pay the money.

On the current and future maintenance, I note the offer by the respondent to pay $438.11 *per* month as against the $1 300 *per* month claimed on behalf of the child by the applicant. I must point out, at this stage, without taking anything from his case, that the applicant, as the custodian parent who has single-handedly maintained the child for twelve years, is better placed than the respondent to give more reliable information on the costs of the maintenance needs of the child.

The applicant's schedule of expenditure, on the basis of which the amount of $1 300 *per* month claimed from the respondent is calculated, reveals a high standard of living, typical of a single-parent earning a good salary in a management position and with one child to support. Whilst the child is accustomed to this high standard of living, the amount claimed from the respondent, as his contribution towards its maintenance, fails to take into account the fact that he is a married man with nine other children to support. Without denying that he has a wife and nine other children to maintain, the applicant calculated the respondent's contribution of $1 300 *per* month, on the assumption that he had one child to support.

The starting point is to take the combined net income of the applicant and the respondent. In Gwachiwa v Gwachiwa S-134-86 at p 5 McNally JA said:

> "... once that figure is arrived at, a calculation based on two shares for the husband, two shares for the wife and one share for each child is a helpful calculation. It will tend to produce a maximum figure for maintenance which will have to be scaled down in accordance with the realities."

See also *Hora v Tafamba* 1992 (2) ZLR 348 (S) at 352F-353A.

In this case, there are three adults and ten children to share (at two shares an adult and one share *per* child) a total net income of $17 029.24 giving a child's share as $1 064. That is however a starting point. The figure has to be adjusted up or down depending on the circumstances of the case.

In this case, the applicant's net income is based on a pay slip for October 1995. She did not produce the latest pay slip. It is possible, however, that her salary has since increased, placing her in a position to contribute to the maintenance of the child, more than the net income used in the arithmetical calculation permits.

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I also note, in fact, that she had included in the schedule of expenditure on which the amount claimed from the respondent was based, costs of her own needs. She would have incurred the same expenses towards things like rates, house maintenance and plumbing, even if the child was not there.

I am not impressed however by the balance sheet presented by the respondent. It exaggerates the debit side. He did not produce any pay slip. If he wanted the court to believe his assertion that he cannot afford to pay more than $438,11 *per* month for the maintenance of his child, he should have produced documentary evidence of his income and expenditure.

In Chituku v Chituku HH-303-88 at p 2 Mtambanengwe J quoted from the judgment of Dumbutshena J (as he then was) in *Ansell v Ansell* 1980 ZLR 416 (G) at 418 where his Lordship said:

> "To be of assistance to the court, pay slips for the last three consecutive months would be most helpful. The mere assertion that a party is in receipt of X dollars *per* month is, in my opinion, not enough. There is always the temptation to reduce one's actual income in order to qualify for a bigger award or to pay less to the applicant, just as there is a tendency to exaggerate estimates of expenditure in order to gain more or pay less maintenance. Parties should be encouraged to prove their incomes by the production of documentary evidence in order that the court may be better able to determine as nearly as is humanly possible an award or a contribution which falls reasonably within the income bracket of the respondent."

The respondent was represented by a firm of lawyers who must be presumed to have advised him of the necessity to produce documentary evidence to prove his income and expenditure. No reason was given why pay slips were not produced. The respondent is himself to blame for the inference that the whole truth of the extent of his means was not told. In my view he is able to pay more than $438.11 maintenance *per* month.

The expenses relating to the use of the house in Gweru are not likely to be incurred every month in the same amounts stated in the schedule of expenditure. The respondent is unlikely to visit his constituency every month.

The schedule of expenditure shows that his monthly expenses exceed his income. He said he finances the deficit by an overdraft facility of $10 000 that he runs with his bankers. The applicant revealed, however, that the respondent had not disclosed allowances amounting to $5 666 payable to him every month, in terms of the Parliamentary Salaries, Allowances and Benefits Notice 1995 (SI 328 of 1995). The allowances include general allowance; housing allowance; travelling and subsistence allowance; and constituency allowance. The respondent did not favour the court with his pay slip and did not deny that the income he disclosed did not include these allowances. Mr Moyo, who acted as a correspondent legal practitioner, could not advance any argument against the allegation by the applicant that the allowances had not been disclosed.

Taking into account the fact that the respondent is prepared to incur

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expenses in excess of his disclosed income, it is easy to accept that he has some undisclosed sources of income. He said he paid tuition for his children at three foreign universities. It is highly unlikely that the amount of $2 192,50 in the schedule of expenditure as being for school fees for the children takes account of the tuition for the children at the universities. That confirms the suggestion that the respondent has other sources of income that he did not disclose to the court.

He did not say whether or not his wife is working. If she is working, her salary is there to swell his household's income. If she is unemployed, she must be presumed, in the absence of evidence to the contrary, to be capable of looking for work to raise money to supplement the family's income.

I note however that in July 1995 the applicant wrote to the respondent, through her lawyers, asking for maintenance in the sum of $700 *per* month. Considering all the circumstances of this case I am of the view that the respondent should be ordered to pay $700 *per* month for the maintenance of his child.

It was decided in Harwood v Harwood 1976 (4) SA 586 at 588D-E that maintenance claimed on behalf of a child, can be awarded retroactively in a proper case. Section 6(6)(c) of the Maintenance Act [Chapter 5:09] permits of a maintenance order, against a parent in favour of a child, being made with retrospective effect from the date the application was made. The draft order prays for maintenance as from 1 January 1996. The interests of the child demand that the order be made to take effect from 1 January 1996.

I turn to consider costs. It was submitted on behalf of the applicant that the respondent, should pay the costs of the blood test. Mr Moyo, for the respondent, said the parties should share the costs equally between them.

I, however, agree with Mr Stirling. The costs were in the best interest of the child and were as necessary as the maintenance applied for. As the respondent had, in fact, not denied sexual intercourse, the onus was on him to rebut the presumption that he was the father of the child. The blood test was, therefore, arranged to satisfy his interests and not those of the applicant. He asked for it to be arranged.

On the costs of the application, Mr Moyo said that, if the applicant is adjudged the successful party, she should be awarded costs on the magistrates court scale. He argued that the relief sought by the applicant was within the jurisdiction of the magistrates court and that she should have commenced action in that forum. Mr Stirling said the applicant was justified in bringing the application to the High Court because it involved complex questions of law.

A judge has a discretion whether to award costs to a successful party on the lower court scale or not, in a matter over which the magistrates' court has jurisdiction.

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The discretion, which has to be judicially exercised, is dependent upon the circumstances of the case. No definite lines may be circumscribed within which cases in which High Court costs will

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be awarded must fall. The plaintiff must show the existence of special reasons, either at the time of the commencement of the action or during the hearing, which satisfy the court that he acted reasonably in bringing the case to the High Court.

In White v Saker & Co 1938 WLD 173 Schreiner J (as he then was) said that one such special reason is the fact that the case presented questions of law or fact of extreme "difficulty and complexity". In other words, it is not a special reason, that the case raised difficult questions of law or fact. The difficulties must be those out of the ordinary. In Hunt & Ors v Campbell 1945 WLD 1 Millin J referred to Koch v Realty Corp South Africa 1918 TPD 356 and said at p 4-5:

> "An attempt was made during the course of the argument to classify all the previous cases where Supreme Court costs had been allowed in cases which were within the magistrates' jurisdiction. The classification came to this; firstly, a plaintiff may be justified in coming to the Supreme Court to vindicate his personal or professional reputation for example, where a medical man is refused his fee on the ground of incompetence. In such a case, it may be considered reasonable to come to the Supreme Court even though the amount claimed is a trifling sum. Secondly, where the case presents extraordinary difficulties either in law or fact. Thirdly, where the costs are about the same in the two courts and the remedy in the Supreme Court is the speedier. I think later cases show that where the speediness of the relief is of importance, the qualification that the costs in the two courts should be about the same is no longer insisted upon."

See also: de Winter v Ajmeri Properties & Invstms 1957 (2) SA 297 (D) at 299A-D; Ramsuran v Yorkshire Ins Co Ltd 1965 (2) SA 263 (D) at 264G-265A.

The child had not received any maintenance from its father for 10 years. Any further delay in ordering the respondent to contribute towards the child's maintenance was prejudicial to its interests. The applicant acted reasonably in using the speedy remedy of court application to obtain the maintenance order for her child without unnecessary further delay. It is clear from the papers that the respondent would have defended the action before the magistrates court. Those proceedings would have been protracted and the costs thereof would have been about the same as those awarded on the High Court scale in this application.

The question whether a claim by the overpaying parent, against the underpaying parent, for re-imbursement of expenses incurred in maintaining their child, in excess of his or her proportionate share of the joint duty to maintain the minor, is a claim for a debt subject to prescription, had not been specifically raised for decision in previous cases in our jurisdiction. It was a question of law of some importance to the public. The statement of law the

question gave rise to, will help women in future to be mindful of the need to claim what is due to them, from defaulting fathers of their children, timeously and avoid being non-suited by the defence of extinctive prescription.

I am satisfied that the applicant was not unreasonable in bringing the case to the High Court. She has been substantially successful in her application and is entitled to costs on the High Court scale.

It is therefore ordered as follows:

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"(1) That respondent pay maintenance to the applicant in respect of Yevai Amy Maravanyika born on 25 December 1984 in the sum of $700 *per* month with effect from 1 January 1996 until the child attains 18 years or is self supporting which ever is the earlier.

(2) That respondent pay applicant the sum of $14 400 in respect of money she spent towards the maintenance of the said child during the period extending from 1 January 1993 to 31 December 1995.

(3) That respondent pay $2 595 being the costs of the blood test conducted on the parties on 15 July 1996.

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

Coghlan & Welsh, applicant's legal practitioners

Chihambakwe Mutizwa & Partners, respondent's legal practitioners

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S v KATSAURA 1997 (2) ZLR 102 (HC)

Court **High Court, Harare**

Bartlett J & Mungwira J

Criminal appeal

14 July 1997 Judgment No. HH-127-97

Flynote

Court - judicial officer - conduct of - avoidance of flippant remarks desirable

Criminal procedure (sentence) - common law offences - theft - value of property stolen - effect of inflation in assessing sentence - position of trust - accused's salary in relation to responsibility placed on him - effect

Criminal procedure (sentence) - general principles - factors affecting - plea of guilty - weight to be attached to plea of guilty - general failure by trial court to give effect to plea - effect

Criminal procedure (sentence) - general principles - factors affecting - prevalence of offence - extent to which should result in heavier sentence - desirability of avoiding excessive devotion to considerations of prevalence

Criminal procedure (sentence) - general principles - imprisonment - desirability of not imposing - length of sentence - minimum possible sentence should be imposed

Criminal procedure (sentence) - general principles - mitigation - loss of employment as result of conviction - weight to be attached to loss of employment

Headnote

The appellant was convicted of fraud. Over an 11-month period he had defrauded his employer of some $44 000 worth of oil. $1470 worth was recovered. He pleaded guilty. He was open and candid with his employer, the police and the court. As a result of the offence he lost his employment. He had worked for the company for 27 years but was on a salary of only $2000 a month. He was sentenced to 94 months' imprisonment, of which 58 months were suspended on conditions, an effective sentence of 36 months. The magistrate gave as a reason for the offence

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the prevalence of cases of theft and fraud by employees, remarking

that "the national sport of stealing from the employer must come to an end". On appeal against the sentence,

Held, that the plea of guilty should have resulted in a meaningful reduction in sentence. It was clear that, although the magistrate said he had taken the plea into account, he had actually not given sufficient weight to it.

Held, further, that the magistrate's choice of words in describing the prevalence of the offence had crossed the borderline between showing a bit of judicial colour and being flippant.

Held, further, that while the prevalence of an offence is a relevant and appropriate aggravating feature, it should not be over-emphasized and should never be regarded as a warrant to impose unduly harsh sentences.

Held, further, that even though it was the appellant's own fault, the loss of employment by the appellant was a punishment in itself and the magistrate should have regarded it as a factor to weigh in the balance.

Held, further, that the magistrate overlooked the low salary earned by the appellant, particularly when his length of service and responsibilities were taken into account. The duty of trust between an employer and an employee is a two-way process. While the employee owes a duty of honesty, there is a corresponding duty on the part of the employer to pay a fair wage.

Held, further, that while the offence was such that only an effective term of imprisonment was appropriate, the approach of the court should be that the minimum effective period necessary should be imposed. Over-long incarceration is counter-productive. The need to impose the minimum appropriate sentence of imprisonment is a custom more noted for its breach than its observance.

Held, further, that the downward spiral in the value of money needs to be recognised in the sentences imposed for theft and frauds. The money stolen by the appellant would, fifteen years ago, have bought him a mansion. Now it would not even buy a two-roomed house in a high-density area. Although sentences in similar cases are of value, and although the moral blameworthiness of the accused is the main factor, the value of the property involved is of considerable importance. Some sort of balance needs to be drawn, taking account of 25 years as the highest sentence for the worst imaginable dishonesty and giving due effort to the apparently never-ending downward spiral in the value of money.

Sentence altered to 54 months' imprisonment, of which 36 months were conditionally suspended.

Cases cited:

S v Buka 1995 (2) ZLR 130 (S)

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S v Chapanduka HH-65-96

S v Chari S-230-95

S v Chikanga S-123-93

S v Dube S-129-93

S v Gorogodo 1988 (2) ZLR 378 (S)

S v Holder 1979 (2) SA 70 (A)

S v Hope HB-18-93

S v Mantana S-20-82

S v Mbambo HB-210-86

S v Moyo HB-34-96

S v Moyo & Ors GB-70-79

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

S v Mupanduki 1985 (2) ZLR 169 (S)

S v Mutongi HH-348-86

S v Mutuma HH-185-92

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S v Ndhlovu HH-32-82

S v Ngombe HH-504-87

S v Shonhiwa 1987 (1) ZLR 215 (S)

S v Sidat 1997 (1) ZLR 487 (S)

S v Teburo HH-517-87

S v Wood 1973 (2) RLR 11 (A)

S v Woods \& Ors S-60-93

Case Information

D Moyo, for the appellant

N T Maredza, for the respondent

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Judgment

Bartlett J: The appellant, Livingstone Katsaura, was employed by Hubert Davies as a sales clerk in the oil department. In the period June l994 to May l995, he defrauded his employer of $44 l00 worth of oil by recording different amounts on the original and duplicates of sale invoices. $l 470 of the misappropriated oil was recovered and $42 630 was not recovered. He pleaded guilty to 13 counts of fraud and was sentenced to a total of 94 months' imprisonment with labour, of which 24 months was suspended on the normal conditions and 34 months on condition of restitution. He was unhappy with the sentence imposed by the trial magistrate and noted an appeal - perhaps hoping that this court would be able to pour oil on the troubled waters he had created for himself by his fraudulent conduct. After an unconscionable delay (of which I shall have more to say later) the appeal was heard. At the conclusion of argument, my sister Mungwira and I set aside the sentence imposed and replaced it with a total sentence of 54 monhs' imprisonment with labour, of which l8 months was suspended on the normal conditions and a further l8 months was suspended on condition that restitution was completed. The appellant had restituted over half of the value of the missing oil by his employer retaining is leave pay and pension entitlements. Our order (in view of the delay in hearing the appeal) entitled Katsaura to his immediate release and a warrant of liberation was issued. I gave brief reasons for our decision and indicated that detailed reasons would follow. These are those reasons.

The basis of our criticism of the trial magistrate was that he misdirected himself on a number of relevant aspects and the cumulative effect of these misdirections was the imposition of a sentence which was in our view so manifestly excessive as to induce a sense of shock. I will deal with each of the aspects in respect of which we consider the magistrate fell into error.

PLEA OF GUILTY

The appellant pleaded guilty to all the charges and was open and candid with his employer, the police and the court. It ought to go without saying that

this should have been regarded as a mitigating factor of substance resulting in a meaningful reduction in sentence. But as Ebrahim JA stated in *S v Buka* l995 (2) ZLR 130 at 134G-135A:

> "... judicial officers do not always give sufficient weight to where an accused person tenders a plea of guilty to a charge levelled against him. It is important not merely to pay lip service by repeating what one is expected to say when a plea of guilty has been tendered. One often reads in a judgment the following:
>
> > 'I have taken into account that you have pleaded guilty, that you are a first offender and that you have expressed contrition'.
>
> It is not enough to repeat these phrases without giving due weight to the plea proffered. They are factors of mitigation and judicial officers should take proper account of them."

McNally JA underlined this approach when he stated in *S v Sidat* 1997 (1) ZLR 487 (S):

> "A plea of guilty must be recognised for what it is - a valuable contribution towards the effective and efficient

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> 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?"

I am aware of these reservations expressed by Reynolds J in *S v Mpofu* l985 (1) ZLR 285 (H) at 291C-292C, but am of the view on a reading of the record that the appellant's plea reflected a genuine expression of contrition.

It is my view that the magistrate did not give sufficient weight to the plea of guilty but fell into the trap so eloquently described by Ebrahim JA *supra*. I would go further than Ebrahim JA and state that this is a trap into which magistrates fall so often that it has become the rule rather than the exception to become ensnared in it. I believe it is true to say, from the multitude of review matters which pass across my desk in the course of a year, that it is difficult to discern any meaningful difference between sentences imposed by magistrates when accused persons plead guilty as opposed to when they plead not guilty. It would accordingly seem fair to observe that there appears to be a definite reluctance on the part of magistrates to give meaningful effect to the views expressed by Ebrahim JA and McNally JA. This is unfortunate. It is time magistrates heeded the clear direction provided by the Supreme Court and gave appropriate weight to pleas of guilty. This is of particular importance when considerationis given to the overcrowded situation of Zimbabwe's prisons. See the comments of Garwe J in S v Chapanduka HH-65-96 at p 2.

PREVALENCE

A basic reason for the sentence imposed by the trial magistrate is his view of the prevalence of cases of dishonesty involving theft or fraud by employees.

BARTLETT J

The magistrate describes this somewhat colourfully by stating - "the national sport of stealing from the employer must come to an end. It is a serious breach of trust which should not be tolerated". I would consider that the magistrate's choice of words was too flippant. I am aware that Waddington J stated in S v Mutuma HH-185-82 at p 2:

> "Mr *Gillespie* complained of the magistrate's extravagant language in listing the aggravating features. But, for my part, I do not consider that too much importance can be attached to the judicial officer's obvious desire to describe his assessment of the appellant's behaviour in suitably emphatic terms. The pages of law are prosaic enough without requiring magistrates to avoid the use of a little judicial colour in expressing themselves better."

I am sure that Gillespie J in his new life fully agrees with the sentiments expressed by Waddington J (as indeed do I). There is, however, a fine line between judicial colour and flippancy, and I consider that the magistrate crossed that line.

I consider that the trial magistrate over-emphasised the importance of prevalence in assessing sentence and that this resulted in too severe a sentence being imposed. It is my view that the magistrate's intemperate use of language in describing the prevalence of offences involving dishonesty committed by employees against employers provides testimony of that assessment. In regard to the over-emphasis of the significance of prevalence I would refer to the observation made by Muchechetere J (as he then was) in S v Mbambo HB 210-86 at p 4, where the learned

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judge stated:

> "It should always be borne in mind that prevalence does not justify the imposition of progressively heavier sentences. See R v Makaza & Ors l969 (l) RLR 97 at l00C-F and *S v Sibanda* GB-2-79."

I would also refer to the similar observation made by Reynolds J in S v Mutongi HH-348-86 where the learned judge stated:

> "Prevalence should never be regarded as a warrant to impose unduly harsh sentences."

I would finally, on the question of prevalence, quote the wise words of Beck JA in S v Mupanduki 1985 (2) ZLR 169 (S) at 175 at p 8 where the learned Judge of Appeal referred to -

> "the insidious temptation to judicial officers to resort to sentences of ever increasing severity in a vain attempt to stem the tide of lawlessness - a tide that requires many forms of endeavour other than just those that are offered by the powers of sentencing if it is to be contained, let alone reversed."

I would not wish it to be though that I am suggesting that prevalence is not a relevant and appropriate aggravating factor to be taken proper account of in assessing sentence. But as Gubbay JA (as he then was) stated in *S v Gorogodo* l988 (2) ZLR 378 (S) at 382H-383A:

> "What is to be guarded against is such an excessive devotion to the course of deterrence

> as may obscure other relevant considerations as to lead to a punishment that is disparate to the offender's deserts."

LOSS OF EMPLOYMENT

The appellant lost his employment as a result of his dishonesty. That was his own fault and of course entirely appropriate. An employer cannot be expected to continue to employ a dishonest worker. But the loss of employment (though the fault of the employee) is nevertheless a not insubstantial punishment in itself. As McNally J (as he then was) stated in *S v Ndhlovu* HH-32-82:

> "Regular employment among the poorer members of society is a truly precious thing. It is often difficult to obtain and once lost may be almost impossible to regain."

It is a sad fact that McNally J's words are even truer in l997 than they were in l982.

The trial magistrate accordingly should have taken account, as a general mitigatory factor, that the loss of the appellant's employment, though a result of his dishonesty, nevertheless constituted a punishment in itself. This would have been one of the factors to weigh in the balance with all the other factors - both mitigating and aggravating. Instead the magistrate paid no regard to it, incorrectly stating that: "it is safe to proceed on the basis that you are now between jobs".

LOW SALARY IN RELATION TO RESPONSIBILITY

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Mr Moyo argued as follows:

> "Having worked for the complainant company for all his working life Livingstone Katsaura earned only $2 000 *per* month. From this he was expected to pay for rates, water, electricity, transport, school fees, school levies, clothes for his family, groceries and other sundry expenses. It is respectfully submitted that this kind of return for one's sweat and loyalty breeds strong temptation in employees to steal from their employers in order to supplement their incomes. This submission is not made for the purpose of condoning the crimes committed by the appellant but merely highlights the fact that the appellant stole from need rather than greed."

The trial magistrate completely overlooked this aspect. Whilst accepting that the appellant had been in employment for 27 years and that he was earning $2 000 as a counter clerk, the magistrate commented only on the aggravating aspects of theft from an employer. It was appropriate to emphasise the aggravating aspect. It was, however, also important for the magistrate to have taken a balanced view. The duty of trust between employer and employee is a two-way process. While the employee owes a duty of honesty, there is, I consider, a corresponding duty on the part of the employer to pay

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a fair wage. There is little doubt, in my view, that a salary of $2 000 for a counter clerk with 27 years of service constitutes a low salary. The appellant especially since he was trying to pay school fees for six children - would have been in a position where he was susceptible to temptation. That does not justify his resorting to dishonesty, but it does mitigate his blameworthiness. The magistrate completely overlooked the miigatory aspect. This was an error by the magistrate and a failure to include all relevant factors in the balance.

Fieldsend CJ in S v Mantana S-20-82 emphasised the mitigatory aspect of low wages in relation to responsibility and long service, when he stated when referring to a senior clerk:

> "Equally, one cannot disregard the fact that $145 seems to be a very low wage for a person in a responsible position, particularly after many years of service."

The value of $145 in l982 is probably not very greatly different from the value of $2 000 in l995, given the ravages of inflation. See also *S v Moyo* & Ors GB-70-79 in regard to the mitigating aspect of low wages. See also the comments of Malaba J in *S v Moyo* HB-34-96 at p 6.

A related observation was made by Rumpff CJ in S v Holder l979 (2) SA 70 (A) at 80 (quoted in S v Motsoezoana l986 (3) SA 350 at 369) where reference was made to a Time Magazine essay stating:

> "A society can be subverted by a system that appears to be not only inconsistent but almost whimsical in its workings. A huge sense of grievance festers. The injustice of the courts seems to mirror the injustice of the economic system. All the rules of society seem to have been changed. You work hard, but inflation destroys your gains; so much for the work ethic. You obey the law, but somehow you get hurt and criminals profit, unpunished."

Countless thousands of people in Zimbabwe like the appellant have had to tighten their belts as inflation cuts deep. And then tighten them again and again until they can be tightened no more. It is sad but easy to see the prevailing economic conditions in Zimbabwe grinding down decent, honest people - until, like the appellant after 27 years of blameless endeavour, they succumb to

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temptation and fall into dishonesty in an attempt to prevent a further erosion of their living standards. This must be regarded as a general mitigating factor.

THE LENGTH OF THE PERIOD OF IMPRISONMENT IMPOSED

The blameworthiness of the appellant in defrauding his employer of some $44 000 was such that only an effective term of imprisonment was appropriate. But as Reynolds J stated in S v Ngombe HH-504-87 at p 2:

> "It has been repeatedly stressed that a sentence of imprisonment is a rigorous and severe form of punishment, often bearing drastic and destructive consequences for the accused

> and the members of his immediate family. This form of penalty should be resorted to only if absolutely essential in the circumstances of the case, and only if no other available form of punishment would be preferable and appropriate."

A corollary of this approach is that where imprisonment is imposed the minimum effective period necessary should be imposed. Greenland J in S v Teburo HH-517-87 (at p 2) explained the rationale behind this approach as follows:

> "Given the limited avenues available to a judicial officer, he can attempt to achieve this by tempering the sentence with mercy and compassion, especially here when the accused is a contrite first offender. Such an approach is more likely to induce a positive response from the accused than a sentence which will simply brutalise him and lead ultimately to the man redefining himself as a criminal and behaving accordingly.
>
> Moreover, overlong incarceration is counter-productive. It destroys and contaminates. See S v Khumalo & Anor l984 (3) SA 327 (A) at 331. The court therefore ends up contributing to the criminalisation of society.
>
> For the above reasons, it is a better approach for a judicial officer to appeal to the good sense of responsibility residual in the contrite first offender and impose the least punishment which will still achieve the objectives of punishment."

A further salutary explanation was made by Blackie J in S v Hope HB-18-93 at p 3-4, quoting the words Macdonald JP (as he then was) in S v Wood l973 (2) RLR (A) 11 at p 13H-14C:

> "In imposing a prison sentence on a first offender, sight should never be lost of the fact that, for the greater part, the form of punishment itself, much more than the length of the sentence, is likely to reform him and act as a deterrent to others. This is particularly true where the offender belongs to a class, the members of which, whatever their race, feel deeply the shame and stigma of a prison sentence. The publicity of the trial, the exposure as a criminal, the far reaching and often devastating effect of imprisonment on his social, family and economic life are, in the case of a first offender, aspects of punishment which should never be overlooked or underestimated. It is these consequences attendant on serious criminal conduct, much more than the length of the prison sentence, which are likely to deter other persons and to reform the first offender. If they do not, it is unlikely that the length of the prison sentence will, in the majority of cases, have a significant effect on bringing about the deired results. In this connection I should make the point that it should not be thought that to deprive a first offender of his liberty, even for a short period of six months, is not to impose a substantial term of imprisonment. To the first offender, accustomed to liberty and deprived of it for the first time, even such a period would, I would think, seem to be interminable. It is of course, of the utmost importance that a person should not be kept in prison for longer than is necessary in the interests of the offender, of society, or both. The reasons for this need hardly be stressed, nor is it necessary to stress that in a civilised society, the retributive effect of punishment should not receive great

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weight."

These salutary explanations are, however, it seems seldom given meaningful effect by magistrates. Like the inability to give proper weight to a plea of guilty, the need to impose only the minimum appropriate term of imprisonment, is a custom more noted in the breach than in the observance. The magistrate

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in this matter certainly gave no indication of seeking to impose the minimum appropriate sentence in view of the mitigating factors, the accused's status as a first offender, the plea of guilty and the expression of contrition. The failure to give due consideration to the authorities and approach I have referred to constituted a basic misdirection by the magistrate and was instrumental in the imposition of a sentence that was manifestly excessive.

SENTENCES PREVIOUSLY IMPOSED IN SIMILAR MATTERS

The sentence imposed on Livingstone Katsaura is, however, undoubtedly in general accord with sentences imposed involving similar amounts of prejudice over the last 5-l0 years. The Attorney-General's heads of argument make that plain.

I would, however, sound a warning against too slavish an adherence to the approach laid down in apparently similar cases. I can do no better in this regard than quote at length the wise words of Dumbutshena CJ in Tendayi Shonhiwa v S SC-78-87 at p 13-14:

> "All I want to do is to point out the danger of assessing sentences on the sole ground that there are similar facts in the cases being considered. There is no doubt that 'sometimes a succession of punishments imposed for a particular type of crime provides useful guidance to a court dealing with such a crime. But each case should be dealt with upon its own facts, connected with the crime and the criminal, and no countenance should be given to any suggestion that a rule may be built up out of a series of sentences which would be irregular for a court to depart from': *per* Schreiner JA in R v Karg l961 (l) SA 231 (A) at 235G-H. It is important to remember that decided cases are of value for the principles of law laid down in them. It does, of course, not mean that in assessing sentences similar facts are irrelevant. They are not. They form a broad guideline which, depending on the circumstances of each case, may be useful. S v Fraser l987 (2) SA 859 (A) was an appeal against sentence in which counsel for the appllant argued that there was a similarity between the facts of that case and those of S v Erwee l982 (3) SA 1057 (A) in which a sentence of periodical imprisonment was substituted for a sentence of imprisonment for one year. Counsel urged the court to adopt a similar course. Nicholas AJA rejected counsel's submission. He said at 863A-C:
>
> > 'I do not think that that is a proper approach. In R v Wells l949 (3) SA 83 (A) Centlivres JA said at 87-88 that:
>
> "Decided cases are ... of value not for the facts but for the principles of law which they lay down. In this connection I cannot do better than quote the remarks of Lord Finlay in Thomson v Inland Revenue [l9l9] SC (HL) 10):
>
> > 'No enquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together; the use of cases is for the propositions of law they contain, and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case'."
>
> Decided cases dealing with sentence may be of value also as providing guidelines for the trial court's exercise of

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discretion (see *S v S* l977 (3) SA 830 (A)) and they sometimes

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provide useful guidance where they show a succession of punishments imposed for a particular type of crime. (See R v Karg l961 (l) SA 231 (A) at 236G). But it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence.'

I agree with what Nicholas AJA said and I adopt his approach in deciding the appropriate sentence in this case."

I also agree with what Nicholas AJA said and I too adopt his approach in deciding the appropriate sentence in this case.

It is also my view that consideration of the factor I discuss below must result in a moderation of the level of sentencing in respect of a number of offences involving dishonesty.

THE EFFECT OF INFLATION ON PERIODS OF IMPRISONMENT IMPOSED FOR OFFENCES INVOLVING DISHONESTY

Just as it must be accepted that the corrosive effect of inflation drives honest people into dishonesty, so it must be accepted that the downward spiral in the value of money needs to be recognised in the sentences imposed for thefts and frauds. The $44 000 defrauded by Katsaura in this matter would, 15 years ago, have bought him a mansion in Highlands. Today he would struggle to buy a two-roomed house in Chitungwiza with it. Similarly, he could have bought a new car in the early l980s for little more than $6 000 or $7 000. Today his pilfered $44 000 would not even pay for half the price of the cheapest new vehicle. Inflation has devoured the value of money at an average annual rate of at least 20-25% in the last five years. To impose the same sentence today as would have been imposed l0 years ago for a theft or fraud involving $44 000 would be unfair. $44 000 was worth very much more then than it is now. The same principle applies in my view even over a period of as little as 2-3 years as long as inflation cntinues its headlong gallop. I have not forgotten that moral blameworthiness is the main factor in assessing an appropriate sentence for any offence. But it cannot be gainsaid that the value of the property stolen or defrauded is a factor of considerable importance in assessing sentence for such offences.

Another complicating factor is what was described in S v Marere S-87-86 (at p 8) as "the ever increasing spiral of larger sums" being stolen or defrauded. That spiral has certainly shown no signs of decreasing in intensity over the past decade. Yet the Supreme Court has imposed a very definite cap on the upward limit of sentences for dishonesty unaccompanied by violence. In *S v Chari* S-230-95 Gubbay CJ, referring to a 25 year sentence for a multiple car theft, said: "It is at the upper limit of what a court in this jurisdiction will impose for offences of dishonesty unaccompanied by violence." See also S v Chikanga S-23-93 (at p 15) where the Supreme

BARTLETT J

Court indicated that 25 years was in effect the maximum sentence whether for one offence or a

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series of offences. See also *S v Woods \& Ors* S-60-93.

If a sentence of 25 years is the maximum allowable and a magistrate imposes almost 8 years for dishonesty involving just over $40 000, what sentence should be imposed for a theft of $400 000 or $4 million or $40 million? While an arithmetical progression is obviously not appropriate, some significant account must be taken of burgeoning amounts. The higher amounts I refer to are not fanciful. Frauds or thefts approaching $l million or more are often reported in the Press. Indeed, an alleged fraud on the Grain Marketing Board involving some $40 million was reported several years ago but it seems to have receded from view and no offenders, as far as I know, have been brought to book (although a summary judgment application in regard to it did pass my desk last year where the papers clearly indicated that a fraud of that magnitude had been committed).

Overall, some sort of balance needs to be drawn taking into account that 25 years (according to Supreme Court dictates) is the highest sentence for the worst imaginable dishonesty and giving due effect to the apparently never ending decline in the value of money. That balance in my view must result in a dishonesty offence involving some $40 000 slotting in at a level substantially less than 8 years. The 41_2 years (before considering any suspension) decided by my learned sister Mungwira and me at the appeal hearing is in my view at the upper limit of that level.

The only Supreme Court authority counsel for the appellant and I have been able to find dealing with the effect of inflation on sentence provides comfort for my approach - though somewhat obliquely. In *S v Dube* S-129-93 (at p 6) McNally JA, in deciding that a fine was appropriate for the theft of property worth some $2 750, referred to a l98l case where a fine had been imposed for a theft of $2 125 and stated:

> "$2 125 in l980-1 is the equivalent roughly of $l0 000 at today's prices - perhaps more - so by comparison the amount we are concerned with is small."

The Supreme Court was in effect taking account of the declining value of money in reducing a sentence and I believe I am simply clarifying and developing that approach. The trial magistrate clearly took no account of any of the factors I have endeavoured to analyse and this resulted, in our view, in a sentence which is manifestly excessive and induces a sense of shock.

In summation, the misdirections on the various aspects to which I have referred resulted in a sentence manifestly excessive, as I have stated. We accordingly set aside the sentence imposed and replaced it with the sentence specified at the commencement of this judgment.

BARTLETT J

THE DELAY IN HEARING THE APPEAL

There was an inordinate delay of two years in setting down the hearing of this appeal. The appellant's legal practitioner told us that this was because the record of proceedings was lost in the magistrates court - and that despite many visits to the clerk of the court and several letters to the magistrate it did not resurface until June this year. The Attorney-General's representative

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did not dispute this contention. As Mr Moyo pointed out, the delay was not the fault of the appellant.

The delay is unconscionable. This appeal should have been heard over l8 months ago. The record is only several pages long and there is no backlog of such matters (or indeed of any matters) in the High Court. I have endeavoured to limit the prejudice to the appellant by ordering his release today.

I would suggest for the assistance of the appellant's legal practitioner - and other legal practitioners faced with similar problems - two options to prevent a recurrence of such delays. The first is that when their queries receive no response from the clerk of the court or the provincial magistrate they should immediately take the matter up with the Chief Magistrate. I know that the Chief Magistrate is committed to resolving the administrative inefficiency that often occurs in the magistrates courts. In the unlikely event of there being no response from the Chief Magistrate, the matter should be referred directly to the Judge President.

I would finally like to commend the appellant's counsel, Mr Moyo, for the quality of his heads of argument. Judges regrettably become used to a diet of sparsely prepared and unappetising heads as the rule instead of the exception. It is a refreshing change to be able to digest heads of cordon bleu quality.

MUNGWIRA J: I agree.

Kadandara Mhiribidi & Chinhengo, appellant's legal practitioners

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S v KARANI 1997 (2) ZLR 114 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

16 July 1997 Judgment No. HH-117-97

Flynote

Interpretation of statutes - absurdity - penalty provision referring to wrong subsection - provision to be read as though referring to correct subsection

Headnote

During the revision of the statute law in 1996, the subsections in ss 54 and 55 of the Road Traffic Act [Chapter 13:11] were placed in a different order. What was subs (1) in each section and created offences was renumbered as subs (2). The new subs (1) contained definitions. The subsection creating the penalties was not, however, altered and continued to refer to "an offence in terms of subsection (1)".

Held, that if the court were not able to supply the relevant corrections to the penalty

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subsections, it would mean that there would be no penalty enacted for the offences. The punishments would be otiose since they would refer to non-existent offences. Such an absurdity should not be allowed to stand in the light of the obvious intention, and the reference in the penalty subsections to subs (1) should be read as a reference to subs (2).

Cases cited:

Durban City Council v Gray 1951 (3) SA 568 (A)

R v Venter 1907 TS 910

S v Mujati 1997 (1) ZLR 508 (H)

Judgment

Gillespie J: The provincial magistrate in Harare has convicted the accused of contravening s 54(1) of the Road Traffic Act [Chapter 13:11] and has sentenced him to a fine of $1 200 or 6 months' imprisonment. Becoming aware of error the learned magistrate has addressed to me a minute which reads:

> "I sentenced the accused $1 200 for c/s 54(1) of RTA by mistake. I erroneously excluded the maximum of $1 000. May my sentence be set aside and substituted by $1 000 or 3 months."

The fact that the magistrate exceeded his jurisdiction is not the only error.

The section creating the offence is wrongly cited. Subsection (1) of section 54 of the Act merely provides a definition of the terms "similar offence" and "special circumstances". The offence is created by subs (2) and should be cited as "contravening s 54(2) of the Road Traffic Act". A similar error is

frequently made in respect of the allied offence of contravening s 55(2) of the Act, wrongly cited as 54(1). These errors are, I see, perpetuated by the enactment itself, which in ss 54(4) and 55(5) erroneously refer to an offence committed in terms of subs (1) of the respective sections. That reference is an obvious mistake.

The previous edition of this law, Act 48 of 1976, had the subsection creating the offence in each instance as subs (1); the subsection defining the terms "similar offence" and "special circumstances" was the final subsection in each section. The law reviser, as he was entitled to do in terms of s 10(2)(k) of the Statute Law Compilation and Revision Act [Chapter 1:03], altered the order of these subsections so as to have them appearing as the first subsection in each case. The reference to subs (1) in each penalty subsection, however, was not correspondingly altered.

As was said by Schreiner JA in Durban City Council v Gray 1951 (3) SA 568 (A) at 580B:

> "[It] is within the powers of a court to modify the language of a statutory provision where this is necessary to give

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effect to what was clearly the legislature's intention."

Such power is undisputed where slavish literalism:

"leads to an absurdity so glaring that it could never have been contemplated by the legislature, or if it leads to a result contrary to the intention of Parliament as shown by the context or by such other circumstances as the court is justified into taking into account."

(*Per* de Villiers AJ in Venter v R 1907 TS 910 at 915).

If the court were not able to supply the relevant correction of ss 54(4) and 55(5) then there would be no penalty enacted for the offences of contravening ss 54(2) and 55(2) of the Act. The punishments, considered in meticulous detail, and set out in ss 54(4) and 55(5) would be completely otiose since they would refer only to a non-existent offence. Such an absurdity cannot be permitted to stand in the light of the obvious intention. The reference in each subsection to "an offence in terms of subsection (1)" must be read as "an offence in terms of subsection (2)".

As for the sentence in this matter, the maximum penalty enacted is a fine not exceeding $1 000 and imprisonment for a period not exceeding five years. This is one of those provisions where inflation has worked so as to render the maximum fine entirely disproportionate to the possible prison sentence. Although one reserves the maximum penalty for the most serious possible contravention, there is some reason for giving close consideration to imposing the maximum fine in this case. First is the consideration of the inadequacy of the monetary penalty measured against the custodial alternative. Second is the fact that the accused has one previous conviction (over ten years old) for this same offence and two for negligent driving. Third is that the punishment

GILLESPIE J

of $1 000 is not necessarily the effective maximum non-custodial penalty since the court has, in terms of s 54(4)(a)(i), a discretion to prohibit from driving a person convicted for the first time within the previous ten years.

In this case, the magistrate should have given serious consideration to a prohibition from driving for, say, six months. Cancellation of the licence would not have been competent - see *S v Mujati* 1997 (1) ZLR 508 (H). That, conjoined with a fine of $1 000, may well have been appropriate for this person, whose record shows him to be a potential menace on the roads. Since prohibition was not mandatory and was not ordered I cannot now order it myself without increasing the sentence. I can, however, decline to reduce the fine below $1 000, despite the fact that that is the maximum monetary punishment.

I accordingly order as follows:

"The conviction is corrected to refer to a contravention of s 54(2) of the Road Traffic Act [Chapter 13:11]. The sentence is set aside and in its place is ordered a fine of $1000 or in default of payment 3 months' imprisonment."

Bartlett J agrees.

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MUKADAM ENTERPRISES & ORS v STANBIC BANK ZIMBABWE LTD 1997 (2) ZLR 117 (HC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Civil appeal

26 June & 22 July 1997 Judgment No. S-93-97

Flynote

Contract - suretyship - liability of sureties - when liability may be excluded - public policy - agreement contrary to - unconscionable terms in contract - when court will interfere with contract

Headnote

The second, third and fourth appellants had signed deeds of suretyship, whereby each bound himself as surety and co-principal debtor in solidum for the repayment of all sums of money which the first appellant might owe to the respondent bank, irrespective of how and when the indebtedness arose. They argued that their obligations were limited to the particular trading accounts with which they were concerned. Alternatively, they argued that the deeds of suretyship were so unconscionable as to be invalid on the grounds of public policy.

Held, that it was difficult to imagine a more widely framed obligation than was shown in the deeds of suretyship. There was no room for a tacit term excluding liability on the grounds that (a) the debts arose out of a different facility obtained under a different trading name and (b) the debts were incurred long after the deeds were signed.

Held, further, that there was no room for the contention that the deeds were so unconscionable as to be invalid on the grounds of public policy. The courts are slow to interfere on such grounds and there were no grounds for doing so in this case.

Cases cited:

Bank of Lisbon & SA Ltd v de Ornelas & Anor 1988 (3) SA 580 (A)

Botha & Anor v Finanscredit (Pty) Ltd 1989 (3) SA 773 (A)

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

Eastwood v Shepstone 1902 TS 294

Olson v Standaloft 1983 (1) ZLR 67 (S)

Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd 1993 (4) 206 (W)

Rob NO v Standard Bank Ltd & Anor 1979 ZLR 16

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

Van der Walt & Orrs v UDC Ltd S-61-97

Webb v Shell Zimbabwe \(Pvt\) Ltd 1982 (1) ZLR 102 (S); 1982 (2) SA 763 (ZS)

Case Information

DP Carter, for the appellant

R M Fitches, for the respondent

Judgment

McNally JA: This is an appeal against the granting of summary of judgment

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McNALLY JA

in a case in which the respondent ("the Bank") was claiming over $1.5 billion, and summary judgment was given in the lesser amount of $838 352, with leave to defend in respect of the balance.

The appeal is based on two grounds: First, on the facts, the sum was not shown to be due. Second, on the law, the second, third and fourth appellants should not have been found liable as sureties and co-principal debtors.

I do not propose to define summary judgment. I need refer only to what was said recently by EBRAHIM JA in van der Walt & Ors v UDC Ltd S-61-97. There is no dispute in principle that it is proper for a court to grant summary judgment for part of a claim and give leave to defend in regard to the balance. It is simply contended that the amount awarded was not proved on a balance of probabilities.

There is no doubt that the figures involved are complex and confusing. What the learned judge *a quo* did was to fasten upon a statement by the first appellant, and to treat it as an admission that a certain figure, on any version of the facts, was indisputably owing.

It was argued that what was said fell short of being an unequivocal admission. I think that that argument is correct. It was a somewhat equivocal admission. The first appellant said:

> "According to my rough calculations, the amount actually borrowed is approximately $1048746, and the correct interest is $708438, approximately. Taking into account the payment of $918832, the correct balance would be in the region of $838352, as follows:

Capital	1 048 746.00
Add Interest	708 438.00
	1 757 184.00

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Less paid	918 832.00
	$838 352.00."

"However", the affidavit continues "this is only a rough estimate and a thorough exercise to determine the exact interest would have to be carried out".

Businessmen not infrequently, whether by accident or design, use obscure language. This passage is a contrived mix of specificity and obfuscation. The amount he actually borrowed is said to be "approximately $1048746". The amount is so specific that "approximately" can only be taken to mean "disregarding the cents", or "to the nearest dollar". It us interesting that he claims to have borrowed just under $10000 more than the Bank claims to have lent him. The Bank says it lent him $1038753.69. Indeed, he confirms that figure in para 3(b) of his opposing affidavit, and again in para 4(f).

McNALLY JA

Neither side has referred to this discrepancy, and it does not materially affect the issue. But to be fair to the first appellant, the amount awarded by way of summary judgment should be adjusted downwards by $10000.

The correct interest, he says, is "$708438". This figure is again so specific that one must assume he means "disregarding cents". It is extremely unlikely that a businessman of the first appellant's status would consciously over-calculate the amount of interest he owes, especially since the major thrust of his argument is that the Bank has calculated the interest wrongly. The court is entitled to assume that his calculations have been based on the rates of interest most favourable to himself. In effect he is saying: "I do not owe more in interest than $708438".

Finally, the last figure of $918832 is an agreed figure of what he has repaid. He does not use the word "approximately" in this context. So we can rely on it without hesitation.

It seems to me, therefore, that despite the equivocal language, the admission was properly relied upon. However, since we are dealing with summary judgment I propose to err on the side of caution by reducing the figure by $10000 as indicated

The second argument relates to the liability of the second, third and fourth appellants who claims that their obligations as sureties were limited to the particular trading accounts with which they were concerned. They dispute, therefore, that they are generally liable for the debts of the first appellant however incurred. In particular, they deny being responsible for this debt.

The wording of the documents of suretyship in each of their cases is very wide indeed. They read, in part, as follows:

> "... do hereby guarantee and bind the company/myself as surety and co-principal debtor in solidium for the repayment on demand of all sum or sums of money which the Debtor may now or from time to time hereafter owe or be indebted in to the Bank, its successors or assigns, whether such indebtedness be incurred by the Debtor in the Debtor's own name or in the name of any firm in which the Debtor may be trading either solely or jointly with others in partnership or otherwise, and whether such indebtedness arise from money already advanced or

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> hereafter to be advanced, or from promissory notes or bills of exchange already or hereafter to be made, accepting or endorsed, or from guarantees given or to be given by the Debtor to the bank on behalf of third parties or guarantees given or to be given by the Bank on behalf of the Debtor, or otherwise howsoever, including interest, discount, commission, law costs, stamps and all other necessary or usual charges and expenses."

It is difficult to imagine a more widely framed obligation. Nonetheless, there are, as Mr Carter pointed out, cases which limit that liability to some extent. He points out that in the case of these three sureties the debts with

McNALLY JA

which we are concerned -

1. arose out of a different facility obtained under a different trading name;

2. were incurred long after they signed.

It will be apparent that both these circumstances are specifically covered in the wording of the deeds of suretyship. Compare the remarks of JOUBERT JA in the majority judgment in Bank of Lisbon & South Africa Ltd v de Ornelas & Anor 1988 (3) SA 580 (A) at 609F. I am unable to accept Mr Carter's submission that there is room for a tacit term excluding such liability. Nor can I accept that there is room for the contention that the deeds are so conscionable as to be invalid on grounds of public policy. The cases to which Mr Carter referred us show how slow the courts are to interfere on these grounds. See Eastwood v Shepstone 1902 TS 294 at 302; Sasfin (Pty) Ltd vs Beukes 1989 (1) SA 1(A) at 7J-8G and 9B-D; *Olsen v Standaloft* 1983 (1) ZLR 67 (S) 74E and 82D; Botha (now Griessel) & Anor v Finanscredit (Pty) Ltd 1989 (3) SA 773 (A) at 783A-B; and Donelly v Barclays National Bank Ltd 1990 (1) SA 375 (W). In this last case, I note the words of KRIEGLER J (as he then was) at 381F where, commenting on Sasfin v Beukes *supra*, he said:

> "It seems that that judgment has come to be regarded as a free pardon for recalcitrant and otherwise defenseless debtors It is decidedly not that."

See the similar comments in the judgments of MARAIS J in Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd 1993 (4) SA 206 (W) at 210 et seq. The contracts in the cases cited were very unusual ones, unlike the present.

I turn finally to the two Zimbabwean cases cited by Mr Carter, Robb NO v Standard Bank Ltd & Anor 1979 ZLR 16(G) (also reported in 1979 (2) SA 420) was a case decided in the what was then the General Division of the High Court by the present CHIEF JUSTICE. He held that a pledge to secure an overdraft did not cover the purchase by the bank owed by the debtors to a third party. That purchase was far from being an ordinary banking transaction, and was extrinsic to the relationship between the company and the bank (at 27H). In *Webb v Shell Zimbabwe \(Pvt\) Ltd* 1982 (1) ZLR 102 (also reported at 1982 (2) SA 763) the situation was almost exactly the same.

However, in the present case, the transactions with which we are concerned indisputably form part of ordinary banking transactions between the debtor and the Bank. They cannot be

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described as extrinsic to the relationship between the first appellant and the respondent. Accordingly, in my view this defence fails.

In the circumstances, the appeal is dismissed with costs but the order of the

McNALLY JA

court *a quo* is amended by altering the quantum of the award from $838 352 to $828 352.

KORSAH JA: I agree

MUCHECHETERE JA: I agree

Scanlen & Holderness, for the appellants

Wilmot & Bennet, for the respondent

MATAMISA v CITY OF MUTARE 1997 (2) ZLR 122 (HC)

Court **High Court, Harare**

Chinhengo J

Civil application

6 May & 23 July 1997 Judgment No. HH-120-97

Flynote

Employment - contract - termination - dismissal of Town Clerk - whether approval of Minister of Labour to dismiss required

Local authority - officer - termination of employment - town clerk - dismissal by city council - whether lawful without approval of Minister of Labour

Headnote

The City of Mutare, with the approval of the Local Government Board, purported to dismiss the applicant, who had been Town Clerk of Mutare. In so acting the City of Mutare acted in terms of s 139 of the Urban Councils Act [Chapter 20:15]. The applicant challenged the legality of his dismissal on the grounds that it was null and void because his employer had failed to obtain the approval of the Minister of Labour to dismiss him as required by s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985) as read with the Labour Relations Act [Chapter 28:01]. The applicant sought a declaratory order declaring his dismissal to be null and void and an order for the payment to him of all outstanding salary and benefits owing to him.

Held, that there was a proper basis for the application for a declaratory order.

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Held, further, that s 3 of the Labour Relations Act makes it clear that the Act applies to all employers and employees except those whose conditions are otherwise provided by or under the Constitution. The terms and conditions of an urban council employee are not provided for by or under the Constitution. The legislature may, however, include provisions in an enactment that exclude the application of s 3 of the Labour Relations Act and provide that the approval of the Minister of Labour will not be required. On a proper interpretation of the relevant provisions of the Urban Councils Act it could not be concluded that the intention of the legislature was to exclude the application of Labour Relations Act and the regulations. The prior approval of the Minister of Labour for the dismissal of the applicant was thus required. As that prior approval had not been obtained the dismissal was unlawful and therefore null and void.

Held, further, that the declaratory order sought by the applicant amounted to an application for his reinstatement. When reinstatement is sought the court has a discretion as to whether or not to order reinstatement. In the present case it was clear that an unhealthy relationship existed between the applicant and the Mayor, the councillors and other officials. That troubled relationship was not conducive to the proper running of the affairs of the City of Mutare. This was therefore not a case in which an order for reinstatement would be appropriate. In any event this matter could only be decided upon after there had been argument on the merits.

CHINHENGO J

Held, further, that in terms of s 139(5)(a) of the Urban Councils Act any suspension of a town clerk lapses after six months. The purpose of this provision is to ensure that the officer does not remain on suspension for a period in excess of six months. If the fate of the town clerk has not been decided by the relevant authority within this period, the suspension falls away. The applicant's suspension therefore terminated after six months and after this period had elapsed he was entitled to receive his salary and other benefits.

Held, obiter, that there was merit in the argument that it is unduly cumbersome to require an urban council wishing to dismiss its town clerk to have to take the matter before a labour relations officer after the dismissal has already been approved by the Local Government Board. The Local Government Board is a high powered body that can determine the issue of dismissal with fairness. Consideration should be given to empowering the Local Government Board to deal conclusively with the matter.

Cases cited:

Carrot v A-G [1933] NZLR 1461

Chinhoyi Municipality v Mupandira S-146-96

Commercial Careers College \(1980\) \(Pvt\) Ltd v Jarvis 1989 (1) ZLR 344 (S)

Gumbo v Norton Selous Rural Council 1992 (2) ZLR 403 (S)

Khumalo v Dir of Co-operation and Development 1991 (1) SA 158 (A)

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Masasi v PTC 1991 (2) ZLR 73 (H)

Muringi v Air Zimbabwe Corp & Ors 1997 (1) ZLR 357 (H)

Musara v Zinatha 1992 (1) ZLR 9 (H)

The court referred to the following statutory provisions:

Labour Relations Act [Chapter 28:01], s 17

Urban Councils Act [Chapter 29:15], ss 116, 123, 132, 138, 139

Case Information

S Hwacha, for the applicant

L T Biti, for the respondent

Judgment

Chinhengo J: The applicant, Mr Verbas Rewayi Matamisa was notified by the respondent, the City of Mutare, by letter dated 28 October 1996, of his dismissal from employment as the Town Clerk of the City of Mutare. His dismissal was with effect from 14 February 1996, being the date on which he had been suspended from employment without pay. In these proceedings the applicant challenges the legality of his dismissal. He seeks the following order:

> "1. The applicant be and is hereby declared to be the Town Clerk of the City of Mutare;
>
> 2. The dismissal of the applicant from the position and office of the Town Clerk of the City of Mutare be and i8 hereby declared null and void;
>
> 3. The respondents be and are hereby ordered to pay applicant all outstanding salary and benefits; and
>
> 4. The respondents are ordered to pay the costs of this application."

In his founding affidavit, the applicant identifies himself as the Town Clerk

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CHINHENGO J

of the City of Mutare. It is not often that an applicant is so sure-footed about the position he has adopted in legal proceedings. The applicant in this case is so convinced about the correctness of the posture he has adopted that it goes to emphasise his critical averment that in law he has not been relieved of his post.

The respondent is equally sure-footed about the stance it has taken. Its letter of dismissal reads as follows:

> "We refer to your disciplinary matter.
>
> We advise that the Local Government Board approved our request for your dismissal. You are therefore lawfully dismissed with effect from the date of suspension. We enclose for your information a copy of the decision of the

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Local Government Board."

Quite clearly, the respondent did not entertain any doubt as to the lawfulness of the applicant's dismissal. It is for this reason that the applicant, in his founding affidavit, states that the respondent has no intention to apply to the Ministry of Labour for permission to terminate his contract of employment or take any further or other steps in regard to applicant's dismissal. (see para 9 of applicant's affidavit).

The applicant's case is as follows: The respondent's action is null and void because the respondent did not comply with the provisions of the Labour Relations Act [Chapter 28:01] in that it did not apply to the Minister responsible for labour to terminate his contract of employment as required by s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/85). The respondent's belief that the matter of the applicant's dismissal was concluded when the Local Government Board (the LGB) of the Ministry of Local Government, Rural and Urban Development approved the termination of his employment is erroneous. While he did not accept the LGB's findings on the merits, it was not his intention to challenge those findings in this application - those findings are matters to be dealt with at a hearing which should be held in terms of the Labour Relations Act. For the purposes of this application, the applicant was content to challenge the lawfulness of his dismissal o the basis that the respondent failed, or considered that it was not necessary, to comply with SI 371/85.

In so far as his salary is concerned, the applicant's case is that he was suspended in terms of s l39(3)(a) of the Urban Councils Act [Chapter 29:15]. This section provides that if the respondent does not decide to discharge him within six months from the date of his suspension, that suspension expires by operation of law. The six months expired in August 1996 before the respondent decided to dismiss him. He was, as a consequence of the failure by the respondent to discharge him as aforesaid, automatically reinstated as an employee of the respondent. He thereby became entitled to be paid his

salary and other benefits. He presented himself at the workplace to assume his duties but was turned away. The applicant further argues against the fact that the letter of dismissal backdated his dismissal. This, he says, was wrong because a dismissal can only be valid as from the date on which it is effected. Applicant also argues that even if the respondent's action was valid, he was entitled to his salary and benefits p to the date of termination of his employment being the date of the letter of dismissal and not the date of the letter of suspension.

The respondent's opposing affidavit was deposed to by the Executive Mayor of the City of Mutare. The respondent is emphatic and unmistaken in its averments. According to it, the applicant is not the Town Clerk of Mutare any longer. He was lawfully dismissed in terms of the Urban Councils Act. In limine, the respondent states that the application before the court is one for a review of the procedure adopted by the respondent and being such an application it should have been instituted within eight weeks as required by the Rules of the High Court - Order 33. The application should therefore be dismissed for failure to comply with the Rules. It is not an

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application for a declaratory order. It is an application for review so says the respondent.

Regarding the lawfulness of the applicant's dismissal, the respondent argues that if the old Urban Councils Act [Chapter 214] had not been repealed, the respondent would have been required to obtain the permission of either the Minister of Labour or the Minister of Local Government, Rural and Urban Development to terminate the applicant's contract. This however, is no longer the position. With the enactment of the new Urban Councils Act [Chapter 29:15] the permission to terminate the applicant's contract of employment is now solely obtainable from the LGB. This is the body which now exercises the powers of the Minister of Local Government, Rural and Urban Development under the equivalent provisions of Chapter 214. It is therefore not a requirement any more that the approval of the Minister responsible for labour should be obtained if an urban council wishes to terminate the services of a town clerk. The reference of such a matter to a labour relations officer would be absurd and would create consequences which the legislature did not intend. The Urban Councils Act [Chapter 29:15] is a later enactment to the Labour Relations Act [Chapter 28:01] and its provisions take precedence. Section 139 of Chapter 29:15 is a special provision that deals exclusively with the termination of the contract of employment of a Town Clerk and its provisions override the provisions of SI 371/85, not only because it is a later enactment, but also because it is a special provision dealing with the matter of the termination of a town clerk's contract of employment. A labour relations officer (or the Labour

Relations Tribunal) has no power to review a decision of the LGB because the LGB is of superior legal status. If action has been taken in compliance with s 139 aforesaid, there is no place for the application or operation of SI 371/85. A decision of the LGB is final in the matter of the dismissal of a Town Clerk.

If the court upheld the applicant's contentions in this application, the respondent submitted that since the procedures adopted by the respondent up to this stage are legal and valid as mandated by law, they should not be upset. Rather the court should issue an order that the respondent should take the necessary outstanding steps to comply with SI 371/85. To put this aspect beyond any doubt, the respondent filed a counter application in which it beseached the court to direct that the respondent should take steps to comply with SI 371/85 if the court did not entirely dismiss this application.

The respondent opposed the applicant's claim for payment of his salary and other benefits and said that it was ill-founded. The decision to discharge the applicant was made within four months of applicant's suspension on 7 June 1996. The respondent had therefore acted well within the six months stipulated by s 139(5) of the Urban Councils Act.

These are the disparate legal positions of the parties in this application. They were argued in detail by Mr Hwacha for the applicant and Mr Biti for the respondent on the basis of lengthy and well researched heads of argument. The issues for determination are clear and were summarised by Mr Hwacha as being:

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(a) is it lawful for an Urban Council to dismiss the Town Clerk without complying at all with the provisions of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/85); and

(b) is it lawful for an Urban Council to withhold payment of salary and other benefits beyond six months into the suspension of a Town Clerk?

Mr Biti agreed that the "critical legal issue raised in this case is whether the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 applies in casu".

The LGB is established by s 116 of the Urban Councils Act. It consists of seven members appointed by the Minister of Local Government, Rural and Urban Development. The functions of the Local Government Board are specified in s 123. Its functions which are relevant to this case are specified in subs (1) as being:

"(a) to provide guidance for the general organisation and control of employees in the service of councils;

(b) to ensure the general well-being and good administration of council staff and the maintenance thereof in a high state of efficiency;

CHINHENGO J

(c) to make model conditions of service for the purposes stated in paras (a) and (b) for adoption by councils;

(d) to make model regulations stipulating the qualifications and appointment procedures for senior officials of councils;

(e) to approve the appointment and discharge of senior officials;

(f) ...; and

(g) ..."

"Senior official" means a town clerk, a chamber secretary, a head or deputy head of a department or such employee of council as may be prescribed.

The LGB approves the appointment of a person to be the town clerk (s 132). While the LGB has the powers specified in s 123 to make model conditions of service for council employees, model regulations regarding qualifications and appointment procedures, and approves the appointment and discharge of senior officials, s 138 provides that:

"Notwithstanding anything to the contrary contained in any other law, no council shall fix or alter the conditions of service of its employees except with the approval of the Minister responsible for the administration of the Labour Relations Act [Chapter 28:01]."

It is clear that the Minister responsible for labour's exclusive jurisdiction on labour matters is preserved by this section. He approves the conditions of service of employees of the council. A council cannot fix or alter such conditions of service without the approval of the Minister of Labour. I am in agreement with Mr Hwacha who submitted that s 138 was inserted to ensure that there was no conflict between the Labour Relations Act and the Urban Councils Act. The

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fixing of conditions of service is in the domain of the Labour Relations Act whose purpose is, inter alia, to define and declare the fundamental rights of employees and regulate conditions of employment (see preamble of the Act). Section 3 of the Labour Relations Act makes it clear that the Act applies to all employers and employees except those whose conditions of employment are otherwise provided for by or under the Constitution. Section 3 was judicially interpreted in Gumbo v Norton Selous Rural Council 1992 (2) ZLR 403 (S). In this case, McNaly JA said at 406H-407A:

> "The first, and perhaps the only, question which needs to be answered is whether an officer of the Norton Selous Rural Council is an employee 'whose conditions of employment are otherwise provided for by or under the Constitution' by reference to s 3 of the Labour Relations Act. If he is not, the Minister's approval is not necessary. If he is not, the Minister's approval is necessary."

He found that an employee of a rural district council was not an employee whose conditions of employment are otherwise provided for by or under the

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CHINHENGO J

Constitution. As to the meaning of the words "by or under the Constitution" see the meaning attributed to them at 408H-409C. I therefore have no difficulty in finding that the town clerk is an employee of the respondent and that his conditions of service are not provided by or under the Constitution. This I believe is common cause. The essential question is, however, whether or not the Urban Councils Act specifically excludes the town clerk or other council employees from the ambit of the Labour Relations Act. At 41lA-B, McNally JA said:

> "In short, the effect of the Labour Relations Act was to take away from employers certain of the powers they originally had over their employees. Whether these employers had these powers by virtue of private contract or by reason of statutory enactment was immaterial. The powers were now to be exercised under the overall control and supervision of the central government. The only employer exempted from this takeover was, logically enough, central government itself."

He reached this conclusion on an interpretation of s 62(3) of the Rural Councllls Act [Chapter 211] as amended by s 25 of Act 31 of 1974 which provided that:

> "Unless otherwise provided in the contract of employment concerned, a council may, by resolution passed by a majority of the councillors entitled to sit on the council, discharge -
>
> (a) an officer, upon notice of not less than three months; or
>
> (b) an employee ...
>
> Provided that a council may discharge without notice, an officer or employee for any dishonesty, misconduct, negligence or other reason which would justify such discharge at common law."

His Lordship was careful to stress that in this case he was interpreting a provision of one specific enactment and that the applicability of SI 371/85 may be excluded by the specific provisions of the enactment to be interpreted. He said at 405A-B:

> "This appeal raises a question of statutory interpretation ... It is whether the provisions of ... (SI 371 of 1985) apply to parastatals and/or rural and urban Councils, or to one or other of them. In fact, as I will endeavour to show, one

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cannot generalise. Differently worded statutes lead to different conclusions,"

He accepted that the specific wording of the Parastatals Commission Act 1987, which, as he noted, had been repealed at the time of his judgment, and the Urban Councils Act [Chapter 214] as amended in 1986 and which has since been repealed, excluded employees of parastatals and urban councils (in the latter case, subject to the application of s 90(9)) from the ambit of the Labour Relations Act.

After noting the modifications to both the Urban Councils Act [Chapter 214] and the Parastatals Commission Act which necessitated such an interpretatlon his Lordship said at 511D-G:

CHINHENGO J

"But no change has been brought about in respect of rural councils ... This case, however, concerns a rural council and I have concluded that there is no provision in the Rural Councils Act which overrides the provisions of s 3 of the Labour Relations Act."

It is quite apparent that McNally JA accepted the general proposition that the question whether employees in any given case came under the ambit of the Labour Relations Act was different depending on the specific provisions of the enactment relating to the conditions of employment of those persons.

This is precisely the question I must determine in this case. I have already shown how, in terms of the Urban Councils Act [Chapter 20:15], the LGB was established and functions were conferred on it. This body was intended to administer the affairs of municipal and town councils which fell within its area of jurisdiction as determined by reference to its functions specified in s 123. The termination of contracts of employees of a council are dealt with in Part IX of the Urban Councils Act. The Town Clerk's dismissal is dealt with under s 139. The decision to discharge a Town Clerk should be approved by the LGB, (s 139(2)); any other senior employee's dismissal is in terms of s 140 and should be approved also by the LGB. The dismissal of an employee other than a Town Clerk or other senior employee is governed by s 141 which requires the approval of the council. The LGB is concerned only with the dismissal of the Town Clerk and other senior employees as much as the council is concerned with the dismissal of thegenerality of council employees.

Section 139 provides as follows:

"(1) Subject to subsection (2) and to the conditions of service of a town clerk, a council may at any time discharge -

(a) upon notice of not less than three months; or

(b) summarily on the ground of misconduct, dishonesty, negligence or any other ground that would in law justify discharge without notice.

(2) A council shall not discharge a town clerk unless the discharge has been approved by the Local Government Board.

(3) If it appears to the mayor or chairman, as the case may be, that the town clerk of the council has been guilty of such conduct that it is desirable that the town clerk should not be permitted to carry on with his

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work, he -

(a) may suspend the town clerk from office and require him forthwith to leave his place of work; and

(b) shall forthwith notify the council or, in the case of a municipality, the executive committee, in writing, of such suspension and shall cause the suspension to be reported to the council at the first opportunity.

(4) Where a council has received a report of a suspension in terms of subsection (3), the council shall without delay -

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(a) conduct an inquiry or cause an inquiry to be conducted into the circumstances of the suspension; and

(b) after considering the results of the inquiry decide whether or not -

(i) to lift the suspension; or

(ii) to do any one or more of the following -

A. reprimand the town clerk;

B. reduce the salary or any allowance payable to the town clerk;

C. impose a fine not exceeding three thousand dollars or three months' salary which fine may be recovered by deduction from the salary of the town clerk;

D. subject to subsection (2), discharge the town clerk;

and shall inform the town clerk accordingly.

(5) Where the town clerk has been suspended in terms of subsection (3) -

(a) his suspension, unless earlier lifted, shall terminate when the council has decided not to discharge him or after six months has elapsed, whichever occurs first;

(b) during the period of his suspension he shall not be entitled to his salary or wages in respect of that period, but he may be paid such allowances, not exceeding the amount of his salary or wages, as the council may fix;

(c) if he is not subsequently discharged, he shall be entitled to the full amount of his salary or wages and any allowance that would otherwise have been paid to him in respect of the period of his suspension, less any amount paid to him in terms of paragraph (b)" (emphasis added).

The respondent has argued that this provision does not require that the dismissal of the Town Clerk should be approved by the Minister of Labour. That used to be the position under the Urban Councils Act [Chapter 214] which provided in s 90(9) that if the consent of the Minister of Local Government, Rural and Urban Development has not been obtained to discharge an employee of the council, then the permission of the Minister of Labour shall be obtained. This conclusion, as I have shown, found support in Gumbo's case *supra* which was confirmed in Municipality of Chinhoyi v Mupandira S-146-96.

The question in this case is whether s 139 takes the Town Clerk outside the ambit of the Labour Relations Act and the regulations made thereunder. I do not think so. I have referred to the

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provisions establishing the LGB and specifying its functions. I have also referred to the other provisions of the Act which relate to the termination of the employment of senior officials of a council as well as general employees. I cannot conclude from those provisions that the intention of the legislature was to take all these employees of the

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council outside the ambit of the Labour Relations Act and regulations. All that Part IX did was to provide for the differential treatment of employees of different levels by stipulating that the senior employees would be dealt with by the LGB while all other employees would be dealt with by the council concerned.

Mr *Biti* argued that SI 371/85 does not override the specific provisions of s 139 and submitted that the decision in Gumbo's case *supra* and in Masasi v Posts and Telecoms Corp 1991 (2) ZLR 73 (H) should be revisited.

Firstly, it is not possible for me to do so. I am bound by the decision of the Supreme Court in Gumbo's case. Secondly, even if I were minded to do so, I would still not be able to arrive at a different result. Mr Biti appreciated that McNally JA in Gumbo's case *supra* dealt with the very question which he now raises, but thought that if the question was reconsidered, a different result may ensue. McNally JA addressed the question whether a mere regulation made under the Labour Relations Act could overrule a specific provision of the Rural Councils Act which point had been rejected in the court quo (Gumbo's case HH-293-91). At 410, his Lordship had this to say:

> "I do not accept the force of this argument for two reasons. In the first place, logically it is not the Labour Relations Regulations which override the provisions of the Rural Councils Act. It is the provisions of s 3 of the Labour Relations Act which override the provisions of s 62 of the Rural Councils Act. Secondly, as pointed out by Mr Colegrave, the words 'This Act' in s 3 of the Labour Relations Act mean 'This Act and the regulations made under it' - see s 3(1) of the Interpretation Act. So it is not a question of a regulation overruling an Act, but of a later Act overruling an earlier Act."

I am satisfied on the basis of Gumbo's case that the Labour Relations Act overrules the Urban Councils Act.

Mr *Hwacha* submitted that s 17(1) of the Labour Relations Act empowers the Minister of Labour generally to make regulations providing, inter alia, for the regulation and control of employment and conditions of service. He also submitted that s 17(3)(r) specifically empowers the Minister of Labour to make regulations "specifying or otherwise restricting the circumstances in which contracts of employment may be terminated summarily or otherwlse". These submissions raise an interesting point which deserves to be explored despite the fact that I am bound by the Supreme Court decision in Gumbo's case *supra*.

I agree with Mr *Hwacha* that s 17 confers upon the Minister of Labour legislative powers equal to those of Parliament. It particularly empowers the Minister to enact regulations which govern employment in all sectors of employment except in respect of those employees who are excluded by s 3 of the Labour Relations Act. The enactment process necessarily involves amendment and repeal of existing laws whether expressly or impliedly (which is a matter of

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interpretation). If therefore the Minister enacts regulations

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which are in conflict with existing Acts of Parliament the regulations so enacted prevail on the principle of lex posterior derogat priori.

Support for this proposition is to be found in Khumalo v Director of Co-operation & Development 1991 (1) SA 158 (A) at 165F where it is stated:

> "... the earlier enactment ... is, of course not an Act of Parliament. But as was said in Maharaj (*supra* at 194) s 25(1) of Act 38 of 1977 bestowed upon the Governor-General powers of legislation within the areas concerned, equal to those of Parliament. Regulation 9 is therefore not a subordinate legislation in the true sense of the phrase. Hence there appears no reason why, for purposes of the exception, the regulation should not be equated with an Act of Parliament."

So even though in Gumbo's case, McNally JA said that the situation was actually not that of a regulation overruling an Act, but of a later Act overruling an earlier Act, I think that there is an irrestible attraction in the argument put forward by Mr Hwacha that a regulation such as SI 371 of 1985 is of sufficient force, deriving from the power conferred on the Minister of iabour by Parliament under s 17 of the Labour Relations Act, to be equal with an Act of Parliament. On this basis, I think it can also be held that SI 371/85 overrules any other Act. Attractive as this argument may be, it has no place in my decision in this matter as I am bound by Gumbo's case *supra*.

In the present case, I do not have to deal with Mr Biti's argument that "s 139 stands on its own", (see para 3.1.5 of his heads) implying, in my view, that it is a special provision in respect of which the maxim generalia specialibus non derogant is applicable. Section139 was enacted, in place of s 90(9) of the repealed Urban Councils Act [Chapter 214] which had specifically empowered the Minister of Local Government to grant permission to terminate the employment of council employees and which function had, hitherto, reposed solely in the Minister of Labour. The legislature, if it intended to affect the powers of the Minister of Labour in this regard, needed only to state specifically. It did not do so and therefore the conclusion or interpretation that it intended to leave the Minister of Labour's power intact is inevitable. Section 139 was not a new provision. The scope of its precursor (s 90(9) of Chapter 214) had already been modified by creating the alternative avenue to the Minister of Local Government In enacting s 139, all that was necessary, if the legislature intended that the LGB should grant the final permission to discharge a Town Clerk or other employee of the council, was simply to spell it out. (See Khumalo's case *supra*) at 166D-F). I am therefore unable to hold that a town clerk or any other employee of an urban council may be lawfully discharged in the absence of a compliance with the Labour Relations Act and the regulations made thereunder. In the result, I find that the dismissal of the applicant without the permission of the Minister of Labour was unlawful and therefore null and void.

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The second issue in this case is whether the respondent is entitled to withhold the applicant's salary beyond six months from the date of suspension. Section 139(5) requires a careful examination in order to arrive at a correct interpretation. It provides that a town clerk's suspension, unless earlier lifted shall terminate when the council has decided not to discharge him or after six months has elapsed whichever occurs first. So far as the council is concerned, the requirement is that it must reach a decision one way or the other within six months. If it does not take a decision within the stipulated time, the suspension shall terminate. The question is what happens if the council decides to discharge a town clerk within the six months period but, as in this case, the actual discharge of the town clerk is not effected before the six months expired. The answer I think is the same. The suspension falls away.

The requirement that the council shall merely reach a decision to discharge as opposed to actually discharge of the town clerk within the six months period is an obvious and deliberate one. It is predicated on the recognition that the final say in the discharge of a town clerk does not lie with the council. After reaching the decision to discharge him in terms of s 139(4)(b)(ii)(D), the council is required to refer its decision to the LGB (s 139(2)), after which still the decision by the LGB to discharge the town clerk must be referred to a labour relations officer in compliance with SI 371/85 as I have determined.

The purpose of s 139(5)(a) is to ensure that a town clerk does not remain on suspension for a period in excess of six months. If a council or other competent authority has not pronounced definitively on the fate of the town clerk within six months, then the suspension without pay and other benefits falls away. This, of course, does not mean that the town clerk may not be re-suspended on other conditions, for example (and perhaps the only example) on the condition that his suspension shall henceforth be on full pay and benefits. Less still does this mean that the council should cease to pursue the town clerk's dismissal. It must be recalled that the suspension in terms of s 139(3) is based solely on the mayor or chairman's assessment that "it is undesirable that the town clerk should be permitted to carry on his work". The termination of his suspension therefore is determined by reference to the expiry of the six months period where the town clerk has not been discharged. I am satisfied that the applicant's supension terminated six months from the date of his suspension, and from that date onwards he became entitled to his salary and other benefits.

This however is not the end of the matter in as far as the difficulties in which the respondent finds itself are concerned. How does it overcome the difficulty which arises as a consequence of the provisions of s 94 of the Labour Relatlons Act. This section provides in subs (l)(b) as follows:

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> "(1) Subject to subsection (2), after 1 January 1993, no labour relations officer shall entertain any dispute or unfair labour practice which -
>
> (a) ...
>
> (b) arises after 1 January 1993, unless it is referred to a labour relations officer within one hundred and eighty days from the date when such dispute or unfair labour practice first arose."

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Subsection (2) merely excludes from the application of this section an unfair labour practice which is continuing at the time it is referred to or comes to the attention of a labour relations officer. Subsection (3) is helpful to determine when a dispute or unfair labour practice is deemed to have first arisen. I do not think that subs (3) is intended to be exhaustive as to the circumstances which constitute the initial emergence of a dispute or unfair labour practice. The question in each case therefore is when did the dispute or unfair labour practice first arise. In the case before me, the dispute can safely be said to have first arisen for the purposes of the determination of this application when the applicant was alleged to be guilty of misconduct and suspended by the Executive Mayor on 14 February 1996.

The six months period stipulated in s 94(1)(b) above lapsed on or about 14 August 1996. This presents a real and practical difficulty for the respondent which I must deal with unless I merely wished to avoid the issue.

In para 9 of his founding affidavit the applicant says:

> "At this stage, I wish only to state that the Local Government Board erred and was misdirected in its findings and thus in approving the respondent's request to dismiss me from my employment. Unless it becomes necessary, I propose to detail my challenge to the findings of the Local Government Board at that Labour hearing in terms of the Act."

Whether this averment was deliberately so couched or it was made without appreciating the difficulty created by s 94 aforesaid, I cannot say. I, however, would venture and say that this averment was a calculated move by the applicant. He tactically but misleadingly, to the unguarded at least, suggested that the applicant was considering that it was still open to the respondent to bring the dispute before a labour relations officer. Convinced, perhaps, that this averment pointed to the possibility that the dispute could still be brought before a labour relations officer, the respondent counter-applied for an order that it be allowed to take the dispute further under the Labour Relations Act. I do not think that the respondent fully appreciated the difficulty arising from the stipulation in s 94. Instead of regarding s 94 as effectively barring it from bringing the dispute before a labour relations officer, the respondent endeavoured only to show that s 94 was inconsistent with s 139(5) in so far as both provisons stipulate a period of six months within which action specified therein is to be taken. I am not persuaded that this argument is valid. The two sections are not inconsistent with each other

and, even if they were, I would declare that s 94 prevails for the reasons I have already given. The reference of the council decision to the LGB in terms of s 139 followed before a dispute is referred to a labour relations officer. The LGB should be aware of this requirement. It is a part of the Local Government machinery and should be viewed as on the same side with the council for the purposes of meeting the time limits prescribed by law. There is nothing on the papers before me in this application to suggest that, the procedures specified in s 139 of the Urban Councils Act cannot practically be completed within six months so as to enable an urban council to refer a dispute to a labour relations officer before the expiry of the period of six months.

There is no doubt that the period of six months stipulated in s 94 of the Labour Relations Act

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has lapsed and the respondent will therefore be unable to bring the dispute before a labour relations officer. I have had to pronounce myself on this issue because the law is clear. I considered the desirability of requesting the parties to make submissions on this point but I am satisfied that the point is so clearly spelt out that I only have merely to flag it.

The applicant's specific prayer is for an order declaring that he is the Town Clerk of the City of Mutare. There are certain difficulties here which impel me to take the approach of Robinson J in *Muringi v Air Zimbabwe Corp* & Anor 1997 (1) ZLR 357 (H). In that case, the learned judge was faced with a not dissimilar problem. The judge had this to say:

> "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 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."

In similar vein, the effect of holding in the present case that the purported dismissal of the applicant is unlawful would be to restore the status quo ante which also means that the applicant's contract of employment continues to subsist. In Muringi's case *supra* Robinson J rejected the applicant's claim for reinstatement and accepted in part Mr de Bourbon's argument that the applicant should pursue a claim for such damages as he may be able to prove. In reaching his decision as to the approach to take, the learned judge said:

> "It is not clear to me whether Mr de Bourbon intended to signal to the court that if the court set aside the Labour Minister's decision approving the termination, on notice, of the applicant's contract of employment, the Corporation was not interested in persisting in its application under s 2(2) of SI 371/85 and would treat the applicant's contract 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 preempting the Corporation's right, should it so choose, to persist in its application under s 2(2) of SI 371/85 for approval to terminate the applicant's contract of employment on notice ... with the applicant in the meantime,

> remaining on leave on full pay and enjoying 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 ...
>
> 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."

I think that this approach and the logic underlying it is applicable in this case. The respondent's counter-application seeks an order based on such an approach and logic.

A declaratory order sought by the applicant has the same effect as an application for reinstatement. If, therefore, I made an order in terms of the applicant's draft order I would in effect be ordering that the applicant be reinstated. Where an application is made for the reinstatement of an employee, the judge has a discretion to consider whether it is appropriate to order reinstatement (*Commercial Careers College \(1980\) \(Pvt\) Ltd v Jarvis* 1989 (1) ZLR 344 (S) at 349E). I think that if a judge has such a discretion in respect of an application for

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reinstatement in the circumstances of Muringi and Commercial Careers *supra*, a similar discretion is retained by him where the effect of declaratory order is to reinstate an employee. In exercising this discretion, I am impelled by the fact that the relationship between the Town Clerk on the one hand and the Mayor, councillors and other officials involved with the applicant in this dispute has become unhealthy. This is evident from the annexures to the affidavits fied of record and from the very action taken by the respondent against the applicant. That relationship cannot be conducive to the proper running of the affairs of the respondent. The applicant's reinstatement would not be appropriate in view (as held by Robinson J in Muringi's case *supra*) of the council's belief that the applicant was no longer suitable to run the affairs of the respondent as its Town Clerk. In any case, I think that it would be imprudent, if not entirely wrong, of me to grant an order whose effect is to reinstate the applicant without the merits of the dispute having been argued before me. I think I have no choice in the circumstances except to approach the matter in the way I have suggested. Additionally, I do not think that the respondent's avenues in this dispute have all been closed nor that the respondent no longer wishes to pursue the applicant's dismissal. I cannot go beyond this statement.

It will be apparent that I have not dealt with respondent's point in limine. This is so because I am satisfied on the authorities to which I was referred that this application was properly instituted. The application was for an order to declare that the applicant's action is null and void. This is a proper basis

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on which to apply for a declaratory order (see Musara v Zinatha 1992 (1) ZLR 9 (H) at 14).

I will therefore not grant the relief in terms of the applicant's draft order. I have the discretion to make such order as I think is appropriate in the circumstances of this case.

Before finalising my judgment in this matter, I propose to say a word or two on Mr Biti's general argument that it is undesirable that having gone through the procedures laid down in the Urban Councils Act, an urban council which wishes to dismiss its town clerk should take the dispute before a labour relations officer. I am attracted to the view that the procedure is unnecessarily cumbersome and duplicative. The LGB is a high powered body composed of persons who can determine any issues brought before it with fairness. In my view, consideration could be given to empowering the LGB in specific terms to deal conclusively with a dispute of this nature. The law as I have determined provides otherwise. In Carrot v Attorney-General [1933] NZLR 1461 cited by G C Thornton in Legislative Drafting 2 ed at 332 a New Zealand judge said:

> "The courts have no concern with the reasonableness of the regulation; they have no concern with its policy or that of the Government responsible for its promulgation. They merely construe the Act under which the regulation purports to be made giving the statute ... such fair, large and literal interpretation as will best attain its objects. They look at the regulation complained of. If it is within the objects and intention of the Act, it is valid. If not, however reasonable it may appear, or however necessary it may be considered, it is ultra vires and void."

An adoption of the principle enunciated in these words is not a literalistic approach to statutory interpretation. It is an approach which recognises the distinction between the various arms of the State and the particular function of the courts in the overall framework of the management of

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the affairs of the State. It is an approach which does not exclude a consideration of the contextual setting of the provision to be interpreted nor the need to take a purposive interpretation of the provision concerned in an appropriate case. In the case before me, while I am sympathetic to the views expressed by Mr Biti regarding the long-windedness of the procedure, I am bound to give effect, as I have endeavoured to do, to the provisions of the statutes concerned.

In the result, it is ordered as follows:

1. The respondent's purported termination of the applicant's contract of employment without compliance with the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371) be and is hereby set aside.

2. The applicant's suspension be and is hereby declared to have terminated after the expiry of a period of six months from the date of his suspension.

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3. The respondent shall pay to the applicant his salary and other benefits with effect from the date on which the applicant's suspension terminated.

4. The respondent shall pay the costs of this application.

Kantor & Immerman, applicant's legal practitioners

Bere Brothers, respondent's legal practitioners

1997 (2) ZLR p138

S v MAGAYA 1997 (2) ZLR 138 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

23 July 1997 Judgment No. HH-122-97

Flynote

Evidence - sexual cases - cautionary rule - nature of and justification for rule - extent to which court required to consider hypothetical dangers of false incrimination

Headnote

The cautionary rule in sexual cases has been much criticised recently, the grounds given being that (a) there is no reason to treat rape any differently from any other offence; (b) the danger of false incrimination in sexual offences is based on prejudice, not fact; and (c) it impedes the conviction of rapists the rule adds to the trauma of the victimised woman and provides unfair

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protection to the wrongdoer. In several countries, the rule, which requires the judge to warn the jury that it is dangerous to act on the uncorroborated evidence of a complainant in sexual cases, has been abolished or relaxed. In this jurisdiction, though, where the trier of fact is the judicial officer himself, the cautionary rule is no longer seen as a rule of law but as a procedural safeguard, an admonition to scrupulous objectivity where the scope for error is high. The rule here prescribes no greater burden of proof in respect of women in sexual matters than it does in respect of any complainant who is a single witness in any oher criminal case.

In respect of sexual cases, various arguments were put to support the cautionary rule. Such justifications were advanced as sexual neurosis, fantasy, jealousy, spite, hysteria or an over-active imagination. If the proposition was that an adult woman is so notoriously prone to flights of sexual fantasy, or so inclined to hidden or unmotivated malice, as to cause a court to regard all women with suspicion and there complaints as dangerous, that would be a deplorable basis on which to found any approach to justice. It is an attitude that cannot do other than cause offence to women and discredit to criminal justice. Nonetheless, the cautionary rule is a valuable tool. It is not vulnerable to the criticism that its only purpose is to discriminate against women complainants. It is but one aspect of a wide ranging exhortation to caution in all cases where the main or only evidence against the accused might reasonably be regarded as requiring extra care. Such cases would include those, not only sexual, cases, where tere was a single witness or any witness with a peculiar opportunity falsely to incriminate another, such as an accomplice.

To contemplate the possibility of a hidden motive for false incrimination is not, as has been suggested, a stunningly imaginative approach. The court is not enjoined to engage in unfounded speculation, nor to supply a defence which the accused has not cared to suggest. The court must, though, bear in mind the possibility that a complaint which is supported by nothing other the complainant's say-so might not be reliable. The fact that such a possibility might be excluded by the very cogency of the complainant's evidence does not render the rule valueless. The practical scope for error and the likelihood of the judicial

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officer being deceived should it be that a false charge has been laid is appreciably greater in cases regarded as cases of "suspect witnesses" than in any other case, and this is enough to justify the retention of the rule. False complaints are undoubtedly made and are a danger. There can be no sensible objection to requiring a judicial officer to give conscious and conscientious consideration o the likely risk of false incrimination, and to ensure that it is excluded before reposing his complete confidence in a complainant.

Cases cited:

S v D 1992 (1) SA 513 (Nm); 1992 (1) SACR 143 (Nm)

S v F 1989 (3) SA 847 (A)

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

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S v M 1992 (2) SACR 188 (W)

S v Magaya HH-75-97

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

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

Judgment

Gillespie J: The accused is a schoolteacher who was convicted of raping a pupil. He was sentenced by the then senior regional magistrate to imprisonment for 10 years, a portion of which was suspended. This, a meet punishment for such an offence, is nevertheless a miscarriage of justice, since the accused should not have been convicted.

[The learned judge considered the evidence and continued:]

Having summarised the evidence the magistrate embarked on an analysis of it. With the appearance of due caution he referred to the existence of the cautionary rule in words which suggest that he understands it. The truth, however, seems otherwise. He found the complainant to be generally credible and proceeded to determine whether there were sufficient corroboration of her evidence. It is most regrettable that in doing so he appears not to have examined the matter from any objective viewpoint. Rather his point of departure seems to involve an uncritical acceptance of the evidence of the complainant and his quest for corroboration a search for justification of that acceptance.

I have attempted to show that the cautious approach involves not the finding of a convenient peg upon which to hang one's subjective belief in a complaint, but rather a real awareness of the possibility of false incrimination, as disclosed by the facts of any case, and a reasoned disposal of such an eventuality. I put it thus in the case of S v Makanyanga 1996 (2) ZLR 231 (H) at 240F:

> "There must in addition be a conscious advertance to the risk, as it may be demonstrated by the peculiar circumstances of the case, of false incrimination."

This risk will vary from case to case. In Makanyanga the risk was the real possibility that the accused had engaged in adulterous intercourse with her husband's brother, as a result of which her marriage had failed. She needed

to recover the protection of her parents who had effectively disowned her when she had married a husband of whom they had disapproved. Different examples can be given. In *S v Magaya* HH-75-97 (not reported), the danger of false incrimination subsisted in the reasonable possibility that intercourse had taken place in circumstances of the considerable intoxication of both parties and that on regaining her sound and sober senses the revelation of what she had done, and the fact that what had been done had become know, so appalled the complainant as to

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cause her to make an untrue complaint.

I do not say that it is necessary in any case for a judicial officer to seek out hypothetical dangers and solemnly, one by one, to eliminate them from consideration; nor, because of the absence of any evidence in respect of some remote and fanciful possibility to refuse to convict where all the other evidence is satisfactory. What he must do, if he is to display a properly cautious approach, is to consider what possible danger of false incrimination, if any, is revealed by the individual circumstances of any case and then conscientiously to enquire into whether that danger can be eliminated as a reasonable possibility.

[The learned judge then considered the magistrate's analysis and continued:]

All in all, far from corroborating the complainant's allegations, all the evidence external to her own testimony tends rather to add to the doubt that ought properly to be entertained arising out of certain improbabilities inherent in that story. Although he cited a cautionary rule and purported to seek corroboration, the magistrate did not approach her evidence cautiously. He did not understand wherein lay a danger of false incrimination. He misunderstood important parts of the evidence. He was moved by a subjective and unduly sympathetic acceptance of the complainant's version and failed to discern that that version could not establish beyond reasonable doubt the guilt of the accused.

I have gone to some length to analyse the reasoning in this matter, and to point out the deficiencies in the magistrate's approach, because it is most important that this oft-cited cautionary rule should be properly understood. It is a principle of assessment of evidence which owes its origin to a rule of law formerly applicable in trials by jury. According to this rule, a judge was obliged expressly to warn the jury that it is dangerous to act upon the uncorroborated evidence of a complainant in sexual cases. A similar cautionary rule applied in many other instances of suspect witnesses. The absence of the express warning was a misdirection to the jury and a fatal irregularity in the trial. Thus in Andrews & Hirst on Criminal Evidence, The Criminal Law Library No 4 at p 205, para 9.22 it is written:

> "It has been held that the warning must actually explain why reliance on the complainant's uncorroborated evidence would be dangerous. The judge must effectively explain that,

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> 'Human experience has shown that in the courts girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons ... and sometimes have no reason at all.'

[citing R v Henry (1968) 53 Cr App R 150]

The judge does not have to use any particular form of words when giving the warning; but the warning must be given, however, inappropriate he may feel it to be on the facts of the particular case."

The requirement for such a warning to be given has in recent times come under considerable criticism. It has been described as "an insult to all women" by J Temkin "Towards a modern law

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of rape" (1982) 45 MLR 399 at 418.

The cause for criticism is perceived to lie in the following. First, it is said that there is no reason to treat rape any differently from any other offence where proof beyond a resonable doubt suffices. Second, the profferred rationalisation of the supposed danger of false incrimination in sexual offences is said to be "based on prejudice not on fact. Underlying it is a folkloric assumption that women are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it": Temkin op cit p 417. Thirdly, it is said to impede the conviction of rapists - adding not only to the difficulty in securing a conviction but even to the difficulty of encouraging a report and initiating a prosecution. The essence of the criticism is that the rule adds to the trauma of the victimised woman and provides unfair protection to the wrongdoer.

The rule was considered by the South African Law Commission in its 1985 Report on Women and Sexual Offences in South Africa. That report shows that in many countries, for instance, in New Zealand and certain Australian states as well as Canada and certain of the American United States, the rule has been abolished or relaxed. The report rehearses the criticisms of the rule and its justifications.

In this jurisdiction, as in South Africa, where the trier of fact is the judicial officer himself, the cautionary rule is no longer seen as a rule of law but as a procedural safeguard. An admonition to scrupulous objectivity where the scope for error is high. Macdonald JP (as he then was), in *R v J* 1966 (1) SA 88 (RA) at 90, also reported as R v Judson 1965 RLR 501 (A) at 503F, said:

> "[W]hile there is always the need for special caution in scrutinizing and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to displace the exercise of common sense. If a judicial officer, having anxiously scrutinized such evidence with a view to discovering whether there is an reasonable possibility of conscious or unconscious fabrication, is satisfied that there is no such possibility and that the evidence of a single Crown witness may, due and proper weight being given to the whole of the

> evidence, be safely accepted as proving the guilt of the accused beyond reasonable doubt, he should not allow his judgment to be swayed by fanciful and unrealistic fears."

In addition, du Toit AJ, in *S v M* 1992 (2) SACR 188 (W) 191a, said:

> "Die omsigtigheidsbenadering is geen regsre' l nie - net 'n vermaning tot die behoedsame aanwending van gesonde verstand."

Translated:

> "The cautious approach is not a rule of law - only an admonition for the cautious application of common sense."

In the same case, Flemming DJP wrote:

> "Die versigtigheidsre'l is nie 'n regsre'l nie. Sien R v Mokoena 1956 (3) SA 81 (A) op 86A-B; S v Ganie & Ors 1967 (4) SA 203 (N) op 206A. Dit is ook nie 'n voorskrif van die bewysreg wat die oortuigingskrag van getuienis omskryf of verminder nie. Die 're'l' is gerig aan die feite bevinder; hy moet homself bedag maak."

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I translate this as:

> "The cautionary rule is not a rule of law ... Likewise, it is not a precept of the rules of evidence that prescribes or diminishes the cogency of evidence. The 'rule' is directed to the finder of fact; he must ensure his own carefulness."

If this is so, then it can be seen that the criticism directed against the rule in jurisdictions where it must be uttered as a formal and express warning to the jury is misplaced in the context of the rule as applied in our courts. The complainant is not exposed to the trauma of hearing herself described to the very people trying the accused as a person whom it might be dangerous to believe. The rule prescribes no greater burden of proof in respect of women in sexual matters than it does in respect of any complainant who is a single witness, in any other criminal case.

Nevertheless, in Southern Africa it has been held to be a contravention of gender rights. In the Namibian case S v D 1992 (1) SA 513 (Nm); 1992 (1) SACR 143 (Nm), it has been held that:

> "I am of the view that the so-called cautionary rule has no other purpose than to discriminate against women complainants. This rule is thus probably also contrary to art 10 of the Namibian Constitution which provides for the equality of all persons before the law regardless of sex.

To sum up, in my view, the cautionary rule evolved in cases of rape has no rational basis for its existence and should therefore not form part of our law and is probably contrary to the provisions of the Namibian Constitution."

Per Frank J at 146f-g. The decision was greeted by A Wilmot, noting the case in (1992) 5 SACJ 211, as:

> "a rather welcome light at the end of the proverbial tunnel."

The author urged

> "that the court should follow this enlightened path and begin the, with respect, long overdue move towards the recognition of the equality of women with men in the eyes of the law."

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On the other hand, du Toit AJ, in *S v M supra* at 190h referred to the decision as "'n te skrille oordeel" - too shrill an opinion.

In my respectful view, there is much of validity in the criticism of the cautionary rule. That which is valid in the criticism, however, relates to its apologetics but not to its manner of application. In another article, "Sexual Offences - the Questionable Cautionary Rule" by P J Schwikkard in (1993) 110 SALJ 46, the decision in *S v M* was itself criticised and the hope was expressed that in future the views of Frank J in S v D *supra* would be treated more favourably than they were in *S v M supra*. The author observed at the foot of p 47:

> "It is easier to understand the charges of discrimination if attention is paid to the traditional formulation of the rule."

She then gathered in her case note a number of references to various learned judgments or articles wherein the cautionary rule is supported by various arguments. Prominent among the

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various justifications advanced for the rule is the declamation that a substantial danger exists of deliberately false charges being laid because of "sexual neurosis, phantasy (*sic*), jealousy, spite." 1(3) So, too, it is said that unconscious fabrication is a risk because of hysteria and an over-active imagination. 2(4) (The attributions for these remarkable insights are to be found in Schwikkard's article.) A similar rationale (and no doubt similarly offensive to women) was the frequently cited dictum of Lewis AJA (as he then was), in *R v J supra* at 92A-C; 505F-G, which attracted no little vitriol from Frank J in S v D *supra*.

With the benefit of thirty years of hindsight, the rationale of Lewis AJA, and all similar such expostulations, can be seen as most unfortunately put (Wilmot unashamedly calls the dictum of Lewis AJA "sexist"). Yet the opinion underlying these dicta was by no means confined to the few. It was the accepted rationale for a cautionary rule in sexual offences. To my mind, the proposition (if such is intended) that an adult woman is so notoriously prone to flights of sexual fantasy, or so inclined to hidden and unmotived malice, as to cause a court to regard all women with suspicion and their complaints as dangerous is a deplorable basis upon which to found any approach to judgment. It is an attitude that cannot do other than cause offence and discredit to criminal justice.

I nevertheless consider the cautionary rule, as it is applied in our courts, to be a valuable tool and one that is not vulnerable to the criticism levelled at it by Frank J and so many others. It must be recognised that this cautionary

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rule is not something that is confined to women, nor even to sexual offences. Although, as Frank J observed, in sexual cases, it is generally the evidence of women which is subjected to the scrutiny prescribed by the cautious approach, this is not to say that it is calculated to or does disciminate against women. It is but one aspect of a wide ranging exhortation to caution in all cases where the main or only evidence against an accused might reasonably be regarded as requiring extra care. As Baron JA said in *S v Mupfudza* 1982 (1) ZLR 271 (A) at 273:

> "There are several types of witnesses who for one reason or another must be approached with caution. Among the more common are the accomplice, the complainant in a sexual case and the person found in possession of stolen property. In all such cases, there is potentially a danger of false incrimination ... "

In any case, not only a sexual case, where a single witness, or any witness with a peculiar opportunity falsely to incriminate another, gives evidence, it is appropriate to ensure that particular care be taken to exclude the possibility of false incrimination.

This special care, properly understood, does not involve any preconception that the witness is a liar, far less any bias against women. Moreover, as was pointed out by Flemming DJP in *S v M supra* it necessitates no different an approach as to the cogency of any type of evidence. All that is required is that there be:

> "A conscious advertance to the risk, as it may be demonstrated by the peculiar circumstances of the case, of false incrimination. Some further significant feature or evidence is to be sought, external to the unsupported evidence of the complainant, and which serves to satisfy that the danger of false incrimination arising in any particular case is

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so remote and illusory as not to constitute a reasonable doubt,"

as I put it in S v Makanynga *supra* at 240F-G. This statement seems to echo (although I did not know it at the time) the words of Flemming DJP in *S v M supra* at 193h:

"Die vermaning tot omsigtigheid hou net in dat die verhoorhof 'n bewustheid moet handhaaf van die risiko wat (soms onopsigtelik) aanwesig is by die spesifieke situasie was voor die hof dien."

I translate:

"The admonition to caution operates only in that the trial court must maintain an awareness of the risk which (occasionally unobtrusively) is presented by the specific situation coming before the court."

Thus far I would think there can be no arguable objection to the cautionary rule. In S v D *supra* Frank J targeted for criticism a dictum of Botha JA in S v Balhuber. This was an unreported decision of the South African Appellate Division, although a passage, irrelevant to the present enquiry, was reported in 1987 (1) PH H2 (A). The relevant portion is to be found reproduced in the decision in *S v F* 1989 (3) SA 847 (A) at 853-855 where it was cited with

approval. The particular passage in respect of which Frank J wielded a pen mightier than a sword was the following:

"In the present case, a number of possible motives for the complainant to have acted as the appellant alleged she did, suggest themselves. She may have been overcome by shame, disgust or remorse (perhaps even alcoholic remorse) at the fact that she had consented to intercourse with the appellant; she may have been sexually frustrated because of the appellant's drunken state (he may not have realised that they did not both enjoy the act); she may have been filled with revulsion at the unusual sexual acts to which the appellant had wanted her to submit, whether or not she was a willing party to such acts (as distinct from the act of intercourse); or she may simply have become afraid, with the coming of the morning, that her male friend would arrive at the flat. It is true that these possibilities are speculative and that a court is not usually required to speculate on possibilities having no foundation in the evidence placed before it (cf S v Glegg 1973 (1) SA 34 (A) at 38H), but if the appellant were telling te truth there was no way in which he could have offered any explanation in evidence for the complainant's conduct, and possibilities of the kind I have mentioned are inherently present in the circumstances of a case such as the present. It is precisely because of the difficulty of discerning hidden motives that cases of this nature require special treatment."

Although Frank J did not cite further, Botha JA went on to say:

"To quote again from Glanville Williams [The Proof of Guilt 3 ed] (at 160):

> 'The distinctive reason for the warning in sexual cases is that experience shows that the complainant's evidence may be warped by psychological processes which are not evident to the eye of common sense. The danger of convicting on the evidence of an accomplice who is trying to minimise his own part in the affair is obvious even to an unintelligent person. In sexual cases, on the other hand, the danger is usually not obvious'."

This preparedness, as an exercise in caution, to contemplate the possibility of hidden motive for false incrimination Frank J derided as a "stunningly imaginative approach".

With respect, I do not consider it so. The court is not enjoined to engage upon unfounded

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speculation as to hidden or inexplicable motive. It is not expected to supply a defence which an accused has not cared himself to suggest. It is not called upon to imagine any particular danger of incrimination in the absence of some feature of evidence which may suggest the risk. It is, however, exhorted to bear in mind, as it assesses the evidence as a whole, the possibility that a complainant which is supported by nothing other than the complainant's say-so might not be reliable. To this extent only might it be said that the court may be obliged to speculate. That possibility, however, may be excluded by the very cogency of the complainant's evidence. If the word of the complainant suffices and the accused's protestations of innocence do not avail, there is nothing to impede a conviction despite the fact no other or weightier evidence than that of the victim is available. I repeat the words of Macdonald JP in R v Judson *supra*:

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> "the exercise of caution should not be allowed to displace the exercise of common sense. If a judicial officer, having anxiously scrutinised such evidence with a view to discovering whether there is an reasonable possibility of conscious or unconscious fabrication is satisfied that there is no such possibility and that the evidence of a single Crown witness may, due and proper weight being given to the whole of the evidence, be safely accepted as proving the guilt of the accused beyond reasonable doubt, he should not allow his judgment to be swayed by fanciful and unrealistic fears."

If that is the full extent of the meaning of the cautionary rule, then it can be said with logical accuracy that the rule is unnecessary. This indeed is one of the criticisms advanced. Much of Schwikkard's criticism of the rule is summed up in the following (at p 47 of the work cited):

> "Presuming that those appointed as magistrates and judges are competent, surely all the perceived dangers attributed to a complainant's evidence can be guarded against without invoking a specific cautionary rule applicable to sexual offences."

In a perfect world this would be true. Since the rule imposes no greater standard of proof on the State in sexual matters than in any other, since all that is required is for the court to satisfy itself beyond a reasonable doubt, ignoring remote and fanciful possibilities, why seek to impose any particular caution on a trained judicial officer? This, it might be said, is like asking a healthy man to walk with a crutch.

In my view (and in my own experience as a reviewing judge), the answer lies in that fact that the practical scope for error on the part of a judicial office, the likelihood of his being deceived should it be that a false complaint is laid, is appreciably greater in the cases regarded as cases of "suspect witnesses" (if I can use that term in its technical sense without intending to offend the sensibilities of women) than in any other case. It is not particularly helpful to surmise why this may be so. It may be that the false complaint is considered sufficiently unusual as not to figure as a likelihood in the magistrate's thinking. It may be that the sympathy one naturally feels for the victim of sexual assault tends to predispose one to less than critical acceptance. It is in truth not the overheated female imagination or feminine malice from which the cautionary rule seeks to protect one accused of a sexual offence. Rather it is judicial error one is attempting to avoid.

Whatever the reason for it, this greater scope for error when a false complaint is made is such as to justify the retention of a cautionary rule. And false complaints undoubtedly are made. As J

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Reid-Rowland has written in his work Criminal Procedure in Zimbabwe at 21-6:

> "There can, it is submitted, be little doubt that false allegations of sexual offences are not unusual and that it is foolish and unrealistic to pretend otherwise."

The author supports this submission by reference to newspaper reports current at the time of writing. If anyone doubts that false reports are made a danger, let them read the judgments in the cases of *Makanyanga and Magaya*

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above. They are two recent examples. This case is another. Not only were false reports probably made, but they deceived the magistrates who did not proceed with caution. There can be no sensible objection to requiring of a judicial officer conscious and conscientious consideration of the likely risk of false incrimination, such as it may be, and to ensure that that is excluded before reposing his complete confidence in a complainant. Although it may be that in many cases it needs no formalistc cautious approach to arrive at the correct conclusion, nevertheless, should such an approach be properly adopted, error would almost certainly be avoided.

It follows that I respectfully disagree with the views of Frank J. Although its proffered rationale does not always bear scrutiny, the cautionary rule evolved from practice and has valuable and necessary role to fulfill. The report (*supra*) of the South African Law Commission offered its recommendation that the status quo be maintained. So too has the Zimbabwean Law Reform Commission. It rightly remains part of our law. It does not constitute discrimination against women or against any person or class of persons whose evidence might be subjected to special scrutiny as a result of its application.

In the event, I consider that the conviction in this case must be quashed and the sentence set aside and I order accordingly.

Chatikobo J agrees.

S v MUSA 1997 (2) ZLR 149 (HC)

Court **High Court, Harare**

Chatikobo J & Chinhengo J

Criminal review

23 July 1997 Judgment No. HH-119-97

Flynote

Criminal law - common law crimes - contempt of court - contempt in facie curiae - statement by accused person that he did not want to be tried by magistrate conducting his trial - whether contemptuous - difference

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between contempt in facie curiae and contempt ex facie curiae

Criminal procedure - contempt of court - summary trial - warning court should give person alleged to be in contempt - whether person should be given opportunity to be heard before punishment imposed - effect of failure by court to grant such opportunity

Criminal procedure - review - summary committal for contempt - duty on magistrate committing person for contempt to ensure that record is sent for review

Headnote

The accused was arraigned before a magistrate on a charge of housebreaking. After the allegations had been read to him, he said in Shona that he did not want to be tried by the magistrate. Warned that he was being insolent and contemptuous, he repeated the remark, whereupon he was committed to 30 days' imprisonment for each utterance. The record was sent for review some three months later, and two months after the accused had been committed to prison. The magistrate blamed the clerk of court for the delay. He also claimed that he had convicted the accused, not in terms of the Magistrates Court Act, but under his common law power.

Held, that the responsibility for forwarding the record was the magistrate's, not the clerk of court's, and the magistrate's excuse was a lame one. The magistrate was required to submit the record without delay; this he did not do, with the result that the accused would have served his sentence before the record reached the High Court.

Held, further, that the magistrate had no common law power to commit for contempt. His powers were derived from the Act.

Held, further, that when the accused expressed a disinclination to be tried by the magistrate, he was in effect asking the magistrate to recuse himself, something he was quite entitled to do. The Act requires that any insult of the court must be wilful, which implies that *mens rea* is required. The court did not ask the accused to explain himself, so there was nothing which would enable the court to determine the accused's state of mind. The magistrate's failure to ask the accused to explain himself was a misdirection.

1997 (2) ZLR p150

CHINHENGO J

Held, further, that when the accused said that he did not wish to be tried by the magistrate, the magistrate should have first warned him that he proposed to consider whether he should be convicted of contempt. This would have opened the doors for the accused to proffer his explanation or defence. It would only be in exceptional circumstances that the audi alteram partem principle would not apply to a case where an offender is tried summarily for contempt. One such case might be where the alleged conduct had the effect of disrupting the proceedings, which was not the situation here. The magistrate had not conducted the proceedings fairly.

Held, further, that the magistrate's finding that the accused's utterances were intended to belittle the magistrate could not be upheld. The power to commit for contempt is not to be used to vindicate the magistrate as a person.

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Held, further, that the magistrate appeared confused about whether the alleged contempt was ex facie curiae or in facie curiae. The contempt in this case was in facie curiae.

Held, further, that the punishment was not such as would enhance the dignity of the presiding magistrate. It was wrong to treat the accused's actions as two counts; they were part of the same transaction. The punishment was also disproportionate to the offence and grossly excessive. A fine would have been appropriate.

Held, further, that it was doubtful whether the court's dignity could be protected by punishing a fool for his indiscretion. It would have been wiser for the court to take time for reflection; this might also have given the accused time to reflect. A magistrate is bound to subordinate his personal dignity to the overall decorum of the court over which he presides. This does not mean that he should not exercise firm control; but keeping firm control is a far cry from saying that the slightest affront to the court's dignity should be visited with summary committal for contempt.

Held, further, that the judge who reviewed the proceedings in the accused's trial for housebreaking should be asked to reconsider the matter, as the events which preceded the trial might have vitiated the trial itself.*(5)

Cases cited:

In re Muskwe 1992 (1) ZLR 44 (H)

R v Beitswe 1960 (3) SA 714; 1960 (2) PH H211 (GW)

R v Hughes 1970 (1) RLR 515 (G); 1970 (1) SA 156 (R)

R v McLoughlin 1929 CPD 359

R v Makebe 1967 (1) SA 464 (N)

R v Moran (1985) 81 Cr App Rep 51

S v Mushonga 1994 (1) ZLR 296 (S)

S v Nel 1991 (1) SA 730 (A)

S v Nyalambisa 1993 (1) SACR 172 (Tk)

S v Pillay 1990 (2) SACR 410 (CkA)

R v Silber 1952 (2) SA 475 (A)

S v Tobias 1966 (1) SA 656 (N)

The court referred to the following statutory provisions:

Magistrates Court Act [Chapter 7:10], ss 55(1)(b), 71(2)

Judgment

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Chinhengo J: On 10 January 1997, the accused appeared before the

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provincial magistrate at Karoi on a charge of housebreaking (store breaking) with intent to steal and theft. The accused pleaded not guilty to the charge. The facts as contained in the outline of the State case were read to him and the outline was tendered as an exhibit. The following then happened (as in the record of proceedings).

> "Accused to Court:
>
> In vernacular '... Iwe handidi kutongwa newe!' meaning I do not want to be tried by you!
>
> Court to accused:
>
> You are warned that you are being insolent and contemptuous towards the court especially in the eyes of those who understand the Shona language. Would you withdraw your remarks now!
>
> Accused - I do not want. I repeat that '... handidi kutongwa newe!' Meaning I do not want to be tried by you. Give the defence outline yourself.
>
> Committal by court summarily for ex facie contempt of court:
>
> There is no doubt that accused was or is being extremely so contemptuous and insolent towards this court especially if one considers the import of the Shona words he uttered in a sitting court.
>
> They were ex facie contemptuous and were uttered to belittle the trial magistrate. Those in court must have understood them as such. The court has the power to protect its own dignity in such situations as the contempt is blatant and obvious. Though the power of court to commit a person summarily for contempt is to be sparingly resorted to I believe this is one such case where a court is compelled to summarily commit a person to prison as a way of protecting its dignity.
>
> Accused repeated his contemptuous words twice. I regard these as constituting two counts of contempt of court. For each count accused is summarily committed to Karoi Prison for 30 days iwl. The dignity of a court has to be upheld at all times. I also rule that the trial should proceed."

On 4 March 1997, the provincial magistrate sent the record of proceedings to the High Court for review. This record was no doubt submitted for review very late. The provincial magistrate's letter accompanying the record reads:

> "Would you please place the attached record before an Honourable Judge for review. I regret the clerk had inadvertently filed it away under the mistaken impression that the period of imprisonment was not subject to review by the High Court in the ordinary course of things. The error was later picked up and the record had to be promptly despatched to the High Court for review as the case involves summary committal to prison for contempt of court which is subject to automatic review irrespective of periods of imprisonment involved.
>
> The oversight is profusely regretted and is no doubt a result of the rarity of cases of this nature."

It was clear that the magistrate was not accepting responsibility for the late submission of the record. Instead he was putting blame on the clerk of court.

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CHINHENGO J

This in my view is inexcusable. In terms of s 55(1)(b)(ii) of the Magistrates Court Act [Chapter 76:10] a magistrate is himself required to "forthwith transmit the record of the proceedings ... to the registrar and a copy thereof to the Attorney-General" so that, in the case of a transmission of the record to the registrar of the High Court, the record shall be laid with all convenient speed before a judge of the High Court in chambers for him to review the proceedings. The excuse proffered by the magistrate in this case is a lame one. In practice I understand that a magistrate will invariably endorse an appropriate record with the word "reviewable" to indicate that the record of the proceedings is to be submitted for review. Judicial officers must be careful not to neglect their responsibilities or divest themselves of the responsibilities placed upon themby statute. Section 71(2) of the Magistrates Court Act is also quite specific that where a magistrate commits or fines any person for contempt of court he shall without delay transmit to the registrar a statement certified by him to be true and correct of the grounds and reasons for his action and furnish to the person convicted a copy of such statement. This too the magistrate did not do.

The record of proceedings was only received at the High Court on 13 March 1997, some two months after the accused was committed to prison. It became apparent to me that the accused had already served the sentence of two months when the record was submitted for review. This seemed to me to suggest that the magistrate withheld the record until the accused person had served the sentence imposed on him. If the magistrate's explanation for the delay is not *bona fide*, and if he was motivated by the desire to ensure that regardless of the outcome of the review, the accused would have served his sentence by the time the record came on review, that action would be most reprehensible. I will however accept the explanation given but remind the magistrate concerned that the responsibility in such a case is his to ensure that the record of proceedings is forwarded to the High Court for review within 7 days of passing sentence, as required by s 57(1) of the Magistrates Court Act.

I also enquired with the magistrate whether he had proceeded with the trial after finding the accused guilty of contempt of court. If he had, I requested him to forward a record of those proceedings to me. I also asked the magistrate if he had complied with s 71(2) of the Magistrates Court Act. In his response dated 16 June 1997 the magistrate said that when he "convicted the accused for contempt of court I did not do so in terms of s 71 of the Magistrates Court Act ... but I was relying on common law contempt of court. That being the case the trial magistrate did not have regard to s 71(2) of the ... Act". He also submitted the record in the main proceedings together with this letter. I find that the proceedings are replete with errors. Errors of

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procedure, of judgment and misdirections on law. The contempt was not ex facie curiae; it was in facie curiae. The summary committal was not in accordance with rules of natural justice. The magistrate has no common law powers of committal in the circumstances of the preent case - his powers are statutory, as provided in the Magistrates Court Act. The punishment was not only so severe as to further erode the dignity of the court or presiding officer, it was also not

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warranted in the circumstances. I now proceed to show how all these detractions arise.

When the accused, who was not represented by a legal practitioner, expressed a disinclination to be tried by the magistrate, he was in his own way applying for the magistrate to recuse himself. As long as his application was *bona fide* and not calculated to insult the presiding judicial officer, the accused was perfectly entitled to make it and that does not constitute contempt of court. In R v Silber 1952 (2) SA 475 (A) Schreiner JA said at 481A-B:

> "Now the right of any litigant to ask a judicial officer to recuse himself is a very important right which must be given full protection as long as it is being honestly exercised. But if the right is abused and if, under the cloak of an application for recusal, the applicant is in truth insulting the court wilfully, summary committal may be appropriate."

In R v McLoughlin 1929 CPD 359 Watermeyer J had made the same point more crisply. He said at 361:

> "Now it is the right of every litigant who appears in court to recuse the magistrate if it is thought necessary to do so, and I think it is equally the right of a complainant in a criminal case to point out to the public prosecutor facts which might furnish reasons for recusing the magistrate. The courts must be very careful to do nothing to limit that right, or to make litigants timid about exercising it, because it is a valuable right to which they are entitled. Provided they are *bona fide* in what they put forward as grounds for recusation, I do not think that such recusation can be construed as contempt of court."

Section 71 of the Magistrates Court Act provides as follows:

> "(1) if any person, whether in custody or not -
>
> (a) wilfully insults the magistrate during his sitting in court or any clerk or messenger or other officer of the court during his attendance therein; or
>
> (b) wilfully interrupts the proceedings of or otherwise misbehaves in court; or
>
> (c) ...
>
> it shall be lawful for any police officer or private person by order of the magistrate to take such offender into custody and detain him until the rising of the court, and the magistrate may by warrant under his hand commit any person so offending to prison for any period not exceeding three months or may impose a fine not exceeding three hundred dollars for every such offence and in default of payment thereof commit the offender to prison for any time not exceeding three months unless the fine is sooner paid" (emphasis added).

Section 71(1)(a) of the Magistrates Court Act requires that the insult

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intended should be wilful. Mens rea is therefore required. In order to determine whether the accused had the necessary *mens rea* I have to examine the detailed grounds for his application that the magistrate should recuse himself (R v Silber (*supra*) at 482B-C). In the present case the magistrate did not at all inquire into the reasons for the accused's application. There is nothing on record which would assist the court to determine the state of mind of the accused at the time when he uttered the words considered to be contemptuous. The accused was clearly not given an opportunity to explain himself. This was a misdirection by the judicial officer.

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This brings me to a consideration whether the court should convict a contemptor without giving him the opportunity to be heard. The right to be heard is a fundamental tenet of natural justice and as such the court should as a general approach, inform the contemptor of the complaint against him and afford him an opportunity to answer for himself. In *S v Pillay* 1990 (2) SACR 410 (CkA) at 418e-h Rabie CJ said:

> "There does not appear to be any reported South African case in which it has been stated in express terms that the court must, when dealing summarily with a case of contempt committed in facie curiae, first warn the person concerned that it proposes to consider whether he should be found guilty of contempt of court, and there are reported cases of instances where persons were, apparently without prior warnings, found guilty of contempt of court committed ex facie curiae in which it has been said that a person should be warned of the court's intention to consider whether he should be found guilty of contempt of court ... This does not mean, of course that a warning is called for only in cases of contempt committed ex facie curiae. The question as to when a warning is necessary will have to be decided in the light of each particular case.
>
> One's starting point is that contempt of court is a criminal offence which can have serious consequences for the person concerned and justice requires that that person should not suffer prejudice when it can be avoided."

When the accused asked for the magistrate to recuse himself by stating that he did not want to be tried by that magistrate, he was warned that he was being "very insolent and contemptuous towards the court ..." and was asked to withdraw his remarks. This was not, in my view, an adequate and complete warning. The warning should in all cases inform the person concerned that the court intended to consider whether or not he should be found guilty of contempt of court. Such a proper warning will open the doors for the person concerned to proffer his explanation or defence against the complaint made.

In S v Nel 1991 (1) SA 730 (A) the court stated that it was not an inflexible or immutable rule that a person must first be heard before he can validly be found guilty of contempt but observed however that it is a salutary point of departure that he be given an opportunity of addressing the court before he is found guilty. White J in S v Nyalambisa 1993 (1) SACR 172 (Tk) did not agree with this observation. He said at 177:

> "It seems to me that the audi alteram partem rule is so ingrained in, and is such a

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> fundamental part of, our law of criminal procedure, that a person has an unassailable right to be heard before judgment is given, irrespective of the flagrant nature of the offence he is alleged to have committed, or his degree of knowledge of criminal procedure. The Appellate Division has found that when a court applies the summary procedure to determine a person's guilt or innocence for contempt in facie curiae, the general rule is that the audi alteram partem principle does apply, but that in exceptional cases it does not apply. It will indeed be difficult to determine when such exceptional circumstances exist, and magistrates will be well advised to accept that the audi alteram partem principle applies to all cases in which they try an offender summarily for contempt of court in terms of s 108(1)."

This statement of the law commends itself to me. It accords with the right of any person to the protection of the law as contained in s 18 of the Constitution of Zimbabwe. Contempt of court is a criminal offence and where any person faces such a charge, even if the offence is committed in facie curiae, that person should be afforded the fundamental right to be heard in his defence. In *S v Mushonga* 1994 (1) ZLR 296 Gubbay CJ was dealing with an allegation of contempt of

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court committed ex facie curiae. He had this to say at 309A:

> "Obviously, as the learned judge was disposed to deal with the absent appellant himself, some degree of formality was required to bring him before the court. But at most, a citation in writing from the learned judge calling upon the appellant to attend at a designated time and place to show cause why he should not be punished for contempt was all that was necessary."

It seems to me that the learned Chief Justice was adverting to the audi alteram partem principle. Granted that the behaviour complained of was ex facie, I think the principle contained in the Chief Justice's words is even more applicable in a case where the contempt is committed in facie curiae. There is nothing lost to a judicial officer to require that the person concerned should explain his conduct or proffer his defence. In fact, it is all the more appropriate that the person should be heard in his defence before he is adjudged guilty of contempt. I would not wish to state it as an immutable procedural requirement that the person should be given such an opportunity in every case because if the alleged conduct has the effect of disrupting the proceedings, which was not the case here, a judicial officer may disregard the audi alteram partem rule. But I must say that Nyalambisa's case (*supra*) is meritorious on this point. Indeed Adam J was compelled to the definite conclusion that the power to act summarily ithout affording the accused an opportunity to be heard is a violation of ss 11 and 18 of the Constitution of Zimbabwe. See In re Muskwe 1992 (1) ZLR 44 (H).

The magistrate did not ask the accused why he did not want to be tried by him. He did not ask for an explanation for his utterances. He did not at all give the accused an opportunity to defend himself. I am unable therefore to hold that the magistrate conducted the proceedings fairly and was beyond reproach.

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The accused's conduct or utterance was not such as required prompt and drastic action to preserve the dignity of the court or the carrying out of its functions. It is noteworthy that in finding the accused guilty of contempt the magistrate found that the accused's utterances were intended to "belittle the trial magistrate". This does not appear to me to have been the position. The accused was not legally represented, he was a layman and a greater indulgence by the court could not have been harmful. The magistrate appears to me to have sought to vindicate himself as a person. This is not proper. The power to commit for contempt "is not used for the vindication of the judge as a person" (South African Crimial Law and Procedure Vol II 3 ed by J R L Milton at p 167). Thus even giving allowance for the fact that the conduct complained of was a contempt in facie curiae one is hard put to condone the magistrate's conduct of the proceedings. I have made the allowance that the magistrate was "in a better position ... to assess the needs of the situation and to judge the state of mind of the party asking for recusal" (Silber's case at 481B). I am nonetheless unable to reach the conclusion that the necessary *mens rea* was established.

The magistrate said that he did not act in terms of s 71 of the Magistrates Court Act but dealt with the alleged offence at common law. There is no merit at all to this assertion. Section 71 is quite clear. The magistrate could only have dealt with the offence in terms of that section. Had it been an ex facie contempt, perhaps there might have been some substance to the magistrate's

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assertion.

The magistrate appears to have been confused in his use of the Latin terms in this case. He refers to committal "for ex facie contempt" and that the utterance was "ex facie contemptuous". Contempt in facie curiae occurs when, during the sitting of a court, a person by word or conduct interferes with the administration of justice or violates the dignity of the court. (See S v Tobias 1966 (1) SA 656 (N) at 660). The kind of contempt which the magistrate was dealing with in this case was clearly in facie curiae. It was wrong for him to refer to it as ex facie curiae. Strictly speaking, therefore, the magistrate convicted the accused for an offence not supportable by the complaint levelled against him. If there were no other problems with the conviction, I would have merely substituted ex facie curiae for in facie curiae and confirmed the proceedings.

The punishment for the contempt in this case was not such as would enhance the dignity of the presiding magistrate. He committed the accused to 60 days' imprisonment on what he believed were two counts of contempt of court. First, I do not think that there were two counts of contempt. The words uttered by the accused were uttered as part of the same transaction. They were not separate acts. The magistrate was therefore wrong to regard

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the utterances as constituting two counts of contempt of court. Second, the punishment was clearly disproportionate to the offence. The approach to the punishment of a contempt in such cases was outlined by Botha J in S v Nel *supra* at 752I-753E (of the translation):

> "The most important function of the imposition of punishment in this case is to enforce the court's authority. There is no room whatsoever for any notion of retribution. There can also be limited scope for reformation: for the most part (leaving aside exceptional cases) the purpose of the punishment which is imposed is to bring the offender to his senses in the very proceedings in which the offence is committed. Deterrence is by the same token often and chiefly directed at getting the offender to refrain from continuing his contemptuous conduct in the proceedings which are underway. The punishment is not meant to hurt the offender but to bring about an end to the outrage to the court's esteem and authority. The extent of the punishment stays in the background; in the forefront is the esteem and authority of the court; and between the one and the other there is no direct relationship. The authority of the court is too precious to attempt to measure it against any punishment which may be imposed for conduct which harms it. Esteem for the court cannot be achieved by heavier punishments for insults to the court. These considerations indicate why a heavy sentence in these sort of cases is generally inappropriate in the ordinary course of events. This probably explains why our lower courts were in the past moderate in the punishment which they imposed for contempt in facie curiae as appears from the reported cases. That is a salutary practice which deserves encouragement and no good reason exists why the same approach should not be employed in the Supreme Court" (emphasis added).

In casu the 60 day committal was in my view grossly excessive. It could not have been perceived by the accused or by others in the courtroom as being other than a retributive punishment. Clearly, the court's dignity or that of the presiding magistrate was not enhanced, let alone preserved, by an apparently overreactive drive to punish the contemptor. A fine or a committal of, say, 7 days would have been more appropriate if the committal was warranted.

I have shown that the summary proceedings were irregular in many respects. The magistrate did not properly warn the accused. He did not apply the audi alteram partem rule whose application was clearly called for. He did not comply with the provisions of s 71 of the

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Magistrates Court Act. He did not establish that the accused had the necessary *mens rea* as required by law. He showed a degree of confusion as to whether the offence was in facie or ex facie in the proper sense of the meaning of these phrases in such proceedings. He failed to protect his own dignity or that of the court by imposing too severe a punishment. The conviction must certainly be quashed and the sentence set aside. I do not consider that this is a case in which I should order a proper trial. In my opinion, the unrepresented accused was in effect requesting that the magistrate should recuse himself. Even though he appeared to have gone overboard in asking the magistrate himself to put in the defence outline, I do not think that that derogats from the essential purpose of his application.

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The magistrate forwarded to me the record of the proceedings in the main trial on the charge of house breaking with intent to steal and theft. Those proceedings have been confirmed by another judge who was not made aware of the contempt proceedings. The only question which I pose here is whether the magistrate was correct to proceed to try the accused after convicting the accused for contempt of court for reasons which he did not solicit from the accused. It may well be that the accused had legitimate reasons for recusal; it may be that he had been tried and convicted by the same magistrate before (he has previous convictions) or it may be that it was for some other reason inappropriate for the magistrate to sit in his trial. That is the information which is lacking from the record of the contempt proceedings or the proceedings on the main charge. It seems to me there is merit in placing the record in the main trial before the reviewing judge for reconsideration in view of the facts which have now come to ligt.

Accordingly, it is ordered that the conviction in *S v Musa* is set aside and the sentence is quashed.

Since the accused is serving a long prison term of 36 months on the charge of housebreaking with intent to steal and theft the benefit of this judgment should be afforded to the accused person before the end of his term of imprisonment. This I must stress is not designed to interfere with the sentence on the main charge, but merely to avoid the technicality that the accused may be regarded as having already served the sentence on the charge of contempt of court before serving the sentence on the main charge.

Chatikobo J: I agree with the conclusion to which my brother Chinhengo has come on the question of contempt. I wish merely to add a few observations of my own. In doing so I must preface my comments by saying that I entertain serious doubts about the efficacy of routinely resorting to summary committal of a contemnor as a vehicle for preserving the dignity of the court in each case of contempt in facie curiae. I doubt if the court's dignity can be protected by punishing fools for their indiscretions. I respectfully share the sentiments expressed by Botha JA in S v Nel 1991 (1) SA 730 (A), which regrettably for me is in Afrikaans. The headnote to the report reads in part:

> "A presiding judge or magistrate who is of the opinion that someone has acted in contempt of the court should just consider whether it is necessary and desirable for him to take action. Very often conduct which strictly speaking constitutes contempt of court can quite fittingly merely be ignored without really impairing the dignity or the authority of the court or the orderly conduct of the proceedings. Too liberal a use of the court's powers to punish

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persons for contempt can undermine the very reason for the existence of such power."

The saying that one should not argue with a fool lest people fail to notice the difference is not without a moral. A restrained reaction to insult should

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be the first step in the process of asserting the decorum of the court where contempt occurs in facie curiae because, as the cases emphasize, the judicial officer acts to protect his office and not himself personally. Compare S v Silber 1952 (2) SA 475 (A) at 480G-H.

The lead judgment deals fully with the question whether or not a contemnor in the face of the court should be given an opportunity to defend himself. In this case the magistrate fell into the grave error that he assumed, rather than ascertained, if the accused was being contumacious. To my mind, it matters little that a contemnor addresses the court in an obviously rude manner or the contempt is demonstrable from the words used; the court should at the very least ask the accused to explain or give reasons for his conduct.

It behoves the court to explain to the accused the consequences of his conduct and to call upon him to reconsider his position. As Lawton LJ stated in R v Moran (1985) 81 Cr App R51 at 53, referred to with approval by Adam J in In re Muskwe 1992 (1) ZLR 44 (H) at 542F-G:

> "The following principles should be borne in mind. First, a decision to imprison the man for contempt of court should never be taken too quickly. The judge should give himself time for reflection as to what is the best course to take. Secondly, he should consider whether that time for reflection should not extend to a different day because overnight thoughts are better than thoughts on the spur of the moment."

Invariably where the judicial officer gives himself time to reflect, the contemnor would no doubt use the time to reflect as well. If after reflection the contemnor apologises that should be the end of the matter.

Contumacious behaviour often has two consequences. It can have the effect of disrupting the proceedings, in which case the court would be obliged to take immediate action to assert its authority and restore order in the proceedings. On the other hand, it can have the effect of undermining the authority of the court without necessarily disrupting the orderly conduct of proceedings. In this latter case, resort to the summary procedure may not be warranted. It seems to follow therefore that the course of action which the court should adopt in any particular situation depends on the effect of the contemnor's behaviour on the proceedings. That being so, the correctness of the procedure followed depends in turn on the intention with which the contemnor acts. If this be so, then it is, in my view, a matter of paramount importance for the court to ascertain the reason behind the contemnor's actions.

In casu, the magistrate acted rather precipitately. I cannot accept that the words used disclose an intention to be contumacious. That could have been the accused's way of drawing to the attention of the magistrate a legitimate grievance which he may have had against the magistrate. Instead of sensing an attack upon his dignity the magistrate should have become curious to

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know the reason behind the accused's objection. If the accused had a reason to believe that he was unlikely to receive justice from the presiding magistrate he may have acted out of a feeling of anger and rejection. A judicial officer is by profession one who is trained to retain his composure and to exercise restraint when faced with the most unwarranted forms of affront to his dignity, for, as the cases show, it is not his personal dignity which he should preserve but that of his office. There might be a fine line between his personal dignity and that of the court, but that is no reason for a judicial officer to overreact to an apparent inult from a litigant. A magistrate is duty bound to subordinate his personal dignity to the overall decorum of the court over which he presides. I must not be understood to say that a judicial officer should not maintain a firm hand in his court. *Per* contra I should be understood to say that a judicial officer must at all times maintain a firm control over proceedings in his court. However, keeping a firm control of proceedings is a far cry from saying that the slightest affront to the court's dignity should be visited with summary committal for contempt.

Before ending this judgment, I must advert to a point which causes me a great deal of disquiet. It is this. After the summary committal of the accused for contempt, the magistrate ordered the trial to proceed. At the end of the trial the accused was convicted and sentenced to a term of imprisonment. The record of proceedings in that trial was placed before Mubako J who confirmed them on review. At the time he reviewed the proceedings, Mubako J was not aware of the contempt proceedings which had preceded the trial, which have now been set aside. My concern is that there has not been an investigation into the accused's objection to the court's jurisdiction. If his objection had been investigated it may have been found to be justified in which case the magistrate would have recused himself. It may well be that the magistrate's precipitate and irascible response to the objection was an attempt to whitewash what he knew to be a legitimate objection. Whatever the case may have been, I am left with the uneasy feelin that the accused did not receive a fair trial.

Since the judge who reviewed the proceedings (Mubako J) is available, there is merit in Chinhengo J's observation that he should be asked to consider whether or not to withdraw his certificate on the basis that the events which preceded the trial whose proceedings he confirmed may have vitiated the subsequent trial.

In R v Beitswe 1960 (3) SA 714; 1960 (2) PH H211 (GW) the court held:

> "A reviewing judge's certificate of confirmation of a sentence may be withdrawn not only by the judge who issued the certificate but also by another judge having jurisdiction in a case when the former judge has ceased to have jurisdiction in the division in question. Such withdrawal of a certificate can take place when attention is subsequently drawn to an

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> irregularity in the proceedings, when it is discovered that the judge made a mistake or where facts are discovered which, if timeously known, would have resulted in the withholding of the confirmation."

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See also S v Makebe 1967 (1) SA 464 (N) and *R v Hughes* 1970 (1) RLR 515 (G); 1970 (1) SA 156 (R).

Here, facts which were not before Mubako J at the time he reviewed the proceedings have come to light. It is only just that he be asked to consider withdrawing his certificate. The matter has been brought to his attention.

S v TODZVO 1997 (2) ZLR 162 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Criminal appeal

6 May & 24 July 1997 Judgment No. S-103-97

Flynote

Court - judicial officer - duties - unrepresented accused - method of getting accused to give his evidence

Criminal law - common law offences - assault with intent to do grievous bodily harm - single kick with booted foot - whether only common assault

Criminal procedure - trial - unrepresented accused - method of adducing evidence from accused

Criminal procedure - witness- calling of - by court - witness's decision essential to just decision - duty on court to call witness

Criminal procedure (sentence) - general principles - community service - offences for which appropriate - common assault

Evidence - medical - affidavit - using abbreviations as well as containing unsatisfactory conclusions - need to call doctor to give evidence

Headnote

A young first offender with a family to support had been convicted of assault with intent to do grievous bodily harm and had been sentenced to an effective term of nine months' imprisonment. He had not been legally represented at his trial.

The allegation against him was that he had kicked the complainant once in the arm with a booted foot. He was a farm guard and the complainant was one of a group of alleged stock thieves. The medical evidence consisted of an affidavit from a doctor. The report contained a number of abbreviations.

When put on his defence, the appellant was asked if he adhered to his defence outline and adopted it, which he did. The accused declined to call a witness who the complainant said was present at the scene.

In sentencing the appellant, the magistrate said, on the question of whether community service,

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that he felt strongly that this was not a case where community service was applicable, but gave no other reasons for not imposing such a sentence.

On appeal,

EBRAHIM J

Held, that the doctor who had made out the medical report should have been called to give evidence. The courts cannot be expected to take judicial notice of medical abbreviations. The conclusions reached in the report were unsatisfactory.

Held, further, that there was doubt as to whether the crime of assault with intent to do grievous bodily harm had been committed by a single blow with a booted foot. The appellant should only have been convicted of common assault.

Held, further, that the method adopted of adducing evidence from an unrepresented accused, while convenient to the court, is unsatisfactory. It is bound to lead to confusion and the possibility of omitting things. The accused should be asked to give his evidence in the normal way, not simply adhere to his defence outline.

Held, further, that the court should have called the witness not called by the appellant, as his testimony was essential for a just decision in the case.

Held, further, that when it comes to sentence judicial officers should base their conclusions not on strong feelings but on reasons. In all the circumstances of this case community service would have been an appropriate sentence, contrary to the decision of the magistrate that it was not appropriate.

Cases cited:

S v Chibvongodze HH-108-97

S v Chikukutu 1996 (1) ZLR 702 (S)

S v Dullabh 1994 (2) ZLR 129 (H)

S v Melrose 1984 (2) ZLR 217 (S)

S v Tachiona \& Anor 1994 (2) ZLR 402 (H)

Case Information

M R D Stonier, for the appellant

M Majuru, for the respondent

Judgment

Ebrahim JA: The appellant was charged with and convicted of assault with intent to do grievous bodily harm. He was sentenced to twelve months' imprisonment with labour, of which

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three months were conditionally suspended and an order of compensation to the complainant was made in the sum of $600. Counsel for the respondent did not support the compensation order, correctly, in my view, as the order was incompetent, both because compensation was not requested by the complainant and because compensation was not readily quantifiable. See ss 363, 366(1)(b)(i) and 368 of the Criminal Procedure and Evidence Act [Chapter 9:07].

He had been summoned to appear at the magistrates court at Kadoma on 31 August 1995, but the trial did not actually begin until 13 November 1995. A plea of not guilty was recorded on 6 December 1995 and the trial was concluded on that date. A notice of appeal was filed on 19 December 1995. It is not clear from the original manuscript record or from the typed copy when the magistrate replied to the grounds of appeal, although the typed copy is date-stamped 20 January 1997, just over thirteen months after the notice of appeal was filed. The reason for this dilatoriness in transcribing a record is not evident. The magistrate's manuscript notes of the evidence, when

transcribed, come to only six typed pages. It is hard to think of any satisfactory reason for the matter to have taken so long. Such a delay is entirely contrary to the interests of justice and is to be deprecated in the strongest terms.

It is unclear whether the appellant has been on bail pending the appeal. If he has not, he would long ago have served the effective sentence of nine months' imprisonment imposed by the magistrate and this appeal is to some extent academic. It would assist this court considerably if appeal records were, as a matter of practice, to state whether the appellant has been released on bail and, if so, when.

The allegation against the appellant was that he had kicked the complainant on the arm once with a booted foot. The appellant was a guard at a farm and the complainant and two other persons had been arrested by the farm owner on allegations of stock theft. It was alleged in the State outline that the complainant and his companions had been handed over to the appellant and another guard and that the appellant kicked the complainant on the arm, fracturing the arm.

The complainant, Isaac Chauke, said in evidence that the appellant and the other guard, William Paradza, handcuffed him and the other alleged stock thieves. Paradza assaulted them with a stick. The appellant said Paradza was being too lenient, took a larger stick and hit "us" hard. Chauke said that the appellant then kicked him on the right arm, causing a fracture. The only other State witness was John Chipunza, who had also been arrested. His evidence in essence supported the complainant.

The prosecutor produced a medical report, consisting of an affidavit from a doctor. The relevant part reads:

> "Soft tissue swelling over rt hand e # shaft of rt. radius.
>
> These injuries were likely to have been caused by blunt object.

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In order to inflict these injuries, the ammount (*sic*) of force used could have been ~~SLIGHT~~/~~MODERATE~~/SEVERE.

The possibility of permanent injuries was SERIOUS/~~NOT SERIOUS~~."

It has been said by this court numerous times that such reports are worthless. For a start, the courts are not to be expected to take judicial notice of the abbreviations doctors use on their reports. The abbreviation "e #" is meaningless. The use of the symbol "#" for "fracture" is not unusual, but what "e " means I do not know. It is not explained. There is no explanation for the soft tissue swelling over the right hand. The conclusions are also unsatisfactory. The amount of force used to cause soft tissue swelling is not likely to have been severe. I would also question the conclusion that the possibility of permanent injury was serious. I would have thought that

permanent injury was most unlikely from a fracture. Such injuries, unpleasant as they are, seldom result in permanent injury. The report should not have been accepted as it stood. The doctor should have been called.

The appellant, when put on his defence, was asked if he adhered to his defence outline and adopted it, which he did. This method of adducing evidence from an unrepresented accused, while convenient to the court, is unsatisfactory. It is bound to lead to confusion and the possibility of omitting things. See *S v Chikukutu* 1996 (1) ZLR 706 (S). The accused should be asked to give his evidence in the normal way.

The appellant denied having assaulted the complainant. He could not account for the complainant's injury. He did not call Paradza, the other guard, on the grounds that Paradza had told him that he did not witness anything because he was 100 metres away.

This is a situation where the magistrate should have called the witness. If the complainant's story was true, Paradza was there throughout. If the appellant's story was correct, Paradza should have been able to support it. Either way, Paradza's evidence was "essential to a just decision of the case" and the magistrate was obliged to call him: see s 232 of the Criminal Procedure and Evidence Act [Chapter 9:07]. Instead, he saw the appellant's failure to call Paradza as indicating that the appellant knew that Paradza would not support him. While this may be true, it is not the only conclusion. The magistrate's failure to call Paradza constituted, in my view, a serious irregularity. The magistrate deprived himself of the opportunity to clarify the evidence. Instead, he relied on two persons who, while not accomplices, were in such a position that their evidence should have been treated with caution.

The magistrate found the complainant and Chipunza to be satisfactory witnesses. On the face of it, their evidence is consistent and corroborative of each other. But even if the complainant's evidence could be accepted as against that of the appellant, there still remains the question of whether the crime of assault with intent to do grievous bodily harm has been established. The essential elements of that offence have been set out in numerous cases. See, for example, *S v Melrose* 1984 (2) ZLR 217 (S); *S v Tachiona \& Anor* 1994 (2) ZLR 402 (H). These cases make me doubt whether this was more than a common assault. One would not expect a single kick to cause permanent or disabling injury. In my view, the appellant should have been convicted of

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common assault only. I would therefore set aside the conviction and substitute one for common assault.

Finally, as regards the sentence imposed, I consider that this was manifestly excessive. Even if the conviction was in order, for a single kick an effective sentence of nine months' imprisonment was excessive. See the comments made by Gillespie J in S v Chibvongodze HH-108-97, in regard to the

EBRAHIM J

quantum of the sentence and the proportion that was suspended. I would have thought that an effective sentence of no more than three months' imprisonment would have been warranted. It is disturbing, too, that the magistrate gave little consideration to community service, simply saying:

> "I strongly feel that this is not a case where community service is applicable."

Judicial officers should base their conclusions, not on strong feelings, but on reason. Community service is not appropriate for serious cases such as murder, rape and armed robbery (see *S v Dullabh* 1994 (2) ZLR 129 (H) at 134), but otherwise there is no limitation. Speaking for myself, I would have thought that community service would have been entirely appropriate in this case, even for some cases of assault with intent to do grievous bodily harm.

However, as the conviction has been altered to one of assault only, and in view of the appellant's youth (he is only 24 years old), the fact that he is a first offender with a family to support, and the nature of the assault, this is a case where a fine would be appropriate. I consider that a fine of $500 or, in default of payment, two months' imprisonment with labour, would meet the justice of the case.

KORSAH JA: I agree.

MUCHECHETERE JA: I agree.

Jarvis-Palframan, appellant's legal practitioners

LENS AGENCIES (PVT) LTD v KNIGHT FRANK & RUTLEY & ANOR 1997 (2) ZLR 167 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

17 June & 24 July 1997 Judgment No. S-94-97

Flynote

Interest - deposit of money - good tenancy deposit lodged by tenant with landlord's estate agent - whether

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tenant entitled to interest thereon

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

Headnote

A tenant who had leased premises from a landlord had been obliged to lodge a good tenancy deposit with the landlord's estate agent. The tenant claimed that it was entitled to interest on the amount lodged as a deposit.

Held, that there is nothing in s 50 of the Estates Agents Act [Chapter 27:05] that obliges an estate agent to pay interest on money held as a deposit. Equally, there is nothing in that section that says that the estate agent is entitled to keep interest earned on this money. However, no authority was placed before the court to show that under common law interest is invariably payable by anyone holding money of another. The deposit paid was in reality a mutuum or loan for consumption, and interest is only payable under a mutuum if the contract expressly or impliedly provides for it.

Held, further, that the privity of contract was between the landlord and the tenant. The estate agent held the deposit on behalf of his principal, the landlord, and was accountable to him alone. It was the landlord that was accountable to the tenant. The landlord does not claim interest on the deposit from the estate agent and it does not seem that he has a duty to do so and then account to the tenant. If the landlord had such a duty, the estate agent would then require some further reimbursement to replace what is no doubt a significant source of income for the estate agent.

Cases cited:

Allied JBS Bldg Soc v Price NO 1980 (3) SA 874 (A)

British Kaffrarian Savings Bank Soc v Attorneys, Notaries & Conveyancers Fidelity Guarantee Fund Bd of Control 1978 (3) SA 242 (E)

Ex p Smith 1940 OPD 120

Mayton & Co v Williams; Williams v Mayton & Co 1908 EDC 458

Price NO v Allied JBS Bldg Soc 1979 (2) SA 262 (E)

Standard Bank of SA v Lotze 1950 (2) SA 698 (C)

McNALLY J

The court referred to the following statutory provisions:

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

Case Information

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J C Andersen SC, for the appellant

A P de Bourbon SC, for the respondent

Judgment

McNally JA: It is surprising that the question in this appeal has not, apparently, arisen before. The appellant (the tenant) leased premises from the second respondent (the landlord). Like most tenants, he was required to lodge a "good tenancy" deposit with the landlord. In practice the deposit was lodged with the first respondent (the estate agent). The tenant considered he should be entitled to interest on this deposit. He sued accordingly.

There were two consecutive lease agreements during the period in question. The first began on 1 November 1984, the second on 1 July 1994. The second agreement contained the following clause:

> "The tenant shall upon signature of this lease deposit with the landlord a good tenancy deposit, as defined in Clause 1 hereof, as security for the due performance by the tenant of his obligations in terms of this lease or any extension thereof. The landlord shall have the right of appropriating the whole or portion of the good tenancy deposit towards payment for any damages or any liability for which the tenant is responsible. The tenant further agrees to abide by the assessment of damages as made by the landlord, whose assessment shall be final and binding upon the Tenant."

The clause in the first lease was in effect the same, save that the assessment was to be made by the estate agent. In practice that alteration was probably of no significance.

The tenant claimed that it should be entitled to interest on its deposit. It asked for an order:

1. That it be told where the money was and how much interest it had earned;
2. That that interest should be paid over by either the landlord or the estate agent to the tenant.

The tenant had originally sued the estate agent only. In judgment HH-42-95, Bartlett J dismissed the application on the procedural ground that the landlord should have been joined as a party. There was no appeal against that decision, and, with respect, rightly so. The learned judge did however go into the merits to a considerable extent, but strictly his observations on the merits were *obiter dicta*.

When the matter came before the High Court again, with both the landlord and the estate agent being sued, Mubako J in effect agreed with and adopted the attitude taken on the merits by Bartlett J and dismissed the application with costs. This appeal is therefore against the order of Mubako J.*(6)

McNALLY J

The first submission by Mr Andersen for the appellant tenant was that a proper construction of s 50 of the Estate Agents Act [Chapter 27:05] shows that the estate agent is not entitled to retain interest on money deposited with him and kept in his trust account, against the beneficiary on

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whose account it is held.

Section 50 provides that an estate agent shall keep one trust account, and may keep a second. The one is a requirement, for the deposit and safe keeping of "all moneys held or received by him on account of any person in the course of his business as an estate agent or by way of a rental or deposit due to such person in terms of a lease of immovable property."

It will be noted that all moneys have to be deposited, not only clients' money, provided that they are held or received in the circumstances set out. It will be noted also that tenancy deposits are specifically mentioned.

But it will significantly be noted that nothing is said about a duty to pay interest. And it will be recalled that until comparatively recently, commercial banks did not pay interest on current accounts. It was for that reason, as I recollect, that provision was made in the legislation permitting estate agents (and legal practitioners) to open a second interest-bearing trust account. So prior to that there could be no claim on an estate agent or on a legal practitioner for interest on moneys held in a trust account, because no interest was receivable from the bank.

The second trust account is the one referred to in the proviso to para (a). But again, nothing is said about the person to whom interest should be paid. There is reference, in s (1)(b), to a duty to keep particulars in the bo oks of account of "any interest earned by moneys in an account referred to in the proviso to para (a) which are payable to any such person". But it does not seem to me to follow as of necessity, that in all cases the interest is payable to the person to whom the moneys are payable. Similarly, s 50(4) provides that the money in a trust account shall not form part of the assets of the estate agent, unless it is money left over after every depositor has been paid on it. Such money might well be interest.

I find nothing therefore in s 50 of the Act which obliges the estate agent to pay interest to the persons whose money he holds in trust.

But by the same token, there is nothing in s 50 which says that the estate agent is entitled to keep the interest earned on clients' or other's moneys. So Mr Andersen's next argument is that under the common law there is an obligation to pay interest. He refers to Halsbury's Laws of England 4 ed vol 44 para 331. That paragraph however deals with solicitors, and does not say, as a general statement of law, that interest must be paid on clients' money. It speaks of money "on which having regard to all the circumstances (including the amount and the length of time for which the money is likely

to be held) interest ought, in fairness to the client, to be earned for him." Thus money held which did not fall into that category would not create an obligation to pay interest. And we know that in our Legal Practitioners Act [Chapter 27:07], there is provision in s 13 for the sharing of interest between the Compensation Fund and the practitioner. No mention is made of any right on the part of the client. I am not sure wy, but s 13(5)(b) seems unequivocal.

Mr Andersen also referred to Halsbury vol 48 para 954 which speaks of the duty of a trustee first

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to earn interest on trust money where the court considers he ought to have done so, and second to account for that interest to his principal.

This raises the question - who is the estate agent's principal? Is there privity of contract between tenant and estate agent? Mr Andersen argued that there was, largely because the tenant paid the money direct to the estate agent, who controlled it and who exercised the discretion how much to retain for breakages etc at the end of the tenancy.

In my view, however, the privity of contract is clearly between landlord and tenant. The estate agent holds the deposit on behalf of his principal, the landlord, and is accountable to him alone. It is the landlord who is accountable to the tenant. The landlord does not claim interest on the deposit from the estate agent. Nor do I think it has been shown that he has a duty to do so, and then to account to the tenant. If that were the position the whole structure of the tripartite relationship would be affected. The estate agent would require some further reimbursement to replace what is no doubt a significant source of income for him. (Compare the rise in bank changes since banks began paying interest on current accounts). I do not find support for Mr Andersen's argument in this point in the case cited - British Kaffrarian Savings Bank Society v Attorneys, Notaries & Conveyancers Fidelity Guarantee Fund Board of Control 1978 (3) SA 242 (E) at 248-9. In fact the passage at 249G seems specifically to run counterto the submission. It reads:

> "There was no fiduciary relationship between the plaintiff and Walsh. The plaintiff never intended to 'entrust' money to Walsh in the sense that he was to hold it or do something with it on the plaintiff's behalf.
>
> When the plaintiff caused the R60 000 to be paid into Walsh's trust account it intended to discharge its obligation to Mrs Price by paying what it owed her to her agent, on what it accepted as her express instructions."

If we substitute "the tenant" for "the plaintiff"; "the estate agent" for "Walsh"; and "the landlord" for "Mrs Price", the conclusion must be that the learned judge was supporting the opposite contention.

Nothing that was placed before us in argument shows that, under the common law, interest is invariably payable by anyone holding the money of another. Moreover, although the money in this case is spoken of as a good tenancy deposit, it is in reality, money paid under a contract of *mutuum* rather

McNALLY J

than a contract of *depositum*. See Ex p Smith 1940 OPD 120 at 126 et seq; Price NO v Allied JBS Building Society 1979 (2) SA 262 (E) at 270B-C, approved on appeal in 1980 (3) SA 874 (A)); 8 LAWSA, para 68 (Definition of deposit); the repetition of that definition in 8(1) LAWSA (Reissue) at para. 123; the definition of Mutuum in 15 LAWSA para 289.

A mutuum, or loan for consumption, requires the payment of interest only if the contract expressly or impliedly provides for it. See 15 LAWSA 294. Standard Bank of SA Ltd v Lotze 1950 (2) SA 698 (C) is a case involving a bank overdraft and the learned judge, van Zyl J, had no difficulty in finding an implied agreement by the customer to pay interest. But in Mayton & Co v Williams, Williams v Mayton & Co 1908 EDC 458 at 460 KotzŽ JP said "In the absence of

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definite proof of agreement or custom, interest should only be allowed from the tempus morae".

In the present case, I find neither an agreement to pay interest nor a custom in terms of which interest is paid, either by the landlord to the tenant, or by the estate agent to the landlord. Nor do I find any nexus between the estate agent and the tenant sufficient to found a claim for interest by the tenant from the estate agent.

Accordingly, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Mushonga & Associates, appellant's legal practitioners

Surgey, Pittman & Kerswell, respondent's legal practitioners

ZIMBABWE IRON AND STEEL CO LTD v DUBE & ORS 1997 (2) ZLR 172 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Ebrahim JA

Civil appeal

7 & 24 July 1997 Judgment No. S-107-97

Flynote

Employment - employee - dismissal - disciplinary action under code of conduct for taking part in illegal strike - whether disposal order by labour relations officer debars employer from taking action to discipline employees who went on strike

Headnote

The respondents were employees of the appellant company and members of a trade union. The union was involved in a dispute with the appellant about the conditions of the nonmanagerial employees, whom it represented. The dispute reached the point where strike action was threatened. The appellant notified the employees that such action would be illegal under s 104(3)(v) of the Labour Relations Act *[Chapter 28:01].* A show cause order was issued, signed by a labour relations officer., this was followed by a disposal order. Further negotiations were held, which ended in deadlock, and the employees went on strike. Two days after the strike began, a disposal order was issued by a labour relations officer, directing that the strike be tenninated, and that the disputed issues should be discussed. The employees obeyed the order.

In spite of this, the appellant took disciplinary action against the respondents, preferring five charges under the company's code of conduct. The proceedings resulted in the dismissal of the respondents. The respondents' appeal to the Labour Relations tribunal was upheld on the ground that the disposal order was invalid, there having been no show cause order issued by

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the Minister, and that as the disciplinary proceedings were based on an invalid disposal order, the disciplinary proceedings themselves were invalid.

Held, that the strike was unlawful in terms of s 104(3)(a)(v) of the Act, there being in force an extant collective bargaining agreement. The disposal order did not make the strike unlawful. The disciplinary proceedings were based on the infringement of the code of conduct consequential upon engaging in an unlawful strike.

Held, further, that a disposal order in terms of s 107(5)(a) of the Labour Relations Act in which the dismissal of striking employees had not been ordered by the appropriate authority, does not bar the employer from subsequently taking disciplinary action against such employees under a registered code of conduct which makes it a dismissable offence to take illegal industrial action. There is no provision in Part XIII of the Act to the effect that a disposal order grants immunity from the unlawful collective job action referred to in it.

Cases cited:

Cargo Carriers (Pvt) *Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S)

GUBBAY CJ

The court referred to the following statutory provisions:

Labour Relations Act *[Chapter 28:011, s* 104(3)(a)(v)

Case Information

J C Andersen SC, for the appellant

P Nherere, for the respondent

Judgment

Gubbay CJ: The appellant is a public company which, as its name signifies, carries on the business of producing and processing iron and steel at its plant in Redcliff. Its operation necessitates die employment of a large workforce. The non-managerial employees are members of the Iron and Steel Workers Union of Zimbabwe ("the Union").

On 7 March 1995, the Union notified the appellant in terms of s 104(2) of the Labour Relations Act *[Chapter 28:01]* ("the Act") that unless the conditions of service of its non-managerial employees were improved to the extent that their grievances were resolved, collective job action would be resorted to on 21 March 1995. The next day the acting chief executive of the appellant circulated a notice to all employees in which he advised that the collective job action threatened for 21 March 1995 would be in contravention of s 104(3)(v) of the Act. The response from the Union was to reiterate that recourse to such action would occur on 21 March 1995 unless before then an acceptable solution was forthcoming.

On 15 March 1995, a show cause order was issued at the instance of the appellant in purported

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compliance with s 106(1) of the Act. It was signed by a labour relations officer and called upon the Union to show cause on 16 March 1995 why the collective job action should not be disposed of in terms of s 107 of the Act. The following day a disposal order was issued by that labour relations officer. He noted that both parties were prepared to discuss the matters in dispute and directed that they were to meet as soon as possible to do so. Later that day the appellant circulated another notice, professing its willingness to commence discussions and urging the non-managerial employees to return to work.

The discussions, which were held in Harare, ended in deadlock. The length to which the appellant was prepared to go in seeking to improve the conditions of service of the non-managerial employees fell short of their demands.

So it was that on 24 March 1995 the non-managerial employees went on strike. 'Me same labour relations officer again issued an order calling upon the parties to show cause why the strike should not be disposed of in terms of s 107 of the Act.

When the strike continued the next day, the labour relations officer issued a disposal order on 26 March 1995. It directed that the unlawful strike be

terminated and that the disputed issues, which fell within the appertaining Collective Bargaining Agreement, should he discussed.

The employees complied with this order and returned to work. The appellant, however, instituted disciplinary proceedings against the respondents. It suspended them and then preferred the following category five charges under its Code of Conduct, as contained in Collective Bargaining Agreement SI 23 of 1992:

"(1) incitement to strike;

(2) participating in an illegal industrial action/strike;

(3) wilful disobedience to al awful order given by the company or its representative (to return to work on Friday 24 March 1995);

(4) refusal to obey a lawful show cause order which ordered the termination of the strike;

(5) act, conductor omission inconsistent with the fulfilment of the express or implied conditions of the contract of employment."

The proceedings resulted in the dismissal of the respondents, who then appealed to a labour relations officer for the dismissals to be set aside on the ground that the disposal order of 26 March 1995 precluded the appellant from bringing disciplinary proceedings against them. This contention was upheld on 19 June 1995. It was ordered that those dismissed were to be reinstated to their former positions without loss of salary and benefits. A senior labour relations officer, who beard the appeal on 19 October 1995, confirmed the previous determination.

An appeal to the Labour Relations Tribunal followed. It held that the disposal order of 26 March

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1995 was invalid since the show cause order had been issued by a labour relations officer and not by the responsible Minister. See *Cargo Carriers \(Pvt\) Ltd v Zambezi \& Ors* 1996 (1) ZLR 613 (S). The Chairman, who delivered the judgment, went on to find:

> "It also follows that the disciplinary proceedings instituted by the appellant were also invalid because they were founded on an invalid disposal order. In other words, it admits of no doubt that in the absence of the show cause order and the disposal order based on it, the disciplinary proceedings would not have been instituted. The effect of a contrary argument would be that an unlawful act is capable of producing lawful results. In my view, such a situation is not tenable."

Contradictory orders were then made in which the appeal was upheld (which meant that the dismissals would stand) whilst the appellant was to reinstate the respondents and bear the costs of the proceedings.

Mr *Andersen,* who appeared for the appellant, submitted, correctly in my view, that the disciplinary proceedings were not based on the disposal order of 26 March 1995, but on the events surrounding the unlawful strike. The

strike was unlawful not because it was declared to be so by the disposal order but because it was in contravention of s 104(3)(a)(v) of the Act. This provision reads:

> "Subject to subsection (4) [which is of no relevance to this matter], no collective job action may be threatened, recommended or engaged in by
>
> (a) any employees, workers committee or trade union -
>
> .....
>
> (v) if the matter in dispute is governed by or provided for in existing employment regulations or by a collective bargaining agreement which has not expired in terms of any provisions specified therein."

Certainly, there was an extant Collective Bargaining Agreement in force at the time the collective job action was threatened and then resorted to, which governed the matters in dispute. This was pointed out to the Union by the appellant's acting chief executive in his letter of 7 March 1995 and reiterated in the notice given to employees the next day. It is not surprising therefore that the respondents did not place the illegality of the strike in dispute, either at the disciplinary hearing, before the labour relations officers or, indeed, before the Tribunal.

Thus the finding by the Tribunal that the invalidity of the disposal order of 26 March 1995 expunged, as it were, the unlawfulness of the strike, thereby preventing the appellant from taking any disciplinary proceedings against the respondents, was based on a fundamental misconception. The invalidity of the disposal order did not cleanse the respondents of their wrongful action in going on strike. It did not wipe the slate clean. It was not, as the Tribunal believed, that the disposal order made the strike unlawful. Such action was prohibited by s 104(3)(a)(v) of the Act.

The disciplinary proceedings held by the appellant were predicated on infringements by the respondents of the Code of Conduct consequential upon engaging in an unlawful strike and

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other activity related to it (one of the gross infractions listed is "illegal industrial action"); and not on the validity or otherwise of the disposal order. There is nothing in the Code itself that precludes the taking of disciplinary measures even where a disposal order validly made has directed that unlawful collective job action be terminated.

In *Cargo Carriers \(Pvt\) Ltd v Zambezi \& Ors supra* the apposite Code of Conduct was held to be inapplicable. This was not because it was *ultra vires* to the extent that it dealt with collective job action, but because factually:

> "there was no realistic way in which the appellant could convene a form of mass trial of 322 employees and stay within the parameters of the Code of Conduct."

Although one of the specific offences was taking part in unlawful industrial action, the provisions of the Code were dwarfed by the enormity of the problem facing that appellant.

GUBBAY CJ

In the present matter, there is no indication that a comparable situation existed. The number subjected to disciplinary proceedings was far less. It appears also from the notices to attend that all the respondents were not dealt with at a single bearing. Most importantly, no complaint was raised that the procedure adopted was in any way irregular or unfair. The common defence was simply that the effect of the disposal order, then thought by all concerned to be valid, was to deprive the disciplinary committee of jurisdiction to punish those involved in the strike. There was no question of the appellant's disciplinary machinery having to determine the legality or otherwise of the strike. It was admittedly unlawful.

The real point to decide, so it seems to me, is whether it was the legislative intention that employees who have taken part in unlawful collective job action are only dismissable under the direction of a disposal order - such conduct not being subject to a code of conduct. Put differently, that ss 104 to 108 in Part XIII of the Act are specifically designed to deal with all forms of collective job action.

This was the main and most weighty argument that Mr *Nherere* advanced on behalf of the respondents. Acknowledging that the bringing of disciplinary proceedings under a code of conduct would be permissible where the charges resulted from the taking of collective job action, as for instance theft or wilful destruction of the employer's property, counsel submitted that such conduct was not dependent on the unlawfulness or otherwise of collective job action.

It is true, as was emphasised, that Part XII of the Act is concerned with the determination of disputes and unfair labour practices; Part XIII with collective job action. But these Parts are not mutually exclusive. Section 107(5)(a) details the powers conferred upon an appropriate authority in the making of a disposal order in the case of unlawful job action. Although the power to dismiss specified employees or categories of employees engaged in the unlawful collective job action is provided for in para (iv), its exercise is discretionary. The appropriate authority need not have recourse to it. Instead, the appropriate authority may decide merely to suspend the employer's liability to pay part of wages due to specified employees in respect of part of the duration of the unlawful collective job action (see para (i)); or suspend, with pay, specified

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employees for a defined period (see para (ii)); or take no disciplinary measures against the employees. In casu the disposal order of 26 March 1995 only directed that the unlawful job action be terminated. It was not directed to the liability of the respondents involved in the unlawful strike for disciplinary proceedings.

Accordingly, it is my view, that a disposal order made pursuant to s 107(5)(a) of the Act, in which the dismissal of specified employees had not

GUBBAY CJ

been ordered by the appropriate authority, does not bar the employer under a code of conduct which categorised "illegal industrial action" as a dismissal offence, from subsequently charging that offence and applying the prescribed penalty to those employees found guilty. Plainly, there is no provision, either. express or implied, in Part XIII of the Act to the effect that a disposal order grants immunity from the unlawful collective job action referred to in it.

In the result, 1 am satisfied that the appeal must be allowed with costs and that the order of the Labour Relations Tribunal be amended to read:

"(1) The appeal is allowed with costs.

(2) The dismissals of the respondents from employment are confirmed."

MCNALLY JA: I agree.

EBRAH1M JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Honey & Blanckenberg, respondents' legal practitioners

CHIOZA v SAWYER 1997 (2) ZLR 178 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

17 & 24 July 1997 Judgment No. S-108-97

Flynote

Costs - legal practitioner and client scale - dishonesty - by litigant - litigant saying one thing in dispute with one party and another thing in a dispute with another party

Damages - costs - when claimable as damages

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Headnote

The appellant was the owner of a farm of which the respondent was the tenant. The appellant tried to have the respondent evicted from the farm on the basis that the lease had expired, but the respondent obtained a court order interdicting the appellant from evicting him. The appellant appealed, and the respondent cross-appealed. The basis of the cross-appeal was that the trial judge should have awarded costs on the higher scale. The respondent also claimed damages calculated by reference to the difference between party and party costs and his own actual costs.

Held, that the appeal should be dismissed as it was without merit and doomed to failure. The costs of the appeal should be awarded on the higher scale because the appeal had an element of harassment.

Held, further, that costs could only be recovered as damages if there were in fact an eviction, not just an attempted one. If the eviction failed, costs would be awarded against the landlord.

Held, further, that the costs in the lower court should have been awarded on the higher scale, as the appellant had acted dishonestly. He had claimed against the respondent that the lease had expired, yet in reply to a demand from a creditor had made a statement which clearly approbated the lease.

Cases cited:

Baeck v Tinago 1985 (2) ZLR 177 (H)

Borrowdale Country Club v Murandu 1987 (2) ZLR 77 (H)

Davidson v Standard Finance Ltd 1985 (1) ZLR 173 (H)

Ian H Ferreira (Pvt) Ltd v Chendamudima HB-7-94

Marco Entrprs (Pvt) Ltd v Shar & San (Pvt) Ltd HH-29-94

Mudzimu v Chinhoyi Municipality & Anor 1986 (1) ZLR 12 (H)

Mutede v Duly & Co Ltd S-202-93

Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD 597

Rautenbach v Symington 1995 (4) SA 583 (O)

Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A)

McNALLY J

Case Information

E T Matinenga, for the appellant

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J B Colegrave, for the respondent

Judgment

McNally JA: This case involves an appeal and a cross-appeal against a decision in the High Court (Garwe J). The basic facts are that the appellant ("Chioza") is the owner and the respondent ("Sawyer") is the tenant of a farm ("Rothbury Farm").

After a long and protracted dispute over their respective rights, Sawyer obtained a provisional order on 11 September 1996. That provisional order came for confirmation before Garwe J, who was asked to make a final order -

1. interdicting Chioza from (a) evicting Sawyer from Rothbury Farm until 31 August 1998, and (b) interfering in any way with Sawyer's use of the leased property;

2. that Chioza pay $1 500 in nominal damages; and

3. that Chioza pay the costs on the higher scale.

The learned judge granted the interdict with costs, but refused to confirm the order as to damages or to allow costs on the higher scale.

Chioza appealed against the interdicts, and Sawyer cross-appealed on the damages and the refusal of costs on the legal practitioner and client scale.

In this court, Mr Matinenga quite understandably found himself unable to advance argument in favour of the appeal. It is totally clear that Sawyer's rights as a tenant extend to 31 August 1998 (to say nothing of his option to renew). It is, in my view, perverse to argue otherwise, or to try to interpret an earlier decision by Chidyausiku J as meaning that the lease expired on 31 August 1996.

On this basis, I have no hesitation in dismissing the appeal. Nor do I think we can resist the prayer for costs on the higher scale. The appeal was always doomed to failure and litigants, although they have a right to appeal, should not be permitted to force their opponents to incur costs when the appeal is hopeless. It is true we do not penalise every hopeless appeal in this way - see Mutede v Duly & Co Ltd S-202-93. But the present case has an element of harassment which justifies such an award. See generally Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A) at 21F; Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD 597 at 607; and Cilliers Law of Costs 2 ed p 54 et seq.

The appeal therefore must be dismissed with costs on the scale of legal practitioner and client.

It remains to consider the cross-appeal, which has two elements - damages and costs.

As to damages, Sawyer claimed what were called "nominal or contemptuous

damages" in the sum of $1 500. It is not clear on what basis these damages were sought. In

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argument it was contended that they were for his "unlawful threat of eviction, trespass and general interference" and that they should be calculated by reference to the difference between legal costs recoverable on a party and party basis and those incurred in fact by Sawyer in contesting the eviction proceedings.

If that is the basis, then it seems to me we are talking about the second leg of the argument, ie costs on the higher scale. If he recovers damages and costs on the higher scale he will be twice compensated for the one injury. I prefer to deal with the matter under the heading of costs on the higher scale.

If, however, as Mr Colegrave argued, the claim for costs as damages is based on Voet 21:2:25, then it is clear such costs can only be recovered as damages if in fact there is an eviction, not just an attempted one. The distinction is not an invidious one. Voet says expressly "costs of suit not claimable as damages if buyer wins eviction suit". The reason is that if he wins the suit he can recover the costs as costs.

I agree therefore with the court *a quo*, though for different reasons, that damages are not claimable.

The final question raised by the cross-appeal is whether Garwe J should have awarded costs against Chioza on the higher scale.

The contention is that the learned judge erred and was unwarrantedly generous in saying that Chioza was misled by wrong advice and should not be penalised for that.

Mr Colegrave argues with, it seems to me, compelling force, that Chioza has been shown to have acted dishonestly by saying one thing in his dispute with Sawyer, and another thing in his dispute with a creditor. In case number HC-4076-96 he swore an affidavit on 15 May 1996 that he would be receiving a large sum in rental from Sawyer on 31 August 1996, in terms of a lease agreement running up to August 1998. Yet on 14 February 1996, vis-ˆ-vis Sawyer, he had insisted that that very same lease agreement had expired. And, of course, he has maintained that stance up to the present.

Dishonesty in litigation is certainly a ground for an order of costs on the higher scale. (Cilliers op cit para 4.14 p 54). And compare *Davidson v Standard Finance Ltd* 1985 (1) ZLR 173 (H); *Baeck v Tinago* 1985 (2) ZLR 177 (H); Mudzimu v Municipality of Chinhoyi & Anor 1986 (1) ZLR 12 (H); *Borrowdale Country Club v Murandu* 1987 (2) ZLR 77 (H); Marco Entprs (Pvt) Ltd v Shar & San (Pvt) Ltd HH-29-94; Ian H Ferreira (Pvt) Ltd v Chendamudima HB-7-94; Rautenbach v Symington 1995 (4) SA 583 (O). Had the learned judge appreciated the point he would have accepted that the award of costs on the higher scale was justified.

Accordingly, the appeal is dismissed with costs on the scale of legal

McNALLY J

practitioner and client. The cross-appeal is allowed with costs to the extent that the order of the court *a quo* is amended in para 2 by the addition of the words "on the scale of legal practitioner

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and client".

GUBBAY CJ: I agree.

KORSAH JA: I agree.

Manase & Manase, appellant's legal practitioners

Surgey, Pittman & Kerswell, respondent's legal practitioners

PASIPANODYA v MUCHORIWA 1997 (2) ZLR 182 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

30 June & 30 July 1997 Judgment No. S-110-97

Flynote

Family law - marriage - customary law marriage - breakdown - division of assets - whether claim for division of assets may be prescribed

Prescription - Prescription Act [Chapter 8:11] - s 3(2) - application - not applicable to distribution of matrimonial property on breakdown of unregistered customary law union

Headnote

The appellant and the respondent had been married in an unregistered customary law union. The marriage had broken down irretrievably. The appellant sought a half share of the matrimonial property. There had been a special plea that the claim had prescribed.

Held, that s 3(2) of the Prescription Act laid down that the Act did not apply to any right or obligation of one person in relation to another that is governed by customary law.

Held, further, that even if the Act had been held to apply to the claim, the claim still would not have been prescribed. The marriage had not been dissolved, as an unregistered customary law union can be dissolved under customary law. When the parties had separated there was no proper distribution of the matrimonial property. In the circumstances the appellant's claim for a formal distribution of the property could not have prescribed.

The court considered the following statutory provisions:

Prescription Act [Chapter 8:11], s 3(2)

Case Information

Appellant in person

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A Debwe, for the respondent

Judgment

Muchechetere JA: There were two cases between the same parties which were due to be heard by this Court on the same day - numbers SC-193-96 and SC-750-96.

The first case was concerned with a caveat which the appellant had caused to be registered in the register of Deeds against the title of Stand 724, Parktown Township, 13 of Lots 36-41, Parktown Extension of Upper Waterfalls, Salisbury ("the said property") registered in the name of the respondent under Deed of Transfer 8344/88. The court *a quo* held that the

appellant had no authority to register the caveat against the property. The appeal against that decision was by consent adjourned to be heard together with the second appeal. It was also agreed that the respondent would be interdicted from disposing of or encumbering the property in any way until finalisation of both matters. The question of costs was left for determination after the hearing of both matters.

At the hearing, it was agreed that the resolution of the first case depended on the outcome of the second case. In the circumstances submissions were presented in connection with the second case.

The relevant facts in the second case were stated in the appellant's Declaration in the High Court as follows:

"3. The plaintiff (appellant) and defendant (respondent) contracted an unregistered customary law union in or about December 1983.

4. The aforesaid customary law union broke down in 1988. Plaintiff has lived separately from that time and the union has irretrievably broken down and there is no prospect of a reconciliation between plaintiff and defendant.

5. There are two minor children to the unregistered customary union namely:

(i) Ruvimbo (born 9 May 1983)

(ii) Takudzwa (born 1 January 1987).

6. Before the parties' separation, plaintiff and defendant had jointly acquired the following assets:

(a) A dwelling house known as No. 724 Masothla Ndlovu, Waterfalls, Harare (the said property).

(b) A Renault motor vehicle valued at $5 000

(c) C.I. Printer (Computer) $7 500

(d) An Investment Account in CABS

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	Paid Up permanent shares	$4 000
(e)	A colour television	$2 500
(f)	Furniture	$3 500
		$22 500

7. At the dissolution, each partner of the union was accordingly entitled to an award of property being an equal contribution of the union's assets between the parties.

8. When the union was dissolved plaintiff only got the furniture which was valued at $6 000 and defendant retained the rest of the union assets.

9. Plaintiff remains entitled to half share being the outstanding balance of her share of the unions' assets." (my emphasis).

MUCHECHETERE JA

In particular, the appellant demanded that she be given a half share of the said property.

The respondent's plea included a special plea which reads:

"1. Plaintiff's claim is based on an unregistered customary law union which broke down in 1988. In that year the plaintiff's claim was due.

2. The plaintiff's summons was issued on the 7 February 1995 and served on defendant on or about the 14 February 1995, that is, more than three years after the date upon which the claim arose.

3. In the premises hereof, plaintiff's claim is prescribed in terms of Prescription Act, No. 31 of 1975 as amended [Chapter 8:11]" (The emphasis is mine).

The special plea was set down for hearing in the High Court and judgment was handed down on 26 November 1996. The appellant now appeals against that judgment.

From a reading of the record, the submissions by both parties and the learned judge's judgment, it is clear that the provisions of s 3(2) of the Prescription Act [Chapter 8:11] ("the Act") were never considered. The section reads:

> "In so far as any right or obligation of any person in relation to any other person is governed by customary law this Act shall not apply."

It is common cause that the parties were married in terms of customary law. Their rights and obligations are therefore governed by customary law as modified by statutes passed from time to time. In the circumstances the Act does not apply in this case. The special plea should therefore have been dismissed at the outset.

I am also of the view that even if the Act had been held to apply the claim for a formal distribution of matrimonial property would not have been prescribed. This is because in my view the marriage was not dissolved - a marriage under an unregistered customary law can be dissolved under customary law either by giving the wife "gupuro" or before a customary law

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court. The parties merely separated. On separation, there was no proper distribution of the matrimonial property. In the circumstances, the appellant's claim for a formal distribution of property cannot be prescribed.

The respondent was all along labouring under a misapprehension. There is need for a formal distribution of matrimonial property. Formal evidence must therefore be heard over the issue which includes the said property. In the circumstances I am of the view that the costs in both actions should be borne by the respondent.

In the result, I make the following order:

1. In connection with the case No. SC-193-196:

   (a) The order by consent made by this court on 10 February 1997 is to remain in force.

MUCHECHETERE JA

   (b) The wasted costs in the matter are to be paid by the respondent.

2. In connection with case No. SC-750-96:

   (a) The appeal is allowed with costs.

   (b) The matter is referred to the court *a quo* for trial.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

Mapfumo Debwe & Partners, respondent's legal practitioners

MANDEBVU & ANOR v PEARCE T/A F&B BUILDERS 1997 (2) ZLR 186 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

28 July & 7 August 1997 Judgment No. S-127-97

Flynote

Contract - building contract - dispute as to whether work done in accordance with contract - onus on builder to prove that work was performed in accordance with contract

Legal practitioner - conduct and ethics - preparation of pleadings - not simply an impassive recipient of instructions

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Practice and procedure - pleadings - drawing of - legal practitioner's role

Headnote

The respondent builder entered into a contract with the appellants to build a house for them. After the house had been built, the appellants withheld some outstanding payments, claiming that the builder had failed to perform all the work in accordance with the contract. In an appeal against the decision of the trial court in this matter:

Held, that the pleadings in the present case were unsatisfactory. Pleadings, especially in building disputes, are important. Legal practitioners should not act as passive recipients of instructions from their clients. The object of a legal education is to enable the lawyer to determine the issues and then to ask questions designed to obtain the information necessary both for pleading and, later, for giving evidence.

Held, further, that the onus in this case was on the builder. She had to prove the contract, even though in some respects she had to prove a negative, namely that certain work that the owners claimed had not been done was not part of the contract.

Cases cited:

Book v Davidson 1988 (1) ZLR 365 (S)

Jani v Corporate Ins Brokers (Pvt) Ltd HH-83-97

Kriegler v Minitzer & Anor 1949 (4) SA 821 (A)

B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A)

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

Case Information

S Takundwa, for the appellants

J Sibanda, for the respondent

McNALLY JA

Judgment

McNally JA: The relationship between home-owner and builder is not always a happy one. So it proved in this case. The Mandebvus (the owners), having paid an initial $10 994 for their three bedroomed house at Nketa 9, Bulawayo, intercepted payment of the final cheque of $20 000 from the Building Society, and declined to pay an additional $2 800 which, according to the respondent (the builder), they had agreed to pay.

In the result, the owners have been living in the house since 1 January 1992, having paid only

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$10 994. On 26 January 1993, they offered, in full and final settlement, a further $13 000 and costs to date, but that offer has not been accepted. It was made "with prejudice" in terms of Order 22 Rule 146 of the High Court Rules.

The pleadings, especially in building disputes, are important. In this, as is some other High Court cases which have come before us recently, the standard of pleadings is poor. Legal practitioners should not act as passive recipients of instructions from their clients. The object of a legal education is to enable the lawyer to determine the issues and then to ask questions designed to obtain the information necessary both for pleading and later, for giving evidence.

In this case, before drawing the declaration, it would have been useful to refer to an authority such as Amler's Precedents of Pleadings (3 ed) under the heading *Locatio Conductio Operis* on pp 190-195. (If the phrase is unfamiliar, it may be traced in the index under "Building Contracts").

The declaration is factually incorrect about the time at which the extra payment of $2 800 was allegedly agreed upon.

According to the evidence it was agreed in January 1991, whereas the house was allegedly completed only in about December 1991.

It was not alleged, as it should have been, that the house was completed on a certain date, because it is only on completion that the final payment becomes due. See B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A). Indeed it was not even properly alleged that the house was completed at all. One has to infer that allegation from various paragraphs which refer in passing to the completion of the house. Nor was it alleged, as it should have been, that defendant accepted the benefit of the work done, by taking occupation.

In para 8 of the declaration, it is alleged that the owners intercepted the Building Society's cheque made out to the builder, and "held on to it". I am not sure what that slang expression is intended to mean? That they literally retained possession of the cheque? That they deposited it in their own account? That they prevailed upon the Building Society to cancel it? Different legal consequences ensue, depending on which of these allegations is intended.

McNALLY JA

Interpreting the declaration in the light of the subsequent evidence it seems that what was intended to be alleged was -

- There was a building contract in 1990.
- The house was to be built in accordance with a plan.
- The contract price was $30 994 plus a further $2 800 agreed in January 1991.
- The work was completed in December 1991.

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- The owners accepted the benefit of the contract by moving in on 1 January 1992.
- Only $10 994 was paid.
- The balance of $22 800 is due and owing.

The plea raises in effect two issues -

1. That the contract was not properly completed in a number of respects which were detailed.
2. That the $2 800 was not an increase in the price, but an agreed charge for the installation of extras, namely a geyser and burglar proofing, which were not installed.

Accordingly the purchase price was not payable, nor was the $2 800.

It is convenient to dispose of the second issue at once. The evidence showed quite clearly, and the learned trial judge rightly found, that the extra $2 800 had nothing whatever to do with a geyser or burglar proofing. The defence on this point was not sustainable. The builder's contention, on the evidence, is the correct one.

The first issue remains. Was the building completed in terms of the contract?

In her replication the builder contended that it was indeed completed. In regard to the specific allegations the contentions were as follows:

- The first five allegations related to the fitting of windows smaller than those specified on the plan, or in the one case, omitted altogether. These allegations she denied.
- One door was not fitted. She denied this.
- A one metre rather than a 1.2 metre sink was installed. She denied this.
- Sub-standard doors without handles were fitted to the toilet and bathroom. She denied this.
- The cistern and flash (flush?) pan were sub-standard. She denied this.
- Small copper pipes rather than galvanised steel water pipes were used externally. She admitted using copper pipes but said they were not inferior.
- The floor of the kitchen and verandah were holed and uneven. This was denied.
- No meter-box was fitted and insufficient plug sockets. It was her

contention that a meter-box was not specified, and the plug sockets installed were as provided in the contract.

- No geyser or burglar bars were fitted. This was admitted, but she contended they were not

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provided for in the specification.

- Electric wires were left hanging in the toilet. This was denied.
- The wall of the left front window was not straight. This was denied.
- Kimberley or concrete bricks were used internally instead of Goliath bricks as specified. This was admitted, but it was contended Goliath bricks were not available and the substitute bricks were as good as and more expensive than Goliath bricks.

It was on these issues that the parties went on trial. It is important in cases of this nature to determine the onus of proof. The learned judge correctly held that the onus rested on the plaintiff builder. She had to prove the contract, even if it involved proving a negative (eg in this case that a geyser and burglar bars were not part of the contract). See Kriegler v Minitzer & Anor 1949 (4) SA 821 (A); *Book v Davidson* 1988 (1) ZLR 365 (S) at 384; Watchtower Bible & Tract Society of Pennsylvania & Anor v Drum Invstms (Pvt) Ltd & Anor 1993 (2) ZLR 67 (S) at 72C; Jani v Corporate Ins Brokers (Pvt) Litd HH-83-97.

It was important therefore that careful instructions were taken from the builder on each of the points raised. Yet when the matter came to trial the builder's evidence varied in many respects from the replication.

[The learned judge dealt with the builder's evidence in some detail, and continued:]

The learned judge in the court *a quo*, without undertaking quite such a detailed analysis, correctly came to the conclusion that the onus was on the builder to show that she had completed her contract before she could claim payment. He correctly found that she had not done so, on her own admission, and that she had failed to quantify the value of the omissions.

He found however, and again I think with respect, correctly, that she was entitled to the contract price less the omissions, because the work had been accepted. He quantified those omissions in the sum of $3 170.36, using Mr Chizema's figures. Those figures were based on 1994 prices and were thus probably too high, but the builder, having failed to discharge the onus of proof herself, was in no position to complain.

I am not sure how the learned judge came to that total. In my view, of the twelve complaints listed, only the first two and the eighth and perhaps the tenth were substantiated. On the figures given by Mr Chizema, the difference in cost, ie the unauthorised savings by the builder, amounted by my calculation to $2 941.91. But since the difference favours the appellant, and there is no cross-appeal, it is immaterial.

McNALLY JA

In the result, the appeal fails, and is dismissed with costs.

GUBBAY CJ: I agree.

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KORSAH JA: I agree.

Lazarus & Sarif, appellants' legal practitioners

Ben Baron & Partners, respondent's legal practitioners

MCHECHESI v FIELD NO 1997 (2) ZLR 191 (SC)

Court **Supreme Court, Harare**

McNally JA

Application for condonation of late noting of appeal

5 & 7 August 1997 Judgment No. S-132-97

Flynote

Practice and procedure - default judgment - rescission - application under common law - grounds on which application may be made

Headnote

An application for rescission of judgment had been made. The application was not a routine application for rescission of default judgment in terms of the Rules. It was a common law application.

At common law the grounds for setting aside a judgment are fraud, justus error, in exceptional circumstances when new documents have been discovered and where judgment has been granted by default.

There was no fraud. As regards justus error, this was a difficult ground to establish. The just error must be an error by the court induced by a non-fraudulent misrepresentation to the court by the party obtaining judgment. Even then, apart from rare and unusual circumstances, such an error does not justify rescission. In the present case there was no justus error.

Cases cited:

Childerley Est Stores v Standard Bank of SA Ltd 1924 OPD 163

Deary v Deary 1971 (1) SA 227 (C)

de Wet & Ors v Western Bank Ltd 1979 (2) SA 1031 (A)

Groenewald v Gracia (Edms) Bpk 1985 (3) SA 968 (T)

Mukundadzviti v Mutasa 1990 (1) ZLR 342 (H)

Case Information

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V Matipano, for the applicant

R Y Phillips, for the respondent

Judgment

McNally JA (in chambers in terms of r 55A of the Supreme Court Rules):

This was an opposed application for condonation of the late noting of an appeal. The appeal was lodged only twelve days out of time, but the real issue is whether there is any prospect of success.

The history of the matter is quite complex: Mr Mchechesi had a house built by a company, now in liquidation, called Lorac (Pvt) Ltd, which I will call "Lorac". Mr Mchechesi still owed some $166 000 when the house was finished, and he was faced with the threat of a builder's lien, which would deny him occupation. He says, however, that there were defects in the house, for which he had (and has) a counter-claim for $170 000.

McNALLY JA

The impasse over occupation was resolved when Mr Mchechesi signed a mortgage bond in favour of Lorac Property Development (Pvt) Ltd (which I will call "LPD") for the outstanding amount. LPD was in liquidation at the time, which fact is recorded in the bond.

Mr Mchechesi fell into arrears, and the liquidator, Mr Field, issued a provisional sentence summons on the bond in March 1995. Mr Mchechesi opposed the proceedings on the grounds that he had a counter-claim. But he acknowledged the claim and his signature in terms of r 29.

Final judgment was given in favour of LPD (in liquidation) but, owing to what must have been an oversight, execution was stayed pending determination of the counter-claim which was to be lodged within fourteen days. I say there must have been an oversight because the counter-claim was not against LPD but against Lorac, a related company but a different legal persona. There has been no appeal against this judgment, which was given on 28 June 1995. However, when the counter-claim was lodged LPD, through the liquidator, took the point that the wrong party was being sued. LPD had not built the house.

LPD then applied for dismissal of the counter-claim on the grounds that it was frivolous and vexatious. A different judge made an order postponing the application *sine die*, while giving leave to Mr Mchechesi to apply for the rescission of the earlier judgment.

That application for rescission came before a third judge who refused it on 12 February 1997 - case No. HH-11-97. An appeal was noted out of time. I therefore have to decide whether to condone the breach of the Rules, and I must consider the prospects of success.

We are not here dealing with a routine application for rescission of a default judgment in terms of the Rules. This is a common law application for rescission. Erasmus Superior Court Practice at B1 - 306 says:

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"At common law a judgment can be set aside on grounds of fraud, justus error (on rare occasions), in certain exceptional circumstances when new documents have been discovered, and also where judgment had been granted by default."

Fraud is out of the question. The affidavit supporting the application for provisional sentence clearly set out the fact that Lorac had built the house and LPD had granted the bond. It said specifically: "The bond was registered in the name of Lorac Property Development (Pvt) Ltd (in liquidation), a fellow subsidiary of M & C Holdings, and not Lorac (Pvt) Ltd". The judgment certainly was not obtained by fraud.

What about *justus error*? The first point to be made is that this is a difficult ground to establish. As appears from the many cases that have followed the decision of de Villiers JP in Childerley Estate Stores v Standard Bank of SA Ltd 1924 OPD 163, the "just error" must be an error by the court, induced

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McNALLY JA

by a non-fraudulent misrepresentation to the court by the party obtaining the judgment. Even then, apart from rare and unusual circumstances, such an error does not justify rescission - see Deary v Deary 1971 (1) SA 227 (C) at 230C-E; *Mukundadzviti v Mutasa* 1990 (1) ZLR 342 (H) at 345F-347H.

Secondly, in his affidavit in support of condonation, Mr Mchechesi does not say he was misled. He says "it was not possible for a mortgage bond for the security of the loan of money to have been registered in favour of Lorac Property Development (Pvt) Ltd. The transaction must therefore be set aside on the basis of the applicant's defence based on Condictio Sine Causa".

He may have misunderstood the legal position. I can see no reason why Lorac (acting through the same liquidator) should not have required security in the form of a bond in favour of a related company. Mr Mchechesi may not have appreciated the full implications of this. But that is not justus error. As was said in Groenewald v Gracia (Edms) Bpk 1985 (3) SA 968 (T): "an applicant who is himself negligent and is the author of his own problem will not succeed with his application for rescission". See also de Wet & Ors v Western Bank Ltd 1979 (2) SA 1031 (A) at 1044D.

I conclude that there is no prospect of the appeal succeeding. I do not think costs on the higher scale are warranted.

Condonation is refused with costs.

FORUM PARTY OF ZIMBABWE & ORS v MINISTER OF LOCAL GOVERNMENT, RURAL AND URBAN DEVELOPMENT & ORS 1997 (2) ZLR 194 (SC)

Court **Supreme Court, Harare**

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

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Constitutional appeal

31 July & 14 August 1997 Judgment No. S-129-97

Flynote

Local authority - election - mayoral election - validity - validity of elections held under Presidential Powers (Temporary Measures) (Urban Councils) Regulations 1995 - whether elections validated by subsequent legislation

Statutes - regulations - validity - regulations possibly ultra vires the enabling legislation and possibly unconstitutional - mayoral elections held in terms of questioned regulations - whether regulations could be validated by subsequent legislation - whether elections could be validated by subsequent legislation

Headnote

Mayoral elections for the city of Gweru had been held in terms of the Presidential Powers (Temporary Measures) (Urban Councils) Regulations 1995 (SI 148A of 1995) ("the Regulations"). The appellants had applied unsuccessfully in the High Court to have these elections set aside.

On appeal, the appellants argued that the Regulations were invalid because they contravened provisions in the Constitution of Zimbabwe. Their alternative argument was that the Regulations were ultra vires the enabling Act. The preliminary point raised by the respondents was that the legislature had anticipated the possibility of the Regulations being declared ultra vires and had passed s 321(2) of the Urban Councils Act in order to ensure that the elections would be valid. In regard to this preliminary point:

Held, that the principle is well established that regulations ultra vires the enabling legislation existing at the time they were made are not validated by wider enabling legislation passed subsequently. The question is whether by extension it could be argued that if the regulations are not only ultra vires but also unconstitutional by virtue of the unconstitutionality of the enabling Act, they can be validated by a subsequent Act of Parliament.

Held, further, that the aim of the legislature in enacting s 321(2) of the Urban Councils Act was to ensure that there was no possibility of the mayoral elections being held pursuant to the Regulations being voided by the courts. The possibility of invalidity, with the consequential

GUBBAY CJ

loss of time as well as substantial expense, was a state of affairs the legislature was not prepared to countenance.

Held, further, that even if it is assumed that the Regulations are ultra vires and unconstitutional on the grounds argued, s 321(2) had validated the election by express wording. This section provided that any mayor who is elected is deemed to have been elected in terms of the Urban Councils Act and not under the Regulations. The impact of the provision is to remove the election away from the Regulations and give it validity and deem it to be done under the Urban

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Councils Act.

Held, further, that once validated by an Act of Parliament the election could no longer be contrary to the Constitution. The election itself did not infringe the Constitution and the provision in the Urban Councils Act had adopted it and declared it a valid election.

Held, further, that s 321(2) of the Urban Councils Act validated the election process irrespective of the validity or otherwise of the Regulations. This has rendered the election immune from challenge on the ground that the Regulations may have been invalid. It is of no relevance that the Regulations may have been invalid during the limited period of their life and that anything done under them may have been tainted with consequential illegality.

Held, therefore, that it was unnecessary to decide the argument raised by the appellants regarding the constitutionality of the Presidential Powers (Temporary Measures) Act.

Cases cited:

Dada v Mafeking Municipality (1902) 19 SC 219

Germiston Municipality v Rand Cold Storage Co Ltd 1913 TPD 530

Kennasystems SA CC v Chrmn, Bd on Tariffs & Trade & Ors 1996 (1) SA 69 (T)

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

Simmer & Jack Proprietary Mines Ltd v Union Govt (Min of Rlys & Harbours) 1915 AD 368

S v Gatsi; S v Rufaro Hotel (Pvt) Ltd 1994 (1) ZLR 7 (H)

S v Olsen 1970 (1) RLR 177 (G)

The court referred to the following statutory provisions:

Urban Councils Act [Chapter 29:15], s 321(2)

Case Information

A P de Bourbon SC, for the appellants

P A Chinamasa, Attorney-General, with him *J Musimbe*, for the first, fourth and fifth respondents

P Nherere, for the second and third respondents

Judgment

Gubbay CJ: This appeal is brought by the first appellant, a registered political party, against that part of the judgment of the High Court (Adam J) reported in 1996 (1) 461 ZLR (H) declining to set aside the October 1995 general election for the office of mayor of the City of Gweru. The election had been held in terms of the Presidential Powers (Temporary Measures) (Urban Councils) Regulations 1995, (SI 148A of 1995) ("the Regulations"), which had been made under the Presidential Powers (Temporary Measures) Act [Chapter 10:20].

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The notice of appeal challenged the decision of the learned judge on the grounds that:

GUBBAY CJ

- The Presidential Powers (Temporary Measures) Act is contrary to ss 50 and 51 of the Constitution of Zimbabwe and, accordingly, invalid.
- Alternatively, the Regulations (since expired) were ultra vires s 2(1) of the enabling Act, and anything done thereunder was invalid.
- Further alternatively, ss 6(1), 6(3) and 8(1) of the Regulations and the Presidential Powers (Temporary Measures) (Nomination of Mayors) Notice 1995, (SI 267E of 1995) were ultra vires s 2 of the Presidential Powers (Temporary Measures) Act.

At the hearing before this court, it was agreed, however, that a point, overlooked in the court below but now raised by the respondents, justified prior determination; for success of the argument founded thereon would dispose of the appeal in favour of the respondents, without the necessity of considering the submissions counsel for the appellants proposed to advance.

The point taken was that in enacting s 321(2) of the Urban Councils Act [Chapter 29:15], the legislature intended to meet the possibility of the Regulations being declared ultra vires; that anticipating such occurrence, the lawmaker was at pains to ensure that the election of councillors and mayors would nonetheless stand as valid.

Section 321(2) reads:

> "Anything done in terms of the Presidential Powers (Temporary Measures) (Urban Councils) Regulations 1995, published in SI 148A of 1995, for the purpose of an election of councillors or for the office of mayor shall be valid as if it had been done in terms of this Act, and any person elected as councillor or mayor in terms of those regulations shall be deemed to have been elected councillor or mayor, as the case may be, in terms of this Act and shall assume office as such on the date of commencement of this Act" (emphasis added).

When the Urban Councils Act came into operation on 22 December 1995, the application was already pending before the High Court. It had been lodged under a certificate of urgency on 13 October 1995. The founding affidavit deposed to by the Vice-President of the first appellant, though not protesting the constitutionality of the Presidential Powers (Temporary Measures) Act, impugned the validity of the Regulations made thereunder. Argument in the matter was eventually heard by the learned judge on 9 April 1996. Judgment was handed down on 8 May 1996.

I do not think it can be gainsaid that before the promulgation of the Urban Councils Act the basis upon which the election of councillors and mayors was being challenged was already known. The first respondent would also have been aware of the decision of the High Court in S v Gatsi; S v Rufaro Hotel (Pvt) Ltd 1994 (1) ZLR 7 (H) in which the Presidential Powers (Temporary Measures) Act was found to be intra vires the Constitution; and that on the papers before Adam J there was no intimation that the first appellant did not accept the correctness of that decision.

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GUBBAY CJ

It is against this historical setting that s 321(2) of the Urban Councils Act must be construed. In doing so it is permissible to enquire into the perceived mischief that Parliament was so anxious to prevent or remedy. See *Nkomo \& Anor v Attorney-General \& Ors* 1993 (2) ZLR 422 (S) at 431C-432A and the cases there cited.

It seems to me that counsel for the respondents were correct in contending that the aim of the legislature in enacting s 321(2) of the Urban Councils Act was to ensure that there was no possibility of the elections held pursuant to the Regulations being voided by the courts. The possibility of invalidity, with the consequential loss of time as well as substantial expense, was a state of affairs the legislature was not prepared to countenance. The councillors and mayors duly elected at the October 1995 elections had to remain in office. They were not to be subjected to a fresh election.

The issue then, as I perceive it, is whether the words used in s 321(2), viewed not in a vacuum but with reference to the prevailing background and the object of the legislature, effectively preserves the validity of the election of the mayor of the City of Gweru.

The principle is well established that regulations ultra vires the enabling legislation existing at the time they were made are not validated by wider enabling legislation passed subsequently. See Dada v Municipality of Mafeking (1902) 19 SC 219 at 221; Germiston Municipality v Rand Cold Storage Co Ltd 1913 TPD 530 at 537; Simmer & Jack Proprietary Mines Ltd v Union Government (Minister of Railways & Harbours) 1915 AD 368 at 400; And the same applies to legislation. See *S v Olsen* 1970 (1) RLR 177 (GD) at 178C-D. Yet can it be argued by an extension of this principle, that since the Regulations were not only ultra vires the Presidential Powers (Temporary Measures) Act but also unconstitutional by virtue of the unconstitutionality of the enabling Act, they were not capable of being validated by an Act of Parliament (the Urban Councils Act)?

Even if the ultra vires of the Regulations and the unconstitutionality of the Presidential Powers (Temporary Measures) Act is assumed (without it being decided), such an argument must fail in my opinion. This is so because s 321(2) of the Urban Councils Act validates the election in express wording. Any councillor or mayor who is elected is deemed to have been elected in terms of the Act and not under the Regulations; and they are to assume office on 22 December 1995, the very date upon which the Act came into force. Thus the impact of the provision is to remove the election away from the Regulations. It is given validity and deemed to be done under the Urban Councils Act.

Second, the election if *validated* by Act of Parliament would not be inherently contrary to the Constitution. The election itself does not infringe

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any constitutional provision and the Urban Councils Act has "adopted" it and declared it a valid election. The words "shall be valid as if it had been done in terms of the Act" presuppose the possibility of invalidity. There would have been no need for the insertion of these words if the

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possibility of the Regulations being held invalid was not foreseen.

In sum, I am satisfied that the effect of s 321(2) of the Urban Councils Act is to save the election process irrespective of the validity or otherwise of the Regulations. It is of no relevance that the Regulations may have been invalid during the limited period of their life, and that anything done under them may have been tainted with consequential illegality. As the Attorney-General so aptly put it, the legislature has enacted that the elections completed under the Regulations shall be valid and has rendered them immune from challenge on the ground that the Regulations themselves may have been invalid. See in this regard, Kennasystems South Africa CC v Chrmn, Board on Tariffs and Trade & Ors 1996 (1) SA 69 (T) at 74I-J, *per* Spoelstra J.

Accordingly, I would dismiss the appeal with costs payable by the appellants jointly and severally, the one paying the others to be absolved.

McNALLY JA: I agree.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Webb, Low & Barry, appellants' legal practitioners

Chihambakwe & Mutizwa, second and third respondents' legal practitioners

Civil Division of the Attorney-General's Office, first, fourth and fifth respondents' legal practitioners

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DURCO (PVT) LTD v DAJEN (PVT) LTD 1997 (2) ZLR 199 (HC)

Court **High Court, Harare**

Chatikobo J

Civil application

10 July & 20 August 1997 Judgment No. HH-133-97

Flynote

Arbitration - award - effect - whether award final or whether rights under that award can be waived and matter can be submitted to fresh arbitration proceedings - whether it would be contrary to public policy to enforce second arbitration award

Headnote

The applicant wished to sell maize on the Zimbabwe Commodity Exchange (Zimace) and the respondent wished to buy maize. The applicant's broker concluded a contract with the respondent's broker, in terms of which the applicant was to sell maize to the respondent.

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However, the respondent refused to take delivery of the maize, claiming that its broker had not been authorised by it to conclude this contract. Because of the respondent's refusal to take delivery of the maize, the applicant was obliged to dispose of the maize to a third party at a loss. As a result there was a dispute between the applicant and the respondent as to whether the respondent's broker actually had the authority to conclude the contract, and if it did, whether the respondent was liable for the loss suffered by the applicant. By agreement between the applicant and the respondent, the matter was referred to arbitration. The outcome of the arbitration was that the respondent was found not liable because it was found that the respondent's broke did not have authority to conclude the contract on behalf of the respondent.

Subsequently, a representative of Zimace discussed with an arbitrator the implications of possible further arbitration proceedings between the applicant and the respondent's broker. If it was found at this second arbitration that respondent's broker was authorised to act on behalf of the respondent, the applicant would then be left without a remedy as it would have no recourse against the respondent's broker, because he would have been found to have acted with authority and he would have no recourse against the respondent who was not a party to the second arbitration. To avoid this possible end result, it was decided that a second arbitration should be held involving the applicant, the respondent and the respondent's broker. The three parties agreed to submit to this second arbitration. At the second arbitration, the arbitrators found by a majority that that the respondent's broker did have authority to act for the respondent and that the respondent was thus liable to the applicant. When the applicant then deanded payment from the respondent, the latter refused to pay. The applicant applied to court for the enforcement of the second arbitration award. The respondent opposed the application on two grounds, namely that the second award was not valid and enforceable and, even if it was valid, it would be contrary to public policy to enforce it.

Held, that the enforcement of the second award would not be contrary to public policy. In terms of the Arbitration Act 6 of 1996, a court may refuse to enforce an arbitration award if it

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would be contrary to public policy to do so because it was induced by fraud or corruption or if the proceedings breached the rules of natural justice. In the present case, there had been no fraud or corruption. The representative of the respondent had submitted to the second arbitration on behalf of the respondent, knowing the implications for the respondent of what he was doing, the implications having been carefully explained to him. There had been no breach of the principles of natural justice. There was no allegation of bias on the part of the arbitrators and the respondent had been legally represented at the second arbitration. Although the respondent's legal representatives objected to the second arbitration on the ground that the matter has been conclusively settled by the first arbitration, the legal representatives ten fully participated in the proceedings.

Held, further, that although an arbitral award is final and binding between the parties to the arbitration and although it is in the interests of public policy that there should be finality in a case where a matter has been submitted to arbitration, one of the parties who had acquired rights as a result of the award was free to surrender or waive those rights. In the present case, the

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respondent, with full knowledge of his rights, had abandoned his rights by signing the submission of the matter to the second arbitration. This had had the effect of extinguishing the rights acquired as a result of the first award. The respondent was not entitled after the second arbitration unilaterally to withdraw its waiver.

Held, therefore, that the application to have the second arbitration award enforced must succeed.

Cases cited:

Austen v Joubert 1910 TPD 1095

Bheka v Disablement Benefits Bd 1994 (1) ZLR 353 (S)

Laws v Rutherfurd 1924 AD 261

Schoeman v van Rensberg 1942 TPD 175

Stambolie v Commissioner of Police 1989 (3) ZLR 287 (S)

Stumbles \& Rowe v Mattinson; Mattinson v Stephens \& Ors 1989 (1) ZLR 172 (H)

Verhagen v Abramowitz 1960 (4) SA 947 (C)

Statutes referred to:

Arbitration Act 9 of 1996, First Schedule, arts 35 & 36

Case Information

F Girach, for the applicant

P Nherere, for the respondent

Judgment

Chatikobo J: In March 1996 the applicant, "Durco", engaged the services of a broking company "Croplink", to dispose of its maize on the Zimbabwe Commodity Exchange ("Zimace"). The respondent "Dajen", was at the same time descious of procuring substantial quantities of maize for its milling activities; it engaged the services of Atrax Commodities (Pvt) Ltd ("Atrax"), another broking firm, to act on its behalf. The result was that a contract was concluded by Croplink and Atrax in terms of which Durco sold to Dajen, who agreed to buy 240 metric tonnes of maize. Dajen however refused to take delivery of the maize, contending that it had not authorised Atrax to conclude the contract. The refusal by Dajen to accept delivery of the maize forced Durco to dispose of the consignment to a third party at a loss.

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As a consequence, a dispute arose between Durco and Dajen as to whether Atrax had the requisite authority to conclude the contract for the purchase of the maize on behalf of Dajen

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and, if so, whether Dajen was lable for the loss suffered by Durco in selling the maize consignment in question at a loss. This dispute was by agreement of both Durco and Dajen, referred to arbitration in terms of the Zimace rules of arbitration. The result of the reference was that Dajen was found not liable because the arbitrator held that Atrax did not have authority to conclude the contract on behalf of Dajen. Thereafter Durco set in train steps to recover its loss from Atrax on the basis of a breach of a warranty of authority.

While Durco, Zimace and Atrax were mooting the possibility of referring the dispute between Atrax and Durco to arbitration to determine whether or not Atrax had acted with the authority of Dajen in concluding the contract for the purchase of maize from Durco, the parties decided, it seems at the behest of Zimace and Ian Donovan, that a meeting should be held between Durco, Dajen, Atrax, Croplink, Zimace and Donovan himself. I should say that Donovan is an officer of this court who is currently not practising but has been involved in a number of Zimace arbitrations.

Donovan has deposed to an affidavit in support of Durco in which he explains that he was contracted by a Mr Goggin who is the administrator for Zimace. They discussed the possible implications of further arbitration proceedings between Durco and Atrax. It was feared that the second arbitration would be called upon to reconsider the question of Atrax's authority to conclude the contract on behalf of Dajen. The possibility existed that the second arbitral process might find that Atrax was authorised to act on behalf of Dajen. If that happened Durco would be left without a remedy because Atrax would be exonerated and Dajen, which had already been cleared could not be held responsible on the basis of findings made at the second arbitration to which it was not a party. Donovan, who considered such a conundrum to be undesirable, thought that it was in the best interests of all three parties, namely Durco, Dajen and Atrax to submit to arbitration proceedings which involved all three parties at which the arbitrator wuld be asked to consider whether Dajen was liable to Durco for breach of contract or whether Atrax was liable to Durco for a breach of a warranty of authority on the basis that it was not authorised to act for Dajen. In other words, the issue of Dajen's liability had to be considered afresh.

A meeting was convened to discuss the possibility of such a fresh submission to arbitration. At that meeting, which was held on 25 November 1996, Dajen was represented by David Sydney Dryer. At the conclusion of that meeting, the agreement, annexure "A" to the founding papers, was signed by representatives of Durco, Dajen and Atrax. Fresh arbitration

proceedings were subsequently conducted in terms of that agreement and an award was made on 23 January 1997. The arbitrators found, by a majority, that Atrax did have the authority of Dajen to conclude the contract and accordingly that Dajen was liable to Durco in the sum of $92 577,44 being the amount of the loss. Dajen was also to pay interest at the rate of 25% *per* annum with effect from 16 December 1996 to date of payment.

When Durco demanded payment from Dajen in terms of this award, the latter refused to pay, contending that the award made on 23 January 1997 was invalid because when it was made

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there was no dispute which existed between the parties, such dispute having been conclusively resolved by the earlier award which had been made at the first arbitration proceedings. This prompted Durco to bring the present proceedings in which it prays the court to enforce the award made on 23 January 1997.

Dajen seems to peg its opposition on two related grounds. The first is that the award made on 23 January 1997 is not a valid and enforceable award and the second ground is that if it is a valid award it would nevertheless be contrary to the public policy of Zimbabwe to enforce it.

An application to enforce an arbitral award is governed by Chapter VIII, Articles 35 and 36 of the Model Law, which is contained in the First Schedule to the Arbitration Act 1996. In art 35(1) it is provided that an arbitral award shall upon application to the High Court, be enforced subject inter alia to the provisions of art 36. Article 36 lays down the grounds upon which a court may refuse to enforce an arbitral award. The only ground upon which reliance is placed by Dajen is art 36(1)(b)(ii) which provides that the High Court may refuse to enforce an arbitral award if it finds that the recognition or enforcement of the award would be contrary to the public policy of Zimbabwe.

Article 36(3) provides that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if the award was induced by fraud or corruption or if the rules of natural justice were breached in connection with the making of the award. It can thus be seen that the circumstances under which the court may refuse to enforce an arbitral award on the ground that to do so would be contrary to public policy is circumscribed by the Act. Although the definition of public policy contained in art 36(3), if it be a definition, is not intended to limit the generality of the phrase "contrary to the public policy of Zimbabwe" in art 36(1)(b)(ii), it is wide enough to encompass most, if not all situations, which would offend against public policy. Most other situations apart from those foreshadowed in art 36(3) would largely fall under the other specific grounds adumbrated in art 36(1).

In casu no allegation of fraud or corruption has been made nor is there any

evidence upon which a finding of fraud or corruption can be made. Dryer says he signed the submission, annexure "A" to the papers, because he was confused as to whether he was doing so to assist Durco to recover from Atrax or whether he was agreeing to reopen the question of Dajen's liability. Donovan and Goggin are adamant that Dryer was not at all under any illusion as to what he was signing. In particular, Donovan says he went out of his way to explain to Dryer the implications of what was being discussed. Not only does Dryer's allegation of confusion fly in the face of cogent evidence of rebuttal, but the allegation of confusion does not amount to an accusation of fraud.

The independence of the arbitrators has not been impugned. The respondent, Dajen, was legally represented at the arbitral proceedings. Although its legal representative objected to the proceedings on the ground that the matter had been conclusively settled by the previous arbitration, Dajen and its legal representative did participate fully in the proceedings. There was

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therefore full compliance with the rules of natural justice.

The foregoing remarks are better understood in the context of the factual averments made on behalf of Dajen. These are:

1. that the first arbitral award made on 21 August 1996 was final and disposed of the parties' dispute. That arbitration was conducted in terms of the Zimace rules of arbitration which provided inter alia that the arbitrator's decision shall be final and binding upon the parties. That being so, the parties were not at liberty to re-submit the same dispute to a second arbitration;

2. that to recognise and enforce the second arbitration would be contrary to public policy because the time honoured practice of the ordinary courts of law, of stressing the importance of the need for finality to litigation, applies to arbitral proceedings as well;

3. that the second submission to arbitration, annexure "A" to the papers is invalid; and

4. that the conduct of Zimace in both arbitrations was tainted with impropriety.

FINALITY OF THE FIRST AWARD

It admits of no doubt that as between the parties, an arbitral award is final and binding. In this regard, there is a similarity of approach between the courts of England and those of South Africa. The English position is aptly summarised in Halsbury's Laws of England 4 ed vol 2 para 611:

> "As between the parties to the arbitration agreement, the award gives rise to an estoppel *inter partes* with regard to the matters decided therein analogous to that created by the

> judgment in an action in *personam*; thus if the award was in respect of a breach of a contract, it may bar further proceedings even though fresh damage has flowed from the breach. Once an award has determined the construction of a contract, the parties are bound by that construction even though a new source of difference raising the question occurs. Since it is the duty of a party to bring forward his whole case where the reference is of all matters in difference, he will, generally speaking, lose his right of action in respect of any matter of difference not brought to the arbitrator's attention to the same extent as if it had been included in the matters actually determined.
>
> The publication of the award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement."

And Joubert LAWSA vol 1 para 479 puts it thus:

> "When an award is made it is the equivalent to lis finita and as between the parties is *res judicata*. For an award to be *res judicata* there must have been a full and final adjudication."

What emerges with unmistakable clarity from these two passages, and from cases such as Austen v Joubert 1910 TPD 1095 at 1096; Schoeman v van Rensberg 1942 TPD 175 at 177 and Verhagen v Abramowitz 1960 (4) SA 947 (C) 950, is that estoppel or *res judicata*, as a form

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of defence or plea in bar, can be raised by a party to an arbitral award who is sued on a cause of action which has been finally determined by an arbitrator's award. The cause of action is extinguished but only as between the parties.

The thrust of Mr Nherere's attack on behalf of Dajen was that, as long as the original award remained extant, the parties were not free to submit to another arbitration. I think there is a fallacy in this submission. The original award conferred certain rights on one of the parties to the submission which led to that award, namely Dajen. Dajen, as the holder of the right, was at all material times free to surrender the right if it so wished, as long as the surrender or waiver of that right was done in the full knowledge of the facts. All that needs to be shown is that Dajen, "with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it": *per* Innes CJ in Laws v Rutherfurd 1924 AD 261 at 263.

In this case, the evidence of waiver of its rights by Dajen is to be found in the second submission to arbitration signed on its behalf on 25 November 1996. It is clear from the depositions of Donovan that Dryer signed this agreement in the full knowledge of what rights Dajen would forfeit if it submitted to a fresh arbitration. As I will further demonstrate below, there is nothing upon which I can hold that the second submission was invalid, and, once the validity of the second submission is established, as I think it has been established then -

> "It also follows from the contractual nature of waiver that as soon as the contract to waive a contractual right is concluded that right is irrevocably destroyed. It may be replaced by

> a new right (and if the new right is identical with the old right there is no harm in saying that the old right is revived) by agreement between the parties, but a waived right cannot be resuscitated by a purported unilateral withdrawal of the waiver": Christie Law of Contract in South Africa 3 ed p 487.

By signing the submission to a fresh arbitration on 25 November 1996 Dajen did, by contract, destroy its rights under the original submission, and, by refusing to discharge its obligations under the second submission, it purported to unilaterally withdraw the waiver. It cannot be allowed to do so. Once it waived its rights under the first submission the finality of the award made under that submission fell away. Any rights which had accrued to Dajen under that submission have been extinguished.

FINALITY OF LITIGATION

It is correct that public policy demands that there should be finality in litigation. See *Stumbles \& Rowe v Mattinson; Mattinson v Stephens \& Ors* 1989 (1) ZLR 172 (H); *Stambolie v Commissioner of Police* 1989 (3) 287 (S) at 299 and *Bheka v Disablement Benefits Board* 1994 (1) ZLR 353 (S) at 358. I am prepared to accept that this principle applies to arbitral proceedings, as evidenced by the authorities to which I have already referred to as well as the further passage from Russell in Russell on Arbitration 18 ed p 312 that -

> "A valid award on a voluntary reference operates between the parties as a final and conclusive judgment upon all matters referred unless there is an express provision in the arbitration agreement that it shall have a temporary

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effect only, or, it is an interim award."

But that is as far as the principle goes. It does not supplant or destroy a party's power to waive any rights derived from an award. It is crystal clear to me that the finality of an award and, by a parity of reasoning, the finality of the litigation, is no more than a shield of defence which can be raised by a party to the lis where, for example, he is sued by one of the parties on the same cause of action which had been determined by an arbitral award. It is not intended to provide a willing contracting party with an avenue of escape from the consequences of a deliberate waiver of its rights.

VALIDITY OF THE SECOND SUBMISSION

The second submission of 25 November 1996 was a separate independent reference. Its validity does not depend on the status of the original submission. Rather, it depends on the freedom with which holders of rights under the first submission abandoned those rights in favour of fresh arbitral proceedings. As I have attempted to demonstrate, the parties possess untrammelled powers to abandon any rights conferred by the first submission and the award following upon that submission. I find no substance in this ground of attack as well.

1997 (2) ZLR p206

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THE PROPRIETY OF ZIMACE'S CONDUCT

Zimace is a non profit-making agricultural commodity exchange. The nature of its business has not been detailed on the papers but there is enough upon which one can hold that they do not have a direct interest in a transaction conducted through their exchange. Even if they had, that would not necessarily mean that the second award was not valid. Both arbitrations were conducted under their auspices in terms of their arbitration rules. The fact that they facilitated the arbitral process is no ground for impugning the validity of the awards. The complaint is made, in a somewhat veiled fashion, that one of the deponents to the answering affidavit, Ivor John Prior, acted improperly. It is said that Prior is not only director of Zimace but is also a director of Croplink, the broker for Durco. He signed the second submission on behalf of Durco. This set of facts, it is contended, invalidated the submission. I fail to see how. Prior says he was authorised to sign the agreement by Durco. The question of who Durco choe to represent it in negotiating the terms of the second submission can hardly be said to have swayed Dryer's volition when he signed the second submission. I find no substance in this line of attack either. Still further, I do not see how the participation of Zimace as an organisation and Prior as an individual could be contrary to the public policy of Zimbabwe.

I hope I have demonstrated that whether one looks at the grounds of opposition from the point of view of the provisions of arts 35 and 36 to the First Schedule to the Act, or from the point of view of the line of attack mounted by Dajen, the conclusion remains inescapable that the case for Durco is unassailable. The application succeeds and it is ordered as follows:

1. The arbitral award issued on 23 January 1997 in favour of the applicant against the respondent be and is hereby recognised and enforced.

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2. The respondent shall pay to the applicant the sum of $92 577.44 together with interest thereon at the rate of 25% *per* annum from 16 December 1996 to date of payment.

3. The respondent shall pay the costs of this application.

Winterton Holmes & Hill, legal practitioners for the applicant

Coghlan, Welsh & Guest, legal practitioners for the respondent

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ETHNOMUSICOLOGY TRUST v DEPUTY CHAIRMAN, LABOUR RELATIONS TRIBUNAL & ORS 1997 (2) ZLR 207 (HC)

Court **High Court, Harare**

Chatikobo J

Civil action

23 July & 20 August 1997 Judgment No. HH-135-97

Flynote

Practice and procedure - stare decisis rule - effect - judgment of superior court binding on inferior court even if lower court considers it wrong - binding until overruled by superior court

Review - grounds - error in law - inferior tribunal reaching decision in compliance with precedent from Supreme Court - Supreme Court subsequently reversing that decision - not a ground to bring tribunal's decision on review

Headnote

The Labour Relations Tribunal had decided in an appeal that the purported termination of employment of an employee by his employer was a nullity because, if the employee was being retrenched, the employer had failed to comply with the Labour Relations (Retrenchment) Regulations 1990 and if he was being dismissed the employer had failed to comply with the Labour Relations (Termination of Employment) Regulations 1985. In a review application, the employer sought to have the ruling by the Labour Relations Tribunal set aside on the grounds that it acted ultra vires the Labour Relations Act [Chapter 28:01] and that its decision was grossly unreasonable. The employer also argued that the Tribunal had erred in not specifying an amount of damages to be paid as an alternative to reinstatement and thus committed a reviewable error.

Held, that there were no grounds for setting aside the ruling of the Labour Relations Tribunal. The termination regulations forbid termination of employment unless the employer and employee agree, in writing, to the termination. In the present case, it was clear that there was no such written agreement. As regards retrenchment, in terms of the retrenchment regulations an employee may be retrenched if "the authority" (as defined) secures an agreement between the employer and the employee. The employee's letter in which he indicated a willingness to discuss a suitable retrenchment package was no more than an invitation to the employer to

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regularise the position by attempting to secure an agreement. It was not an acceptance on his part of the illegality which had been committed by the employer.

Held, further, that in the particular circumstances of this case the Tribunal had not erred, as alleged, in not specifying the amount of damages to be paid as an alternative to reinstatement in the job. At the time the Tribunal made its decision, there was a decision of the Supreme Court which held that there was no obligation to award damages. Although

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that decision was subsequently held to be wrong, that did not mean that it did not represent the law before it was overruled. An inferior tribunal is bound by the decision of a superior court on the law even if it thinks that the decision is wrong and remains so bound until the superior court's ruling is altered. Consequently, the Tribunal had not committed a reviewable error.

Cases cited:

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

Hama v NRZ 1996 (1) ZLR 664 (S)

Perepeczko v Agricultural & Rural Development Authority S-106-95

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

Taruvinga v Save the Children Fund (UK) HH-311-88

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

Case Information

S Hwacha, for the applicant

A P de Bourbon SC, for the second respondent

No appearance for the first and third respondents

Judgment

Chatikobo J: The second respondent, "Tutani", was engaged by the Zimbabwe College as an administrative director with effect from 15 April 1989. His contract of employment was determinable on three months' notice. Tutani's employment was terminated in December 1989 but he was reappointed in February 1990. The reason advanced for the termination was that the college was at that stage not adequately funded and could not afford to retain Tutani in his job. At the time of his reappointment the financial and administrative responsibility for the college's ethnomusicology programme to which Tutani was attached had been assumed by the applicant, "the Trust". The Trust thus became Tutani's new employer with effect from 1 January 1990 and his contract of employment was determinable on one month's notice. Thereafter, a series of events took place leading to the present proceedings. The sequence of those events is as

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follows:

1. On 10 December 1992, the deponent to the Trust's founding papers, Ben Zulu, wrote to Tutani giving him the requisite month's notice for the termination of his employment. In that letter Zulu explained that the decision to terminate Tutani's contract of employment had been necessitated by the poor financial position of the Trust as well as the need to restructure the staffing requirements of the Trust to take account of the deteriorating financial position.

2. After serving the period of his notice, Tutani wrote to Ben Zulu on 18 February 1993 advising the latter that he had received advice from the labour relations office to the effect that the Trust should not have retrenched him without complying with the procedure for retrenchment laid down in the Labour Relations (Retrenchment) Regulations 1990,

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published in SI 404 of 1990 ("the retrenchment regulations"). He advised that he was prepared to negotiate a severance package.

3. The upshot of this turn of events was that the matter ended up before a labour relations officer, who after a hearing issued a determination in which she reinstated Tutani in his employment without loss of benefits. At the hearing before the labour relations officer the Trust contended that it had intended to dismiss Tutani for incompetence but had resorted to the subterfuge of financial problems in order to protest Tutani from the embarrassment of being dismissed for incompetence. A perusal of the labour relations officer's reasons for her determination shows that she held in essence that if the Trust intended to retrench Tutani, it did not comply with the retrenchment regulations. If it intended to dismiss him there was a failure to comply with the provisions of the Labour Relations (Termination of Employment) Regulations 1985, published in SI 371 of 1985 ("the termination regulations"). In other words, whichever way one looks at the Trust's action, it was a nullity.

4. Being dissatisfied with the labour relations officer's determination, the Trust asked for the matter to be referred to a senior labour relations officer. The senior labour relations officer upheld the labour relations officer's determination. He too found that there was non-compliance with the retrenchment as well as the termination regulations.

5. Undaunted by the defeats, the Trust appealed to the Labour Relations Tribunal. The grounds of appeal were that:

   "1. The senior labour relations officer erred in finding that respondent was retrenched.

   2. The senior labour relations officer erred in not considering or evaluating the evidence of the appellant as to the circumstances of the letter. (I assume its the letter of termination of 10 December 1992).

   3. The senior labour relations officer erred in not finding that mutual agreement is not apparent ex facie the documents tendered. (I think the draftsman put one too many negatives in this ground. The

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preceding events show that the Trust always contended that there was mutual agreement.)

4. The senior labour relations officer erred in failing to comply with s 112(1)(c) (now s 96(1)(c)) which obliges her office to stipulate 'an amount in damages as an alternative to reinstatement'."

6. While the appeal was pending before the Tribunal, Tutani died.

7. The Tribunal, like the two functionaries before it, held that the purported termination of the late Tutani's employment was a nullity because of the Trust's non-compliance with the retrenchment or termination regulations.

8. The Trust now wishes this court to review the Tribunal's decision on two grounds. The first is that the Tribunal acted ultra vires the Labour

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Relations Act [Chapter 28:01] and the second is that the Tribunal's decision is so grossly unreasonable that no reasonable tribunal could possibly have arrived at it.

In para 18 of the founding affidavit, the following averment is made on behalf of the Trust:

> "At the hearing of the appeal, applicants [this should be 'applicant'] conceded that the termination did not specifically comply with the termination of employment regulations SI 371/85 or the Retrenchment Regulations SI 404/90 as amended. Applicants contended, however, that Mr Tutani was estopped from relying on those aspects because clearly on the evidence, he and applicants had in fact agreed that his employment be terminated. Further that he had proceeded to serve his notice but was to discover only later that both he and the applicant had been wrong."

There are two contradictory and mutually destructive averments in this passage. One is that there was no compliance with the termination of employment regulations and the other is that Tutani's employment was terminated by mutual agreement. The termination of employment regulations prohibit the termination of contract of employment unless, among other things, the employer and the employee, mutually agree, in writing, to the termination of the contract. By conceding that these regulations were not complied with the deponent was, by that admission, conceding that there was no written agreement signed by both parties. That being so there could not have been a mutual agreement giving rise to an estoppel as claimed by him. Section 2(1)(b) of the termination regulations is clear in its terms. It envisages a situation where employer and employee agree in writing that the contract of employment should be determined. Nothing short of a written agreement will suffice. See Taruvinga v Save the Children Fund (UK) HH-311-8. What is revealed by the record of the proceedings leading up to the appeal before the Tribunal is not that there had been a mutual termination of the contract of employment but rather that the effect of what had transpired was a purported retrenchment of Tutani. It was upon this premise that it was argued that it was not open to the labour relations officer or the senior labour relations officer to order reinstatement because Tutani had not asked for reinstatement but for a retrenchment package. There can be no doubt that the manner in which the Trust purported to terminate the contract of employment amounted to retrenchment. However, the purported retrenchment came nowhere near compliance with the retrenchment regulations. Of such a retrenchment, the Chief Justice stated in Perepeczko v Agricultural &

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Rural Development Authority SC-106-95 at p 7 of the cyclostyled judgment:

> "It is clear from a perusal of the retrenchment regulations that an employee may only be retrenched if the 'authority' (as defined) is able to secure agreement between the employer and representatives of the employees concerned, as occurred on 22 October 1993 (s 3(5));

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> or, if not, where ministerial approval has been given to the recommendation of the retrenchment committee to the proposed retrenchment (s 6). It is this procedure that must be observed. The adoption of any other has no effect whatsoever (s 10) and constitutes an offence by the employer (s 9)."

When viewed as a retrenchment, the conduct of the Trust amounted to a nullity in the eyes of the law giving rise to no rights upon which reliance could be placed. Tutani's letter in which he indicated his willingness to discuss a suitable severance package was no more than an invitation to the Trust to regularise the position by attempting to secure an agreement. It was not an acceptance on his part of the illegality which had been committed by his employer. If the termination of his contract was a nullity, then the Tribunal had no choice except to declare that up until his death, Tutani was still an employee of the Trust.

At the hearing before the labour relations officer, it was not averred that Tutani's employment had been terminated through the retrenchment procedure. It was contended that the true reason for the termination of his contract was Tutani's incompetence. At the same time, it was conceded that the contract had not been terminated in accordance with the relevant regulations. No attempt was made to establish grounds upon which the labour relations officer could have granted permission for the dismissal of Tutani in accordance with the termination regulations. Instead the Trust's efforts were directed towards showing that what had taken place constituted lawful termination of Tutani's employment.

Where an employer accepts that the procedures laid down in the regulations for the termination of an employee's contract of employment have not been complied with, such employer cannot seek to justify the dismissal on the purported acceptance of the termination by the employee where such acceptance falls short of the written agreement envisaged in s 2(1)(b) of the termination regulations. The purported termination in such a situation is as much a nullity as a defective retrenchment.

This brings me to the final ground of attack, namely, that the Tribunal erred in not specifying an amount of damages to be paid as an alternative to reinstatement in a job.

In terms of the proviso to s 96(1)(c) of the Labour Relations Act [Chapter 28:01] (the Act) a determination shall specify an amount of damages to be awarded to an employee to whom an order of reinstatement applies as an alternative to such reinstatement. In this case the employee, Tutani, died before the appeal before the Tribunal was heard. At the time of the hearing, Tutani was not available to be reinstated. The proviso to s 96(1)(c) of the Act is intended to obviate the undesirable situation that would result where, by an order of reinstatement, an employee is foisted upon an employer, irrespective

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of any animosity which might exist between them, or, where for any other reason, it would be detrimental to the interests of the employer to receive the employee back into his employ. It is not intended to provide an employer with a cheap method of buying his way out of the consequences of an unwarranted dismissal. This is precisely the situation which Korsah JA had in mind in Hama v National Railways of Zimbabe 1996 (1) ZLR 664 (S) when he said that the proviso to s 96(1)(c) of the Act recognised the possible impracticality which might result from a strict adherence to the requirement of reinstatement. If at the time of adjudication of the dispute between the employer and the employee, the latter is no longer available to be reinstated, the situation is akin to that which arose in Blue Ribbon Foods Ltd v Dube NO & Anor 1993 (2) ZLR 146 (S) at 151H-152A where McNally JA remarked:

> "Gonyora's rights as an employee existed at the time he noted his appeal against the decision of the labour Relations Officer. He was entitled to a full re-hearing in terms of s 17 of SI 368/85, as read with s 15 of the same Statutory Instrument. Once that right is vested he is entitled to an order, whether or not his status is subsequently altered. Obviously, reinstatement would not at that stage be a viable option, but an order that back-pay up to the time of the termination of employment could be made in terms of s 111(2)(a) (now s 96(1)(a)) of the Act."

The fact that in this case the matter was pending before the Tribunal where there would be no re-hearing does not distinguish this case from the Blue Ribbon case. In casu, Tutani's rights vested when the labour relations officer ordered his reinstatement in his lifetime. The senior labour relations officer confirmed his rights before he died. The implementation of those rights, namely, reinstatement, was only delayed by the appeal which was lodged by his employer. The Tribunal merely confirmed what had been ordered by the preceding adjudicating authorities but by the time the Tribunal did so, Tutani was no longer available to be reinstated. Hence the Tribunal ordered back pay up to the time of his death in terms of s 96(1)(a) of the Act. It did not act in terms of s 96(1)(c) of the Act; it could not have done so as Tutani was by then dead. As damages can only be ordered as an alternative to reinstatement the Tribunal could not have considered the question of damages because it was not ordering reinstatement o Tutani in his job. This really should be the end of the matter, but I nevertheless feel morally obliged to comment briefly on an argument to which Mr Hwacha for the Trust, devoted considerable vigour. The argument was premised on the assumption that Tutani had been reinstated by the Tribunal. He was reinstated in the preceding fora but not at the Tribunal stage. The Deputy Chairman of the Tribunal, who delivered the judgment, said:

> "Both the labour relations officer and the senior labour relations officer arrived at the

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> correct decision. Their order has since been overtaken by events by reason of respondent's death. It is therefore necessary to set aside their order and substitute it by a fresh order that will suit the present state of affairs."

If one subsumes this observation under the language of the Act, the Deputy Chairman was saying that although the labour relations officer and the senior labour relations officer correctly proceeded in terms of s 96(1)(c) of the Act, it was no longer competent for the Tribunal to

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proceed in terms of s 96(1)(c) but in terms of s 96(1)(a). The order which the Tribunal proceeded to make accords with the terms of s 96(1)(a). Mr Hwacha's argument, premised as it was on the incorrect assumption that there had been a reinstatement, was that the Tribunal could not have ordered a reinstatement without specifying an order for damages as required by s 96(1)(c) of the Act.

At the time that the Tribunal made its ruling, it was bound by the decision of the Supreme Court in United Bottlers (Pvt) Ltd v Murwisi 1995 (1) ZLR 246 (S). In that case, it was conceded that no grounds of suspension had been proved. The sole ground of appeal advanced was that in ordering reinstatement the Tribunal should have specified an award of damages as an alternative. The Supreme Court declined to accede to the submissions advanced in support of the point and held that there was no obligation on a labour relations officer or any of the adjudicating authorities under the Act, to specify damages. That this was the legal position at the time of the Tribunal's ruling was underscored in the subsequent decision of the Supreme Court in *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1996 (1) ZLR 123 (S) where the Chief Justice remarked:

> "Speaking for myself, I cannot say that the *ratio decidendi* in the Murwisi case is obviously wrong. Until such time as the full court, after the benefit of argument, holds to the contrary, that decision is to be regarded as correctly stating the law" (my emphasis).

If I understood Mr Hwacha's submission correctly, it was that Murwisi's case has always been wrong so it never was the law; the law has always been as stated in the Act.

The doctrine of stare decisis demands that judgments of superior courts be followed by all inferior tribunals upon which they are binding. That is so even if it appears to a subordinate tribunal that the decision of the superior court is wrong. The fact that Murwisi's case was wrong, as eventually held by the Supreme Court in *Hama v National Railways of Zimbabwe supra* did not mean to say that it did not represent the law before it was overruled. As Gardiner JP observed in Ex p Jones 1929 CPD 134 at 137:

> "Stare decisis is to my mind a good practical maxim. It is better that the law should be unsound historically than that it should be uncertain. Laymen in their usual commercial transactions wish to have a certain rule of law by which they may be guided, and care not whether it can be supported by the niceties of legal argument. To them what matters is that

> the law has been laid down in a certain way; once it has been so laid down they must follow it. But it concerns them not at all whether it is a correct interpretation of Voet or Averanius."

And, as Hahlo & Kahn The South African Legal System and its Background point out:

> "The reasons advanced by the judges for adhering to a doctrine of judicial precedent have been the need for legal certainty, the protection of vested rights, the satisfaction of legitimate expectation and the upholding of the dignity of the court."

These noble objectives would be eroded, much to the detriment of the fundamental values upon which our system of jurisprudence is based, if inferior tribunals were to regard themselves as

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free to depart from those pronouncements of the Supreme Court which they considered erroneous.

It was perhaps the choice of procedure which forced Mr Hwacha to resort to this argument. Had the matter been referred to the Supreme Court as an appeal on a point of law, then the correctness of Murwisi's case could have been properly attacked. Herein lies the pith of Mr de Bourbon's attack, which was that it is for the Supreme Court to enunciate the law, and for the Tribunal to follow the law as enunciated by the Supreme Court. By following the law as enunciated by the Supreme Court, the Tribunal does not commit a reviewable error. The decision is therefore not one that should have been taken on review.

The conclusion I have come to makes it unnecessary for me to deal with the preliminary point taken by Mr de Bourbon on behalf of the second respondent, namely, that the applicant is not properly cited because a trust is not a juristic person. It was contended that the individual trustees should have been cited in their own names. Although heads of argument were filed dealing with this point, both counsel were agreed that I did not have to resolve this point if I find against the applicant on the merits. I therefore leave the point undecided.

The application is dismissed with costs.

Kantor & Immerman, legal practitioners for the applicant

B M W Kahari, legal practitioner for the second respondent

1997 (2) ZLR p215

NATURAL STONE EXPORT CO (PVT) LTD & ANOR v DIRECTOR OF NATIONAL PARKS AND WILDLIFE MANAGEMENT & ORS 1997 (2) ZLR 215 (HC)

Court **High Court, Harare**

Smith J

Civil application

7 & 20 August 1997 Judgment No. HH-129-97

Flynote

Environment - national parks - safari park - mining activities in safari park - whether restrictions may be imposed on such activities by Director of National Parks

Mines and minerals - rights - national parks - safari park - mining activities in safari park - whether restrictions may be imposed on such activities by Director of National Parks

Statutes - regulations - validity - Parks and Wild Life (General) Regulations 1990 - fees fixed by Director of National Parks in respect of mining activities - validity of such fees - tariff of fees - vagueness of

Headnote

The first applicant mined black granite at various claims in the Mufurudzi Safari Area, in terms of a tribute agreement with the second applicant. The Director of National Parks, purporting to act

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in terms of the Parks and Wild Life (General) Regulations 1990, fixed a tariff of fees for "services" provided by the Department of National Parks. The fees were said to be with effect from 1 November 1996, though they were not published in the Gazette until 20 December. The mining tariff prescribed three charges. The applicants objected to the charges and sought an order declaring that the charges did not apply in safari areas.

Held, that in terms of the Mines and Minerals Act [Chapter 21:05] as read with the Parks and Wild Life Act [Chapter 20:14], prospecting and mining activities are regulated in all parts of the "park area" other than safari areas. Although the Director of National Parks and the Minister of Environment and Tourism have the function and duty of controlling, managing and maintaining safari areas for specified purposes, they could not deprive prospectors and miners of the rights conferred on them by the Mines and Minerals Act unless specifically authorised by the Parks and Wild Life Act.

Held, further, that the fees introduced by the Director impinged on the applicants' mining activities. Although the Parks and Wild Life Act gave the Minister power to make regulations for a wide variety of matters, including the fixing of fees, fees could not be fixed for activities or things not permitted by the Act. The Act gave no specific authority to

provide for fees for prospecting or mining activities in safari areas. The fixing of fees, which could result in a miner being prohibited from carrying on prospecting or mining activities in safari areas, could result in a prospector or miner being prevented from doing what the Mines and Minerals Act authorises him to do.

Held, further, that even if the Act did allow fees to be fixed in respect of mining activities, these regulations were void for vagueness. For a regulation to be valid it must be certain. The tariffs were not worded in clear and unambiguous terms. Some of the words were capable of several meanings and in many instances it was not possible to say what fees were charged for what item.

Cases cited:

The Master v I L Back & Co Ltd 1982 (4) SA 763 (C)

PF-ZAPU v Min of Justice (1) 1985 (1) ZLR 261 (H)

S v O'Malley & Anor 1976 (1) SA 469 (N)

Smith NO & Anor v Wonesayi 1972 (1) RLR 262 (A); 1972 (3) SA 289 (RA)

The court considered the following statutory provisions:

Mines and Minerals Act [Chapter 21:05], ss 26, 27, 29, 31 and 178

Parks and Wild Life Act [Chapter 20:14], ss 2, 35, 119 and 129

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Parks and Wild Life (General) Regulations 1990 (SI 362 of 1990), s 97

Case Information

Miss E Mushore, for the applicants

J Musimbe, for the respondents

Judgment

Smith J: The first applicant (hereinafter referred to as "NSE") mines black granite at various mining claims in the Mufurudzi Safari Area. It tributes the claims from the second applicant. The mining claims are duly registered in terms of the Mines and Minerals Act [Chapter 21:05] (hereinafter referred to as "Chapter 21:05") and have been so registered since 19 April 1972. The first respondent (hereinafter referred to as "the Director"), purporting to act in terms of s 97 of the Parks and Wild Life (General) Regulations 1990 (SI 362 of 1990), has fixed a tariff of fees for various services and facilities provided by the Department of National Parks and Wild Life Management (hereinafter referred to as "the Department"). The tariff of fees, which was approved by the second respondent (hereinafter referred to as "the Minister"), includes a mining tariff which is set out in Part VIII thereof. It was published in General Notice 606 of 1996 on 20 December 1996, although it took effect some two months earlier from 1November 1996. The mining tariff prescribes three charges. There is a fee of $10 000 *per* annum *per* hectare mined, cleared or disrupted by mining, a fee of $500 *per* cubic metre of rock removed and a prospecting licence fee of $150 *per* 30 day permit. The prospector is also liable for "park entry and accommodation/camping fees".

NSE objects to the mining tariff imposed by the Director. It contends that it will have to pay between $150 000 and $1,5 million a month, depending

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on the construction or interpretation of the tariff. As it cannot afford to pay such amounts, it will have to cease its mining operations. It seeks an order declaring that the mining tariff does not apply to its mining operations in the Mufurudzi Safari Area. The Director and the Minister oppose the application on the following grounds. The Department is responsible for servicing and maintaining roads in the safari area and it also carries out patrols for the preservation and protection of the safari area. The applicants should pay for these services and should also pay compensation for the environmental damage caused by their mining activities. The damage so caused to the environment is so immense that the money claimed is required for reclamation. The charges are lawful. The charge for rock removed refers to rock removed from the site which is in the safari areaand "which is difficult to replace but only by imported rubble" (*sic*). The other charges "represent the services provided by the Minister by way of patrols conducted by National Parks staff to stop illegal panners, poachers and trespassers". "The charge will also aid the costs of maintenance and reclamation thus the insurance to the Department in case of company bankruptcy" (*sic*). The charge is, however, imposed even if there is no suggestion of "company bankruptcy".

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Mr Musimbe took the point, in limine, that the application is essentially an application for review and should therefore have been brought within 8 weeks of the action taken by the Director - r 259 of the High Court Rules. As the application had been filed well after the expiration of the prescribed period and the applicants had not applied for condonation, the application was improperly before the court. I cannot agree with this submission. The applicants are seeking a declaratory order. They argue that part of the tariff of fees fixed by the Director is ultra vires his powers and that some charges are void for vagueness. Such an argument can be raised at any stage. If one were to accept the submission by Mr Musimbe it would mean that the Director could impose a fee which was not authorised by the relevant legislation and, if that fee was not challenged within the prescribed period, he would be able to collect it even though it was illegally raised. In the case of the present tariff of fees, it took effect fom 1 November 1996 but was not published in the Gazette until 20 December 1996. Consequently, the 8 week period prescribed by r 259 had almost expired by the time the tariff of fees was published and brought to the attention of members of the public. One wonders why it took so long to have the tariff of fees published. One would expect the tariff of fees to be published in the Gazette before it took effect so that members of the public were notified in advance of the fees that would be charged with effect from a specified date. The point raised in limine is dismissed.

The applicants are seeking an order declaring that the fees prescribed by the

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Director in Part VIII of the tariff of fees do not apply to their mining operations and interdicting the Director from demanding payment from them of such fees. I consider that the court should determine firstly whether the mining fees in Part VIII of the tariff of fees have been lawfully prescribed or whether the Director acted ultra vires in prescribing them. If it is found that the Director acted intra vires, then the court must determine whether the fees are clearly and definitely prescribed or whether they are void for vagueness.

It is not disputed that the mining operations of NSE are being conducted in accordance with the provisions of Chapter 21:05. Section 178 of Chapter 21:05 provides for the surface rights of miners. They include the right to the use of any surface within the boundaries of the mining location for all necessary mining purposes, the right to use, free of charge, soil, waste rock or indigenous grass situated within his location for all necessary mining purposes and the right to sell or otherwise dispose of waste rock recovered by him from his location in the course of *bona fide* mining operations. In terms of s 26 of Chapter 21:05, all State land is open to prospecting. The rights of the holder of a prospecting licence are set out in ss 27 and 29 of Chapter 21:05. Section 31 of Chapter 21:05 specifies areas which are not open to prospecting. National parks and safari areas are not so specified. Part XIV of Chapter 21:05 deals with the payment of royalties by miners on all minerals or mineral-bearing products won fro mining locations. It is clear that Chapter 21:05 deals comprehensively with the rights and obligations of licensed prospectors and holders of registered mining locations. Nowhere does Chapter 21:05 provide that the rights of licensed prospectors and miners in areas regulated by the Parks and Wild Life Act [Chapter 20:14] (hereinafter referred to as "Chapter 20:14") are limited in any way. Chapter 20:14, on the other hand, does deal specifically with prospecting and mining. That Act provides

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for the establishment of the Parks and Wild Life Estate, which consists of all land which is a park area, and the regulation and control thereof. "Park area" is defined in s 2 of Chapter 20:14 as meaning any botanical garden, botanical reserve, national park, recreational park, safari area or sanctuary. In terms of s 119 of that Act, no person may prospect or acquire or work any mining location in terms of Chapter 21:05 within a national park, botanical reserve or garden, sanctuary or recreational park except in terms of permit issued by, or a written agreement with, the Minister or in accordance with prospecting or mining rights lawfully acquired before the area became a park area. The only category of park area not referred to in s 119 is that of safari areas. It is clear, therefore, that it was the intention of the legislature to regulate prospecting and mining activities in all parts of the park area other than safari areas. The only provisions in Chapter 20:14 dealing with prospecting and mining activities are contained in s 119

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and they do not authorise the Minister or the Director to fix fees in relation to such activities.

Mr Musimbe conceded that the respondents did not dispute the applicants' rights to carry on their mining activities in the Mufurudzi Safari Area. He argued, however, that the Director and the Minister had the mandate, in terms of s 35 of Chapter 20:14, to control, manage and maintain safari areas for the purposes set out in that section. I agree that it is the function and duty of the Director and the Minister to control, manage and maintain safari areas for the specified purposes but they cannot deprive prospectors and miners of rights conferred on them by Chapter 21:05 unless specifically authorised by Chapter 20:14 to do so. There is no such authority conferred by Chapter 20:14. Mr Musimbe submitted that the respondents were not seeking to interfere with the applicants' mining rights and that they accepted and recognised the applicants' rights to free and unrestricted mining activities. The respondents merely introduced fees for reclamation and other services they offered. I cannot accept those submissions The fees introduced by the Director definitely impinge on the applicants' mining activities. The fact that s 119 of Chapter 20:14 mentions all categories of park area other than safari areas clearly indicates that the intention of the Legislature was that no additional restrictions were to be imposed on prospecting and mining activities in safari areas. I consider, however, that even if s 119 of Chapter 20:14 had included safari areas, there is no indication in that Act that the Minister could impose fees in relation to prospecting and mining activities in a park area.

Section 129 of Chapter 20:14 confers power on the Minister to make regulations. In terms of that section, he may make regulations for a wide variety of matters, including the fixing of certain fees. Paragraph (c)(ii) of subs(2) of s 129 authorises him to provide for fees to be paid by persons entering a park area, which includes safari areas, or to be paid in respect of the doing of any specified thing therein or the use of any article or facility provided therein. By virtue of para (u) of s 129(2), the Minister may provide for the fixing and altering of fees to be paid for any authority, permit or licence granted or issued in terms of Chapter 20:14, including the fixing of different fees to be paid by persons resident in Zimbabwe and persons not so resident. The Minister, in the exercise of his powers under s 129 of Chapter 20:14, made the Parks and Wild Life (General) Regulations 1990 (SI 362 of 1990). In s 97 thereof the power to fix fees is

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conferred on the Director. However, the Director cannot fix fees or activities or things not permitted by s 129 of Chapter 20:14. There is no specific authority in s 129 to provide for fees for prospecting or mining activities in safari areas. Accordingly, I consider that the mining fees fixed by the Director in Part VIII of the tariff

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of fees are ultra vires because they are inconsistent with the provisions of Chapter 21:05 and are not specifically authorised by Chapter 20:14.

If it were to be held that the Minister could make regulations imposing fees for mining operations it would mean that the Director could prohibit a licensed prospector or holder of a mining location from carrying on prospecting or mining activities within a safari area unless he paid the appropriate fee. Therefore he would, in effect, be able to prevent a licensed prospector or holder of a mining location from doing what he is authorised to do by Chapter 21:05. That cannot have been contemplated by the legislature. If it was intended that the Minister should have that authority, then specific provision therefor would have been made in Chapter 20:14. In terms of Chapter 21:05, NSE is entitled to remove from its mining locations in the Mufurudzi Safari Area not only the black granite it is mining but also the waste, which it is entitled to sell. The imposition of a charge by the Director of $500 *per* cubic metre of rock removed amounts, in effect, to an additional royalty on the black granite and a levy on the wste rock sold. These are a form of taxation and can only be imposed if specifically authorised by the legislature. I do not consider them to be a fee for services.

Accordingly, I find that the Director acted ultra vires in fixing the mining fees in Part VIII of the Tariff of Fees.

It is trite that for any regulation or statutory instrument to be valid it must be certain. The courts have, on many occasions, held subsidiary legislation to be void for vagueness. In Smith NO & Anor v Wonesayi 1972 (1) RLR 262 (A); 1972 (3) SA 289 (RA) (at 274A-E/295-6 of the South African Report) Beadle CJ said:

> "The reasons for which subordinate legislation will be set aside by a court on the grounds of vagueness have long been settled. If the words are capable of being understood with reasonable certainty by those who are bound by them, they will not be regarded as being too vague. See R v Jopp & Anor 1949 (4) SA 11 (N) at p 14. The words must not be 'so vague as to create confusion or substantial uncertainty in the minds of reasonable subjects who have to apply its terms'. See Arnold v Race Classification Appeal Board & Anor 1967 (2) SA 267 at p 272. 'It is, however, the duty of the court to avoid, if possible, the conclusion that the Notice is too vague to be effective' - *Per* Centlivres JA in R v Pretoria Timber Co (Pty) Ltd & Anor 1950 (3) SA 163 (AD) at p 170. 'The law requires reasonable and not perfect lucidity and the fact that cases may arise in which it would be difficult, perhaps extremely difficult,' to apply the regulation is not 'a reason for holding that the description is not reasonably clear'. - PerSchreiner JA, in the same case at p 176.
>
> As I see it, if the legislation can be applied with reasonable certainty in the vast majority of cases, that is enough, and the fact that in borderline cases it may be extremely difficult to apply is not a ground for holding the legislation to be void for vagueness."

These tests were approved in S v O'Malley & Anor 1976 (1) SA 469 (N), The Master v I L Back

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& Co Ltd 1982 (4) SA 763 (C) and PF-Zapu v Minister of Justice (1) 1985 (1) ZLR 261 (H).

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Mr Musimbe argued that the mining fees are worded in clear and unambiguous terms and that the issue of whether or not a particular tariff is applicable is an administrative issue to be decided by the Director and not by the courts. I beg to differ with regard to both submissions. I do not consider that the tariffs are worded in clear and unambiguous terms. They are not reasonably lucid. With regard to the charge of $10 000 *per* annum *per* hectare mined, cleared or disrupted by mining, whilst it might well be possible to measure an area that has been mined or cleared, it is not clear what is meant when the term "disrupted" is used and how would one measure such an area. According to the dictionary, "disrupt" means to separate, to break asunder, to rend. How does one disrupt areas of ground? The tariff states that the area would include mine dumps or open cast pits that had not been properly reclaimed. Who is to decide whether or not any reclamation is "proper"? What standard is to be applied? The charge of $500 er cubic metre of rock removed is also ambiguous. It is not clearly expressed, or even implied, that the rock must be removed from the mining location. Furthermore, I cannot agree that it is an administrative issue for the Director to decide whether or not a particular charge is applicable. In fixing the fees the Director must do so in a manner which clearly indicates what charges are payable, and how the charges are to be calculated. Accordingly, even if I had determined that the mining tariffs were intra vires I would have been compelled to find that they are void because of their vagueness and lack of certainty.

Before concluding I feel constrained to comment on the tariff of fees generally. The notice published by the Director baldly states that he has fixed the tariff of fees in respect of the items specified in the Schedule. However, in many cases it is not possible to say what fees are charged for what item. For example, in Part I of the Schedule there are charges for "sample/specimen collected". For insects the charge is "US$50 *per* day. Zimbabwean Z$50 *per* day. Bag limit of 10 specimens". Apparently if one is not successful and does not collect an insect, there is no charge because the charge is tied to the collection of a sample or specimen. If one spends one day and collects 10 specimens the charge will be US$50 or Z$50 but if it takes one a week to collect the 10 specimens the charge will be US$350 or Z$350, depending on whether or not the person is a Zimbabwean. Since the Act permits the fixing of different fees for residents of Zimbabwe and for non-residents, the tariff should not refer to Zimbabweans but t residents of Zimbabwe. It seems, however, that the provision for making such a differentiation applies to fees referred to in para (u) but not to fees referred to in para (c)(ii) of s 129(2) of Chapter 20:14. The charge for collecting small mammals/bats is US$150 *per* day and for Zimbabweans Z$100 *per* day. So if a non-Zimbabwean spends 10 days and collects one bat it will cost him US$1500. If he fails to get his

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bat, however, he will not pay any charge. One wonders why the charge should be based on a daily tariff. For the use of Mushandike NRC the charge is "$2500 *per* day, $10 *per* person,

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excluding catering, use of kitchens and staff, which will be costed. Schools, the aged and disabled to pay $10 *per* day *per* person". Is the basic fee $2500 *per* day, irrespective of the number of persons, and then each person pays an additional $10? However, schools, the aged and disabled are charged $10 *per* day *per* person. Do they pay the $2500 *per* day? Is one classified as "aged" after turning 60 or 65 or is it left to a memer of staff to decide? Does one have to pay $10 for a baby in arms? How is the use of kitchen and staff costed and who does the costing? The charge for hiring a capture team at Boulton Atlantica is "commercial rates". That is meaningless.

I would strongly recommend that the Director refer the Tariff of Fees to the Attorney-General's Office for redrafting by a trained, competent draftsperson and that any revised tariff be published in the Gazette before it comes into effect.

It is declared that in fixing the mining tariff charges prescribed in Part VIII of the Tariff of Fees set out in the Schedule to GN 606 of 1996 the Director acted ultra vires. Accordingly it is ordered that:

1. The applicants shall not be liable to pay the mining tariff fees in respect of their mining operations in the Mufurudzi Safari Area;

2. The first and second respondents shall pay the applicants' costs, the one paying the other to be absolved.

Coghlan, Welsh & Guest, applicants' legal practitioners

Civil Division, Office of the Attorney-General, first and second respondents' legal practitioners

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HUBERT DAVIES & CO (PVT) LTD v EDUCATIONAL BUSINESS SUPPLIERS (PVT) LTD 1997 (2) ZLR 223 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

1 July & 28 August 1997 Judgment No. S-133-97

Flynote

Contract - sale - deposit for purchase of goods - buyer paying deposit - seller breaching contract by failing to deliver within stipulated time period - whether buyer entitled to mora interest on money paid - date from which mora interest payable

Interest - mora - interest on deposit paid for purchase of goods - contract breached by seller and deposit reclaimed - interest on deposit due from date of breach, not date of payment of deposit

Headnote

The respondent and the appellant entered into a contract in terms of which the appellant was to supply certain goods. The respondent paid a deposit and the appellant undertook to deliver the goods within eight weeks from the date of payment of the deposit. The appellant failed to deliver

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the goods within the stipulated period. Because of this breach of the contract the respondent cancelled the sale. The appellant refunded the deposit paid by the respondent as requested but the respondent also sought to recover damages, for the interest payable on the deposit during the time it had been held by the appellant.

Held, that the respondent was entitled to recover mora interest on the deposit it had paid but that the mora interest started to run, not from the date the deposit was paid, but only from the date when the refund of the deposit was due because of the breach of the contract, that is, eight weeks after the deposit was paid.

Cases cited:

Bains Motors v Piek 1955 (1) SA 534 (A)

Bellairs v Hodnett & Anor 1978 (1) SA 1109 (A)

Baker v Probert 1985 (3) SA 429 (A)

Philip v Metropolitan & Suburban Rly Co (1893) 10 SC 52; 3 CTR 55

Rhodesia Cold Storage Co v Beira Cold Storage (1905) 15 CTR 881

Case Information

D Mandudzo, for the appellant

E Matinenga, for the respondent

Judgment

Korsah JA: The real bone of contention between the parties is whether the trial court's determination that the respondent was entitled to recover interest of $25 334 on a deposit of $400 000 paid by the respondent to the appellant for the supply of two Erf horses is justifiable in law.

KORSAH JA

A statement of agreed facts was placed before the trial court, which did not bespeak the true state of affairs between the parties and completely misled the court into concluding that no valid contract of sale had been arrived at by the parties because the purchase price of the merx had not been stipulated. The factual position, as appears from the record and as submitted by Mr Matinenga, is as follows:

Representatives of the parties met in Mutare around April/May 1991, to discuss the purchase of two Erf horses. The probabilities are that the sum of $600 000 was discussed as the tentative price; for at that time the Hire Purchase Act [Chapter 284] provided that a purchaser of a new vehicle to be used for transportation should deposit a minimum of 30% of the cash price of the goods with the vendor before delivery of the goods.

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The probabilities are that the $400 000 which the respondent deposited with the appellant for the two Erf horses represented 30% of the price of the two Erf horses, which would make the tentative price of each Erf horse about $600 000. The factual basis for uncertainty regarding the prices of vehicles is the ever-changing assessment of the duty to be levied on vehicles. As the appellant explained in its letter of 9 January 1992 to the respondent:

> "The vehicle kits were not supplied in bulk to Hubert Davies but are delivered in monthly batches from the United Kingdom. The Ministry of Finance invoices this company for each consignment of kits received. You can appreciate that the selling price of the vehicle is dependent on the cost of the vehicle kits. As the Ministry of Finance sets the kits' cost to Hubert Davies, it is obvious that the Ministry is effectively dictating the selling price, Hubert Davies has no control or recourse in this matter.
>
> ...
>
> Please note that due to the reasons stated and the fact that the vehicle pricing is based on foreign currency rates Hubert Davies has no control on the selling price ... "

In the result, all that dealers who are awaiting the delivery of vehicles for sale can do to protect their interest is not to bind themselves to a fixed price before the delivery of the vehicle. It would be unwise for a dealer to bind himself to a fixed price before delivery of the vehicle and invidious of a court to imply that because of the uncertainty as to the price of the vehicle ordered no binding agreement had come into being. Counsel for both parties contended, for different reasons, that there was a valid contract of sale.

Supportive of the fact that a tentative price was agreed by the parties are the following facsimile messages from the appellant to the respondent on 28 November 1991:

> "RE: ERF
>
> We regret that due to circumstances beyond our control, we are unable to hold the price of the Erf Horse. The price inclusive of sales tax is $846 000 for fully imported unit and $747 000 for unit with local sleeper cab - subject to limited stocks.

KORSAH JA

> Please advise."

And:

> "DELIVERY OF YOUR VEHICLE
>
> Please confirm acceptance of increased price, delivery will be subject to notification from your finances that funds are available for payment."

If no price for each horse had been agreed upon, what was it that the appellant was unable to hold? There must have been an earlier agreement as to the price at the discussions in April/May 1991 which the appellant was unable to hold.

In the statement of agreed facts the parties stated that:

> "There is a conflict as to whether the agreed purchase price would be $600 000 or not. However, for the purposes of resolving the instant dispute, this issue is not material and can be left unresolved. The probable fact is however

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> that (the) parties possibly discussed $600 000 as the tentative price."

The very fact that a round figure of $600 000 is given as the price is suggestive of what both parties had in mind and the anticipation of some escalation in the price of an Erf horse.

The trial court was again misled by the statement of agreed facts into placing reliance on the agreement of 23 September 1991 between the appellant, Scotfin Ltd and the respondent, as the agreement of sale between the parties and to conclude that the sale agreement was silent on the question of the purchase price and the date of delivery. The agreement of 23 September 1991 was nothing more than an agreement for a loan by Scotfin to the respondent for the payment of a deposit to the appellant. There was, therefore, no room in that agreement for the mention of the purchase price and the delivery date of the merx. A separate sale agreement had already been concluded between the appellant and the respondent.

It was, however, common cause that the delivery of the vehicle was to be effected within eight weeks from the payment of the deposit. Payment of the deposit was effected by a cheque paid to the appellant on 30 September 1991. The appellant failed to deliver within eight weeks in terms of the contract. On 28 November 1991, the appellant sent the facsimile message *supra* advising the respondent of the escalation in prices. The respondent's reaction is summed up in the following passage of a letter dated 16 December 1991, written on its behalf by its lawyers:

> "Our client does not accept the new price and is of the strong view that at the time that he was requested to pay the security deposit, kits to assemble his truck were already in the country and had your company followed the proper procedure in distribution, he could have got his truck within the stipulated period of six to eight weeks.
>
> In the premises, our client has instructed us to demand, as we hereby do, that his two trucks be delivered to him at the original price of about $600 000 failing which we shall commence legal proceedings for damages occasioned to our client due to the non-delivery of the truck."

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The appellant's letter of 9 January 1991 *supra* clarified the reason for escalation in prices without making a new offer. Thus the statement in the respondent's legal practitioner's letter of 10 February 1992, that their client was of the view that he had been heavily prejudiced but that:

> "Nonetheless, he has to continue with his business operations and in the meantime he has instructed us to accept the offer to purchase one (1) truck and the deposit currently held to be put towards the total purchase price of this truck,"

was not an acceptance of any offer made by the appellant. It was a fresh offer to the original offer of two trucks agreed upon in April/May 1991, which had not been executed within the stipulated period. The respondent's counter-offer was not accepted by the appellant.

The respondent subsequently wrote to the appellant demanding the refund of its deposit of $400 000. This was duly repaid. The respondent then claimed that by virtue of the breach by the appellant, it had suffered damages in the amount of interest payable on $400 000 over the period of one hundred and forty days that the appellant was in possession of that sum. The interest claimed on the capital sum for that period amounts to $25 334.

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The learned trial judge observed that:

> "... it would appear that there is no dispute that the amount claimed as interest is the least that could have been earned by way of interest by the $400 000 during the 140 days and that if anything the defendant (now the appellant) realised more than what is being claimed by way of interest from the plaintiff's (now the respondent) deposit."

The only issue posed for determination by the trial court in the agreed statement of facts was: "Whether in law the plaintiff is entitled to the interest on the deposit so paid".

The general principle regarding the measure of damages for non-delivery of goods is that the injured party should be placed in the same position as if the contract had been duly performed so far as that can be done by the payment of money, and without undue hardship to the defaulting party.

I shall commence my reasoning with an analogy of what happens in law to the fruits and profits of the thing sold. At p 212 of Norman's Purchase and Sale in South Africa 4 ed is to be found the following:

> "Together with the thing sold the vendor must deliver all the fruits thereof, natural as well as civil, which have come into existence at the time of the sale. If the vendor is in mora in making delivery, he must account not only for the fruits which he has gathered from the time delivery should have been made, but also for those which he could have but has not gathered if the purchaser could have gathered them. If he is not in mora he need only account for the fruits actually gathered by him.
>
> From the moment the sale is perfecta, the fruits and accessories of the property belong to the purchaser."

According to Mackeurtan Sale of Goods in South Africa 5 ed p 63:

> "By civil fruits is meant any advantage appreciable in money which anything procures

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> or produces periodically, and upon which one can count with an approach to certainty as may be done in the case of natural fruit."

The effect of rescission of a contract is to bring to an end the duty to perform. Neither party can claim performance from the other and either party can use the rescission as a defence against the other. If, therefore, the parties are not bound to perform, it follows logically that any performance already received is retained without just cause and can be reclaimed on the basis of unjust enrichment. There is also authority supportive of the assertion that an injured party, in addition to rescission, may claim as damages such loss suffered that flows naturally from the breach of contract. The onus is on the aggrieved party to formulate and prove a claim for damages. Thus in Silverton Estates Co v Bellevue Syndicate 1904 TS 462 at 466 Innes CJ remarked that:

> "A vendor undertakes not only to deliver the thing sold but to deliver it timeously on the day, if any, indicated by the contract. ... And if he is in default in that respect, and if the purchaser can prove damages duly arising in consequence, it is not easy to see any general principle which ought to prevent the latter from recovering damage so sustained."

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And in Bains Motors v Piek 1955 (1) SA 534 (A), where a forfeiture clause containing penal remedies in addition to a *lex commissoria* fell for consideration by the Appellate Division, the court sought to throw light on Voet's statement in Commentaries 18.3.3., when van den Heever JA said at 544E-G of the report that:

> "Voet's statement in Commentaries 18.3.3. is perfectly plain. In n 2 he had considered the position of the purchaser where the seller had elected to exercise his right of rescission: the purchaser is bound to restore the subject matter of sale with all its accessories and fruits. In n 3 he considers the position of the seller. The vendor is obliged to restore to the purchaser any part of the price he may have received, unless it was part of the agreement that it should be forfeit as a penalty for the default. In that case, he continues, the purchaser is entitled to retain the fruits. But it is clear that, like the Roman jurist upon whom he relies, he comes to that equitable conclusion only because the contract was silent on the fate of the fruits in the event of rescission" (emphasis is mine).

The contract in the present case is similarly silent on the fate of the fruits in the event of rescission. See also Baker v Probert 1985 (3) SA 429 (A); Phillip v Metropolitan & Suburban Railway Co (1893) 10 SC 52; 3 CTR 55. And in Rhodesia Cold Storage Co v Beira Cold Storage Co (1905) 15 CTR 881 Buchanan ACJ held that even where specific performance of a contract of sale is decreed, damages immediately arising out of and consequent on the mora of the vendors may be recovered.

As already stated, the only damages that can be recovered for breach of contract are such as might reasonably be supposed to have been in the contemplation of the parties as naturally arising out of the transaction. I note from the respondent's declaration that the interest of $25 334, which it claims as damages, is the interest payable on the sum of $400 000 for the period

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extending from 30 September 1991 (the day that sum was lodged with the appellant) to February 1992 (the day the appellant refunded the capital to the respondent). But the agreement between the parties was that the Erf horse was to be delivered to the respondent within eight weeks from the date that the sum of $400 000 was paid to the appellant. The appellant may therefore be said to have been in mora only when it failed to deliver as contracted within the eight weeks and mora interest commenced to accumulate from then on until the repayment of the capital.

In Bellairs v Hodnett & Anor 1978 (1) SA 1109 (A) the full bench of the South African appeal court expressed the view that mora interest in a case where money due has been paid after due date, constitutes a form of damages for breach of contract. The court expressed itself thus at p 1145D-G of the report:

> "It may be accepted that the award of interest to a creditor, where his debtor is in mora in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date (Becker v Strusser 1910 CPD 289 at p 294). This loss is assessed on the basis of allowing interest on the capital sum owing over the period of mora (see Koch v Panovka 1943 NPD 776). Admittedly, it is pointed out by Steyn Mora Debitoris p 86, that there were differences of opinion among the writers on Roman-Dutch law on the question as to whether mora interest was lucrative, punitive, or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the

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> debtor can show that the creditor would not have used the capital sum owing, this question has not lost its sigificance. Nevertheless, as emphasised by Centlivres CJ in Linton v Corser 1952 (3) SA 685 (A) at p 695, interest is today the 'life-blood of finance' and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of mora interest seeks to compensate the creditor."

To the question whether in law the respondent is entitled to mora interest on the deposit paid to the appellant, the answer must be in the affirmative. However, in my opinion, such mora interest commenced to run, not at the date when the deposit was made, but at the date when a refund was due - that is, eight weeks after the deposit was made and the appellant could not deliver in terms of the contract. Since the interest claimed was calculated on retention of the deposit from the date it was received (ie one hundred and forty days instead of when payment was due fifty-six days thereafter), the loss claimable by the respondent is the said interest on the said amount for a period of eight-four days, which reduces the mora interest claimable to $15 200.40.

In the result, the appeal insofar as it has succeeded in substantially reducing the damages claimed by the respondent has been partially successful. The

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respondent has also achieved a measure of success in resisting the appellant's contention that it was not entitled to damages. I would order that each party is to bear its own costs of this appeal. The order of the High Court is amended to read:

> "There will be judgment in favour of the plaintiff in the sum of $15 200.40, together with costs."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Gonese, Takaidza & Company, respondent's legal practitioners

KELLOGG CO v CAIRNS FOODS LTD 1997 (2) ZLR 230 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

8 July & 28 August 1997 Judgment No. S-135-97

Flynote

Delict - unfair trade practice - passing off - defined - common field of endeavour - two brands of cereals -

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similar but distinct get-up - passing off not established

Intellectual property - trade marks - registered trade mark - unauthorised use - trade mark for a breakfast cereal - trade mark only partially descriptive - use of descriptive words so nearly resembling those in registered trade mark as to deceive or cause confusion - whether a *bona fide* description

Headnote

Kelloggs, the long established manufacturer of breakfast cereals, manufactured a cereal which went under the name of "Froot Loops". The cereal was made in the shape of a hoop or ring, and had a fruit flavour. This name had been a registered trade mark since 1900 in the United States, in Australia since 1963, in South Africa since 1982 and in South America since the late 1980s. The trade mark was registered in Zimbabwe in January 1995, with a specific disclaimer that Kelloggs had no exclusive right to the use of the word "Froot" or its phonetic equivalent "fruit". In October 1994 Cairns, under the trading name of Willards, began selling a breakfast cereal which it called "Fruit Hoops". This cereal also had a fruit flavour and was produced in the shape of a ring. Kelloggs sought an interdict to prevent Cairns from using the name "Fruit Hoops". The interdict was sought on two bases: (1) that the use by Cairns of the name "Fruit Hoops" amounted to a passing-off of Cairns' product as that of Kelloggs; and (2) that the name constituted an infringement of Kelloggs' registered trade mark. The High Court (Chidyausiku J) dismissed the application. On appeal:

Held, that in order to determine whether a representation amounts to a passing off, there must be a reasonable likelihood that members of the public may be confused into believing that the business of the one party is, or is connected with, that of the other party. The fact that there is a common field of endeavour between the parties is only one factor. In this case, the prominent position on the packets of the brand names was such as to ensure that there was no confusion. The prominence of the Willards brand name was such as to underline the point that Cairns were effectively saying that the product was their version of the cereal in question.

Held, further, that for a mark to be a trade mark, it must be used, in relation to goods or services for two purposes: (a) to indicate a trade connection between the goods and the person having the right to use the mark; and (b) to distinguish the goods from the same kind of

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goods connected with any other person. As to whether Cairns were using a mark so nearly resembling Kelloggs' registered trade mark as to be likely to deceive or cause confusion, the words "Froot Loops" were merely partly descriptive, in that they did not describe the essential feature of the product, namely, that it is a breakfast cereal. The words "Fruit Hoops" had an inescapable similarity, both visually and phonetically. Cairns did not have to use the word "hoops" to describe their product; other words would have done equally well. They chose to use the word visually and phonetically nearest to "loops" and the conclusion must be that they were using a mark which so nearly resembled Kelloggs' registered trade mark as to be likely to decive or cause confusion.

Held, further, that although the registration of a trade mark did not interfere with the use by any

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person of any *bona fide* description of the character of his goods, it would be na•ve to pretend that Cairns did not chose the name "Fruit Hoops" precisely because of its closeness to the words in the registered trade mark.

Cases cited:

Abbott Laboratories v Xeragen Laboratories Ltd (unreported, Natal 1996)

Brian Boswell Circus v Boswell-Wilkie Circus 1985 (4) SA 466 (A)

Capital Estate & General Agencies (Pty) Ltd v Holiday Inns Inc & Ors 1977 (2) SA 916 (A)

Imperial Tobacco Co Ltd v de Pasquali & Co (1918) 35 RPC 185

Irvings Yeast-Vite Ltd v Horsenail (1934) 51 RPC 110

Kellogg Co v Cairns Foods Ltd 1996 (1) ZLR 528 (H)

Luster Products Inc v Magic Style Sales CC 1997 (3) SA 13 (A)

Plascon-Evans Paints v van Riebeeck Paints 1984 (3) SA 623 (A)

Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A)

Saybrook \(1978\) \(Pvt\) Ltd \& Anor v Girdlestone 1986 (2) ZLR 185 (S)

Shredded Wheat v Kellogg Co [1938] 1 All ER 618 (PC)

Standard Bank of SA Ltd v United Bank Ltd 1991 (4) SA 780 (T)

The court referred to the following statutory provisions:

Trade Marks Act [Chapter 26:04], ss 8(1) and 11(1)(b)

Case Information

A P de Bourbon SC, for the appellant

C W Lloyd, for the respondent

Judgment

McNally JA: The appellant ("Kelloggs") failed in its application in the High Court to have the respondent ("Cairns") interdicted from using the mark "Fruit Hoops" in marketing one of its breakfast cereals. It alleged that the use of the mark:

1. in conjunction with the general "get-up" of the product, amounted to passing-off; and
2. infringed Kellogg's registered trade mark "Froot Loops".

The judgment is reported as *Kellogg Co v Cairns Foods Ltd* 1996 (1) ZLR 528 (H).

Kelloggs is an American breakfast cereal manufacturer with a long established international

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reputation. Cairns some years ago took over

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Willards, a local breakfast cereal manufacturer, whose products became established in Zimbabwe during the long period between international sanctions in the seventies and the Economic Structural Adjustment Programme in the nineties, during which period there were virtually no imports of Kelloggs products. Thus Cairns retained the "Willards" brand name.

Kelloggs applied for registration of the trade mark "Froot Loops" (the words only, not the design in which the "O"s depict the actual product) on 23 November 1993. It was registered on 23 January 1995. The certificate of registration noted a specific disclaimer - "that the registration shall give no right to the exclusive use of the word 'Froot' or its phonetic equivalent 'Fruit'." A limited number of packets of Froot Loops, 8 400 in all, were sold in Zimbabwe from April 1994. Cairns began selling Fruit Hoops in October 1994. Kelloggs' affidavit, signed by its trade marks counsel in Battle Creek, Michigan, sets out three grounds for seeking the interdict:

1. Cairns' mark infringes Kelloggs registered trade mark, in that it is so visually and phonetically similar that it is likely to deceive or cause confusion to the purchasing public;

2. Cairns' use of the mark "Fruit Hoops" is a passing-off, in that the purchasing public is likely to be deceived or confused into believing that Cairns goods are Kelloggs goods;

3. Cairns' infringement and passing-off are likely to diminish the value of Kelloggs' trade mark, injure Kelloggs' reputation, and lose sales for Kelloggs.

Cairns in reply averred that it first started selling Fruit Hoops in October 1994, though the original launch date was to have been April 1994 (when Kelloggs Froot Loops were first sold). It used machinery which had been in use by it since 1985, producing a savoury snack in exactly the same shape. It had been thinking since before 1993 of producing a fruit flavoured breakfast cereal in the "hoop" shape. It had worked on a product called "spaghetti hoops", later abandoned. The use of the word "hoops" was therefore contemplated from before 1993.

Cairns contended that it was unaware of Kelloggs' intention to launch its product in Zimbabwe, or to register Froot Loops as a trade mark in Zimbabwe, and only became aware of these matters in January 1995 when Kelloggs' letter of complaint was received. It was, however, aware that Froot Hoops were being marketed in South Africa by Kelloggs. Also its former production director had brought a sample of Kelloggs Froot Loops back from Australia. The packet was given to Cairns' designers in July 1993 when they were instructed to design a packet for Willards Fruit Hoops.

All in all, I conclude, given that economic structural adjustment was in the

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air, Cairns must have realised that Kelloggs would consider moving into the hitherto protected market.

It was pointed out by Cairns that there is inevitably a similarity in names when similar products are sold with descriptive names. Purely descriptive names are not registrable, and on these grounds Cairns has made an application under s 37(1) of the Trade Marks Act [Chapter 26:04] to have the Kelloggs registration of Froot Loops expunged.

Cairns illustrates this inevitable similarity by pointing to a series of similar products with similar names, as follows:

KELLOGGS BRAND NAME	WILLARDS BRAND NAME
All Bran Flakes	Bran Flakes
Coco Pops	Cocoa Puffs
Corn Flakes	Corn Flakes
Froot Loops	Fruit Hoops
Frosties	Sugar Frosted Flakes
Fruitful Bran	Raisin Bran Flakes
Hifibre Bran	Hi-fibre Bran Flakes
Rice Krispies	Crispies - plain/strawberry/chocolate
Toasted Muesli	Muesli.

Kelloggs in reply denied Cairns' *bona fides*. It also denied that the use of "Willards" in conjunction with Fruit Hoops would obviate deception or confusion, and pointed to the similarity in packaging. It pointed out that its mark "Froot Loops" was registered all over the world, and was therefore internationally accepted as registrable.

PASSING-OFF

I propose to deal with this aspect first. Passing-off has been defined, in Capital Estate & General Agencies (Pty) Ltd v Holiday Inns Inc & Ors 1977 (2) SA 916 (A) at 929C-D as follows:

> "The wrong known as passing-off consists in a representation by one person that his business (or merchandise as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing-off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of the other."

Rabie JA (as he then was) then went on to say that whether there is a reasonable likelihood of such confusion arising is a question of fact. In the case with which he was concerned, there was no "common field of endeavour"

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between the parties. In this case there is. Nonetheless, the learned Judge of Appeal agreed with the trial judge that the ordinary man would assume that a shopping centre called "The Holiday Inn Shopping Centre" must have some connection with the Holiday Inn Hotels. There was a passing-off.

In Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A), there was a common field of endeavour. Brasso and Brillo were both metal polishes. They were sold in containers of identical shape and size. In coming to the conclusion that there was no passing-off, Harms AJA (as he then was), delivering the unanimous decision of the court, took into account -

1. that the "get-up" of the two tins was noticeably different;
2. that it was for the court rather than for witnesses, whether expert or not, to decide whether the impugned get-up was calculated to deceive;
3. that the class of persons purchasing the goods must be borne in mind in deciding whether there was a likelihood of confusion or deception;
4. that purchasers of ordinary household goods know that similar goods having different origins often have similar containers (compare toothpaste tubes and shoe or floor polishes);
5. an intention to compete must not be confused with an intention to deceive;
6. the respective trade marks were not descriptively or confusingly similar, and the prominent design marks differed in shape and colour;
7. the evidence that the public was confused into thinking that there was some business connection between the two was not convincing.

In the court *a quo* in the present case, the learned judge held, with respect correctly, that Kelloggs had to establish three things:

1. that it held some goodwill or reputation in the particular merchandise;
2. that it was likely that the ordinary purchaser had been or would be misled or deceived into believing that Willard Fruit Hoops was the same as Kelloggs Froot Loops, or that there was some connection between them;
3. that Kelloggs had a clear right protectable by no other remedy.

He answered the first two points in the negative. Consequently, the third point fell away. There was no passing-off.

I must say that I would prefer to leave the first point open. It is true that 8 400 packets of Kelloggs Froot Loops is not a great number. On the other hand, the requirement is only that the applicant hold "some goodwill or reputation" in the product. See *Saybrook \(1978\) \(Pvt\) Ltd \& Anor v Girdlestone* 1986 (2) ZLR 185 (S) at 189A. And I note that Corbett JA (as he then was) in

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Brian Boswell Circus v Boswell-Wilkie Circus 1985 (4) SA 466 (A) at 479D-E queried whether reputation in this sense is always a sina qua non of a successful passing-off action.

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It is not necessary to decide the question because I am in complete agreement with the learned judge as to the answer to the second question. I consider that the get-up of the two packages is similar but distinct. In particular, the dominant position of the brand names, Kelloggs and Willards, is such as to ensure there is no confusion. I bear in mind that the purchasers of breakfast cereals are not normally illiterate, and that, given the nature of the product, they would buy cereals regularly - not necessarily this particular cereal, but one or other of the various cereals available. They would therefore be likely to be aware of the existence of the two major brands. They would know that breakfast cereals come in broadly similar packs, and thus even as between the various Willards (Cairns) products they would have to make their selection.

It seems to me that the prominence of the name Kelloggs or Willards underlines the point that, far from passing-off their goods as Kelloggs goods, Cairns are effectively saying "This is our (Willards) version of this particular cereal, not the Kelloggs version".

I would therefore agree with the learned judge *a quo* that passing-off has not been established.

TRADE MARK INFRINGEMENT

Here we are not relying on the common law, as in passing-off, but on the provisions of Chapter 26:04. The first question is whether the rights acquired by Kelloggs, by the registration of the trade mark Froot Loops, have been infringed. In terms of s 8(1) of Chapter 26:04, those rights are infringed by:

> "(a) unauthorised use as a trade mark in relation to goods or services in respect of which the trade mark is registered, of a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion; or
>
> (b) unauthorised use in the course of trade, otherwise than as a trade mark, of a mark identical with or so nearly resembling it as to be likely to deceive or cause confusion if such use is -
>
> (i) in relation to or in connection with goods or services in respect of which the trade mark is registered; and
>
> (ii) likely to cause injury or prejudice to the proprietor of the trade mark."

It seems to me that we are plainly concerned with subs (a).

The phrase "use as a trade mark" is one that has caused difficulty. "Trade mark" is defined in the Act, in s 2(1). So "use as a trade mark" means "use as a trade mark as defined."

In order to be a trade mark, a mark must be used, in relation to goods (or services), for two purposes, and I summarise:

1. to indicate a trade connection between the goods and the person having the right to

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use the mark; and

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2. to distinguish the goods from the same kind of goods connected with any other person.

In Irvings Yeast-Vite Ltd v Horsenail (1934) 51 RPC 110, the alleged infringer used on his goods a label stating "Yeast tablets. A substitute for Yeast-Vite". The court had no difficulty in concluding that the alleged infringer was not using "Yeast-Vite" as a trade mark. Quite the opposite. He was indicating a distinction, not a connection. He was asserting that his tablets were not Yeast-Vite.

In Plascon-Evans Paints v van Riebeeck Paints 1984 (3) SA 623 (A) at 639-649, Corbett JA (as he then was) was satisfied, despite difficulties in interpreting the section, that to call a paint "Mikacote" was to use that word as a trade mark. He went on to conclude that that use was an infringement of the registered trade mark "Micatex" used on the appellant's paints, because it "so nearly resembled the appellant's registered trade mark as to be likely to deceive or cause confusion". I may say that the confusing section is still in our legislation, but was altered in 1993 in South Africa - see Abbott Laboratories v Xeragen Laboratories Ltd, an unreported judgment of Hurt J in the Natal Provincial Division delivered on 11 December 1996.

Mr de Bourbon urged us, by parity of reasoning, to conclude that to call a breakfast cereal "Fruit Hoops" is to use those words as a trade mark; and such use is an infringement of Kelloggs' registered trade mark "Froot Loops" because the former so nearly resembles the latter as to be likely to deceive or cause confusion.

It seems to me that this argument has a great deal of force (though subject to what follows in relation to the "purely descriptive" argument). In a sense it is odd that Cairns cannot rely on the fact that the word "Willards" appears prominently before the offending words in all but one minor instance on the packet. But the cases are clear - see Webster and Page SA Law of Trade Marks 3 ed pp 266-7, and Luster Products Inc v Magic Style Sales CC 1997 (3) SA 13 (A) at 27G-I. I agree with what the learned judge *a quo* said in this regard. One must look at the offending words in isolation. They certainly are very similar.

But this leads to a consideration of the argument that the words "Froot Loops" (with a disclaimer in respect of the word "froot" or "fruit") are in reality purely descriptive. My conclusion is that they are not. They do not, after all, describe the essence of the product, namely that it is a breakfast cereal. They describe only its incidental qualities (flavour and shape). They are thus not "completely descriptive", to use the words of Lord Russell of Killowen in Shredded Wheat v Kellogg Co [1938] 1 All ER 618 (PC) at 626B.

The contrary argument is that, for the people who buy breakfast cereals, the fact that "Froot Loops" is a breakfast cereal is assumed. Given that assumption,

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the name is wholly descriptive, in that it describes the two features which distinguish it as a breakfast cereal from other breakfast cereals - its flavour and its shape. Thus, so the argument concludes, the reasoning in the Shredded Wheat case is applicable in the present case. Lord Russell was at pains to point out (at 629C-E) that:

> "The plaintiff company was in no way using the words shredded wheat as indicative of the origin of the goods contained in the carton, but was using them only as descriptive of those goods. The indications of origin are the trade mark in association with the factory at Niagara Falls, and the name of the company, all of which are prominently displayed. By that carton the plaintiff company was telling the public as plainly as it could that shredded wheat need not necessarily be of its manufacture, but that it was the person who was the original manufacturer of the product known as shredded wheat. The plaintiff company was in fact using the words shredded wheat to indicate the thing, not the manufacturer, to indicate the stuff of which the biscuits were composed, not who made them."

Accordingly, despite the fact that "shredded wheat" was the plaintiff's registered trade mark, the court held that that registration was invalid, and that an action based upon its validity must therefore fail.

In the present case, Kelloggs have no patented monopoly over the production of a breakfast cereal with a fruit flavour in the shape of a hoop, loop or ring. Cairns are entitled to produce the identical product if they can do so, or if they cannot, then a similar product. And they must be entitled to give it a name which describes its particular qualities - those which distinguish it from other breakfast cereals in its own range. The two distinctive qualities which the product has are its fruit flavour and its circular shape.

I accept that Kelloggs have no patented monopoly. But otherwise I reject the contrary argument. I conclude that "Froot Loops" is merely partly descriptive, in that it does not describe the essential feature of the product - that it is a breakfast cereal. Accordingly I cannot hold that the registration of the trade mark is invalid, if indeed that question is strictly before us; there is an action for expungement in another court.

Nevertheless, as Astbury J pointed out eighty years ago in Imperial Tobacco Co (of Great Britain and Ireland) Ltd v de Pasquali & Co (1918) 35 RPC 185 at 195:

> "A distinctive, invented, or fancy word has a much wider scope for colourable imitation than a word primarily descriptive, especially if the latter be in common English use."

Thus the weight of the onus upon a plaintiff seeking to establish colourable imitation is substantially lighter in the case of a fancy word than in the case of a partly descriptive word - see Webster and Page op cit at p 267 and the cases cited in footnote 43. I note also the remark by Plewman JA in the Luster Products case *supra*, that " use as a trade mark is not readily seen as descriptive use" (at 28H).

McNALLY JA

Once it is accepted that the registered trade mark "Froot Loops" is only partly descriptive, then one is faced with the question: "Is the mark "Fruit Hoops" so visually and phonetically similar

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that it is likely to deceive or cause confusion to the purchasing public?".

Because of the disclaimer in respect of the words "froot" or "fruit" we are really looking at the words "loops" and "hoops" used in conjunction with "fruit/froot". And it seems to me there is an inescapable similarity, both visually and phonetically.

Cairns cannot be heard to say that they had to use the word "hoops" in order to describe their product. They could have used other words. "Rings", "rounds", "roundels", "wheels" all come to mind. They chose to choose the word visually and phonetically nearest to "loops".

The conclusion must be that they are using a mark which so nearly resembles Kelloggs registered trade mark as to be likely to deceive or cause confusion.

One line of defence remains. This is the provisions of s 11(1)(b) of the Act, which read:

> "The registration of a trade mark shall not interfere with -
>
> (a) ...
>
> (b) the use by any person of any *bona fide* description of the character or quality of his goods or services."

Despite Cairns' protestations of innocence, I cannot think it would be anything other than na•ve to pretend that the name was not chosen precisely because of its closeness to the registered trade mark words. I have already said that, given the historical context, Cairns must have known that Kelloggs would move into Zimbabwe under the trade liberalisation programme. And they must have known that "Froot Loops" was a registered trade mark abroad for many years - in the United States of America since 1900, in Australia since 1963, in South Africa since 1982, in South America since the late 80s. Obviously, the overwhelming probability was always that Kelloggs would eventually wish to market "Froot Loops" in Zimbabwe.

As Corbett JA said in Plascon-Evans *supra*:

> "... the legislature intended to safeguard ... the use by a trader, in relation to his goods, of words which are fairly descriptive of his goods, genuinely for the purpose of describing the character or quality of his goods: the use of the words must not be a mere device to secure some ulterior object, as for example where the words are used in order to take advantage of the goodwill attaching to the registered trade mark of another."

Given that conclusion, it is unnecessary to decide the correctness of the conclusion reached, after a most interesting and compelling analysis, by Schutz J (as he then was) in Standard Bank of SA Ltd v United Bank Ltd 1991 (4) SA 780 (T) at 806C-D. His Lordship contends, with some force, that when

one is dealing with s 8(1)(a) rather than s 8(1)(b) of one Act, the provisions of s 11(1)(b) cannot be called in aid by the alleged infringer. (I have substituted the Zimbabwean sections for the (since amended) South African sections with which he dealt). As I understood Mr Lloyd's heads of argument, in particular paras 6-8, he accepted and adopted this approach.

I conclude therefore that the court *a quo* erred in its approach to the infringement question, first

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by dealing with the matter under s 8(1)(b), second by requiring proof of the establishment of a reputation, and third by accepting the contention by Cairns that it did not know Kelloggs would launch its product in Zimbabwe under the name "Froot Loops".

Accordingly, the appeal is allowed with costs and the order of the court *a quo* is altered to read:

> "Judgment for the applicant as prayed".

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

HATTINGH & ORS v VAN KLEEK 1997 (2) ZLR 240 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

24 July & 28 August 1997 Judgment No. S-138-97

Flynote

Contract - illegality - agreement to repay loan outside the country - whether agreement violated exchange laws - par delictum rule - applicability - whether rule should be relaxed

Headnote

A foreign visitor to Zimbabwe (the respondent) agreed to give a loan to a Zimbabwean (the first appellant) to be used to develop a safari business. The money loaned was paid to the first appellant by paying the money into his bank account outside Zimbabwe. The first appellant, together with two other Zimbabweans (the second and third appellants), signed a promissory note to repay the loan.

The respondent sued the three appellants for the recovery of the loan. The High Court held that the appellants were jointly and severally liable to repay the loan. The three appellants appealed against this decision on the grounds that the agreement contravened s 8(1)(a)(ii) of the Exchange Control Regulations 1977 (RGN 399/1997). Dismissing the appeal:

Held, that the agreement to repay the loan did not contravene the Regulations.

Held, further, even if the manner in which the repayment was to be made did contravene the Regulations, and thus the in *pari delicto potior est conditio possidentis* rule applied, this was certainly a case which called for the relaxation of the rule. The respondent accepted the undertakings given by the appellants in good faith and on the understanding that they would

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honour them, only to be told, at the last moment, that the appellants' undertaking to repay the loan would contravene Zimbabwean exchange control regulations. The respondent had not been aware of the existence of such a law and could not reasonably have been expected to have been aware of it. Where a contract is on the face of it legal, but by reason of a circumstance known to one party, is forbidden by legislation, it may not be declared to be illegal so as to debar the innocent party from relief; for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceit.

Cases cited:

Archibald (Freightage) Ltd v S Spanglett Ltd, Randall (Third Party) [1961] 1 QB 374

Dube v Khumalo 1986 (2) ZLR 103 (S)

Jajbhay v Cassim 1939 AD 537

Macape (Pty) Ltd v Executrix Est Forrester 1991 (1) ZLR 315 (S)

Case Information

J C Andersen SC, for the appellants

A P de Bourbon SC, for the respondents

KORSAH JA

Judgment

Korsah JA: On 31 July 1996, the High Court, Harare held that the appellants were jointly and severally liable to repay to the respondent the sum of US$150 000 with interest thereon at the rate of 15 percent *per* annum from 15 February 1991 to date of payment, less a sum equivalent to US$11 400, together with costs of suit, the one paying the others to be absolved. It is this decision that the appellants are aggrieved with and dissatisfied by. The events leading to the liability of the appellants follow:

In February 1989, the respondent, who was resident in the United States of America, visited this country on a hunting safari. He met Piet Hattingh ("Hattingh") and discussed the question of him lending money to Hattingh for the purpose of Hattingh developing a safari business on his ranch in Kadoma. By a letter dated 17 December 1990, addressed to the respondent in the United States of America, Hattingh requested an initial loan of US$150 000 for the development of the safari ranch on his farm at Kadoma. There was a fax, which Hattingh admitted in evidence having sent to the respondent (although in the pleadings he denied sending it), instructing the respondent to send the money to the account of Mr Ahmid at the United Bank of Kuwait in London for the attention of Mr James McCafferty. On 14 February 1991, Mr James McCafferty, who was the manager of the branch of the United Bank of Kuwait in London to which the money was sent, wrote to the respondent confirming that the money had been received and credited to he account of Mr Ahmid. There is thus no doubt that in February 1991 the

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respondent loaned and advanced to the first appellant in London the sum of US$150 000.

On 5 August 1991, the first and second appellants each signed a promissory note to repay the sum of US$150 000 at Portland, Oregon, with interest at 15% *per* annum from 15 February 1991. In addition, on 17 September 1991, the first and second appellants signed a document acknowledging their undertaking to repay the sum of US$150 000 with interest to the order of the respondent or Susan R Walter at Portland, Oregon.

In or around September 1991, the first and third appellants signed a document in which it was stated:

> "It is agreed hereby that the loan to us in 1991 will be repaid in full as from February 1994 to April 1994."

There was no qualification to the third appellant's signature to indicate that he signed as a witness. Furthermore, on 25 November 1993, the third appellant called on Mr Edkins at his office at Coghlan, Welsh & Guest, in response to a letter addressed to the first appellant, and acknowledged his personal liability in respect of the loan. As the learned trial judge rightly observed:

> "His visit to Edkins could not have been induced by a summons as he alleges, because the summons was not issued until some time after his visit to Edkins."

KORSAH JA

The above summarises the facts on which the trial court depended to find all three appellants jointly and severally liable to repay the respondent the sum owed with interest thereon at the rate of 15% *per* annum from 15 February 1991 to date of payment.

The only questions which call for resolution are: (1) whether the agreement between the parties contravened the Exchange Control Regulations 1977 (SI 399 of 1977) ("the Regulations"); (2) whether the in pari delicto rule applied; and (3) if applicable, ought it, on the facts of this case, to be relaxed.

It was common cause that the agreement the subject of this appeal did not contravene s 3 of the Regulations, which proscribes dealings in foreign currency in Zimbabwe without prior authorisation by the relevant Minister. The arrangement by the first appellant was clearly not a dealing in foreign currency within Zimbabwe.

The contention of the appellants is that the arrangement between the parties in some way contravened s 8 of the Regulations, which provides for payments outside Zimbabwe and recites that:

> "8.(1) Subject to the provisions of subsection (2), unless otherwise authorised by the Minister -
>
> (a) no Zimbabwean resident shall do any act which involves or is in association with -
>
> (i) the making of any payment outside Zimbabwe; or
>
> (ii) the incurring of any obligation to make payment outside Zimbabwe;

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(b) no foreign resident carrying on any trade, business or other gainful occupation or activity in Zimbabwe shall do any act which involves or is in association with -

(i) the making of any payment outside Zimbabwe; or

(ii) the incurring of any obligation to make payment outside Zimbabwe;

in respect of the trade, business or other gainful occupation or activity carried on by him in Zimbabwe.

(2) The provisions of subsection (1) shall not apply in relation to any act which -

(a) is done by a Zimbabwean resident who is an individual; and

(b) relates to any payment from money which -

(i) is lawfully held by him outside Zimbabwe; and

(ii) is available to him at the time of the act concerned; and

(iii) was acquired by him otherwise than by way of the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe."

KORSAH JA

In particular, it was contended that the arrangement sinned against s 8(1)(a)(ii) of the Regulations in that the agreement of loan, together with any guarantees in the repayment of the loan, was proscribed.

It is pertinent to note that s 8(1) commences with the words "Subject to the provisions of subsection (2)". It is, therefore, necessary in construing subs (1) to ascertain whether the act complained of has not been exempted by subs (2) from the ambit of subs (1).

In the instant case, the loan was solicited by the first appellant, who is a Zimbabwean resident who is an individual; on his instructions it was paid from Portland, Oregon, into an account in London. From the time of payment into the London account, the amount of US$150 000 became lawfully held by the first appellant or his agent, Mr Y Ahmid, outside Zimbabwe, and was available to him at the time that the first and second appellants (as Zimbabwean residents who are individuals), on 5 August 1991, appended their signatures to a promissory note to repay that amount to the respondent at Portland, Oregon, with interest thereon at 15% *per* annum from 15 February 1991. The moneys were acquired by the first appellant otherwise than by way of the proceeds of any trade, business or other gainful occupation or activity carried on by him. In my judgment, the proceeds of any trade, business or other gainful occupation or activity are such monies accruing to such venture or any person on his behalf and for his use after pyment of all the proper expenses of the venture; in other words, the net amount received after payment of commission and other expenses of the venture. The loan itself does not qualify as the proceeds of a venture, nor can the act of undertaking by the first appellant to repay the loan be categorised as proceeds of a venture. Thus the provisions of s 8(1) are inapplicable to the transaction between the first appellant and the respondent.

I have not concerned myself in this judgment with s 7 of the Regulations, which prohibits payment in Zimbabwe, without the authority of the Minister, to the credit of a foreign resident or

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on behalf of a foreign resident and prohibits the placing of any sum to the credit of a foreign resident, because payment in the present matter was to be made, not in Zimbabwe, but in the United States of America, and the appellants have not prayed in aid the provisions of s 7.

Section 8(1)(a)(ii), the mast to which the appellants had nailed their colours, forbids a Zimbabwean resident, subject to the provisions of subs (2), to do any act which involves or is in association with the incurring of any obligation to make a payment outside Zimbabwe. In Macape (Pty) Ltd v Executrix Estate Forrester 1991 (1) ZLR 315 (S), McNally JA declined speculation on the conjectural and said at 317H:

> "We must look at the facts as presented before the court. We must decide whether the

> agreement by a Zimbabwean resident, who is to hold that money on behalf of a foreign resident, is legal or unenforceable."

The learned Judge of Appeal then said at p 319E:

> "This case is not about the making of payment outside Zimbabwe. It is about the making of payments in Bulawayo",

which is covered, not by s 8, but by s 7 of the Regulations. On the facts in that case, the learned Judge of Appeal concluded that in terms of s 7 of the Regulations:

> "There was no evidence before the court to show that the underlying cause of the acknowledgement of debt was illegal, and the acknowledgement itself was not illegal."

To the extent that the decision in the Macape case *supra* was based on an interpretation of s 7 of the Regulations, it is of limited assistance in the instant case.

I have dealt with the position of the first appellant in terms of s 8 of the Regulations. I agree with Mr de Bourbon that the matter must be looked at from two aspects: firstly, there is the initial loan to the first appellant; and secondly, there is the subsequent intervention by the second and third appellants.

It seems to me pertinent that s 8 of the Regulations only prohibits, but does not declare void or illegal, the transactions enumerated therein. Lord Pearce advised on the approach to be adopted by the courts towards such legislation in Archibald (Freightage) Ltd v S Spanglett Ltd, Randall (Third Party) [1961] 1 QB 374 at 386-7 thus:

> "Lord Wright said in Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277 at 293:
>
> > 'Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.'
>
> If the court too readily implies that a contract is forbidden by statute, it takes it out of its own power (so far as that contract is concerned) to discriminate guilt and innocence. But if the court makes no such implication, it still leaves itself with the general power, based on public policy, to hold those contracts unenforceable which are ex facie

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> unlawful, and also to refuse its aid to guilty parties in respect of contracts which to the knowledge of both can only be performed by a contravention of the statute."

This is the approach which lets in the two rules which are of general application mentioned by Gubbay JA (as he then was) in the passage cited hereunder from the Dube case.

As far as the second and third appellants are concerned, there is no evidence one way or the other that their undertakings to repay the loan relates to any payment from money which is lawfully held by either of them outside

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KORSAH JA

Zimbabwe and which was available to them at the time of their undertakings. However, the onus of proving unlawfulness is on the party alleging it. If, therefore, the second and third appellants were alleging unlawfulness as a defence because they were not endowed with funds outside Zimbabwe from which they could lawfully draw in consonance with their undertakings when made, then they seek to take advantage of their own unlawful actions to avoid their undertakings to the respondent.

The respondent was visiting this country to participate in a hunting safari. He came from a country to which exchange control regulations were alien. Of them he knew nothing, and of them he never thought. His mind never for an instant of time rested on them. He accepted the undertakings by the appellants in good faith and on the understanding that they were legally binding and that the appellants would honour them, only to be told, at the last moment, that the appellants' undertaking to repay what he had advanced to them was, by the internal legislation of Zimbabwe, contrary to the laws of this country and worthless. Must any reasonable person on hearing the terms of the contract realise that it was illegal, if he has not lived in this country and is not conversant with our then stringent exchange control laws? There was not a shred of evidence that the respondent knew or ought reasonably to have known that such laws were in place in Zimbabwe. If both parties (the second and third appellants on the one hand ad the respondent on the other) had the knowledge that the transaction was unlawful, the undertakings would be unenforceable as being a contract which, to their knowledge, could not be carried out without a violation of the law, subject to the qualification which follows.

Even supposing both parties knew that their agreement was tainted with illegality, as Gubbay JA (as he then was) said in *Dube v Khumalo* 1986 (2) ZLR 103 at 109D-F:

> "There are two rules which are of general application. The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced (by the courts). This rule is absolute and admits no exception. See Mathews v Rabinowitz 1948 (2) SA 876 (W) at 878; *York Estates Ltd v Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim ex turpi causa non oritur actio. The second is expressed in another maxim in *pari delicto potior est conditio possidentis*, which may be translated as meaning 'where the parties are equally in the wrong, he who is in possession will prevail'. The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the par delictum rule and order restituion to be made. They will do so in order to prevent injustice, on the basis that public policy 'should properly take into account the doing of simple justice between man and man'."

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The learned Judge of Appeal then cited a passage from the judgment of

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Stratford CJ in Jajbhay v Cassim 1939 AD 537 at 544-545 to underscore the point that "in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment".

The cases clearly show that where a contract is on the face of it legal but, by reason of a circumstance known to one party only, is forbidden by statute, it may not be declared illegal so as to debar the innocent party from relief; for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceit.

Mr de Bourbon rightly contended that s 37(1) of the Regulations expressly provides that a debtor may not avoid payment by reason only of the debt not being payable without the permission of the Minister. That is to say, judgment can be given even though the payment itself requires the permission of the Minister. Thus, by virtue of s 37(1), the fact that the transaction is prohibited by s 8(1)(a)(ii) of the Regulations, to incur an obligation to make any payment outside Zimbabwe, does not render the claim invalid.

I am of the same opinion as the learned trial judge that the debt did not contravene any provision of the Regulations and if it did it was a case calling for a relaxation of the par delictum rule.

The appeal is accordingly dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Byron Venturas & Partners, appellants' legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

S v TSANGAIZI 1997 (2) ZLR 247 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

3 September 1997 Judgment No. HH-142-97

Flynote

Court - judicial officer - magistrate - transfer out of district - effect on uncompleted criminal trial - whether trial

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de novo before another magistrate may be ordered

Headnote

The accused had pleaded before a magistrate at Mutoko and evidence from one witness had been led. The trial was adjourned and when it resumed the accused, who was on bail, defaulted. Some four years later he was arrested. In the mean time, the magistrate had been transferred twice and by the time of the accused's arrest had been promoted to the position of regional magistrate, stationed in Bulawayo. The magistrate at Mutoko suggested that in view of (a) the time it would take to make the administrative arrangements for the first magistrate to go from Bulawayo to Mutoko and (b) the effect on the regional magistrates court in Bulawayo, the proceedings should be quashed and the matter should be heard de novo by a magistrate at Mutoko.

Held, that such a course was not permissible. Where a judicial officer dies or is incapacitated, the incomplete proceedings are a nullity and the matter may be commenced afresh. Because the judicial officer is incapable of bestowing a verdict, the accused has no right to demand one. Similarly, where the judicial officer recuses himself, he becomes functus officio and it is necessary, if the prosecutor wishes to continue with the case, to have a new hearing. However, where a magistrate is transferred out of the district, he is not disqualified from continuing with the case, provided the necessary administrative steps are taken to vest him with the jurisdiction to exercise his powers in that district. Indeed, this may well be a situation where the concept of implied powers shows that his jurisdiction to complete pending cases continues.

Held, further, that to the extent that the High Court may have a discretion to set aside proceedings which were incomplete because of the transfer of a magistrate, and to order a trial de novo, such a power may only be exercised on the application by one of the interested parties, on notice to the other. It is not a power available on automatic criminal review.

Cases cited:

Monderwa Farms (Pvt) Ltd v B J B Kirstein (Pvt) Ltd 1993 (2) ZLR 82 (S)

Punshon v Wise NO & Ors 1948 (1) SA 81 (N)

S v Chagumbu 1979 RLR 527 (G)

R v de Beer 1962 R & N 382 (SR)

S v de Koker 1978 (1) SA 659 (C)

S v Gwala & Ors 1969 (2) SA 227 (N)

S v Makoni & Ors 1975 (2) RLR 75 (G); 1976 (1) SA 169 (R)

GILLESPIE J

R v Mhlanga 1959 (2) SA 220 (T)

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Zackey v Magistrate, Benoni & Anor 1957 (3) SA 12 (T)

The court referred to the following statutory provisions:

Criminal Procedure and Evidence Act [Chapter 9:07], s 180(6)

Judgment

Gillespie J: A record has been placed before me by the magistrate in Mutoko. He has written this minute:

> "The trial in this matter commenced before my brother magistrate, Mr S Kudya on 29 June 1993.
>
> After one state witness had given evidence the accused defaulted in attending court at the next trial date. A warrant for his apprehension was then issued against him. The accused person was only arrested yesterday i.e. 29 May 1997.
>
> During the time the accused person was on the run Mr Kudya was transferred first to the Harare Magistrates' Court and then the Regional Court in Bulawayo.
>
> The most logical thing to do in the circumstances would be to arrange for Mr Kudya to come from Bulawayo to Mutoko to conclude this partly heard matter. Past experience, however, shows that such arrangements take time to be approved and once approved Mr Kudya's coming to Mutoko will obviously affect the Regional bench in Bulawayo.
>
> Fearing that the accused might abscond for the second time he has now been remanded in custody.
>
> In view of the fact that all the state witness in this matter reside at Mutoko as well as the consideration that only one of them had given evidence I kindly request that the proceedings in this matter be quashed and that it be ordered that the trial starts afresh.
>
> In coming to the above conclusion I have also taken into account that considerable expenses will be incurred by the Ministry in the event of the trial magistrate returning to Mutoko to finalise the matter."

Expedient as this suggestion might seem, I am unable to accede to it. The law does not permit it.

One of the foremost principles of criminal jurisprudence is that a person who has once pleaded to a charge is entitled to a verdict on that charge. This law is encoded in the provisions of the Criminal Procedure and Evidence Act [Chapter 9:01] by s 180(6). The enactment reads:

> "Any person who has been called upon to plead to any indictment, summons or charge shall, except as is otherwise provided in this Act or in any other enactment, be entitled to demand that he be either acquitted or found guilty by the judge or magistrate before whom he pleaded." 1(7)

There are certain exceptions to this rule provided in the Act. None of them, however, cover the situation facing the magistrate in Mutoko. Indeed, there is no provision in either the Criminal Procedure and Evidence Act, or in the Magistrates Court Act, even regulating the position where a magistrate dies or becomes incapacitated. These problem areas are dealt with by the common

GILLESPIE J

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law. In order to determine whether this trial can be commenced afresh, it is therefore necessary to examine the common law relating to the incapacity or unavailability of a judicial officer.

In Gardiner and Lansdown, 2(8) the learned authors state the following:

> "Where a magistrate who has partly heard a criminal case becomes incapacitated the case must be adjourned. In the event of his death or of the incapacity proving other than purely temporary, the matter must be heard de novo before another magistrate."

Reid-Rowland 3(9) summarises the position in these terms:

> "If evidence has been led and the presiding officer dies or is incapacitated (other than temporarily), the proceedings must be regarded as a nullity and the accused may be tried again. It would not be permissible for the new judicial officer to start from where the former left off. If the judicial officer retires or resigns, the proceedings are abortive (except to the extent that a judge of the High Court or Supreme Court may complete proceedings begun by him) and lapse without their having to be set aside.
>
> If a magistrate becomes ill and the incapacity is likely to persist for a considerable period, the proceedings should be set aside on review so that the might be commenced de novo before another magistrate. However, if the magistrate recovers before the proceedings have been recommenced, the reason for the order setting aside the original proceedings no longer exists and the order may be rescinded, so as to allow the proceedings to resume before the first magistrate."

The first proposition, that the death or incapacity of a magistrate brings about the nullity of the incomplete proceedings, is entirely correct. The point is exemplified in a number of cases, which I shall shortly examine below. The principle is that if during the course of proceedings a judicial officer ceases to have jurisdiction then the proceedings up to that point are abortive. 4(10) In such an event, the person on trial cannot demand a verdict since the presiding officer is incapable of bestowing one. The part-heard matter is accordingly a nullity and may be commenced afresh. Without any order of a higher court setting aside the incomplete proceedings.

This was made clear, if greater clarity were required, in S v de Koker 5(11) where Flemming AJ held:

> "Volgens die regspraak bring onmoontlikheid daarvan om met die verhoor voort te gaan weens onbeskikbaarheid van die landdros mee dat die verrigtinge sonder meer as abortief beskou word en verval sonder die noodsaak van enige tersyderstelling deur 'n hoër Hof."

This is translated as:

> "According to the decisions of the courts, the impossibility of continuing with the trial by reason of the unavailability of the magistrate results, without more, in the proceedings

> being regarded as abortive and they fall away without it being necessary for a superior court to set them aside before a new trial can take place."

The first question then is whether the transfer of a magistrate away from the seat of jurisdiction where the incomplete proceedings were commenced is just such an incapacity as renders the

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proceedings null and void.

In R v Mhlanga 6(12) precisely this point was at issue. A person had been arraigned and evidence had been led before a magistrate. The magistrate, during the trial, had been transferred out of the Transvaal and to South West Africa, as it was then known. The trial was commenced afresh in the Transvaal before a new magistrate. Upon his conviction the accused appealed and took the point that the conviction was bad in law since he was entitled to a verdict from the magistrate before whom he had initially pleaded. At p 222 Claassen J held:

> "In my opinion, that point taken is not a good point. In my opinion the relative subsection of the Code relied upon applies if the court as then constituted at the time of recording the plea, continues in existence and retains jurisdiction until the time is ripe to render a judgment of acquittal or conviction. Many events may however occur after the taking of the plea which may render the proceedings abortive and therefore a nullity because the court, as constituted at the plea stage, has ceased to exist or the presiding judicial officer has ceased to have jurisdiction in the matter. Such events may include the death of a magistrate, his resignation or dismissal, his recusal or his transfer out of the particular district. One can think of other possibilities too, but I think it is quite clear that the magistrate only has jurisdiction in a particular district as long as his appointment in that district continues. The moment his appointment there is terminated, his jurisdiction has also come to an end. When an vent such as a transfer has taken place, the magistrate has ceased to have jurisdiction in the court in which the plea was taken and the proceedings in the particular case therefore have become abortive; they have logically become a nullity."

The correctness of this decision, however, has been doubted. In S v Gwala 1969 (2) SA 227 (N), Kennedy AJP distinguished the position where a magistrate has been transferred from other circumstances of unavailability. The learned Acting Judge President observed that Claassen J had cited as authority for his conclusion two cases, namely Punshon v Wise NO & Ors 7(13) and Zackey v The Magistrate of Benoni & Anor 8(14) neither of which was pertinent authority. Indeed, these two cases both refer to the position of a magistrate who has recused himself. The *ratio decidendi* in each is that where a magistrate has recused himself the accused is not entitled to demand a verdict and the proceedings are a nullity. The rationale for this decision is expressed by Williamson J at p 14A of the latter of these two cases:

GILLESPIE J

> "But it seems to me that [a decision to recuse oneself] must amount to a decision that the court has no jurisdiction to hear the matter. Once that is decided the court could not be properly seized of the matter at all, and all the proceedings before that court prior to the recusation being accepted must logically become a nullity. In my view an accused successfully asking for recusation cannot demand any more than that the court records its recusation - it cannot claim any verdict at all."

Similarly, Kennedy AJP in Gwala *supra* said of a magistrate recusing himself, at 229A:

> "Clearly, such officer becomes functus officio upon his recusal and, the prosecutor desiring to proceed with the case, it becomes necessary to have a completely new hearing. Equally, so the death of a magistrate, his resignation or dismissal would give rise to the opening of a case de novo against an accused person."

He held that in the case of a magistrate being transferred in mediis rebus that the judicial officer must be brought back to conclude a part-heard case. He said at p 229E:

> "But the fact that a magistrate who has been transferred out of a district no longer has jurisdiction in that district, does not disqualify him from properly resuming an interrupted hearing in that district, provided the necessary

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administrative steps are taken to enable him to exercise his powers in that district."

Of the two approaches that of the Natal Court seems to me to be the correct one. I do not see any reason for holding the transfer of a magistrate from a province effectively to have curtailed his jurisdiction to complete pending cases. This may well be a situation where the concept of implied powers shows that the jurisdiction continues. It seems to me to be a case analogous to that considered in the matter of Monderwa Farms (Pvt) Ltd v BJB Kirstein (Pvt) Ltd *supra* where a judge's power to formulate and to hand down judgment after resignation was held to be necessarily incidental to his function. But even if such a power is not held to be necessarily incidental to the jurisdiction of a magistrate who is transferred from his former seat, nevertheless he is by no means incapacitated from exercising that jurisdiction further. The simplest of administrative steps are all that are required to ensure his temporary return to his erstwhile province in order to complete a part-heard matter. Certainly, there is no reasn which I can perceive in such an event to deny the accused his right to demand a verdict from the magistrate before whom he pleaded. I therefore hold that the transfer of a magistrate during the course of criminal proceedings does not have the effect of rendering the part-heard proceedings a nullity in the same way as if he had died or become incapacitated.

This brings me to consideration of a second point mentioned above and considered by Reid-Rowland. The point concerns the proposition that a temporary incapacity of the presiding magistrate may be perceived by the High Court on review of the part-heard proceedings as sufficient ground for

setting aside those proceedings and ordering trial de novo. This proposition has been considered in this court in the matter of S v Makoni & Ors.9(15) Davies J, (as he then was) had to decide whether temporary illness constituted incapacity. He said:

> "It seems to me that in principle where a magistrate is incapacitated through illness from continuing with a case justice requires that the proceedings should in fact be set aside and commenced de novo before another magistrate, if the incapacitation of the magistrate is likely to persist for a considerable period. There is no doubt that the delay of at least three months which will be involved in the present cases if the same magistrate is to continue hearing them is a lengthy delay and I consider in the circumstances that I can properly set the proceedings aside.
>
> The Director of Public Prosecutions, to whom the matter has been referred, submits that this court has an inherent right so to act and he agrees that I should so order."

This dictum contains two points. The first is that the temporary illness of a magistrate may amount to an incapacity which in the appropriate case will justify the setting aside of proceedings interrupted by that illness. This proposition commends itself to good sense and expedience. Particularly inasmuch as it not defined in such a way as suggests that the illness of itself nullifies the proceedings underway. The authority of the learned judge who pronounced the decision, and of him who endorsed it, 10(16) is moreover such that one would not wish to disagree with it. It is the second part of the passage quoted which causes me difficulty.

The difficulty I perceive relates to procedure. Davies J was acting on review. The judgment

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shows no thought being given to the question of the proper procedure to be adopted if a judge is to determine the question whether or not to set aside a partially completed trial on the grounds of a magistrate's temporary illness. He heard no submission from the Attorney-General other than the proposition that the court has an inherent power to act. This may be so, but it still does not elucidate the question of procedure. There are two major jurisprudential obstacles to the expedient approach adopted by Davies J. The first is the question of audi alterem partem. The accused might not wish the proceedings to be set aside. He might not wish a trial de novo; he might wish to demand a verdict from the magistrate before whom he pleaded. If this court has a discretion to overrule his wishes, it is one which surely must only be exercised after he has been heard.

The second obstacle is illustrated in a decision of Maisels J during the period, all too brief, when that great advocate graced this Bench. In the matter

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GILLESPIE J

R v de Beer 11(17) the learned judge pointed out that in terms of the relevant provision of the then existing High Court Act the court can only exercise the powers of review of criminal proceedings provided by statute once a conviction has been entered. The present law, s 29 of the High Court Act [Chapter7:06], is undoubtedly very different from the law as it existed in 1962. Nevertheless, it is clear from the Act that the statutory review powers are provided for in circumstances where the entry of a conviction renders the proceedings ripe for review. This is the inescapable conclusion from the fact that the powers given are the altering or quashing of a conviction or the reduction or setting aside of a sentence. And also from the fact that the powers may not be exercised unless there has occurred a substantial miscarriage of justice.

It is true that the statutory powers of review do not exclude the inherent jurisdiction of the court to regulate the proceedings of lower tribunals. This inherent jurisdiction was recognised and referred to in Makoni's case. For this common law power to be exercised, however, it seems to me that there must be a proper application for review before the court. Either the Attorney-General or the accused must have moved the court to act. The opponent, as I have already said, must have responded to this motion. One cannot manufacture a species of automatic review of incomplete proceedings by the mere expedient of a magistrate causing papers to be placed before a judge.

I am therefore led irresistibly to the following conclusion. The transfer of a magistrate from the seat where he commenced proceedings does not bring about the nullity of proceedings, which were incomplete at the time of the transfer. To the extent that the High Court may have a discretion to set aside proceedings remaining incomplete for this reason, and to alter a trial de novo before a different magistrate, such power can only be exercised on application by one of the interested parties on notice to the other. It is not a power available on automatic criminal review as set out in statute. An automatic review does not lie in such circumstances since the proceedings will not have been completed.

I must therefore decline to act in the manner suggested by the magistrate. The necessary administrative arrangements to have the original magistrate conclude the matter must be made

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or a substantive application must be made by one of the interested parties.

UNITED PARTIES v MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS & ORS 1997 (2) ZLR 254 (SC)

Court **Supreme Court, Harare**

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

Constitutional application

30 July & 5 September 1997 Judgment No. S-139-97

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - enforcement of rights - locus standi - application by political party challenging constitutionality of certain provisions of Electoral Act [Chapter 2:01] - whether a political party has locus standi to challenge constitutionality of such provisions and seek redress under s 24(1) of the Constitution - s 20(1) - freedom of expression - s 3 of Political Parties (Finance) Act [Chapter 2:04] - s 3 - whether violates s 20(1) of Constitution

Headnote

The applicant, an opposition political party, sought to challenge the constitutionality of ss 25(1), 26(5) and 158(2)(c) of the Electoral Act on the basis that these provisions contravened the protection of freedom of expression contained in s 20(1) of the Constitution. The party also sought to challenge the constitutionality of s 3 of the Political Parties (Finance) Act [Chapter 2:04] on the basis that this provision contravened the constitutional protections of freedom of expression (s 20(1)), assembly and association (s 21(1)) and freedom from discrimination (s 23(1)).

As regards the challenge to ss 25(1) and 26(5) of the Electoral Act:

Held, that the applicant had no locus standi in judicio to bring the matter before the Supreme Court. In terms of s 24(1) of the Constitution an applicant has locus standi to seek redress where there has been a contravention of the Declaration of Rights in relation to himself. The applicant must be able to show a likelihood that it would be affected by the law impugned. It has no right to seek redress either on behalf of the general public or anyone else. The applicant was not entitled to carry the torch for claimants and voters generally. The impugned provisions related to individuals who were claimants or voters. A political party could be neither a claimant nor a voter and thus it had no locus standi in this matter.

Held, further, that even if it could be said that the applicant could be affected by those provisions in the sense that some of its members were voters and some could be claimants and that these members might be affected by the provisions, the applicant was required by s 24(1) of the Constitution to show that it was likely that the Declaration of Rights would be contravened in respect of its members. To establish that there was likely to be a contravention, it had to be shown that there was a reasonable, realistic or appreciable probability that there will be a

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contravention. A remote or fanciful prospect of this

happening would not suffice. The applicant had produced no evidence that in past elections anyone had been impeded in the enjoyment of his or her rights by the challenged provisions. It had not been established that there was a likelihood in the future of the constituency registrar being faced with situations in which he is prohibited from taking action; and that a claimant or voter so affected may wll be a member of the applicant's party. Thus the applicant had only established a fear or remote possibility of the contravention and this was an inadequate foundation upon which to seek enforcement of the protective provisions of the Declaration of Rights.

As regards the constitutional challenge to s 158(2) of the Electoral Act:

Held, that this law was not restricted in its ambit to a claimant or voter or other specified person and thus the applicant had locus standi to challenge it.

Held, further, that the contention that this provision violates the freedom of expression protection was quite untenable. The provision empowered the President to make a statutory instrument providing for the validating of anything done in connection with an election which is in contravention of the Electoral Act or any other law. However, there is no extant statutory instrument made by the President in terms of this provision. Until such a statutory instrument is made, the issue of its constitutionality does not arise. A law that does not exist cannot be impugned. Only when such a law is made can it be challenged.

As regards the constitutional challenge to s 3 of the Political Parties (Finance) Act:

Held, that an enactment neutral on the face nonetheless may, in its application, offend the Constitution if it denies, or unduly burdens, the exercise of a fundamental freedom protected by the Constitution, such as freedom of expression.

Held, further, that freedom of expression is universally recognised as a core value of society. One of the functions of freedom of expression is to protect the free flow of information and ideas in a society. This is essential to the proper functioning of a democratic system. In the political sphere, political parties competing for power are entitled to communicate freely with the electorate in order to try to persuade the electorate to support them and vote for them. Only by the spread of information, opinions and arguments, can voters make a responsible choice in determining whether they should support a particular candidate at an election or the party that person represents.

Held, further, that the curtailment of this right to disseminate and to receive information about competing political parties adversely affects freedom of expression and undermines the democratic process. Political parties contending for ascendancy ought not to be limited by over-stringent legislative measures in the capacity to engage in dialogue as widely as is deemed necessary.

Held, further, that effective communication by political parties with the electorate requires money. Money is required to distribute written materials, to hold meetings around the country

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and to travel to various parts of the country to speak to people. In poorer countries it is not possible to obtain sufficient amounts of finance to subsidise these activities from the private sector and from contributions from members of parties.

Held, further, that the funding of political parties enables the parties to disseminate information to the electorate in the lead up to elections and between elections and this advances the purposes of freedom of expression.

Held, further, that it is justifiable to place a reasonable limitation upon the payment of State funds to political parties. Such limitation encourages serious political contenders but discourages trifling parties from being established solely in order to secure public funding.

Held, further, that unless funding is provided in a manner that is non-exclusionary and tolerant of political pluralism and electoral competition it will do no more than entrench major political parties and treat far less fairly minor or new opponents. A high threshold for

entitlement to receive State funding makes it extremely unlikely that small but meaningful voices will be heard. In a non-affluent society, where nothing like adequate funding is available from private sources, such a threshold renders it virtually impossible for other political parties to gain any real margin of success. Any public funding system that systematically excludes all but one party strongly suggests that the threshold is set too high.

Held, further, that in assessing whether the threshold is set too high, the court can take into account the practical effect of this funding system upon political parties in Zimbabwe. The threshold of fifteen elected members of Parliament to qualify for State funding places the system way beyond the reach of all opposition parties presently. The result of the present system is that only the ruling party receives funding. The system manifestly maintains the status quo as it allows the ruling party it to gain a considerable advantage over opposition parties in communicating with the electorate. All the other political parties are placed at a disadvantage; none of them qualify for funding because of the high threshold set and these other parties are thus not able to engage in meaningful political campaigning.

Held, therefore, that the present scheme upon which State funding is paid abridges the protection of freedom of expression because it sets a too high threshold for political parties to qualify for public funding . Thus the whole of s 3(3) of the Political Parties (Finance) Act is invalid as it is inconsistent with s 20(1) of the Constitution. As the striking down of s 3(3) of the Act rendered the allied provisions contextually inappropriate, it will be incumbent upon the legislature to replace the whole of s 3 of the Act.

Cases cited:

A-G v Times Newspapers [1973] 3 All ER 54 (HL)

A-G, Canada v Barrette & Payette (1994) 113 DLR (4th) 623

Australian Capital Television (Pty) Ltd v Commonwealth of Australia (1992-1993) 177 CLR 106 (High Court of A)

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Barrette & Payette v A-G, Canada (1993) 14 CRR (2d) 166

BVerfGE 20, 56 (1966) (German Constitutional Court)

BVerfGE 24, 300 (1968) (German Constitutional Court)

BVerfGE 88, 264 (1992) (German Constitutional Court)

Elliott v Comr of Police & Anor 1997 (1) ZLR 315 (S); 1997 (5) BCLR 670 (ZS)

In re Wood & Anor 1994 (2) ZLR 155 (S); 1995 (1) BCLR 43 (ZS)

Parkin v Norman [1982] 2 All ER 583 (QBD)

Reform Party of Canada v Canada (A-G) (1995) 27 CLR 254

Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199 (S); 1995 (9) BCLR 1262 (ZS); 1996 (1) SA 847 (ZS)

Ruwodo NO v Min of Home Affairs & Ors 1995 (1) ZLR 227 (S); 1995 (7) BCLR 903 (ZS)

S v ffrench-Beytagh 1972 (3) SA 430 (A)

S v Protea Medical Services (Pvt) Ltd & Anor 1972 (1) RLR 17 (A)

Upjohn Co v Merck & Anor 1987 (3) SA 221 (T)

The court considered the following statutory provisions:

Constitution of Zimbabwe 1980, ss 20(1) and 24(1)

Electoral Act [Chapter 2:01], ss 3, 25(1), 26(5) and 158(2)(c)

Political Parties (Finance) Act [Chapter 2:04], ss 3 and 4

Election Act 1985 (Canada), s 241

Election Finance Act 1986 (Ontario), s 46(1)

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Election Act (Quebec), s 457

Electoral Act 1992 (Queensland), s 297(1)

Parliamentary Elections Act 1981 (Sri Lanka)

Case Information

A P de Bourbon SC, with him *D Mwonzora*, for the applicant

P A Chinamasa, Attorney-General, with him *Mrs J Zindi*, for the first, second and third

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respondents

No appearance for the fourth and fifth respondents

Judgment

Gubbay CJ: The applicant is a recognised political party formed at the end of 1994 in opposition to the ruling party, Zimbabwe African National Union (Patriotic Front) ("ZANU (PF)"). It held its inaugural congress on 18 February 1995, at which occasion the Reverend Abel Muzorewa was elected to the office of President. It has no members in the current Parliament.

Pursuant to the right to obtain enforcement of the protective provisions of the Declaration of Rights, afforded to any person by s 24(1) of the Constitution of Zimbabwe, the applicant has laid directly before this Court the constitutionality of various sections of the Electoral Act [Chapter 2:01] and the Political Parties (Finance) Act [Chapter 2:04]. It asserts that ss 25(1), 26(5) and 158(2)(c) of the former Act contravene s 20(1) of the Constitution - the protection of freedom of expression; while s 3 of the latter Act infringes ss 20(1), 21(1) - freedom of assembly and association - and s 23(1) - freedom from discrimination - and is likewise unconstitutional. The relief sought, which is opposed by the respondents, is in the form of declarators to the effect stated, with consequential orders of invalidity.

THE ISSUES

It is proposed to consider the substantive issues raised by the parties in the following order:

(a) Has the applicant locus standi in judicio to obtain redress in respect of the impugned sections of the Electoral Act?

(b) If, so, do such provisions offend against s 20(1) of the Constitution?

(c) Is s 3(3) of the Political Parties (Finance) Act inconsistent with either s 20(1) or s 21(1) or s 23 of the Constitution?

(d) What remedy is the applicant entitled to if contraventions of the Constitution are established?

THE INTEREST OF THE APPLICANT IN RELATION TO THE IMPUGNED SECTIONS OF THE ELECTORAL ACT

Section 24(1) of the Constitution reads in material part:

GUBBAY CJ

> "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him ... then, without prejudice to any other action with respect to the same matter which is lawfully available, that person ... may ... apply to the Supreme Court for redress."

Unless the context otherwise requires, "person" is defined in s 113(1) to mean:

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"any individual or any body of persons, whether corporate or unincorporated."

Thus, s 24(1) affords the applicant locus standi in judicio to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate that law. See Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Anor 1995 (2) ZLR 199 (S) at 207H-208A; 1995 (9) BCLR 1262 (ZS) at 1269E-G; 1996 (1) SA 847 (ZS) at 854D-F.

So it was in In re Wood & Anor 1994 (2) ZLR 155 (S) at 159F-160B; 1995 (1) BCLR 43 (ZS) at 46H-47B; 1995 (2) SA 191 (ZS) at 195G-I, that this court held that the right to reside in any part of Zimbabwe, as guaranteed by s 22(1) of the Declaration of Rights, vested in the minor child of Mrs Wood and not in her. No constitutional right in relation to her was violated by the refusal of the immigration authorities to grant her a residence permit. See also Ruwodo NO v Min of Home Affairs & Ors 1995 (1) ZLR 227 (S); 1995 (7) BCLR 903 (ZS).

It is convenient at the outset to recite ss 25(1) and 26(5) of the Electoral Act in order to determine whether the applicant is being, has been or is likely to be affected by their terms. Section 25(1) reads:

"(1) If a constituency registrar has reason to believe that -

(a) a claimant is not entitled to be registered; or

(b) a claimant is not entitled to be registered on the voters roll on which he has claimed to be registered; or

(c) a voter registered on a voters roll is not qualified for registration on that voters roll;

he shall send to the claimant or voter, as the case may be, written notice of objection to which a form of notice of appeal shall be annexed:

Provided that no such objection shall be taken or notice sent during the period between the issue of a proclamation referred to in section thirty-eight or thirty-nine and the close of polling at the election to which such proclamation relates."

Section 26(5) has this:

"Notwithstanding anything in this section, if the constituency registrar receives an objection in terms of subsection (1) during the period of thirty days immediately prior to the polling day or first polling day, as the case may be, fixed for an election in the

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constituency in which the person to whom the objection relates is registered, he shall take no action on such objection until after the close of the polling day or last polling day, as the case may be."

To be read with these sections are the definitions of "claimant" and "voter" appearing in s 3 of the Act. "Claimant" means a person who:

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"(a) has completed a claim form; or

(b) has submitted a written application in terms of subsection (2) of section 24" (that is, to the constituency registrar to be registered on the new voters roll having been previously registered as a voter on the voters roll for that constituency).

And "voter" means:

"a person who is entitled to vote and is registered on a voters roll."

When regard is had to the meaning of "claimant", it becomes apparent, I think, that the applicant, as a political party, does not come within the purview of s 25(1). It does not complete a claim form, nor is it registered on the voters roll. The applicant is not a person even liable to be affected by the opinion of the constituency registrar, or by the mandatory inaction of that official.

Precisely, the same line of reasoning is applicable to s 26(5). The applicant is not touched by this provision. The objection must be that of a voter. The applicant is not entitled to vote and is not registered on a voters roll. It is a political association whose members, though not necessarily all of them, are voters. It is they, if voters, not the applicant itself, who are given the right of objection.

If it be assumed (contrary to the view expressed) that the reach of ss 25(1) and 26(5) of the Electoral Act may affect the applicant, in the sense of those claimants or voters who are its members, the question then is whether these provisions have been, are being or are likely to be contravened in relation to such members.

No evidence has been offered that at any past election anyone has been impeded in the enjoyment of his or her rights under these provisions. It is not alleged that the constituency registrar has ever had occasion to apply the mandatory sanctions. In the absence of any factual foundation, can it be said with any degree of conviction that the constituency registrar is likely to do so in the future?

Much turns on the meaning of the phrase "likely to be contravened". Certainly it does not embrace any fanciful or remote prospect of the Declaration of Rights being contravened. Nor does it refer to the Declaration of Rights being liable to contravention. See Parkin v Norman [1982] 2 All ER 583 (QBD) at 589c-d. Rather it means a "reasonable probability" of such a contravention occurring. See S v Protea Medical Services (Pvt) Ltd & Anor 1972 (1) RLR 17 (A) at 22F-G, 1972 (2) SA 386 (R, AD) at 390A-B; S v ffrench-Beytagh 1972 (3) SA 430 (A) at 457 in fine- 458B; The Upjohn

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Company v Merck & Anor 1987 (3) SA 221 (T) at 224G-I. There must exist a realistic or appreciable probability - and not merely a reasonable possibility - for there to be the requisite basis to invoke a constitutional challenge.

Under s 25(1) it is only during the period between the issue of the proclamation and the close of

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polling, namely thirty days, that the constituency registrar is barred from taking an objection against a claimant or voter. And in terms of s 26(5), he is not permitted to take any action upon an objection by a voter to the retention of any name on the voters roll of the constituency in which he is registered, should such objection be received during the period of thirty days immediately prior to the polling day. What then the applicant has to establish is both a realistic or appreciable probability of the constituency registrar being faced with the situations in which he is prohibited from taking action; and that a claimant or voter so affected may well be a member of the applicant's party.

The applicant is not entitled under s 24(1) of the Constitution to carry the torch for claimants and voters generally. It has to show that absence of action by the constituency registrar is likely to affect those of its members who qualify under ss 25(1) and 26(5) of the Electoral Act.

In my opinion, the most the applicant has been able to indicate in relation to itself, in this wide sense, is a fear of such an occurrence - a remote possibility of it happening. That is an inadequate foundation upon which to seek enforcement of the protective provisions of the Declaration of Rights. In short, the applicant's concern is predicated on surmise or conjecture.

Under s 158(2)(c) of the Electoral Act:

> "Statutory instruments made in terms of subsection (1) [that is, by the President] may provide for -
>
> (c) validating anything done in connection with, arising out of or resulting from any election in contravention of any provision of this Act or any other law."

Although not restricted in its ambit to a claimant, voter or any other specified person, the contention that this provision offends against s 20(1) of the Constitution is quite untenable. There is extant no statutory instrument made by the President providing for the validation of anything done in relation to an election in contravention of the Act or any other law. Until such a statutory instrument is made, the issue of its constitutionality does not arise. It is prematurely raised. A law that does not exist cannot be impugned. The power to make the law must be implemented before it, or anything done under it, becomes open to challenge.

The applicant is not therefore entitled to question before this court the constitutional validity of ss 25(1), 26(5) and 158(2)(c) of the Electoral Act.

GUBBAY CJ

THE POLITICAL PARTIES (FINANCE) ACT

(1) THE NATURE AND STRUCTURE OF THE ACT

The preamble to the Act states that its purpose is:

> "... to provide for the financing of political parties by the State and for matters connected therewith or incidental thereto."

In order to qualify for financial support, a political party must apply to the Minister of Justice, Legal and Parliamentary Affairs for registration in terms of s 4. Any such application must

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identify each of its candidates for election in the general election. Further information prescribed by the Minister may also be required. If the Minister is satisfied that the candidates identified are members of the political party concerned, he must register it. An appeal lies to the High Court against the Minister's refusal to entertain an application by a political party.

Section 3 deals with the actual financing of political parties. Subsection (1) stipulates that every registered political party shall be entitled to receive from the State the sums of money payable to it under the Act. Subsection (2) obliges the Minister, with the approval of the Minister of Finance, to specify annually by notice in the Gazette (a) the total amount of moneys payable to all registered political parties; and (b) the moneys paid to each individual registered political party. Subsection (3) reads:

> "For the purpose of paragraph (b) of subsection (2), each registered political party shall be entitled to the same proportion of the total moneys specified in terms of paragraph (a) of that subsection as the number of elected members of Parliament who are members of that political party bears to one hundred and twenty:
>
> Provided that, where fewer than fifteen elected members of Parliament are members of a particular registered political party, that political party shall not be entitled to any moneys in terms of this Act."

Subsection (4) is concerned with the calculation of the number of elected members of Parliament who are members of any political party. And subs (5) covers the situation where a general election is held in a year in which the Minister has already published a notice in terms of subs (2). The proviso to para (b) thereof states that no political party shall be required to refund any amount paid to it where payment had been made in an election year, but prior to the election itself.

Section 6 expresses that moneys paid to registered political parties are to be paid from the Consolidated Revenue Fund.

Finally, s 8 makes it clear that the Act does not preclude any political party from lawfully obtaining moneys from persons other than the State. No limitation is placed on the amount that may be so raised.

GUBBAY CJ

What is most significant about this Act is that no registered political party with less than fifteen elected members of Parliament will be entitled to be paid any moneys by the State. Parties with the requisite number of elected members will receive funding every year and not only after a general election has taken place. The amount of such funding is calculable on the basis of the number of their members as a percentage of the one hundred and twenty common roll constituencies. Plainly the funding is designed to subsidize permanently the political parties that qualify and not merely to reimburse their election expenses.

(2) THE FACTUAL BACKGROUND

On 22 December 1987, the "Unity Accord" was achieved, in pursuance of which the two main political parties in Zimbabwe, ZANU (PF) and the Patriotic Front - Zimbabwe African People's Union, merged under the name ZANU (PF). In the event, the ZANU (PF) party had seventy-nine

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elected members in the then House of Assembly out of a total of ninety-nine.

At the general election held on 28 and 29 March 1990, one hundred and seventeen of ZANU (PF)'s candidates were elected to Parliament out of a total of one hundred and twenty. The party did not lose a single seat in the eight by-elections which preceded the next general election.

At the 1995 general election, convened on 8 and 9 April, the ZANU (PF) party yet again scored a mammoth victory. One hundred and eighteen of its candidates, out of a total of one hundred and twenty, were elected to Parliament. At a by-election which followed in December 1995, an independent candidate was elected for the Harare South constituency.

On 23 October 1992, the Political Parties (Finance) Act was promulgated. For each of the three successive years from 1 July 1993 to 30 June 1996 ZANU (PF), being the only registered political party that qualified in terms of s 3 of the Act for funding, was paid $32 million. For the eighteen month period extending from 1 July 1997 to 31 December 1998, it is to receive $65 million ($22 million for the six months of 1997, and $43 million for 1998). The estimated payments to be made to it for the years 1999 and 2000, are $40 million and $47 million respectively.

The next general election is due in the year 2000.

(3) COMPARATIVE SYSTEMS OF PUBLIC FUNDING OF POLITICAL PARTIES OR CANDIDATES

(a) *Germany*

The electoral system that operates is essentially one of proportional

representation. However, political parties that obtain less than five percent of the total vote at a general election receive no mandate at all.

State financing of political parties commenced in 1959 and came under the scrutiny of the Federal Constitutional Court in the case reported as BVerfGE 20, 56 (19 July 1966). The court held that general party financing was not allowed under the Constitution. But the State was permitted to reimburse the costs of the election - elections being considered a task of the State, for the fulfilment of which it depended on the co-operation of political parties. The court expressed the view, however, that a reimbursement of costs only to those parties which passed the five percent threshold was incompatible with the principle of party equality (termed "the equality of chances"). The threshold was too high and should be lowered. On the other hand, the court found a limitation acceptable which prevented parties from participating in the election solely in order to receive public funds. As to the amount of the reimbursement, the court held that the Constitution did not require that an equal sum be given to every party which participated in the election. It emphasised that the principle of equality was violated if funding was restricted either to those parties already represented in Parliament, or which acquired seats at the

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election.

As a consequence of this decision, the Federal Parliament enacted a law in 1967 granting reimbursement of election costs to those parties which obtained at least 2.5% of the total vote at a general election. The outcome of the election also determined the amount of reimbursement. For every vote that a party had obtained above the threshold, the sum of DM 2.5 was paid.

This law was considered by the Federal Constitutional Court in BVerfGE 24, 300 (3 December 1968). Although not objecting to the general approach of the Legislature, the court held that the reimbursement level fixed at 2.5% of the total vote was still too high. As the only valid justification to deny reimbursement to political parties was to exclude the non-serious competitors, it held that a minimum threshold of 0.5 percent of the total vote was sufficient to warrant reimbursement of a party's election expenses.

In BVerfGE 88, 264 (9 April 1992) the Constitutional Court altered its opinion as to the impermissibility of general party financing by the State. It now allowed such financing of political parties for constitutionally acknowledged tasks. Yet it stressed that political parties, as societal forces, had to remain rooted in the electorate and not become dependent on the State. Therefore State financing was not to exceed half of the total income of parties. This meant that election results could no longer be the only parameter for State funding.

The decision necessitated an amendment to the law covering political parties. The threshold of 0.5% of the total vote was not changed.

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Although State funding in Germany is no longer restricted to reimbursement of election expenses provided the requisite threshold is attained, what must not be overlooked is the weight placed by the Constitutional Court on equality of opportunity. And, furthermore, that it is inconsistent with this principle for funding to be provided solely to those parties that had already been represented in Parliament or that acquired seats in Parliament. See generally, Murphy and Tanenhaus *Comparative Constitutional Law - Cases and Commentaries* at 583-586.

(b) *Canada*

This system gives financial support to political parties through individual candidates as reimbursement for personal election expenses. For Federal elections, s 241 of the Canada Election Act, R.S.C. (1985) c. E-2 allows for candidates who have secured at least 15% of the popular vote in their constituency to be reimbursed to the extent of 50% of their election expenses. An identical provision is contained in s 46(1)of the Ontario Election Finance Act, 1986 O.S. c. 23. The Quebec legislation is both more lenient and more restrictive. It requires a candidate to obtain at least 20% of the popular vote in order to receive reimbursement of 50% of his or her expenses. However, it also automatically offers reimbursement to the winning candidate, the incumbent and the candidate who is a member of one of the two most popular parties at the last election (see s 457 of the Election Act, RSQ c. E 3-3).

Public financing of political parties also occurs through various forms of direct assistance. At the

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Federal level since 1983, parties are automatically reimbursed 22.5% of their election expenses on the condition that they have spent at least 10% of the maximum expenditure allowed. In Ontario reimbursement is also afforded to political parties, but only to those who have received 15% of the vote on a province wide basis. In Quebec all registered parties receive an annual allowance that is independent of the electoral process and is designed to help cover their operating costs. This funding is proportional to the number of votes received in the last election. A party may thus receive the allowance without being represented in the Assembly.

The constitutional validity of election expenses under the Canada Election Act was considered by the Quebec Superior Court in Barrette and Payette v Attorney General of Canada (1993) 14 CRR (2d) 166. The facts were that in the 1988 Federal election the second petitioner, Payette, was an unsuccessful candidate for election in one of the electoral districts. He received 11.89% of the total votes validly cast. His election agent was the first petitioner, Barrette. Reimbursement of Payette's election expenses was refused because he had not attained the requisite 15% of the vote. In consequence the

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petitioners applied for an order declaring that the regime of 15%, fixed by ss 24(1)(a) and 242 of the Act, was in violation of the Charter of Rights and Freedoms. The matter came before Gomery J, who held that the limitation of the reimbursement of election expenses to those candidates receiving 15% of the vote, was contrary to the Charter's s 3 (the right to vote) and s 2(b) (freedom of expression); but that s 15 (theright to the equal protection and equal benefit of the law without discrimination) was of no application. He therefore granted the declaratory order.

On appeal by the Attorney-General of Canada, reported in (1994) 113 DLR (4th) 623, the Quebec Court of Appeal reversed the decision of the lower court. McCarthy JA (with whom Moisan J, ad hoc, concurred) reasoned that the sections of the Canada Election Act which limited the right to reimbursement of election expenses, do not impede the right to vote or the right to express oneself freely; that the Legislature is not obliged by ss 3 and 2(b) of the Charter to supply candidates with the means necessary to make known their views; and that if it does so, any restriction on the ability to supply such means can only be grounded in s 15 of the Charter (see at 626h-627c). The learned Judge of Appeal proceeded to hold, however, that the 15% threshold did not reveal any discriminatory purpose or effect within the meaning s 15 (see at 628g-629b).

This approach I consider, with deference, to be flawed. It failed to acknowledge that the right to vote and the right to freedom of expression have an egalitarian dimension. It was therefore far too narrow a perception to decide the issue on the basis of equality of rights afforded by s 15 of the Charter.

The remaining member of the court, Mailhot JA, preferred to rest his agreement, not so much upon an absence of infringement of ss 3 and 2(b) of the Charter, but on his opinion that the threshold of 15% was reasonable and demonstrably justified in a free and democratic society

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(see at 632e-h).

(c) *Australia*

Section 297(1) of the Electoral Act 1992 (Queensland) permits reimbursement if the total number of eligible votes polled in the candidate's favour exceeds 4% of the total number of eligible votes polled in favour of all the candidates in the election.

(d) *Sri Lanka*

In terms of the Parliamentary Elections Act 1981, every recognised political party that polled not less than 1% of the total number of valid votes at the last preceding general election, is entitled to receive financial assistance in respect of the forthcoming general election.

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(e) *Denmark*

Law No. 940 of 23 December 1986 provides for annual grants to be paid to political parties and individual candidates according to the number of votes gained at an election.

(f) *Sweden, Austria and Italy*

These countries have instituted regimes for public funding of political parties which provide support for a series of activities beyond direct election expenses. In each the threshold is low, with the entitlement ranging from 1 to 2.5% of the national vote. The funds are intended to meet many of the costs of general party organisation, because those institutions are considered crucial to a healthy democratic polity. In addition, parties are subsidised in proportion to the size of their parliamentary representation. See generally, Jensen Innovation and Equality: The Impact of Public Funding at 136-138, published in Comparative Issues in Party and Election Finance, Dundrum Press, Toronto, 1991.

This court was not referred to any foreign legislation, and itself has not found any, that makes the entitlement to funding by the State entirely dependent upon the number of members of a political party elected to Parliament at the last general election. In this, s 3(3) of the Political Parties (Finance) Act appears to be a provision that stands unique in the free and democratic societies of the world. The most common system in allocating such public funding is to do so by having regard to the total number of votes secured by a political party at a general election, and not according to a fixed number of its successful candidates.

(4) THE THRESHOLD OF FIFTEEN ELECTED MEMBERS OF A PARTICULAR REGISTERED POLITICAL PARTY AS THE ENTITLEMENT TO RECEIVE FUNDING FROM THE STATE

The justification for placing a reasonable limitation upon the payment of State funds to political parties admits of no controversy. Its purpose is understandable. It is to encourage serious political parties or candidates to contest an election and thereby strive to obtain representation in Parliament. Yet, on the other hand, it is to discourage inability to attract an important

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following - to command a significant proportion of the votes cast. Put differently, the aim is to inhibit the proliferation of trifling parties; to prevent them from participating in the election simply in order to secure public moneys.

Jensen op cit at 113-114 points out that the regulation of public funding for elections has been identified with the following five goals:

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(i) to ensure equality of opportunity in a liberal democracy characterised by inequities in the distribution of wealth;

(ii) to make enough money available that competitive campaigns can exist;

(iii) to allow new entrants, while not encouraging frivolous candidates or propping up decaying political organisations;

(iv) to reduce the opportunity for undue influence; and

(v) to prevent corruption.

In the Zimbabwean setting, the first three of these goals are particularly apposite, but are not achieved by s 3(3) of the Political Parties (Finance) Act. Obviously, the mere presence of public funds is not sufficient. It must be provided in a manner that is non-exclusionary and tolerant of political pluralism and electoral competition. Otherwise it will do no more than entrench and reinforce the regime of the major political parties, and treat far less fairly their minor or new opponents. Thus a high threshold for entitlement to receive State funding makes it extremely unlikely that small but meaningful voices will be heard. In a relatively non-affluent society, where nothing like adequate funding from private sources is available, such a threshold renders it virtually impossible for other political parties to gain any real margin of success.

It seems to me legitimate to assess the measure of the threshold by taking account of the situation on the ground. The question to ask is: what is the practical effect of this funding system upon political parties in Zimbabwe? The answer is clear. It is the provision of finance for the ZANU (PF) party alone. The last two general elections have demonstrated this; and the pattern is likely to continue. In the 1990 election, the political party known as Zimbabwe Unity Movement polled 17% of the total votes cast. Yet notwithstanding such a significant number of votes, it did not qualify for any funding from the State, subsequent to the passing of the Political Parties (Finance) Act two years later. See Ncube (1994) Legal Forum Vol 6 Part 3 at 26.

Any public funding regime that systematically excludes all but one or two political parties strongly suggests that the threshold is set too high. Although, to my mind, public funding is a vital element of a sound democracy both as an egalitarian measure and as a means of curbing the dependency of political parties upon private interests, it should be offered in a manner respectful of pluralism and the possibility of political change. It is in this respect that s 3(3) of the Political Parties (Finance) Act falls far short. Its very formula creates a threshold far higher, and less attainable, than those of any of the other countries to which reference has been made.

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(5) THE EFFECT OF THE EXCESSIVELY HIGH THRESHOLD UPON THE APPLICANT'S RIGHT TO FREEDOM OF EXPRESSION

Subsection (1) of s 20 of the Constitution enjoins that:

(a) no person shall be hindered

(b) in the enjoyment

(c) of his freedom of expression which includes -

(i) freedom to hold opinions;

(ii) freedom to receive and impart ideas and information without interference;

(iii) freedom from interference with his correspondence.

The profound role of this protected right, as one of the fundamental freedoms, has been underlined by this Court in several decisions. The most recent is Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Anor *supra* in which, at 211E-212B (ZLR), 1271J-1272D (BCLR), 856H-857C (SA), freedom of expression is characterised as one universally recognised as a core value of society.

But self-expression by the communicator is not the single value encompassed by s 20(1) of the Constitution. One of its functions is to protect the obtaining of information and the interchange of ideas. Any dissemination thereof and, consequently, any expenditure of funds that makes it possible, advances the purposes of this freedom.

Of course, an enactment neutral on the face of it may, in its application, nonetheless offend the constitutional mandate if it denies, or unduly burdens, the exercise of a protected freedom. See the Retrofit case *supra* at 218E-F (ZLR), 1276G-H (BCLR), 861H-J (SA); Elliott v Comr of Police & Anor 1997 (5) BCLR 670 (ZS) at 673B-C.

The applicant has invoked this basic guarantee. It protests that the right to freedom of expression is of paramount importance both at the time a general election is held and during the period between elections; and that any legislative provision which, though facially neutral, in reality restricts its ability as a political party to engage in electoral free speech, is constitutionally offensive. It further articulates that because ZANU (PF) is the sole political party to qualify for the payment of funds by the State (the threshold of 15 elected members in Parliament being way beyond the reach not only of itself but other opposition political parties besides), it is able to engage in a far greater interchange of opinions and ideas with the public than any other party before, at, and after, a general election. By contrast, the applicant, so it is submitted, suffers a diminution of the quantity and diversity of its political expression. Effective advocacy of both public and private points of view, especially cotroversial ones, which is enhanced by group association, is lost to it.

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I have no hesitation in accepting that freedom of expression concerning the activities of the political party in power, and of other opposing parties, should be protected from hindrance. This is essential to the proper functioning of a democratic system. Any abridgement affects the right of the people to be informed, through sources independent of government, about matters of public interest. Political parties contending for ascendancy ought not to be limited by over-stringent legislative measures in their capacity to engage in dialogue as widely as is deemed necessary. They must be unfettered in their ability to communicate arguments and opinions, from diverse and antagonistic sources, so as to enable the populus to make an informed judgment as to how they should be governed, and as to what policies are in the interests of themselves and the nation. I can do no better than to repeat the following excerpt from the judgment of Conrad JA in Reform Party of Canada v Canada (Attorney-General) (1995) 27 CLR 254 (Aberta Court of Appeal) at 306-307:

> "The suggestion that political messages are of different values, or that the platforms of those parties with a reasonable chance of forming the government are the most important messages, flies in the face of the guarantee of freedom of expression. Even more offensive is legislation designed to favour the incumbent. It is the discourse of political views that is important. 'Single issue' or 'fringe' parties may raise for discussion the most critical issues of a particular election. It matters not that they cannot form a government. What is important is the content of the message being communicated. Moreover, even if they are not running sufficient candidates to ever have a majority in the House of Commons, one elected representative is of consequence. Important in a free and democratic society is the right of a party to communicate its message, and the right of the public to receive it. In the arena of elections, I am satisfied that the guarantee is not merely to protect the right of the person to speak, but he right of the public to hear: Communication is fundamental to expression of any kind" (emphasis added).

See also, Tribe American Constitutional Law 2 ed at 1150 in initium.

Only by the spread of information, opinions and arguments, can electors make a responsible choice in determining whether they should support a particular candidate at an election or the party which that person represents. As Lord Simon of Glaisdale so pertinently remarked in Attorney-General v Times Newspapers Ltd [1973] 3 All ER 54 (HL) at 77j:

> "People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions."

Effectual communication requires the expenditure of money. The distribution of leaflets entails printing, paper and circulation costs. Speeches and rallies necessitate the hiring of indoor and outdoor venues and the publicising of the function. Transportation expenses of candidates or party representatives to distant constituencies have to be met.

Dependence upon the private sector of Zimbabwe to provide enough

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funding to enable a political party to mount an adequate campaign at a general election and, thereafter, to strengthen the momentum gained up to the time of the forthcoming election, is not

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a viable option. The amount of funding received by the ZANU (PF) party from the State every year represents a barometer of the level to which it is regarded as essential for the fulfilment of its ideals and policies. I do not imply that the need for funding of the smaller or emerging political parties is comparable. Nonetheless it is of a magnitude quite beyond the capacity of their supporters to furnish. The inevitable result is an ill-financed campaign. In affluent societies where the ability exists to raise substantial sums of money from private enterprise, State funding for political parties augments rather than curtails free expression. It facilitates and enlarges participation in the electoral process. However, in poorer societies, where private fundingis either not available or offers inadequate assistance, the inability to obtain State funding, because the qualification is set too high, causes a reduction of the effective freedom of expression of political parties. See Tribe op cit at 1149 n 3. It restricts the number of issues debated, the depth of their exploration and the size of the audience reached. See Buckley v Valeo 424 US 1 (1976) at 19. In short, it has a marked and adverse impact upon political advocacy.

I am left in no doubt that the provisions of s 3(3) of the Political Parties (Finance) Act manifestly maintain the status quo. Preferential treatment is accorded to the political party represented by 15 elected members in the preceding and present Parliament. No other meaningful campaigning party falling below this very high threshold is advantaged.

Consequently, the regulatory regime favours the established party without securing any compensatory benefit for others wishing to participate in the electoral process or in the political debate which is such an integral part of it. It is in this respect that the words of Mason CJ in Australian Capital Television (Pty) Ltd v Commonwealth of Australia (1992-1993) 177 CLR 106 (HC of A) at 139 commend themselves:

> "Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion. In truth, in a representative democracy, public participation in political discussion is a central element of the political process."

Archibald Cox, in his renowned work The Court and the Constitution (1987) at 212, comments to similar effect.

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The view I hold that s 3(3) of the Political Parties (Finance) Act impedes the applicant's right to freedom of expression (in the manner I have ventured to illustrate) is one which finds firm support in the judgment of Gomery J in Barrette & Payette v Attorney-General of Canada *supra*. He said at 182:

> "In the present case, the question must be viewed from the point of view of the persons to whom opinions are expressed. Freedom of expression is a value which the Charter protects so as to permit the person expressing opinions to do so freely, but also so as to permit the listeners to hear a variety of opinions. Any law which has as

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its effect the limitation of public debate, especially during an election campaign, serves as a restriction of freedom of expression and is inconsistent with the Charter. For the reasons already given, the court considers that the threshold of 15% constitutes an inhibition to public debate on the part of some candidates for election. Accordingly, it violates s 2(b)."

I need only add that if the learned judge was correct in his reasoning, as I perceive him to be, then a fortiori the higher threshold with which this matter is concerned contravenes s 20(1) of the Constitution.

In the Australian Capital Television case *supra* broadcasting time for political parties during an election period was restricted by an Act of Parliament to a certain period of "free time" allocated to political parties in proportion to the number of first preference votes it obtained at the last election. This weighted the grant of such free time very heavily in favour of the established political parties represented in the legislature immediately before the election, and the candidates of those parties. The plaintiff, a commercial television broadcaster, complained that to exclude the use of radio and television during election periods severely impaired the freedom of expression, presently enjoyed by citizens as well as broadcasters, to discuss public and political affairs and to criticise government institutions. It restricted the access of political parties, groups, candidates and persons generally, to express their views on radio and television. The High Court of Australia, by a substantial majority, rule in favour of the complaint. It emphasised that a guarantee of freedom of expression in relation to public and political affairs was implicit in the Constitution of Australia which established a representative democracy. It went on to hold that the sweeping provisions of the Act banning paid broadcasting in relation to political process excluded participants - candidates, established political parties, electors, groups and bodies, who wished to present their views to the general public - from access to an extremely important mode of communication with the electorate (see at 145).

I consider that the factual situation in that case is analogous to the present and the ratio apposite and persuasive. The free broadcasting time manifestly accorded preference to established political parties to the exclusion of other intended participants in the electoral process. In parity, the regulatory regime of State funding operative in Zimbabwe maintains the status quo by favouring

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the one registered political party which obtained the required 15 seats in Parliament in the last election. It denies others.

Finally, and for the sake of clarity and completeness, it should be stated that neither s 3(3) nor the Political Parties (Finance) Act as a whole, make provision for any of the matters specified in paras (a), (b) or (c) to s 21(2) of the Constitution as derogations from the protection of freedom of expression. Indeed, no argument to the contrary was advanced.

The conclusion reached makes it unnecessary for this court to pronounce upon the validity of the two remaining grounds upon which the applicant sought the same redress. I leave their resolution open.

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THE REMEDY

It is my view that the whole of s 3(3) of the Political Parties (Finance) Act, and not merely its proviso, should be declared inconsistent with s 20(1) of the Constitution. This is because, as mentioned earlier, it is, in essence, the scheme upon which State funding is paid that abridges the protection of freedom of expression. Even if the threshold of the number of elected members were set far below fifteen, the requirement of there having to be representation by a registered political party in Parliament, in order to qualify for annual funding, would still put aspiring opposition political parties at a severe monetary disadvantage in mounting an electoral campaign; and, thereafter, in maintaining potent political survival. It seems probable that an appreciation of this factor was the motivation for other countries passing legislation which makes the entitlement to funding dependent upon the attainment of a fairly low percentage of the overall number of votes cast at a general election (if the funding is to e provided annually, which is the policy in Zimbabwe).

It may be true to say that at the next general election the hurdle for smaller or emerging political parties will remain fairly formidable. Yet, assuming a reasonable threshold is fixed by Parliament on the basis of a percentage of the total number of votes cast, it should be reached with less difficulty than under a regulatory system that effectively entrenches the status quo.

As the striking down of subs (3) renders the allied provisions contextually inappropriate, it will be incumbent upon the legislature to replace the whole of s 3 of the Political Parties (Finance) Act in conformity with this judgment.

COSTS

The failure of the applicant to establish locus standi to question the constitutional validity of the sections of the Electoral Act it endeavoured to

impugn, must be reflected in the ultimate order of costs. On the other hand, the applicant's challenge to the Political Parties (Finance) Act has been upheld. Overall, it has achieved partial success.

The arguments presented on these two main issues occupied about the same length of time. In the circumstances, I consider that fairness to both parties dictates that neither recover costs against the other.

THE ORDER

In the result, I would order as follows:

1. The application to have ss 25(1), 26(5) and 158(2)(c) of the Electoral Act [Chapter 2:01] declared to be in contravention of s 20(1) of the Constitution is dismissed.

2. Section 3(3) of the Political Parties (Finance) Act [Chapter 2:04] is declared to be in

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contravention of s 20(1) of the Constitution and is to be struck down.

3. The parties are to bear their own costs of the application.

McNALLY JA: I agree.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Sengwayo, Mwonzora & Partners, applicant's legal practitioners

Civil Division of the Attorney-General's Office, first, second and third respondents' legal practitioners

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DEPUTY SHERIFF, HARARE v MAFUKIDZE & ANOR 1997 (2) ZLR 274 (HC)

Court **High Court, Harare**

Chinhengo J

Interpleader action

3 April & 10 September 1997 Judgment No. HH-145-97

Flynote

Family law - husband and wife - property rights - whether an African woman married in terms of the Marriage Act is entitled to own property purchased by her from monies earned from her employment

A husband and wife were married under the Marriage Act *[Chapter 5:11].* A judgment was obtained against the husband for a debt owed by him. Goods taken from the matrimonial home under an attachment order and these goods were about to be sold in execution. The wife sought to prevent the sale, claiming that the goods were her own property. The creditor argued that the sale in execution should be allowed to proceed, firstly, on the grounds that the claim by the wife to the goods was bogus and, secondly, on the basis that the goods could not he owned by the wife, because such ownership was excluded by s 13 of the Customary Marriages Act *[Chapter 5:071.* 'Rat section provides that the marriage between Africans in terms of the Marriage Act does not affect of the property of the spouses and that this property devolves according to customary law unless disposed of by will.

Held, that in terms of s 13 of the Customary Marriages Act customary law applies to the proprietary rights of Africans married in terms of the Marriage Act. Under customary law, property acquired by the wife during marriage becomes the property of the husband subject to certain exceptions. These exceptions are:

· property disposed of by will;

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- the disposal of immovable properly on divorce or the death of the husband is governed by general law, as private ownership of immovable property is unknown to customary law.,
- umai property, that is, livestock and its increases accruing to the woman as a result of her daughter's marriage or pregnancy;
- mavoko property, that is, property acquired by the woman through her personal labours;
- damages awarded to her for injury to her person or her reputation.

Held, further, the controversy which exists as to whether property acquired by a married African woman by means of monies earned from her employment should have been resolved by legislation but in the absence of such legislation the court had itself to pronounce on this issue.

Held, further, that there is an apparent conflict between *Jena v Nyemba* 1986 (1) ZLR 138 (S) and *Mujawo v Chogugudza* 1992 (2) ZLR 321 (S). In *Mujawo* it was decided that the choice of law rule contained in s 3 of the Customary Law and Primary Courts Act superceded s 13 of the Customary Marriages Act. On the other hand, in *Jena* it was held

that s 13 bad not been implicitly repealed by the Legal Age of Majority Act 15 of 1982, as s 13 deals with the substantive law governing moveable property while the Legal Age of Majority Act deals with age, status and capacity, which are matters of adjective law. Ibis conflict could be resolved by examining the underlying basis of the decisions in *Bennett NO v Master of the High Court* 1986 (1) ZLR 127 (H) and *Chihowa v Mangwende* 1987 (1) ZLR 228 (S). It is clear that the Legal Age of Majority Act was intended to effect fundamental change by freeing all women over 18 from the shackles of their lack of capacity. In the fight of this, s 13 of the Customary Marriages Act should not be taken as laying down the substantive law on the proprietary consequences of marriage. Instead, it should be taken to allow for the application of the choice of law rule set out in s 3 of the Customary Law (Application) Act *[Chapter 8:051.* That choice of law rule provides that customary law applies where the parties have agreed that it will apply or where it seems to be just and proper that it should apply in the light of the nature of the case and the surrounding circumstances. The rule suggests that the common law of Zimbabwe is the basic law of the land and customary law is only applicable by way of exception or that it is subordinate to the common law. In the present case the dispute was between the creditor and the married woman. The parties had not agreed to the application of customary law. The surrounding circumstances were such as to point to the conclusion that it would be proper for general law to apply.

Held, further, that although the issue in the present case was essentially concerned with the proprietary consequences of her marriage, and not with her capacity, there is a necessary link between capacity and ownership. The Legal Age of Majority Act granted to persons over the age of majority the capacity to enter into contracts. It grants the same capacity to both married and unmarried women. The granting of this capacity to women is meaningless if all that it allows a married woman to do is to acquire property as agent for bet husband. 'Re capacity conferred

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upon married and unmarried women must have been to acquire property in their own right.

Held, further, that although properly acquired by a married African woman from monies earned from employment could be said to fall into the category of *mavoko* properly, but it is not *mavoko* property in the strict sense, because in traditional society it was unknown for a woman to be in employment and to earn her own money in this way.

Held, further, that property acquired by a married African woman by means of monies earned from employment or from other productive activities by her can now be owned by her in her own right.

Held, therefore, that as the wife had established that the goods in question had been purchased in her own name from monies earned by her from employment, the goods belonged to her, were not executable and should be released to her.

Editorial Note

Subsequent to this judgment the legislature put this matter beyond doubt by repealing s 13 of the Customary Marriages Act (see s 7 of the Administration of Estates Amendment Act 6 of 1997). 'Me effect of this amendment is that a woman married under the Marriage Act can own property in her own right. Part H of the Customary Law and Local Courts Act *[Chapter 7:051* was brought into effect by the Administration of Estates Amendment Act.

Cases cited:

Bennett NO v Master of the High Court 1986(1) *ZLR* 127 (11)

Bruce NO v Josiah Parkes & Sons (Rhodesia) (Pvt) Lid 1971 (1) *RLR* 154 (G)

Chihowa v Mangwende 1987 (1) ZLR 228 (S)

CHINHENGO J

Chikosi v Chikosi (1) 1973 (1) ZLR *161 (G)*

Chikosi v Chikosi (3) 1975 R [A 140 (G)

Jena v Nyemba 1986 (1) ZLR *138 (S)*

Kalsidzira v Chironw 1981 ZLR *87 (G)*

Mhungu v N Motoring Svcs S-60-97

Mujawo v Chogug wdza 1992 (2) ZLR *321 (S)*

The court considered the following statutory provisions: Customary Law (Application) Act *(Chapter 8:051, s 3* Customary Marriages Act *[Chapter 5.07], s 13*

Case Information

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V Malipano, for the applicant

W Mutezo, for the claimant

B Kagoro, for the judgment creditor

Judgment

Chinhengo J: In case No. 1IC-2485-95, Elevator and Lifting Equipment (Pvt) Ltd (the creditor) obtained judgment against Stafficy Maftikidze (the debtor). The debtor is married to Lily Mafukidze (the claimant) under the Marriage Act *[Chapier* 5:11]. Tbejudgment was for the payment of $50 000 together with interest at the prescribed rate calculated from 18 July 1994 to the date of payment and costs of suit.

After judgment the debtor agreed with the creditor that he would pay off the judgment debt by instalments. He undertook to pay $20 000 on or before 19 January 1996 and $5 000 *per* month thereafter until the debt was liquidated. The first instalment of $5 000 was to he paid on or before 1 February 1996 and thereafter on or before the first day of each succeeding month. The debtor paid $20 000 as agreed, but failed to pay the first instalment of $5 000. The Deputy Sheriff was instructed to proceed against the debtor for the full amount. This was in pursuance of a writ of execution against the debtor's movable property. Goods were attached at the debtor's home on 17 February 1996. These goods comprised two sets of lounge suites, a fridge, a dining room suite, one colour television and video, one radio and accessories.

The debtor again approached the creditor's legal practitioners for another indulgence. An agreement was reached that the Deputy Sheriff would not at that stage proceed with execution and that the debtor would resume the payments. The goods attached pursuant to the writ were, however, to remain under attachment. The debtor made further payments which altogether amounted to $20 000 but he defaulted again in May. The Deputy S heriff was then instructed to remove the goods under attachment for purposes of a salc in execution. The removal was to take place on 29 May 1996. On 23 May 1996, the debtor paid $15 000 but the Deputy Sheriff remained under

instructions to remove the goods and sell them in order to satisfy the judgment in full.

A day before the goods were due to be removed, the claimant submitted to the Deputy Sheriff an affidavit in which she claimed the goods as her property. This affidavit prompted the Deputy Sheriff to institute this interpleader action.

The creditor asserted that the claimant's affidavit was prepared and submitted to the Deputy Sheriff solely for the purpose of delaying and/or frustrating the due satisfaction of its claim. It argued that if the claimant had been genuine in claiming the goods as her sole property, she should not have waited three months to submit her claim. The creditor challenged her to prove her ownership of the goods by the production of invoices showing the dates on which she had purchased the goods. It also challenged her to produce proof of her earnings. It noted that the

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claimant had made the admission that the debtor had contributed to the purchase of the goods and contended that, although she did not specify the extent of the debtor's contribution, the creditor was entitled, at the very least, to execute against the debtor's share in the goods.

The creditor raised another point in support of its contention that execution should be allowed to proceed. It averred that even if it is established that the claimant purchased the goods, those goods cannot, by reason of s 13 of the Customary Marriages Act *[Chapter 5:07],* be owned by her. The claimant is married to the debtor and by virtue of that marriage she does not own property because such ownership is excluded by s 13 of the Customary Marriages Act. In support of this argument the creditor cited the case *of Jena v Nyemba* 1986 (1) ZLR 138 (S).

The claimant produced documentary evidence in the form of invoices and returned cheques in her name to prove that she purchased the goods herself. In her affidavit dated 28 May 1996 and filed with the Deputy Sheriff (Annexure. B to the application) the claimant deposed to the fact that the 11 property attached to be removed was purchased by herself with minimal, if any, assistance at all from the defendant" (para 6 of Annexure B). She also states that she considered "the property to be matrimonial and/or family property" and that she believed that "it is unfair, unjust and improper for the family property to be executed against in a matter which does not have anything to do with me and my children". (See paras 7 and 8 of the Annexure B).

I do not think that it would be proper for me to draw any inferences from the claimant's statement that the property attached is "matrimonial and/or family property" so as to deny her the claim to sole ownership of the goods. 1 would equally be uncomfortable to read much into her statement that she

purchased the goods "with minimal, if any, assistance" from the debtor. Her affidavit filed together with the notice of opposition is more explicit in respect of her claim to ownership of the goods. In para 2 of this affidavit she says that "I am the owner of the property attached by the Deputy Sheriff'. It is to this affidavit that she attaches invoices and returned cheques in her name and other documentary proof which establish that she purchased the goods. She has stated the nature and particulars of her claim and set out facts which prove her ownership of the goods *(Bruce NO v Josiah Parkes & Sons (Rhodesia) (Pvt) Ltd 1971* RLR 154 (G) at 156). On the evidence before me, 1 am satisfied that she purchased the goods in her own name and she would he the owner of the goods if no account is taken of the effect of s 13 of the Customary Marriages Act *[Chapter 5:071.*

I have therefore to deal with the creditor's contention that even if it was established that the claimant purchased the goods in her own name, she nonetheless does not own them by reason of s 13 of the Customary Marriages Act. This contention raises an important point of law, which was my reason for reserving judgment. It is a point of much wider public interest.

Jena's case *supra*, the only case cited by the creditor's legal practitioner, was an appeal against a High Court ruling that the Legal Age of Majority Act repealed by implication the proviso to s 3(3) of the Customary Law and Primary Courts Act *1981* (now the Customary Law

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(Application) Act *[Chapter 8:051)* as well as s 13 of the African Marriages Act. Section 3(3) reads as follows:

> "(3) The capacity of any person to enter into any transaction or to enforce and defend any rights in a court of law shall, subject to any enactment affecting any such capacity, be determined in accordance with the general law of Zimbabwe:
>
> Provided that, if the existence or extent of any right held or alleged to be held by any person or any obligation vesting or alleged to be vesting in any person depends upon or is governed by customary law, the capacity of the person concerned in relation to any matter affecting that right or obligation shall be governed by customary law."

The court accepted the submission by both counsel that s 3(3) means that "the capacity of any person falls to be determined by customary law only if the existence of the right or obligation in issue is dependent on customary law ... " (*per* GUBBAY JA, as he then was, at 140C), The court therefore held that the right to sue for damages for personal injuries in issue in that case did not depend on customary law but on the common law and the principles of Roman Dutch Law (at 142D-E). The application of customary law is no doubt, dependent on whether or not the right or obligation in issue is governed by customary law. The present case is concerned with the defence of a right to property. The capacity of the claimant to defend her right to the goods was not, nor could it have been, directly challenged. It was in fact obliquely

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challenged by the contention that the claimant cannot own property. This oblique challenge highlights the relationship between capacity and ownership to which 1 will revert later on in this judgment.

In Jena's case, the learned JUDGE OF APPEAL went onto make the point that where African spouses entered into a civil marriage. they incurred all the consequences of a civil marriage unless such consequences were excluded by clear and express statutory provisions. He referred to the following cases in support of this statement: *Chikosi v Chikosi* (1) 1973 (1) ZLR 161 (G) at 164H-165A; *Chikosi v Chikosi* (3) 1975 RLR 140 (G) at 143B-H.

He then proceeded to deal with the situation where the consequences of a civil marriage are excluded by clear statutory provision. Such an exclusion, he said, is provided by s 13 of the African Marriages Act *[Chapter 2381* (now s 13 of die Customary Marriage Act *[Chapter 5:071)* which reads:

> "The solemnization of a ~age between Africans in terms of the Marriage Act shall not affect the property of the spouses, which shall be held, may be disposed of and, unless disposed of by will, shall devolve according to customary law."

After citing this provision His Lordship stated at 14 1 B-E as follows:

> "Thus regardless of whether Africans enter into a marriage in terms of the Marriage Act, African law and custom continues to apply to their proprietary rights. It is not open to them to elect to have the property consequences of their marriage governed by the general law of Zimbabwe. They are not permitted, however much they may desire to do so, to choose to be married either in or out of community of property. In other words, the proprietary consequences of s 2 of the Married Persons Property Act *[Chapter 381* are in the case of Africans married under

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the Marriage Act excluded by s 13 of the African Marriages Act, for that provision specifically enacts that the marriage "shall not affect the property of the "uses", which is exactly what s 2 of the Married Persons Property Act does. Section 13, therefore, prevents Africans who enter into a civil marriage from enjoying the proprietary consequences of a marriage under the Marriage Act which are available to other Zimbabweans, and to that extent, albeit not unconstitutionally, discriminates against them on account of their race. (see s 23(3)(b) of the Constitution).

In African law and custom properly acquired during a marriage becomes the husband's properly whether acquired by him or his wife. To this rule there are a few exceptions..." (my emphasis).

The learned JUDGE OF APPEAL outlined the four exceptions as being: the ownership of immovable property which in the event of divorce or death of the husband is determined in accordance with general law because the concept of private ownership of immovable property was unknown to customary law; property disposed of by will as provided by s 13 referred to above; "umai" property, which comprises livestock and its increase which accrues to a woman as a result of her daughter's marriage or pregnancy and "*mavoko"* property, which is property acquired by the woman through her personal labours; and an award of damages for injuries suffered to her person or reputation which is governed by Roman Dutch Law.

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In regard to property purchased by the wife with monies earned from her employment, the learned JUDGE OF APPEAL expressed a doubt as to what die law may be in the modern day. At 142B-C he said:

"Today there is controversy as to the ownership of property acquired by married women by means of monies earned from employment, an activity unknown to traditional African society. Although logically and equitably such property would seem to fall into the *mavoko* category and not belong to the husband since the woman worked for it herself, that view is not universally shared by African men (cf *Katsidzira v Chiromo* 1981 ZLR *87 (G)* at M)."

This controversy should be resolved. It can be resolved by legislative action or by the courts. It is always preferable that a controversy of this kind should be resolved by legislative enactment. However, when a court of law is called upon to determine what the law is in the absence of a clear statutory provision, it can only do its best to pronounce the law, guided as it should be by logic and equity. The present case requires this court to pronounce itself on the question of the ownership by a married African woman of moveable property during the subsistence of such woman's civil marriage.

As I see it, the problem in the present case is essentially one of choice of law. The starting point in my view is s 3 of the Customary Law (Application) Act *[Chapter 8:051* which provides as follows:

"(1) Subject to this section and any other enactment, unless the justice of the case otherwise requires -

(a) customary law shall apply in any civil case where -

(i) the parties have expressly agreed it should apply; or

(ii) having regard to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or

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(iii) having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply.,

(b) the general law of Zimbabwe shall apply in all other cases.

(2) For the purposes of paragraph (a) of subsection (1) -

"surrounding circumstances", in relation to a case, shall, without limiting the expression, include -

(a) the mode of life of the parties;

(b) the subject matter of the case;

(c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case;

(d) the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be."

This section provides a choice of law rule. It clearly states that customary law shall apply where the parties so agree or, depending on the nature of the case and the surrounding circumstances, it appears that the parties have so agreed or if it appears just and proper that customary law should apply, regard

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being had also to the nature of the case and the surrounding circumstances. The parties to the present action are not all Africans. The dispute is not between the claimant and her husband, the debtor. There can therefore be no suggestion that all the parties have agreed to the application of customary law. However the surrounding circumstances so far as they relate to the claimant and the debtor would suggest that the general law of Zimbabwe applies. The claimant and the debtor are married in terms of the Marriage Act. They live in the low density surbuban area of Harare. They engage themselves in the modem economic way of life, as evidenced by the debtor's loan from which the judgment debt arose. All indications are that they are relatively closer to the general law of Zimbabwe than they are to customary law, at least in so far as this case is concerned. I think that the claimant and the debtor have a sufficient appreciation or understanding of the general law of Zimbabwe to bring them even closer to it than to customary law.

In discussing the choice of law rule embodied in s 3 of the Customary Law (Application) Act T W Bennett, in *Application of Customary Law in Southern Africa* says at p 103-104:

> "Choice of law rules in the independent state of Zimbabwe were again revised in the Customary Law and Primary Courts Act of 1981. Although the major purpose of this Act was to reorganise the court system, important changes were made to rules regarding the recognition and application of customary law. Choice of law is no longer expressed in racial terms and the repugnancy proviso has been omitted. The nature of the conflict rules was changed again in two significant respects: by removing the gravamen of the choice of law process from its dependency on the cause of action to the cultural attributes of the case and removing the preferred (or basic) position of either system. In other words, customary law is no longer basically or *prima facie* applicable in particular causes of action.

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...

> Although this section appears to control the application of customary law much more tightly than s 11 (1) of the South African Black Administration Act, it would soon become evident from a reading of the cases concerned with the application of s 11 (1) that the Zimbabwe choice of law provisions now bear close resemblance to the approach of the South African courts. Moreover s 11 (1) makes choice of law a matter of judicial discretion in that neither customary law nor the common law is basically applicable; and the new Zimbabwe Act has the same general import."

At bottom of p 104, the learned author observes:

> "A novel provision is 'the understanding by the parties of the provisions of customary law or the general law of Zimbabwe'. This could prove useful in regulating choice of law regarding wills, marriage and contract. It will assist the courts in deciding to what extent the form of a juristic act should govern choice of law and the parties' understanding of the applicable law could check a tendency to say that the form of a transaction is the decisive factor in determining the applicable law."

He concludes, and I respectfully agree with him, that the section suggests that the common law of Zimbabwe is "the basic law of the land and customary

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law is only applicable by way of exception". Our legislature has not yet reached the stage at which it is emboldened to declare in clear terms that customary law is applicable by way of exception or that it is subordinate to the common law. But if consideration is given to the general import of s 3 of the Customary Law (Application) Act, the conclusion is inescapable that the general law of Zimbabwe has been given preference over the customary law. In so far as the capacity of any person to institute or defend legal action, the stage seems to me to have already been set for making the general law the basic law of Zimbabwe. Part II of the Customary Law and Local Courts Act *[Chapter* 7:051 (which is not yet in force) repeals the proviso to s 3(3) of the Customary Law (Application) Act, thus removing the tendency to rely on the nature of the right or obligation as a determinant in matters of capacity. This will also further enhance the primacy of the general law as the basic law of the land. The new s4 of the Customary Law and Local Courts Act, which will replace s 3(3) of the Customary Law (Application) Act, reads as follows:

> "Subject to any enactment affecting such capacity, the capacity of any person to enter into any transaction or to enforce or defend any tights in a court of law or to inherit rights or property shall be determined in accordance with the general law of Zimbabwe."

The primacy of the general law is what MANYARARA JA recognised in *Mujawo v Chogugudza* 1992 (2) ZLR 321 (S) when, as I shall show later on in this judgment, he said that s 3 of the Customary Law and Primary Courts Act has superceded s 13 of the Customary Marriages Act as the former does not preclude an inquiry to determine the choice of law rule applicable in a given case. This was in contrast to GUBBAY JA's statement in Jena's case that s 13 has not been implicitly repealed by the Legal Age of Majority Act as it "deals with the substantive law governing moveable property of African spouses and the disposal and devolution of such property whilst the Legal Age of Majority Act ... is concerned with age, status and capacity, all of which are matters of adjective law". In my view, the point which MANYARARA JA was making

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is that s 13 does not in fact deal with the substantive law governing moveable property of African spouses.

Jena's case and *Mujawo's* case are conflicting decisions. To resolve the conflict 1 think one needs to examine other cases in which s 13 of the Customary Marriages Act has been interpreted.

One case which offers guidance and assists in resolving the apparent conflict of case authority on this subject is *Chihowa v Mangwende* 1987 (1) ZLR 228 (S). In that case it was held that one of the consequences of the Legal Age of Majority Act is that a woman who has attained the age of eighteen years can now be validly appointed as an intestate heiress to her father's estate with the same rights and duties as those which devolve upon a mate person under customary law. If such heiress is married she would hold the

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property so inherited in her own right, at least initially. There is a certain logic in *Chihowa's case* which I should pursue. Property of any kind has the potential to be multiplied andlor transformed from one form into another, depending on how it is used by its owner. Because of this potential, it is difficult to see how such property can retain, indefinitely, its character as inherited property and continue to be held by an heiress as her own on the basis of inheritance. At some point in its utilization and the process of multiplication and transformation, such property must be held by the heiress as her own and not on the basis of inheritance. The fruits or profit made by her from the gainful utilization of the inherited property cannot be regarded as inherited property. It must be held by her under a different regime. That regime cannot be any of the exceptions mentioned in *Jena's* case. That regime must surely be the general law of Zimbabwe which recognises, after the enactment of the Legal Age of Majority Act, her right to own property. Property which accrues to an African woman in the circumstances I have postulated is similar in its origin to property which accrues to her from monies earned from her employment or other individual effort.

The other case which also provides guidance *is Bennett NO v Master of the High* Court 1986 (1) ZLR 127 (H). Here SMITH J was called upon to decide on the disposal and devolution of movable property on the death of an African male, married according to Christian rites in the United Kingdom, who had died intestate. He held that s 13 of the Customary Marriages Act did no apply to the disposal and devolution of moveable property where the parties were married in the United Kingdom. He also stated that the role of customary law in the devolution of moveable property on the death of an African changed with the introduction of the Legal Age of Majority Act. If the devolution and disposal of his property on the death of an African male is not affected by s 13, I do not think that it was the intention of the legislature that s 13 should continue to affect the holding of property by African spouses during their lifetime and the subsistence of their marriage contracted under the Marriage Act. That could not have been intended to be the only exception, regard being had to the wide-ranging changes and developments in the law which were introduced by the Legal Age of Majority Act. The Legal Age of Majority Act freed an African woman, including one married under the Marriage Act, from the shackles of her lack of capacity. I think that the approach I should take in the present case is to regard s 13 of the

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Customary Marriages Act as providing, not the substantive law on the proprietary rights of African spouses, but as not excluding the choice of law rule provided by s 3 of the Customary Law (Application) Act in line with the decision In Mujawo's case *supra*.

I have already stated that the present case is not essentially concerned with

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the capacity of the claimant but with the proprietary consequences of her marriage. 1 think however that there is a necessary link between capacity and ownership.

It is now accepted that a woman over the age of 18 years has the same capacity as a man also over 18 years to enter into contracts. This was the effect of the Legal Age of Majority Act. Its "effect ... is to bestow capacity upon African married women. Indeed it is unthinkable that in the context of its avowed aim of liberalisation the legislature could have intended to limit its grant of capacity to unmarried African women who fulfil the age requirement, but retain a married African woman of say fifty years of age in the disadvantageous condition of minority" (see *Jena's* case at 143A).

What was the purpose of the granting of capacity under the Legal Age of Majority Act? Was it intended to grant the married African woman the capacity to act as an agent of her husband only? In other words, would it have been the intention of the legislature to grant her the capacity to, for instance, enter into a contract of purchase and sell and deny her, in all cases, ownership of the goods so purchased? If this were so, the capacity granted to a married African woman would be different in its effect and in a material sense to that granted to an unmarried African woman. In the latter case she would be enabled to enter Into a contract, say of sale, and acquire the property in her own right, whilst in the former case she would be enabled to enter into the same contract but not acquire the subject matter of the contract as her own property but as that of her husband. Capacity would be meaningless if all that it enabled a married African woman to do is to acquire the property as agent for her husband. The necessary connection between capacity and ownership was recognised by SMITH J in *Bennett NO v Master of the High Court supra* where he stated:

> "The effect of having majority status is that one has full legal capacity and full legal independence. This includes the right to contract and marry unassisted by a guardian (see *Katewe v Muchabaiwa supra* and the right to assume guardianship of another (set *Dokwani v Old Mutual & Anor* HH 103-86 (not reported) *and must also include the right go own property"* (at *132E) (my* emphasis).

This statement commends itself to me. The capacity conferred on a married African woman is not only the same as that conferred on the unmarried African woman but, more importantly, it is capacity to own property in her own right.

I think there has been a tendency to regard any property owned by a married African woman which does not fall under any of the recognised categories of immovable property or *umai* property as a form of *mavoko* property. Such a tendency does not appear to me to take due cognisance of the real effect of the Legal Age of Majority Act and the necessary link between

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capacity and ownership. The acquisition of property by a married African woman by means of monies earned from her employment was, of course, an activity unknown to traditional African society. In traditional African society a married woman did not seek employment and become employed as a servant of another. This is quite understandable because the cash economy was not in existence. She acquired *umai* and *mavoko* property which became her sole property. This property was different in the nature of its acquisition and magnitude from the property which a woman who is gainfully employed is able to acquire today. There is no logic in my view why property acquired by means of monies earned from employment unknown as it was to traditional African society should not be regarded as her sole properly today. It is acquired by means of monies earned from her singular efforts. To regard it as *mavoko* property is to obfuscate the true nature of that form of property as it has been understood in our law (see Child *The History and Extent of Recognition of Tribal Law in Rhodesia* at p 76).

In *Mhungu v PJ Motoring Services* S-60-97 MUCHECHETERE JA regarded property acquired by a married woman by means of monies earned from employment as being a form of *mavoko* property. At p 2 of the cyclostyled judgment, the learned JUDGE OF APPEAL said:

> "Miss *Magoge* for the appellant submitted that as the parties were married in terms of African Law and Custom the marriage is neither in nor out of community of property. See *Jena v Nyemba 1986 (1)* ZLR 138 at 141. She also submitted that a woman's wages or salary is classified as *mavoko* property, that is property acquired by a woman through her personal labours and therefore belongs to her. See also *Nyemba supra* at p 142. See also Ncube's *Family Law in Zimbabwe* at p 171-172.
>
> As already stated the above property was acquired by the appellant using her salary. The property is in the form of *mavoko* property. I agree that it cannot be taken into execution to satisfy the respondent's debts for that reason, and because it is not community property. This case is more compelling because the debt in question was incurred personally by Mr Mhungu whilst he was living with another woman. It would in any event be unjust to saddle the appellant. with the responsibility of repaying it."

The learned JUDGE OF APPEAL was of course dealing with a case in which s 13 of the Customary Marriages Act was not applicable. The marriage was an unregistered customary law marriage. However if the property acquired by the married woman in such a marriage can be regarded as a form of *mavoko* property with the result is that that property is owned by her, I do not see why similarly acquired property relative to an African woman married under the Marriage Act can not be classified in the same way. More than that I think *Mhungu's* case can be distinguished from the present case in so far as the categorization as a form of *mavoko* property of property acquired by means of monies eamed from employment by a married African woman is concerned. In *Mhungu's* case the learned JUDGE OF APPEAL was not categoric in his

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classification. He said that "the property is in the form of *mavoko* property" He seems to me to have been saying the property is akin to *mavoko* property I think 1 have the latitude to be more

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categoric and say that such property is owned by her by virtue of the capacity conferred on her by the Legal Age of Majority Act.

The case of *Katsidzira v Chiromo* 1981 ZLR 87 (G) was concerned with the acquisition and ownership of immovable property by an African married woman. At 93D and H, DUMBUTSHENA J, as he then was, made statement. to the effect that African customary law allows a married woman to acquire personal property. He did not however elaborate as to whether that property was *umai* or *mavoko* property. One would assume that the learned JUDGE OF APPEAL had in mind this kind of property since later on in his judgment he said that the woman made an income from her own labours and from employment. Notably, he did not attempt to classify the property, as was done in *Mhungu's* case. I"There are find DUMBUTSHENA J's words in *Katsidzira's* case *supra* at 96F-G as providing an avenue for the fuller and complete development of the law in this area. He says:

> "There are many African women of varying degrees of civilization and education who own immovable property. And in the present changed circumstance many more will acquire immovable property. In some cases, the properties will be bought by other women. In other cases married women will contribute, together with their husbands, to the purchasing or acquiring of properties. *The courts must keep in step with the times and shed away outmoded concepts in the field of properly by Africans and the proprietary rights of married women. The courts must import into the ownership of immovable property the generosity of African custom and law which allow a married woman to acquire property as a result of her labours"* (my emphasis).

To these words, one may add the observation by T W Bennett in A *Source Book of African Customary Law for Southern Africa* at p 394 where he says:

> "Prior to the existence of ownership, customary law recognised a variety of highly specific F rights in property, many of which existed concurrently in respect of the same thing. Commerce, however, requires property to be loosened from this complex network of conventional rights and obligations; property has to be freed of particularistic claims and entitlements so that is can be freely bought and sold in the market place.
>
> The transition from a subsistence to a market economy is the great watershed in legal development. It had not occurred in Southern Africa before the colonial conquest, which can be gauged, *inter alia,* from the absence of a category of property (and with it the legal form of ownership) in customary law. Property was still embedded in personal obligations. Any possibility of an endogenous growth of customary law was then thwarted by the introduction of common law."

A significant and notable move to "keep in step with the times and shed outmoded concepts" in the field of ownership by African women referred to by DUMBUTSHENA J in *Katsidzira's* case and "a quantum and qualitative leap from the customary position" was made in *Mujawo v Chogugudza supra*

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where MANYARARA JA adopted the words of RUSSELL ACJ in *Dayimano v Kgaribaitse 1931 SR 134* at *138* as an immutable principle of law:

> "The celebration of marriage according to civilised usage creates a definite status whereunder the parties acquire certain rights and are subject to certain obligations. The dissolution of such marriages and the consequences arising therefrom are governed by fixed principles of policy and justice, even though the parties may he natives. 1 therefore Lake the view that the attributes and incidents of native law may only exist side by side with the civilised

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status in so far as they do not violate *these principles*."

MANYARARA JA accepted the proposition that a person who has entered into a civil marriage should be regarded as having waived the privileges (and disadvantages too) of a customary marriage and should be deemed to have avoided the consequences of such a marriage. He accepted the submission that *s 3 of* the Customary Law and Primary Courts Act overrides *s 13* of the Customary Marriages Act. He said:

> "It follows that I have no quarrel with the manner in which Mr *Chatikobo* has chosen to attack s 13 of the Chapter 238. He submits that the provision is overridden by s 3 of the Customary Law and Primary Courts Act, in that it does not preclude an enquiry in terms of s 3 thereof to determine which choice of law rule should apply to ascertaining whether the estate should be referred in terms of s 69 of Chapter 301 or the general law" (at 330B).

The law, as I understand it and as I think it has been interpreted since the passing of the Legal Age of Majority Act, has developed to a stage where a woman including a married African woman can own various kinds of property in her own right. Where such property is acquired by means of monies earned from employment or other individual productive effort that property belongs to her. The development in the law since the Legal Age of Majority Act was passed recognises that she can own such property. The logical and legal consequence of the granting of capacity on an African woman whether married or not is that she can own property in her own right. This was the true effect of the Legal Age of Majority Act.

In the result, therefore, and for the reasons I have outlined, I am satisfied that the property acquired by a married African woman by means of monies earned from employment or from her other individual productive effort can be owned by her in her own right. It may fall to be considered in the broad category of *mavoko* property but it is not *mavoko* property in the strict traditional sense. It is property which she can own in tier own right deriving from the dispensation introduced into the general law of the land by the Legal Age of Majority Act.

The position of the creditor's argument based on s 13 of the Customary Marriages Act cannot avail it. 1 am satisfied however that on the strength of her opposing affidavit in which the claimant declares the property to be hers, she bought the property either from monies earned from employment or from

monies earned from her other individual productive effort. The property was definitely not purchased by the husband. She has the capacity to Own it.

Accordingly, the claimant's claim is upheld. The attached property is not executable and should be released to her. The judgment creditor shall pay the applicant and the claimant's cost in this matter.

Madzivanzira & Partners, applicant's legal practitioners

Mutezo & Partners, claimant's legal practitioners

Kantor & Immerman, judgment creditor's legal practitioners

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HM THE QUEEN IN RIGHT OF CANADA v IRVINE 1997 (2) ZLR 289 (HC)

Court **High Court, Harare**

Chatikobo J

Application for ejectment

23 July & 10 September 1997 Judgment No. HH-137-97

Flynote

Landlord and tenant - tenant - ejectment - statutory tenant - failure to comply with duty as tenant - no duty to vacate to terminate statutory tenancy and allow landlord to recover occupancy - good and sufficient cause for landlord to require ejectment order - landlord requiring use for purpose prohibited by law - whether court may order ejectment - foreign government requiring premises for use as diplomatic premises - Ministerial authority to purchase premises for that purpose previously granted - not open to tenant to query Minister's authority

Headnote

The applicant (the Canadian Government) owned a premises in the city of Harare, which it used as its High Commission. It subsequently bought the premises next door, which were then occupied by the respondent under a lease agreement with the previous owner. It obtained the necessary permission from the Minister of Local Government in terms of the Foreign Missions and Agencies Act [Chapter 3:01] to purchase the premises for the use by the Canadian Government's aid agency. Notice was later given to the respondent that the applicant required him to vacate the premises so that the aid agency could be placed there. The respondent challenged the right of the applicant to purchase, let alone occupy, the premises, on the grounds that such occupation would contravene the Regional, Town and Country Planning Act [Chapter 29:12], as this would alter the character of the use of the premises. In the meantime, the City Council had agreed to the consolidation of the two stands.

The respondent also argued that he had become a statutory tenant and that the applicant did not have good and sufficient ground to claim his ejectment. In particular, he argued that the applicant wanted to use the premises for a purpose which was prohibited by law. The applicant argued that, not only did it have good and sufficient grounds to claim ejectment, but the respondent was in breach of his duties as a tenant under the lease agreement.

Held, that the implied duty under the lease to vacate in order to allow repairs or renovations to be carried out is enforceable only when the tenant is being asked to vacate temporarily with a view to his later return. Here the tenant was being asked to vacate so that the landlord could take over occupation. There was no duty under the lease to comply with a demand to vacate permanently.

Held, further, that a litigant who asks the court to make a value judgment in his favour should satisfy the court that the relief he seeks does not contravene the law of the land. If the applicant's conversion of the premises into diplomatic offices would be in contravention of the law, then the court would be reluctant to grant relief. However, this was not the

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situation. The Minister had granted the necessary permission under the Foreign Missions and Agencies Act and the permission included authority to alter the use of the premises. In any event, the stands had been consolidated. The use of the original stand for diplomatic premises was permissible and the use for that purpose of the second stand thus became permissible.

Held, further, that it was not open to the tenant to attack the validity of the authority granted by the Minister. If the grant of the authority was tainted by procedural flaws, this was not relevant to the issue of whether good and sufficient cause existed for the landlord to require the premises.

Applicant granted.

Cases cited:

Boka Entprs (Pvt) Ltd v Joowalay & Anor 1988 (1) ZLR 107 (S)

Ex p Frost 1956 (2) SA 110 (O)

Guthrie Hldgs (Pvt) Ltd v Arches (Pvt) Ltd 1989 (1) ZLR 184 (S)

Lazarus & Jackson v Wessels & Ors 1903 TS 499

Mobil Oil Zimbabwe (Pvt) Ltd v Chisipite Svc Stn (Pvt) Ltd 1991 (2) ZLR 82 (S)

Moffat Outfitters \(Pvt\) Ltd v Hoosein \& Ors 1986 (2) ZLR 148 (S)

The court referred to the following statutory provisions:

Commercial Premises (Rent) Regulations 1983 (SI 676/1983), s 22(2)

Foreign Missions and Agencies Act [Chapter 3:01], s 8

Regional, Town and Country Planning Act [Chapter 29:12], s 22(1)

Case Information

S Moyo, for the applicant

R Y Phillips, for the respondent

Judgment

Chatikobo J: In December l989, the applicant owned and occupied, through the aegis of its diplomatic legation to Zimbabwe, premises known as Stand 1656 Salisbury Township, situated at 45 Baines Avenue in the City of Harare. At that time, the respondent, a practising dentist, was occupying and continues to occupy property which is contiguous to Stand 1656, being Stand 1657 Salisbury Township, commonly called number 49 Baines Avenue. His right of occupation was derived, and continues to derive, from a lease agreement concluded between himself and a company called Mediview Investments (Pvt) Ltd. On 12 December l989, the applicant, acting in

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terms of s 3 of the Foreign Missions and Agencies Act [Chapter 3:01] (the Act), sought and obtained from the Minister for Local Government, Rural and Urban Development permission to purchase Stand 1657 from Mediview Investments (Pvt) Ltd. It was necessary to secure such permission because in terms of s 3 of the Act, a diplomatic mission of a foreign state cannot purchase, hir or otherwise acquire immovable property except in accordance with the Minister's approval. The Minister's approval stated in part that permission had been granted to the Canadian High Commission to purchase

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Stand 1657, 49 Baines Avenue, for the Decentralised Assistance Programme. It was common ground that the reference to the Decentralised Assistance Programme was a reference to a programme run under the auspices of the Canadian International Development Agency (CIDA). The Canadian Government in Ottawa was creating a southern African centre for CIDA which was to be based in Harare and to be housed at Stands 1656 & 1657 (45 & 49 Baines Avenue).

The permit granted to the applicant to purchase Stand 1657 was subject to the condition that no development, as defined in the Regional Town and Country Planning Act [Chapter 29:12] could take place on that stand without the prior consent of the Minister. Development is in turn defined in s 22 (l)(b)(i) of the Act as including the altering of the character of the use of the building, unless the existing use and the proposed use falls within the same prescribed use group.

Having been granted permission to purchase Stand 1657, the applicant concluded an agreement with Mediview Investments (Pvt) Ltd, in terms of which it purchased the property on 26 January l990. Transfer of title to the applicant followed on 6 April l990. On 11 October l990, a letter was addressed to the respondent on behalf of the applicant wherein the respondent was advised of the fact that applicant was the new owner and that from then onwards rentals should be paid to the applicant at 45 Baines Avenue. The author of that letter also pointed out that it was intended to demolish the existing building on the property in order to construct a three storey office building for CIDA, which as already stated, is a development wing of the Canadian Government. By letter dated 24 October l991, the applicant gave formal notice to the respondent to vacate the property by 31 December l99l to enable it to take occupation on the following day, l January l992. Although it was stated in that letter that the applicant had, forthe time being, shelved the plan to demolish the existing building, the applicant nevertheless advised respondent of its intention to place CIDA in occupation of the premises in its present state. This letter of 24 October l991 was responded to by the respondents' lawyers by letter dated l0 January l991, some ten days after the date by which the applicant should have assumed occupation. It was contended on behalf of the respondent that respondent required between six and nine months to relocate his dental practice in alternative premises. It was also contended that Stand 1657 fell in Zone 2, General Residential, SubZone 2c, which in terms of the operative town planning scheme was zoned for surgeries and not office accommodation. Between the time this letter was written and l0 October l996, when the City of Harare granted to the applicant a permit to consolidate Stands 1656 and 1657 into one property to be henceforth referred to as Stand 18540, Harare, several letters passed between

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the parties' lawyers. The gavamen of the contentions raised in those letters was that the respondent was challenging the right of the applicant to purchase, let alone to occupy, Stand 1657, as such occupation would be in contravention of the Regional Town and Country Planning Act in that, so it was contended, no permit had been obtained to purchase and to alter the character of use of the premises. This challenge notwithstanding, the applicant did, after the consolidation of the two stands, issue another notice to the respondent on 24 January, l997 to vacate the premises by 30 March l997. The respondent refused to yield possession to the applicant, thus prompting the applicant, after a seven-year effort to secure occupation of the premises, to resort to these proceedings to obtain an order for the eviction of the respondent from the premises.

I perceive the following facts to be common ground or at the very least, to be indisputable:

1. The respondent, after the expiry of the original lease, became a statutory tenant in terms of the Commercial Premises (Rent) Regulations l983 (SI 676 of 1983). An order for his ejectment can only be issued if the applicant satisfies the court that she has good and sufficient grounds for requiring the premises.

2. The property, formerly Stand 1657, and now part of the new Stand 18540, was lawfully acquired by the applicant after the due and proper issue of a permit in terms of the Act.

3. The property, Stand 1657, at least before its consolidation with Stand 1657, fell under Zone 2 SubZone 2c of the relevant Town Planning Scheme zoned for surgeries.

4. The applicant requires the property, for its own use, whether in its existing state or after the construction of a multi-storey building on the property.

5. Similarly, it seems to be accepted that the respondent has had adequate notice to vacate the property.

The sole bone of contention is that that applicant does not have good and sufficient grounds upon which to base a claim for the ejectment of the respondent. This attack is premised upon the contention that the authority granted by the Minister in December l989 constituted no more than permission to purchase the property. It was not a permit to alter the character of use of the property, which is zoned, not for diplomatic missions but for surgeries. Until such time as the applicant can produce a permit authorising her to put the building to the proposed use, she cannot claim to have good and sufficient grounds for requiring the ejectment of the respondent. The applicant counters this argument by placing reliance upon the permit issued in December l989 which states, inter alia, that authority was being granted to the applicant for

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the purchase of the property in order to use it for its decentralised programme. The permit

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states as much.

Only two points were argued before me. The first point taken by Mr Moyo, who appeared on behalf of the applicant, was that the respondent is in breach of the lease agreement and, consequently, he has by virtue of that breach, disentitled himself to the protection normally afforded to a statutory tenant by s 22(2) of the Commercial Premises (Rent) Regulations. The second point, which was raised by Mr Phillips on behalf of the respondent, was that although the applicant has lawfully acquired the premises, there can be no good and sufficient cause for the eviction of respondent because the applicant has not secured a permit to alter the character of use of the premises. Unless and until such permission is sought and obtained in terms of s 8 of the Act, it would be premature to order the eviction of the respondent.

1. BREACH OF THE LEASE

Section 22(2) of the Regulations provides that:

> "No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee:
>
> (a) continues to pay the rent due, within seven days of due date; and
>
> (b) performs the other conditions of the lease;
>
> unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that:
>
> (i) the lessee has declined to agree to an increase in rent; or
>
> (ii) the lessor wishes to lease the premises to some other person."

The thrust of Mr Moyo's submission was that, over the last seven years, the respondent has persistently ignored the notice to vacate the premises, notwithstanding the fact that it was made clear to him that the premises are required for demolition and reconstruction and, furthermore, the premises have been required for use by the applicant. It was submitted that the respondent's refusal to vacate the premises constitutes a failure to "perform the other conditions of the lease" as required by s 22(2)(b) of the Regulations and that such breach divests the respondent of the protection afforded to a statutory tenant by the regulations. Reliance was placed on the judgments of the Supreme Court in *Moffat Outfitters \(Pvt\) Ltd v Hoosein \& Ors* l986 (2) ZLR 148 (S) and Guthrie Hldgs (Pvt) Ltd v Arches (Pvt) Ltd l989 (l) ZLR 184 (S). In the Moffat Outfitters case *supra*, the present Chief Justice, then judge of appeal, held that (a) the duty to allow the landlord an opportunity to

execute necessary repairs to the premise is an implied term in any contract of lease and that such term remains binding even after the lease has been converted into a statutory one, and (b) where a statutory tenant has been given notice to vacate the premises to allow the necessary work to be done, he fails to perform a condition of the lease and becomes liable to

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eviction if he does not vacate the premises.

It admits of no doubt that the authorities upon which Mr Moyo relied involved situations where the dominant purpose for requiring the tenant to vacate was not so as to terminate the statutory lease, but to allow the landlord an opportunity to carry out necessary repairs and thereafter to permit the tenant to return to the premises. The implied duty to vacate in order to allow repairs or renovations to be carried out, is one which is enforceable only when the tenant is being asked to vacate during the currency of the repair work. In such a case the tenant is asked to vacate temporarily. In casu, however, the respondent was being asked to vacate, not so that reconstruction can be done, but so that the landlord can take over occupation. The dominant purpose for requiring the tenant to vacate was to enable the applicant to assume occupation of the premises. That is why, when the applicant shelved the plans to build a multi-storey building on the property, the respondent was nevertheless asked to vacate so that th applicant would move into the building in its present state. The duty which is implied by law is one to vacate temporarily to allow for repairs to be carried out. There cannot be a duty to comply with a demand to vacate permanently. The Moffat Outfitters case and the other authorities in line with it are not authority for the submission made by Mr Moyo that the respondent should have vacated the premises and thereafter asserted his right to return to the premises. Once the respondent vacated the premises in response to the notice to do so, the statutory lease would come to an end and respondent could not thereafter be able to assert any right of occupation, as he would have none. I have to hold that the refusal by the respondent to vacate did not amount to a failure to perform any of the terms of the lease.

2. PERMISSION TO USE PREMISES AS A DIPLOMATIC MISSION

In this regard the argument is that the applicant was obliged to seek and obtain permission to purchase the premises. This was done. The applicant was required to go further and obtain permission in terms of s 8 of the Act authorising it to carry out development on the premises. The need to obtain permission arises from the fact that the premises were zoned for surgeries and any new development should be preceded by Ministerial authority. Since in terms of s 22(l)(b) of the Regional Town & Country Planning Act, development

includes change of character of use, the premises could not be converted from a surgery into diplomatic offices without the prior authority of the Minister.

The essence of this contention seems to be that a landlord who seeks to recover leased premises in order to use such premises for a purpose which is prohibited by law cannot be heard to claim that he has good and sufficient grounds upon which to pray for the eviction of the tenant. The matter is not entirely free from doubt but there are dicta which seems to support such proposition. In Lazarus & Jackson v Wessels & Ors l903 TS 499 at 509 Innes CJ said:

> "There is perhaps no argument which appeals so strongly to a court as one which is founded upon equitable considerations; but such appeals must always be closely scrutinised. This court cannot grant equitable relief, if by so doing it would be going contrary to a well defined principle of Roman-Dutch law or to some statutory provision."

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See also Ex p Frost 1956 (2) SA 110 (O) at 111D-E.

Speaking for myself, I have no problem in accepting that a litigant who asks the court to make a value judgment in his favour should satisfy the court that the relief which he seeks does not contravene a provision of the law of the land, whether it be the common law or a statutory provision. In other words, if it were the position in the present case that it would be contrary to the Act or the Regional Town and Country Planning Act for the applicant to convert the premises into diplomatic offices, then I would be loath to exercise my discretion in the applicant's favour. But I am not at all satisfied that that is the position here. I say so for the reasons which follow.

In terms of s 8 of the Act, the Minister responsible for Local Government, Rural and Urban Development is the responsible authority vested with the power to grant permission to carry out any development on the premises of a diplomatic mission. In granting the necessary permission he can impose any conditions which he deems fit. The letter by which the authority to purchase the premises was granted stated that the authority was being granted for the applicant's decentralised assistance programme. Although the permission was granted subject to the condition that no development should be carried out before the permission of the Minister was sought and obtained, it is clear to me that this condition was intended to cover forms of development other than the alternation of the character of use, because the authority to alter the use of the building was granted at the same time as the authority to purchase. The wording of s 8 satisfies me that in authorising development the Minister does not have to follow the proceure laid down in the Regional Town and Country Planning Act. The section gives the Minister power to grant permission to carry out development in a way he deems fit, notwithstanding the provisions of the Regional Town and Country Planning Act.

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The fact that the Minister is currently concerned about the fact that the applicant continues to lease the premises to the respondent is consistent with his original intention that the premises should, after being acquired by the applicant, be utilised only for diplomatic purposes. Understandably, the Minister is concerned that the applicant has, albeit unwillingly, entered into a commercial contract of lease from which income is derived. Had the Minister ever entertained any notion that applicant had no authority to use the premises for diplomatic purposes, I am sure he would have rectified the position.

The premises, that is Stand 1657, have now been consolidated with Stand 1656 to form Stand 18540. The property now forms an integral part of Stand 1656 upon which the siting of diplomatic offices is permissible. It has thus become impossible to treat the premises which previously constituted Stand 1657 as separable from Stand 1657. That use which was permissible on Stand 1656 is now permissible on what used to be Stand 1657.

It is now settled law that a landlord who seeks to recover possession of his property for his own use need only assert his good faith and bring some small measure of evidence to demonstrate the sincerity of his claim. See Boka Entprs (Pvt) Ltd v Joowalay & Anor l988 (l) ZLR 107 (S);

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Mobil Oil Zimbabwe (Pvt) Ltd v Chisipite Service Station (Pvt) Ltd 1991 (2) ZLR 82 (S).

The applicant sought permission not only to purchase the property but also to use it for a particular purpose and the necessary authority was granted. It is not now open to the respondent to attack the validity of the authority which was granted. Even if the Minister did not comply with the relevant legislation in granting the necessary authority, I cannot, in determining whether good cause has been shown, go beyond the Minister's ipse dixit in order to satisfy myself that the authority was granted in accordance with the operative legislation. The applicant did, in good faith, take steps to secure the use of the premises in accordance with Zimbabwean law. The functionaries concerned granted applicant the necessary consent and, I may say, in good faith. Whether the authority granted is tainted with procedural flaws is not a matter which is relevant to the issue of whether good and sufficient cause exists. Moreover, where authority has been given by the relevant statutory functionary, the failure of such functinary to comply with the governing legislation does not make the applicant's use illegal. The Minister's action is covered by an evidential presumption of validity expressed in the maxim omnia praesumuntur rite isse acta. Until the act in question has been found to be unlawful by a court of law, it is enforceable. As I have already stated, there is nothing upon which I can now reopen the question of the validity of the authority granted by the Minister. I have not been specifically invited to do

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so, but even if I had, I would have declined an invitation to investigate such a collateral issue.

It is for these reasons that I have come to the conclusion that this ground of opposition must fail. Accordingly, the application succeeds and I make the following order:

1. That the respondent vacates forthwith property number 1657 Salisbury Township, otherwise known as 49 Baines Avenue, Harare, failing which the Sheriff of this Honourable Court be and is hereby ordered and directed to eject the respondent from the said property number 49 Baines Avenue, Harare and give possession thereof to the applicant or her duly appointed representative in Zimbabwe.

2. That the respondent be and is hereby ordered to pay the costs of this application.

Scanlen & Holderness, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

S v MAKWAKWA 1997 (2) ZLR 298 (HC)

Court **High Court, Harare**

Gillespie J

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Criminal review

10 September 1997 Judgment No. HH-141-97

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 13 - protection of right to liberty - requirement that arrested person be brought to court without undue delay - effect on power of police to detain an arrested person - s 15 - protection against inhuman or degrading treatment - suspect being shackled to bench in police station overnight and questioned throughout

Criminal law - statutory offences - escape from lawful custody - no offence where custody unlawful

Criminal procedure - arrest - without warrant - detention following arrest - maximum period allowed - requirement that arrested person be brought to court as soon as possible - effect - when delay may be countenanced

Headnote

The Constitution requires that an arrested person be brought before a court without undue delay. This is the guiding principle in determining what power the police may have to detain a person before his first appearance in court. The Criminal Procedure and Evidence Act [Chapter 9:07] allows for the arrest of a person without a warrant in certain circumstances. Where such an arrest takes place, s 32(2) allows the person to be detained for up to 48 hours. This period may be extended to not more than 96 hours, depending on when the arrest took place and when the initial period of 48 hours expires. The detention of the arrested person may also be extended if a warrant for his further detention is obtained, though the Act does not specify the duration of such a warrant. The fact, though, that the person arrested may be detained does not mean that he should be detained. Just as the exercise of the power to arrest is open to challenge, so the decision whether or not to hold him for the maximum period permissible undr the Act or whether to permit his further detention without bringing him before a magistrate is likewise open to scrutiny. Delay in bringing a detained person before a magistrate will only be countenanced where that delay is excusable on some objective ground. The ground might relate to physical difficulties in presenting the person in a court, or it might relate to a legitimate, genuine and justifiable decision to use to the fullest extent the discretionary powers vested in the police by the law.

Where a person escaped after some 60 hours of detention, during which two court days had passed, where there was not reason why he could not have been taken to court, where there was no reason why he should have been detained the full 48 hours or why the 48 hour period

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should have been extended, and where the prolonged detention was accompanied by inhuman and degrading treatment,

Held, that the escape was not from lawful custody.

Cases cited:

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Allan v Min of Home Affairs 1985 (1) ZLR 339 (H)

Muzonda v Min of Home Affairs & Anor 1993 (1) ZLR 92 (S)

R v Mulekadza 1923 SR 45

R v Sambo 1964 RLR 565

The court referred to the following statutory provisions:

Constitution of Zimbabwe 1980, ss 13 & 15

Criminal Procedure and Evidence Act [Chapter 9:07], ss 32, 33(1) & 44(1)

Judgment

Gillespie J: In January 1996, young Tosana Makwakwa was arrested on suspicion of stock theft. The date of arrest was 9 January 1996. The time of arrest was 1420. He had the right to be taken before a magistrate within 48 hours of his arrest. The 48 hours would actually expire at 2.20 pm, but would be deemed to expire at 4.00 pm on 11 January. That was a Thursday. Any detention after that time on that date would have been unlawful without a warrant for further detention or if it were not possible to get him before a magistrate within that time limit. In which latter event the longest period he might lawfully be held in police custody is 96 hours.

At about 1.00 am (0100) on 12 January, Makwakwa was still in the custody of police. He was not in the police cells. He was in handcuffs in the charge office. He was handcuffed to a public bench. He was left alone. Somehow he managed to break the manacle on his wrist. He climbed out of a window. He escaped. He remained at liberty for over a year. He was rearrested apparently in about February 1997. He was tried by the magistrate in Kadoma on 23 May 1997 on a charge of contravening s 44(1) of the Criminal Procedure and Evidence Act, "escape from lawful custody".

Makwakwa defended himself saying that he had been held in police custody for 5 days before his alleged escape. Three nights he spent in police cells. Then he was moved to the charge office. He was manacled and shackled and tied to a bench. He spent two nights like that. He was then released from custody.

The police suggest that, on the first night after his arrest on 9 January, Makwakwa tried to kill himself in his cell. He was therefore removed from the cell and kept under observation in the charge office the following night, that of 10 January. It is claimed that a warrant for his further detention was obtained on the 11th and that during the small hours of the night of the 11th, he escaped from lawful custody.

The magistrate found him guilty. First of all, he believed the police evidence as to whether the detention of Makwakwa was lawful and as to whether the necessary warrant had been timeously obtained. Second, he

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disbelieved the claim that Makwakwa had been released. Third, he misunderstood the police evidence, believing that Makwakwa had in any event absconded in the early morning of 11 January rather than during the small hours of the 12th. He therefore held that Makwakwa had escaped even before the initial 48 hours period of lawful detention had expired. I judge that the magistrate was correct in disbelieving that Makwakwa had been released and also in disbelieving his claim to have been held for over five days in all. He was wrong, however, in his other findings. He erred in convicting Makwakwa.

The documents produced by the police do not completely bear out their version of the facts. The Detained Persons Book, or a copy of the relevant page of the book, was the first of the documents. It shows the accused's arrest as having occurred on 9 January at 1420. It records the alleged issue of a warrant for further detention in these rather cryptic terms:

> "WFD *11/1/96 to 1600* am/pm / / "

(The italicised portions reflect manuscript insertions in an otherwise printed space.) Clearly, the entry has not been properly completed. The extract also notes the disposal of the accused as:

> "Escaped whilst in the charge office."

The other document, however, casts considerable doubt on all this. It is the alleged warrant for further detention.

Rather it is a photocopy of an alleged warrant. The original was not produced. The photocopy is not even certified as authentic. On the face of the alleged warrant, appears the information that an application for a warrant was made on 11 January at 1600. In another block of print appears the suggestion that a warrant was duly issued authorising detention until 12 January (no time is given). This portion of the document has to be filled in and signed by the magistrate or justice of the peace. It boasts, however, no signature. Where the name of the official signing should be inserted in block capitals, the name "S MUKANGANISE" is written in. The designation of this person is not expressed. Where the date of signature should be written in, no insertions are made. The apparent impression of a rubber date stamp, however, is evidently intended to suggest that a Superintendent of Police in the Kadoma district stamped the document on 11 January. The date "11" is not part of the rubber stamp but is obviously, even on he photocopy, written in by hand in the stamped impression.

On the face of it, therefore, I entertain doubts concerning the validity of the alleged warrant. This is because it is not an original document. Because it does not bear the purported signature of a person having the power to sign such a warrant. Had the signature been present on an original document, then I would have accepted it as having been presumptively legitimately issued, even without the evidence of the authorising officer, according to the maxim

omnia praesumuntur rite esse acta. I am not prepared to make such an assumption, however, in a case affecting the liberty of the individual and where technical regularity on the face of the

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document is not manifest.

Even were I to suppose the warrant to have been regularly issued, there is a further difficulty with it. That difficulty relates to the question whether such a warrant could legitimately have been sought and issued. One is dealing with the following laws. The Constitution of Zimbabwe provides in s 13 of the Declaration of Rights that no person shall be deprived of his personal liberty save in cases authorised by law. One of those cases (by s 13(2)(e)) is the case of a person arrested on suspicion of having committed an offence. Where a person has been so arrested, then, by s 13(4), he must be brought without undue delay before a court. His entitlement to compensation for any unlawful arrest or detention is specifically protected by s 13(5).

The Criminal Procedure and Evidence Act [Chapter 9:07] provides for the arrest without warrant of a person suspected of, or engaged in, criminal conduct. Upon such arrest, that person's liberty is safeguarded in s 32(2) as follows:

> "Subject to subsections (3) and (4), a person arrested without warrant shall as soon as possible be brought to a police station or charge office and, if not released by reason that no charge is to be brought against him, may be detained for a period not exceeding forty-eight hours unless he is brought before a judge or magistrate upon a charge of any offence and his further detention is ordered by that judge or magistrate or a warrant for his further detention is obtained in terms of section thirty-three."

The questions of the purpose, grounds for issue and period of validity of a warrant for further detention are by no means clearly expressed in the legislation. Such a warrant is provided for in s 33(1) of the same Act which provides for the procedure in the same terms as it does for the issue of a warrant of arrest:

> "Any judge, magistrate or justice [of the peace] may issue a warrant for the arrest of any person or for the further detention of a person arrested without warrant on written application ... setting forth the offence alleged to have been committed and that, from information available to him, he has reasonable grounds of suspicion against that person ..."

A superintendent of police generally holds office as a justice of the peace. The issue of a warrant for the further detention in police custody is something that can be accomplished entirely within the police force. An assistant inspector in charge of a police station might apply to his commanding superintendent, stating no more than that on information he has grounds for suspicion against a man arrested and already in custody and, without giving reasons for the need to extend the period of detention before placing the prisoner before a court, secure that continued detention in police custody.

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There is nothing expressly limiting the duration of any such extended period of detention on warrant. Reid-Rowland, in his work, Criminal Procedure in Zimbabwe, writes, at 5-11:

"It is not clear from the Act for how long a person may be detained under such a warrant. Although in practice a warrant for further detention is taken as extending the 48-hour period to a maximum of 96 hours, there is no legal basis for this practice. Section 32(3), which allows the 48-hour period to be extended to 96 hours, makes no reference to the extension of the 48 hour

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period by a warrant for further detention."

The learned author is quite correct. Section 32(3) provides that:

> "If the period referred to in subsection (2) expires -
>
> (a) on a day which is not a court day or on any court day after four o'clock in the afternoon, the said period shall be deemed to expire at four o'clock in the afternoon of the court day next succeeding that day; or
>
> (b) on any court day before four o'clock in the afternoon, the said period shall be deemed to expire at four o'clock in the afternoon of that court day:
>
> Provided that this subsection shall not in any case be construed as extending the period referred to in subsection (1) beyond a period of ninety-six hours."

The provision relates only to the extension of the period of detention without warrant on the grounds that the 24 hour period expires on a day or at a time when the prisoner cannot be taken to a court.

To summarise, the Constitution demands that an arrested person be brought before a court without undue delay. The Criminal Code demands that one arrested without warrant be brought to a police station as soon as possible and there detained for up to 48 hours. This period may be extended. Either automatically without warrant, up to a maximum of 96 hours, where the normal period of 48 hours expires after court hours or on a day not a court day. Or by warrant. A warrant, whether for the arrest or for the further detention of a person, is issued subject to the obligation to take the affected person as soon as possible to a police station and thereafter to bring him as soon as possible before a judicial officer.

It is extremely difficult to perceive in this regime any need or any justification for the system of further detention on warrant consequent upon an arrest without warrant. I have heard no argument on the point and therefore would not presume to hold that any such procedure is *per* se unconstitutional. It could be that it is. It certainly seems unnecessary. I do not wish to speak definitively on the point. Some other point is clear and is crucial to the case. It is the question whether, whatever powers the police may have in respect of arrest and detention without warrant, or further detention with warrant, these powers were lawfully exercised in the particular case. For the powers given are prone to abuse if unchecked. Reid-Rowland gives an example of one type of abuse at 5-10 of the work cited:

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> "Although the courts do not usually sit on Saturdays (at one time they used to), Saturdays are regarded, for this purpose, as 'court days'. Nonetheless, it is possible to abuse the latitude granted by the section and so arrange matters that the accused remains in police custody for nearly 96 hours, without having to obtain a warrant for the suspect's further detention. For example, if the suspect is detained after 4 pm on a Thursday, the 48 hour period, which actually expires at the corresponding time the following Saturday, is deemed to expire at 4 pm on the next court day, the Monday. While such an occurrence may be lawful, it is certainly undesirable; and there is a suspicion that many arrests are carefully arranged to give the police as much time as possible with the accused."

Another type of abuse relates to the use of a warrant for further detention where there is absolutely no need to resort to such a device. Where there is absolutely no need to retain a

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man in police custody.

I call this an abuse because the Constitution requires that a person be placed before a court without undue delay. This is the guiding principle in determining what power the police may have to detain a person prior to his first appearance in court. Since the formulation "without undue delay" is being used in order to define a freedom it must be narrowly construed in favorem libertatis. It is the tradition of this court that such phrases are strictly interpreted even when not found in a declaration of rights. In R v Mulekadza 1923 SR 45 at 46 Tredgold SJ wrote concerning a similar provision:

> "[E]very arrested person must be brought before a magistrate with all convenient speed. 'All convenient speed' means at least the next sitting day of the court. On arrest, the accused person should be brought before the Magistrate and if the case is not ready for trial the circumstances should be explained and a remand asked for. It is for the Magistrate to decided what is to be done with an arrested person; the Police have no greater authority to do this than any ordinary individual. A tendency appears to be growing to detain a man pending enquiries; detention is arrest the ideas cannot be differentiated in Police work. As a matter of fact one person alleged to be only detained, broke away and was actually charged with escape 'from custody'.
>
> This practice must cease. Any detention or arrest must be at once reported to the Magistrate by taking the prisoner before him, and he will then give orders as to the subsequent conduct of the case. Any reasonable explanation justifying remand would probably be acted on by him."

The learned SENIOR JUDGE was addressing in particular the phrase "with all convenient speed". The force of his remarks is by no means lessened by the fact that the present statute uses the words "as soon as possible". Indeed the words "as soon as possible" have rather greater exigency about them: not "with all convenient speed" but "with all possible speed". Nor is the stringency of any of this diminished by the use in the Constitution of the words "without undue delay". These words make it clear that any delay that is encountered in bringing an arrested person before a magistrate is subject to investigation as to whether or not the delay might be regarded as justifiable.

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If then, an arrested person is to be brought before a court without undue delay and as soon as possible, what is the position of the time limit of the 48 hours (or 96 hours as the case may be) detention without warrant or of any warrant purporting to extend that period of detention? This problem causes Reid-Rowland to question whether a person can be detained for up to 48 or 96 hours in all circumstances. He writes at 5-10 to 5-11:

> "The wording of s 32(2) seems quite clear; the police are entitled to hold the accused for 48 hours (or for the extended period provided by s 32(3)) and are not obliged to bring the accused to court before the expiry of the appropriate period.
>
> There are two ways of looking at this. The first is to argue that the object of s 32(2) of the CP&EA is not to give the police a free hand with the accused for 48 hours but simply to give them a reasonable time in which to bring the accused before a court. Many police stations are not within easy reach of a magistrates court and it may be impossible for the accused to be brought before a court any earlier. Forty-eight hours, though, should be an adequate time for a person to be brought from the remotest police station to a court for remand.
>
> The other, more pragmatic approach is to argue that it was clearly intended by the legislature that if the police are

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> to perform their role properly they must have the opportunity to question suspects in what is admittedly a hostile atmosphere. The prosecution of crime would otherwise become impossible, as many convictions rely on confessions."

It seems to me that the answer to this problem may be discovered by analogy with other similar situations.

For example, the very power to arrest reposes a discretion in a policeman. The mere fact that he may have the power to arrest does not mean that an arrest will be justified. It was made clear by Gubbay CJ that the exercise of the power to arrest is open to challenge, on the grounds applicable to the challenge of any administrative decision, even where the objective grounds for arrest may be said to exist. In Muzonda v Min of Home Affairs 1993 (1) ZLR 92 (S) at 99E-G the learned Chief Justice wrote:

> "In making the determination of whether the decision to arrest the plaintiff is open to challenge several important factors require to be considered. They are: (i) the possibility of escape; (ii) the prevention of further crime; and (iii) the obstruction of police enquiries."

In like manner, I would say that the decision as to whether or not to hold a person for the maximum permissible period or whether to permit his further detention without placing him before a magistrate (to the extent such a course may be constitutional) is likewise open to scrutiny, even though the power to choose such a course might be clear.

The reason for this strict protection was declaimed by Reynolds J in Allan v Min of Home Affairs 1985 (1) ZLR 339 (H) at 346A et seq:

> "[I]t is essential, in my view, for any person entrusted with the signal power of arrest to recognise, and to keep constantly in the forefront of his mind, the concept that this power should be exercised only in cases of urgency or real necessity ...

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> Since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society. Long before the Magna Carta codified the principle almost eight hundred years ago, man has pursued and jealously guarded his right to freedom of person. In the words of Thomas Jefferson - 'The God who gave us life gave us liberty at the same time'."

This passage was quoted with approval by the learned Chief Justice in Muzonda's case *supra*.

The need for strict enforcement of the right to freedom is also illustrated in *R v Sambo* 1964 RLR 565 at 570A where the former Chief Justice, Beadle CJ, remarked that it was wrong of the police to hold a suspect on a minor statutory offence where the real purpose was to investigate a much more serious offence. This device, referred to as a "holding charge", is obviously an exercise in bad faith and provides no justification for the deprivation of liberty.

The lesson to be learned from this is that delay in bringing a detained person before a magistrate will only be countenanced where that delay is excusable on some objective ground. The ground might relate to physical difficulties in presenting the person in a court, or it might relate to a legitimate, genuine and justifiable decision to use to the fullest extent the discretionary powers vested in the police by law. It is not to be thought, however, that the mere

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giving of the power is itself sufficient reason for the wielding thereof.

In this case, the evidence concerning the detention of Makwakwa shows the following. I extract the passages from the testimony of Cst Tauya, from whose custody he escaped:

> "I was then informed during the day axd attempted to hang himself in the cell. I/O had withdrawn everything from the cell - his clothes, blankets. He was left only with his trousers. I then thought axd might suffer from mosquitoes and decided he be kept in the charge office. In the charge office I tied him with leg irons, and handcuffs, and tied him to a bench. I thought it was necessary as he had attempted to hang himself. I feared he could run out. The following morning at 0500 I knocked off duty. Everything was intact. I spent the whole night questioning him. I left him in that position. I don't know how he was secured during daytime. I came again for duty 11 January 1996. I commenced duty at 2100. Axd was still being held at the station. He was in the cells. He was handed over to me again. I asked Cst Takaendesa to take axd from the cells, as I wanted to secure him as the previous night. Axd was still alive in his cell. I took him to the charge office. Before I secured axd O/C approached me and instructedme how I should secure axd different from what I did previous night. It was just more comfortable to axd. But to myself security was compromised. I tied him to a bench as *per* O/C's instructions only one hand was tied to bench. There were no leg irons this time. I was in charge office up to around 0100. I left charge office for the toilet nearby. I entered the toilet. Whilst inside I heard a bang. I came out to see what had happened. I had gone out for just a minute. I did not see anything. I ran to the charge office. I noticed axd was no longer there."

This recitation adds another cause for concern to the question concerning

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the continued detention of Makwakwa, which I have already addressed. It is that the prisoner was treated shamefully. I cannot believe that the steps were taken to save him from himself. That is inconsistent with the other unconvincing reason that he was to be saved from the nocturnal depredations of mosquitoes.

He was certainly afforded no greater protection from these insects in the charge office than he would have enjoyed in his cell. He had to spend a whole night in irons, chained to a bench. He was faced with another night of the same.

The Constitution, in s 15(1), protects a person from torture, from inhuman or degrading punishment or other such treatment. Civilised notions would recoil at the thought that the treatment meted out to Makwakwa should be regarded as anything other than inhuman or degrading. The fact that it was necessary to shackle him to prevent him from escaping does not save the State's position, despite s 15(2) of the Constitution, since if he was to be held, he should have been held in a proper cell. Not in a public office. Not in chains. If it were feared that he were potentially suicidal, all the more reason not to keep him in police cells but to take him before a magistrate and have him remanded in custody according to law and where he could be properly supervised.

The extract from the evidence is all the more telling. The constable reveals that he spent all night questioning his prisoner. It is difficult to resist the conclusion that the whole episode was designed to bring about just that "hostile atmosphere" referred to by Reid-Rowland. There is nothing to say that the prisoner could not have been taken before a magistrate. There is nothing to say that although he could be presented in court, nevertheless it was justifiable to hold him in custody. The holding in custody was on the face of it done in order to facilitate oppressive

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questioning. Even if that was not the object, unacceptable interrogation and improper treatment was undoubtedly the result.

In my judgment, therefore, it cannot be said that the custody from which the accused escaped was lawful. He escaped after almost 60 hours of detention had elapsed. During that 60 hours two court days had passed. There was no reason why the man could not be taken to court. There was no reason given why he should he held a full 48 hours. There was no reason given why the 48 hours should be extended. The prolonged detention was in addition accompanied by inhuman and degrading treatment. This was unlawful. The escape was not unlawful.

Even were I to be incorrect in this view, I would still quash the conviction. I do not believe that a warrant for further detention was duly applied for and issued. Even if it were applied for it is not signed. It has therefore not been

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shown to have been issued. I suspect that the documents pertaining to the alleged warrant were created ex post facto. It has certainly not been proved, and it is for the State to prove, that the extended detention was duly warranted and accordingly lawful.

I order accordingly that the conviction is quashed and the sentence set aside.

CHINHENGO J agrees.

S v MAKOSI & ANOR 1997 (2) ZLR 308 (HC)

Court **High Court, Harare**

Chinhengo J

Criminal review

10 September 1997 Judgment No. HH-138-97

Flynote

Criminal law - statutory offences - Concealment of Birth Act [Chapter 9:04] - s 2 - endevouring to conceal birth of child - can only be committed by mother of the child - person assisting mother to conceal birth must be charged as a socius criminis - mother burying a five-month dead fetus - such a fetus not a child in terms of the Act

Headnote

The accused were mother and daughter. While they were out working, the daughter aborted a five-month fetus. The fetus was dead. The two women buried the fetus in a shallow grave. They subsequently pleaded guilty to a charge of contravening s 2 of the Concealment of Birth Act [Chapter 9:04].

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Held, that the charge was defective. The offence of concealing the birth of a child was one which could only be committed by the mother of the child. A person who assisted the mother to conceal the birth could not be charged as a principal offender, but only as a socius criminis. Nevertheless, because there had been no miscarriage of justice, the failure to frame the charge properly did not render the proceedings defective.

Held, further, that the objects of the section were (a) a more technical approach to ensure proper registration of births and deaths; and (b) an anxiety to prevent the murder of infants by insisting on the reporting of births and the punishment of concealment. To determine whether either objective had been defeated in any given case, it was necessary to determine whether or not there had been the birth of a child. There was no requirement to report the birth of a fetus of less than 28 weeks' intra-uterine existence and consequently the fetus in this case was not a child for the purposes of the section.

Cases cited:

S v Chingodza 1996 (1) ZLR 521 (H)

S v Jasi 1993 (2) ZLR 451 (H)

S v Kellner 1963 (2) SA 435 (A)

S v Madombwe 1977 (1) RLR 325 (G)

The court referred to the following statutory provisions:

Births and Deaths Registration Act [Chapter 5:02], s 11

Concealment of Birth Act [Chapter 9:04], s 2

Judgment

Chinhengo J: The accused persons are related to each other. The second accused is the daughter of the first accused. They are both charged with the

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contravention of s 2 of the Concealment of Birth Act [Chapter 9:04] (the Act). The allegations against them are that on 26 March l997 the accused persons were working in their fields when the second accused's pregnancy was aborted. A five month fetus was expelled from her womb. The fetus was dead. It is not clear whether the expulsion was induced or whether it was spontaneous. The accused persons are said to have connived with each other and secretly buried the fetus in a shallow grave. They both pleaded guilty to the charge and were sentenced, in the case of the second accused, to eight months' imprisonment which was wholly suspended for three years on condition that she did not, during that period, commit any offence involving the contravention of s 2 of the Act for which she is sentenced to imprisonment without the option of a fine; and in the case of the firstaccused, to fifteen months' imprisonment of which six months were suspended for five years on conditions similar to those imposed in respect of the

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second accused. The first accused is therefore serving an effective nine months in jail.

The charge reads:

> "Charged with the crime of contravening s 2 of the Concealment of Birth Act [Chapter 9:04] in that on 26 March l997 and at Daraeurika Resettlement area, Soti-source, Gutu and after Rhodha Makosi, a woman, had given birth to a child, both Rhodha Makosi and Ruramisai Makosi or one of them unlawfully endeavoured to conceal the birth thereof by secret burial or other disposal of body of the child."

The first question is whether the accused persons were properly charged. To answer this question I have to examine the wording of the Act. It reads:

> "Any woman who is delivered of a child shall be guilty of the crime of concealing the birth of her child if she, by secret burial or other disposal of the child, endeavours to conceal the birth thereof, and shall be liable to imprisonment for a period not exceeding five years."

The offence is principally committed by a woman who is delivered of a child. Any other person can only be a socius criminis, that is to say, a person who takes part in the commission of a crime other than as the actual perpetrator and other than an accessory after the fact. "Thus the term socius criminis is wide enough to include a person who, with the necessary *mens rea*, aids, abets, counsels or assists in a crime, either before or during its commission. The term, therefore, covers the accessory before the fact and the principal in the second degree of English Common Law": Burchell and Hunt South African Criminal Law and Procedure vol 1 General Principles at p 350.

The same authors state at p 350-351 in relation to a person's liability as a socius criminis in criminal offences against a statute as follows:

> "A person is liable as a socius criminis whether the crime is one against the common law or statute law. This follows from the rule of the common law which equates the guilt of the

> *socius* with that of the actual perpetrator, and there is 'no warrant in logic or justice for excluding the rule in the case of criminal offences against a statute. It is immaterial that the statute does not expressly refer to a socius criminis as being within its scope' ... Moreover, since the liability of the socius stems from the common law, *mens rea* on his part is always a pre-requisite of guilt even where the offence is a statutory one which does not require *mens rea* on the part of the principal offence."

The first accused was not herself, as I have said, delivered of a child. She aided or abetted the principal offender. Her liability as a socius criminis therefore arises from aiding and abetting the second accused in committing the offence. In S v Kellner l963 (2) SA 435 (A) Steyn CJ stated that a person who aids and abets a principal offender is himself a socius. He said at 446F-447:

> "As will appear from what I have said above, this line of cases proceeds upon the principle that a person cannot be an accomplice for the purposes of the statutory requirement as to the confirmation of the evidence of an accomplice, unless he is liable to be charged with the same offence as that alleged against the principal offender. In my opinion, that principle is too widely stated and, in relation to an offence which the alleged accomplice cannot himself commit, it is, having regard to our law as set out in *R v Jackson supra*, quite clearly erroneous. In the case of such an offence, although the legal impediment to its commission precludes such a person from being a principal offender, it cannot be disputed that he is an accessory before the fact if he aids and abets its

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> commission, and therefore an accomplice. It would be more correct to say that a person is an accomplice if he is liable to prosecution in connection with the commission of the same offence as the principal offender, bearing in mind, howeve, that an accessory after the fact, ie after the commission of the offence, was held in R v Mlooi & Ors l925 AD 131, is not an accomplice, whether or not a person is so liable must depend upon what he has done and the state of mind with which he has done it. If that, in the case of a person who cannot himself commit the offence, makes him an aider and abettor of a person who can and has done so, he is an accomplice for the purpose of s 257."

The offence created by s 2 of the Act is the concealment of birth. It is not, as one need not state, the giving of birth to a child. The offence is committed after giving birth to a child and the mother endeavours to conceal that birth. The person who has not given birth to the child, but aids and abets the concealment of the birth, is himself liable to prosecution in connection with the commission of the same offence. The first accused aided and abetted the second accused in concealing the birth of the child delivered of the second accused. She is no doubt a socius criminis. The charge therefore is defective. In order to inform the first accused of the exact facts upon which the allegation against her was based the charge should have specified that the she is guilty of having aided and abetted the commission of the principal offence. To this extent, the first accused was not properly charged. However, I do not think that the failure to charge the first accused with proper particularity as indicated above reners the proceedings defective. No miscarriage of justice arises from this. The charge as amended along the lines I have indicated

would still have resulted in a conviction. I should however draw the attention of the presiding officer to the need to ensure that an accused person is properly charged. The second accused was properly charged.

The wider question, which arises in the present case, is whether or not the accused persons committed the offence in the charge. Section 2 of the Act specifies the crime as being the "concealing of the birth of the child" by secret burial or other disposal of the body.

In relation to the second accused, the commission of the offence is not beyond doubt. She was eighteen years old when she gave birth to the child. The birth was in the presence of her mother, the first accused. Can it be said that she endeavoured to conceal the birth of the child? What did the legislature have in mind when it created the offence? In *S v Chingodza* 1996 (1) ZLR 521 (H) at 526 Gillespie J stated the policy underlying this Act as follows:

> "The aim of the provision would appear to be twofold: one, a more technical approach to ensuring proper registration of the important matters of births and deaths. Underlying that, however, there must be an anxiety to prevent the murder of infants by insisting upon the reporting of births and by punishing any concealment."

I entirely agree that these are the two objectives of the Act. To determine whether either of the objectives has been defeated in any given case, it is necessary to determine whether or not there has been a birth of a child.

In the present case, the fetus was five months old. In *S v Jasi* l993 (2) ZLR 451 (H), Adam J reviewed a number of authorities and said at 459E-G:

> "It is a truism that there have been rapid, extensive and most remarkable developments in the medical field,

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including obstetrics and gynecology, since l977. I cannot, therefore, accept that Whitaker J was correct when he held that a fetus of less than 28 weeks should not be regarded as a child within the provisions of the Act. In my view, a child within the provisions of the Act is one that has reached a stage of development, irrespective of the duration of the pregnancy, which makes the child capable of being born alive, that is to say, after separation from its mother the child breathes independently either naturally or with the aid of a ventilator."

This approach appears to me to be quite pragmatic and supportable by medical evidence and the dicta in the many cases referred to by Adam J. It is pragmatic in that it adverts to a single consideration ie whether the child, after separation from its mother is capable of some independent existence. In the case before him, Adam J found no evidence that the intra-uterine still-birth fetus was either naturally or with the aid of a ventilator capable of independent existence. He set aside the conviction.

I am in agreement with the conclusion in Jasi's case but for different reasons. My reasons are similar to those given by Whitaker J in *S v Madombwe* l977(1) RLR 325. In that case, the accused had aborted a five and a half months old fetus and endeavoured to conceal its birth by disposing of

it in a dustbin. Whitaker J held that a fetus of less than twenty-eight weeks should not be regarded as a child within the provisions of the Act. He stated at 325 G as follows:

"The word 'child' is not defined in the Act nor, as far as I am aware, has it been defined by this court. The meaning of the word as used in equivalent South African legislation has been considered by the South African Courts, however, in the case of R v Matthews l943 CPD 8 Davies J (at p 9) stated:

> 'No definition is given of 'child' in s 113 of Act 46 of l935 under which she was charged. But my attention has been drawn by the Attorney General to the Births, Marriages and Deaths Registration Act 17 of l923. Under s l9 of that Act the birth of a still-born child must be certified and reported. But a still-born child is defined as a fetus of over six months of intra-uterine existence - s 49. I cannot think that there has been any concealment of birth of a fetus where the law imposes no necessity in regard to reporting it. It is true that in one case in England the judge expressed the view that a fetus of less than six months might be a child, but with this view Gardiner and Landsdown are not in agreement (see vol 2 p 1310). The latter opinion, it is submitted, is that a fetus is not a child for purposes of the statute unless it has reached a stage of development sufficient to have rendered its separate existence apart from its mother a reasonable probability.'

This approach commends itself to me and I consider it should be adopted. The Birth and Deaths Registration Act [Chapter 30] (now Chapter 5:02) makes provision for the registration inter alia of still births and in terms of s 2 the term still-birth is interpreted as applying 'to any child which has issued forth from its mother after the twenty eighth week of pregnancy and which did not at the time after being completely expelled from its mother breathe or show any signs of life'."

WHITAKER J had obtained the views of the Attorney-General to the effect that a fetus of less than twenty-eight weeks should not be regarded as a child.

In adopting the views of Whitaker J, I do not believe I am turning the clock against a development which had been brought about by Jasi's case *supra*. The Births and Deaths Registration Act requires that notice should be given to the registrar of any birth or still-birth. The definition of still-birth has not been changed. In my opinion, the fetus can only be

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considered to be a child within the provisions of the Act if it was not less than twenty-eight weeks old. It is in respect of the birth of a child, twenty-eight weeks or older, that the obligation to notify the registrar is imposed on the persons referred to in s 11 of the Births and Deaths Registration Act. I am satisfied that the conviction in the present case cannot be upheld, as the fetus was only twenty weeks old. This approach resolves another problem which had occurred to me - whether concealment of a birth is to be regarded as concealment from the authorities or from any other person or persons. A resort to s 11 of the Births & Deaths RegistrationAct indicates that the concealment of birth is a concealment from the authorities as contemplated by the requirement of this section. If one were to dispense with the definition of still-birth ie the twenty-eight week old criterion, one would be at a loss as to the meaning of

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concealment as any concealment in disregard of the twenty-eight week age of the fetus would not make sense.

Accordingly, the conviction and sentence in respect of both accused persons are set aside. The first accused is therefore entitled to her immediate release. In fact I issued a warrant for the liberation of the first accused as soon as the record of these proceedings was placed before me. This was on 25 August l997.

Finally, I would like to observe that if the conviction had been in order, I would have had great difficulty in confirming the sentence in respect of the first accused. The case of *S v Chingodza supra* lays down the correct approach to sentencing in cases of this nature. Judicial officers are therefore encouraged to read this case as it provides immeasurable guidance in cases of this nature.

GILLESPIE J agrees.

MAPHOSA & ANOR v COOK & ORS 1997 (2) ZLR 314 (HC)

Court **High Court, Bulawayo**

Malaba J

Civil application

12 September 1997 Judgment No. HB-39-97

Flynote

Immovable property - title deed - caveat registered against title deed by judgment creditor of landowner - effect on rights of purchaser of property where transfer not made

Headnote

The applicants had agreed with the first respondent to buy her half share in a piece of land.

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They had paid the bulk of the agreed purchase price. Before transfer was made, the second respondent, a bank, obtained judgment against the first respondent in respect of certain debts. In pursuance of a writ of execution, the sheriff attached the first respondent's half share in the property and recorded the attachment as a caveat to the title deeds. The applicants sought the upliftment of the caveat to clear the way for the transfer of the property.

Held, dismissing the application, that even though the applicants had paid the purchase price, they did not become owners until transfer was made. They had personal rights claimable against the landowner.

Held, further, that even if a caveat does not confer a real right on the judgment creditor (the authorities are not consistent), it provides a judicial lien in the attached property. The judgment creditor is entitled to have the property sold even if a third party has a personal right against the debtor.

Held, further, that the court had a discretion as to whether to uplift the caveat, if the applicants could discharge the onus of showing that there were special circumstances why an order uplifting the caveat should be granted. They would have to show not only that the property had been sold to them but also that there were facts or circumstances which would satisfy the court that it would be just and equitable to grant the relief sought. In this case, the balance of convenience did not support the applicants.

Cases cited:

Bulle v Merchant Bank of Central Africa Ltd & Ors HH-2-96

de Villiers v Cohen 1906 TH 12

Reynders v Rand Bank Bpk 1978 (2) SA 630 (T)

Union & Rhodesia Wholesalers Ltd's Liquidators v Brown & Co 1922 AD 549

The court referred to the following statutory provisions:

Deeds Registries Act [Chapter 20:05], s 64

Case Information

V B Sibanda, for the applicants

B Longhurst, for the respondents

MALABA J

Judgment

Malaba J: In an ex tempore judgment delivered on 12 September 1997 I dismissed an application for an order uplifting a caveat registered by the second respondent over property

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owned by the first respondent.

It is common cause that first respondent is the registered owner of an undivided half share in a piece of land called Subdivision 2 of Lot G of Upper Rangemore, Bulawayo held under Deed of Transfer No. 1382/73. It is also not in dispute that the applicants entered into an agreement of sale with first respondent on 3 May 1983 in terms of which they agreed to buy from her the half share at a purchase price of $10 500. The applicants have paid $10 000 of the purchase price and are desirous to get transfer of the property.

On 15 October 1992, the second respondent was in case HC-1999-92 granted judgment against the first respondent for the payment of $457 802.25 with interest thereon at the rate of 34% *per* annum from 29 June 1992 to date of payment. In pursuance of a writ of execution issued on 10 March 1993 the Deputy Sheriff attached the first respondent's undivided half share in subdivision 2 of Lot G of Upper Rangemore and recorded the attachment against the title deed under Caveat Number 207/93. It is this caveat that the applicants apply to have uplifted to clear the way for the transfer of the property into their names. The second respondent is opposed to the granting of the order of upliftment.

It is clear to me that at the time the second respondent recorded the caveat against the undivided half share in the land, the first respondent was the lawful owner of the real rights therein. The applicants had personal rights against her to claim transfer of the real rights. Maasdorp Institutes of South African Law vol 2 6 ed at p 82 states:

> "In South Africa no person can be said to be the owner of land or immovable property until he has obtained transfer of the same. It is the transfer that gives the dominium. Without transfer a purchaser has only to claim the transfer. He is not the proprietor of the ground, although he may have paid the purchase price."

At p 55 of the 9th edition, the learned author states:

> "Where the basis for the transfer of ownership of immovables is a contract, formal transfer in terms of the Deeds Registry Act is necessary to pass the ownership, and payment of the purchase price, coupled with giving the purchaser possession of the land sold, does not avail to make him the owner of the land."

The second respondent did not only attach the real rights at a time they were owned by its judgment debtor but recorded the caveat against the title as notice to the world at large of its interest in the property attached.

The applicants, on the other hand, did not have the agreement of sale endorsed on the title deed in terms of s 64(1) of the Deeds Registeries Act [Chapter 20:05]. They remained in possession of personal rights claimable against first respondent. They are creditors without security.

MALABA J

The applicants relied on the decision in Bulle v Merchant Bank of Central Africa Ltd & Ors HH-2-96 at 7-8 to the effect that a caveat recorded against a title deed does not confer on the judgment creditor real rights. The applicant in Bulle's case was, however, shown to have been the lawful owner of the attached property although it was still registered in the judgment debtor's

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name. In that case, the property attached had not belonged to the judgment debtor.

SMITH J said at pp 7-8 of the cyclostyled judgment:

> "In my opinion, the affidavits filed by the applicant establish that she is the rightful owner of the property and therefore registered in her name. What about the caveats, though? There can be no doubt that, if there were a mortgage, the title deeds then that bond would have to be cancelled before the transfer could be registered. The rights of the bondholder would be protected. Does a caveat have the same protection ie does it confer a real right? I do not think that a caveat does confer a real right on the judgment creditor."

It is no more than a notice which the Registrar of Deeds is required to record in terms of s 5(u) of the Deeds Registries Act [Chapter 20:05]. The effect of such a notice was described as follows in Liquidators Union & Rhodesia Wholesalers Ltd v Brown & Co 1922 AD 549 at 558-9 by Kotze JA:

> "It will be desirable, before referring to s 201 of the Companies Act to consider the law on the subject of the right possessed by a judgment creditor who has arrested the goods of his debtor under a writ of execution. While an ordinary arrest of property under the Roman-Dutch law gives no preference, an arrest effected on property in execution of a judgment creates a pignus praetorium or to speak more correctly a pignus judiciale, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the lands or custody of the officer of the court. They pass out of the estate of the judgment debtor so that in the event of the debtor's insolvency the curator of the latter's estate cannot claim to have the property attached delivered up to him to be dealt with in the distribution of the insolvent's estate."

A court has a discretion in the matter. Even if a caveat does not confer real rights (see Reynders v Rand Bank Bpk 1978 (2) SA 630 at 633H for a view to the contrary) it provides to the judgment creditor a judicial lien in the attached property for the recovery of the debt owed by the judgment debtor. In fact the endorsement procedure provided for in s 64 of the Deeds Registries Act [Chapter 20.05] was designed to protect a purchaser in the attachment of the land in execution.

Herbstein and Van Winsen Civil Practice of The Superior Courts in South Africa 3 ed state at p 597:

> "A judgment creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against such a debtor to the ownership or possession of such property which right arose prior to the attachment or even the judgment creditor's cause of action and of which the judgment creditor had notice when the attachment was made. An attachment in execution creates a judicial mortgage or *pignus judiciale*."

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The onus was on the applicants to satisfy the court that there are special circumstances why an order uplifting the caveat should be granted. The second respondent is a secured judgment creditor. The applicants are not secured in anyway against the disposal of the property by first respondent. As they are all creditors of the first respondent, the second respondent is in a stronger preferment position. There is no evidence that it knew when it attached the property of the existence of the applicants' personal rights against the first respondent to implement her contractual obligation to pass transfer of the property to them.

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The applicants did not show to my satisfaction that the second respondent had available to it some other way of obtaining the satisfaction of its judgment once the caveat is discharged. The amount of money owed by the judgment debtor to the second respondent is far greater than the purchase price paid by the applicants to first respondent for the attached property. The balance of convenience does not support the applicants and in the absence of special circumstances it is not enough to simply allege that the property was sold to them by the judgment debtor (van Niekerk v Fortum 1913 CPD 457 at 458-9).

In de Villiers v Cohen 1906 TH 12 (headnote quoted in Reynders' case *supra* at 635C) it was stated that:

> "De V bought and paid for certain stands the registered property of H in 1903, but failed to have the property registered in her name. C, in execution of the judgment against H, and without knowledge of prior rights attached the said property in 1905. Subsequent to attachment he was informed of De V's position in regard thereto.
>
> *Held*: on an application by De V for a discharge of the attachment that an attachment of immovable property creates a pignus praetorium in favour of a creditor ignorant of prior rights and acting without fraud.
>
> *Held*: further that a purchaser of land who has not taken transfer coram lege loci, cannot claim the privileges of an owner."

It is clear from the authorities that in the exercise of its discretion the court will consider the fact that the attached property had been sold to the applicant but that the applicant must show, in addition to that factor, the existence of facts or circumstances which satisfy it that it would be just or equitable to grant the relief sought. In this case the applicants failed to discharge that onus.

The application is dismissed with costs.

Jumo Mashoko & Partners, applicants' legal practitioners

Ben Baron & Partners, second respondent's legal practitioners

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WATSON v GILSON ENTERPRISES (PVT) LTD & ORS 1997 (2) ZLR 318 (HC)

Court **High Court, Harare**

Gillespie J

Application for temporary interdict

4 July 1996 & 24 September 1997 Judgment No. HH-149-97

Flynote

Agency - principal - non-existent principal - whether agent incurs rights or obligations under contract

Company - pre-incorporation contract - requirements for validity - person acting as agent or trustee of company to be formed - distinction

Contract - pre-incorporation contract of company to be formed - contract entered into by an agenct on behlaf of a company to be formed later - whether agent had personal right to enforce the contract if the company is not

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later formed - benefit of third party - acceptance - whether promisee may enforce promise made for benefit of third party - interpretation - ut res magis valeat cum pereat

Legal practitioner - conduct and ethics - conflict of interest - what constitutes - whether court will prevent lawyer from acting where conflict of interest arises

Practice and procedure - interdict - temporary - application for - requirements for the granting of temporary interdict - *prima facie* right - meaning - court's discretion to refuse interdict

Headnote

The applicant sought a temporary interdict to prevent the disposal of a farm to a third party pending the determination of a claim instituted by applicant for transfer of the farm to him.

Held, that in an application for a temporary interdict the applicant had to establish at least a *prima facie* right in his own name to the property. There also had to be a reasonable apprehension of irreparable harm, a balance of convenience in favour of the applicant and the absence of any adequate alternative remedy. The court has a discretion to refuse such an interdict.

Held, further, that the applicant had entered into the contract in respect of the farm as agent for a company which had not yet been formed (and which was not in fact later formed.)

Held, further, that in terms of s 47 of the Companies Act [Chapter 24:03] a company when formed can ratify or adopt a contract entered into before it was formed by a person professing to be an agent for the company to be formed.

Held, further, that an agent entering into a contract on behalf of a company to be formed acquires no personal right to enforce the contract on his own behalf should the anticipated company

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not be formed (or should the company, when formed, fail to accept the benefits of the contract) unless the contract bestows such rights upon him expressly or by necessary intendment. Any personal liability incurred by the agent in such a situation would arise from a warranty of authority and would not flow from the contract.

Held, further, that in present case the contracting parties had had no intention that the applicant would acquire personal rights under the contract. The applicant deliberately set out to avoid possible personal liability by acting throughout as agent on behalf of a company to be formed. He had not acted as principal in this transaction.

Held, further, that the applicant had failed to prove his locus standi to bring the proceedings in his own name as he had failed to establish a *prima facie* right deserving of protection.

Held, further, that even if the applicant had established a *prima facie* right, the court would still have refused to grant a temporary interdict as, in all the circumstances, the alternative remedy of damages was a preferable remedy and the balance of convenience was against granting a

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temporary interdict. A further consideration against granting a temporary interdict was the protracted delay on the part of the applicant in bringing the application.

Application dismissed.

Cases cited:

AFC v Pocock 1986 (2) ZLR 229 (S)

Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 (T)

Benmac Eng (Pvt) Ltd v Angelique Entprs (Pvt) Ltd 1988 (2) ZLR 52 (H)

Blower v van Noorden 1909 TS 890

Brown's Executrix v McAdams 1914 AD 231

Crundall Bros (Ltd) v Lazarus NO 1991 (2) ZLR 125 (S)

Francis v Roberts 1972 (2) RLR 238 (A)

Gardner v Richardt 1974 (3) SA 768 (C)

Gool v Min of Justice & Anor 1955 (2) SA 682 (C)

Kelner v Baxter (1866) LR 2 CP 174

Martian Entertainments (Pty) Ltd v Berger 1949 (4) SA 583 (E)

McCullogh v Fernwood Est Ltd 1920 AD 204

Nordis Construction Co Ltd v Theron, Burke & Isaac 1972 (2) SA 535 (D)

Peak Lode Mining Co Ltd v Union Govt 1932 TPD 48

Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunmisversprediers (Edms) Bpk 1970 (3) SA 367 (A)

Webster v Mitchell 1948 (1) SA 1186 (W)

Statements referred to:

Companies Act [Chapter 24:03], s 47

Case Information

P Nherere, for the applicant

E W W Morris, for the respondents

Judgment

Gillespie J: Adam Watson wishes to realise a return for no outlay. Nice work if you can get it. Success depended upon the co-operation of Stanley Follwell. Stanley Follwell is a farmer who

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fell on hard times. So numerous and pressing were his creditors that he felt he had to sell his farm - Echo Farm. The Agricultural Finance Corporation in particular was threatening the imminent sale of the farm in terms of the summary powers granted to it by legislation. Watson heard of this and thought he would buy it. He entered

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an association with John Gould. The two of them, as long ago as 8 December 1993, obtained Follwell's signature on an agreement of sale between Follwell and a company to be incorporated under the name of Echo Farm Investments (Pvt) Ltd. The purchase price was $2 200 000. Watson signed the agreement as representing the company to be formed. It does not appear as a written term on the agreement, but it seems that the parties may have agreed that Watson and Gould would satisfy AFC's demands so as to pevent the sale in foreclosure of Echo Farm.

Watson and Gould then set about trying to find someone else either to purchase the farm from them (or rather the company awaiting formation) or to enter some joint venture with a view to exploiting the farm. They did not want to put their own money up as the purchase price of the farm. They planned to raise the money from the purchase price on a "back to back" sale or from the investment of any partner in a joint venture. Indeed, they obtained an offer from Quality Flowers (Pvt) Ltd to purchase the property for $3 000 000. But $800 000 was not enough for them. They preferred to persuade the horticulturists to enter a joint venture.

Time was getting short. They must have some commitment in time to dissuade the AFC from foreclosing on the farm and selling it. On 17 December, notice was given that the sale would be held on 31 December. Follwell therefore gave notice that he would cancel the agreement with Watson and Gould. His ground for doing so was the averment that the agreement was entered into on the strict understanding that the purchasers

> "would take immediate steps to ensure that the AFC no longer proceeded with their intended sale of my property. In this regard,"

he said,

> "you specifically undertook to liaise with the AFC either to guarantee my indebtedness to them or, alternatively, make other arrangements with them to prevent their selling my property prior to the transfer of the property to you or your company."

When he received no reply to this letter, Follwell canceled.

Watson responded to the cancellation if not to the prior warning. He did not say that there had been no agreement such as Follwell described. He sought to blame Follwell. He claimed that he had been misinformed as to the position with AFC. He said that despite this, he and Gould had carried out their responsibilities.

Still most earnest to prevent the sale, Follwell entered an agreement with Darrel Botha and Deborah Davies. This was on 5 January 1994. They bought Echo Farm acting on behalf of a company to be formed and named Gilson Enterprises (Pvt) Ltd. The purchase price was $2 300

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000. They paid $300 000 straight away. This persuaded the AFC to grant a moratorium. Watson learned of this from the AFC on 2 January when he made further

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belated attempts to have them stay their hand against Follwell. He and Gould then entered into negotiations with Botha and Davies.

It seems that Gould and Watson sought to persuade Botha and Davies not to take transfer of the property into the name of Gilson Enterprises. There was no hindrance to the latter taking transfer. They proposed instead a joint venture in terms of which Echo Farm (which Davies and Botha would have paid for) would be subdivided and a portion would be transferred to Gould and Watson for development as a housing estate and game park. No payment would be made to Davies and Botha for this. But eventually, once the houses were sold and the development complete, they would obtain 25% of the net profits. Nothing like taking the lion's share.

These negotiations seem to have been somewhat heated. Gould appears to have presented a reasonable and businesslike demeanor. Watson seems to have been rather aggressive and threatening. Davies and Botha say he threatened to tie up the property in litigation for the next two years or more. Watson protests that all he did was to point out, perfectly reasonably and helpfully, that the alternative to agreement was damaging litigation.

There is dispute as to what, if anything, was resolved at this meeting. Watson says that Davies and Botha agreed not to take transfer until such time as all parties had reached agreement resolving whatever differences there might have been between them. Gould says nothing specific. Davies and Botha both claim that there was an undertaking not to take transfer immediately, which undertaking was given on the clear understanding that a draft agreement for their consideration would be presented to them the following day. After more than a week had passed with no response from Watson and Gould they felt free to act as they would and caused transfer to be registered in the name of Gilson Enterprises. This was done on 1 February 1994.

And then - nothing happened. Nothing, that is, as between Watson and Gould on the one hand and Davies and Botha on the other. In fact, Follwell and Gilson Enterprises fell into dispute with Follwell purporting to cancel the sale for various reasons and claiming return of the farm and other relief. This dispute led to Follwell instituting action on 7 March 1995.1(18) Many months later, in October 1995, Watson suddenly found himself bestirred to action. He instituted a court application 2(19) claiming an order joining him as a third party in the action between Follwell and Gilson Enterprises. He wanted also an interdict restraining Gilson Enterprises from disposing of Echo Farm.

His action was singularly ill advised. Third party procedure is by definition the means of bringing before the court in a dispute between two parties a third

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party from whom a party in the existing action claims an indemnity from or contribution to any award that might be given against him in favour of his opponent. It is not a means by which a party might intervene in existing proceedings in order to advance a claim of his own against one or other of the parties in those proceedings. What Watson should have done, of course, if he wished to pursue a claim for relief, was to institute his action *in rem* claiming transfer of the property against tender of the purchase price. Any claim for an interim interdict pending determination of those proceedings would have been much better received had there been an existing action pending. I will, however, address more fully below the merits of the restraint that was moved. Before I progress, I must mention that this application of Watson's was ready for set down in mid-Nvember 1995. Nevertheless, it was not effectively prosecuted. There was an unsuccessful chamber application by Watson to adduce a supplementary affidavit. With its refusal, the proceedings ground to a halt.

After this lapse into inactivity and apparent disinterest, Watson was spurred into endeavour once again on 15 March 1996. Instead of causing his existing application to be set down, he embarked upon fresh litigation. He instituted a court application, which he engagingly described as "urgent". His attorney supplied a certificate of urgency. It advanced the attorney's "confirmation" that there was a risk of irreparable harm to Watson were the matter not heard urgently. Watson claimed in these proceedings a provisional order operating as a temporary interdict against the disposal of any part of Echo Farm pending determination of what was described as "the main action". I cannot tell whether this referred to the existing application or to some claim which Watson hoped to prosecute by intervening in the ongoing proceedings between Follwell and Gilson Enterprises.

The stimulus for this display of energy was the fact that Gilson Enterprises had subdivided Echo Farm and had sold a portion of it. It appears that Watson somehow discovered something of the sort and approached Gilson's agent in respect of the transfer of the portion of the farm. He told the agent that he had a caveat over the property. The agent therefore enquired from Davies. Her attorney accordingly wrote to Watson's attorney making a full disclosure of the fact of the subdivision and sale and contesting the claim that there were any sort of hindrance to transfer.

Watson brought this second application against Gilson and against Follwell. He alleged that the two had conspired to settle their dispute so as to defeat his claim to the farm by agreeing that Gilson should take transfer. He purports to assert a right in his own name to the farm. Gould has dropped out of the picture. He evidently knows that the essence of making money out of the sort of opportunistic deal he and Watson were hoping for, is to strike while the iron is hot, and not to drag the dispute into litigation. Davies and Follwell each

oppose Watson's claim on much the same basis as their opposition to his earlier application. It is apparent from their affidavits that litigation proceeds between them concerning a question of damages but that Follwell's purported cancellation of the sale to Gilson has been compromised.

At the last moment, I was offered another affidavit from Primaflora (Pvt) Ltd. The affidavit was received without objection from Mr Morris. Mr Nherere, however, submits that I should not

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entertain it.

Late as the affidavit might be, I do not consider that I ought to exclude it. It emanates from a party with a major interest in the issue. That party has a point of view which I cannot ignore. The existence of this party, if not its identity, was known to Watson before he instituted the second application. He should have exercised himself to cause this party to be joined in the proceedings or at least to be served with the papers. If he has had no opportunity to answer the affidavit that is at least partly his own fault. I have therefore decided to admit the affidavit. In doing so, however, I recognise that there is no answer to it from Watson and that any factual allegations it makes are not necessarily undisputed. It is a source of some confidence to me that Mr Nherere has not pointed out in the affidavit any area of material factual dispute between Watson and Primaflora.

The deponent relates that the company has purchased Echo Farm from Gilson for $2 200 000. This so-called "Echo Farm" is in fact a subdivided portion of the farm originally purchased by Gilson. The deponent swears that he knew nothing of Watson's claim until well after the agreement of sale had been concluded and indeed until well after he mistakenly believed the property to have been transferred to Primaflora. In fact, transfer has not occurred although occupation had been given some time previously and Primaflora has been engaged in cultivation on the land. It had incurred considerable capital expenditure on the land since taking occupation and would suffer substantial loss if it were not to be entitled to enforce its claim to the land.

After argument had concluded, yet another affidavit was offered by Davies. It purports to disclose a point of mendacity in Watson's case. The point is immaterial and by no means relevant to the issue. I have disregarded the affidavit.

I now have to decide both applications. They have been set down together. They are for substantially the same relief. The relief might be regarded as nominally for a final interdict. That is how the draft order in each was rather ineptly framed. I am prepared to treat the applications, however, as applications for an interim interdict pending determination of a claim instituted by Watson for transfer of the farm. The earlier rather vexatious claim by Watson to be joined as a "third party" has been properly abandoned. Rather, a summons has just recently been issued together with a declaration, in an action in which Watson does indeed claim transfer of the property, or, in the alternative, damages.

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Before addressing the merits, however, I must look to a preliminary point with which I was detained. Watson sought an order preventing Gilson's attorneys from acting for them. The cause of his complaint was that there was a conflict of interest arising from the fact that the attorneys, Messrs Winterton Holmes and Hill, seem to have represented most of the parties in this dispute at one time or another. So Gould is a long-time client of that firm's Mr Thompson. Thompson first received instructions from Botha and Davies concerning the purchase from Follwell before he was aware of any Gould or Watson interest in the matter. On this ground, he later declined instructions from Gould to act against Botha and Davies (who were at that time

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known to Gould only as "a third party") immediately after Follwell's cancellation of the agreement with Watson and Gould. He accepted instructions from Gould and Watson, however, to draft the settlement agreement which those gentlemen wished to put before Botha and Davies. For thisreason, Watson considers Thompson to be *privy* to confidential information crucial to his case which he is in a position to disclose to Gilson. He feels that Thompson is a witness whom he wishes to call in the trial. These issues have been canvassed in correspondence placed before me during argument. Thompson denies that he has any information proper to Watson's case. He denies that he is a compellable witness for the reason that his knowledge of the matter stems from instructions confidential to Gilson. He refused Watson's demand that he withdraw from further attendance on the matter. It does not appear that Gould ever made any such demand of Thompson.

This court hs previously held that it will in the appropriate case take action to prevent the appearance in a matter of a legal practitioner where that appearance gives rise to a conflict of interest. 3(20) In particular, such a conflict may be shown to have arisen when in the course of acting for one party that legal practitioner may have received confidential instructions which may be of use to a future opponent should the same legal practitioner purport subsequently to act for that opponent.

In the present case, while Thompson's acceptance of instructions from Gould and Watson to draw the settlement agreement may approach the limits of that which is sensible, I can find no evidence of a conflict of interest nor of any improper conduct. The suggestion of receipt of confidential instructions is unfounded and unconvincing. When they approached Thompson he had already made it clear that he could accept no instructions from them in any contentious matter. The drafting of a proposed compromise could reasonably have been perceived as not at all contentious. Knowing that he acted for

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Botha and Davies, Watson and Gould could not possibly have given Thompson any information not intended for the ears of the persons they knew to be his clients. The vague mention of an intent to call Thompson is unsupported by any details as to what he might be expected to say, and I cannot perceive, in the absence of particularity, what evidence Thompson could have which would be compellable from him at Watson's instance. I ave to say that I tend to regard Watson's claim as vexatious, and calculated to bring about precisely that delay in litigation which, on the affidavits of Davies and Botha, he threatened.

Turning to the merits, if he is to succeed in obtaining the interdict which he would have me order, Watson must prove the right he asserts in the property. Since he effectively seeks only an interim interdict it is sufficient that he establish at least a *prima facie* right in his own name to the property, even though the claim may be open to some doubt. The first point that will have struck the attentive reader is how Watson can purport to assert in his own name a claim to Echo Farm. He contracted as agent for a company to be incorporated. This point certainly did not escape Mr Morris who appeared for Gilson. He has placed in issue Watson's locus standi. His submission is that a person signing a contract for the purchase of property as agent for a company to be incorporated acquires no personal liability on or interest in the contract or the

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property purchased under it. He contrasts the position of such an agent with a person who contracts as a trustee in similar circumstances or otherwise as principal.

The distinction Mr Morris makes is one well-known to the law. It has frequently been considered, although in somewhat different circumstances. The law of agency makes it clear that:

> "there can be no ratification by a principal not in existence at the date of transaction." 4(21)

Thus where a person purports to contract as agent for a company which is not yet formed, the company upon its incorporation cannot at common law (leaving aside for the moment the relevant provisions of the Companies Act) purport to ratify that contract. It could only enjoy the benefits of that contract were it to enter into a new contract itself with the other party.

On the other hand, the Roman-Dutch law recognises the concept of the stipulatio alteri by which -

> "where two persons have entered into a contract for the benefit of a third, the latter may, before the promise has been revoked, accept it and thus acquire a right of action ... " 5(22)

The third party may accept the benefit even if it did not exist when the promise was made. Where such a third person, particularly a company not

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incorporated at the time of the agreement, purports to ratify or to adopt a contract made for its benefit, it was therefore formerly most important to determine whether the person purporting to act in the non-existent third party's interests acted as agent or as a principal contracting party.

I say formerly because much of the importance of this distinction as far as companies are concerned has been removed by the provisions of s 47 of the Companies Act. 6(23) This provides that, subject to certain formal requirements:

> "Any contract made in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly registered as if it had been duly formed, incorporated and registered at the time when the contract was made...."

The object of the equivalent enactment in South Africa (they are in pari materia) has been held to be:

> " ... not to curtail the company's common law right of adopting the latter [a stipulatio alteri] but merely to remedy its common law inability of ratifying the former [a contract for an non-existent principal]." 7(24)

Issue might still arise, however, concerning whether a similar contract was an invalid agency or an enforceable pact for a third party if the formal requirements of the statute have not been complied with.

In such a case, the court is seized with an issue not of law, but of fact. It is a question of construction whether or not the contract falls within one definition or the other. It is a matter of

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intendment whether the relevant contracting party held himself out as agent or as principal.

> "I think that we should interpret the meaning of the words 'professing to act as agent or trustee for a company not yet formed' in the light of all the surrounding circumstances and not consider ourselves bound by the fact that on the face of the contract [a party] purported or professed to contract in his capacity as the agent and trustee for a company in the process of formation." 8(25)

In the present case, the distinction is sought to be applied in this manner by Mr *Morris*. Watson entered the contract as agent. He therefore incurred no obligation and more importantly acquired no rights under the contract. He therefore has no claim to enforce.

Mr *Nherere* attempts to meet Mr *Morris'*s argument with the factual submission that Watson contracted not as agent but as a principal. He invited me to consider not the form of the agreement, which discloses an apparent agency, but its substance, which he submits shows that Watson, whatever words may have been used, contracted in his personal capacity. He suggested that I should not be distracted by this issue of fact but should leave it for a trial

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court. This last submission is a bad one. I must address the issue. I need not make a definitive factual finding but I must at least be able to determine whether or not Watson asserts a *prima facie* case, albeit one open to some doubt, that he acted as principal and not as agent. The manner of determining the existence of such a case has been explained thus:

"The use of the phrase '*prima facie* established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as 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 could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective pejudice in the grant or refusal of interim relief." 9(26)

The word "could" in the clause "could on those facts obtain final relief at a trial" was subsequently qualified 10(27) and the accepted test is now whether on the undisputed facts the applicant for interim relief should obtain final relief at a trial and whether serious doubt is thrown on those uncontested facts by any factual issue raised by the respondent. 11(28)

Ingenious as may be Mr Nherere's submission on the facts, it suffers in that it is not predicated upon Watson's own oath that he had intended to undertake a personal obligation and to acquire a right of his own. He does not make the express assertion that both parties had contracted on this basis. He is silent on the point. Since the fundamental of a *prima facie* case is that the applicant for relief must depose facts upon which he should obtain final relief at trial, I

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have to hold it against Watson that he has said nothing which constitutes an unequivocal statement that in fact he acted as principal assuming a personal liability. The best he has said is this:

> "I confirm Echo Farm Investments (Pvt) Ltd has not been duly incorporated in terms of the Company's (*sic*) Act. There is no such company in being. I confirm in the circumstances the Agreement of Sale signed on 8 December 1993 is between Stanley Norman Follwell and myself in my personal capacity. It is clear from the designation in the Agreement of Sale that since the company has not been formed the Agreement has clearly come into existence between Follwell and myself."

This deposition is far from the unequivocal statement it might be thought to be. It is not a statement of fact at all. It is a purported conclusion of law - ie where an agent contracts on behalf of a non-existent principal he acquires

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rights under the contract in his own capacity. Read very generously it could perhaps mean that Watson contracted as a principal - the promisee in a contract for the benefit of a third party where that party had not accepted the benefit, and that therefore he is in law entitled to step into the shoes of that third party. Much the same averment is to be found in the declaration which was filed in the action recently instituted by Watson for transfer of the property. That contains the ambiguous and seemingly impossible statement that Watson entered the agreement "acting as agent and trustee for a company to be formed." (My emphasis: one would expect him to have been one or other, not both) and advances the averment that "The company to be formed was not formed and Plaintiff is accodingly entitled to exercise the agreement in his personal capacity." I therefore turn to examine whether either of these propositions of law is correct.

Dealing first with the possibility that Watson acted as principal in a contract for the benefit of a third party. In such an event, Watson would generally not be expected to enjoy any right to enforce the contract in his own name. Professor Christie writes:

> "Unless the contract so provides, [the promisee] cannot, on the refusal or failure of the third party to accept the contract, step into his shoes and accept it himself. Indeed, when it is doubtful whether a contract is intended to be for the benefit of a third party, the fact that the contract confers powers on the promisee will point against such a conclusion. " 12(29)

This proposition has the persuasive support of Friedman AJ 13(30) in circumstances where the issue was specifically the position of a person who acts as trustee - principal - for a company about to be formed:

> "It does not follow as a matter of law that, because a trustee incurs obligations under a contract such as this, he therefore has the right to sue on the contract for specific performance. If he had such a right and exercised it, it could result in the company for whose benefit he so contracted, being deprived on its formation of the benefit intended for it."

And further:

> "In my opinion, ... there is no rule of law entitling a person who contracts as trustee for a company to be formed, to claim transfer of property into his own name, merely by reason of the fact that the company has not been

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formed." 14(31)

I respectfully think this undeniable. The promisee in a contract for the benefit of a third party obtains no right himself to sue for specific performance under the contract, the third party having failed to accept the benefit, unless the contract bestows such a right expressly or by necessary intendment. 15(32)

Similarly, if Watson contracted not as trustee for the company to be formed

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but as agent. A person who acts as agent when he has no authority to do so from a principal may incur consequent liability. That liability, however, arises from a warranty of authority. It does not flow from the contract. It is a liability in damages. 16(33) It does not give rise to an enforceable right under the contract. Even this liability does not arise if both parties were aware of the absence of authority at the time of the contract. That precisely the same considerations apply where the lack of authority flows from the non-existence of the principal is a point which was decided by Greenberg J (as he then was):

> "It seems to me, therefore, to follow that the position of an unauthorised agent is now the same whether the alleged principal was or was not in existence at the time of the contract and that such an agent is not liable as a party to the contract, nor is he liable under a warranty of authority if the other contracting party knew at the time of the contract that he had no authority." 17(34)

Once again one is able to state that unless a contract provides in its express terms, or in its necessary implication, that the agent for a non-existent principal acquires rights or incurs obligations under the contract, rather than solely in delict, no such contractual provisions may be enforced.

Thus the only basis upon which Watson could (and even more so - should) obtain final relief at trial would be if he were to establish a *prima facie* case that the contract with Follwell provided for his personal liability and his personal right to enforce the sale should the anticipated company not be formed or not accept the benefit. I refer again to the failure of Watson to make any averment to this effect. Even if I overlook this failure and look to those objective indiciae with which Mr Nherere would move me, the situation is no better for Watson. He claims, or rather Mr Nherere claims for him, that Follwell has always regarded Watson as personally liable and has looked to him for performance. But in fact the letters demanding performance and threatening and effecting cancellation, upon which Mr Nherere relies, were addressed to:

> "Mr Adam Watson,
>
> Echo Farm Investments."

In addition, the description of Watson as an agent for the company to be incorporated appears more than once in the agreement. In the preamble, the purchaser is described as "Echo Farm Investments (Pvt) Ltd (a company to be formed and herein represented by Adam Watson)." This contract was prepared by attorneys acting for Watson and Gould. More tellingly, Watson himself has inserted in manuscript under his signature the legend, "for: Echo Farm Investments

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(Pvt) Ltd a company to be formed." Finally, when

GILLESPIE J

attempting to interest Quality Flowers in investing in the property, Watson gave that company what appears to be a right of first refusal. He described the seller of the property as "Echo Farm Investments (Pvt) Ltd represented by Adam Watson". I am therefore bound to observe that Watson has done all that he could to ensure that his name appeared on documents only as an agent.

Why would he do that? The answer is simple. He was not about to put up his own money for the property and did not wish to incur any personal liability. Although he now asserts that as a result of the non-formation of the company he has ipso jure incurred personal rights and obligations, that, as I have shown, is not the law. As a final point against Watson's claim it must be remembered that at all times during the course of the purchase of the company, Watson and Gould were acting together. One would expect that any right to step into the shoes of the company would be a right shared by these two gentlemen. There is nothing placed before me, either by Watson or by Gould, to show that any such right is enjoyed exclusively by Watson nor that Gould has abandoned or ceded to Watson any such right of his own. There is therefore nothing in the contract itself, nor in any extraneous evidence concerning it (examined irrespective of any question as to whether such evidence may permissibly be considered), which shows tht the parties intended Watson to enjoy the right of enforcing the contract in his name in the event the company were not formed or failed or refused to accept the benefit.

In coming to this conclusion, I have given consideration to the principle of interpretation that seeks to preserve the validity of a contract. In attempting to determine whether a contract is entered as agent or as principal the courts have on many occasions expressly resorted to the canon of construction ut res magis valeat quam pereat. They have preferred that construction which would leave in place an enforceable agreement rather than a nullity. But this cannot be done if the intention of the parties is to the contrary.

> "In order to make a contract operative if possible by applying the maxim ut res magis quam pereat the courts, in applying the Kelner v Baxter principle, have held the supposed agent to be liable as principal. But in my respectful opinion, the question seems to be one of construction rather than one of 'intendment of law'. It follows that the court cannot in order to obtain validity to the agreement between the parties make a contract between them which obviously from the agreement they never intended (Kynochs, Ltd v Transvaal Silver & Base Metals Ltd 1922 WLD 71 at p 80)." 18(35)

In this case, it seems clear that Watson deliberately set out to avoid possible personal liability on a deal where he depended upon obtaining financing from

GILLESPIE J

other sources. Follwell, too appears to have understood that Watson was attempting to avoid personal liability by acting as agent for a company to be formed and was content to deal on that basis - indeed he may have had little choice so closely were his creditors pressing him. In all the

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circumstances to hold that Watson contracted as principal and acquired personal rights would be flying in the face of what appears to me to have been the unequivocal intention of the parties.

I therefore hold that Watson had failed to prove his locus standi to bring these proceedings and hence fails to establish a *prima facie* right deserving of protection. For this reason alone, I would dismiss the applications. I do not intend to address the factual dispute concerning Follwell's cancellation of, or right to cancel, the contract entered for the benefit of Echo Farm Investments (Pvt) Ltd. That issue only arises if I find that Watson can enforce the contract in his own name. However, lest I should be thought to be in error on the point which I have determined, I will explain why I would exercise my discretion to refuse the relief even if it could be said that a *prima facie* right were proven.

The well known requirements for the granting of an interim interdict are the establishment of a *prima facie* right; the reasonable apprehension of irreparable harm; proof of a balance of convenience in favour of the applicant; and the absence of an adequate alternative remedy. Underlying all these *essentialia*, however, is the discretionary nature of the remedy:

> "[T]he court always has a discretion to refuse to grant an interdict, even though all the requisites for an interdict are present. That that is so is beyond question." 19(36)

As was pointed out by Franklin J:

> " ... the question whether damages would be an adequate remedy is a factor which forms part of the general discretion possessed by the court to grant or refuse a temporary interdict. The very phrase 'no other adequate remedy' which is normally employed in this connection imports the notion of discretion. So, too, the requisite of a 'reasonable apprehension of irreparable harm' implies that the court must exercise a discretion as to whether an applicant could or could not be placed in the same position in which he was before the infringement or threatened infringement of his rights." 20(37)

By the same token, notions of the "balance of convenience" are even more redolent of a value judgment, at the court's discretion, exercised judicially in the light of all the circumstances of the case. I therefore find it more helpful to consider all these factors together in order to decide whether on balance they are of sufficient persuasive force to justify the discretionary grant of an interdict.

In his argument, Mr Morris rather unkindly compared Watson to the

jackal, which hovering, yelping, in the proximity of a kill, would steal from under the nose of the King of the Beasts as much of the prey as it could sneak. 21(38) Hyperbolic as this image is, it nevertheless contains a certain truth. If I might mix the metaphor, Watson would reap where he has not sown. His endeavour had been to secure a financial return at no outlay or risk of his own. He is not wedded to any particular use of the land; he would use it in any way he can, including selling it, simply to return a profit. I say this not as criticism, but merely as observations of his motives. The other parties, however, and in particular Primaflora, have a specific use for this land. Millions of dollars have been invested in developing it. It is under productive

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cultivation. All this tells me that any harm which Watson might fear he will incur, is purely financial. That being the case, the remedy of damages is not only adequate but would seem to me t be the preferred remedy. The balance of convenience moreover rests clearly with those people who occupy and use the land and have invested in it, rather than with Watson who would as life speculate with it. Add to this Watson's many delays in brining this application and one arrives at a situation such as justifies specific performance purely on the grounds of the inappropriateness of the remedy because of the passage of time since the alleged wrong. 22(39) Had he really required an interdict, Watson could, and should, have brought this application at the first opportunity and should have prosecuted it expeditiously. He should have not dallied; nor let the grass grow under his feet; nor permit, by his inactivity, a situation where other parties might acquire rights in the land.

In the premises, I dismiss the applications, with costs.

Ali Ebrahim, applicant's legal practitioners

Winterton, Holmes & Hill, first respondent's legal practitioners

Gill, Goldonton & Gerrans, second respondent's legal practitioners

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S v NYAMBO 1997 (2) ZLR 333 (HC)

Court **High Court, Harare**

Smith J

Criminal review

24 September 1997 Judgment No. HH-148-97

Flynote

Criminal law - statutory offences - Dangerous Drugs Act [Chapter 15:02] - possession of prepared Indian hemp - meaning of "prepared" - means more than merely packing dried leaves into a bag or "cob"

Criminal procedure (sentence) - general principles - imprisonment - form of sentence - no longer necessary to specify that imprisonment is to be with or without labour

Headnote

The accused was charged with, and pleaded guilty to, possession of some 12 kg of prepared Indian hemp or dagga. He had been found in possession of a bag containing the dagga, which he planned to sell. The Dangerous Drugs Act provides mandatory penalties for the possession of "prepared" Indian hemp, whereas the penalty for possession of Indian hemp is discretionary. The accused was sentenced to 7 years' imprisonment with labour, of which portion was suspended.

Held, that preparation envisages some process or activity which is intended to ensure that the dagga is ready for smoking. When leaves are picked from a dagga plant, they constitute a drug to which Part II of the Act applies, whether they are green or dry. Merely packing dried leaves

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from a plant into a bag or sack to bring them into town to sell, or packing them into a "cob", does not make them more dangerous and therefore put them into the category of drugs specified in Part III of the Act, for which a much more severe penalty is provided. Consequently, the accused should not have been convicted of possessing "prepared" dagga.

Held, further, that the wording of the sentence was incorrect. It is no longer necessary for a court to specify that imprisonment should be with or without labour. The decision as to whether a prisoner should perform labour is made by the prison authorities.*(40)

Cases cited:

S v Chidziwa S-96-82

S v Chigovanyika 1996 (2) ZLR 185 (H)

S v Holmes 1982 (2) ZLR 267 (H)

S v Ndekete 1978 RLR 377

The court referred to the following statutory provisions:

Criminal Procedure and Evidence Act [Chapter 9:07], s 344(1)

Dangerous Drugs Act [Chapter 15:02], ss 7, 9 and 19(3)

SMITH J

Judgment

Smith J: The accused was charged with contravening s 9(b), as read with s l9(l)(a), of the Dangerous Drugs Act [Chapter 15:02], in that he unlawfully had in his possession prepared Indian hemp, that is to say 12.49 kg with a street value of $62 450. The facts, according to the statement of agreed facts, were as follows. The accused alighted from a bus which had come from Mashumbi Pools, Guruve, carrying a black canvas bag. He was stopped by a foot patrol of policemen who searched his bag and found that it contained dagga. He was arrested and taken to the police station where the dagga was weighed. It weighed 12.49 kg. The accused pleaded guilty and the essential elements were put to him. He was not legally represented. He was asked whether he had prepared Indian hemp in his possession and he said yes. He accepted that the possession was unlawful and said that he did not have a licence to possess the dagga. He is a first offender and is 22 years of age. When asked whether he was dealing in drugs he said that h was trying to eke out a living. He was sentenced to 7 years' imprisonment with labour and in addition to a fine of $5 000 or, in default of payment, 2 years' imprisonment with labour. Of the 7 years' imprisonment, 2 years were suspended for 5 years on conditions of good conduct.

The Dangerous Drugs Act [Chapter 15:02] (hereinafter referred to as "Chapter 15:02") is divided into a number of parts. Part II deals with coca leaves, Indian hemp and raw opium and Part III deals with prepared opium and prepared Indian hemp. Section 3 specifies the drugs to which

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Part II applies. In terms of subs (1)(a) thereof, Part I applies to Indian hemp or dagga, resins obtained therefrom and all preparations of which such resins form the base. In subs (2) of that section, Indian hemp or dagga is defined as meaning the whole or any portion, whether green or dry, of the plant, including the seeds thereof but excluding certain products obtained from the plant or seed. Section 6 of Chapter 15:02 empowers the Minister to make regulations prohibiting, controlling or restricting, inter alia, the possession of drugs to which Part II applies. The Minister has made regulations, the Dangerous Drugs Regulations l975 (SI 1111 of l975), which, inter alia, make it an offence for a person to acquire or possess a drug o which Part II applies unless he is an authorised or licensed person. (In passing, I would mention that these Regulations refer to Part I, Part II and Part III drugs respectively, which was appropriate prior to the coming into operation of the Revised Edition of the Laws l996. I would recommend that the regulations be revised so as to refer to Part II, Part III and Part IV drugs, which would avoid confusion).

Part III of Chapter 15:02 applies to prepared Indian hemp. In s 7 "Indian hemp" as defined as meaning any portion of the dagga plant and "prepared Indian hemp" is defined as meaning Indian hemp which has been prepared

SMITH J

for smoking. Section 9 specifies offences in relation to prepared opium and prepared Indian hemp. In terms of para (b) thereof it is an offence to be in possession of prepared Indian hemp.

Section l9 of Chapter 15:02 deals with offences and penalties. In terms of subs (l) thereof, any person who contravenes any provision of the Act or any regulations made thereunder is guilty of an offence and liable to a fine not exceeding $l0 000 or to imprisonment for a period not exceeding l0 years or to both such fine and such imprisonment. However, subs (3) thereof provides for a mandatory minimum sentence in certain circumstances. That subsection provides as follows:

> "(3) Notwithstanding any other provision of this section, any person who is guilty of an offence under this Act involving the unlawful dealing in any of the drugs, other than Indian hemp, to which Part II applies, or any drug to which Part III or Part IV applies, shall be liable to -
>
> (a) imprisonment for a period of not less than fifteen years or more than twenty years; and
>
> (b) a fine of not less than fifteen thousand dollars or, in default of payment, imprisonment for an additional period of not less than five years or more than ten years;
>
> and, notwithstanding anything to the contrary contained in any other enactment, the court shall not order that the operation of the whole or any part of the sentence be suspended:
>
> Provided that, where upon conviction the convicted person satisfies the court that there are special circumstances in the particular case, which circumstances shall be recorded by the court, why such a sentence should not be imposed, the convicted person shall be liable to imprisonment for a period not exceeding fifteen years or to a fine not exceeding fifteen thousand dollars or to both such imprisonment and such fine."

I referred the case to the Attorney-General for his opinion. In his response he commented as

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follows:

> "The meaning of the word 'prepare' is given in the Oxford English Dictionary as 'to put before hand into suitable condition for some action, to set in order previously for some purpose, to get ready, to make ready, put things in readiness before hand, to make ready (food, meal) for eating, to cook, etc'.
>
> When one considers the definition of 'prepared Indian hemp' in the Act in light of the above definition, then it is clear in my respectful opinion that preparation envisages some process and purpose. The process encompasses any activity, manual or chemical or technical, employed on the dagga for the purpose of smoking and extends from harvesting, drying the leaves and seeds to actually putting it into a smokeable form such as a cigarette or tobacco form. It does not include prior activity such as planting, weeding and watering for that process merely relates to an activity necessary to nurture the plant to maturity. It includes a manufacturing process, however. Accordingly, a plant which has grown to maturity whose leaves and or seeds have not been plucked therefrom whether dry or green is not prepared Indian hemp. It is not in a smokeable state if no further manual or chemical activity or process has been applied to it, even if it has been simply uprooted and left to dry as a plant or simply left to wither o its own.

SMITH J

> It is submitted that the definition is intended to cover the state or form of the Indian hemp immediately before smoking. Implicit in the definition is the intention of the preparer which of course can be inferred from the state in which the Indian hemp is found. It can also be inferred from other factors such as an inference of dealing.
>
> That this is the most logical construction to be put to the phrase is clearly discernible from the fact that the legislation deals with Indian hemp in two different parts with different wording and definition. Contrast the wording and definitions in Part II and Part III."

After referring to *S v Chigovanyika* 1996 (2) ZLR 185 (H), the Attorney-General submitted that the magistrate had misdirected herself on the question of sentence in that she was required by subs (3) of s l9 of Chapter 15:02 to impose the minimum sentence specified therein unless there were "special circumstances". He further submitted that it was not necessary to set aside the conviction, as was done in Chigovanyika's case, in order to establish whether or not the dagga possessed by the accused was "prepared" because, according to the statement of agreed facts, the dagga was in a prepared form and the accused admitted that he was in possession of prepared dagga. He argued that the accused "would hardly have been in possession of dagga in the circumstances admitted by him which was not prepared. In any event, he brought it into Harare for resale". He went on to submit that the conviction should be confirmed but that the sentence should be set aside and the matter remitted to the trial magistrate for her to inqure into the question of "special circumstances". She should be referred to S v Ndekete l978 RLR 377, *S v Holmes* l982 (2) ZLR 267 (H) at 270F and S v Chidziwa S-96-82 in deciding whether or not special circumstances existed.

In *Chigovanyika's* case *supra*, the conviction was set aside and the matter referred back to the trial magistrate because there was no evidence that the dagga found in the possession of Chigovanyika was "prepared" for smoking and it was not even alleged in the outline of the State case that the dagga was so prepared. In this case, the statement of agreed facts merely stated that the accused was in possession of dagga. However, when the magistrate put the essential elements to the accused, she asked the accused whether he had prepared Indian hemp in his possession and he said yes. The Attorney-General argued that this showed that there was no dispute as to the state or form of the Indian hemp found in the accused's possession. I do not

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agree. The accused was not represented. He is hardly likely to have appreciated the significance of the word "prepared" in this context. In this case, unless special circumstances were found to exist, it would mean that his sentence would be more than double if the dagga was in fat prepared for smoking.

I agree with the opinion expressed by the Attorney-General that preparation envisages some process or activity which is intended to ensure that the dagga is ready for smoking. I cannot accept, however, that merely packing dried leaves from a dagga plant into a bag or sack and bringing them to town for

the purpose of selling them constitutes preparation for smoking. The legislature, in enacting Chapter 15:02, clearlyB intended that dagga which has been prepared for smoking should be dealt with differently to dagga which has not been so prepared. Each is dealt with in a separate part of the Act. Then, when one looks at subs (3) of s l9 one finds that the mandatory minimum penalty applies if the offence involves the unlawful dealing in any drug to which Part III of the Act applies (ie including prepared Indian hemp) and to any drugs, other than Indian hemp, to which Part II of the Act applies. It is not clear why in the one case reference is made to "drugs" whereas in the other the word "drug" is used. It is clea, however, that when leaves are picked from the dagga plant they constitute a drug to which Part II of the Act applies, whether the leaves are green or dry. I fail to see how the mere putting of the leaves into a bag or sack makes them more dangerous and therefore puts them into the category of Part III drugs which would attract a much more severe penalty if one is dealing in them. The legislature could not have intended that dealing in the leaves of a dagga plant to which Part II of the Act applies should attract the mandatory sentence provided for in s l9(3) of the Act merely because the dagga leaves are packed into a bag. Even where dagga leaves are packed into a "cob", I consider that that does not constitute preparation for smoking. The packing is for the purpose of selling.

There is no evidence that the dagga which the accused possessed was prepared for smoking. I consider that the accused should have been charged with contravening s 4 of the Dangerous Drugs Regulations l975 as read with s l9(l)(a) of Chapter 15:02.

The definition of prepared dagga in Part III does cause some anomalies in the application of s l9(3) of Chapter 15:01. A person who sells a few cigarettes containing dagga leaves at a beerhall would be liable to a sentence of not less than l5 years' imprisonment and a fine of $15 000, unless there are special circumstances, whereas a person in possession of a large quantity of dagga leaves which have not been prepared for smoking would be liable to a maximum sentence of $10 000 or 10 years' imprisonment or both. I would recommend that consideration be given to amending the definition of "prepared dagga" in s 7 of Chapter 15:01 and that further consideration be given to sub (3) of s l9 insofar as it applies to dagga. The principle of minimum sentence is one that is not welcomed by the courts. I wonder if the necessity for sub (3) of s l9 still exists and if it does, whether it should apply to dagga.

In passing, I would comment on another aspect of the sentence. The magistrate sentenced the

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accused to 7 years' imprisonment with labour. Whereas formerly the Criminal Procedure and Evidence Act provided that courts could impose a sentence of imprisonment with labour, Part XVII of the

SMITH J

Criminal Procedure and Evidence Act [Chapter 9:07] refers to imprisonment simpliciter. That is because the decision as to whether a convicted person should or should not perform labour and the kind of labour to be performed is made by the Prison authorities in terms of the Prisons Act [Chapter 8:11] and the regulations made thereunder. It is not for the magistrate to require that a convicted person who is sentenced to imprisonment must perform labour. It is therefore wrong for a magistrate to sentence a person to imprisonment with labour.

The charge is amended so as to refer to contravening s 4 of the Dangerous Drugs Regulations l975 as read with s l9(l) of Chapter 15:02 and by deleting the word "prepared". With that amendment the conviction and sentence are confirmed.

GILLESPIE J agrees.

D v N 1997 (2) ZLR 339 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

11 & 25 September 1997 Judgment No. S-147-97

Flynote

Family law - paternity - onus - intercourse denied by alleged father - onus on plaintiff

Headnote

The appellant had been ordered to pay maintenance for the respondent's child, which the respondent claimed had been conceived as a result of being raped by the appellant. The appellant appealed against the award.

Held, that where the man denies that he has had sexual intercourse with the woman the onus is on the woman to prove that the man in question is the father. Only if the man admits sexual intercourse is there an onus on him to prove that he is not the father. The appellant had denied that he had had sexual intercourse with the respondent and thus the magistrate had misdirected himself by remarking that the appellant had a defence available, namely to have a blood test.

Held, further, as the magistrate had doubts about the credibility of the woman and there was no corroboration of her evidence, he should not have found that the balance of probabilities was in

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her favour. This is a case where the magistrate should have investigated further. He might have asked to see the child.

Held, further, that the magistrate should have granted absolution from the instance, thus enabling her, if so advised, to bring further proceedings.

Cases cited:

Kashiri v Muvirimi 1988 (1) ZLR 270 (S)

Mountford v Mukukumidzi 1969 (2) RLR 1 (A)

Moyo v Sifelani 1988 (1) ZLR 98 (S)

Ruswa v Muzvidziwa S-4-91

V v A 1984 (2) ZLR 139 (S)

Case Information

I Chagonda, for the appellant

No appearance for the respondent

Judgment

McNally JA: In this case, there was no appearance for the respondent. The appellant asked for leave to appeal out of time. His original notice contained no prayer, though in the circumstances it was clear what was being sought. The application was granted.

In the maintenance court, the respondent had claimed maintenance from

McNALLY JA

the appellant for her child. She claimed he was the father, as a result of a rape on 7 April 1994. She was unemployed; he was a teacher. The child was ten months old when the claim was made on 8 November 1995. She claimed $500 *per* month. She was awarded $205 *per* month. He denied any sexual intercourse with her.

The claim suffers from weakness of evidence, and, in particular, lack of corroboration of or support for the admittedly graphic evidence of the respondent. The primary weakness is that she failed to report the rape to anyone. It was only when her mother noticed her pregnancy three months later that she came out with the story. Even then she did not go to the police. Indeed it was the appellant, who at all stages denied rape or intercourse, who threatened to go to the police.

There is a small conflict between the evidence of the respondent and that of her mother. She says her mother sent her on an errand on the day in question. Her mother says she was away in Kariba. It seems she did not initially tell her mother who was responsible for her pregnancy.

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Nor does her mother seem to have had much confidence in her. She said she thought her daughter might be lying. When asked "What do you think now?", she said "I don't know".

It seems the magistrate was also doubtful about her credibility. He said "the circumstances are such that the complainant (*sic*) could have been raped". And later he said: "There is another possibility, as the mother said the two could have in fact been lovers".

It seems to me that if the magistrate had doubts about her credibility, and there was no corroboration of her evidence, he could not, and should not, have found a balance of probabilities in her favour.

In passing he also remarked that the respondent had "one more defence available" - that of a blood test. But that, I suggest, was a misdirection. The onus is on the plaintiff in such a case. Only if the man admits sexual intercourse is there an onus on him to prove he is not the father. But where, as here, there is no such admission, the onus remains on the woman. See *Kashiri v Muvirimi* 1988 (1) ZLR 270 (S) at 272E-F; Moyo v Sifelani 1988 (1) ZLR 98 (S) at 99D et seq; *V v A* 1984 (2) ZLR 139 (S) at 140F et seq.

This is one of those cases in which the magistrate should have investigated further. He might have asked to see the child - see *Mountford v Mukukumidzi* 1969 (2) RLR 1 (A); Ruswa v Muzvidziwa S-4-91 (not reported). But he did not. In the circumstances, we cannot support his conclusion. He should have granted absolution from the instance, thus enabling her, if so advised, to bring further proceedings. She may consider that the child looks so like its alleged father that its mere presence in court will tip the balance; she may demand a blood test. But on the present evidence she should not have succeeded.

McNALLY JA

The appellant asks only for costs in the court below. Accordingly, the following order is made:

1. The appeal is allowed, with no order as to costs;

2. The order of the court *a quo* is set aside, and in its place the following order is made -

"There will be absolution from the instance."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Danziger & Partners, appellant's legal practitioners

MONARCH STEEL (1991) (PVT) LTD v FOURWAY HAULAGE (PTY) LTD 1997 (2) ZLR 342 (HC)

Court **High Court, Bulawayo**

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Malaba J

Special plea

26 September 1997 Judgment No. HB-6-97

Flynote

Court - jurisdiction - High Court - peregrinus - need for defendant to be present in Zimbabwe or have property capable of attachment - jurisdiction cannot be established merely by service of summons abroad

Practice and procedure - summons - service - service on peregrinus - application to judge for leave to effect service - application must state grounds on which it is alleged that court has jurisdiction - effect of failure to use correct procedure

Headnote

The plaintiff company claimed damages for alleged breach of contract by the defendant company, which was registered in South Africa. The company had no property in Zimbabwe capable of attachment. The plaintiff made a chamber application for leave to effect service of the summons and declaration at the defendant's registered office in Boksburg, South Africa. Leave was granted, although the plaintiff did not submit a statement setting out the grounds on which it alleged that the court had jurisdiction to entertain the claim. The defendant entered appearance to defend but filed a special plea in which it averred that the court had no jurisdiction. The plaintiff replied that the court did have jurisdiction by virtue of the issue of the process.

Held, upholding the special plea, that the application which the plaintiff had made for an order for "substituted service" was made without any regard to the provisions of s 15 of the High Court Act [Chapter 7:06]. For the issue of summons and declaration in this case to have had the effect of founding or confirming the court's jurisdiction over the defendant, the plaintiff should have made a court, not a chamber, application and should have made a statement to the effect that the defendant was present in the country or had property capable of attachment. The purpose of s 15 was to give the court the discretion to confirm jurisdiction by the issue of process rather than by arrest or attachment; but it did not relieve the plaintiff from the burden of having to show that the peregrinus was within the country or had property capable of attachment.

Cases cited:

African Distillers Ltd v Zietkiewicz & Ors 1980 ZLR 135 (G)

Clan Transport (Pvt) Ltd v Govt of the Republic of Mo ambique 1993 (3) SA 795 (Z)

Mackay v Hepker 1941 SR 33

MALABA J

The court considered the following legislation:

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High Court Act [Chapter 7:06], s 15

Case Information

D P Carter, for the plaintiff

A J Dyke, for the defendant

Judgment

Malaba J: In an extempore judgment delivered on 26 September 1997, I found that this court had no jurisdiction to entertain the claim by the plaintiff against the defendant and upheld a special plea with costs taken and filed by the defendant objecting to the jurisdiction of this court. The special plea had been set down for hearing with the consent of the parties. The plaintiff has today, 6 October 1997, asked that I reduce the reasons for the judgment to writing. The following are the reasons.

On 9 September 1996, the plaintiff, an incola, drew up a summons commencing action wherein it claimed from the defendant, a peregrine company with registered offices in the Republic of South Africa, payment of the sum of $44 958.22, interest thereon and costs of suit.

The plaintiff alleged that on 7 September 1995, the defendant entered into an oral agreement with it at Bulawayo, in terms of which it undertook to carry by road, ten cases of copper wire belonging to the plaintiff from Johannesburg to Bulawayo at a cost of R1 994.19. It alleged that in breach of the agreement, the defendant delivered nine cases of copper wire and failed to account for the tenth case. The amount of money claimed by the plaintiff from the defendant was the value of the missing case of copper wire.

It became necessary for the plaintiff to serve the summons and declaration on the defendant at its registered office at Old Heidelberg Road, Boksburg in the Republic of South Africa. Order 6 r 45(1) and (3) of the High Court Rules 1971 provide that when it becomes necessary to serve a summons on any person in a province of the Republic of South Africa, a chamber application shall be made to a judge for leave to effect the service of summons.

The application must be accompanied by a draft of the summons to be issued and a statement setting out concisely the facts upon which the cause of action is based; the grounds upon which the court has jurisdiction to entertain the claim, and the manner of service which the judge is asked to authorize (the emphasis is mine).

On such application, the judge may make such order as to the manner of service as to him seems proper and necessary. The summons is then issued at the time the judge grants the order as to the manner of service.

The plaintiff did not follow the procedure prescribed by the provisions of r 45 but made a chamber application, instead, in terms of r 46(2) for an order

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authorising it to serve summons on the peregrine defendant by registered post at its registered office in the Republic of South Africa.

An application under r 46(2) is appropriate in a case where it becomes necessary to obtain the leave of a judge to serve process, "on any person within the jurisdiction who cannot be served in any of the ways provided in Order 5" (the emphasis is mine). An application in terms of r 46(2) is not required to be accompanied by a statement setting out the grounds upon which the court has jurisdiction to entertain the claim because the summons is intended to be served on a person who is within the jurisdiction of the court. The plaintiff gave no reasons at all as to why it was necessary to adopt the wrong procedure in making the application for the relief it sought.

I considered it a reasonable inference to draw from the circumstances of this case that the object of making a wrong application under r 46(2) for relief which the plaintiff could have obtained in terms of r 45(4) was the avoidance of the obligation, placed on the plaintiff by the provisions of r 45(3), to set out the facts disclosing the grounds upon which the court had jurisdiction to entertain the claim.

The plaintiff successfully placed before the judge a red herring and on 2 October 1996 obtained an order in these terms:

> "(1) That applicant's summons and declaration be served by registered post upon the respondent at old Heidelberg Road, Boksburg, Republic of South Africa.
>
> (2) The respondent enter appearance to defend by proxy or in person within thirty days after the service upon it of the said summons and declaration."

The order was served, together with the summons and declaration, on the defendant by registered post at its registered office in South Africa. On 16 January 1997, the peregrine defendant entered appearance to defend the action through a firm of legal practitioners in Bulawayo. On 10 June 1997, the defendant filed the special plea in which it averred that this court had no jurisdiction to entertain the plaintiff's claim as it was a resident of the Republic of South Africa and had no property within Zimbabwe capable of attachment at the time the summons was issued.

In its replication to the special plea, the plaintiff denied that the court had no jurisdiction to entertain the claim. It averred that the court's jurisdiction over the peregrine defendant was "founded and confirmed, as the case may be, by the issue of such process in terms of s 15 of the High Court of Zimbabwe Act [Chapter 7:06]".

Section 15 of the High Court of Zimbabwe Act [Chapter 7.06] ("the Act") reads:

> "15. Exercise of jurisdiction founded on or confirmed by arrest or attachment.
>
> In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property the High Court may permit or

> direct the issue of process within such period as the court may specify for service either in or outside Zimbabwe

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without ordering such arrest or attachment *if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached* and the jurisdiction of the High Court in the matter shall be founded or confirmed as the case may be by the issue of such process" (the emphasis is mine).

One thing is clear. The application on which the plaintiff obtained the order of "substituted service" from the judge on 2 October 1996 was made without any regard to the provisions of s 15 of the Act. There was no court application for the issue of the summons and declaration by court in terms of s 15. For the issue of the summons and declaration in this case to have the effect of founding or confirming the court's jurisdiction over the peregrine defendant, in terms of s 15 of the Act, the plaintiff must show that the application on which it obtained the order of 2 October 1996 was made to the court, accompanied by a statement in which it made known to the court that the defendant had property within Zimbabwe capable of attachment. The application was made to a judge in chambers.

Although s 15 altered the common law to the extent that it gave the court a discretion not to order attachment of the property belonging to a peregrine defendant or order his arrest but to elect in lieu thereof to found or confirm its jurisdiction over the peregrinus by issue of process, it did not discharge the plaintiff from the burden of having to satisfy the court, before the issue of process, that the peregrinus was present within the country for arrest or had property within the country capable of attachment.

It was in the sense that s 15 made it no longer necessary for the court to order the arrest of the peregrinus or an attachment of his property that Sandura JP in Clan Transport Co (Pvt) Ltd v Govt of the Republic of Mo ambique 1993 (3) SA 795 (Z) said at 797 F:

> "Although under common law there must be an arrest of the defendant peregrinus or an attachment of his property within the territorial jurisdiction of the court in order to found or confirm jurisdiction that position has been altered by s 15 of the High Court of Zimbabwe Act 29 of 1981."

The learned Judge President did not suggest, as was argued by Mr Carter for the plaintiff, that it was no longer necessary to show to the court before issue of court process for purposes of s 15 of the Act, that the peregrinus was present within the court's jurisdiction or had property therein capable of attachment. The court's discretion lies in having to determine whether or not to order the arrest of a peregrinus who must be in the country or order the attachment of his property which must also be within the country. That discretion is also available to a judge before whom a chamber application is placed in terms of Order 6 r 45.

The above construction of the provisions of s 15 of the Act receives authority from the decision of Beck J (as he then was) in African Distillers

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MALABA J

Ltd v Zietkiewicz & Ors 1980 ZLR 135 (G), from which the Judge President in Clan Transport's case *supra* quoted with approval at p 136F-H. In African Distillers Ltd case *supra*, the plaintiff, an incola, sued the defendants, who were peregrini resident in the Republic of South Africa, for damages arising from their alleged breaches of a contract with the plaintiff that was entered into and performed in this country.

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Two of the defendants entered appearances to defend the action and filed a special plea objecting to the court's jurisdiction. They alleged that they were resident in the Republic of South Africa; that no order had been sought by the plaintiff to attach their persons or their property; that neither of them was possessed of any property in Zimbabwe and that neither of them submitted to the jurisdiction of the court. After applying the common law principles and practice, Beck J concluded that the plaintiff's suit could not be entertained against the two peregrine defendants.

An argument arose, however, whether s 40 (predecessor of s 15) of the High Court Act [Chapter 14] had altered the common law as to entitle the plaintiff to have its claim tried in the court without the need to fortify and confirm the jurisdictional ground (ratione contractus) that existed.

Following the decision in Mackay v Hepker 1941 SR 33 at 35-36 Beck J delivered himself of the following at 138H-139B:

> "It is one thing to confer a discretion to dispense with the need for the arrest of a peregrinus or for the attachment of his property where such arrest or attachment can be made but where the court has reason to conclude that the oppression inherent in such arrest or attachment is not, in all the circumstances, reasonably necessary for the purpose of rendering effective a judgment unfavourable to the peregrinus. It is quite another thing to give to the court a jurisdiction it would not otherwise possess under the common law over a peregrinus whose person and whose property are both beyond the territorial limits of the court's powers and thus not subject to arrest or attachment, and who refuses to submit to the court's jurisdiction."

Later on in the judgment his Lordship declared at 140C-D that:

> "The important consideration is that there must be property of some value within the jurisdiction that is capable, if need be, of attachment in order to give recognition to the doctrine of effectiveness even though its value may be woefully insufficient to 'satisfy' the judgment sought."

The onus was on the plaintiff to show that the court process was issued in terms of s 15 of the Act. It failed to discharge the onus. The chamber application did not comply with provisions of r 45(3). There was no mention of the court's jurisdiction in the founding affidavit filed in support of the chamber application for the order granted on 2 October 1996. In other words, the affidavit did not aver facts to the effect that the peregrine defendant had property within Zimbabwe capable of attachment. The plaintiff would have been forced to consider that requirement had it made the application in terms

of r 45(3). Had a proper application in terms of r 45 been placed before the judge on 12 October 1996, he would have satisfied himself that this court had no jurisdiction over the peregrine defendant without reference to the provisions of s 15 of the Act.

The fact that it chose to make the application in terms of r 46(2) which does not require disclosure of facts upon which jurisdiction is claimed suggests that the plaintiff knew that it could not prove that the peregrine defendant had property within Zimbabwe.

Mr *Carter* did not suggest in the plaintiff's heads of argument, nor in his address to court, that the peregrine defendant had property within Zimbabwe at the time the plaintiff obtained the

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order of "substituted service" on 2 October 1996. He could not contradict Mr *Dyke*'s argument that the peregrine defendant did not have property within Zimbabwe at the time the summons was issued. The plaintiff failed to show that the summons in this case was issued in terms of s 15 of the Act. It also failed to show that this court had jurisdiction over the defendant.

Accordingly, this court has no jurisdiction to entertain the plaintiff's claim against the defendant and the special plea is upheld with costs.

Ben Baron & Partners, plaintiff's legal practitioners

Webb Low & Barry, defendant's legal practitioners

S (PVT) LTD v COMMISSIONER OF TAXES 1997 (2) ZLR 348 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Muchechetere JA

Income tax appeal

15 & 30 September 1997 Judgment No. S-151-97

Flynote

Revenue and public finance - income tax - Income Tax Act [Chapter 23:06] - allowable deductions - industrial buildings - buildings used mainly in connection with hotel business - manager's residence - requirement under Liquor Act [Chapter 14:12] that manager should reside on licensed premises - house thus used by hotel owner entirely in connection with hotel business

Headnote

The appellant company owned a country hotel which was licensed in terms of the Liquor Act [Chapter 14:12]. It was a requirement of that Act that, subject to certain exceptions, the approved manager of licensed premisesshould reside on the premises. The company built a house on the hotel premises in which the manager and his family resided. The company claimed an allowance in its tax return for the year of construction, on the ground that the building was used mainly in connection with the hotel business. The claim was disallowed. The President of the Special Income Tax Court, who upheld the ruling of the Commissioner of Taxes, held that the house was used principally to house the manager and his family and that its use for hotel business, though important, was incidental, since most of the manager's work in connection with the hotel was done in an office in the hotel building. He decided that the house was "staff housing", which does not qualify for an allowance. On appeal:

Held, that the approach of the President was wrong. He should have asked what the company used the house for, not what the manager used the house for. If he had asked that, he would have had to conclude that the company used the house to comply with the requirements of the Liquor Act. It did not matter whether the company incidentally used the house to accommodate the manager; the house was used to comply with the law and the connection of the house with

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the business was intimate, mandatory and absolute.

Appeal allowed.

Cases cited:

A v CoT 1988 (1) ZLR 344 (H); (1988) 50 SATC 164 (ZH) (sub nom A2 v CoT)

CoT v Swaziland Ranches Ltd (1978) 40 SATC 232 (Swaziland Ct of Appeal)

ITC 1439 (1988) 50 SATC 178 (Zimbabwe Special Ct)

SBI v Lourens Erasmus (Edms) Bpk 1966 (4) SA 434 (A); (1966) 28 SATC 233

The court referred to the following statutory provisions:

Income Tax Act [Chapter 23:06], Sch 4, para 1

McNALLY JA

Liquor Act [Chapter 14:12] s 41(3)(c)

Case Information

A P de Bourbon SC, for the appellant

D P Carter, for the respondent

Judgment

McNally JA: This is an appeal from a decision of the President of the Special Income Tax Court. He decided that a house built on licenced hotel premises to accommodate the approved manager did not fall within the definition of "industrial building" in para 1 of the Fourth Schedule of the Income Tax Act [Chapter 23:06].

The paragraph includes within the definition:

> "(v) Any building used mainly for a hotel business in respect of which a hotel liquor licence or casino licence, not being a temporary licence, has been issued, and includes ancillary buildings, structures and works of a permanent nature which are, in the opinion of the Commissioner, used mainly in connection with such business."

The appellant ("the company") owns the Tambuti Lodge Motel some eleven kilometres outside Chiredzi on the banks of the Chiredzi River. The motel holds a liquor licence, and in terms of s 41(3)(c) the Liquor Act [Chapter 14:12]:

> "the approved manager shall reside on the licenced premises or at premises which the Board has approved and specified in terms of subs (4)."

Subsection (4) allows the Board to approve premises where the approved manager may reside off the licenced premises if they are reasonably close by and there are adequate

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communications and the manager will be able to maintain proper control. But in a country hotel like this obviously the approved manager should be on the premises.

In this case, the approved manager (who is also a major shareholder in what is apparently a family company) lives in a three-bedroomed house on the hotel premises constructed in March 1990 at a cost of $170 790. The company claimed a special initial allowance in that amount in its tax return for the year of assessment 1989-1990 and the claim was disallowed. The company's appeal to the Special Income Tax Court also failed (Income Tax Appeal 3/93). Judgment was handed down on 7 December 1994. The company's appeal came before us only on 15 September 1997.

The President of the Special Income Tax Court decided that the house was used principally or mainly to house the manager and his wife, and that the use for the purposes of the hotel business was "incidental, though important". He thus upheld the Commissioner's ruling.

In coming to that conclusion, the learned President was influenced by the evidence that the manager and his wife actually did most of their "hotel" work

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McNALLY JA

in an office in the main hotel building. When they were at home they were normally off duty, though obviously on call should anything serious occur. The house, he decided, was "staff housing", which does not qualify for a special initial allowance.

It seems to me, with respect, that he has come to the wrong conclusion because he has (although not in so many words) asked the wrong question. The question is not "what does the approved manager use the house for?", but rather "what does the company use the house for?"

I have no doubt, on the evidence, that the approved manager uses the house mainly as his residence. I say so regardless of whether "mainly" means 51% of the time or 99% of the time.

But I am equally satisfied that, from the company's point of view, it uses the house 100% to comply with the requirements of the Liquor Act by housing its approved manager on the premises. One cannot separate the two concepts. One cannot say the company uses the house 50% to comply with the law and 50% to accommodate the manager; or mainly to house the manager and incidentally to comply with the law.

In short, I do not think we need concern ourselves with what I may describe as the "51% v 99%" controversy in Sekretaris van Binnelandse Imkomste v Lourens Erasmus (Edms) (Bpk) (1966) 218 SATC 233; 1966 (4) SA 434 (A). On either interpretation, in my view, the house is an ancillary building of a permanent nature, used by the company mainly in connection with its hotel business.

One can look at the question from another point of view. In the Fourth Schedule the taxpayer can obtain tax deductions for a "commercial building" but the definition excludes staff housing. In other words, no deduction is allowable for staff housing under the definition of "commercial building".

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Similarly, the taxpayer can obtain tax deductions for "farm improvements", but that does not include staff housing, which is specifically excluded.

But in the definition of "industrial building" there is no specific exclusion of staff housing except under sub-heading (viii) which is not relevant here. The learned President said: "I think that this is because no building can be used mainly for two separate and quite distinct purposes".

I do not, with respect, follow the logic of that statement. I can understand the argument that, generally speaking, if an hotel company builds houses for its staff, those houses are not "used mainly in connection with" the hotel business. Thus, so the argument would proceed, houses for members of staff other than the approved manager fall outside the definition of industrial building, not because they are staff housing, but because they are not used by the hotel company mainly in connection with the hotel business.

But accommodation for the approved manager of a licenced hotel, whether

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it be a flat incorporated in the body of the hotel, or a chalet or house in the grounds dedicated for the purpose, or simply a room in the hotel used for the purpose, must in my view qualify as a building used mainly in connection with that business. It is used 100% by the company to comply with the law which requires it to house its approved manager on the premises. The connection with the hotel business is intimate, mandatory and absolute. Far more so than in the various cases cited: CoT v Swaziland Ranches Ltd (1978) (Swaziland Court of Appeal) 40 SATC 232; A v CoT 1988 (1) ZLR 344 (H); (1988) 50 SATC 164 (ZH) and ITC 1439 (1988) 50 SATC 178 (1988) (Zimbabwe Special Court).

I would allow the appeal. The order of the President of the Special Court for Income Tax Appeals in Income Tax Appeal 3/93 is set aside. In its place, the following is substituted:

1. The appeal is allowed.

2. The Commissioner is directed to amend the assessment for income tax of the appellant for the year ended 31 March 1990 by treating the manager's house as an industrial building qualifying for the appropriate special initial allowance.

3. The appellant's costs in this court and in the Special Court for Income Tax Appeals shall be treated as a deduction in terms of the provisions of s 15(2)(aa) and (bb) of the Income Tax Act [Chapter 23:06].

KORSAH JA: I agree.

MUCHECHETERE JA: I agree.

Stumbles & Rowe, appellant's legal practitioners

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

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MANDIMIKA v MANDIMIKA & ANOR 1997 (2) ZLR 352 (HC)

Court **High Court, Harare**

Chinhengo J

Civil action

3 March & 1 October 1997 Judgment No. HH-152-97

Flynote

Family law - divorce - husband already married when he entered into contested marriage - second marriage bigamous and therefore null and void - whether court entitled to make order in terms of consent paper if marriage null and void

Conflict of laws - foreign law - marriage - validity - marriage contracted in Ghana - whether to be recognised as valid in Zimbabwe

Headnote

The plaintiff and the defendant had been married in Zimbabwe in terms of the Marriage Act [Chapter 5:11]. The plaintiff brought an action for divorce from the defendant. The parties had drawn up a consent paper setting out the terms on which their relationship was to terminate. It was clear that the marriage had irretrievably broken down. However, before marrying the defendant, the plaintiff had previously married another woman in Ghana.

Held, that the marriage contracted in Ghana was a civil union similar to a Zimbabwean marriage under the Marriage Act. A foreign marriage is recognised in Zimbabwe if it is a valid marriage in the country in which it was contracted, provided that it is not contrary to the public policy of Zimbabwe. This applies to both civil and registered customary marriages. As the Ghanaian marriage was valid in Ghana, it must be recognised as a valid marriage in Zimbabwe.

Held, further, that the purported Zimbabwean marriage under the Marriage Act amounted to bigamy, whether the pre-existing marriage was a civil marriage or a customary union and therefore the purported Zimbabwean marriage was null and void.

Held, further, the court could not make an order embodying the terms of the consent paper. The parties had entered into the consent paper on the assumption that their marriage was valid. As the marriage was null and void there was no antecedent right on the basis of which the parties could request the court to make an order embodying the terms of the consent paper. Additionally, the relief asked for had no foundation in the pleadings nor did it flow naturally from the cause of action.

Held, further, that if the parties had not concluded the consent paper and this matter had pleaded, the court might have been able to have given an order as to the distribution of the property either on the basis of putative marriage if the court was of the opinion that the defendant was an innocent party or on the basis that the parties were joint owners of the property which property should be divided between them.

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Cases cited:

CHINHENGO J

Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A)

Hodd v Hodd 1942 NPD 198

Kassim v Ghumran & Anor 1981 ZLR 227 (G)

Case Information

S Mushonga, for the plaintiff

F M Katsande, for the first defendant

Judgment

Chinhengo J: The plaintiff's declaration prayed for the relief that his marriage to the defendant be declared null and void and that the second defendant "cancels the marriage certificate". This relief was sought on the grounds that when the plaintiff entered into the marriage with the defendant he had a pre-existing marriage with another woman, a Ghanaian, which marriage had been contracted in Ghana in terms of that country's Marriage Ordinance, Chapter 127. The plaintiff later amended his declaration by deleting any reference to his previous marriage and seeking the grant of a decree of divorce and other ancillary relief on the ground that the marriage was irretrievably broken down.

In her plea to the plaintiff's unamended declaration, the defendant had denied that her marriage to the plaintiff was affected by the prior marriage. She had contended that the plaintiff's Ghanaian marriage was a customary union, a potentially polygamous one which was superceded by the Zimbabwean marriage. After the plaintiff amended his declaration, the defendant who did not object to such amendment pleaded to it and admitted that the marriage was irretrievably broken down and that a decree of divorce should be granted. It was clear to me that these amendments were intended to facilitate and procure for the parties the termination of their relationship.

The trial commenced on the basis of the parties amended pleadings. After the plaintiff had given his evidence but before he was cross-examined on it, it became quite clear that the parties could not get around the problem created by the plaintiff's Ghanaian marriage. However, the parties' anxiety to terminate their relationship, I think, prompted them to prepare and agree on the terms on which their relationship was to terminate. They signed a consent paper which provides as follows:

"1. Whereas the plaintiff has issued summons claiming a decree of divorce and ancillary relief;

2. Whereas the defendant has agreed to file a waiver and withdrawal of her opposition to the plaintiff's action if the terms hereinafter are incorporated into the final terms of the divorce order granted by this Honourable Court;

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3 (a) The parties were married to each other on 3 July 1987 in Harare and the marriage still subsists;

(b) There are no children from this union.

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4 (a) The court can, if it is mindful grant a decree of divorce;

(b) The plaintiff will pay the defendant $45 000 in line (*sic*) of her share and claim in House No. 49 Carstens Road, Belvedere payable as follows:

a. $20 000 on or about 30/6/97

b. $25 000 on or about 30/11/97.

5. The plaintiff will sign all necessary papers so that the defendant will get a rent to buy agreement with the Ministry of Public Construction and National Housing with regards to House No. 6-60th Avenue, Mabelreign, Harare as her sale (*sic*) property.

6. The defendant will get the following movable properties as her sole property - ie

a. Dining room suit (*sic*)

b. Bedroom suit (*sic*)

c. 4 plate stove

d. Display Cabinet.

7. Costs - each party to bear its own costs."

Despite the consent paper I did not grant the decree of divorce. I requested the parties' legal practitioners to make written submissions on whether it was competent for the court to grant a decree of divorce in the circumstances of this case. I did not consider that it would have been proper for me to make an order in terms of the consent paper in view of the evidence on record, which in addition to the original pleadings, included the marriage certificate of the plaintiff's Ghanaian marriage. That marriage subsisted at the time that the parties were married in Zimbabwe. It is still subsisting. In my view, the question which needed to be examined was whether despite the consent paper and the evidence indicating that the parties' marriage was irretrievably broken down, it was correct in law for the court to grant a decree of divorce.

The parties' legal practitioners have made written submissions to me on this point.

A sworn affidavit by the parents of the plaintiff's Ghanaian wife is on record. It was properly executed before a notary public whose signature was authenticated by the Chief Registrar (General) of the Judicial Service of Ghana. The latter's signature was confirmed by the Acting Director General in the Legal and Consular Bureau of the Ministry of Foreign Affairs of the Republic of Ghana. The affidavit reads:

"We Christian Koku Atiogbe and Augusta Atiogbe of Block M7 Korle Bu, Nurses Flat, Accra, in the Greater Region of Ghana solemnly declare as follows:

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1. That we are the declarants herein.

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2. That Anastasia Adzo Atiogbe (now Mrs Anastasia Tuwaya is our daughter.

3. That Mrs Anastasia Tuwaya then known as Anastasia Adzo Atiogbe was customarily married to Bernard Mwandipandusa Tuwaya at Alajo in Accra on 7 July 1983, prior to their civil nuptial ceremony under the Marriage Ordinance on 25 August 1983.

4. That the customary marriage was under Ghanaian customary law, and in a Ghanaian customary marriage a certificate of marriage is not made and therefore no such certificate is given to the parties to the marriage.

5. That the essentials of a valid customary marriage in Accra are the giving of a dowry, bible and a ring to the bride together with 2 bottles of Schnapps, whisky and gin plus soft drinks and other necessaries. And the ceremony is witnessed by principal members and elders of both families and a host of relations and friends.

6. That their customary marriage is valid and has the same legal weight as their marriage under the Ordinance.

7. That prior to the enactment of the Marriage Ordinance Chapter 127 of 1884 customary marriage was in existence and has not been disturbed.

8. That whereas under customary marriage no certificate of marriage is given to the parties, in a civil nuptial ceremony, a certificate is given to the parties and most couples choose to have a certificate as written evidence of marriage.

9. Wherefore we honestly and conscientiously declare to the truth of the statements herein."

I must note that the deponents to this affidavit have not indicated their qualification to state authoritatively the law relating to marriages in the Republic of Ghana. They are not authorities on the subject. But their statement to the effect that the marriage contracted by the plaintiff and his Ghanaian wife is a "civil" marriage; the documentary evidence in the form of the certificate of marriage issued in terms of the Ghanaian Marriage Ordinance and my own research satisfy me that the marriage is a civil one.

The question which must arise for determination is whether the marriage in Ghana is recognised in Zimbabwe. The form and ceremonies of entering into a contract of marriage are regulated by the *lex loci contractus*. The essentials of the contract are regulated by the *lex domicilii*. "A foreign marriage which observes the forms and ceremonies of the *lex loci contractus* will be valid in England unless one of the parties is domiciled in England and the contract is contrary to public policy by the general consent of Christendom or by Act of Parliament" (see D Tolstoy The Law and Practice of Divorce 6 ed at p 108). This I think is the same position in our law in respect of any civil marriage. Unless the foreign marriage does not accord with public policy it will be valid in Zimbabwe (see generally Kassim v Ghumran & Anor 1981 ZLR 227 (G)). The Customary Marriages Act [Chapter 5:07] provides in s 3(1)(a) and (d) as follows:

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CHINHENGO J

"3(1) Subject to this section, no marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless -

(a) such marriage is solemnized in terms of this Act; or

...

(d) being a marriage contracted outside Zimbabwe, such marriage is recognised as a valid marriage in the country in which it was contracted."

Two points emerge from this section. The first is that a marriage at customary law is only recognised in Zimbabwe if it is solemnized in terms of the Customary Marriages Act. As such a marriage which is not so registered is not recognized in this country. This accords with the definition of a "marriage" in s 2 of the Matrimonial Causes Act [Chapter 5:13] which states that -

"'marriage' includes a marriage solemnized in terms of the Customary Marriages Act [Chapter 5:07]."

The second point is that a foreign customary marriage is recognized in Zimbabwe if it is a valid marriage in the country in which it was contracted.

It seems to me that there is no basis on which the plaintiff's Ghanaian marriage can be impugned. It is recognised as valid in the country in which it was contracted. It was registered in that country in terms of that country's Marriage Ordinance as evidenced by the marriage certificate. It must therefore be recognised in Zimbabwe as a valid marriage and I do so recognise it. This must be so whether the marriage is a customary marriage or a civil marriage. The position is the same regardless of whether the result of my own research on the nature of the Ghanaian marriage is correct.

Proceeding from this recognition therefore one has to determine whether it was competent for the plaintiff to have contracted another marriage with the defendant under the Marriage Act. The answer must surely be in the negative. P M A Hunt South African Criminal Law and Procedure vol II revised 2 ed discusses this problem in the context of the crime of bigamy. He says at p 247-248:

"The Zimbabwean courts have reasoned that the crime of bigamy is directed at profanations of the civilized marriage ceremony, and that it is therefore committed in the case of polygamous customary marriages even perhaps if unregistered, when either the first, or the second marriage is a valid Christian or civil marriage, but not where both 'marriages' are customary polygamous unions. It follows that Zimbabwean bigamy indictments must specify that at least one of the marriages is by Christian or civil rites. In order, therefore, to give effect to what the Zimbabwean courts conceive to be the essential ratio of the crime of bigamy, customary unions are given a limited degree of recognition which, however, the Zimbabwean courts have refused to extend to the crime of incest."

The above statement supports the view that it is bigamous for a person to enter into a marriage under Chapter 5:11 when he has a pre-existing

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customary marriage valid under the Customary Marriages Act or a valid foreign marriage

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recognised as valid in Zimbabwe as provided by s 3(1)(d) of the Customary Marriages Act. Although I understand that the plaintiff's Ghanaian marriage is in fact a civil marriage similar in all respects to the Zimbabwean marriage contracted under [Chapter 5:11], it is not necessary for the purposes of my decision in this case to decide whether in fact the Ghanaian marriage is a civil marriage or a registered customary marriage. If recognition can be extended to the Ghanaian marriage, as no doubt it should in this case, then, the fact of the bigamous nature of the Zimbabwean marriage is established. A bigamous marriage is null and void. "A marriage that is void *ab initio* produces none of the incidents of marriage" (HR Hahlo - The South African Law of Husband and Wife 5 ed at p 103).

The plaintiff and defendant's legal practitioners both contended in their heads of argument that the court did not have to concern itself with what was contained in the pleadings before their amendment. The amended pleadings do not at all raise the existence of the Ghanaian marriage and in terms thereof the parties are quite happy to proceed on the basis that their marriage in Zimbabwe is valid. I cannot accept this proposition. I have already mentioned that the parties amended their pleadings after the trial started and were in my opinion motivated by a mutual desire to have their relationship terminated on the terms agreed between them. I perhaps erred by permitting the parties to amend their pleadings with the result that they appear now to have attempted to evade or avoid the legal tangle in which they had found themselves. But it must be recalled that the court has the widest discretion to grant amendments to pleadings even if the pleadings involve the introduction of new causes of action and new claims. That discretion is much easier to exercise in a case where the parties to the action are agreed that it should be exercised in favour of an amendment. In the present case the amendments were acceptable to both parties; none of them was likely to suffer any prejudice. I could not have refused to grant the amendment as at that stage I was not in a position to determine whether or not the amendment lacked *bona fides*. It may be quite true that the litigants did not, at the time of the amendment fully appreciate the nature of the Ghanaian marriage and how that marriage was to be an impediment to them obtaining the relief which they sought. I am therefore unable to impute mala fides to the parties. Even if I erred I would not for that reason, or for the reason that the parties have reached an agreement on how the dispute between them should be resolved, ignore the correct legal position which obtains in this case and its consequences. In this regard I adopt the words of Centlivres JA in Collen v Rietfontein Engineeing Works 1948 (1) SA 413 (A) at 433 where he stated:

> "This court, therefore, has before it all the materials on which it is able to form an opinion,

> and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial."

These words were said by the learned Judge of Appeal when he was faced with the need to reach a decision on the basis of issues which were not on the pleadings. In the present case, the amended pleadings have avoided the issue raised by the Ghanaian marriage hence both legal practitioners have urged me not to peer behind the pleadings. I have however to do precisely that ie peer behind the pleadings because I am constrained by the law to do so. What

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the parties are in effect asking me to do is to give judgment for divorce on terms agreed between them. This is not permissible in a claim for divorce. "In every case, ... the plaintiff is under the necessity of proving title to divorce, or the action fails" (Hodd v Hodd 1942 NPD 198 at 205). Happily for me, these are not divorce proceedings but proceedings for a nullity. It is therefore unnecessary for me to insist that the plaintiff or the two parties (since they have acted jointly by drawing up a consent paper) should prove title to divorce.

The matter does not end here. Should the court, after declaring the marriage of the parties a nullity, proceed and make an order in terms of the consent paper? In my view, this cannot be done. Support for this view is to be found in Hodd v Hodd *supra* where at pp 203-209 this issue is fully canvassed. The headnote summarises the position succinctly as follows:

> "In two undefended divorce actions, the Durban and Coast Local Division made the usual orders on the merits, but in each case the court was asked to embody in its order an agreement between the spouses providing for the maintenance of one of them after divorce. The court was doubtful as to the propriety of making agreements of this description part of an order, and directed that the question should be argued before the Full Bench.
>
> *Held*, refusing the applications in both cases, that the agreement by the plaintiff to pay defendant maintenance was based upon no antecedent right on the part of the defendant to receive any maintenance from the plaintiff and as it represented no agreed settlement or compromise of agreement made in the action there was no locus to ask the court to make the agreement part of its order."

The situation is the same in the present case. The parties' marriage is null and void. The parties have however entered into a consent paper on the assumption that their marriage is valid, which is clearly wrong. They have asked the court to incorporate the terms of their agreement as part of the court order. Clearly, both parties have no antecedent right to the relief to be embodied in the order which they seek. This position was conveyed with clarity in Hodd v Hodd *supra* where at p 204-205 it was stated:

> "The principle of the thing is, I think, that the court is not a mere registry of documents or agreements and although it will undoubtedly give effect by way of orders to rights recognised by the law, and to agreed settlements and compromises based upon those rights (cf Kotzè AJ in Schierhout v Minister of Justice 1925 AD 417 at p 423), some causes of

> action, or recognised legal right to invoke the assistance of the court, must exist before the court will make any order, except, perhaps, one dismissing the proceedings."

I am satisfied that the present case is one in which I cannot accede to the parties request and make an order embodying the terms of their consent paper. To do that would be to reduce the court to a mere "registry of documents". In addition, as stated in Hodd v Hodd (*supra*), "if this agreement (in this case the consent paper) were embodied in the court's order it would represent an obligation based upon nothing but the agreement of the parties". This cannot be a principle on which this court can properly discharge its functions. But would it be proper for this court not to make any other order as may be appropriate in the light of its finding that the marriage is a nullity. If a consent paper had not been concluded between the parties and the pleadings amended in the way they were amended, I think, consideration could have been given to embodying part of the terms of consent paper in an order of the court basing such

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embodiment perhaps on the possible putative nature of the marriage if the court was of the opnion that the defendant was an innocent party. An alternative basis could also have been that the parties are joint owners of the property which should be divided between them. The consent paper has complicated the whole picture. Returning to Hodd v Hodd *supra*, the court in that case addressed a similar problem in the following words:

> "It is, in such circumstances, incumbent on the court to prune the agreement or excise its objectionable features, and then to embalm the remains in its order. I doubt it. And in any event, if it is, must the parties necessarily be deemed to desire an agreement so truncated or mutilated. I very much doubt that too. In general, I think the position must be that assuming there is a locus to ask the court to make an agreement part of its order, that agreement must contain only terms such as the court can properly approve; that is to say, such as seen to the court to be enforceable, both legally and practically. The court must, it seems to me, assume that amount of responsibility for the terms of any agreement it makes part of its order."

This court cannot, in the circumstances of the present case, assume any responsibility in respect of the agreement contained in the consent paper. The relief asked for by the parties has no foundation on the pleadings nor does it flow naturally from the cause of action. There is no antecedent right on which the parties may ask this court to make the consent paper a part of its order.

The only order I can make is a declaratory one, ie one which records the unmarried status of the parties. Such declaration is not, nor can it be, constitutive. I do however imagine that the parties will adhere to the terms of the consent paper in so far as it relates to the division of property between them. It would be ill advised for either of them to resile from the contract they have entered into, which though not sanctioned by the court, is reasonable in

the circumstances. The only aspect of the agreement between the parties which I think it is only fair to adopt is the portion to the effect that each party should bear its own costs.

Accordingly, it is ordered:

1. That the marriage purportedly contracted by the parties on 3 July 1987 at Harare, Zimbabwe, is null and void.

2. The agreement of the parties that the consent paper signed by them be made an order of the court is hereby refused.

3. The Registrar of Marriages is hereby directed to expunge from his records the certificate evidencing the marriage between the parties.

4. That each party shall bear his or her own costs.

Mushonga & Associates, plaintiff's legal practitioners

Katsande & Partners, first defendant's legal practitioners

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MAWERE v MUKUNA 1997 (2) ZLR 360 (HC)

Court **High Court, Harare**

Chinhengo J

Application for default judgment

1 October 1997 Judgment No. HH-151-97

Flynote

Interest - rate - debt expressed in foreign currency - prescribed rate - applicability - rate applicable where money of account differs from money of payment

Headnote

The plaintiff sued the defendant for the payment of R7 800, which the defendant admitted owing. The plaintiff applied for default judgment, with interest at the prescribed rate, currently 25% *per* annum. Section 4 of the Prescribed Rate of Interest Act [Chapter 8:10] stipulates that interest shall be at the prescribed rate, if the rate "is not governed by any other law or by an agreement or trade custom or in any other manner".

Held, that where a loan is advanced in foreign currency, it is desirable that the contract should specify the money of payment as opposed to the money of account. If the money of payment is the same as the money of account, the rate of interest is that applicable to the money of account. If the money of payment is different from the money of account, the rate should be that applicable to the money of payment. In this case, the money of payment was not specified, so the rate of interest should be that applicable to the money of account, that is, the prevailing rate applicable in South Africa.

Cases cited:

AMI Zimbabwe \(Pvt\) Ltd v Casalee Hldgs \(Successors\) \(Pvt\) Ltd 1997 (2) ZLR 77 (S)

Gabelsberger & Anor v Babl & Anor 1994 (2) SA 677 (T)

Industrial Equity Ltd v Walker 1996 (1) ZLR 269 (H)

Woodhouse A C Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1971] 1 All ER 665 CA; [1971] 2 QB 23 (CA)

The court referred to the following statutory provisions:

Prescribed Rate of Interest Act [Chapter 8:10], s 4

Case Information

E I Manikai, for the plaintiff

Defendant in default

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Judgment

Chinhengo J: The plaintiff sued the defendant for the payment of R7 800 which amount the defendant owed to the plaintiff arising from a loan advanced to the defendant by Africa Resources Ltd. Africa Resources Ltd ceded its rights in the loan to the plaintiff. When the defendant was served

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with the summons, on 5 June 1997, he did not enter an appearance to defend. Instead, on 10 June 1997 he wrote a letter to the plaintiff's legal practitioner and acknowledged his indebtedness apologising for his "shameful failing to honour a commitment".

On 15 July 1997, the plaintiff's legal practitioner applied for judgment by default to be entered against the defendant. He sought the following order:

> "That judgment with costs is granted in favour of the plaintiff in the sum of R7 800 together with interest thereon at the prescribed rate of 25% *per* annum from 21 October 1996 to the date of payment in full."

When the application was placed before me in chambers, I raised a query which was transmitted to the plaintiff's legal practitioner by the Registrar. I asked the legal practitioner to explain why the plaintiff was claiming interest at the prescribed rate when the judgment was in foreign currency. His response was:

> "As far as we are aware, the Prescribed Rate of Interest Act does not discriminate as regards the currency in respect of which it applies. We are not aware of any other provision on which our client would be entitled to claim interest. In the circumstances, we relied on the prevailing prescribed rate of interest. However, we would be quite happy to obtain judgment with interest at the mid market rate applying to the South African Rand. As at today's date, First Banking Corp Ltd advises that this rate is 2.5410. Although we could obtain some certification therefor, we did not see it necessary to do so as the rate will undoubtedly fluctuate and we ask the Honourable Judge to take our word for it!"

As a consequence of the query which I raised and the response of the plaintiff's legal practitioner, I had to decide whether it is competent for this court to order that interest at the prescribed rate should be paid on a judgment sounding in South African rand ie in a currency other than Zimbabwean currency.

The Prescribed Rate of Interest Act [Chapter 8:10] (the Act) provides in ss 4 and 5 as follows:

> "4. If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.
>
> 5. (a) Every judgment debt which would not otherwise bear any interest after the date of judgment or order by virtue of which it is due shall, from the day on which such judgment debt is payable, bear interest at the prescribed rate, unless that judgment or order provides otherwise.
>
> (b) ..."

The prescribed rate of interest is presently 25% *per* annum. In the present case, interest at this

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rate is claimed from the date on which the loan was due to be repaid ie 21 October 1996. On the face of it, the rate at which interest

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is to be calculated would appear to be that provided in s 4 of the Prescribed Rate of Interest Act. A claim for interest at the Zimbabwean prescribed rate is commonly made, despite that the judgment or order sought is in foreign currency. What is the correct thing to do?

Section 4 of the Act provides generally that the rate of interest on an interest bearing debt shall be the prescribed rate. That rate is not applicable if the rate at which the interest is to be calculated is governed by other law or by an agreement or trade custom or "in any other manner". That rate is also not applicable if a court of law on a consideration of special circumstances determines that the prescribed rate shall not apply. On the pleadings filed of record, the present claim for interest is not affected by an agreement as to the rate applicable nor by any trade custom. There are no special circumstances relating to the debt which I should consider. I think however that the rate at which the interest is to be calculated is "governed by other law". "Other law" in my opinion means common law or statutory law which may be operative to exclude the application of the prescribed rate of interest. The plaintiff formulated his claim in the following manner:

> "R7 800 due and owing to the plaintiff by the defendant being a personal loan advanced to the defendant by Africa Resources Limited on 14 October 1996 payable on 21 October 1996 which loan has been ceded to the plaintiff by the said Africa Resources Ltd, which amount despite demand the defendant has failed to pay."

While this formulation is adequate for the purpose of disclosing a cause of action, it is lacking in respect of certain averments which, if the action had been defended, would have been the subject matter of a request for further particulars. Ideally that the plaintiff should have, in his particulars of claim or declaration, specified the place where the agreement of loan was entered into. He should have specified what currency was to be paid to discharge the debt. The provision of such detail would not only have been good pleading, but more importantly, it would have assisted the court in determining the rate of interest applicable. I think that in any case in which a loan is advanced in foreign currency or the monetary obligation assumed is to be discharged in a foreign currency, it is generally desirable, if not necessary, to specify the money of payment as distinguished from the money of account. Lord Denning Mr in Woodhouse A C Israel Cocoa Ltd SA v Nigerian Produce Mktg Co Ltd [1971] 1 All ER 665; [1971 2 QB 23 (CA) clearly articulated the distinction between money of account and money of payment. He said at 667 (54):

> "The money of account is the currency in which the obligation is measured. It tells the debtor how much he has to pay. The money of payment is the currency in which the obligation is to be discharged. It tells the debtor by what means he has to pay."

It is important to draw this distinction for, if the money of payment is the

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same as the money of account, then, in my view the rate at which interest should be calculated is dependant on the money of account. But if the money of payment is different from the money of account, and unless a specific rate of interest is agreed upon, the rate of interest to be used should be the legal rate applying to the money of payment. Such an interest rate would be based on the assumption that by agreeing to a different currency for the money of payment the parties by implication agreed that the rate of interest applicable to the money of payment would apply.

The parties to the present case did not specify the money of payment, hence the claim is for South African rand and not for the equivalent in Zimbabwean dollars. Had it been the latter, I would have had no problem applying the Zimbabwean prescribed rate of interest of 25% *per* annum. A debtor discharges an obligation to pay money by paying off the debt in one or other currency and I think that the legal rate of interest applicable to the currency in which the debt is to be discharged should be used in the calculation of the amount of interest payable. It is not logical that a monetary debt is paid in one currency and the rate of interest used to arrive at the amount of mora interest or other interest is derived from another currency. Section 4 of the Act, in providing for the prescribed rate of interest, could not possibly have intended that the prescribed rate of interest should be applicable to any other currency other than Zimbabwean currency.

It is universally accepted that when a court enforces or clothes a foreign judgment with its own sanction the rate of interest on the judgment is that applicable in the foreign country from where the judgment comes, because the rate of interest on a judgment is part of the procedure of the courts and is within the rule lex fori. If interest is given by that law on the judgment, whatever the rate may be, it becomes an integral part of the judgment. See Gabelsberger & Anor v Babl & Anor 1994 (2) SA 677 (T) at 680A-B. I think that our courts like the South African courts should not, and I believe they do not, alter the rate of interest to the Zimbabwean prescribed rate when giving effect to a foreign judgment. The flipside of this principle is that Zimbabwean courts can and should as a general rule apply the Zimbabwean prescribed rate of interest to judgments debts sounding in local currency only and they are at large to order interest to be paid at any other rate if the judgment sounds in foreign money.

It might assist to express a view on why interest is charged at all. To express such a view, I need to do no more than quote from F A Mann The Legal Aspect of Money 4 ed at 110 (n 146) where the learned author says:

> "It should however be emphasised that interest is awarded to compensate for the deprivation of the use of money due until payment, not to preserve the real value of the sum due or afford protection against inflation: Pickett v British Rail Engineering Ltd [1980] AC

> 136. Where interest is awarded the plaintiff should be paid at the rate at which he actually had to borrow, even if this was abroad and in a different currency: Helmsing Schiffahrts GmbH v Malta Docks Corp [1977] 2 LILR 444."

That the interest to be awarded to the plaintiff should be at the rate at which the creditor

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"actually had to borrow" is a sound principle and I should follow it in this case. The principle derives from the fact that the money of account is the true expression of the value with which the creditor has had to part. This accords with the decision of Bartlett J in *Industrial Equity Ltd v Walker* 1996 (1) ZLR 269 (H) in which a similar question arose for determination. His Lordship ordered interest to be paid at the rate prevailing in the Supreme Court of Judicature in respect of the award made in pounds sterling and at the rate prevailing in the High Court of Australia in respect of the award made in Australian dollars. He said at p 307F-308A:

> "My view was that where a judgment is given sounding in a foreign currency the rate of interest should follow the rate of interest applicable in the country where the foreign currency is the home currency. This is because it was my view that one of the basic criteria in setting prescribed rates of interest is the prevailing economic conditions in the country to which the currency relates. It would, to my mind, be unfair to order interest to run at the Zimbabwean Prescribed Rate (currently 25%) on an award in pounds sterling if the rate prescribed in England for judgments in pounds sterling were for example 5%. The plaintiff would then be getting an excessive return. If for example the prescribed rate of interest on judgments by the Supreme Court of Judicature were 50% it would be equally unfair for this court to order interest to run at the Zimbabwean prescribed rate of 25%. The matter is, in my view, one of common sense and fairness."

Bartlett J's decision was approved by the Supreme Court in *AMI Zimbabwe \(Pvt\) Ltd v Casalee Hldgs \(Successors\) \(Pvt\) Ltd* S-91-97 *(41) a case which I had the good fortune to lay my hands on as I finalised this judgment. In dealing with the question of what interest is to be ordered to be paid by a debtor on an award in foreign currency McNally JA said at pp 86F-87E:

> "It is desirable that this policy question be decided. To illustrate the importance of such a decision it is only necessary to look at the facts of the present case. If the judgment debt were to be Z$106 425 and interest were to run at the statutory rate from say 1 January 1990 to say 31 December 1997, the interest would be 10% *per* annum up to 5 September 1991 (SI 146/86); 121/2% *per* annum up to 9 December 1993 (SI 251/91); and 25% *per* annum thereafter (SI 273/93). That gives a rough total owing of about Z$214 732. But if one starts with a figure of US dollars of $42 750 and applies the same interest rates, one comes to a figure of US$106 340, which at today's exchange rate is roughly Z$1 212 283. The one figure is four and half times the other. The difference is enormous.
>
> ...
>
> Accordingly, it seems to me that the approach of Bartlett J is the correct one. It is difficult to say and may be a matter of argument, what the proper rate is, and which

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> country's rate is applicable. But the principle must prevail that the creditor must receive his award in the appropriate currency with a rate of interest appropriate to that currency in the circumstances. Since this is a matter of practice, I have shown this judgment to the Chief Justice, who authorises me to say that he agrees with this approach to the question of interest."

In my opinion, there can be no better articulation of the principle that unless the parties agree otherwise, the rate of interest should depend on the money of account. The difficulty postulated above by McNally JA is, in my view, resolved by a resort to the money of account as being the currency on which the rate of interest must be based.

In the present case, the plaintiff has avoided making any averment as to where the loan was advanced. That however makes no difference to my decision. The operative principle is that the

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charging of interest is not intended to disadvantage any of the parties to a monetary obligation. The charging of interest is intended to compensate for the deprivation of the use of money and the proper and fairest rate at which interest should be calculated, in the absence of any rate prescribed in relation to the money of account, is the rate at which the plaintiff "actually had to borrow the money" and this rate is none other that the rate of the money of account. If an obligation is assumed in foreign money the discharge of that obligation is by paying to the creditor in that foreign money because that foreign money is in fact the measure of value. This must be so, even if no agreement exists between the creditor and the debtor that the latter can discharge his obligation in the foreign money. Fairness and common sense, hich is the gravamen of the decisions in Industrial Equity (Pvt) Ltd and AMI Zimbabwe (Pvt) Ltd *supra*, militate against the application of the Zimbabwean prescribed rate of interest in any such case. Such fairness and common sense require that a different rate of interest should be applied in the present case. That rate is the prevailing rate in any of the Divisions of the Supreme Court of South Africa which I believe is stipulated in that country's Prescribed Rate of Interest Act.

I must reiterate that it was not the intention of the legislature that the prescribed rate of interest shall apply in all cases across the board. Exceptions were made and it is in respect of these exceptions that a discretion has been given by the Act to a judge or other judicial officer. The judge or judicial officer must use this discretion (see AMI Zimbabwe *supra* at p 87A). The object of the Act, which in my opinion, is the same as that of the South African Prescribed Rate of Interest Act is, as stated by R H Christie Law of Contract in South Africa 3 ed at p 617 to enable "the rate to be varied when necessary to conform with changing economic conditions without the necessity of leading evidence". The careful wording of the Act was designed to ensure that its provisions did not override other laws, agreements between parties or trade custom. The Act is facilitative and not prescriptive in essence.

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In the result, therefore, judgment in default is granted in favour of the plaintiff for R7 800. The defendant shall pay the costs of this action as well as interest on the sum of R7 800 calculated at the rate prevailing in any Division of the Supreme Court of South Africa.

Gill, Godlonton & Gerrans, legal practitioners for the plaintiff

CHIDZIVA & ORS v ZIMBABWE IRON & STEEL CO LTD 1997 (2) ZLR 368 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

24 July & 6 October 1997 Judgment No. S-137-97

Flynote

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Employment - contract - termination - retrenchment - failure to follow correct procedure laid down in regulations governing retrenchment - employees accepting retrenchment package and delaying in enforcing rights - whether had thereby waived their rights under regulations

Waiver - statutory right - failure by employer to follow correct procedure laid down in regulations governing retrenchment - employees nevetheless accepting retrenchment package and delaying in enforcing rights - whether had thereby waived their rights under regulations

Headnote

A parastatal corporation had retrenched large numbers of its workers. All but two of the workers had accepted termination of employment and had accepted the money paid under the retrenchment package.

The procedures that have to be followed before a company can retrench workers are laid down in the Labour Relations (Retrenchment) Regulations 1990 (SI 404 of 1990). The workers contended that that the proper procedures had not been followed before the workers in question were retrenched and that the retrenchment exercise was therefore null and void.

Held (by Ebrahim JA and Korsah JA), that assuming that there had been a failure on the part of the company to follow the correct procedures for retrenchment, the workers who had accepted the benefits under the retrenchment package had waived their legal rights arising out of the failure to follow procedures and that the two workers who had not accepted the benefits had also waived their rights by unreasonably delaying in seeking to enforce their rights. The requirements for waiver had been satisfied. The defendant must prove a decision on the part of the plaintiff to abandon his rights. Waiver can be by express or implied abandonment. The decision must usually be conveyed to the defendant but where the defendant engages in conduct which is indicative of abandonment of rights, the plaintiff can act on the basis of that conduct. Failure to take action to remedy the breach within a reasonable time after knowledge of the breach can be evidence of waiver. Although the defence of waiver should normally be pleaded, n exceptional circumstances the court can consider this defence even in the absence of proper pleadings.

Held (by Muchechetere JA, dissenting) that there had been a whole series of breaches of the Retrenchment Regulations and that the failure to comply with the Regulations had rendered the whole retrenchment exercise illegal and void. The workers were entitled to the relief they sought as they had not waived their rights. The clear intention of the Regulations is to prevent unnecessary and wholesale retrenchments of employees. The

process of retrenchment must be carried out in a fair and transparent manner. Especially where retrenchment of large numbers of workers is sought, many of whom had spent most of their working lives with the company seeking retrenchment, there must be strict compliance with the Regulations. The fact that the employer was a company funded by the taxpayer further demanded transparency and strict compliance with the Regulations. As regards waiver, there is a strong presumption against waiver and the onus is on the party asserting waiver to prove it. The allegation of waiver must be specialy pleaded, which it was not in the present case. A

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person can only abandon his rights if he has full knowledge of his rights. It is clear that the workers were not aware of their rights and their legal implications. It took the hearing and decision of the court to identify and confirm their rights. The delay in bringing proceedings was not unreasonable when regard was had to the legal complications of the case, the financial constraints faced by the workers and the ignorance of the law on the part of the workers.

Cases cited:

Admin, Orange Free State v Mokonpanele 1990 (3) SA 780 (A)

African Distillers Ltd v Chaya HH-122-89

Bortslap v Spangenberg & Anor 1974 (3) SA 695 (A)

Charles Richards Ltd v Oppenhaim [1950] 1 KB 616

Dale v Fun Furs (Pty) Ltd 1968 (3) SA 264 (O)

de Villiers v Pyott 1947 (1) SA 381 (C)

Dhlamini v Protea Assurance Co Ltd 1974 (4) SA 906 (A)

Essop v Abdullah & Anor 1986 (4) SA 11 (C)

Hepner v Roodepoort Maraisburg Town Council 1962 (4) SA 772 (A)

Laws v Rutherfurd 1924 AD 261

Mahabeer v Sharma NO & Anor 1983 (4) SA 421 (D)

Mahabeer v Sharma NO & Anor 1985 (3) SA 729 (A)

Metro Western Cape (Pty) Ltd v Ross 1986 (3) SA 181 (A)

Montesse Township & Investm Corp (Pty) Ltd v Gouws & Anor 1965 (4) SA 373 (A)

Mutual Life Ins Co of New York v Ingle 1910 TPD 540

Pottie v KotzŽ 1954 (3) SA 719 (A)

Prosser & Ors v Zimbabwe Iron and Steel Co HH-201-93

Schierhout v Union Govt (Min of Justice) 1926 AD 286

Traub v Barclays National Bank Ltd 1983 (3) SA 619 (A)

van der Westhuizen v Smit NO & Anor 1954 (3) SA 427 (SWA)

Case Information

E W W Morris, for the appellants

J C Andersen SC, for the respondent

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Judgment

Muchechetere JA: This is an appeal against the judgment of the High Court, Harare on 26 March 1996 in which the appellants' application for an order setting aside letters of retrenchment dated 25 October 1993 issued by the respondent to the appellants and others was dismissed with costs.

The facts in the matter are that the appellants and other workers they claimed to represent were employees of the respondent. On 30 September 1993, the respondent gave notice, by letter of that date ("letter of retrenchment")

MUCHECHETERE JA

purportedly in terms of s 3(1) of the Labour Relations (Retrenchment) Regulations, 1990 (SI 404 of 1990) ("the said Regulations") to the Chairman of the respondent's Works Council for non managerial employees ("the Works Council") of its intention to retrench 1170 of its employees. Thereafter a series of meetings of the Works Council were held between 5 October and 23 December 1995 on the matter.

On 6 October 1993, the workers' representatives on the Works Council ("Workers' Council Members") wrote to the Chairman of the Works Council, in response to the notice of retrenchment, suggesting a number of alternatives to the proposed retrenchment and that retrenchment must be the last resort. A copy of the initial retrenchment package was submitted to the Works Council and the Zisco Workers Chairman addressed a reply thereto to the Chairman of the Works Council on 8 October 1993, on behalf of possible retrenchees whose identities had not yet been disclosed.

On 11 October 1993, the Zisco Workers' Representative wrote to the Chairman of the Works Council asking amongst other things, for a list of the personnel that the respondent proposed to retrench to enable them to be aware of the criteria proposed to be utilised in the retrenchment exercise. The same Workers' Representatives also made a similar request at a meeting of the Works Council on 11 October 1993 stating that they did not know what criteria was proposed to be used in the retrenchment exercise. The members were however only provided with the list of those employees proposed to be retrenched after the close of a meeting held on 22 October 1993 but no transparent formula or criterion such as the principle of "last in, first out" was put forward or agreed. On 25 October 1993, the respondent commenced the issue of retrenchment letters to approximately 1142 of its employees.

The appellants contend that in terms of the said Regulations the Works Council is obliged to attempt to secure an agreement between the employer and the employees concerned, that is those to be retrenched, or their representatives as to whether or not the employees concerned should be retrenched and if so on the terms and conditions on which they may be retrenched. In this connection, see s 3(2a) of the said Regulations which reads:

> "Without any derogation from the generality of subsection (2), an authority shall attempt to secure agreement on the following matters -

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(a) the possibility of implementing measures to avoid the retrenchment of employees, including -

(i) restricting overtime; and

(ii) transferring employees between departments, plants, enterprises and relating companies; and

(iii) job-sharing or the reduction of working hours; and

MUCHECHETERE JA

(iv) rotational unpaid leave; and

(v) the voluntary retirement of employees; or

(b) if the retrenchment of employees is unavoidable -

(i) the phasing of retrenchments over a period of time; and

(ii) the criteria for selecting employees to be retrenched; and

(iii) the benefits to be paid on retrenchment, including redundancy or severance payments and relocation allowances."

They allege that there was no attempt made during the retrenchment exercise to utilise all or any of the above stated measures in s 3(2a)(a) and there was no compliance with s 3(2a)(b) either. They further allege that the only meetings called or held with any of the workers of the respondent consisted of a meeting to announce the commencement of the retrenchment exercise on the issue of the letter of retrenchment and a second meeting attended by some workers and members of the public on 25 October 1993 to announce the package offered and warn workers to accept it. They also allege that no meetings were held with any workers or representatives of the workers during the course of the meetings of the Works Council to ascertain whether the package negotiated within the Works Council was acceptable to the employees concerned or whether the criteria of selecting the employees concerned was acceptable. In this connection they add that as the employees concerned received no intimation of the prospective retrenchment ntil the actual letters of retrenchment were issued this could not be done.

The appellants also contend that because no objective criteria for the selection of employees to be retrenched were put forward or agreed upon this resulted in more workers being placed on retrenchment than was either necessary or was in the best interests of the respondent. They allege that subsequently the respondent has had to seek to rehire some of the workers retrenched. They further allege that in many instances skilled workers have been retrenched and replaced by newly qualified apprentices. And that in one department the employees who have remained have completed a relining exercise and been paid their monthly salary plus 50%. And further, that in the majority of the departments it is now necessary for employees to work overtime in consequence of the retrenchments leaving them short staffed. They also allege that it also was apparent that because of the lack of objective criteria the exercise has been conducted on the basis of the personal likes and dislikes of management or supervising staff of the rspondent and that there have therefore been many complaints of tribalism, nepotism and

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victimisation in the process of selection.

The appellants further question the *bona fides* of the management of the respondent as to the necessity for and particularly the extent of the retrenchment

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exercise in the light of the fact that substantial pay increases of between 15% and 20% back dated to 15 January 1994 have been introduced, the replacement of management company cars and the sale of existing management company cars at the most nominal prices to user managers and the reported extravagance of the then Acting Chief Executive.

They therefore submit that there was no valid agreement between the respondent and its retrenched workers. And that neither the Works Council Members nor Zisco Workers Representatives were representatives of the employees concerned for the purposes of reaching an agreement of this nature (but were part of the Works Council). In conclusion they submit that the said Regulations were not correctly followed or complied with and that in the circumstances the retrenchment exercise by the respondent was null and void.

One Peter Chikohwero Chimbwa Moyo ("Moyo"), the Acting Chief Executive of the respondent, filed an opposing affidavit on behalf of the respondent. He admits the following in para 6 of his affidavit:

> "During the course of the deliberations of the Works Council Respondent's representatives advised workers representatives that in the interests of all concerned in particular the respondent, it was desirable that the potential retrenchees be named only at the end of the exercise for security reasons. This was accepted by the workers representatives ... "

He also states that those same workers representatives accepted that retrenchment was unavoidable. On the request of the criteria to be used in the exercise, Moyo stated that some representatives were provided with organisational charts showing the positions that had been removed and an assurance that management personnel would be dealt with first. He further states in para 8 of his affidavit:

> "They were not given the names of the potential retrenchees as it was agreed at the meeting of 18 October 1993 that this must come last. The reasons for this were the real fear that some workers might sabotage plant and equipment and also some workers' representatives who were affected might then not negotiate in good faith."

He added that the respondent's representatives on the Works Council were at some stage prepared to release the names of the affected workers but on condition that they were placed on leave but that the workers representatives however preferred the agreed procedure to prevail.

Moyo adds that the question of criteria in particular was discussed at the meeting of 18 October 1993. He states as follows in para 9.2 of his affidavit:

> "Organisation charts were given to the workers' representatives once requested as were the names of the affected persons towards the end of the exercise. The minutes annexed to the founding affidavit are clear evidence of a full consideration of the criteria to be applied including the 'last in first out' principle for the relations of skill and experience, the principle of flexibility, swopping where possible and rationalisation of jobs. I do not accept

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therefore that there was no transparent formula as now alleged."

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On the question of whether the various measures suggested in the said regulations as alternatives to retrenchment were considered, he stated that while the workers representatives did not make the suggestions that they should be considered they were eventually persuaded by what the respondent's representatives said and finally agreed at the meeting of 25 October 1993 on the retrenchment.

On representation of the workers generally Moyo stated the following in paras 11.2 and 11.3 of his affidavit:

"11.2 ... The workers were represented by their workers committee representatives on the Works Council. The various annexures appended to the founding affidavit are evidence of this. What is more the workers representatives reported to the workers from time to time during the course of the negotiations and sought instructions from them. The Respondents' representatives on the Works Council and the Chairman of the Works Council were satisfied of this regard.

11.3 It is my view and that of Respondent that the Retrenchment Regulations contemplated a situation where the Works Council would resolve retrenchment issues by agreement where possible and that the employer and workers representatives on the Works Council would represent the employer and workers respectively. This was the way in which the matter was tackled and the workers representatives accepted and represented as fully as they were able interests of the workers. In fact two of the retrenchees namely E Dzapasi and S Madzinya were on the Works Council" (my emphasis).

Moyo generally denied the allegations of mala fides on the part of the respondent but admits to some recruitment by the respondent after the retrenchment exercise. He also admits that extra payments were made to employees who had remained as incentives. And that the salary increases which were subsequently granted to the remaining workers were necessary to retain staff and that there was also additional responsibility to those who had remained. He further admits that some overtime was done but explained that it was not as a consequence of retrenchment but that it was designed to deal with any extra work to be done to keep respondent's plants operating efficiently. He adds that the costs of overtime are far less than the staff costs of carrying excess labour. He also admits that as a result of revised forecasts the retrenchment was eventually reduced to about 3500. He dismissed allegations of victimisation, tribalism and nepotism as having been unproven. As for the sale of motor vehicles to managers, he statedthat this was done in accordance with the respondent's policy of selling vehicles which had far exceeded their useful economic life to user managers. And he stated that his reported extravagance is nothing more than a piece of malicious press reporting and is now the subject of High Court action against the publishers of the newspaper concerned for damages for defamation.

I agree with the appellants' contentions and the submissions by Mr *Morris*

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that the provisions of the said Regulations were not correctly followed or complied with in the retrenchment exercise. Indeed, Moyo's affidavit admits as much. Sections 3(1) and (2), 5 and 6 of the said Regulations read:

"1. An employer who wishes to retrench any employee shall -

(a) give written notice of his intention -

(i) to the works council established for his undertaking; or

(b) provide the authority referred to in subparagraph (i) or (ii) of paragraph (a) with details of every employee whom he wishes to retrench and detailed reasons for the proposed retrenchment and

(c) send a copy of the notice to the retrenchment committee.

(2) An authority to which notice has been given in terms of subsection (1) shall forthwith attempt to secure an agreement between the employer and employees concerned, or their representatives, as to whether or not the employees should be retrenched and, if they are to be retrenched, the terms and conditions on which they may be retrenched.

...

(5) If, within one month after receiving a notice in terms of subsection (1), an authority secures an agreement between the employer and employees concerned, or their representatives, on the matters referred to in subsection (2) the authority shall -

(a) send the employer its written approval, substantially in form LRRI, of the retrenchment of the employees concerned in accordance with the agreement; and

(b) send the retrenchment committee a copy of the approval.

(6) If, within one month after receiving a notice in terms of subsection (1), an authority has failed to secure an agreement between the employer and employees concerned, or their representatives, on the matters referred to in subsection (2), the authority shall refer the matter to the retrenchment committee by sending the retrenchment committee written notice substantially in form LRR2, together with copies of all documents which the employer and employees concerned may have submitted to the authority and copies of the minutes of the authority's pleadings and deliberations" (my emphasis).

In the first instance, a works council is a body set up in terms of the Labour Relations (Workers Committees) (General) Regulations 1985 (SI 372 of 1985). It is composed of an equal number of employer representatives and employee representatives who are members of workers committee. The workers representatives on the Council are elected by the general work force of a company and are therefore in the Council to generally push the point of view of the workers at the company - in this case those being retrenched together with those who were not being faced with retrenchment in the Works Council. The Works Council is therefore, in my view, an independent body whose decisions, although persuasive, are not intended to bind either the workers or the employer. Its role is always intended to be a mediator between the workers and the employer.

The above is reflected in the manner in which the said Regulations (Labour

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Relations (Retrenchment) Regulations) are framed. In the first instance, it is clear that those Regulations are intended to primarily protect the interests of workers who are about to be retrenched and not all the workers as such. This is reflected by the fact that the words "employees concerned or their representatives" are used throughout. There would be no point in involving those workers who were not being threatened with retrenchment in an exercise of this nature because their interests were not being threatened and they would have no right to have a say on the rights of those about to be retrenched. Secondly the Regulations clearly refer to three parties; namely the authority (Works Council), the employees concerned or their representatives (those intended to be retrenched), and the employer. The Works Council, as an independent body, is intended to attempt to secure an agreement by means of mediation between the other two partie. The Works Council is therefore not intended to be a party to the agreement but to fulfil the role of mediator or facilitator between the two. Mr Morris properly cited, in support of the above proposition, the case of Prosser & Ors v Zimbabwe Iron & Steel Co Ltd HH-201-93 at pp 7-8 of the cyclostyled judgment where Bartlett J said:

> "The Works Council effectively in terms of s 3(2) was supposed to act in some respects as a mediator between the employer and the employees (or their representatives) to try and decide whether there should be retrenchment and if so on what terms. It accordingly would not be possible for the managerial members of the Works Council to wear two hats - one as members of the Works Council trying to secure an agreement and the other as representatives of the persons about to be retrenched."

It is also clear that the respondent, which as indicated above, was also a respondent in the above cited case, chose to ignore the message and the result in the said judgment. It did even worse in that it did not follow the other provisions of the said Regulations.

In the first instance, it is clear that the respondent did not treat or regard the Works Council as an independent body. Moyo regarded the agreement between members of the Works Council themselves as an agreement between the employees concerned representatives and the employer. This is clear from the above cited paragraphs in his affidavit and in particular para11.3. This as indicated above is improper and the fact that the employees' representative or the Works Council might have thought that they were entitled to act as such is of no consequence - they themselves however do not say that. They clearly must have misunderstood their task.

Secondly, the respondent did not comply with the above quoted peremptory provisions of s 3(1)(b) of the said Regulations - providing the Works Council with "details of every employee whom he wishes to retrench." Those details had to be provided at the same time as the notice of retrenchment was

being given. This position is confirmed by the above quoted s 3(2) of the said Regulations which is to the effect that authority to "which notice has been given in terms of subsection (1) ..." shall then attempt to broker an agreement. That the subsection was not complied with is admitted by Moyo who, as is indicated above, attributes the failure to the respondent's fear for security and to the allegation that the workers' representatives on the Works Council appreciated the respondent's concern and agreed that the names and details of the employees concerned

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would be released at the end of the exercise.

This was not proper and the workers' representatives were not entitled to agree to it. It is worthy of note that the representatives did not testify in support of the respondents position on the issue or on any issue at all. The above wrong was compounded by the failure of the respondent to provide the Works Council with clear and transparent criteria on which individual workers to be retrenched were to be followed. The names and details of the persons who were facing retrenchment were admittedly only supplied at the very end of the exercise thus presenting the persons concerned with a fait accompli.

The failure of the respondent in the above respect leads to a number of questions which can only be resolved against it. How could the Works Council have attempted to broker an agreement when one of the two parties concerned (employees facing retrenchment) was unknown? How could the Works Council have properly considered all the matters outlined in the above quoted s 2(a) of the said Regulations in the circumstances with no details of the employees facing retrenchment - the only persons besides the employer who presumably were aware of the persons intended to be retrenched were the employers' representatives on the Works Council. Further, even if it were to be held that the employees' representatives on the Works Council did represent and were entitled to represent the workers who were intended to be retrenched, how could they have done that without having the names of the persons who were intended to be retrenched?

Thirdly, I am of the view that the workers' representatives on the Works Council had neither the statutory authority nor the mandate to represent the workers who were facing retrenchment. As I have already indicated above, they were appointed on the Works Council as representatives of all the workers but once appointed they became part of the council and separate from the workers. Their duty there was to try, together with their counterparts, to work out an agreed position which they would sell to the workers and the employer. They could not wear two hats. In that capacity, they therefore had no authority to negotiate and reach any agreement on behalf of the workers let alone a special group of workers which was intended to be retrenched.

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Authority had to be specifically given to them for that by the workers who were intended to be retrenched individually if necessary. It is also worthy of note that the alleged representatives themselves did not testify to the effect that they had such authority or mandate. The meetings which were admittedly held, the first one to announce the commencement of the retrenchment exercise (before the persons affected were known) and the second one to announce the package offered and warn the workers to accept it, do not suffice. At neither of the meetings, attended by workers, in general, that is those who were facing retrenchment and those who were not, were the employees invited to make submissions or participate in any way. There were also no resolutions to the effect that the retrenchment and package offered were even acceptable to all the workers in general let alone those who were intended to be retrenched. The latter could in any event not have been done because the workers intended to be retrenched were no known.

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On the allegations of mala fides on the part of the respondent, my view is that these are broadly justified. As already indicated above, the criteria used in choosing employees to be retrenched was never clearly put forward. It should have been a fair and reasonable one in the objective sense. And the one generally favoured as being the most equitable is the "last in, first out" method. Although it was suggested in the minutes of the Works Council that this method would be used it appears that it was not because the appellants who had worked for 27, 24, 26, 23 and 26 years respectively were retrenched whilst many of those who had worked for far less periods remained. The allegation that many more workers than was necessary were retrenched was never properly challenged by the respondent. Most of these allegations were partly admitted as indicated above. Contrary to its assurances, the respondent did not recall any of the retrenched workers to fill vacancies which occurred after the retrenchment exercise, but istead employed several new workers. In reply to some of the allegations Moyo's only reply in para 12.2 of his affidavit was:

> "Where it emerged that the paring of excess staff was too much it was open to the respondent to employ staff."

The appellants' allegations that the respondent replaced many skilled workers with long working records with newly qualified apprentices were and indicated above admitted in that Moyo stated that eleven bricklayers who were retrenched from the Refactories Department were replaced four months later with three new artisans "commanding lower salaries then those of the bricklayers". So were the allegations of overtime, extra payments and pay increments. The respondent should have retrenched less workers or instead recalled some of those retrenched in accordance with the spirit of the said Regulations.

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Further, the fact that the respondent carried out the retrenchment exercise in total disregard as to what was stated in the above cited case in which it was a party and which it did not appeal against, in my view, indicates some mala fides on its part.

In the circumstances, I agree with the submission that the retrenchment exercise was improper. It was carried out in contravention of the provisions of the said Regulations. It was therefore illegal and void. See Schierhout v Union Government (Minister of Justice) 1926 AD 286; Dhlamini v Protea Assurance Co Ltd 1974 (4) SA 906 (A) at 913-914; Metro Western Cape (Pty) Ltd v Ross 1986 (3) SA 181; Pottie v KotzŽ 1954 (3) SA 719 (A) and Essop v Abdullah & Anor 1986 (4) SA 11 (C).

I am also of the view that the appellants did not, by accepting the retrenchment packages, waive their rights. In the first instance an allegation of waiver should be specially pleaded. See Christie The Law of Contract in South Africa 3 ed at p 493 where the learned author said:

> "An allegation of waiver or anything akin to it should be specially pleaded and because close investigation of the facts and surrounding circumstances will almost always be necessary the court is unlikely to be able to dispose of the matter on affidavits."

The cases of Dale v Fun Furs (Pty) Ltd 1968 (3) SA 264 (O) at 266E and de Villiers v Pyott 1947 (1) SA 881 (C) are cited in support of the above proposition. I agree with the proposition.

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In the present case, there is no special allegation of waiver in the respondent's affidavit. The allegation is only hinted at in para 3(3) of Moyo's affidavit where it is alleged that the appellants accepted the retrenchment packages and are therefore no longer entitled to relief. It is also raised in counsel's heads of argument and submissions as was the case in Dale v Fun Furs (Pty) Ltd *supra*. This in my view is not satisfactory. The respondent's main contention throughout was that it had complied with the provisions of the said Regulations.

Secondly, there is a strong presumption against the waiver and the onus of proof is upon the party asserting it. See Hepner v Roodepoort Maraisburg Town Council 1962 (4) SA 772 (A) where Steyn CJ said at 778D-F:

> "There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue (Smith v Womberg (1895) 12 (S) 295 at 304; Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 at p 62) but in Martins v de Kock 1948 (2) SA 719 (A) at p 733 this court indicated that that view may possibly require reconsideration. It sets, I think, a higher standard than that adopted in Laws v Rutherfurd 1924 AD 261 at 263, where Innes CJ says:
>
> > 'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.'

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> This accords with the test applied in City of Cape Town v Kenny 1934 AD 543 and was followed in Collen v Reitfontein Engineering Works 1948 (1) SA 413 (AD) at p 436 and Linton v Croser 1952 (3) SA 685 (A) at p 695. (cf Ellis & Ors v Laubscher 1956 (4) SA 692 (A) at p 702). In my opinion, the test is more correctly stated in these cases" (the emphasis is mine).

In the present case, no real attempt was made to show that the appellants abandoned their rights with full knowledge of those rights. All that was submitted was that the appellants accepted the retrenchment packages. The respondent should have gone further to show that they did this with full knowledge that they were abandoning their rights. On this I also cite with approval the passages at p 489 of Christie's above cited book where the learned author said:

> " ... there is ample other authority that it must be clearly proved that the person who is alleged to have waived his rights knew what those rights were. A party who fails to prove this necessary ingredient of waiver may still be able to raise the defence of estoppel against any attempt to enforce the rights in question. When it cannot be proved that the party alleged to have waived knew what his rights were it may appear that his ignorance is properly classified as ignorance of law. It can now be regarded as settled, despite van den Heever J's decision to the contrary in Schwarzer v John Roderick Motors (Pty) Ltd 1940 OPD 170 at 185 that in this connection ignorance of the law is excusable provided it is iustus et probabilis' - justifiable and probable. This is especially so since Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) which equates mistake of fact and mistake of law for purposes of the condicto indebiti. Murray J's words in Ex p Sussens 1941 TPD 15 at 20 may be taken as a corect statement of law:
>
> > 'The necessity for a full knowledge of the law in the case of waiver follows from the principle that waiver is a form of contract, in which one party is taken deliberately to have surrendered his rights: there must therefore be proof of an intention as to surrender, which can only exist where there is knowledge both of the facts and the legal consequence thereof.'
>
> The necessity to prove knowledge of the rights allegedly waived before it can be said that conduct in question amounts to waiver, applies equally to a case where the act of alleged waiver has been performed not by the party

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to the contract himself but by his agent (Pretorius v Greyling 1947 (1) SA 171 (W) at 177)" (my emphasis).

It is, in my view, clear that when the appellants allegedly waived their rights they were not aware of the rights and the legal implications. It took the hearing and the decision of this court to identify and confirm the rights. Indeed there was no argument to the contrary.

The question of waiver does not apply in the case of two of the appellants, (that is, Christopher Madzokere and Astagie Champion Makumbe Marume) because they did not accept the retrenchment packages. On the question of whether there was delay by them and the others in enforcing their rights, I agree with what Christie stated at p 491 of the above cited book:

"Delay in enforcing a contractual right is not necessarily a waiver of the right. One can go

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further and say the delay, of itself and without more, can never deprive a party of a contractual right except by prescription. In North Eastern Districts Assn (Pty) Ltd v Surkhey Ltd 1932 WLD 181 at 186 KRAUSE J said that:

> 'it is not by mere delay that a man loses his rights, even if he is aware of the fact that another has infringed his rights. Delay or "standing by" as it is called may be taken into consideration by the court in arriving at the conclusion as to whether or not the man did or did not lose his right'."

In the circumstances, I am of the view that the delay by the appellants in asserting their rights - by no means unreasonable when regard is had to the legal complications of the case, the financial constraints of the appellants and the ignorance of the law by the appellants - cannot amount to a waiver.

In considering this question of waiver sight must not be lost of the fact that the retrenchment packages were presented to the appellants as a fait accompli to persons who were not financially able to pass up the respondent's offer. And as submitted by Mr Morris given the high cost of litigation, the real difficulties experienced in finding alternative employment, the fact that the appellants are laymen unversed in the provisions of the law of contract it was not unreasonable for the appellants to take the retrenchment packages.

It should be borne in mind the clear and broad intention of the said Regulations was to prevent unnecessary and wholesale retrenchments of employees by employers. And where retrenchment had been justified to ensure that this had to be done in a fair and transparent manner taking into account all the personal circumstances of the persons to be affected. In the case where a large number of employees, such as in the present case, was to be retrenched there is greater need for the strict compliance with the said Regulations because the lives of many people who had spent most of their working lives with the respondent were at stake. The fact that the respondent was funded by the taxpayer, the appellants and their fellow workers were also taxpayers, further demanded transparency and strict compliance with the said Regulations, not the relaxation which Mr Andersen urged upon this court during his address.

On this matter, I would also echo the words of Bartlett J in the above cited Prosser's case *supra*, at p 3 of the cyclostyled judgment:

"The Regulations lay down a precise procedure to be followed and it is important that the procedure be followed. I

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> say that especially in regard to retrenchment matters because retrenchment by any standard is a traumatic procedure. This is particularly so for persons who have been in employment for many years - 16 years in Prosser's case. It is important that against such an emotionally traumatic climate, that employers should simply and clearly follow the law."

The final matter to resolve is whether or not the granting of condonation by the court *a quo* for the late filing of the appellant's application which was out of time was proper. I do not agree with Mr *Andersen*'s submission that

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just because the learned judge in the court *a quo* dealt briefly with the matter that meant that the matter was not fully considered. The learned judge must have read nine paragraphs of the appellants' affidavit explaining the delay and nine paragraphs by the respondent in reply. In addition he had the benefit of written and oral submissions by counsel for both parties on the matter. In his judgment he gave a brief summary of what he understood as the appellants' case on the issue and at the end stated:

> "I am satisfied that the applicants have given reasonable explanations ..."

In my view, it is clear that the learned judge must be held to have exercised his discretion on the matter. And the discretion was exercised properly. I have gone through Mr Andersen's heads of argument on the matter and am satisfied that condonation cannot be faulted. More so when, with hindsight, consideration is given to the fact that the merits of the matter heavily favoured the appellant.

Incidentally, the learned judge in the court *a quo* also dealt briefly with another preliminary issue - whether the five appellants named on the summons were properly before the court together with other employees. On this he came to the conclusion that only the five appellants were properly before the court. Granted that there was no cross-appeal on the issue, nevertheless I did not hear any complaint or submission by Mr Andersen to the effect that that issue was not fully considered.

In the result, I would allow the appeal with costs.

Korsah JA: Accepting, for the purpose of deciding this appeal, that there were contraventions of the Labour Relations (Retrenchment) Regulations 1990 (SI 404 of 1990) (the Regulations) as carefully tabulated by my brother Muchechetere in his judgment, I ask myself: what, if any, are the legal effects of these contraventions on the retrenchment package, offered and accepted by all but two of the retrenched employees who numbered at least 1170?

The issues upon which the parties contested their rights in the court below were contained in their affidavits. In para 3(3) of Mr Moyo's affidavit the defence of waiver was crisply raised as follows:

> "Each of the former employees of respondent signed termination of employment and clearance forms confirming their acceptance of the termination of their employment. They then received their retrenchment package which they collected and encashed. Save for two former employees Christopher Madzokere and Astagie Champion Makumbe Marume all the applicants have accepted their retrenchment package. There is therefore no basis for

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their complaint presently as set out in the application. They are, in my respectful view, no longer entitled to seek any relief. They have not even tendered repaying of the substantial payments they received from the respondent."

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If the question be asked: why does Mr Moyo say that because the appellants have received their retrenchment package they are no longer entitled to relief? there can be but one answer - they had waived their rights to any other remedy and are estopped from making further claims. While both waiver and estoppel must be pleaded, there is no precise form in which the defences have to be raised so long as the language makes it clear that because of some action or conduct on behalf of the plaintiff the defendant alleges that the plaintiff has lost his legal right to maintain the action. Thus Denning LJ (as he then was) remarked in Charles Richards Ltd v Oppenhaim [1950] 1 KB 616 at 623 that:

"Whether it is called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct, he evinced an intention to affect their legal relations. He made in effect a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on."

See also van der Westhuizen v Smit NO & Anor 1954 (3) SA 427 (SWA) at 430E.

Montesse Township & Invstm Corp (Pty) Ltd v Gouws & Anor 1965 (4) SA 373 (A) at 381B-C and Dale v Fun Furs (Pty) Ltd *supra* are authorities for the proposition that in exceptional circumstances the court will consider the defence of waiver even in the absence of proper pleadings. Furthermore the election to accept the retrenchment package was the exercise of a right clearly inconsistent with the continuance of an employer/employee relationship: Admin Orange Free State v Mokonpanele 1990 (3) SA 780 (A).

The retrenchees, inclusive of the appellants, had a legal right to reject, and not receive, the proposed retrenchment package offered to them by the respondent. Section 3(6) of the Regulations specifically provides for such a situation by reciting that:

"If, within one month after receiving a notice in terms of subsection (1), an authority has failed to secure an agreement between the employer and employees concerned or their representatives, on the matters referred to in subsection (2), the authority shall refer the matter to the retrenchment committee by sending the retrenchment committee written notice substantially in form LRR2, together with copies of all documents which the employer and employees concerned may have submitted to the authority and copies of the minutes of authorities proceedings and deliberations."

There can be no room for doubt that the Zisco Workers Chairman and the Zisco Workers Representatives, who made submissions with several references to the Regulations, were aware that their refusal to accept the retrenchment package would have led to the invocation of subs (6), and not to a stalemate. Yet, almost to a man, all the retrenchees accepted and received the retrenchment package, thus waiving the right to object to it.

The effect of the waiver of a legal right is to extinguish that right and any concomitant obligation: Laws v Rutherfurd 1924 AD 261. In order to establish a waiver, all that one must show is that the party has taken some step

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which is only necessary, or only useful, if the objection to the irregularities has been actually waived, or has never been entertained. However, the intention or conduct of the party waiving a right must be conveyed to the other party.

In Mutual Life Insurance Co of New York v Ingle 1910 TPD 540, Innes CJ explained the legal position as follows at p 540:

> "It seems to me that the mere intention, a mere mental resolution to waive a right not communicated to the other party cannot in law constitute a waiver or renunciation of the right by the person entitled to enforce it ... Until the intention to waive a right is communicated to the other party, or evidenced to him by some overt act, a change of mind is always possible and permissible. Otherwise a man might by an entry in his own diary, of an account of a casual conversation with a friend (quite unknown at the time to the party affected), find himself debarred from enforcing a right which on further reflection he was desirous of vindicating. After all, waiver is the renunciation of a right. When the intention to renounce is expressly communicated to the person affected he is entitled to act upon it and the right is gone. When the renunciation, though not communicated, is evidenced by conduct inconsistent with the enforcement of the right, or clearly showing an intention to surrender it, then also the intention my be acted upon, and the right perishes. But a mere mental resolve, not so evidenced, and not communicated to the other party, but discovered by him afterwards, seems to me, (apart from considerations founded upon lapse of time) to have no effect upon the legal position of a person making the resolve" (my emphasis)

(cited with approval by Botha JA in Traub v Barclays National Bank Ltd 1983 (3) SA 619 (A) at 635).

In the present case, the conduct of the majority of the retrenched employees, by accepting the retrenchment package, was inconsistent with the enforcement of the right to have the matter referred, in terms of s 3(6) of the Regulations, to the retrenchment committee, and clearly evinced an intention to surrender that right. The respondent acted upon their intention to accept the retrenchment package and paid to them the benefits of the agreed package. With acceptance of such payments the rights of the appellants perished.

Turning to the two employees who refused to accept the benefits of the retrenchment package, firstly, those two, if they contend that the retrenchment procedure was flawed, ought to have prayed in aid s 3(6) of the Regulations. They did not. Secondly, they also failed to make a seasonable application to the High Court for review. The application, the subject of this appeal, was launched five months after the event, when all the other retrenched workers had collected their retrenchment packages.

It is true that delay in enforcing a right does not *per* se amount to a waiver: Mahaber v Sharma NO & Anor 1985 (3) SA 729 (A) 736J-0737A. But as Innes CJ observed in New York Mutual v Ingle *supra* at p 551:

> "Neglect to enforce a right timeously may under certain circumstances have the same effect as a waiver of it, even though the period of prescription has not elapsed. Such cases come very near the line of estoppel. As pointed out by the Privy Council in Lindsay

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EBRAHIM JA

> Petroleum Co v Herd (LR 5 PC Appeals, at p 240), where a man has by his conduct and neglect, 'though perhaps not waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted' then lapse of time becomes of great importance. When a person entitled to a right knows that it is being infringed, and by his acquiescence leads the person infringing it to think that he has abandoned it, then he would under certain circumstances be debarred from asserting it" (my emphasis).

In the instant case, all other retrenched employees had accepted and been paid the stipulated retrenchment package, the two retrenched employees, although they did not go to receive their retrenchment packages, did not pray in aid s 3(6) of the Regulations. The period of eight weeks for launching review applications to the High Court had elapsed. In such circumstances their conduct and neglect, though perhaps not waiving the remedy, yet put the respondent in a situation in which it would be unreasonable to place it if the remedy were afterwards to be asserted. For the reason that the other appellants waived their legal right by acceptance and receipt of the retrenchment package, and the two, who did not go to receive the retrenchment package delayed unreasonably in the enforcement of their rights, thus giving the respondent the impression that they had waived their rights, the trial court fell into error in the exercise of its discretion in granting the appellants condonation for the late application for a reiew.

I appreciate that the court's discretion, whenever possible, must be exercised in favour of saving rather than destroying proceedings, but when the proceedings are still-born there is nothing living to save. Since the appellants had waived their rights to a legal remedy, nothing fell to be reviewed and so condonation was not warranted.

In the result, the appeal fails and I would accordingly dismiss it with costs.

Ebrahim JA: There were questions of law in dispute between the parties crisply raised in the affidavits, and which called for resolution. The function of a plea is to inform the plaintiff of the nature of the defence he will have to meet - African Distillers Ltd v Chaya HH-122-89. Most of the facts were common cause. The questions raised by the appellants were:

(a) Whether the respondent had complied with the relevant statutory regulations;

(b) In the absence of such compliance with the said regulations are the applicants entitled to have the retrenchment package set aside?

The respondent's plea, contained in the affidavit of Mr Moyo, was as follows:

(a) Each of the applicants signed termination of employment and clearance forms confirming their acceptance of the termination of their employment.

EBRAHIM JA

(b) They received their retrenchment package which they collected and encashed - save for two former employees.

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(c) Having regard to (a) and (b) they are not entitled to the relief which they seek.

The general rule is that affidavits must contain the facts upon which a party relies for relief and not principles of law applicable to those facts. Thus all that the respondent had to do was to set down facts from which it may be deduced that there had been a waiver by the appellants.

In cases where the defendant relies on waiver as a defence, what is required of the defendant is that he must allege and prove a decision by the plaintiff to abandon the right which is being asserted against the defendant. The decision must have been conveyed to the defendant: Traub v Barclays National Bank Ltd 1983 (3) SA 619 (A) at 634. It is trite law that the decision to abandon a legal right may be made in one of two ways:

(a) an express abandonment of the right; or

(b) an implied abandonment. See Hepner v Roodepoort-Maraisburg Town Council 1962 (4) SA 772 (A); Borstlap v Spangenberg & Anor 1974 (3) SA 695 (A).

In Palmer v Poulter 1983 (4) SA 11 (T) it was held that where a party to a contract has a right on the breach thereof either to repudiate or abide by the contract, his failure to cancel the contract within a reasonable time after knowledge of the breach may be conclusive evidence of waiver. See also Mahabeer v Sharma NO & Anor 1983 (4) SA 421 (D).

In the instant case, the conduct of the appellants can only lead to the conclusion that they waived their rights.

It is for these reasons that I find favour with the views held by my brother Korsah.

In the result, the appeal is dismissed with costs.

Coghlan, Welsh & Guest, appellants' legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners

MHERESI v McNAUGHT WICKWAR 1997 (2) ZLR 386 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

8 September & 13 October 1997 Judgment No. S-154-97

Flynote

Legal practitioner - fees - fees not agreed in advance - dispute as to fees - duty of practitioner to advise client to have reasonableness of fees determined by taxing master

Practice and procedure - summary judgment - claim for legal fees - fees in dispute - summary judgment inappropriate

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Headnote

The respondent, a firm of legal practitioners, obtained summary judgment against their client, the appellant, in respect of legal fees it claimed were owed to it. The client had not agreed a specific fee in advance. The firm claimed that it was charging according to the Law Society's tariff and that it was at least impliedly agreed that the client would pay a reasonable fee. The fees charged in fact appeared to be in excess of the tariff.

Held, that it was at least debatable whether the client could be deemed to have agreed to pay a reasonable fee and, if he had, whether the fee actually charged was reasonable.

Held, further, that the public should be aware, or made aware, that any client dissatisfied with his lawyer's charges may insist that the lawyer tax his bill. Taxation is necessary to prove the reasonableness of the fee, if this is disputed. The court should not have to determine the reasonableness of the fee, except by way of review from the taxing master.

Held, therefore, that summary judgment should not have been granted.

Cases cited:

Art Printing Works Ltd v The Citizen Ltd 1957 R & N 62 (SR)

Mxumalo \& Ors v Guni 1987 (2) ZLR 1 (S)

Case Information

Appellant in person

R M Fitches, for the respondent

Judgment

McNally JA: In the High Court, Harare, on 24 October 1995, summary judgment with costs was granted against the appellant (the client) in respect of legal fees charged by the respondent (the practitioners). The client has appealed.

The facts were that the client consulted the practitioners who did extensive legal work for him between 22 March 1994 and 8 December 1994. The

practitioners' charges for these services were at an hourly rate of $330 in respect of one job carried out by a junior in the firm, and at an hourly rate of $420 in respect of the rest of the work, which was done by a practitioner with between five and six years' seniority. This rate was said to be based on the Law Society of Zimbabwe's Revised General Tariff of Fees for Legal Practitioners effective from 1 January 1994 (the Tariff).

The charges totalled $24 332.20, of which the client paid $10 725. The practitioners sued for the balance of $13 607.20. There was an appearance to defend, followed by an application for

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summary judgment.

We do not have before us the summons on which summary judgment was claimed. But to judge from the length and detail of the affidavit supporting the application, it was not an endorsed summons in terms of Order 3 r 13 of the High Court Rules. Presumably, this is nowadays possible because the wording of r 64(1) has been amended since the decision in Art Printing Works Ltd v The Citizen Ltd 1957 R & N 62 (SR).

Be that as it may, the client opposed the granting of summary judgment and raised two issues. One was that the rate of $420 *per* hour was never agreed. The second was that the practitioners had not been successful in some of the matters. He properly abandoned the second line of defence.

The court rejected his claim that the rate had not been agreed. It left open the question whether there had been a specific agreement, which is what the practitioner asserted. But it decided that "at the very least it was an implied term of the agreement that the plaintiff would charge fees at a reasonable rate."

It seems to me that the learned judge may have overlooked some basic arithmetic. The practitioner concerned claimed that he was charging fees in terms of the Tariff. He was admitted as a legal practitioner in 1989. He charged the fees in 1994. The Tariff provides for the charging of hourly rates for legal work for practitioners of varying experience as follows:

3 - 5 years experience	$165 - $330 *per* hour
6 - 10 years experience	$180 - $460 *per* hour

In 1994 the practitioner (assuming he was admitted in January 1989) had five years and a few months experience. He was not yet in the 6-10 year bracket. His maximum recommended fee was thus $330. Yet he was charging $420. We are concerned here with a charge for (on my rough calculation) forty-six hours, fifty minutes. Including sales tax, the difference is $4 636.50, if one allows a maximum charge of $330 *per* hour.

It is true that the client paid some of the bills, which set out the charges in such a way that he could have calculated that he was being charged at a rate of $420 *per* hour. But it does not seem to me that that alone, in the circumstances, is enough to establish a tacit agreement. And, as I say, if it is

to be held that he must be deemed to have agreed to a reasonable fee, was $420 *per* hour a reasonable fee? That is at least debatable. It may be a matter for evidence. Not, I would think, a matter to be disposed of by summary judgment.

There is, moreover, a more fundamental problem. The public should be aware, or should be made aware, that any client dissatisfied with his lawyer's charges may insist that the lawyer tax his bill. Of course, if the fee has been agreed in advance, the lawyer may sue for his fee without taxation. But in other cases taxation is necessary to prove the reasonableness of the amount

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charged, if this is disputed by the client. See Randell and Bax The South African Attorneys Handbook 3 ed p 159. The Registrar of the High Court is a taxing officer and the matter is dealt with in the Rules of the High Court, Order 38, specifically r 308(1). The law on the subject has been dealt with in this court in *Mxumalo \& Ors v Guni* 1987 (2) ZLR 1 (S).

Lay clients are usually unaware of this right, and it is the duty of a legal practitioner, if a dispute over fees arises, to advise the client of his right to take up the dispute with the taxing master. It will of course cost the client something to have the bill taxed. Nonetheless, it is a useful right. It is generally undesirable that the court should usurp the functions of the taxing master by making decisions as to the reasonableness of fees, except of course when the matter comes from the taxing master by way of review. See Cilliers Law of Costs 2 ed para 13.11. This case therefore should have been referred to the taxing master before summons was issued.

I conclude therefore, both on the merits and on the general principle, that summary judgment should not have been granted in this case. Since the matter is not strictly before us, I make no ruling as to whether summons should even have been issued before the bill was taxed. But certainly, the costs of the summary judgment application should not have been incurred.

Accordingly, the appeal is allowed with costs, and the order of the court *a quo* is altered to read:

> "The application is dismissed with costs. The respondent is given leave to defend."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

McNaught Wickwar, respondent's legal practitioners

STANDARD CHARTERED BANK ZIMBABWE LTD v MATSIKA 1997 (2) ZLR 389 (SC)

Court **Supreme Court, Harare**

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

25 September & 13 October 1997 Judgment No. S-156-97

Flynote

Employment - contract - termination - dismissal - unlawful dismissal - order for reinstatement without loss of pay and other benefits - meaning - employer not entitled to deprive employee of benefits by failing to give him meaningful work

Headnote

Having found that the respondent's purported dismissal from employment on the grounds of misconduct was unlawful because the proper procedures for termination of employment had not been followed, the Supreme Court had ordered that the respondent be reinstated, without loss of pay and other benefits from the date of his suspension. The employer had reinstated the

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respondent but had declined to give him any work to do and had withheld various benefits, claiming that some of these benefits were discretionary, while others were performance based. As the employee was not carrying out any work, his performance could not be assessed.

Held, that upon reinstatement the ordinary contractual relationship between employer and employee resumes. Although there is no obligation for the employer to provide work to a reinstated employee, the failure to give him work to do cannot be used in order to deprive him of contractual benefits that go with the office of the employee. He is entitled to receive all benefits which employees of his class or status are entitled to receive in terms of the contract and by withholding these benefits the appellant was in breach of the court order.

Cases cited:

Commercial Careers College (1980) Pvt Ltd v Jarvis 1989 (1) ZLR 344 (S)

William Dixon Ltd v Patterson [1943] S (J) 78

Case Information

A J Dyke, for the appellant

A P de Bourbon SC, for the respondent

Judgment

Korsah JA: A cardinal principle of the common law is expressed in the aphorism: "nemo ex proprio dolo consequitur actionem", which translates: no one maintains an action arising out of his own wrong. Complementary to this principle is another which stipulates: "*nemo ex suo delicto meliorem suam conditionem facere potest*", which means: no one can make his better by his own misdeed.

KORSAH JA

In this court's judgment in Case No. S-23-96*(42) between the same parties, it was held that the suspension of the respondent was nullified by the omission of the appellant to apply forthwith to a labour relations officer for an order of termination. In the result, the respondent's purported dismissal in terms of s 3(1)(a) of the Labour Relations (General Conditions of Employment) (Termination of Employment), Regulations SI 371 of 1985, (the Regulations) was declared unlawful, and the appellant was directed "to reinstate the respondent without loss of pay and other benefits from the date of his suspension without pay". In effect, the respondent had neither been suspended nor dismissed. The proviso to s 96(1)(c) of the Labour Relations Act [Chapter 28:01] does not come into play.

This court made it crystal clear in the said judgment that:

> "the employer is not precluded from re-suspending the employee and applying forthwith on the same ground as before, or on a different ground, or from simply applying to the labour relations officer, without re-suspending the employee, on any of the grounds specified in s 3(1) of the regulations"

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See p 133 of the report.

On the same day, 8 February 1996, that this court's ruling was handed down, the appellant was advised of it, but declined to give the respondent any work. The appellant, without first complying with the order of this court, offered the respondent at the end of February 1996, $200 000 in full settlement of any claims he may have against the Bank. I find nothing odious about attempts to settle a matter out of court in spite of a judgment against the party seeking the settlement. However, the respondent rejected the offer, as he was entitled to do, because it did not include the lost benefits, as decreed in this court's order, and the tax deduction was inflated.

When this offer was rejected, the appellant, on 8 March 1996, tendered the sum of $171 353.37 as the entitlement of the respondent in terms of the order of this court from 1 August 1992 to February 1996. In addition, a further sum of $163 000 less tax of $68 460 was offered as a severance package. Both offers were rejected by the respondent. Since no further payments were forthcoming from the appellant, the respondent instituted proceedings in the High Court on 22 April 1996, claiming re-instatement and payment of salary and other benefits from the date of his suspension, in terms of the order of this court. In those proceedings he also sought to have the appellant and its Chief Executive Officer held in contempt. The trial court, with the exception of the order for contempt, found in favour of the respondent and ordered the appellant to pay to the respondent:

KORSAH JA

"(a) Unpaid salary in the sum of $369 442,60 less any deductions for personal tax, medical aid and pension contributions for the period August 1992 to April 1996 and thereafter a monthly salary at the rate of $11 939,95 *per* month. For the avoidance of doubt the applicant is to be paid all such salary increases as are awarded to the other bank employees.

(b) The sum of $10 000 by way of vehicle allowance for the period March 1992 to April 1996 and thereafter a sum of $200 *per* month (for such allowance).

(c) The sum of $100 305.25 being a refund of the fees paid by the applicant in respect of the two children and any further amounts as may be due.

(d) The sum of $3 749.85 being the entertainment allowance for the period, August 1992 to April 1996 and thereafter the sum of $83,33 *per* month.

(e) An appropriate share by way of profit share and bonus.

2. Respondent (the Bank) is directed to ensure that all necessary measures are taken to re-instate the applicant (Matsika) on both its medical aid and pension schemes.

3. Respondent (the Bank) is to pay the costs of this application."

It is against the above orders that the appellant sought relief.

The term "reinstatement" is not a term of art and must be accorded its ordinary sense. In William Dixon Ltd v Patterson [1943] S (J) 78 at p 85 Lord Justice-Clerk, Lord Cooper said:

"The natural and primary meaning of 'to reinstate' as applied to a man who has been dismissed (ex hypothesi without justification) is to replace him in the position from which he was dismissed, and so to restore the status

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quo ante the dismissal."

The effect of such an order was considered by Gubbay JA (as he then was) in Commercial Careers College (1980) (Pvt) Ltd v Jarvis 1989 (1) ZLR 344 (S) at 350-1. From an order of reinstatement the following consequences are said to flow:

(a) the employee is entitled to be replaced in his post;

(b) there is no obligation on the employer to provide him with work;

(c) the employer must continue to remunerate him upon the tender of his services;

(d) the employer is to restore him to the pay roll with effect from the stipulated date.

It is common cause that in the instant case the order of reinstatement by this court expressly stated that it was to be without loss of pay or other benefits. It was the respondent's contention in the court of first instance and before us, that the tender made on 8 March 1996, was for pay alone, based on the pay scale applicable as at 1 August 1992, and for payment of the thirteenth cheque for three years. No payment was tendered in respect of other benefits save the thirteenth cheque.

The appellant's stance was that the order of this court did not make it obligatory for him to treat the respondent as if it were satisfied with his services for the payment of salary increases, bonuses, promotions and

KORSAH JA

discretionary benefits. It was contended, on behalf of the appellant, that it was under no statutory or contractual obligation to afford the respondent salary increases, bonuses or assistance with children's education; that all these matters were in the discretion of the appellant and did not constitute at any time a right belonging to the respondent. I must, with respect, disagree with Mr Dyke on this issue.

The order of this court was clear beyond peradventure: "The appellant was directed to reinstate the respondent without loss of pay and other benefits from the date of his suspension without pay". Implicit in the order is that the contract of employment had not been severed and that the contractual chains still bind the one to the other. Thus, the appellant, as Mr de Bourbon rightly submitted, was to put the respondent back into the position the respondent occupied and pay him as though the misconduct and other proceedings had not been brought against him. Indeed, to reinstate an employee and thereafter accord to him treatment inferior to those enjoyed by his peers in office may amount to unfair labour practise by the employer, in terms of s 8 of the Labour Relations Act [Chapter 28:01].

At the time of his suspension, the respondent was the manager of the Chitungwiza Branch of the appellant. Such a position gave him a status and entitled him to:

(a) the use of a motor vehicle belonging to the appellant for both personal and business

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travel, on which benefit he was taxed on a given value of $200 *per* month;

(b) be paid 80% of the costs of the school and boarding fees and other school requirements of his children;

(c) an entertainment allowance which benefitted him to the extent of $83,33 *per* month; and

(d) a share in the profits of the appellant.

For the respondent, it was contended that as an ordinary employee of the appellant, the respondent was entitled to be a member of the pension scheme, and to have the appellant contribute towards that membership. He was, likewise with regard to the medical aid scheme, entitled as a right to membership, by virtue of his employment by the appellant.

Furthermore, all employees of the appellant received a cost of living allowance each year. This was payable from 1 July of each year at stipulated rates. The entitlement of this allowance is not put in issue by the appellant, which merely takes the stance that all allowances can be withheld from the respondent. In addition, employees of managerial rank, in January of each year, received a performance allowance, again at stipulated rates. The attitude of the appellant is that some managers did not receive this allowance and so the respondent is not entitled to that allowance.

KORSAH JA

In relation to the company motor car, Mr Dyke submitted that as the appellant declines to offer the respondent work to do there is no need for him to have the benefit of the use of a vehicle. This argument overlooks the fact that the vehicle although furnished to the respondent to facilitate travel from home to the workplace was also status-linked and carried a maximum private allowance of 417 km *per* month. Thus, even if the respondent is not given work to do, his contractual status, as a manager of the appellant, entitled him to a vehicle with a maximum private allowance of 417 km *per* month, on which benefit he was taxed on a given value of $200 a month.

Mr Dyke contended that the payment of the respondent's childrens' school fees was discretionary and not a right held by him. He submitted that the measure of whether or not a "benefit" is indeed one and not simply a gratuity passed on to the employee is whether the employer is entitled at any time in its discretion, to withhold such payment. He contended that in this case, there is no reason why, had the respondent continued in employment with the appellant, the latter could not elect not to pay school fees henceforth either on an individual basis or for all its employees.

I find this argument neither persuasive nor attractive. One of the fundamental flaws in it stems from the assumption that no contractual relationship exists between the parties simply because the appellant has not given the respondent work to do. The contractual chains binding them to each other have not been severed. The second flaw arises from the misconception of the words

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"benefit" and "gratuity".

In the context of this case, a "benefit", in my opinion, is an advantage, privilege, or an allowance to which a person is entitled, as a member of a class. It is an obligation to pay a member of the class, or on his behalf, the amount specified in a contract upon the conditions therein stipulated. It includes discretionary awards to the children of employees made to assist in meeting the cost of further education by reason of the contract of employment. Thus "benefits" are necessarily of periodic occurrence.

A gratuity, on the other hand, is a pecuniary present of an amount fixed by the giver in recognition of an inferior's good offices. It is something given by the employer without legal consideration. It is a fixed sum of money gratuitously granted or paid whether in one sum of by instalment. Whilst, therefore, a benefit is of periodic occurrence, a gratuity is not. Clearly then, the periodic payment of 80% of the respondent's childrens' school fees was a benefit which the respondent was entitled to the enjoyment with those of his class or status.

This court ordered the reinstatement of the respondent without loss of benefits and it is for the appellant to comply with that order. Non-compliance with that order is wrong. For as long as employees of the status of the

KORSAH JA

respondent enjoy the benefit of subsidised school fees, so too must the enjoyment of it be accorded the respondent.

Concerning the entertainment allowance, Mr Dyke submitted that claiming such allowance is demonstrative of the respondent's unreasonableness in these proceedings. He argues that the allowance was plainly intended to assist the respondent in entertaining the appellant's clients when required. But that does not stop the entertainment allowance from being a benefit; nor does it follow that because the appellant is not giving work to the respondent it is entitled to profit by its own omission, or that the appellant will not entertain its client with that amount, if paid to him. Mr Dyke concludes that to allow the respondent to receive such sums, as the court below ordered, would be to allow him to be placed in a better position than he would have been in had he still been working.

As far as the order of this court stands, the respondent has been reinstated and the contractual relationship subsists. The fact that the appellant elects to give him no work to do is a matter for the appellant, but it cannot so act as to deprive the respondent of a benefit that goes with his office.

Mr Dyke finally submitted that the respondent is in error in claiming that he ought to be paid as is every other employee of his status because the whole basis of discretionary "benefits" or gratuities is that the employer grants or withholds them at his pleasure, the performance of the individual being part and parcel of the decision as to whether to extend the "benefit" or gratuity; and that no prudent employer will pay a benefit or gratuity to an undeserving employee.

Here again, it is the appellant who, by refusing work to the respondent, is wrongfully depriving

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itself of the opportunity of being in a position to assess the performance of the respondent for annual increments wherever an assessment of performance is required for such benefit or increment thereof. The appellant profits by all the benefits that it does not pay to the respondent by refusing to give him work. No one can make his condition better by his own misdeed or omissions.

The appeal is accordingly dismissed in its entirety. The appellant is to bear the costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan Welsh & Guest, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

S v C (a juvenile) 1997 (2) ZLR 395 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

15 October 1997 Judgment No. HH-158-97

Flynote

Criminal law - defences - youthfulness - presumption that child under 14 doli incapax - child of 14 or over - possibility that child is doli incapax cannot be ignored, especially when facts suggest naughtiness rather than criminal intent

Criminal procedure - juvenile offender - decision as to whether to prosecute - whether Attorney-General's authority required - absence of such authority - effect - steps a magistrate should take on the arraignment of a child

Criminal procedure - juvenile offender - unrepresented offender - court's duty towards

Criminal procedure (sentence) - general principles - juvenile - probation officer's report - need for before court can properly decide whether imprisonment or institutionalization is appropriate

Headnote

The accused, a girl of 14, was charged before a magistrate with indecent assault. She was not represented by a legal practitioner nor assisted by a parent or guardian. She pleaded guilty, was convicted and was sentenced to a wholly suspended term of imprisonment.

Held, that where a child is put on trial an enquiry into the child's age must be made, because from that enquiry many other important considerations flow. If the child was under 14 years at the time of the alleged offence, the first decision is whether there is evidence to displace the presumption that the child did not have criminal capacity. Even if such evidence is available, the

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next decision is whether as a matter of policy such a young person should be subjected to the might of the criminal justice system. Other methods of dealing with such an offender might be more appropriate. Even if the child is over 14, the circumstances of the case might suggest that he may have acted without forming or being able to form a criminal intent.

Held, further, that the decision as to whether to prosecute a child is in practice reserved for the Attorney-General himself. If authority is not obtained, this is an irregularity, though not one which could justify the upsetting of a conviction. Nevertheless, the practice of obtaining authority has the whole-hearted approval of the High Court. If no authority has

GILLESPIE J

been obtained, the magistrate should use his moral and persuasive authority, to ensure that the prosecutor seeks authority from the Attorney-General.

Held, further, that the concept of placing a juvenile, particularly a very young one, unrepresented and unassisted by its parents, on trial before a magistrate is inherently repugnant. In a civil proceeding, such a child would be deemed incapable of enforcing or defending its rights. To expect such a child to conduct his own defence in a criminal trial is to expect far too much. It is questionable whether the child would be afforded its constitutional right to a fair trial, without the sympathetic and active involvement of a magistrate assiduous in safeguarding the position of the unfortunate child in such a distasteful milieu.

Held, further, that a court should be extremely slow and reluctant to subject a young person to the punishments prescribed for adults rather than to afford the child the benefit of institutional care. The discretion as to which course to follow cannot be properly exercised if the magistrate does not call for the report and recommendation of a probation officer. While in some cases such a report is unnecessary, in most the failure to receive the report of a probation officer before exposing a child to adult punishment is a serious misdirection.

Conviction set aside. The child ordered to be brought before a juvenile court to be dealt with as a child in need of care.

Cases cited:

R v Eva 1967 RLR 113 (G); 1967 (3) SA 627 (R)

S v F (a juvenile) 1988 (1) ZLR 327 (H)

S v Gorogodo 1988 (2) ZLR 378 (S)

R v K 1956 (3) SA 353 (A)

S v M 1994 (2) ZLR 13 (H)

R v Mahwahwa & Anor 1955 SR 297

R v T 1962 R & N 168 (SR)

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S v Wakiri 1981 ZLR 51 (A)

Judgment

Gillespie J: Little Lydia C is14 years old. At least that is what is said on the form of summary jurisdiction when Lydia came before a magistrate for prosecution on 29 April 1997. She may have been younger. As I shall show, nobody has really thought to investigate the point. The charge was that of indecent assault. On three counts. It was alleged that on two days in early March of this year, in three separate incidents, Lydia played upon the extreme youth of three boys in her community. She disrobed herself and them and with them indulged in sexual play allegedly involving intercourse. On the last incident the guilty act was partially witnessed and that led to her arrest and prosecution.

Lydia was not represented at her trial. There is no record of any parent or guardian being present in court with her. She pleaded guilty to the offences and was convicted. She was sentenced to eighteen months' imprisonment of which nine months were suspended on condition of good behaviour and a further nine months were suspended on condition of community service.

Three important points of principle arise from the proceedings against Lydia. First, there is nothing in the trial record to show her true age at the date

of trial or, more importantly, her age at the time she was said to have committed the offences. The trial magistrate does not seem to have bothered to check Lydia's age before the trial proceeded. Perhaps he was not aware of the importance of that point. He should have been. Second, she was unrepresented. Neither by a legal practitioner, nor by any parent or guardian assisting her. She was entirely at her own devices as to how she conducted her defence. Third, she was sentenced as an adult. There was no prior enquiry into her circumstances by a probation officer. There was none by the magistrate. There was no apparent exercise of any discretion as to whether to deal with Lydia as a juvenile in the manner provided in the criminal code.1(43) I will now address each of these points in turn.

An enquiry into the age of a child is a preliminary investigation from which flows many other important considerations. The law presumes a child under fourteen to be doli incapax. This does not mean unable to do wrong. It does not mean lacking the capacity to differentiate between right and wrong. It means that the child is regarded as incapable of formulating a criminal intention to break the law. He has not the maturity or knowledge to make up his mind to do something knowing it not only to be wrong but also knowing that it is against the law and susceptible to criminal punishment.

If there is contemplated a prosecution of a child who is under 14 years of age when an offence is committed, then the first decision to be taken is whether there is evidence to displace the presumption that the child does not have criminal capacity. For:

> "The presumption may be rebutted and weakens with the advance of the child's years towards fourteen, and the

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particular facts and circumstances attending the doing of the act and manifesting the understanding of the child. The evidence of *mens rea* which is allowed to displace the presumption (expressed in the ancient phrase *malitia supplet aetatem*) should be strong and clear beyond all doubt." 2(44)

This, however, must not be understood as permitting the application of the presumption that every man intends the natural and probable consequence of his actions. That presumption is not applicable to a child under fourteen. 3(45) What is required is positive proof, from the circumstances of the alleged offence or from other evidence as to the child's development and maturity, that the child is capable of a criminal disposition beyond that to be expected in one of his years.

Even once it has been decided that such evidence is available, the next decision to be taken is whether or not as a matter of policy such a young person should be exposed to the full might of the criminal system of justice.

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There are weighty policy considerations against such heavy-handed dealing with the very young, even if they can be shown to be doli capax. Thus the commission of a crime which may be no more than a "boyish prank" should not be prosecuted in the criminal courts; rather:

"the appropriate administrative action might ensure that the parents of the youths administer some form of punishment which would adequately meet the case without the formality of bringing the children before a criminal court." 4(46)

Other expedients such as the warning of a child by a senior policeman, or bringing about an informal reconciliation between the victim and the offender, may also be preferable to an imperfectly considered resort to criminal prosecution. 5(47)

The decision to subject such a very young person to criminal proceedings is one, which carries with it a considerable responsibility. It is a decision which in practice is reserved for the Attorney-General himself. This has been the case since 1967 and the decision in the case of R v Eva, in which the following appears:

"I have discussed the case with the Director of Public Prosecutions, and he has expressed concern that a boy aged nine years would be brought to court at all to face a charge of this nature. This concern is shared by myself and my brother judges with whom I have discussed the matter. The Director of Public Prosecutions informs me that it is proposed to issue a directive to the effect that no child under the age of 14 years should be charged in court without the express authorisation of the Attorney-General. This is a directive this court would whole-heartedly approve." 6(48)

Is it an irregularity in the proceedings if a prosecution occurs without such authority?

"The authorisation of prosecutions of juveniles less than fourteen years old, however, is not a necessity in law but simply a desirable practice instituted in consequence of the case *R v E* 1967 (3) SA 627 (R). No authorising document is issued, and no record is kept of prosecutions so authorised: the Attorney-General merely peruses the police docket and endorses his 'nihil obstat' therein or, as in this case, is appraised of the matter, and gives his consent, over the telephone in the interests of expedition." 7(49)

Strictly speaking, therefore the absence of authority contravenes no law and no procedure save a sensible safeguard introduced as a matter of practice. Nevertheless, the absence of the

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a juvenile has, as a result of the institution of this practice, come to be regarded as an irregularity. 8(50) Still, it is not such an irregularity as could, in itself, justify the upsetting of a conviction. 9(51) Rather, the absence of authority will be taken into account as showing the absence of any pre-trial investigation into the questions of the criminal capacity of the child and of the propriety of criminal proceedings against that child. It may affect the decision as to whether the child could formulate the necessary intent or should be punished with criminal sanction.

A magistrate before whom is arraigned a child has therefore the following enquiries to pursue. The age of the child. Whether the Attorney-General has authorised the prosecution. Whether the child is doli capax.

The first of these, the age of the child, is an obvious enquiry. The magistrate must at least be satisfied as to whether the child is above or below fourteen so that he can determine the proper further investigation into the question of criminal capacity. He will in any event want to know the child's precise age in order that he can make the decision whether to sentence the child or to refer him to a juvenile court.

Whether the Attorney-General has authorised the prosecution is an enquiry into a very important point of policy. Although no legislation requires the giving of authority, a practice has developed with the "whole-hearted approval" of this court. A magistrate should be assiduous in determining whether that practice has been followed in any relevant matter coming before him. It is true that if a child is under fourteen and no authority has been obtained, he is not entitled to decline jurisdiction. The prosecutor as *dominus litis* might insist upon proceeding. But the magistrate has a very great moral and persuasive authority. Should he make it known to the prosecutor that the decision of the Attorney-General is required prior to proceeding, that prosecutor would undoubtedly heed the intimation and consult his superiors. If he did not, he would be acting improperly. Even if a child before the magistrate is fourteen or over, the magistrate may still enquire into the wisdom of criminal proceedings. He may think it apropriate to question whether alternative methods are suitable. He might very properly suggest that the prosecutor consult his superiors if such consultation has not already taken place.

Whether the child is doli capax is fundamental. If the child is under fourteen then plainly in the absence of such an enquiry there will be nothing to rebut the presumption that there was no criminal capacity attending the apparently wrongful conduct. Even if the child is fourteen or more, however,

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this does not mean that the question must be ignored. Far from it. There may be circumstances attending the commission of the alleged offence which suggest very strongly that an accused

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child of fourteen years or more may have acted without forming, or being able to form, a criminal intent in the particular circumstances of the case. As an example of what I mean I cite the wisdom of GREENLAND J.

> "It is common knowledge that young children necessarily internalise perceived behaviour of those around them and then will often proceed to experiment themselves without being conscious of the wrongfulness of such behaviour. In thus mimicking behaviour they are not acting criminally. The law recognises this. Hence its insistence that, in regard to young offenders, the element of knowledge of wrongfulness be proved. At the very least this aspect required investigation before prosecution was resorted to." 10(52)

Although his remarks pertained to the prosecution of a ten year old boy, they apply as well to the intended trial of any juvenile. The fact that the child is over fourteen means only that the onus of establishing the lack of criminal capacity is on the defence rather than a presumption in favour of the juvenile.

This brings me to a consideration of the second of the three main points, which I identified at the commencement of this judgement: the lack of representation of the juvenile. As in any matter involving an unrepresented accused, the duty is upon the magistrate to ensure that the nature of the charge and the availability of potential defences is understood by the accused and examined by the court. In all trials of juveniles of fourteen years or over the magistrate has an obligation to investigate the question of criminal capacity. This is no different from saying that he has a duty to ensure that there is no reasonable doubt as to whether the child was able to and did formulate a *mens rea*. Of course, the older the child, the less reasonable it may be to consider the possibility of a lack of criminal capacity. No enquiry at all, perhaps, need be made in respect of the seventeen year old who has been running in a gang of township hooligans for some years. On the other hand, an enquiry no different in substance fom that necessary for a child under fourteen may be indicated in a fourteen year old charged with an offence suggestive of a mere mimicking of adult behaviour or of childish naughtiness.

It is not to be thought as surprising that such a heavy responsibility of original enquiry should be placed upon a magistrate. The concept of placing a juvenile, particularly a very young child, unrepresented, and unassisted by its parents, on trial before a magistrate, is one that is inherently repugnant. That same juvenile would be regarded in a civil court as incapable of enforcing or defending its rights. What is different about the criminal system of justice that affords the unassisted minor the capacity to defend himself? It

might well be thought that to place such a child in a position where he or she is expected to conduct his own defence in an alien environment in adversary proceedings is to expect far too much. It might even be wondered whether such a proceeding would contravene the child's right in terms of the Constitution to a fair trial.

I am in no position, without full argument, to resolve such an important issue. The Constitution affords to all -

> "the right to a fair hearing within a reasonable time" 11(53)

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which includes the right to be -

> "be given adequate time and facilities for the preparation of his defence." 12(54)

One might well conclude that a child or young person could not possibly defend himself without the assistance of a parent or guardian, a probation officer and a court-appointed lawyer. It seems to me that revision of the system of criminal prosecution of juvenile offenders, and of the facilities and assistance available to such young people, is overdue. If there is anything which might prevent a finding of unconstitutionality in cases such as this, it could only be the sympathetic and active involvement in the proceedings of a magistrate assiduous in safeguarding the position of the unfortunate tot in so distasteful a milieu.

In this case, the magistrate was far from sensitive to the immaturity and lack of experience - and possible lack of criminal capacity - of young Lydia. He did not investigate the girl's age. He thereby disqualified himself from any consideration both as to whether any attention had been given to the bringing of criminal prosecution and authority given for such a course and, more importantly, as to whether she is presumed to be doli incapax. This lack of attention manifests itself in the questioning of the child to ascertain whether her pleas of guilty were genuine. It is apparent too in the sentence imposed.

The record of proceedings shows no prior consideration by the Attorney-General as to the desirability of prosecution. It shows no prior investigation by a probation officer into Lydia's circumstances. It shows no preliminary enquiry by the magistrate into any such matter nor into Lydia's understanding of proceedings. It shows the putting of the charge, the recording of pleas of guilty and the curt and cursory questioning of Lydia on the essential elements of the offence, for all the world as if she were of an age and maturity to understand what was happening. No explanation was offered. No representation was given. No parental assistance present. On this little child's

admission that she committed indecent assault and had no right to do so nor any defence to offer, she was found guilty of three counts of criminal conduct without further ado.

If this were not sufficiently repugnant, the girl was then sentenced as if she were an adult. This leads me to the third point of principle, which I wished to address. A magistrate sentencing any person under nineteen may, instead of imposing punishment in the ordinary course of events, order the child to be placed before a juvenile court or may place the child in a reform school or training institute. 13(55) A court should be exceedingly slow and extremely reluctant to subject a young person to the punishments prescribed for adults rather than to afford the child the benefit of institutional care. The decision as to which course to take is no doubt a judicial discretion to be exercised according to all the circumstances of the case. I cannot see, however, that the discretion can be properly and judiciously exercised if a magistrate does not call for the report and recommendation of a probation officer. In some cases, perhaps, such a report may not be necessary. In this case, and in most cases, particularly those nvolving children of such youth as Lydia, I consider the failure to receive the report of a probation officer before exposing the child

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to adult punishment a serious misdirection.

That misdirection is thrown into stark relief when one considers the sentence imposed. Eighteen months' imprisonment. It is true that the entire period was suspended; nine months on conditions of good behaviour and nine months on conditions of community service. But that is no answer to the criticism that the imposition of eighteen months' imprisonment is brutal. Any sentence of imprisonment that is imposed must be appropriate in itself. Any suspension of that sentence is an act designed to mitigate what is in any event an appropriate sentence. One does not impose an inappropriate sentence and then suspend portion of it so that the effective sentence might then be regarded in isolation as appropriate. Such thinking ignores the fact that the condition of suspension might be breached, in which event the eventual punishment will prove to have been inappropriate. This is a point frequently made. I repeat the words of FIELDSEND CJ:

> "The proper approach is to look primarily at the sentence which the offence should attract and, having determined that, to consider what portion should be suspended, on what conditions, and for how long. I do not regard it as the right approach to decide what effective imprisonment an accused should undergo and then to add a suspended sentence with a view to dissuading him from further crime. The result of this latter course might be, if the dissuasion is not effective, that an accused will have to serve a longer sentence for his offence than it really deserves, because he has again fallen from grace." 14(56)

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The wisdom and correctness of this approach is most tellingly exemplified in this case. One is dealing with a fourteen year old girl who is apparently without parental care or supervision. She is employed as a housemaid. She now has to do 315 hours of community service in 12 weeks, or go to gaol for 9 months. She is of an age and condition where truancy or absenteeism might well be encountered. If she does transgress the conditions of her community service, she will see the inside of our prisons. In no circumstances could that be regarded as an acceptable result.

I have therefore reached the conclusion that the proceedings are not in accordance with substantial justice. The conviction is unsound because of the failure to question Lydia's age and criminal capacity. The behaviour of the girl is that sort of behaviour, which, even if the girl was fourteen at the time of the offence, suggests childish and inquisitive experimentation, innocent of criminality. The strong possibility exists that Lydia, because of her youth and immaturity, was not acting with criminal intent. The failure to investigate this point is in my estimation a fatal irregularity and for that reason I would quash the conviction and set aside the sentence.

In the light of what I have written above concerning the constitutional rights of a juvenile on trial, and generally on the subject of treatment of juveniles, it does seem to me that the time is ripe for earnest reconsideration of the policy and practice relating to the manner of dealing with delinquent juveniles. In particular, deserving of revision is the procedure for authorising prosecution of any juveniles; the establishment of juvenile courts other than magistrates courts exercising juvenile court jurisdiction; the possibility of vesting certain criminal jurisdiction in juvenile courts; and the question of assistance for minors on trial.

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To overturn the conviction and sentence is the work of but a moment. But the problem of what to do in mitigation remains. As I have shown the sentence was misdirected in that no discretion was applied towards whether or not to treat her as a juvenile in sentencing. It was in any event manifestly excessive. One is tempted to think that little Lydia has suffered enough. Setting aside the sentence would leave Lydia is now free to go about her business. I am sensible, however, of considerable disquiet at merely letting her loose on the world. She is fourteen at most. Her parents are divorced. She lives with grandmother. She undertakes employment. She seems unsupervised. One can foresee for her, should she continue in this line, a future of greater and more damaging exploitation. She is not a criminal deserving of punishment. It is very clear to me that she is a child in need of care. She ought to be dealt with as such.

The Children's Protection and Adoption Act 15(57) makes no express provision

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for this court to make any order in respect of a child in these circumstances. A policeman who encounters a child in need of care may, indeed must, take that child to a place of safety and cause it to be placed before a juvenile court. 16(58) It therefore seems to me that, vested as I am with responsibility as upper guardian of minor children, I have the authority to refer to a juvenile court the case of any child apparently in need of care, in order that the child might be dealt with in terms of that Act.

I therefore make the following order:

1. The conviction is quashed and the sentence set aside.
2. The minor child, Lydia C, is to be brought before a juvenile court with all possible expedition for the purposes of the holding of an enquiry in terms of s 19 of the Childrens' Protection and Adoption Act [Chapter 5:06].
3. For the avoidance of doubt, in any such enquiry, the minor child is not, and is not to be regarded as, a person convicted of any offence.

Blackie J agrees.

CONTINENTAL FASHIONS (PVT) LTD v MUPFURIRI & ORS 1997 (2) ZLR 405 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

30 September & 16 October 1997 Judgment No. S-161-97

Flynote

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Employment - contract - termination - retrenchment - dispute as to the severance package for retrenched employees - how severance package is to be assessed

Headnote

The Labour Relations (Retrenchment) Regulations 1990 (SI 404 of 1990) govern the retrenchment of employees by employers. If an agreement cannot be reached on retrenchment or the amount of the retrenchment package, the dispute is referred to a retrenchment committee. This committee makes recommendations to the Minister. The Minister's decision is appealable to the Labour Relations Tribunal.

The appellant company, which was in serious financial trouble and was on the verge of liquidation, sought to retrench some of its employees. It was accepted that retrenchment was necessary. The only dispute was over the quantum of the retrenchment package. The dispute was referred to the retrenchment committee and the Minister accepted its recommendations. The matter was then taken on appeal to the Labour Relations Tribunal. Dissatisfied with the determination of the Labour Relations Tribunal, the appellant company then appealed to the Supreme Court.

Held, that retrenchment in this context is the cutting back of expenditure on the employment of workers by reducing their number. Where the purpose of retrenchment of workers is to avoid the collapse and liquidation of a company, the survival of the company is the immediate motivating consideration and the purpose of the exercise is to save the company and to save the jobs of the remaining workers. But there is also a need to mitigate the consequences to the employees being retrenched.

Held, further, that before retrenching employees the employer must to consult with the employees and give them information, but not where, for instance, the disclosure of the information would harm the employer's business interests for reasons other than its relevance to the consultation process.

Held, further, that where, as in the present case, the employer seeks to withdraw its application for retrenchment, this withdrawal should normally be accepted by the labour officials dealing with the matter, as the first prize is to retain the employees in employment if this is still possible.

Held, further, that when hearing an appeal in terms of ss 89 and 91 of the Regulations the Labour Relations Tribunal must hold a full rehearing of the case.

Held, further, that the Regulations do not provide guidelines or criteria on how the basis of which the quantum of a retrenchment package is to be assessed. Although not stated in the Regulations, the ability of the company to pay the retrenchment package is the ultimate

McNALLY JA

criterion. If the company cannot pay what it is ordered to pay, it must go into liquidation, which is what the retrenchment exercise was designed to avoid. It was thus a fundamental misdirection for the Tribunal to say that the ability of the company to afford to pay the retrenchment package is a irrelevant consideration. In deciding the appeal the Tribunal had misinterpreted the

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evidence and failed to appreciate that the company was on the verge of collapse. Its decision therefore had to be set aside.

Held, further, that because the legislation provides no assistance on how to arrive at the amount to be awarded to persons retrenched when the employer is in dire financial straits, it would be pointless to refer the matter back to the Tribunal. The court therefore proceeded to arrive at what it considered to be a fair package in the circumstances.

Held, obiter, that the State, in consultation with the appropriate parties representing employers and employees, should strengthen and clarify the retrenchment legislation, and, in particular, clarify the basis of assessment of severance packages. Where the employer is on the verge of liquidation, one option would be to lay down a fixed and predetermined severance package. The advantage of this would be that the creditors could then be given a choice between liquidation, in which event they would only be able to recover what might be a small percentage of the debts, or downsizing of the company which might enable the company to survive and eventually to pay back the creditors. In England and South Africa, the fixed sum approach is adopted with the retrenched workers being entitled to a week's pay for every year of service.

Case cited:

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

Philips Electrical (Pvt) Ltd v Jokonya & Anor S-9-97

Sirdar's Mfrs (Pvt) Ltd v Chinya 1995 (1) ZLR 368 (S)

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

Case Information

E T Matinenga, for the appellant

H Zhou, for the respondents

Judgment

McNally JA: The legislation in respect of retrenchment is not very helpful to those required to apply it. (Compare Phillips Electrical (Pvt) Ltd v Jokonya & Anor S-9-97). The Labour Relations Act [Chapter 28:01] contains only two passing references to retrenchment. Section 5(1)(e) forbids an employer to discriminate on any of the usual prohibited grounds in choosing persons for retrenchment; s 17(3)(s) provides that the Minister may make regulations providing for the reinstatement of employees who have been retrenched.

Acting no doubt under one of the other general subheads of s 17(3), such as s 17(3)(r), the Minister has promulgated the Labour Relations (Retrenchment) Regulations, 1990 (SI 404/90 as amended by SI 252/92 and SI 137/94). These Regulations set out, though sketchily, the machinery by which retrenchment is governed.

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If there is no agreement on retrenchment or on the retrenchment package

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(also called severance pay) the dispute is referred to a -retrenchment committee' which consists of four civil servants, two employer organisation representatives and two trade union representatives, under the chairmanship of one of the civil servants.

The committee is required to consider the documents submitted to the -authority' (the body first charged with securing agreement on the retrenchment and its terms and conditions) and then to make a recommendation to the Minister, who may approve or reject it, or approve it subject to terms and conditions. The committee's recommendation is not required to be, and in this case was not, in the form of a judgment setting out facts found and reasons.

Section 7 of the Regulations sets out certain criteria to be followed by all parties (the authority, the retrenchment committee and the Minister) in deciding whether or not to approve the retrenchment. These criteria include the need to mitigate the consequences to the employees of being retrenched. But these criteria are not exclusive. Similarly, s 3(2a) of the Regulations suggests certain possible compromises to be considered, but does not provide guidelines on quantum.

The Minister's decision is appealable to the Labour Relations Tribunal ('the Tribunal') in terms of s 6(2) of the Regulations, which was added to the Regulations by SI 137/94.

"Retrenchment", when used in the context of labour relations, means a cutting back of expenditure on the employment of workers by reducing their number. (The definition is mine. There is none in the Regulations). The consequence of retrenchment for some of the workers is thus redundancy. We are not here, or generally, concerned with retrenchment resulting from the mechanisation of operations, but with retrenchment resulting from loss of profitability.

It is possible that a company might wish to retrench some workers because their particular operation is unprofitable. The firm as a whole might be prospering. In such a case different criteria might apply. But where, as here, the purpose of retrenchment is to avoid the collapse and liquidation of the company, the wellbeing of the retrenchees cannot be the only consideration. The survival of the company is the motivating consideration. The purpose of the exercise is to save the company. In so doing, care must be taken to cushion the blow to the workers. But to say, as the Tribunal has done in this case, that it is almost irrelevant whether or not the company can afford the package, is a fundamental misdirection. The immediate objective of retrenchment remains the saving of the company and of the jobs of the remaining employees.

Clearly therefore, although it is not stated in the Regulations, the ability of the company to pay the retrenchment package is the ultimate criterion - the

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bottom line. If the company cannot pay what it is ordered to pay, it must go into liquidation, which is what the retrenchment exercise was designed to avoid.

In England, redundancy payments are governed by legislation - the Employment Protection (Consolidation) Act 1978. There is a Redundancy Fund, made up from employers' national insurance contributions, which pays workers where the company is insolvent. (Alternatively, redundancy pay could be given preference on liquidation by amending the legislation). Redundancy payments are calculated according to a formula. Basically it is a week's wages multiplied by the number of years worked, in addition to notice.

In South Africa, at least as recently as 1993 (Riekert's *Basic Employment Law* 2 ed p 117), there appears to be no provision for what is there called severance pay, unless it is part of the contract of employment. Despite the absence of legislation, there have been cases where the industrial court has awarded severance pay even where there was neither a contractual nor a legislative basis for it. But the law is uncertain, and I have found no case in which the quantum of severance pay has been considered. Riekert *supra* suggests that a week's pay times the number of years employed is the usual formula.

There is, however, an informative case in South Africa about the need for employers to consult with employees before retrenchment and to give them information. In Atlantis Diesel Engineers (Pty) Ltd v National Union of Metalworkers 1995 (3) SA 22 (A), the Appellate Division held that information must be disclosed, but not where, inter alia, such disclosure -could harm the employer's business interests for reasons other than its relevance to the consultation process' (at 29J-30A).

The workers in this case have relied on the provisions of s 76 of the Act in demanding full financial disclosure by the company. But s 76 is in Part X of the Act, which deals with collective bargaining agreements. It does not deal with retrenchment. As earlier stated, there is no section in the Act dealing specifically with retrenchment and severance pay.

In the present case, there appears to be no doubt and no real dispute that the company was in a very serious financial position and on the brink of liquidation. In fact, it was commercially insolvent. It was accepted that retrenchment was necessary. The only dispute was over the retrenchment package (severance pay). There was no agreement, and the whole question (although in reality only the dispute over the quantum of the retrenchment package) was referred to the retrenchment committee.

The retrenchment committee made a recommendation to the Minister after hearing both sides. There is, however, neither a record of the evidence led nor

a judgment setting out the basis upon which the recommendation was worked out.

What is recorded is a summary of the various parties' positions as follows:

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Package offer by company

1. Two days pay for every year served;
2. One suit for every retrenchee.

Employees' position

1. Five weeks pay for every year served;
2. Relocation allowance $3 000;
3. Notice as *per* statutory requirement;
4. Medical aid for five months;
5. Three suits *per* retrenchee;
6. Re-employment preference for retrenchees;
7. Statutory terminal benefits.

Committee's recommendations

1. Three months severance pay;
2. One week's pay for every year served;
3. One suit for every retrenched worker;
4. Gratuity/pension;
5. Effective date June 30 1996.

What happened thereafter may be summarised in the same way, as follows:

Minister's decision

As *per* recommendation above.

Company's reaction on appeal

1. Three months severance pay to be reduced to one month;
2. One week's pay for every year served to be reduced to three days pay for every year served;
3. Otherwise the Minister's decision is accepted.

It will be noted therefore that the company has moved from its original position to a position more favourable to the workers. This move, argued Mr Zhou, indicates how untrustworthy the company is. That does not seem to me to be a reasonable interpretation of the company's concession.

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When the company argued its appeal before the Tribunal it was clearly conscious of the fact that there were not sufficient facts before the Tribunal

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for it to be able to come to a decision. Accordingly, it proposed to lead evidence as to its financial position in order to show that the Minister's decision was wrong.

The Tribunal agreed to hear the witnesses, and in our view it was correct to take that attitude. However, it did seem to wish to limit its powers in this regard, and it should be stressed that in a case like this the Tribunal's powers on appeal should not be narrowly interpreted, for the following reasons:

1. The Tribunal is the first court of record to consider an appeal arising out of a determination in relation to retrenchment. The previous bodies, as provided for in the Regulations, are the -authority', the retrenchment committee and the Minister. None of these is a court of record. But the Tribunal is - see s 83(1) of the Act. Therefore it is vital that the Tribunal should exercise its powers in the light of all necessary facts. If those facts are not already before it, it must call for them - see *Sirdar\'s Manufacturers \(Pvt\) Ltd v Chinya* 1995 (1) ZLR 368 (S) at 370F-371F.

2. This necessity for the Tribunal to have all the facts before it is emphasised by the fact that the appeal from the Tribunal to this court is only on a question of law - see s 92(2). The Tribunal is the final court of appeal on fact. In order properly to carry out its functions it must be sure it has all the facts - see Sirdar *supra* at 371F.

3. The power to hear an appeal in a retrenchment matter is based on a provision in the Regulations rather than on any specific provision in the Act. It is therefore covered by the general provisions in ss 89(a) and 91 of the Act. These provisions do not elucidate the meaning of -appeal'. In this they are unlike the provisions of s 97(4) which, in different circumstances, give the Tribunal an option as to whether to conduct a (re)hearing or to decide the appeal on the record. There is also an appeal under s 103 of the Act, where it seems obvious, though nothing is said, that there must be a full hearing of evidence on appeal.

It is necessary therefore to interpret what is meant by -appeal' in ss 89 and 91. Is it an appeal in the full sense, a rehearing, or is it merely an appeal on the record? Compare National Union of Textile Workers v Textile Workers Industrial Union (SA) & Ors 1988 (1) SA 925 (A) at 941H; Watchtower Bible & Tract Society of Pennsylvania & Anor v Drum Invstms (Pvt) Ltd & Anor 1993 (2) ZLR 67 (S).

It seems to me that the simple answer is that, since there is virtually no record of evidence, and no judgment, it cannot be an appeal on the record. The powers of the Tribunal must allow it to hear evidence to place itself in a position to make a decision on the facts. It has not only a power to hear evidence; it has a duty to do so in order properly to carry out its function. See SI 30/93, especially ss 4, 18 and 19.

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McNALLY JA

In short, the appeal, in cases such as the present, must be a full rehearing. And indeed, that is what it was, because the Tribunal heard three senior members of the company give evidence, and they were cross-examined by the workers' representative. The workers, conscious of their right to lead further evidence, did not do so, apart from some evidence given by the first respondent, Mr Mupfururi.

Unfortunately, it seems to me that the Tribunal wholly failed to grasp the essential features of the evidence given by the company's witnesses. The evidence made it entirely clear that the company had virtually zero cash flow. Its bank account was so overdrawn that any funds deposited were simply (and quite lawfully) swallowed up by the bank. Deposits were being treated as payments of the debt owed to the bank.

In desperation, the company resorted to subterfuge. It managed to raise money through a sister company. It directed that certain payments be made, not to it, but to its sister company. The workers saw this as a plot against them. The Tribunal saw it, and other similar pieces of evidence, as proof that the company was being untruthful about its financial position.

Perhaps it was, but the untruthfulness was not directed against the workers. These subterfuges were patently intended to keep at least some cash flowing, to enable them to pay at least some workers. The alternative was liquidation and the loss of all jobs in the company. This evidence was, to my mind, completely misinterpreted by the Tribunal.

Satisfied as we are that the Tribunal's decision cannot stand, we have to decide what is to be done. Do we decide on a fair retrenchment package? How do we do that? Do we remit the matter to the Tribunal? If so, do we direct them as to the principles to be applied? If so, what are those principles?

It seems to me that the State should clarify its legislation. At present, there are no real criteria laid down by which the redundancy package (severance pay) is to be assessed. What is a fair amount to pay to your ex-employees when you have no money?

Should not the State make up its mind as to the extent to which it wishes to interfere with the operation of free market forces? At the one end of the scale, where a company has effectively no liquid assets, and where any severance pay will ultimately have to be borrowed from its creditors, market forces dictate that the redundant workers get nothing but their contractual rights - notice, leave pay, return of pension contributions, and whatever else their contract entitles them to receive.

At the other end of the scale, it seems logical to suppose, must be a fixed and predetermined severance package. The advantage of such a fixed package is that the company can say to its creditors - -The choice is between liquidation and downsizing. If we go into liquidation, you will get x cents in

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the dollar. If we downsize, you will have to fund the redundancy package, which will be x dollars, but then we will survive and eventually pay you back everything'. If the cost of redundancy is known, then meaningful decisions can be taken.

But if, as now, the size of the severance package is unknown, the task of those given the duty of assessing it is impossible. It is impossible because there is a fundamental unknown in the equation. What will the creditors agree to? If they do not agree to fund the package, the company goes into liquidation, and all the workers lose their jobs, not only those to be retrenched. The work of the retrenchment committee and of the Minister is rendered futile. How can they guess what the creditors will bear? That is what they have to do under the present legislation.

The members of this court cannot pretend to have any knowledge either of company financing or of the fairness or otherwise of redundancy payments. All that we are able to say is that, apparently, in the English and South African jurisdictions, a week's pay *per* year of service is the basic factor in the calculation. There are of course complications concerning overtime, allowances, etcetera. But formulae can be worked out.

In the present case, and in the absence of helpful legislation, there seems little point in referring the matter back. We must do the best we can in the circumstances.

If we take a rough and ready line through the attitudes of the various parties, we come to the following conclusions:

1. No justification has been shown for the payment of three months' severance pay, but since the company has ultimately agreed to one month's severance pay, that should be allowed.

2. Since the Minister's order that the retrenchees be paid one week's pay for every year of service meets the norm applied in South Africa and England, that order should stand.

3. Since the remaining provisions are agreed between the company and the Minister, they should stand.

Each side has thus partly succeeded, and our order for costs will reflect that position.

One final point must be made. It appears from the papers that at one stage, after the retrenchment committee made its recommendation to the Minister, but before the Minister had approved them, the company sought to withdraw its retrenchment application.

The principal labour relations officer dealing with the matter decided to ignore the -purported withdrawal'. I cannot understand how such an attitude can be adopted. It seems to me to promote form above substance, procedure above reality, red tape above common sense.

McNALLY JA

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The whole purpose of legislation about retrenchment is to mitigate the effect of retrenchment upon those declared redundant. However good the retrenchment package, it must normally be second prize. The first prize must be a withdrawal of the redundancy notice. How an official can reject that first prize when it is offered is incomprehensible. Did he do so on behalf of the workers, and if so, on what authority?

However, I understand that in the present case the offer to withdraw the redundancy notices is no longer on the table.

In the circumstances, this court recommends that the State, in consultation with the appropriate parties representing employers and employees, strengthens and clarifies the legislation in regard to retrenchment. In particular it seems necessary that there be clarity as to the basis of assessment of severance packages.

In regard to the appeal before it, the court makes the following order:

1. The appeal is allowed to the extent indicated below, and the order of the Tribunal is set aside.

2. In its place, the following order is made:

   "a. The retrenchment package as recommended by the retrenchment committee and approved by the Minister is confirmed, save that the figure of three months' severance pay in Clause 1 is altered to read one month's severance pay;

   b. There will be no order as to costs.'

3. Each party will bear its own costs in the appeal to this court.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Byron Venturas & Travlos, appellant's legal practitioners

Madanhi & Associates, respondents' legal practitioners

DELCO (PVT) LTD v OLD MUTUAL PROPERTIES (PVT) LTD 1997 (2) ZLR 414 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

30 September & 16 October 1997 Judgment No. S-169-97

Flynote

Landlord and tenant - tenant - ejectment - statutory tenant - grounds - good and sufficient grounds for termination of such tenancy - landlord requiring to refurbish building to obtain higher rentals from high profile

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tenant - not good and sufficient grounds to eject current tenant

Headnote

The appellant was in occupation of some shops owned by the respondent and was a statutory tenant in terms of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983). The respondent sought the eviction of the appellant from the premises.

Held, that in terms of Regulations the landlord can only evict a statutory tenant if he can discharge the onus of showing that he has good and sufficient grounds for requiring the tenant's eviction. Good and sufficient grounds exist where the lessor genuinely requires the use of the leased premises for the operation of a business or it is necessary for the lessor to effect extensive repairs to premises that are in a dangerous or unsafe condition, which repairs cannot be undertaken while the lessee remains in occupation.

Held, further, that the reason why the respondent wished to evict the appellant was not to repair the building in order to make it safe for occupation, but in order to modernise the portion of the building occupied by the statutory tenant, thereby enabling it to let this portion of the building on a long lucrative lease, to a high profile and high powered tenant. This was not a good and sufficient reason for eviction.

Cases cited:

Boka Entprs (Pvt) Ltd v Joowalay & Anor 1988 (1) ZLR 107 (S)

Checkers Motors \(Pvt\) Ltd v Karoi Farmtech \(Pvt\) Ltd 1986 (2) ZLR 246 (S)

Guthrie Hldgs (Pvt) Ltd v Arches (Pvt) Ltd 1989 (1) ZLR 184 (S)

Mobil Oil Zimbabwe (Pvt) v Chisipite Svc Station (Pvt) Ltd 1991 (2) ZLR 82 (S)

Moffat Outfitters \(Pvt\) Ltd v Hoosein \& Ors 1986 (2) ZLR 148 (S)

S Goulding (Pvt) Ltd v A & L Hldgs (Pvt) Ltd S-233-91

The court considered the following statutory provisions:

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), s 22(2)

Case Information

A P de Bourbon SC, for the appellant

R Y Phillips, for the respondent

GUBBAY CJ

Judgment

Gubbay CJ: Stanley House was built in 1979. It is situate at the corner of Jason Moyo Avenue

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and First Street, at the heart of the most prestigious shopping area in the city of Harare.

Until recently the building comprised a non-air conditioned eight storey block providing 6 006 square metres of lettable retail space and thirty-two parking bays. The ground and first floors, which together measured 2 202 square metres, accommodated sixteen shops, the largest of which was on the ground floor. The remaining six floors were set aside for offices.

On 30 November 1989, the appellant, which as a sub-tenant previously occupied shops 5 and 13 on the ground and first floors of Stanley House, entered into a written agreement of lease in respect of such shops with the then owner of the property, Link Properties Ltd ("Link"). The lease was for an initial period of five years, terminating on 31 December 1994. It was not renewed upon expiration, but the appellant remained in occupation of shops 5 and 13 as a statutory tenant in terms of the Commercial Premises (Rent) Regulations 1983, SI 676 of 1983 ("the Regulations"). It was there that it continued to carry on the business of a retail seller of clothing for the family, manchester and complementary goods.

In the first half of 1994, Link engaged a property consultant to advise upon how best Stanley House, though only fifteen years old, could be modernised and upgraded. It was appreciated that the specifications of newer buildings in the same sought after locality had changed considerably. Consequently, Stanley House had certain obvious inadequacies which meant that it could not compete effectively with those other buildings for the same high quality tenants. Apart from general refurbishment, considerable attention had to be paid to the ground and first floors in order to improve the overall image of the building.

In its written report of 22 November 1994, the consultant recommended, as scheme two, that by doing away with the arcade thoroughfare, and by better utilisation of the first floor space, an additional 184 square metres of retail space on the ground floor and 399 square metres on the first floor, could be attained. And that by removing the unnecessary storerooms and relocating some of the basement services, the number of car bays in the building could be increased by at least ten. It was pointed out that if a single "blue chip" long lease tenant could be found to occupy the large shop unit on both the ground and first floors, the capitalisation factor on the net rental would be attractive.

On 21 February 1995, the property consultant wrote to Link reiterating that Edgars Stores Ltd, a giant clothing retail company, was anxious to lease the proposed large shop unit on both the ground and first floors shown in scheme two, at an initial monthly rental of $125 000.

In the event, Link decided not to undertake any refurbishment of Stanley

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House. Instead, on 29 December 1995, it sold the building to the respondent.

In making the purchase, the respondent was aware that Link had considered upgrading and renovating Stanley House and that if the work was undertaken, Edgars Stores Ltd was positively interested in leasing most of the refurbished ground and first floor area. To the respondent, refurbishment of these two floors was crucial to the economic viability of its acquisition. It

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differed however from the proposals submitted by the property consultant with regard to their scope, cost and program. It resolved to spend at least $12.4 million upon improving the facilities and appearance of Stanley House. By so doing it believed it would achieve additional net income and an increase in capital value. Such expenditure would also make the building a serious competitor with others in the immediate vicinity.

The nature of the refurbishment planned by the respondent, which involved the relocation of the escalators and the demolition of one set of stairs, necessitated the closure of both the ground and first floors. It was deemed essential for the entire area to be vacated by 1 April 1997 so that the contractor could complete the work well before Christmas of 1997. Once the building had been refurbished Edgars Stores Ltd had agreed to lease the whole of the first floor, that is 1 593 square metres, and a major portion of the ground floor, 736 square metres. In the words of the respondent's property investment manager:

> "This is the calibre of a tenant the applicant had in mind after the refurbishment, as it is consistent with the existing retail mix in neighbouring buildings fronting First Street, where major single tenants occupy the majority of retail space, eg Barbours, Greatermans, Truworths (Batanai Gardens), OK Bazaars, etc."

On 23 September 1996, the respondent served written notice of cancellation of the lease agreements upon all the tenants in occupation of the ground and first floors of Stanley House. It gave as the reason that the nature and extent of the refurbishment exercise required that both floors be made available to the contractor by 31 March 1997. A reminder notice was sent to affected tenants on 9 December 1996. The appellant did not raise any objection at that time. It was as late as 7 March 1997 that it sought to resist the threat of eviction from shops 5 and 13 by relying upon the provisions of s 22(2) of the Regulations.

The reaction of the respondent was to apply urgently to a judge in chambers for a provisional order of eviction. This relief was granted on 19 March 1997, the appellant being ordered, pending the return day, to vacate shops 5 and 13 by 27 March 1997. It did so five days before the set deadline. Thereafter, it opposed the return day of the provisional order.

The learned presiding judge considered that the respondent was genuinely seeking to renovate and refurbish the building exclusively as its principal

motive; and was not seeking to increase its rent unjustifiably. In the exercise of a value judgment he held that good and sufficient grounds existed for the respondent to have required the appellant to vacate the building permanently. Accordingly, he granted the respondent the relief it claimed and confirmed the provisional order.

The argument advanced on behalf of the appellant before the learned judge, and repeated in this court, was that the respondent had failed to discharge the onus, cast upon it by s 22(2) of the Regulations, of showing that it had good and sufficient grounds for requiring the appellant's eviction.

As has been frequently stated, the phrase "good and sufficient grounds" is not defined in the

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Regulations. Save for providing that such grounds exclude the refusal of the lessee to agree to an increase in rent and the desire of the lessor to lease the premises to someone other than the lessee, no guidance is given to the court as to the factors to be taken into account in making the determination. See, for instance, Boka Entprs (Pvt) Ltd v Joowalay & Anor 1988 (1) ZLR 107 (S) at 114E.

Although it is true to say that no general rule would be able to cover all the varying circumstances which may arise in determinations of this kind, it has been held that good and sufficient grounds exist where:

(a) The lessor genuinely requires the use of the leased premises for the operation of a business. See *Checkers Motors \(Pvt\) Ltd v Karoi Farmtech \(Pvt\) Ltd* 1986 (2) ZLR 246 (S) at 250 G-H; *Boka Enterprises \(Pvt\) Ltd v Joowalay \& Anor supra* at 115 A-C; Mobil Oil Zimbabwe (Pvt) Ltd v Chisipite Service Station (Pvt) Ltd 1991 (2) ZLR 82 (S) at 88 D-E.

(b) It is necessary for the lessor to effect extensive repairs to premises that are in a dangerous or unsafe condition, which repairs cannot be undertaken while the lessee remains in occupation. See *Moffat Outfitters (Pvt) Ltd v Hoosein & Ors* 1986 (2) ZLR 148 (S) at 154F; Guthrie Hldgs (Pvt) Ltd v Arches (Pvt) Ltd 1989 (1) ZLR 184 (S) at 192 A-E.

Neither of these objectives was entertained by the respondent. The refurbishment to Stanley House, although expensive, fairly extensive and requiring many months to complete, was not motivated by the necessity to repair the ground and first floors in order to render them safe for occupation. Nor did the respondent rely on any failure by the appellant to perform a condition of the lease. In essence, its case was founded on the proposition that sound economic sense dictated the need to refurbish the ground and first floors of the building, not solely to obtain higher rentals and improve on its investment, but also to let such floor space, on a long lucrative lease, to a high profile and high powered third party.

In Guthrie Hldgs (Pvt) Ltd v Arches (Pvt) Ltd *supra* Dumbutshena CJ dealt with a building owner's double intention. He said at 191G-H:

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> "It is, however, fair to say the respondent has two intentions. The first in time and importance is to effect repairs to a building that was built more than sixty years ago. Those repairs are necessary. The second and subsequent intention is to use part of the premises itself and let part to third parties."

After an examination of the evidence, the learned Chief Justice continued at 193B-D:

> "I do not agree with Mr de Bourbon's contention that one of the purposes of the Regulations is to prevent landlords evicting statutory tenants in order to lease to third parties and that this intent applies whether or not there is a plan by the landlord to renovate the premises. It is true that s 22(2)(b(ii) prohibits the ejectment of a lessee just because 'the lessor wishes to lease the premises to some other person'. But that is not the case here.
>
> In this case, that is not even the dominant purpose. The respondent wants the appellant to vacate the premises in order to effect much needed repairs and make some renovations. The works to be carried out by contractors are

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not small when one considers the cost of materials, estimated at $63 820, of which materials valued at $45 110 have already been purchased."

The feature that makes that case distinguishable from the present is that the primary purpose was to undertake necessary repairs - particularly the strengthening of the roof trusses - to an old building. Moreover, it was of significance that the intention of the owner was to utilise portion of the premises itself.

I recognise there are dicta in S Goulding (Pvt) Ltd v A & L Hldgs (Pvt) Ltd S-233-91 (not reported) to the effect that if the intention to reconstruct the building is genuine then good and sufficient grounds will have been shown for requiring the court to issue an order of eviction, notwithstanding that the intention was formulated because the rental paid was unacceptably low or for some other reason. But I do not understand this to mean that the intention of an owner to refurbish and renovate the building specifically in order to lease it at a higher rental to a third party will constitute good and sufficient grounds for the termination of a statutory tenancy. For to permit of such a situation would be to negate the protection afforded to a statutory lessee of commercial premises.

On the facts of this matter, I consider, with respect to the learned judge, that he erred in finding that the respondent's dominant intention for the recovery of possession of shops 5 and 13 from the appellant was the need to renovate and refurbish the building extensively. There was no such need independent of the undertaking given by Edgars Stores Ltd that it would lease most of the ground and first floor space at a much higher rental. That assurance triggered the decision to refurbish. It may even have had a substantial influence upon the respondent's decision to purchase the building.

In my view, the respondent failed to prove that absent the attraction, both financial and prestigious, of having Edgars Stores Ltd as its tenant in place

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GUBBAY CJ

of the appellant and many of the other lessees, it would nonetheless have embarked upon the modernisation exercise.

It follows that in the exercise of a value judgment as to whether the respondent had shown good and sufficient grounds, the learned judge misdirected himself. He should have declined to confirm the provisional order, leaving it to the appellant, which was no longer in occupation, to pursue whatever claim it may have against the respondent for the unlawful termination of the statutory tenancy.

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

"The provisional order is discharged with costs."

McNALLY JA: I agree.

EBRAHIM JA: I agree.

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Ali Ebrahim, appellant's legal practitioner

Scanlen & Holderness, respondent's legal practitioners

TIP TOP DRY CLEANERS (PVT) LTD v KARANGURA 1997 (2) ZLR 420 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Appeal from Labour Relations Tribunal

7 & 16 October 1997 Judgment No. S-167-97

Flynote

Employment - contract - termination - suspension pending application for order terminating employment - notice of suspension - grounds for suspension must be given in notice - effect of failure

Headnote

The respondent, who was employed by the appellant, was given a letter by the appellant which stated that she had been suspended from work and that her case had been handed over to the Ministry of Labour. A copy of the letter was sent to the Ministry. The letter did not state the grounds for suspension. A hearing was nevertheless convened before a labour relations officer where the appellant alleged facts which would have constituted conduct inconsistent with the fulfilment of the conditions of the respondent's contract. An order terminating the respondent's employment was granted. On appeal to the regional hearing officer, the appellant relied on a second ground which it claimed warranted dismissal. An appeal by the respondent to the Labour Relations Tribunal was upheld and the appellant appealed to the Supreme Court.

Held, that failure to state the ground of misconduct relied upon rendered the purported suspension invalid. Since a labour relations officer is bound by the grounds for dismissal furnished by the employer, a fresh application should have been made in which a definitive ground for dismissal was relied upon. It was not competent for the labour relations officer to order termination of employment on a ground which was only relied upon or arose after the date of application, nor could other grounds be introduced on appeal.

Cases cited:

Abernethy v Mott, Hay & Anderson [1974] ICR 323 (CA)

Hama v NRZ 1996 (1) ZLR 664 (S)

Muzuva v United Bottlers \(Pvt\) Ltd 1994 (1) ZLR 217 (S)

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

Case Information

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S Hwacha, for the appellant

F Girach, for the respondent

Judgment

Gubbay CJ: The respondent was employed by the appellant as a depot supervisor at one of its dry cleaning establishments. She had held the position for several years. Her basic duties comprised the receipt of clothing from customers, completion of the required documentation and the handling of

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monies. It was not expected of her to canvass or solicit for custom, and she did not involve herself in such activity.

On 7 December 1987, the appellant had delivered to the respondent, at her residence, a letter addressed in the following terms:

> "You are hereby notified that you were suspended from work as from l December 1987. You were then sent to members of the workers committee to explain to you the reason for your suspension. As you say you did not know how a suspension from your place of employment (*sic*). The company is granting you the benefit of doubt, and paying you one weeks pay.
>
> Your case has now been handed over to the Ministry of Labour Manpower & Social Welfare.
>
> So the company requests you to make enquiries at the Ministry of Labour Manpower and Social Welfares offices.
>
> The driver of the company has been given your one weeks pay. Forty Two Dollars Ninety Five Cents."

The appellant's purpose in forwarding a copy of that letter to the then Ministry of Labour, Manpower Planning and Social Welfare was so as to apply forthwith for an order or determination terminating the respondent's contract of employment, in purported compliance with s 3(1) of the Labour Relations (General Conditions of Employment)(Termination of Employment) Regulations 1985 (SI 371 of 1985) ("the Regulations").

Clearly, the letter was intended to rectify the error of having suspended the respondent on 1 December 1987, and to suspend her without payment and other benefits with effect from 7 December 1987. Hence she was tendered wages for only the previous week.

However, the same deficiency acknowledged by the appellant in relation to the first suspension - the omission to provide any reason - persisted with the second. The letter failed to mention that the appellant had good cause to believe that the respondent was guilty of one or more of the grounds specified in paras (a) to (i) to s 3(1) of the Regulations, which merited summary suspension.

In my view, the consequence of not stating the ground of misconduct relied upon rendered the purported suspension of 7 December 1987 invalid. See the remarks of Lord Denning Mr in Abernethy v Mott, Hay & Anderson [1974] ICR 323 (CA) at 329. And if the suspension was invalid, the application for the termination of the respondent's contract of employment was

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similarly tainted. For it was essential that the labour relations officer, to whom the application was made and who was obliged to investigate the matter, was informed of the nature of the conduct which was the subject of complaint.

It seems to me, therefore, that upon receipt of the letter the labour relations officer would have been justified in refusing to undertake the prescribed investigation. Indeed, the particular labour relations officer to whom the

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letter was referred considered that what the appellant was seeking to do was to retrench the respondent without Ministerial permission. Remarks to that effect were duly endorsed at the foot of the letter.

Notwithstanding the defective application, a hearing was convened on 11 January 1988 before a labour relations officer and a determination made two days later. The completed determination form reveals that the application was based on "low takings of which two warnings were given and signed for by the employee"; and that an order terminating the respondent's employment was granted on the ground that she was guilty of breaching para (a) to s 3(1) of the Regulations, namely, of conducting herself in a manner inconsistent with the fulfilment of the conditions of her contract.

The inevitable inference to be drawn is that a fresh application to a labour relations officer must have been made by the appellant in which a definitive ground for dismissal was relied upon. The propriety of that application was not affected by the invalidity of the suspension of 7 December 1997. See *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1996 (1) ZLR 123 (S) at 132.

I am prepared to assume in favour of the appellant that at some stage prior to 11 January 1988 the respondent was fully advised of the nature of the misconduct alleged against her, and that she was afforded ample time to defend herself. See Matsika's case *supra* at p 131-132.

In a situation in which there has been an invalid suspension, whether by reason of a failure to indicate the ground relied upon, or where the application to the labour relations officer was not made forthwith, it is implicit in the grant of a hearing to the employer that an application to a labour relations officer was made in which information was given of the ground relied upon for an order terminating the contract of employment. If the employee has been advised of the ground in good time, then it seems to me that no prejudice has been suffered in consequence of the initial application being invalid for omitting to furnish the ground upon which termination was being sought. But I emphasise that the employer is bound by the ground or grounds furnished in its application to the labour relations officer. It is impermissible to apply to a labour relations officer for dismissal on one ground, and then, if the matter proceeds on appeal, to introduce and rely upon other grounds. This emerges from the decision in Mtsika's case, *supra*, where at p 130D, I said:

> " ... it would be incompetent for a labour relations officer to order the termination of a contract of employment on a ground that was only relied upon or arose after the date of the application; and was different from either that which

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had motivated the suspension of the employee together with the application made forthwith, or that upon which the application alone was based, where the employee had not been suspended."

That is precisely what occurred in this matter. At the appeal hearing before

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the regional hearing officer the appellant relied upon a second ground which it claimed warranted the order terminating the respondent's contract of employment. This was that the respondent had incurred shortages or shortfalls in the monies paid to her by customers. The regional hearing officer found that dismissal was justified on both grounds and confirmed the order of the labour relations officer.

Dissatisfied with the decision, the respondent appealed to the Labour Relations Board. It held that "low cash takings", even if proved against the respondent, did not constitute a ground for dismissal. Correctly, in my opinion, it pointed out that the supposed misconduct was simply a low volume of business on account of the quantity of clothes brought in to the depot in the charge of the respondent; an eventuality beyond her control. The Board also dealt with the ground that the respondent had incurred shortfalls in cash takings. It found that in the particular circumstances such shortfalls were not symptomatic of dishonesty, and that the appellant had failed to produce records in substantiation thereof. It ordered that the respondent be reinstated with full salary and benefits with effect from 7 December 1987.

An appeal to the Labour Relations Tribunal followed. At the initial hearing the matter was remitted to a senior labour relations officer for investigation as to whether shortfalls had been incurred by the respondent. In the event it was established that over a period of three months from 8 May 1987 to 17 August 1987, the respondent had received from customers amounts totalling $106,20, for which she had been unable to account.

At the recommenced hearing before the Tribunal, the Deputy Chairman held that there was no factual basis upon which the low takings could be blamed upon the respondent. That finding is not susceptible of appeal. See *Muzuva v United Bottlers \(Pvt\) Ltd* 1994 (1) ZLR 217 (S) at 219C-D. It was further held that the shortfalls could not be relied upon because the respondent had been allowed to continue in employment after the last shortfall had occurred on 17 August 1987 (the amount of the shortfalls had been deducted from her salary). Put otherwise, that even if incurring the shortfalls could be categorised as a ground motivating termination of employment, the appellant had condoned such misconduct, which had not been revived by any later infraction. See Anderman The Law of Unfair Dismissal 2 ed at 170.

I regard this reasoning as unassailable. Certainly, the allegation of low takings, which was not a ground for dismissal, did not enable the appellant to resuscitate the prior acts it had condoned.

But there is a simpler basis upon which the decision of the Tribunal must be upheld. This is, as mentioned earlier, that the appellant was only entitled to seek the termination of the respondent's employment on the ground it

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relied upon when making the necessary application to a labour relations officer. That was "low takings". It could not in later proceedings seek to add another ground and justify dismissal upon conduct which never operated on its mind at that time. The regional hearing officer, the Board and the Tribunal fell into error in considering the validity of the additional ground of shortfalls in monies received.

The Deputy Chairman ordered the appellant to reinstate the respondent to her position with effect from the date of the purported suspension without loss of salary or benefits. 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 National Railways of Zimbabwe* 1996 (1) ZLR 664 (S). The peremptory words of the proviso to s 96(1)(c) of the Labour Relations Act [Chapter 28:01] leave no room for doubt that an assessment of damages as an alternative to reinstatement or employment must be made.

This matter must be remitted to the Tribunal, therefore, for an assessment to be made of the damages suffered by the respondent, always provided that the appellant is not willing to reinstate or employ her.

Subject to that caveat, I would dismiss the appeal with costs.

KORSAH JA: I agree.

MUCHECHETERE JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

DEPUTY SHERIFF, HARARE v MAHLEZA & ANOR 1997 (2) ZLR 425 (HC)

Court **High Court, Harare**

Bartlett J

Interpleader proceedings

21 October 1997 Judgment No. HH-168-97

Flynote

Practice and procedure - parties - locus standi - requirement to come to court with clean hands - meaning - wife of judgment debtor having previously bought goods through debtor's business to avoid payment of sales tax - alteration made to invoices when attachment of judgment debtor's property imminent - purchaser not entitled to seek relief until sales tax paid

Headnote

The first respondent was awarded a pension as a war victim and spent it on acquiring various

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luxury items for her house. She bought the goods through her husband's transport business in order to avoid the payment of sales tax. Her husband later failed to pay his debts and was sued by the second respondent, a bank, and judgment was obtained against him. In satisfaction of the debt, the deputy sheriff attached various items, including those bought by the first respondent. She claimed that the goods were hers. In support of the claim she attached the invoices for the purchase of the items. The invoices had been altered to show that she, and not her husband's business, had bought the goods.

Held, that it is a basic principle that people are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. The kind of conduct which the court penalises by withholding its protection is conduct involving moral obliquity, such as fraud or other forms of dishonesty. The basis of the first respondent's claim was that she had dishonestly pretended that the disputed goods were being purchased by her husband or by his business so that she could evade paying the lawfully due sales tax. When she found that, as a consequence of her misrepresentation, the goods were being attached as her husband's, she altered the invoices. She had thus not come to court with clean hands. If she wanted to avoid the consequences of the dishonest web she had chosen to weave, she must clean her hands and satisfy the court that the sales tax, plus any penalties, had been paid.

Cases cited:

Barclays Bank (DC&O) v Volkskas Bpk 1951 (2) SA 296 (T)

Khaile v Administration Bd, Western Cape 1983 (1) SA 473 (C)

Mulligan v Mulligan 1925 WLD 164

Ex p Rhoprops Ltd, in re Piras Garden Properties Ltd 1975 (1) RLR 302 (G); 1975 (3) SA 630 (R)

Tshabalala & Ors v Min of Health & Ors 1987 (1) SA 513 (W)

Underhay v Underhay 1977 (4) SA 23 (W)

BARTLETT J

Case Information

Mrs V Nyemba, for the applicant

S G Ndebele, for the first respondent

Miss W Miles, for the second respondent

Judgment

Bartlett J: People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek

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relief from the court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions. As stated by Davidson J in Underhay v Underhay 1977 (4) SA 23 (W) at 24E -F:

> "It is fundamental to court procedures in this country and in all civilised countries that standards of truthfulness and honesty be observed by parties who seek relief."

If this court were not to enforce that standard, it would be washing its hands of its responsibility.

When this matter was called on the opposed role on 21 October, I mero motu raised the question of the cleanliness or otherwise of Mary Mahleza's hands. Counsel for the Deputy Sheriff, Standard Chartered Bank Zimbabwe and Mary Mahleza were all in agreement with my view that Mary Mahleza's hands were dirty.

Accordingly, after discussion with counsel, I made the following order by consent:

1. That the matter be and is hereby postponed *sine die*. That Mary Mahleza is to bear the wasted costs of the hearing of 21 October l997.

2. That Mary Mahleza is to obtain a certificate from the Commissioner of Taxes proving that all the sales tax due on the annexures to Mary Mahleza's affidavit in the court application have been paid together with any penalties assessed by the Commissioner of Taxes. Mary Mahleza is not to set the matter down for further hearing until the certificate is tendered and the wasted costs of the hearing of 21 October have been paid.

3. That if the certificate referred to in para 2 has not been filed by 30 November l997, the second respondent, Standard Chartered Bank Zimbabwe Ltd, may set the application down for hearing.

I think it not inappropriate to specify the reasons for that order. In order to do so it is necessary to set out the history of the interpleader proceedings.

Mary Mahleza is a liberation war veteran. She applied for compensation in terms of the War Victims Compensation Act [Chapter 11:16]. By a letter of 13 March 1997, the Pensions Office advised her that she had been awarded

compensation for the "sciatic pains and chest pain and s o b sustained in 1977 due to an act of war." The letter does not specify what medical condition is described by the letters "s o b". The letter then advised Mary Mahleza that her permanent disability had been assessed at 35% and that she had been awarded a monthly pension of $672.85 with effect from 1 February 1997 and pension arrears of $50 330.86 from July 1980-February 1997. She was also advised that a cheque for the $50 330.86 was enclosed in the letter.

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Mary Mahleza is, however, not a lady who lets the grass grow under her feet. She had already collected the cheque on 3 March 1997 (there is the word "collected" in handwriting at the bottom of the Pensions Office letter of 13 March) and paid it into her Commercial Bank of Zimbabwe account on 4 March 1997.

Between 4 and 7 March, Mary Mahleza states that she utilised her pension to purchase a colour television set, video recorder, cassette recorder, lounge suite, room divider and fridge. She, however, says that she purchased these items on invoices using her husband's name or the name of his transport business to take advantage of his sales tax number: "By using my husband's sales tax number, I made a saving as I did not pay sales tax."

Unfortunately for Mary Mahleza, the use of her husband's name to evade paying sales tax had taxing consequences which she had not foreseen. Her husband failed to pay his debts and Standard Chartered Bank obtained judgment against him and proceeded to execution. The deputy sheriff attached, inter alia, the colour television, video recorder, cassette recorder, lounge suite, room divider and fridge - which Mary Mahleza says she had bought with her war victims' compensation. Bestirred once more to action by this injustice, Mary Mahleza went on the attack. She filed an affidavit claiming the attached property to be hers. The deputy sheriff commenced interpleader proceedings. Mary Mahleza's affidavit formed the basis of the founding papers and attached to her affidavit were the invoices for the purchase of the goods in issue - with the name of the purchaser altered to Mary Mahleza from that of her husband or his transport business.

Standard Chartered Bank, in opposing papers, pointed out the alteration to the invoices and the fact that Mary Mahleza had not averred that she conducted a business which entitled her to avoid payment of sales tax to wholesale or retail outlets. Mary Mahleza then filed a further affidavit detailing her purchases and stating that:

> "the invoices were originally issued in the name of Philip Mahleza my husband or his business Mahleza Transport and were later altered to reflect that I had bought the goods myself, and this was done when I realised I was in danger of losing the property because of my husband's debts."

The basis of Mary Mahleza's claim is accordingly that she dishonestly

BARTLETT J

pretended that the disputed goods were being purchased by her husband (or his transport business) in order to take advantage of his sales tax number to evade paying the lawfully due sales tax at the point of sale. When she found that, as a consequence of her misrepresentation, the goods had been attached as her husband's, she then altered the invoices to reflect her name as the purchaser and sought the court's protection.

Are her hands clean? She has on her evidence dishonestly evaded paying sales tax at the point of sale by pretending that the purchaser was someone else. She has not apologised for that dishonesty. She has not sought to tell the court that the sales tax has now been paid nor offered to ensure that it will be paid. She seems to regard evasion of tax as part of the natural order of things. While she is probably not the only potential Zimbabwean taxpayer to hold that view, she

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would be well advised to remember that if everybody evaded tax the Pensions Office would have no money to pay her pension. She has, again on her evidence, altered the sales invoices in the founding papers to reflect her name, but has at least accepted and explained those alterations in a further affidavit.

I have already referred to the observations in Underhay v Underhay *supra*. These are underlined in Barclays Bank (DC & O) v Volkskas Bpk 1951 (2) SA 296 (T) at 307C-D where Dowling J stated, referring to dirty hands:

> "the type of misconduct which the court penalises by withholding its protection ... is conduct involving moral obliquity such as fraud or other forms of dishonesty."

See also Tshabalala & Ors v Minister of Health & Ors 1987 (1) SA 513 (W) at 523C; Khaile v Administration Board Western Cape 1983 (1) SA 473 (C) at 480C; Ex p Rhoprops Ltd: In re Piras Garden Properties Ltd 1975 (1) RLR 302 (G) at 304A; 1975 (3) SA 630 (R) at 632A and Mulligan v Mulligan 1925 WLD 164 at 167.

On the basis of the authorities, I have referred to, I am totally satisfied that Mary Mahleza has come to court with dirty hands. Her legal practitioner and the legal practitioners representing the other parties in this matter are in agreement with my view, enabling the order I have already specified to be made by consent.

The lack of clean hands is simple. Mary Mahleza dishonestly evaded paying the sales tax she should have paid if she was buying the goods herself. If she now wants to avoid the consequences of the dishonest web she chose to weave she must clean her hands first and satisfy the court that the sales tax she should have paid has now been paid, together with any penalties the Commissioner of Taxes considers appropriate. She should also bear the wasted costs of the proceedings of 21 October, which wasted costs have been incurred by her coming to court without clean hands. These dual requirements are embodied in the order made by consent, together with the additional

requirement that she does not allow the grass to grow under her feet when paying money as opposed to spending money.

V Nyemba & Associates, applicant's legal practitioners

Gula-Ndebele & Partners, first respondent's legal practitioners

Honey & Blanckenberg, second respondent's legal practitioners

PUMPKIN CONSTRUCTION (PVT) LTD v CHIKAKA 1997 (2) ZLR 430 (HC)

Court **High Court, Harare**

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Smith J & Gillespie J

Exception

9 & 22 October 1997 Judgment No. HH-159-97

Flynote

Company - legal proceedings - summons - signature on summons issued by company - whether summons must be signed by director or other nominated person

Practice and procedure - summons - defective - plaintiff a company - summons not signed by legal practitioner

Headnote

The plaintiff company issued summons for a debt arising out of a building contract. The summons was signed by a person who was the managing director of a debt collecting agency. He claimed that he had been given power of attorney to act on behalf of the company. The defendant excepted to the summons on the grounds that the summons had not been signed by a duly authorised representative of the plaintiff or by a legal practitioner.

Held, that a company, being an artificial person, cannot appear in person in court and must be represented by a legal practitioner. Similarly, since the signing of a summons or plea is part of the legal process, a summons or plea must be signed by a legal practitioner, as must an appearance to defend.

Held, further, that the proviso to s 9(2) of the Legal Practitioners Act [Chapter 27:07] does not permit an officer of a company to act for the company in all courts. It is specifically provided, for example, by the Magistrates Court (Civil) Rules that a company may institute or defend legal proceedings through a nominated officer. The purpose of the proviso is to exempt this situation from the effects of s 9(2) as a whole, which would otherwise prevent a company director from instituting or defending legal proceedings on behalf of the company. There is no equivalent provision in the High Court Rules and consequently there is no statutory authorisation for an officer of a company to sue out process or to institute or defend legal action on behalf of the company.

Exception upheld.

Cases cited:

Agramac \(Pvt\) Ltd v Chisvo \& Anor 1991 (2) ZLR 185 (S)

Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic & Commercial Carpet Fittings (Pty) Ltd & Anor 1977 (4) SA 448 (W)

Dormehl's Garage (Pty) Ltd v Magagula 1964 (1) SA 203 (T)

Lake v Law Soc, Zimbabwe HH-392-86

S A Cultivators Ltd v Flange Eng Co Ltd 1962 (3) SA 156 (T)

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1997 (2) ZLR p431

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The court referred to the following statutory provisions:

Legal Practitioners Act [Chapter 27:07], s 9(2)

Magistrates Court (Civil) Rules 1980 (SI 290/1980), Order 4 r 1

Case Information

T Hussein, for the excipient (defendant)

Plaintiff (respondent) in default

Judgment

Smith J et Gillespie J: The plaintiff issued summons claiming payment by the defendant of the sum of $46 884.23, being the balance of the amount owed for the construction of the defendant's house. The summons was signed by Toliwe Mlambo who describes himself as the managing director of M & D Debt Collection and Claims Recovery. The defendant excepted to the summons on two grounds. Firstly, that the summons had not been signed by a duly authorised representative of the plaintiff or its legal practitioner. Secondly, that the summons did not comply with paras (a) and (b) of r 11 of the High Court Rules 1971 in that full details of the defendant, such as his occupation and the capacity in which he is sued, have not been stated nor has the fact that the plaintiff is not aware of such details and neither has the place of business of the plaintiff or its capacity to sue been stated.

In an irregular response to the exception the plaintiff filed a document stating that the summons was signed by "a duly authorised representatives (*sic*) of the plaintiff. The plaintiff signed a power of attorney". The document was purportedly signed by D Mrehwa who was described as "T/A Pumpkin Construction P/L". There is no indication in the document of the capacity in which D Mrehwa signed on behalf of the plaintiff. In addition, the plaintiff purported to file an affidavit by Toliwe Mlambo in which the deponent stated as follows:

> "1. I am the Managing Director of M & D Collection and I am duly authorised Debt Collector, and registered in the Laws of Zimbabwe, the contents of which are within my personal knowledge and are to the best of my knowledge, information and belief, true and correct.
>
> 2. This Company is not registered with the Law Society of Zimbabwe because it is not a Law Firm but a Debt Collection and Claims Recovery.
>
> 3. I hereby further advised your Honour the Secretary of Law Society of Zimbabwe that there is a big difference between Debt Collection and Law firm."

With the leave of the court, the defendant filed an affidavit from the Secretary of the Law Society of Zimbabwe stating that there is no Mlambo who is registered as a legal practitioner. If any corroboration that Mlambo is not so registered is required, the contents of the affidavit of Mlambo which are set out above show clearly that he has had no training in the law and that his

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ability to express himself in the language of judicial proceedings is questionable.

The plaintiff does not allege that Mlambo is a director or employee of the

plaintiff company. Furthermore, there is nothing on the summons or in the papers filed to establish that Mlambo was duly authorized by the plaintiff company to issue summons or lodge any documents in its name or on its behalf. There is, however, the document (not an affidavit) in which Mrehwa states that the plaintiff had signed a power of attorney and further implies that Mlambo had been duly authorized to sign the summons. Even if that were to be accepted, would it be sufficient to validate the summons?

In Yates Invstms (Pty) Ltd v Commissioner for Inland Revenue l956 (l) SA 364 (A) at 365C Centlivres CJ said:

> "Mr Prior who is the sole beneficial shareholder in appellant company stated that he appeared on behalf of the appellant. As he was not a duly admitted advocate the court questioned his right to appear on behalf of the appellant. He contended that he had the right of audience in that he was vitally interested in the result of the appeal as the amount of the taxable income of appellant was apportioned to him in terms of s 37 of the Income Tax Act l941. But the fact that he was vitally interested in the result of the appeal is irrelevant. Mr Prior and that appellant are different personae. A litigant is entitled to appear in person in any Division of the Supreme Court. The appellant, being an artificial person, cannot appear in person and must be represented by a duly admitted advocate: apart from certain statutory provisions which allow attorneys in very exceptional circumstances to appear in a Superior Court on behalf of a litigant, only a duly admitted advocate can represent a litigant in a Superior Court. A far as the Appellate Division is concerned there are no statutory provisions which allow anybody who is not a duly admitted advocate to appear on behalf of a litigant."

The profession in Zimbabwe being fused, any legal practitioner may appear in the High Court but, following the above principle, only a legal practitioner may appear for a company.

The question of the signing of pleadings was dealt with in S A Cultivators Ltd v Flange Engineering Co Ltd l962 (3) SA 156 (T). In that case, the defendant company had been summoned and had entered appearance through an attorney but the plea and counter-claim were signed by the managing director of the defendant. Jansen J, when dealing with the submission that the plea and counter-claim were irregular, said at 157:

> "In this regard, I have been referred to an unreported case Escombe Manufacturers Ltd v Central Rooiwinkel (Pty) Ltd, a judgment delivered by Hill J on 26 May l959. Inter alia the following appears in the judgment, which deals with an exactly similar situation:
>
> > 'The defendant in the present case, being an artificial person, cannot defend personally and must appoint some one to conduct the defence on its behalf. The signing of the plea is part of the defence a in terms of the Rules the only classes of persons who may represent the defendant are attorneys and advocates.'
>
> I subscribe to this view, and on this ground alone the application for the striking out is justified. It is unnecessary to consider the other ground mentioned, viz that having once entered appearance through an attorney, the defendant is not conducting his defence in person."

In Dormehl's Garage (Pty) Ltd v Magagula l964 (l) SA 203 (T), which involved an appeal from the judgment of a magistrate's court, a Mr J G Dormehl had appeared in the magistrate's court

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as representing the appellant

SMITH J & GILLESPIE J

and he also appeared in the Supreme Court and said that he was again appearing on behalf of the appellant company. A resolution had been filed by the company which authorized Mr Dormehl to sign a power of attorney to prosecute the appeal. The court, after considering the judgments in Ramsey v Fuchs Garage (Pty) Ltd l959 (3) SA 949 (C), Escombe Manufacturers Ltd v Central Rooiwinkel (Pty) Ltd, not reported, and a number of other cases, concluded that an artificial person could not be represented in the Supreme Court otherwise than by an advocate. Therefore the appellant company had no right to be heard when represented by Mr Dormehl. The appeal was accordingly postponed to enable the appellant to obtain proper representation.

The rule has been applied to prevent the officer of a company from entering appearance to defend on behalf of the company. That was in Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic & Commercial Carpet Fittings (Pty) Ltd & Anor l977 (3) SA 448 (W). At 450-451 Margo J said:

> "The requirement of representation by an advocate, which was of decisive importance in the decisions quoted above on the right of audience and the signing of pleadings, does not arise here. Nevertheless, the principle appears to me to be the same. In appearances before the court the position, on the authorities, is that a litigant who does not appear in person must be represented by an advocate, and in certain very exceptional circumstances may be represented by an attorney, but that a company, being an artificial person, may not appear in person. In pleadings the rule is that such must be signed by an advocate and attorney, or by the litigant in person; but, on the decided cases, a corporation, being an artificial person, cannot sign 'in person'."

The law and rules of court in Zimbabwe are consistent with the views set out above. Section 51 of the High Court Act [Chapter 7:06] provides that, subject to s 59, rules of court and any other law, in all proceedings before the High Court the parties may appear in person or be represented by any legal practitioner registered in terms of the Legal Practitioners Act [Chapter 27:07]. When one turns to the High Court Rules l971, r 48 provides that entry of appearance to defend shall be effected by the defendant or his attorney who shall record certain details and sign the entry made. Section 9(2) of the Legal Practitioners Act provides, inter alia, that, subject to any other law, no person other than a registered legal practitioner who is in possession of a valid practising certificate shall sue out any summons or process, carry on or defend any action, suit or proceedings in any court in the name of any other person or appear, plead or act in the capacity of a legal practitioner for or on behalf of any other peron in any action, suit or other proceedings in any court.

Hence, in *Agramac \(Pvt\) Ltd v Chisvo \& Anor* l99l (2) ZLR 185 (S) it was held that a company, being a fictitious person and incapable of appearing in person, could only be represented in the High Court or Supreme Court by a legal practitioner.

SMITH J & GILLESPIE J

Mention must be made of the proviso to s 9(2) of the Legal Practitioners Act which states that

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nothing therein shall prevent any director or officer in the sole employment of a corporation suing out summons or process or commencing, carrying on or defending any action, suit or other proceedings in court in the name of the corporation. It might be thought that this permits the officer of a company to act for that company in all courts. If this were the meaning, it would be a substantial alteration of the common law, effected in terms by no means clear. It should be noted that the proviso is worded in the negative. It does not confer power on a director or other officer to do the things specified in para (a) of s 9(2); it merely states that that subsection shall not prevent a director or officer of a company doing such things in the name of the company. The true meaning and intent of the proviso is much more restricted.

Order 4 r 1 of the Magistrates Court (Civil) Rules l980 (SI 290 of l980) provides that a party may institute or defend and may carry to completion any legal proceedings in person or by a legal practitioner or, in the case of a local authority, company or other incorporated body, through an officer thereof nominated by it for the purpose. Therefore a company may, for the purpose of legal proceedings in a magistrates court, appear by a legal practitioner or by an officer of the company who has been nominated for the purpose. The purpose of the proviso to s 9(2) of the Legal Practitoners Act is therefore solely to exempt this particular situation from the effect of s 9(2) as a whole, which would otherwise be in conflict with the magistrates court rules.

Thus, in Lake v Law Society of Zimbabwe HH-392-86 (not reported) the applicant, who was a registered legal practitioner in the full-time employment of a company, applied for authorization from the court to appear on behalf of the company in any court in any matter to which the company was a party and to undertake the conveyancing of immovable property on behalf of the company. Ebrahim J (as he then was) refused to authorize that the applicant be allowed to represent his employer in court but allowed him to practise as a conveyancer on behalf of his employer. At p 44 of the cyclostyled judgment the learned judge referred to the practice in South Africa and this country that companies were permitted to be represented by a director in inferior courts but must employ a legal practitioner to represent them in superior courts.

There is no provision in the High Court Rules l97l equivalent to Order 4 r 1 of the Magistrates Court (Civil) Rules. Therefore there is no statutory provision authorizing an officer of a company to sue out summons or process or to commence, carry on or defend any action, suit or other proceedings in the High Court in the name of the company. That being the case, the first ground of the exception must be upheld for a variety of reasons. Firstly, Mlambo signed the summons on behalf of M & D Collections and Claims

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SMITH J & GILLESPIE J

Recovery which is not a party to the claim and was not properly appointed to represent the plaintiff. Accordingly, the summons is invalid. Secondly, even if M & Debt D Collections and Claims Recovery had been appointed, by power of attorney, to act on behalf of the plaintiff, the summons would still have been invalid because the High Court Rules do not permit or authorize one company to act on behalf of another in instituting any legal proceedings. Furthermore, even if Mlambo had been an officer of th plaintiff company and duly appointed to act on behalf of the plaintiff company, the summons would still have been invalid, for the reasons set out above.

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With regard to the second leg of the exception, we do not consider that the alleged lack of compliance with paras (a) and (b) of r ll is of such significance as to warrant nullification of the summons. Paragraph (a) of r ll requires that a summons shall contain, in addition to the full name of the defendant and his residence or place of business, his occupation (where it is known) and also, if he is sued in a representative capacity, the capacity in which he is being sued. The summons in this case does not state the occupation of the defendant nor does it state that his occupation is unknown. However, since there is no indication that the occupation of the defendant is known to the plaintiff, the failure to mention his occupation is not a fatal defect. As the defendant is not being sued in a representative capacity, it is not necessary to state the capacity in which he is being sued. There is therefore no breach of the provisions of para (a). Paragraph (b) of r ll requires that the summons shall contain the fll name, occupation and residence of the plaintiff and, if he sues in a representative capacity, the capacity in which he sues. As the plaintiff is not suing in a representative capacity, it is not necessary for it to state the capacity in which it sues. The only formal defect in the summons, therefore, is that it does not state the occupation of the plaintiff. It is obvious, however, from the title of the plaintiff and from the nature of the claim what its occupation is. The defect is trivial and, in our opinion, not sufficiently material to invalidate the summons.

The exception is upheld and the plaintiff's claim is dismissed with costs.

Hussein Ranchhod & Co, defendant's legal practitioners

GILLESPIES MONUMENTAL WORKS (PVT) LTD v ZIMBABWE GRANITE QUARRIES (PVT) LTD 1997 (2) ZLR 436 (HC)

Court **High Court, Harare**

Smith J

Civil application

10 & 22 October 1997Judgment No. HH-160-97

Flynote

Appeal - civil matter - appeal against interlocutory order or interlocutory judgment - meaning of interlocutory order or interlocutory judgment - order granting leave to execute pending appeal - an interlocutory order not having decisive effect on main suit - leave to appeal required

Headnote

In terms of s 43(2)(d) of the High Court Act [Chapter 7:06] a litigant wishing to appeal against an interlocutory order or interlocutory judgment must obtain leave to appeal from the judge who had made the order or granted the judgment.

Interlocutory matters are pronouncements by the court upon matters incidental to the main dispute. However, statutes relating to the appealability of judgments or orders are taken to refer only to simple or purely interlocutory orders or judgments and not to orders or judgments which

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have a final and definitive effect on the main action. Thus leave to appeal must be obtained when the order of the judge is a simple interlocutory order and not an order which has a final and definitive effect on the main action.

The reason why appeals against simple interlocutory matters are subject to restriction is to discourage piecemeal appeals.

In the matter before the court, an ejectment order had been obtained against the applicant. The applicant noted an appeal against the order. The respondent sought and was granted an order granting leave to execute the ejectment order, notwithstanding the noting of the appeal. The applicant sought leave to appeal this later order.

Held, that the order granting leave to execute the ejctment order did not have a final or defnitive effect on the main suit. Consequently, leave had to be obtained to appeal against that order. The noting of an appeal against the order was thus invalid.

Cases cited:

Gillespies Monumental Works (Pvt) Ltd v Natural Stone Exploring Co Ltd & Anor HH-150-97

Jesse v Chioza 1996 (1) ZLR 341 (S)

SA Druggists Ltd v Beecham Group plc 1987 (4) SA 876 (T)

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

The court considered the following statutory provisions:

High Court Act [Chapter 7:06], s 43(2)(d)

SMITH J

Case Information

R M Passaportis, for the applicant

A P de Bourbon SC, for the respondent

Judgment

Smith J: There is a dispute between the parties as to who has the right to mine black granite on a piece of land in the Mutoko District. Originally, the applicant (hereinafter referred to as "Gillespies") mined the black granite in accordance with the rights granted to it by Special Grant 1216. Subsequently the respondent (hereinafter referred to as "Zimbabwe Granite") acquired the right to mine black granite in the area in terms of Special Grant l844. The piece of ground covered by Special Grant 1844 included the area covered by Special Grant 1216. The dispute resulted in each party making application for redress to this court - cases No. H-7203-97, H-7435-97 and H-7695-97. The result was an order that Gillespies vacate the area previously covered by Special Grant 1216 and presently covered by Special Grant l844 - Gillespies

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Monumental Works (Pvt) Ltd v Natural Stone Exporting Co (Pvt) Ltd & Anor HH-150-97. Gillespies noted an appeal against the order granted. Zimbabwe Granite filed an urgent chamber applicaion seeking an order that leave to execute the order be granted notwithstanding the filing of the notice of appeal. The order applied for was granted on 3 October l997. Gillespies then filed an appeal against that order, and applied for an order that Zimbabwe Granite vacate the area concerned pending the outcome of the two appeals. The application was dismissed with costs. My reasons for rejecting the application are as follows.

Section 43(l) of the High Court Act [Chapter 7:06] confers a right of appeal in any civil case to the Supreme Court from any judgment of the High Court. In terms of subs (2) of s 43, however, that right is qualified in the case of certain specified orders. By virtue of para (d) of subs (2), no appeal shall lie from an interlocutory order or interlocutory judgment made or given by a judge of the High Court without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court. There are some exceptions to this but they are not relevant to this case. The terms "interlocutory order" and "interlocutory judgment" are not defined in the High Court Act but they have been considered in many cases. In South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd l977 (3) SA 534 (A) Corbett JA referred to the fact that the tests to be applied in determining whether or not an order is interlocutory "emerge with a reasonable degree of certainty" from a series of decisions f the Appellate Division of South Africa ranging from 1911 to 1977. The general effect of this series of decisions, "together with consistent judgments of other courts", is summarized in Jones & Buckle The Civil Practice of the Magistrates Courts in South Africa vol 1 8 ed at p 330 as follows:

SMITH J

"(a) The term 'interlocutory' refers to all orders pronounced by the court upon matters incidental to the main dispute, preparatory to, or during the process of, the litigation. Orders of this kind are of two classes; (i) those which have a final and definitive effect on the main action; and (ii) those which do not (known as 'simple' (or purely) interlocutory orders' or 'interlocutory orders proper').

(b) Statutes relating to the appealability of judgments or orders which use the word 'interlocutory' or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation.

(c) The test as to whether or not an order is a simple interlocutory one is the well-known one stated by Schreiner JA in Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd:

> ' ... a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit" or ... unless it "irreparably anticipates or precludes some of the relief which would or might be given at the hearing".'

(d) The question is not whether any matter has been fully determined, or whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal can put right, but whether the decision bears upon, and in that way affects, the decision in the main suit. Thus all orders which are merely procedural in nature are simple interlocutory orders, and as such are not appealable. On the other hand, even though an order be made during the process of litigation, if it is not simply interlocutory but has a direct result upon the final issue and disposes of a definite portion of the suit,

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then it has 'the effect of a final judgment' and is appealable. Not merely the form of the order, but also, and predominantly, its effect must be considered. Thus, an order which appears in form to be purely interlocutory will be appealable if its effect is such as makes it final and definitive of any issue or portion thereof in the main action; and by the same token, an orderwhich might appear, according to its form, to be finally definitive in this sense may nevertheless be purely interlocutory in effect.

(e) At common law a purely interlocutory order may be corrected, altered or set aside by the judge who granted it at any time before the final judgment. An order which has final and definitive effect, even though it may be interlocutory in the wide sense, is *res judicata*.

The policy underlying statutory provisions prohibiting or limiting appeals against interlocutory orders is the discouragement of piecemeal appeals. It is not to preclude a party from ever challenging it. A decision on a point of evidence is not an 'order' at all and is not appealable, but the party against whom such an order goes can rely on this as a ground of appeal if the judgment on the whole goes against him. The same principle applies with equal force to appeals against interlocutory orders: though such orders are not subject to an immediate appeal, they may be attacked in an appeal against the judgment in the whole case."

In the South Cape case *supra* it was held that an order granting leave to execute relates to a matter incidental to the main dispute. In applying the

SMITH J

principles set out, above, which he had enunciated, to the case before him, Corbett JA at 551A-C said:

"It seems clear that the litigation which resulted in judgment being given against the applicant on l October l976 (ie for the sum of R111 700.50, interest and costs) is still in progress. The appeal noted to this court is a step in that litigation and the case will not be concluded until this court has pronounced finally upon that appeal. The order given by the Full Bench granting leave to execute related to a matter incidental to the main dispute and would seem, therefore, to fall into the general category of 'interlocutory', in the wide sense."

He then went on at 551G-552A to say:

"Next, the question is whether an order for leave to execute is a simple interlocutory order or an interlocutory order having a final and definitive effect on the main action. If the test laid down in the Pretoria Garrison Institutes case *supra* be applied, then, in my view, it must be held to be simple interlocutory order. It does not dispose of any issue or any portion of the issue in the main suit, nor does it irreparably anticipate or preclude any of the relief which might be given at the hearing (taking the 'hearing' in such a case to be the hearing of the appeal). It leaves the court of appeal free to make whatever decision it deems fit in the main action. Thus, in the present case, this court would remain free to confirm the decision of the trial court, in which event the completed execution of the judgment would not be disturbed; or it could reverse or amend that decision, in which case the respondent would have to make complete or partial restitution. In the latter event, applicant would be protected y the security de restituendo which was ordered to be furnished."

The learned Judge of Appeal conceded that the execution of the order of the trial court may cause the appellant inconvenience or hardship or may even operate to his financial detriment. He said, however, that these matters whilst no doubt being relevant to the consideration of the question as to whether leave to execute should or should not be granted, do not appear to have any bearing on the issue as to whether or not the order is a simple interlocutory one or not. He went on to say at 552D:

"As was laid down in the Globe and Phoenix and Pretoria Garrison Institutes cases *supra* it is only irreparable harm, in the sense of the order bearing directly and irreparably upon the decision in the main suit and thereby

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affecting it in that way, that renders an interlocutory order final and definitive and not a simple interlocutory one."

Finally, at 552G the learned Judge of Appeal concluded:

"On principle, therefore, the order made by the Full Bench granting leave to execute must be classified as being purely interlocutory. Moreover, such authority as there is supports this view. In van Leggelo v Transvaal Cellocrete (Pty) Ltd & Anor l953 (2) SA 287 (T), Blackwell J held that an order by a magistrate granting leave to execute pending an appeal was interlocutory and consequently not appealable in terms of s 83 of the Magistrates Courts Act 32 of 1944, in that it did not have the effect of a final judgment. This is, so far as I am aware, the only South African case in point."

When the decision in the South Cape case *supra* was given, the relevant legislation provided that an appeal could be brought against an interlocutory order of the Supreme Court with the leave of the court granting the order. In l982, the provision in question was amended so as to make no provision for an appeal against an interlocutory order. The result is that unless an

interlocutory order of a Supreme Court in South Africa has a final and definite effect on the main action it is not appealable, even with leave. In South African Druggists Ltd v Beecham Group plc l987 (4) SA 876 (T) the facts were as follows. Beecham had been granted an extension of one of its patents by the Full Bench of the Transvaal Provincial Division. South African Druggists (hereinafter referred to as "SAD") noted an appeal to the Appellate Division. Beecham then applied to the Full Bench for an order putting into operation the order that had been granted pending the outcome of SAD's appeal. The application was granted on 2 June l987. SA then filed a notice of appeal to the Appellate Division against the order of 2 June and filed an application to the Full Bench for leave to appeal against its order. Eloff DJP after quoting with approval the principles enunciated in the South Cape case *supra*, held that the court could not entertain the application for leave to appeal because the appeal was from an interlocutory ruling of the Supreme Court which did not have a final or definitive effect on the main suit. He said that as far as SAD was concerned, the order of 2 June l987 did not irreparably affect its interests, and it certainly did not preclude any relief which SAD might be accorded by the Appellate Division.

In my view, the order I granted on 3 October l997 giving Natural Stone leave to execute the order evicting Gillespies from the area of land concerned does not have a final or definitive effect on the main suit. It is not "decisive or definitive of the rights of the parties and does not have the effect of disposing of the whole, or at least a portion, of the relief claimed by one of them" - see *Jesse v Chioza* l996 (1) ZLR 341 (S) at 344. Accordingly, in terms of s 43(2) of the High Court Act [Chapter 7:06] leave had to be obtained before an appeal could be filed or noted against my order of 3 October 1997. In the absence of such leave, the noting of the appeal was invalid and hence there was no basis for the application by Gillespies.

Winterton, Holmes & Hill, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

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KOHLHAAS v CHIEF IMMIGRATION OFFICER & ANOR 1997 (2) ZLR 441 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Constitutional application

13 & 28 October 1997Judgment No. S-183-97

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 22(1) - right of freedom of movement and to reside in any part of Zimbabwe - right of citizen to have spouse reside with her in Zimbabwe - right not affected by 14th amendment to Constitution - derogations in section aimed at non-citizens

Immigration - marriage of convenience - what is - what must be proved - on whom onus lies

Headnote

The limitations to the freedom of movement permitted by s 22(3)(d) of the Constitution are directed not at citizens of Zimbabwe but at any person who is not a citizen or a permanent resident. The expulsion of a non-citizen will not be a contravention of his fundamental right of freedom of movement, no matter that he is related to or married to a citizen or permanent resident. Consequently, if the non-citizen spouse of a Zimbabwean citizen brings an application, protesting that his right of freedom of movement is being infringed by the refusal of the immigration authorities to permit him to remain, he would be met by the unassailable answer that the decision could be justified under the immigration laws. However, an application brought by the citizen wife on the ground that her freedom of movement was being impaired would be differently regarded. Her fundamental rights embrace the right to have her alien husband reside with her, and this right has not in any way been impacted upon, interfered with or diminishe by the 14th amendment to the Constitution.

Where it is alleged by the immigration authorities that a marriage to a citizen is a marriage of convenience, it must be shown (1) that the marriage was entered into for the primary purpose of evading the immigration laws; and (2) that there must be a lack of intention to live together permanently as husband and wife. Each ingredient is of equal importance. The onus of proving the marriage to be one of convenience rests on the party who makes the assertion. Proof of the first alone will not be enough; the ability to show an absence of intention to show an absence of intention to establish a true marriage relationship will do so. It is well established that even if the parties go through a form of marriage purely for the purpose of representing themselves to the outside world as being married, without the intention of establishing a true marriage in the sense of mutual love, support and comfort, the marriage would be valid and terminable by divorce.

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Cases cited:

Hambly v Chief Immigration Officer (2) 1995 (2) ZLR 431 (H)

Hofstetter v Chief Immigration Officer & Ors HH-136-97

Jesse v Chief Immigration Officer \& Ors 1996 (2) ZLR 720 (H)

Martens v Martens 1952 (3) SA 771 (W)

Maseko v Maseko 1992 (3) SA 190 (W)

Nkomo & Anor v A-G & Ors 1993 (2) ZLR 422 (S); 1994 (3) SA 34 (ZS)

Puttick v A-G & Anor [1979] 3 All ER 463 (FamD)

Rattigan \& Ors v Chief Immigration Officer \& Ors 1994 (2) ZLR 54 (S); 1995 (1) BCLR 1 (ZS)

R v Immigration Appeal Tribunal ex p Khan (Mahmud) [1983] 2 All ER 420 (CA)

Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S); 1995 (1) BCLR 78 (ZS)

Vervaeke v Smith (Messina & A-G intervening) [1982] 2 All ER 144 (HL)

The court referred to the following statutory provisions:

Constitution of Zimbabwe 1980, s 22(1)

Case Information

A J Dyke, for the applicant

L R Goredema, for the respondents

Judgment

Gubbay CJ: Three years ago, in the decision of *Rattigan \& Ors v Chief Immigration Officer \& Ors* 1994 (2) ZLR 54 (S); 1995 (1) BCLR 1 (ZS), this court declared that a female citizen of Zimbabwe, married to an alien, is entitled, by virtue of the right to freedom of movement protected under s 22(1) of the Constitution of Zimbabwe, to reside permanently with her husband in any part of Zimbabwe. For to prohibit the alien husband of a marriage, genuinely entered into with the shared intention of establishing the matrimonial abode in Zimbabwe from residing here, would place the wife in the dilemma of having to decide whether to accompany her husband to a country other than Zimbabwe and live together there, or to exercise her constitutional right to continue residing in Zimbabwe without him. It would thus undermine and devalue the fundamental and unqualified right of the wife, as a citizen and member of a family unit, to live in this country.

Within a matter of months the ruling was extended in Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S); 1995 (1) BCLR 78 (ZS), to embrace within the mobility rights of the citizen wife, the right of the alien husband to lawfully engage in employment or other gainful

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activity in any part of Zimbabwe.

On 6 December 1996, the Constitution of Zimbabwe Amendment (No. 14) Act 1996, was promulgated. Paragraph (d) to s 22(3) of the Constitution was repealed by s 8(1). The amended paragraph, read in conjunction with subs (3), now provides:

> "Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision - ...
>
> (d) for -

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> (i) the imposition of restrictions on the movement or residence within Zimbabwe of any person who is neither a citizen of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe; or
>
> (ii) excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe;
>
> whether or not he is married or related to another person who is a citizen of or permanently resident in Zimbabwe" (my emphasis).

The change brought about by the amendment was to separate the former limitations into subparas (i) and (ii); to alter "any persons" to the singular; and to add the wording that has been italicized.

The applicant is a citizen of Zimbabwe by birth and a permanent resident of the country. She married Hans Hubert Kohlhaas on 1 February 1997. He was born in St Tšnis, Germany, and is a national of that country. During 1988 he entered Zimbabwe under the authority of temporary residence and work permits in order to engage in his occupation as a combine harvester technician. His permits were extended periodically until December 1996 when the Department of Immigration advised that he was required to leave the country by 21 January 1997. At that time, Mr Kohlhaas was unemployed. A temporary visitor's permit was issued to him. Its validity was prolonged on two occasions, but not beyond 4 April 1997. Mr Kohlhaas was informed that if he did not remove himself from the country by then he would be in contravention of the Immigration Act [Chapter 4:02].

On 4 April 1997, the High Court, at the instance of the applicant and her husband, granted an order restraining the respondents from expelling or in any way removing Mr Kohlhaas from Zimbabwe, pending the outcome of an application to be brought by his wife for relief in terms of s 22(1) of the Constitution.

The required application, which was lodged with this court on 11 April 1997, seeks an order in terms identical to those granted in the Salem case *supra*. It is opposed on two grounds: First, that the effect of the amendment to s 22(3) of the Constitution is to deny a citizen wife the relief she was declared entitled to in the Rattigan and Salem decisions. Second, that the marriage between the applicant and Mr Kohlhaas was one of convenience, contracted with the primary purpose of evading the immigration laws of the country and in order to enable Mr Kohlhaas to

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remain living unimpeded in the country of the applicant.

A resolution of the interpretational issue adverse to the applicant will make it unnecessary for the court to decide whether or not her marriage to Mr Kohlhaas was one of convenience.

Before turning to an examination of para (d) to s 22(3) of the Constitution, I would stress that where fundamental human rights or freedoms are

conferred on individuals under a Constitution, derogations therefrom, as far as the language permits, should be narrowly or strictly construed. See *Nkomo \& Anor v Attorney-General \& Ors* 1993 (2) ZLR 422 (S) at 432D-E; 1994 (3) SA 34 (ZS) at 41B-C, and the cases there cited.

It is immediately apparent that the limitations to the freedom of movement permitted by para (d) are not directed at a citizen of Zimbabwe but, in subpara (i) at any person who is neither a citizen of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe; and in subpara (ii) - which is the derogation relied upon by the respondents - at any person who is not a citizen of Zimbabwe. The final sentence to para (d), which applies to both subparagraphs, refers only to the non-citizen. Thus the expulsion from Zimbabwe of a non-citizen under the authority of any law will not be in contravention of his fundamental right to freedom of movement, no matter that he is married or related to a person who is a citizen of, or permanently resident in, Zimbabwe.

It necessarily follows that if Mr Kohlhaas, married to a citizen of Zimbabwe, had brought an application protesting that his right to freedom of movement had been infringed by the refusal of the immigration authorities to permit him to remain in the country, he would have been met by the unassailable answer that the decision was justified under the provisions of the Immigration Act.

But the applicant is the wife of Mr Kohlhaas. It is her right of freedom of movement as a citizen of Zimbabwe that is under consideration. Certainly, there is nothing contained in any law that qualifies the right of a citizen to move freely throughout Zimbabwe, to reside in any part of Zimbabwe, to enter and leave Zimbabwe, and to be immune from expulsion from Zimbabwe, as mandated in s 22(1) of the Constitution. This fundamental right, as declared in the Rattigan and Salem judgments, embraces the entitlement of the applicant to have her alien husband reside with her in Zimbabwe.

Accordingly, it is my view that the recent amendment to para (d) to s 22(3) of the Constitution does not in any way impact upon, interfere with or diminish, the mobility rights of a citizen wife and, in particular, the right to have her alien husband reside with her permanently in Zimbabwe. The Rattigan and Salem decisions retain their authority. The effect of the amendment is merely to restate the law in relation to the rights of non-citizens. It leaves untouched the rights of a citizen spouse. The addition of the concluding sentence to para (d) merely puts in express wording what was previously implicit, namely, that marriage to a citizen spouse or to a person who enjoys permanent residence in Zimbabwe, will not afford the alien partner protection against the imposition of restrictions on movement or residence in Zimbabwe or expulsion from

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Zimbabwe, under the authority of a law which makes such provision.

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The phrase "marriage of convenience" is a popular, not a legal, description. Classic examples of such a marriage are the "immigration marriage", entered into solely for the purpose of enabling an alien to enter or remain in the country of the other party; and the "emigration marriage", contracted in order to obtain for one of the parties an exit permit from his or her country. See Sinclair The Law of Marriage vol 1 at 363.

In R v Immigration Appeal Tribunal, ex p Khan (Mahmud) [1983] 2 All ER 420 (CA) Lord Lane CJ, in dealing with the marriage of a Pakistan national to an English prostitute, set out, at 422a, two ingredients of a marriage of convenience. The first is that the marriage was entered into for the primary purpose of evading the sweep of the immigration laws; the second is the necessity of there being a lack of intention to live together permanently as man and wife. This test was applied by Smith J in *Jesse v Chief Immigration Officer \& Ors* 1996 (2) ZLR 720 (H). I respectfully approve of it.

It is now well established that even if parties go through the form of marriage purely for the purpose of representing themselves as married to the outside world, without the intention of establishing a true marriage in the sense of mutual love, support and comfort, the marriage would be valid and terminable by divorce. See Martens v Martens 1952 (3) SA 771 (W) at 775B; Maseko v Maseko 1992 (3) SA 190 (W) at 196; *Jesse v Chief Immigration Officer \& Ors supra* at p 726; Puttick v Attorney-General & Anor [1979] 3 All ER 463 (FamD) at 469j; Vervaeke v Smith (Messina & Attorney-General intervening) [1982] 2 All ER 144 (HL) at 148e and 156b-c; Sinclair op cit at 364; Bromley's Family Law 7 ed at 92.

In the cases of Hambly v Chief Immigration Officer (2) 1995 (2) ZLR 431 (H) at 433H, Hofstetter v Chief Immigration Officer & Ors HH-136-97 (not reported) and in Jesse v Chief Immigration Officer *supra* at p 727, the High Court has held that the onus of proving the marriage to be one of convenience rests upon the party who makes the assertion. I believe that approach to be correct. Consequently, the factual determination to be made is whether the respondents have proved on a balance of probability that the applicant and Mr Kohlhaas entered into a marriage of convenience in order (i) to allow the latter to continue to reside in this country; and (ii) without any intention of living together as man and wife. Each ingredient is of equal importance. Proof of the first alone will not suffice to defeat the application; the ability to show an absence of intention to establish a true marriage relationship will do so.

In their opposition, the respondents placed much store on the undisputed fact that it was after Mr Kohlhaas had been informed that his temporary residence and work permits would not be renewed and he was issued with a visitor's permit due to expire on 21 January 1997, that he wed the applicant. And, further, that when he wrote to the first respondent on 21 January 1997

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requesting an extension of three months to organise his affairs prior to departure, he did not state that he would be marrying the applicant on 1 February 1997. But as, at that time, marriage to the applicant had not even been discussed, Mr Kohlhaas hardly could be expected to have mentioned it in the letter.

It is of some relevance, as contended by the respondents, that Mr Kohlhaas had resided in Zimbabwe for about eight years without getting married. Yet he did so after a six week courtship, when aware that he was required to leave the country. However, the overall picture portrayed by the applicant in her founding affidavit, together with the depositions and documents in support thereof, seems to me to reduce substantially the significance of this feature.

The applicant met Mr Kohlhaas on 14 December 1996 at a gliding club Christmas party in Concession. The attraction felt for one another was immediate. Virtually from that day they have resided together, save only for the last week of 1996 when the applicant honoured an undertaking to accompany her parents to South Africa. Christmas Day was spent by the couple with the applicant's parents and family members. Photographs of that occasion reflect the presence of Mr Kohlhaas.

On 26 January 1997, it was the applicant, and not Mr Kohlhaas, who suggested that they should marry. Due to the applicant's aversion to the fuss, bother, stress and dissension consequential upon arranging a large wedding - all of which had occurred upon the betrothal of her sister in 1988 - it was at her wish, indeed insistence, that the marriage take place with the minimum of delay. Her attitude was well known to her father and sister, who in supporting affidavits corroborated the reason for the wedding being expedited.

The forthcoming marriage was announced in the daily newspaper of 31 January 1997 and relatives and friends, resident outside the country, were informed by telephone. The applicant's grandfather in South Africa sent a letter of congratulation and various other congratulatory cards in both English and German were received by the day of the wedding.

The marriage ceremony was conducted in church rather than at the magistrates court. The applicant's sister acted as bridesmaid and her own daughter as flower-girl. A friend of Mr Kohlhaas was best man. The reception was held at the home of the applicant's parents in Harare. About thirty guests attended the church ceremony and the reception. Some travelled to Harare from Bindura, Kwekwe and Marondera. The cost of the wedding, inclusive of the dresses for the bride and bridesmaid, estimated at between $4 000 and $5 000, was paid by the applicant's father. Only the food at the reception was provided as a wedding present by a friend of the applicant who operates a catering business. No less than twenty-nine photographs were taken. They bear eloquent testimony to the happiness of the wedded couple. Presents were received and letters of appreciation written in response.

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Two weeks after the wedding a honeymoon was spent touring Zimbabwe with members of the Kohlhaas family, who had arrived from Germany. Photographs of the holiday confirm its

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occurrence.

Nor can it be gainsaid that at the date of the founding affidavit, which was some ten weeks after the marriage, the applicant and her husband were residing together at Glendale in the Mazowe Valley.

On these facts, I regard the assertion of the respondents, that the whole scenario was completely stage-managed in an attempt to escape from the tentacles of the immigration laws, as farfetched. I am satisfied that the respondents have failed to establish even the first ingredient of a marriage of convenience, let alone the second. Even if the onus had rested with the applicant to prove that the marriage was not one of convenience, I would have found it to have been discharged.

Accordingly, the applicant is due the relief claimed. In the result:

1. The application is allowed, with costs to be paid by the first respondent.

2. It is hereby declared that the right of the applicant under s 22(1) of the Constitution of Zimbabwe to freedom of movement, that is to say, the right to reside in any part of Zimbabwe, has been contravened by the actions of the first and second respondents.

3. By virtue of the applicant's right under the aforementioned s 22(1) to have her husband residing with her in any part of Zimbabwe, it is hereby ordered that -

   (a) the first respondent issue to Hans Hubert Kohlhaas, within thirty days hereof, such written authority as is necessary to enable him to remain in Zimbabwe on the same standing as any other alien who is a permanent resident;

   (b) the said Hans Hubert Kohlhaas be accorded the same rights as are enjoyed by all permanent residents of Zimbabwe, including the right to engage in employment or other gainful activity in any part of Zimbabwe, and that the first respondent impose no restriction upon such right.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Scanlen & Holderness, applicant's legal practitioners

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

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RHB IMPORT & EXPORT (PVT) LTD v DIRECTOR OF CUSTOMS & EXCISE 1997 (2) ZLR 448 (HC)

Court **High Court, Harare**

Smith J

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Civil action

21 & 29 October 1997Judgment No. HH-166-97

Flynote

Customs and excise - Customs and Excise Act [Chapter 23:02] - s 39(2) - sale of goods which have not been properly entered - period within which goods may be sold

Headnote

Where two possible meanings can be given to a statutory provision and the one meaning would result in greater hashness effects upon persons affected than the other, the more favourable and beneficial interpretation should be adopted.

The plaintiff had imported goods on 13 December 1993. The goods were removed to a State warehouse on 25 February 1994 because of failure by the plaintiff to pay the required duty timeously. On 25 March 1994, notice was given of a rummage sale to be held on 27 and 28 April. At that sale, the plaintiff's goods were sold. The plaintiff claimed damages on the grounds that the sale was unlawful and should not have been held until 3 months after the goods were removed to the warehouse.

Held, that on a proper interpretation, s 39(2) of Customs and Excise Act [Chapter 23:04] requires that imported goods which have not been properly entered may only be sold when they have been removed to a State warehouse or other specified place and have remained there for not less than three months.

Cases cited:

Cornelissen NO v Universal Caravan Sales (Pty) Ltd 1971 (3) SA 158 (A)

Principal Immigration Officer v Bhula 1931 AD 323

The court considered the following statutory provisions:

Customs and Excise Act [Chapter 23:04], s 39(2)

Case Information

A J Dyke, for the plaintiff

Miss I S Dube, for the defendant

Judgment

Smith J: The plaintiff (hereinafter referred to as "RHB") imported some bearings and wheeljacks. They were sold at a customs rummage sale. RHB claimed that the sale was in contravention of the provisions of the Customs and Excise Act [Chapter 23:02] (hereinafter referred to as "Chapter 23:02") and issued summons claiming damages in the sum of $2 898 409. The

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SMITH J

defendant (hereinafter referred to as "the Director") opposed the claim on the grounds that the goods were lawfully sold in accordance with the provisions of s 35 of Chapter 23:02. The facts in this case are not in dispute. A statement of agreed facts was produced which reflected the following sequence of events. The goods, which were packed in a number of containers, were imported on 13 December l993. They were moved into a State warehouse on 25 February l994. On 25 March l994, a notice was published in the Government Gazette advising that a customs rummage sale would be held on 27 and 28 April l994. RHB submitted a bill of entry on 29 March and a custom assessment was issued on 22 April. The goods in question, which formed part of the consignment imported by RHB, were sold at the customs rummage sale on 27 or 28 April. On l0 May, RHB paid duty totalling $298 823.72. RHB submitted a correct or post entry on 12 July l994.

The parties agreed that RHB suffered damages in the capital sum of $l 745 262.

Both Mr *Dyke* and Miss *Dube* agreed that the crux of the dispute is the meaning to be given to s 39(2) of Chapter 23:02 which reads as follows:

> "In default of entry in terms of subsection (l), the proper officer may cause the goods to be conveyed to a State warehouse or to any other place indicated by him or may himself so remove them, and if entry is not made within three months, together with payment of any duty due and all charges of removal and warehouse rent, the Director may, subject to this section, cause the goods to be sold by public auction, if they have not been entered before the date fixed for their sale."

This provision expressly empowers the Director to sell goods which have not been properly entered within a period of three months. It is not expressly stated, however, when the three-month period commences to run. Section 39(l)(b) of Chapter 23:02 provides that, subject to any regulations made under the Act, every importer of goods which are removed to a transit shed or container depot shall make entry of those goods at the port of entry within ten days after the time of their importation, but the Director may grant an extension of time within which the goods may be entered. The paragraph clearly states when the ten-day period commences to run.

Miss *Dube* argued that the three month period referred to in s 39(2) of Chapter 23:02 started running at the end of the ten-day period referred to in para (b) of subs (l). In the present case, since the goods were imported on 13 December and were sent to a container depot, entry was required by para (b) of subs (l) to be made within ten days, which expired on 24 December. The three-month period referred to in subs (2) of s 39 then started running on 25 December l993 and expired on 25 March. Therefore the sale of the goods on 27 or 28 April was valid. Mr Dyke, on the other hand, submitted that s 39 (2) provided that the proper officer may cause the goods to be removed to a State warehouse or other place and, in the context of that subsection the three

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month period started to run from the date the goods were so removed. He pointed out that

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general notice 192 of 1994 which gave notice of the customs rummage sale on 27 and 28 April stated that goods which remained uncleared in State warehouses for periods in exces of three months would, unless customs clearance was effected before that date, be sold by public auction on the said dates. Since the goods imported by RHB were only moved into the State warehouse on 24 February, the three-month period did not expire until 23 May, by which date RHB had paid duty totalling $278 823.72.

Subsection (1) of s 39 of Chapter 23:02 requires that every importer of goods shall make entry at the port of entry either at the time of importation or within ten days thereof, unless an extension of time is granted by the Director. Imported goods are held at the port of entry or at a transit shed, customs area or container depot pending the making of such entry. Subsection (2) then provides what may be done if entry is not made in accordance with the provisions of subs (l). Firstly, the proper officer may remove the goods to a State warehouse or other specified place or cause then to be so removed. Then, if entry is not made within three months, together with any duty due and all charges of removal and warehouse not, the Director may cause the goods to be sold. I cannot see any reason for holding that the three-month period begins to run from the end of the one-day or ten-day period fixed by subs (l). There is nothing in subs (2) to indicate that. I consider that the three months period must begin to run eiher from the time of importation of the goods or from the date of their removal to a State warehouse or other specified place. The drafting of subs (2) favours the latter interpretation. I say so for two reasons. Firstly, the two provisions are set out in one sentence, which would normally connote a connection between the two concepts. Thus it is a requirement that the goods are removed to a State warehouse or other specified place before the three-month period begins to run. Secondly, the subsection states that the goods may be sold if the importer does not pay any duty due and all charges of removal and warehouse rent. Thus the subsection recognizes that no duty may be payable, by using the word "any", but also recognizes that removal charges and warehouse rent will be due, by using the word "all" instead of "any". This interpretation is fortified by the wording of GN l92 of l994 which gave notice of the customs rummage sale. It stated that goods which remain uncleared in State warehouses for periods in excss of three months will, unless clearance is effected before that date, be sold by public auction.

Where there is ambiguity in the wording of a statutory provision, there are a number of accepted principles of interpretation which may be used to determine the intention of the legislature. In Devenish's Interpretation of Statutes at p 172 the learned author refers to the rule that, in cases of doubt,

the most beneficial interpretation should apply. He says that that rule is founded on a provision of the Digest semper in dubius benigniora praeferenda sunt and is also a reflection of the ethos of natural law with its emphasis on individual justice. Section 39(2) of Chapter 23:02 derogates from the rights of the owner of the property. The owner is not allowed to claim possession of his goods unless and until proper entry has been made and, if he fails to make proper entry within the prescribed period, the Director is empowered to sell the goods. If s 39 (2) were to be interpreted as meaning that the three-month period begins to run when the goods are imported,

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it would mean that the importer would have a much horter period within which to make proper entry and clear his goods. To interpret s 39 (2) as meaning that the three-month period begins to run when the goods are removed to a State warehouse would obviously be more favourable and beneficial for the owner of the goods. In Principal Immigration Officer v Bhula 1931 AD 323 at 336-7 Wessels JA said:

> "There is another principle which ought to be invoked in this case, and which would lead to the same interpretation. It has been repeatedly laid down by this court that where a statute is clear, the court must give effect to the intention of the legislature, however harsh its operation may be to individuals affected thereby. Where, however, two meanings may be given to a section, and the one meaning leads to harshness and injustice, whilst the other does not, the court will hold that the legislature rather intended the milder than the harsher meaning. This principle is thus stated by Maxwell (3 ed p 299): 'A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two possible interpretations (*per* Lord Herschel in Arrow Shipping Co v Tyne Comr [1894] AC 516). Whenever the language of the legislature admits of two constructions, and if construed in one way wouldlead to obvious injustice, the courts act upon the view that such a result could not have been intended unless the intention had been manifested in express words'; and cases cited."

In Cornelissen NO v Universal Caravan Sales (Pty) Ltd l971 (3) SA 158 (A) at 175 Holmes JA commented that if the language of an Act is regarded as uncertain, regard must be had to certain interpretative aids. He mentioned three, the one relevant to the circumstances of this case being:

> "'Where two meanings may be given to a section, and the one meaning leads to harshness and injustice, whilst the other does not, the court will hold that the legislature rather intended the milder than the harsher meaning'
>
> *per* Wessels JA in Principal Immigration Officer v Bhula l931 AD 323 at p 336 in fine."

It seems to me that s 39 (2) of Chapter 23:02 must be interpreted as meaning that imported goods which have not been properly entered may only be sold when they have been removed to a State warehouse or other specified place and remained there for at least three months. That meaning accords with the grammatical interpretation of the subsection and with the principles enunciated by Wessels JA in Bhula's case *supra*. Such an interpretation would not

ordinarily be prejudicial to the State. There is no compelling reason why goods should be sold earlier rather than later. Whether the goods are subsequently cleared or sold by the Director, removal charges and warehouse rent must be paid. Moreover, it appears from the wording of GN l92 of l994 that this is the interpretation that has been placed on s 39 (2) of Chapter 23:02 by the Director.

For the reasons set out above, I consider that the sale on 27 or 28 April l994 of the bearings and wheeljacks imported by RHB was invalid because the goods had been at the State warehouse for less than three months. The parties are agreed that the damages suffered by RHB amount to $1 745 262.

It is ordered that the defendant pay the plaintiff -

(a) $l 745 262, with interest thereon at 25% *per* annum from 21 October l994 to date of

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payment;

(b) costs of suit.

Scanlen & Holderness, plaintiff's legal practitioners

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

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MAKUWAZA v NATIONAL RAILWAYS OF ZIMBABWE 1997 (2) ZLR 453 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Appeal from Labour Relations Tribunal

16 & 30 October 1997Judgment No. S-186-97

Flynote

Employment - contract - termination - grounds for - proof of - admission by employee of *actus reus* of fraud but not of *mens rea* - not an admission of fraud

Employment - contract - termination - suspension pending application for order terminating employment - grounds for - unregistered code of conduct - prescribed penalty for alleged misconduct falling short of dismissal - such misconduct not a ground for suspension

Interpretation of statutes - time - whether Saturdays, Sundays and public holidays included

Headnote

An admission by an employee that he committed the *actus reus* of an alleged offence while either denying that he had the necessary intent or else asserting that the conduct did not constitute an offence is not an admission of the offence.

If an employee commits a minor offence, for which an unregistered code of conduct provides a specific punishment falling short of dismissal, there are no grounds for suspension pending an application for permission to dismiss the employee. All that would have been proved are grounds for a reprimand or other punishment.

Where an enactment refers to a period of time numbered in days, Saturdays, Sundays and public holidays are included in the period unless the enactment specifically provides otherwise.

Cases referred to:

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

Matoi v ZISCO S-231-93

Case Information

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Miss W T Miles, for the appellant

Miss E Mushore, for the respondent

Judgment

McNally JA: This is an appeal from the Labour Relations Tribunal (LRT). The Deputy Chairman refused an application for condonation of the late noting of an appeal to the LRT on the grounds that, although the delay was entirely excusable, the prospects of success were nil.

In this case, said the Deputy Chairman, the reason for dismissal was proved

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McNALLY JA

"in the sense that it is admitted". Therefore, he concluded "dismissal is unavoidable".

In coming to this conclusion the Deputy Chairman overlooked the point, as did the Labour Relations Officer (LRO), that the appellant admitted the facts (*actus reus*) but not the criminal intent (*mens rea*). What he said was that he did not know it was an offence, and anyway it was not an offence under s 156 of the Regulations.

The error is apparent if one looks at the Record of Proceedings signed by the LRO. The relevant extract reads:

> "Submissions from the employee
>
> Mr Makuwaza admitted in a letter dated 17 October 1994, that he had used his PTO's in the conveyance of goods belonging to Messrs R Ndlovu, Nsingo and J Shumba. *He further wrote that he was not aware that he could not use his concessions PTO's to convey goods belonging to others* (my emphasis).
>
> Findings
>
> 1. Mr Makuwaza did admit that he used his Privileged Ticket Orders (PTOs) *in a fraudulent manner*" (my emphasis).

The non sequitur is clear. He did not admit fraud. Fraud requires an intent to defraud. Without intent there is no offence.

That is the first point, which alone invalidates the decision to refuse condonation. But there are others.

The Deputy Chairman noted that "the internal regulations prescribe a penalty less than dismissal for such contravention". He then went on to rule, by reference to two Supreme Court decisions, that where those internal regulations are part of an unregistered Code of Conduct, they are irrelevant once the statutory procedures are invoked. (The Railways Industry Code of Conduct was registered only on 15 November 1995).

I am a little concerned that an over-literal interpretation of these two judgments may result in obvious injustice. It is true that in Matoi v ZISCO S-231-93, it was stated that "An unregistered code would however remain subservient to the Regulations, and its observance or

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non-observance would remain irrelevant to the question of whether the Regulations have been duly complied with."

But that statement was made in the context of an agreement about procedure. It was argued that the procedures under the unregistered Code of Conduct had not been followed, and Muchechetere JA was saying that that was irrelevant.

However if an offender commits a minor offence, for which the unregistered Code of Conduct provides a specific punishment short of dismissal, it must surely be a defence before an LRO to say "I admit the offence, but our unregistered Code of Conduct provides for a warning in such a case. How can my employer now apply for my dismissal?"

McNALLY JA

The reason why that would be a good defence appears, I would suggest, from the decision in the other case cited by the Deputy Chairman - *Masiyiwa v TM Supermarkets* 1990 (1) ZLR 166 (S). In that case, I spoke, not of the "reasons for dismissal" but of the "grounds of suspension". I said at p 170G:

> "If they (the grounds of suspension) are proved, he (the LRO) must proceed in terms of sub-para (a); (ie authorise dismissal)."

I adhere to that statement. But grounds of suspension must be proved. If the grounds upon which the employer seeks to suspend pending dismissal are not proper grounds, because his own Code of Conduct provides for a penalty less than dismissal, or for any other reason, then he has not proved grounds of suspension. He has proved grounds for a reprimand, or grounds for a written warning, or grounds for a fine, or whatever it may be.

The point that was made in Masiyiwa *supra* was that the LRO or the LRT or, for that matter, this court, is not entitled to substitute its discretion for that of the employer, if a proper ground for suspension/dismissal is established. But it can certainly say to an employer "you are in breach of your own rules. Your contract of employment specifies a reprimand for this offence. You cannot rely on it as a ground for suspension pending dismissal."

So if indeed the unregistered Code of Conduct in this case provides for a lesser penalty than dismissal (and I do not know whether or not that is the case), that would be a further ground upon which the appeal might succeed.

The third point raised by the appellant is also worthy of consideration. He says he was charged with a breach of Regulation 156 of the Railways Regulations, when in fact he should have been charged with a breach of Regulation 163.

In one sense, there is no prejudice in this error, because the particulars of the offence alleged make it quite clear that the charge relates to an abuse of the privilege of sending parcels cheaply rather than an abuse of the privilege of travelling cheaply. And the appellant and everyone else concerned understood this.

But in another sense, there is prejudice, because there may be different penalties under

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Regulations 156 and 163. Regulation 156 (3) states that an abuse of travelling concessions "will result in a loss of travelling concession privilege and/or disciplinary action". The correspondence seems to suggest that a first offender would not normally face dismissal, but a subsequent offence should be treated as "serious misconduct".

However, the offence of abusing the privilege of sending personal parcels cheaply falls under Regulation 163, which sets out no penalty at all. The matter may be covered by internal memoranda. We do not know. The penalty would surely not be harsher than for contravening Regulations 156. It might be lighter. But, perhaps more importantly, it is arguable that Regulation 163 is less clear about "personal" use than Regulation 156. It may be easier to believe that a low grade employee might think (although wrongly) that he was entitled to do what this appellant did.

McNALLY JA

Finally, the question arises - how do the Railway authorities define "a first offender"? The phrase is often used loosely in the criminal law to mean "a person facing his first conviction". In this case, the appellant used the facility four times over a period of months. It is for the Railways primarily to decide how they wish to interpret the phrase. Only if they leave it uninterpreted will the courts have to impose a definition.

For all these reasons we are satisfied that the Tribunal misdirected itself in law in refusing to condone the application.

At the hearing, it was conceded that the application for condonation was unnecessary, because the appeal was in fact noted within the time limits prescribed. The determination was made on 27 April 1995. It was posted to the appellant, who received it on 10 May 1995. The appeal was dispatched on 12 May 1995 and was date-stamped as received by the LRT on 26 May 1995. In terms of s 10(1) of SI 30/93:

> "An appeal to the Tribunal in terms of the Act shall be noted within fourteen days of the receipt of the decision, determination, order or direction appealed against, by completing a notice of appeal in Form LR 31, in triplicate, and sending the notice by hand or by post to the Registrar."

It was not contended that, on a literal interpretation of this rule, the noting of an appeal is completed by the sending of the notice, and thus the time lapse was only two days. It was conceded on the understanding that the period from 10 May to 26 May was less than fourteen days if one excludes Saturdays, Sundays and public holidays.

That may be so, but on what basis does one exclude those days? The Interpretation Act [Chapter 1:01] does not allow it. The Labour Relations (Settlement of Disputes) Regulations (SI 30 of 1993) do not authorise it. It is only permitted in matters before the High Court and Supreme Court because the rules of those courts specifically say so (rr 4A and 1 respectively). In the Magistrate's Court Order 1 r 5 covers the matter. In the absence of any such rule in relation to the LRT the period 10 May to 26 May is sixteen days. Condonation was strictly required. But it should have been granted.

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The appeal is allowed with costs. The decision is set aside and in its place is substituted: "The application for condonation is granted."

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Manase & Manase, respondent's legal practitioners

NYAHONDO v HOKONYA & ORS 1997 (2) ZLR 457 (SC)

Court **Supreme Court, Harare**

Gubay CJ, McNally JA & Korsah JA

Civil appeal

21 October & 6 November 1997 Judgment No. S-194-97

Flynote

Evidence - civil case - onus - proof of negative - when onus of proving negative lies on party - where a negative assertion forms part of claim or defence, that party bears burden of proving it

Headnote

The appellant was the owner of a car in which two passengers were carried. They were seriously injured as the result of the driver's negligence. The defence was that, although the car belonged to the appellant's taxi company and had its logo emblazoned on it, the car was supposed to be used only as a delivery and courtesy vehicle. The driver was thus on a frolic of his own and the appellant was not liable for the driver's negligence.

It was argued for the appellant that the respondents had failed to call evidence which would have established whether the car was in fact a taxi.

Held, that ordinarily a party who makes a positive assertion must prove it; but where a negative assertion is an essential part of a party's claim or defence, that party bears the burden of proving it. The driver's alleged "frolic" was a special defence and the onus of proof as regards that defence rested on the appellant.

Cases cited:

Cotler v Variety Goods (Pty) Ltd 1974 (3) SA 621 (A)

Kriegler v Minitzer & Anor 1949 (4) SA 821 (A)

Mandebvu \& Anor v Pearce 1997 (2) ZLR 186 (S)

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Pillay v Krishna & Anor 1946 AD 946

Case Information

E T Matinenga, for the appellant

J Sayce, for the first and second respondent

D P Carter, for the third respondent

Judgment

Korsah JA: At the hearing of this appeal Mr Sayce moved the court for condonation of the late filing of the respondent's heads of argument, blaming himself for this lapse and undertaking to bear the costs involved in the preparation of the respondent's heads personally. Mr Matinenga advised the court that he had no instructions not to oppose the application for condonation. We granted the application on the terms proposed by Mr Sayce and allowed the appeal to proceed.

1997 (2) ZLR p458

KORSAH JA

This is an appeal from a judgment of Barlett J, which has been reported as *Hokonya \& Anor v Chinyani \& Ors* in 1995 (1) ZLR 102 (H). The judgment is flawless, and Mr Matinenga, who appeared for the appellant, understandably experienced considerable difficulty in attacking any part of it.

A summation of the events giving rise to the action is as follows. On 27 July 1990, the respondents boarded a car with their young son who was four years of age. The car had emblazoned on both sides the logo: "Harare Mini-Cabs (Pvt) Ltd". As a result of the negligent driving by the driver, he lost control of the vehicle at the intersection of Enterprise Road and Samora Machel Avenue and there was an accident. The mother was seriously hurt and the child was reduced to a living vegetable.

The car involved was owned by the appellant. He had insured it and had a certificate of fitness and a road service permit for it. The driver was paid by the appellant's taxi company whose logo was emblazoned on both sides of the vehicle. The policy of insurance taken in respect of the vehicle was for private and business purposes only, and did not cover use for hire or reward.

In defence of the claim, the appellant averred that the car was supposed to be used only as a courtesy and delivery car for conveyance of customers of Harare Mini-Cabs (Pvt) Ltd, who brought their cars to be serviced, and for ferrying the drivers of the company to work, and not for use for hire or reward; that the said driver was, at the relevant time, driving the said motor vehicle on a frolic of his own without the authority, knowledge or consent of the appellant and against his express instructions. In the premises the appellant was not liable to the respondents.

There was conflicting evidence between the appellant on the one hand and the respondents on the other, as to whether the vehicle involved in the accident had a taxi meter as well as a radio communication unit affixed within it or not. Bartlett J made the following findings of fact at pp 105F-106B of the reported judgment, which formed the basis of the appellant's attack on the

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judgment appealed against:

"(iii) The Renault R4 had been hired on a fare-paying basis along Enterprise Road outside the Harare Central Prison by Killian Hokonya;

(iv) The Renault R4 had a taxi meter next to the driver's steering wheel and radio communication enabling it to contact other taxis or its depot;

(v) The fare meter was switched on when the Hokonya family entered the vehicle and it had reached approximately $3 when the collision occurred;

(vi) The vehicle was decked out in Harare Mini-Cabs livery emblazoned with the Harare Mini-Cabs logo on the side doors;

(vii) The first defendant (the driver) was acting within the scope of his employment driving the Renault R4 as a taxi with the logo of the second defendant, which vehicle was owned by the third defendant.

For the purpose of clarity I specifically indicate that I reject as completely improbable and unconvincing the third defendant's evidence that the vehicle in question was solely

KORSAH JA

used as a courtesy car for the second defendant. I also reject the third defendant's contention that the first defendant was acting outside the scope of his authority and employment on a frolic of his own. I am quite satisfied that on a balance of probabilities the first defendant was clearly acting in the scope of his employment either with the second or third defendant."

The argument advanced by the appellant against the learned judge's finding that the Renault R4 was a taxi-cab was that Chataruka, who was at the time employed by Nyahondo Mini-Cabs as an inspector, testified that he attended the scene of the accident and that the Renault R4 was towed to the Vehicle Inspection Department. It was contended on behalf of the appellant that: had the VID inspector been called by the respondents to testify, the obscurity surrounding the character of the Renault R4 as to whether it was a taxi would have been resolved. It was likewise contended on behalf of the appellant that according to the insurance claim form, a Cst Charenzi of Harare Traffic Section attended the scene and that there is no explanation on record as to why the respondents did not call this police officer to testify. It was submitted that the absence of such evidence works against the respondents as the persons upon whom the onus of proof lay.

The general principle is that he who makes an affirmative assertion, whether plaintiff or respondent, bears the onus of proving the facts so asserted. However, where a negative assertion can be said to be an essential element of a party's claim or defence, that party bears the burden of proving it: Kriegler v Minitzer & Anor 1949 (4) SA 821 (A) at 828; *Mandebvu \& Anor v Pearce* t/a F & B Builders S-127-97 (not yet reported).*(59)

The respondents alleged that the appellant was the owner of the vehicle which they boarded and that his driver had driven negligently, occasioning to them, as a result, the injuries for which they were claiming damages. The appellant admitted that he was the owner of the motor vehicle. The fact of ownership of the motor vehicle is *prima facie* evidence that the motor car, at the material time, was being driven by the owner or his servant or agent in the course of his

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employment.

The appellant, having admitted ownership of the vehicle, alleged that the vehicle was a private car and therefore the driver was on a "frolic of his own" when he used it in plying for hire or reward. Where a person against whom a claim is made is not content with a mere denial, but sets up a special defence or raises a fresh issue (when he confesses and avoids), then he is regarded in respect of that defence as being the claimant; for his defence to be upheld he bears the onus of satisfying the court that he is entitled to succeed on it: Pillay v Krishna & Anor 1946 AD 946 at 952; Cotler v Variety Goods (Pty) Ltd 1974 (3) SA 621 (A) at 628. Even if the appellant's denial that the Renault R4 was

KORSAH JA

a taxi is considered as a negative assertion, I reiterate that where a negative assertion can be said to be an essential element of a party's claim or defence, that party bears the burden of proving it: Joubert Law of South Africa vol 9 para 570: Kriegler v Minitzer & Anor *supra*.

The driver's "frolic" relied upon as a defence was, in effect, a special defence and the onus of proof as regards that defence rested on the appellant. The incidence of the onus in relation to that defence was governed by the second principle in Pillay v Krishna & Anor *supra* at p 951. Proof that the vehicle camouflaged as a taxi was in fact not a taxi would have been a complete answer to the claim by the respondents against the appellant. The averment that the driver was on a frolic of his own formed an essential part of the appellant's case that the accident did not occur in the course of the driver's employment with the appellant and, on the facts of this case, proof of it rested on the appellant.

The respondents were not obliged to prove their case beyond a reasonable doubt. All the respondents had to do was to prove their case, as the learned trial judge rightly observed time without number, on a balance of probabilities. So that even if the burden lay on the respondents (which I do not for any reason accept) to adduce evidence from the VID inspector and the police in order to resolve the confusion surrounding the character of the car which had been camouflaged as a taxi, the absence of such evidence, as rightly submitted by Mr Sayce, is no ground for overturning the findings of the trial judge. In any event, there was no evidence given as to the attendance or non-attendance of a police officer at the scene.

In civil, as opposed to criminal, cases, it is sufficient for a plaintiff to establish, that, on the evidence adduced by the parties, his is the more probable cause. In the instant case, the learned trial judge in arriving at the finding that the car was used as a taxi and that the driver was not on a frolic of his own, had regard to the vehicle's livery camouflaged as a Harare Mini-Cab; the fact that it had sufficient road service permits to cover the use of the vehicle as a taxi; the misinformation contained in the Insurance Notification Form filled in by the appellant's brother, who was the General Manager of Harare Mini-Cabs, and signed by the appellant; and the alleged immediate disappearance of the driver of the vehicle soon after the accident, while the wages book of the company shows that he was around to collect his salary at the end of the month, as well as the totality of the evidence adduced by the parties.

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I have not been furnished with any reason to depart from the general rule that an appellate court will not interfere with a decision of a trial court based purely on findings of fact unless it is satisfied that having regard to the evidence placed before the trial court, the findings complained of are so

KORSAH JA

outrageous in their defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion. As stated earlier, the reasoning of Barlett J in the judgment appealed against was flawless. There is no merit in the appeal.

The appeal filed by the appellant did not name the third party as a party from whom it was claiming any relief. The third party had consented to judgment in terms of s 43(2) of the High Court Act [Chapter 7:06] to pay to the respondents the damages awarded against the appellant, subject to its claiming to be indemnified by the appellant. Yet the third party sought and was granted leave to be joined as a third party in this appeal.

Mr Carter contended that the third party was obliged to do so because the notice of appeal was all embracing and so it had to apply to join in the appeal to protect itself. But Mr Carter conceded that the grounds of appeal did not threaten the position consented to in the court below by the third party. It is clear to me that any relief which the appellant could have obtained on appeal would have enured to the benefit of the third party even if it had not intervened; for the third party was obliged to pay to the respondents the amount of damages awarded in their favour against the appellant and claim the same from the appellant. The grounds of appeal did not seek to attack the third party's right to be indemnified by the appellant. Thus its presence in this matter is superfluous. It has not gained any relief, let alone substantial relief, against any of the parties and is therefore not entitled to costs.

The appeal is accordingly dismissed with costs. The third party is to bear its own costs.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Manase & Manase, appellant's legal practitioners

Honey & Blankenberg, first and second respondent's legal practitioners

Atherstone & Cook, third party's legal practitioners

MAVHEYA v MUTANGIRI & ORS 1997 (2) ZLR 462 (HC)

Court **High Court, Harare**

Gillespie J

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Court application

27 August & 12 November 1997 Judgment No. HH-173-97

Flynote

Damages - claim - illiquid claim for general damages - quantification of claim - how to be pleaded and proven - proof of - when court will make estimate of damages in the absence of proper proof of loss

Legal practitioner - admission - right of audience based on basis of degree from local university - adequacy of such qualification - conduct and ethics - duty to client - duty to exercise professional competence and diligence

Practice and procedure - summons - contents - must contain general statement of fact and of relief such as discloses cause of action - claim for general damages arising out of motor vehicle accident - lack of specificity in summons or declaration - application for default judgment refused - stale summons - when summons becomes stale - approach of court to stale summons - motion roll - set-down of incomplete cases will not be tolerated

Headnote

The plaintiff applied for default judgment in an action instituted for damages for bodily injury arising out of a road traffic accident. The summons gave no particulars, nor did it disclose a cause of action. The declaration set out various sums claimed for general and special damages, but did not set out the special damages with any particularity. There was no description of the accident, nor of the subsequent events.

Held, that default judgment should be refused. Absolution will be granted if the plaintiff fails to adduce sufficient evidence to establish the damages. The plaintiff had failed to lead such evidence as must have been within his possession. Items of special damage susceptible of exact mathematical calculation had not been supported by any evidence at all. Items of general damage had not been proven, to the extent proof was possible, by evidence that was undoubtedly available.

Held, further, that there should have been an affidavit from the plaintiff, setting out such details as:

- the circumstances of the collision
- the nature of the injuries suffered
- the course of his medical treatment, convalescence and recovery
- his former activities and pleasures

GILLESPIE J

- the impact of his injuries on his daily life
- his former employment and the extent to which it had been interfered with

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- his future income earning prospects
- his future medical or other expenses
- future pain or disability.

The lawyer presenting the claim for default judgment should have been prepared, ideally with properly researched heads of argument, to address the court on all the issues, citing authority on the subject of general damages; net capitalization rates or discount rates applied; contingency reductions applied; the account taken of taxation; and assumptions made as to relevant future events.

Held, further, that a legal practitioner owes his client a duty to exercise reasonable professional competence and diligence in pursuit of his client's instructions. In a claim like this, such diligence and competence would have meant seeking the opinion of a specialist, both as to quantification of the loss and drafting the declaration. Although a legal practitioner might enjoy a right of audience, it is by no means sensible and may be positively unprofessional to undertake work beyond his experience or expertise or even beyond the time and resources he has for research and preparation.

Held, further, that unopposed matters are not to be set down on the motion roll when the papers are incomplete. If this is done, the parties must expect their cases to be struck off, if not dismissed, and lawyers ought not to be surprised at being punished in costs.

Quaere: whether the policy relating to audience in the High Court should be reviewed. The extremely low standard of work in this case gave cause for concern. Graduates of the local university were entitled to admission purely on the basis of their degrees, although newly admitted practitioners lack the knowledge, experience and professionalism to be effective advocates. They are frequently a downfall to their clients and a hindrance to the administration of justice. A graded series of practising certificates should be considered, so that practice in the higher courts should only be permitted on completion of a satisfactory period of practice in the lower courts.

Cases cited:

Arendse v Maher 1936 TPD 162

Beaton v Venter 1949 (1) SA 1051 (O)

Bernstein v Bernstein 1948 (2) SA 205 (W)

Ebrahim v Pittman NO 1995 (1) ZLR 176 (H)

Esso Standard SA (Pty) Ltd v Katz 1981 (1) SA 964 (A)

Hersman v Shapiro & Co 1926 TPD 367

Hunt v Engers 1921 CPD 754

Jesse v Chioza 1996 (1) ZLR 341 (S)

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Min of Defence & Anor v Jackson 1990 (2) ZLR 1 (S)

Molala v Min of Law & Order & Anor 1993 (1) SA 673 (W)

Mwatska v ICL Zimbabwe Ltd HH-126-97

Case Information

A M Gijima, for the plaintiff

Defendant in default

Judgment

Gillespie J: Mr *Gijima* appeared before me on the roll of uncontested matters on the last Wednesday in August. The roll was heavy. One hundred and four matters in all. This matter was an application for default judgment

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GILLESPIE J

on an action instituted for damages for bodily injury arising out of a road traffic accident. So inadequate were the papers that Mr Gijima attracted not only the sharp edge of my tongue (which experience he shared with many others that day so poor was the standard of preparation and presentation), but also an order in the following terms:

"1. The application is dismissed.

2. Summons is to be served afresh.

3. No fees in respect of the application are to be recovered by Messrs Sawyer and Mkushi.

4. Any fees already recovered are to be repaid." 1(60)

That was the order I pronounced. It is evidenced by the notes I made in the course of advance preparations and which reflected my prior inclination, subject to anything which might be said in court. I notice that in preparing a written order, the registrar referred in clause 1 to the "matter" being dismissed and in clause 3 to no fees being recovered in a "chamber application". Since the only matter before me was a court application for default judgment and there never was any chamber application this should lead to no confusion. Nevertheless, for the avoidance of doubt, in an exercise of the powers expressed in r 449(1)(b),2(61) I correct the order issued to read as set out above.

Mr *Gijima* affects to be aggrieved by this order. Notwithstanding the clear exposition of my reasons viva voce he requests a written judgment since, so he writes to me, he intends to advise his client to appeal. He refrains from writing that he wishes to appeal the adverse order relating to costs. This request is as unwelcome (adding as it does to a not inconsiderable workload of more important matters) as it is misguided. Nevertheless, it is one which must be acceded to. These therefore are the reasons which I gave in open court and which I now record for the guidance of a wider segment of the profession.

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Summons in this matter was served on 18 October 1995. Appearance to defend was entered on behalf of the third defendant but not by the first or second defendants. No further proceedings have been taken against the second or third defendant. None were taken against the first defendant until 30 July 1997 when a court application for default judgment was instituted. The form of court application is at its foot addressed to the registrar and to the first defendant. There is no averment that it was in fact served upon him, although strictly, in terms of the rules of court, no notice of such an application is required to have been served.

The first point that struck me, therefore, is that the summons may be said

GILLESPIE J

to be stale. When a plaintiff issues a summons and the defendant totally ignores it, the plaintiff is nevertheless obliged to proceed with his action within a reasonable time.3(62) There is no rule of court which lays down the period beyond which a summons, if not pursued, becomes stale. It is within the discretion of the court to determine whether or not to allow proceedings to continue in the face of delay in the prosecution of an action following the service of summons. 4(63) Proceedings might be permitted to continue. It might on the other hand be demanded of the plaintiff that summons be served afresh. The decision might even be taken to set aside the proceedings and cause the plaintiff to commence de novo.5(64)

What to do about the delay in this case, however, can obviously only be determined after a consideration of all the relevant circumstances. The first of these is the nature and efficacy of the cause of action made out. The summons on the face of it is irregular. It does not comply with the rules of court requiring that a summons should contain a general statement of the nature of each claim made and of the relief or remedies sought in the action. 6(65) There are no particulars endorsed on the summons at all, and no cause of action is disclosed. What does appear on the face of the summons is the legend "Plaintiff's Particulars of Claim: see annexure attached" and a summary of the relief claimed; namely, payment of a certain sum of money together with interests and costs of suit. There are no particulars of claim attached and indeed this is not the sort of matter in which particulars of claim could be endorsed on the summons. It is an illiquid claim for damages. A declaration is required. The face of the summons theefore discloses profoundly muddled thinking on the part of whomsoever was responsible for drawing the summons.

In fact, that defect is, however, mitigated by the filing of a declaration. One thus turns to this declaration in order to examine the cause advanced. It is a cause pleaded, with one exception, with tolerable adequacy, for damages for bodily injury caused by the negligent driving of a motor vehicle in which the plaintiff was a passenger. The exception is the averment of loss which reveals once again ignorance on the part of the pleader. 7(66) This time as to the distinction between general and special damages. It also suggests that no thought beyond

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the most superficial had been given to the question of quantification of damages before the

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drafting of the declaration. The amount claimed is:

"(A) General damages

For pain, suffering, disfigurement and discomfort in the sum of $100 000;

(B) Special damages

(a) Transport expenses and ambulance fee in the total sum of $270;

(b) Future transport expenses estimated to be in the sum of $600;

(c) Medical expenses to date in the sum of $33;

(d) Future medical expenses estimated to be in the sum of $13 000; and

(e) $253 470.53 being loss of income."

Special damages must be specially pleaded with full particularity. Items (b), (c) and (e), if they are properly special damages, are accordingly inadequately pleaded. It is probable that (e) refers to a loss of earning capacity, an item of general damages, and that all three of these items should be claimed as general damages with a conscientious attempt to assess the future loss and to calculate its present value. Such niceties, however, were evidently far from the mind of the pleader.

Regrettably, they had impinged no more closely upon the mind of Mr Gijima when, two years after the issue of summons, he prepared the belated application for default judgment. It was obviously necessary with this application to furnish proof of loss. This is how the attorney pretended to accomplish this task. An affidavit deposed by the plaintiff was filed. This reads in full (apart from formal paragraphs identifying the parties):

"4. I attach as Annexure "A" proof of the damages I suffered being an affidavit sworn before a commissioner of oaths by Dr G A N Vera whose qualifications are set out therein.

5. The summons and declaration was served on the respondent - see annexure "B" being the proof of service.

6. The respondent did not enter an appearance to defend. The time for doing so has lapsed."

And that is it. No deposition of the circumstances of the collision. No description of the nature of the injuries suffered. No account of the course of his medical treatment, convalescence and recovery. No statement of his former activities and pleasures. No attempt to state the impact of these injuries on the plaintiff's daily life. No description of his former employment. No suggestion of the extent to which, if at all, this has been interfered with. No attention paid to his future income earning prospects. To his future medical or other expenses. To future pain or disability. No thought at all as to how his loss has been calculated. Nothing.

The affidavit of Dr Vera takes it no further. In a short affidavit eight paragraphs in length, this orthopedic surgeon describes his qualifications and experience. He recounts the history supplied to him of the occurrence of the injuries. He describes those injuries in two lines. He describes the course of

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treatment and recovery in four lines. The plaintiff suffered a comminuted fracture of the right femur, and superficial lacerations and injuries of the left elbow, back and head. He lost consciousness. The laceration was sutured. The fracture was pinned. He was discharged from hospital two weeks after the accident on crutches. There is a relatively helpful paragraph describing a certain limitation of movement affecting the plaintiff presently. He limps. He needs a crutch. He has limited flexion in the right knee. He suffers back pain. The only thought given to the future prognosis and current quantification of loss is the final paragraph which reads:

> "Mr H S Mavheya's condition is not likely to improve and he is likely to develop osteoarthritis. He is only able to engage in light outdoor work or sedentiary (*sic*) duties. He is not able to gain employment as a bricklayer because of his disabilities. Mr H S Mavheya requires frequently to consult doctors for prescription drugs for pain which cost him about $600 *per* year. The metal pin when removed cost $3700. Mr H S Mavheya's percentage disability is thirty (30) percent."

The affidavit itself is eighteen months out of date.

How anyone can consider this to be adequate proof of loss is quite beyond me. The barest minimum I would have expected in the circumstances would have been a detailed affidavit from the plaintiff setting out the matters I have already intimated. A detailed medico-legal report from the specialist. In fairness to Dr Vera, I suspect that the one supplied by him may have been drafted by the plaintiff's lawyers. It bears the same stamp of superficiality, ignorance of the issues and unpreparedness exhibited throughout these papers. There should be a proper calculation of the anticipated income but for the injury; the actual or projected income since the injury; and a calculation of the present value of that future loss. The lawyer presenting the claim for default judgment should have been prepared, ideally with properly researched heads of argument, to address the court on all the issues, citing authority on the subject of general damages; net capitalization rates or discount rates adopted; contingency reductions aplied; account taken of taxation; and assumptions made as to relevant future events. Concepts such as these, however, are evidently utterly foreign to the lawyers concerned. 8(67)

A legal practitioner owes his client a duty to exercise reasonable professional competence and diligence in pursuit of his client's instructions. I cannot understand how any attorney in a general practice would consider it reasonably diligent and competent for himself to engage upon the specialized pleading, preparation and presentation of a claim such as this without taking the opinion of a specialist. Particularly when the attorney is one lacking experience in the relevant field, counsel's advice on quantification of loss should have

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been sought prior to (and preferable as part of) the drafting of the declaration. The diligent attorney would have sought similar advice regarding the presentation of the claim and would properly have briefed counsel to do so. Although one might enjoy a right of audience, it is by no means sensible, and may be positively unprofessional, to undertake work beyond one's

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experience or expertise, or even beyond one's time and resources for research and preparation.

I have formed the conclusion that the summons was indeed stale. Although the lapse of time between service and further proceedings was not as great as in some of the cases I have cited, I nevertheless consider it unreasonable. The words of Flemming DJP in a slightly different context are apposite:

> "I conclude by underlining that to any court the correct finding of facts is difficult enough. It is unjustifiably exacerbated and made more complicated by delays during litigation, sometimes with no more excuse than that it suits both sets of practitioners. It is clear that this country is a generation behind in embracing the view that the administration of justice also the judicial officers charged therewith and the general public paying therefor has an own interest in the elimination of avoidable delay. Despite the perception of some practitioners, the parties and their legal representatives are not the only persons with an interest in a particular suit.
>
> It is understandable that several jurisdictions have introduced some method of excluding a party from further use of the facility of public courts if his inactiveness has caused his litigation to undergo marked hibernation, a development which, for reasons upon which I have partially touched, mars the reaching of the truth. (That is, of course, only one aspect of delay. Modern views on avoidable delay are evidenced by that of the American Bar Association:
>
> > 'Delay devalues judgments, creates anxiety for litigants and uncertainty for lawyers, results in loss or deterioration of evidence, wastes court resources, needlessly increases the costs of litigation, and creates confusion and conflict in the allocation of court resources.')
>
> Overseas jurisdictions employ fixed time limits created by court rules or by judicial decree and plaintiffs must respect such time limits or suffer loss of the right to proceed. To instill in every plaintiff the realization that it is not tolerated that he may use available process in a dilatory fashion is achieved by such time limits with more certainty, predictability and fairness than our system. In fact our system has done nothing of importance to counteract delays although it is abundantly clear that delay will persist as long as matters are left fully in the hands of practitioners. Huber Hedensdaegse Rechtsgeleertheyt 4.17.15 called the failure for months to bar an opponent an 'abuse' (Gane's translation) and he observes, I think with indignation, that the practitioners dare call it 'legal'." 9(68)

I can think of no good reason, and none was advanced in argument, as to why the delay of some twenty-one months in this case should be considered reasonable.

I then had to determine the proper course of action. In reaching a decision,

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I took into account the lengthy delay that had occurred. The delay had the result that, in this undefended action, judgment was being sought well after the claim would otherwise have prescribed. Had the papers been in order, and had adequate proof of loss been established, I would nevertheless have exercised my discretion to allow the matter to proceed. I would have been particularly inclined to that course had it in fact been so that the legal practitioners for the plaintiff had themselves taken the precaution, as appears to have been done, of serving the application on the defendant. I say "appears to have been done" because there is nothing other than the address to him at the foot of the application. There is no proof of service. Such a service might well have removed any element of surprise to the defendant in the sudden reappearance of a claim which he would reasonably have thought to have become defunct long

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since. In the ligh, however, of the deplorable inadequacy of the proof of damage, as is more fully explained below, there was simply no purpose in permitting the matter to proceed.

Before deciding on the course to adopt in the light of the stale summons, one gave consideration towards ordering judgment for such lesser amount of damages as may have been disclosed.

> "It has long been accepted that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty." 10(69)

Where damage must have occurred but the full extent of it is not susceptible of exact mathematical calculation, the court must do what it can on the evidence available to form its own assessment of the loss suffered. Of such a situation it has been said:

> "It remains, therefore, for the court, with the very scanty material at hand, to try and assess the damage. We are asked to make bricks without straw, and if the result is inadequate then it is a disadvantage which the person who should have put proper material before the court should suffer." 11(70)

If, however, as was pointed out by Diemont JA, 12(71) a plaintiff has not adduced all the evidence reasonably available to him at the trial, this might lead to him being denied any judgment. Thus it has been said:

> "Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those

> circumstances the court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the court must use it and arrive at a conclusion based upon it." 13(72)

All the more so where damage alleged is capable of exact computation, then the court is not obliged, indeed must positively decline, to essay any generalised assessment. Absolution will indeed be granted if the plaintiff fails to adduce sufficient evidence to meet this requirement.14(73)

From what I have said it must be abundantly apparent that the plaintiff has failed to lead such evidence as must have been within his possession. Items of special damage susceptible of exact mathematical calculation have not been supported by any evidence at all. Items of general damage have not been proven, even to the extent proof is possible, by evidence that was undoubtedly available. The plaintiff was accordingly not entitled to any judgment at all.

On being apprised of the many defects and deficiencies in the papers, Mr Gijima moved a postponement. This was the next alternative open to me should I decline any judgment. To allow the matter to proceed on the stale summons, but to postpone the hearing in order to

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attempt to remedy the deficiencies in the papers. This I refused. I did so as an exercise of discretion taking into account the superannuation of the summons; the technical defects in the summons; the glaring deficiencies in the proof of loss; the need, not just to amplify the present application, but to replace it completely; and the complete lack of preparedness, indeed awareness as to what was required, on the part of the attorneys concerned.

The motion roll has in recent months been particularly burdensome. Regularly there have been in excess of eighty matters on the roll. My roll of over one hundred matters on this occasion was itself not unique. These lengthy rolls consist of a huge percentage (on this particular roll well over fifty *per* cent) of matters that are incomplete or defective and not ready for hearing. The indefinite postponement of such matters serves only to add to future rolls an accumulation of matters that simply cannot be heard and must be postponed again. Indeed, many of the matters which were incomplete on my roll on this day had been appearing on the court roll for many months - week after week being postponed because incompetent or negligent legal practitioners could not discover in themselves the knowledge or inclination to do what was necessary to complete the papers in proper form. On each of these occasions, a judge had been obliged to read the papers and a courtroom

full of lawyers had to sit through a seemingly intermnable roll rendered all the more burdensome by the accumulation of such dross as I have described.

The motion roll does not exist for the benefit and convenience of legal practitioners. It is not something upon which they may set down an incomplete matter and thereafter postpone it from week to week, earning fees at each appearance for filing notices of set down and for attendances on the Registrar and in court, until they finally manage to complete the papers. Rule 225A 15(74) provides that the registrar shall not give effect to a notice of set down where the papers are incomplete. If a legal practitioner files such a notice where his papers are incomplete, and if the registrar does give effect to it, that lawyer must expect the matter at least to be struck off the roll, or at worst to be dismissed, and to suffer an adverse order of costs personally, if the papers are still inadequate and incomplete at the time of hearing.

Refusing the application for postponement, I considered dismissing the claim as a whole. That was an option available to me. I did not, however, take it. I did not because the prescriptive period has now long since passed. Had I given such a judgment, the plaintiff would undoubtedly have been in a position to issue a fresh summons, but his claim would have prescribed. I did not consider it just thus to disqualify the plaintiff, whose only sin lay in his choice of legal practitioner. Hence the first and second paragraphs of my order.

The third and fourth paragraphs are an expression of my considerable displeasure at the unprofessional manner in which the attorneys handled their client's case. The reasons for this displeasure are, I think, sufficiently set out above and need no reiteration. I confined that punishment, however, to the extraordinarily deficient application and not to the summons and declaration or the case as a whole, since those, by my order, I preserved intact.

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These, then are the reasons for the order I gave. They will have explained in part why at the commencement of this judgment I termed as misguided the announced intention to appeal. It is misguided not only because of the force of the reasons advanced for the decision but for further reasons. The first of these is that no final judgment has yet been given. It may be (I do not wish to debate the matter) that all that has been ordered by myself is a ruling. As such it would not be appealable at all. 16(75) Even if it is appealable, it may well be interlocutory and thus appealable only with leave. The second reason is a matter of practicality. What does the client really want? Does he want an appeal which, even if it proves successful, will return him to court on the present inadequate papers? Or would he rather serve the existing summons

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afresh and make fresh application for default judgment, assuming, as is likely, that the defendant does not seek to defend? Why is it that legal practitioners do not think of these tings? Or is it that the lawyers simply wanted to attack, without the need to obtain leave, the punitive order of costs alone? If so, then that again was a want of professionalism. It was placing their own interests above those of their client.

The extremely low standard of work encountered in this case, which regrettably is by no means unusual, causes one to ponder on the whole policy pertaining to the right of audience in this court. Graduates of the local university have the privilege of being entitled to obtain admission to the profession purely on the basis of their degrees. Foreign graduates, even those with impeccable academic qualifications from universities in jurisdictions applying the Roman-Dutch law of this country, must undergo further professional examinations before admission. Not only may local graduates obtain automatic admission, but immediately upon being registered as legal practitioners, they may (and unfortunately do) purport to appear in any court, even the Supreme Court, on the most complicated and important of matters. Such newly admitted persons, as this case shows, lack the knowledge, experience and professionalism to be effective advocates. They are frequently a downfall to their clients and a hindrance to the administraton of justice. Yet with time and experience they could become paragons of the profession. That experience cannot conscientiously be obtained by immediate entry to practice at the highest level of the profession. It seems to me that earnest consideration must be given to the institution of a graded series of practising certificates for the differing levels of court. Issue of certificates to practise in the higher courts should be permitted only upon completion of a satisfactory period of practice at lower levels and should be subject to periodical review or renewal. Only thus can one encourage the attainment of the highest standards within the profession. Only thus can public confidence in the profession and the administration of justice be earned.

Sawyer & Mkushi, plaintiff's legal practitioners

MACHIYA v BP SHELL MARKETING SERVICE (PVT) LTD 1997 (2) ZLR 473 (HC)

Court **High Court, Harare**

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Chatikobo J

Application for review

24 September & 12 November 1997 Judgment No. HH-170-97

Flynote

Administrative law - audi alteram partem rule - applicability to contractual relationships

Employment - contract - termination - dismissal - code of conduct - whether employee has right to be heard

Headnote

The applicant, who was employed by the respondent, was suspended from duty after allegations of theft had been made against her. She supplied a written report denying the allegations and requesting a hearing to explain her case more fully. No hearing was held. She was later notified that she had been dismissed. The matter was brought on review, the applicant seeking reinstatement on the basis of procedural irregularity and breach of the principles of natural justice.

Held, that if it were a matter only of a contractual relationship between the applicant and her employer, it would be questionable whether the dismissal could be brought on review. To be afforded a hearing according to natural justice, it would have to be shown that such a hearing was an express or implied term of the contract. Even if the distinction between quasi-judicial and purely administrative acts has been removed, this does not assist in determining when, if at all, the parties to a contract can import into their contract the rules of natural justice.

Held, further, that since there was a code of conduct applicable to the applicant, the relationship between the parties was of a sufficiently public character to be said to have an administrative law element. The code of conduct, like the regulations under which it was framed, provided expressly that the rules of natural justice applied. To determine whether an oral hearing was necessary, recourse would have to be made to the regulations; and these pointed unmistakeably to the requirement to hold an oral hearing. The respondent's failure to hold such a hearing was contrary to the clear provisions of the regulations and the dismissal would have to be set aside.

Cases cited:

Admin, Tvl & Ors v Traub & Ors 1989 (4) SA 731 (A)

Embling v Headmaster, St Andrews College (Grahamstown) & Anor 1991 (4) SA 458 (E)

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

Heatherdale Farms (Pty) Ltd & Ors v Deputy Min of Agriculture & Anor 1980 (3) SA 476 (T)

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Lamprecht & Anor v McNeillie 1994 (3) SA 665 (A)

Logan v Morris NO \& Ors 1990 (2) ZLR 65 (S)

Lunt v University of Cape Town & Anor 1989 (2) SA 439 (C)

Malloch v Aberdeen Corp [1971] 2 All ER 1278 (HL)

Mokgoko & Ors v Acting Rector, Setlogelo Technikon & Ors 1994 (4) SA 104 (B)

Ridge v Baldwin [1963] 2 All ER 66 (HL); [1964] AC 40

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

Theron en Andere v Ring van Wellington van die N G Seginkerk in SA en Andere 1976 (2) SA 1 (A)

Turner v Jockey Club of SA 1974 (3) SA 633 (A)

The court considered the following statutory provisions:

Labour Relations (Employment Codes of Conduct) Regulations 1990 (SI 379 of 1990), s 4

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), s 1A

Case Information

L Nzu, for the applicant

F Girach, for the respondent

Judgment

Chatikobo J: The applicant was, until 23 April this year, employed by the respondent. Although the capacity in which, and the nature of her duties, have not been disclosed on the papers, it appears that she was a junior employee. She was suspended from duty without pay on 7 April 1997 on allegations of having stolen cash amounting to $1 100 from a fellow employee who died before the applicant's suspension. The letter of suspension was signed by the applicant to acknowledge that she had received it, and, in appending her signature to it, she also indicated, in the appropriate space on the face of that letter, that she did not wish to have the members of respondent's workers committee informed of her suspension. This was done, so it seems, in order to comply with clause 2:10 of the respondent's code of conduct (the code) which gives to an employee who is the subject of a disciplinary investigation, the right to be assisted by a workers' committee representative or any other representative of his or her choice a any stage of the disciplinary proceedings.

Before the applicant's suspension, a meeting had been held on 1 April 1997. This meeting was attended by members of respondent's management team, on the one hand, and the applicant on the other. What transpired on that occasion is captured in a letter addressed to the applicant

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by the respondent's Industrial Relations Officer on 10 April 1997, some 3 days later. It reads:

> "We refer to our meeting of Monday 7 April 1997 where you were asked to submit a written report on the incident which you are aware of.
>
> Whilst you promised in that meeting that you would submit your report the following

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> morning ie Tuesday 8 April 1997, we now learned that you telephoned Mr Kusano to advise that we will only have the report after you have consulted your lawyers.
>
> As advised in the meeting of 7 April we would like to confirm that no investigation of this matter will be conducted until your report is received. In order therefore for us to resolve this matter without unnecessary delay, please let us have your written report."

The written report requested in this letter was made available by the applicant's legal practitioners on 14 April 1997. It contained a denial of the allegations of theft, details of which I will revert to later in this judgment. The letter also called for the immediate reinstatement of the applicant, failing which a hearing should be held at which applicant would state her case more fully. She was not reinstated and no oral hearing was held. Instead a letter was addressed to her by the respondent's Corporate Services Director on 23 April 1997 in these terms:

> "Further to our letter of suspension to you dated 7 April 1997 and your subsequent response in a letter through your lawyers dated 14 April 1997, we would like to advise that having now completed our investigations and in terms of B P & Shell Marketing Services (Pvt) Ltd's Code of Conduct Table C Nos. 11 & 13, your employment contract with the Company has been terminated with effect from the date of suspension.
>
> Please make arrangements to conduct the undersigned in connection with your terminal benefits which will be paid less any outstanding amount owing to the Company."

The original allegations of theft were contained in a letter written to the respondent by the deceased employee's mother on 11 April 1997 at the behest of respondent's managers, who felt that the allegations must be put in writing as they were serious. I reproduce the letter without correcting the grammatical errors therein.

> "It was on an evening when my daughter the late Mary Suliali came home and she told me that she had mised money from her purse which was $1 000. She said she had $1 500 but when she looked in her purse it was only $500 left She reported the matter to her boss Mr Maphumba. Onother day, Mr Maphumba gave $100 to buy something which she didn't get. She put the money under a book before giving the money back to him but to her surprise the money was not there. She just replaced the money quietly. When she came home she told me the story but she suspected a girl she worked with which was Mercy but there was no evindence.
>
> On 2 March 1997, my daughter passed away after a day's illness which was a shock to the family. On 3 March 1997, I phone her work place to tell them of her death. The staff of BP came to our house to sympathise, when everybody was going back to work Mercy came with an enevelope to me and told me that she owed Mary money. I took the enevelope and gave it to my sister. My sister opened the envelope there was $1 100. My sister waited for her to come back the next day and asked her what the money was for 'cos it was a lot of money, she didn't give a satisfieng answer. My sister told her to take the money back so she could explain how she owed Mary money.
>
> To my surprise, she never came back. After a week when my sister had left for Malawi where she lives. To my surprise, Mercy came to my work and she asked me if there s anywhere private, I took her to our kitchen and she

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told me that she stole money from Mary's purse which was $1 000 and she went back another day and she stole $100 in a book

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on the desk so that was the money I told her that I wasn't going to take the money but I will phone her. I phoned her on 21 March 1997 so that she'll bring the money. So she came on 22 March 1997 I told her to write a letter and sign it. which she did. So I Mavis Suliali and my husband.

On 24 March 1997, she came home with a friend 'cos she kept on talking about it saying I sorry. I told her that what she is doing is wrong 'cos everytime she comes home and talk about it, it upset me it reminds me of my daughter. I took the letter to BP and gave the letter to Mr Karinye."

The letter referred to in this letter, supposedly written by the applicant, is in these terms:

"I, Mercy Machiya, admit that I took Mercy Suliali's money without her permission. I first took $1 000 from her purse, then $100 from her desk. When I took the money, I intended to return it to her anonymously. I'm sorry that I did not do it in time. May you please accept the money."

The letter purports to have been signed by both the applicant and the mother of the deceased employee from whom the money was taken. The applicant denied being the author of this document throughout the disciplinary inquiry. Her denial of authorship of this document led the respondent to refer it to a handwriting expert who concluded that the applicant was the author.

When the respondent's disciplinary committee decided that the applicant was guilty of theft it based its decision on the letter from the deceased employee's mother, the document purportedly written by the applicant, the report of the handwriting expert and the written representations made by the applicant's legal practitioners.

These documents contain the evidence upon which the decision to terminate the applicant's contract of employment was based. Based on these facts, the applicant has mounted a challenge against her dismissal, claiming relief in para 3 of her founding affidavit in these terms:

"3. I seek a review of the proceedings which led up to my (*sic*) termination of employment by the respondent. Further, I seek an order that the decision made by respondent to terminate my employment be declared null and void and that I be reinstated on the grounds that:

3.1 There was procedural impropriety in the proceedings leading up to termination of my employment.

3.2 There was a breach of the principles of natural justice.

3.3 There are good and reasonable grounds to believe that one of the members on (of) the disciplinary committee was biased on (*sic*) me."

Apart from the question of bias which forms part of the rules of natural justice, the thrust of the applicant's complaint is that she was not afforded an oral hearing by the respondent's disciplinary committee.

I had initially entertained doubt about the availability of the remedy of review to the applicant in view of the fact that the relationship between

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applicant and respondent was a straightforward master and servant relationship and consequently that:

> "Also it will already be obvious that this employment relationship had no public law element to it and that administrative law does not govern the case (cf Malloch v Aberdeen Corporation [1971] 2 All ER 1278 (HL) at 1294d-1295f). McNeillie's alleged right also did not flow from a voluntary association's constitution (see GrŸndling v Beyers & Ors 1967 (2) SA 131 (W) at 139D-G). It was accepted on his behalf that he had to prove a contract (express or tacit) containing a provision (also either express or tacit) incorporating the rules of natural justice (cf Theron en Andere v Ring van Wellington van die NG Senginkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A) at 21D-G, 31E-F):"

per Harms JA in Lamprecht & Anor v McNeillie 1994 (3) SA 665 (A) at 668B-C.

In Gründling *supra* Trollip J stated at 141D-E:

> "In a statute empowering an official or body to give a decision adversely affecting the rights 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 such presumption in a contract. The obligation to afford a hearing according to natural justice must therefore be either an expressed or necessarily implied term of the contract."

See also Turner v Jockey Club of SA 1974 (3) SA 633 (A) at 645H-646B.

In Theron *supra* at p 21D-F it was stated:

> "It is generally accepted that the principles of review which are applicable to the acts of statutory bodies are also applicable to domestic tribunals created by contract. In principle, there seems to be no reason why that should not be so, provided certain obvious differences between the two categories are kept in mind. In the case of statutory bodies the intention of the legislature is the starting-point; in the case of the latter the intention of the parties is decisive. If sometimes in the case of statutory provisions - inter alia, in view of specific words or the obvious intention of the legislature - full effect is not given to the common law presumption that the legislature will not grant the power to act unreasonably, contracting parties can certainly not be regarded as willing to subject themselves to unreasonable acts. The nature of the remedies available to the injured party is also not identical in the two cases. It may be convenient in the case of a statutory body to speak of the court's 'inheren power of review' with its consequential remedies; but in the case of a contractual body the remedies are contractual only."

There are stray dicta in the judgments of South African courts which seem to draw a distinction between the application of the audi alteram partem rule to tribunals or bodies created by statute, on the one hand, and on the other, its applicability to a contractual dispute between, for example, an employer and his employee where the latter claims that there exists a right to be heard. While it was held in the decision of the Cape Provincial Division (Howie J) in Lunt v University of Cape Town & Anor 1989 (2) SA 439 (C) that the doctrine of legitimate expectation (itself an extension of the right to be heard) applies in contractual matters, it was however held in Embling v Headmaster, St Andrews College (Grahamstown) & Anor 1991 (4) SA 458 (E) at 467J-468A that:

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> "The rules of natural justice - succinctly expressed in the maxim audi alteram partem - have no application in the

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> field of contract. Contractual rights and obligations are governed by the law of contract (see Sibanyoni & Ors v University of Fort Hare 1985 (1) SA 19 (Ck) at 301; Mkize v Rector, University of Zululand & Anor 1986 (1) SA 901 (D) at 904F). As the applicant's employment was terminated in accordance with the terms of the contract he was not entitled to a hearing prior to the termination of the agreement."

Embling was a school teacher who had been dismissed in accordance with the terms of his contract. He claimed that his dismissal was unlawful for non-compliance with the audi alteram partem rule and the court, having found that there was nothing in his contract of employment which could be construed as implying the rules of natural justice into its terms, concluded that the school council, whose function it was to dismiss him, did not function as a public body subject to administrative law nor did it make decisions which possess judicial characteristics. The court held further that the audi alteram partem rule did not apply to an ordinary master and servant contract. The reference by the learned judge to decisions which possess judicial characteristics seems to be an attempted resuscitation of the pre-existing dichotomy between purely administrative acts on the one hand, and quasi-judicial decisions on the other. I say a resuscitation because in Admin, Transvaal & Ors v Traub & Ors 1989 (4) SA 731 (A) 763H, Cobett CJ had already signalled the demise of such a dichotomy in these terms:

> "The dictum appears to define 'quasi-judicial' in terms of the effect which the decision has upon the individual concerned. On this basis, a classification as quasi-judicial adds nothing to the process of reasoning: they could just as well eliminate this step and proceed straight to the question as to whether the decision does prejudicially affect the individual concerned. As I have shown, traditionally the enquiry has been limited to prejudicial effect upon the individual's liberty, property and existing rights, but under modern circumstances it is appropriate to include his legitimate expectations. In short, I do not think the quasi-judicial/purely administrative classification, relied upon by counsel, is of any material assistance in solving the problem presently before the court."

In our own jurisdiction, the Supreme Court has held, relying on Traub, that there -

> "... are indications of a developing approach to the validity of administrative acts in which the old distinction between quasi-judicial acts, on the one hand, and purely administrative acts, on the other, has been swept away":

per McNally JA in *Logan v Morris NO \& Ors* 1990 (2) ZLR 65 (S) at 68H-69A .

The removal of the distinction between quasi-judicial decisions and purely administrative acts does not necessarily assist in determining when, if at all, the parties to a contract devoid of any administrative law element can import into their contract the rules of natural justice. In other words, can there be cases of a purely contractual nature which are reviewable on the ground of

denial of natural justice, in particular for non-compliance with the audi alteram partem rule? It seems to have been accepted that such cases exist by Comrie J in Mokgoko & Ors v Acting Rector, Setlogelo Technikon & Ors 1994 (4) SA 104 (B). This case, however, like the disputes in a long line of cases involving university disputes, were predicated upon a consideration of existing statutes dealing with the admission and/or exclusion of students from their respective courses of study. Of those cases, Lunt *supra* was the only one where no reliance was placed on any statutory provision or governing rules and the court nevertheless conluded that the operation of contractual principles does not exclude the audi alteram partem rule. The learned

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judge (Howie J) stated at 449G:

> "In my opinion, the very understandable and indeed natural appeal to the feelings of fairness referred to above does find recognition and effective practical expression in the application of the legitimate expectation approach even in a contractual context. This has been tried and developed elsewhere, as the writings to which I have referred show. It has worked satisfactorily in doing natural justice in situations where the previously existing law was found inadequate to do so. There is, in my view, a need in South Africa for the legal reform referred to in the above-quoted passage in Castel's case and application of the legal expectation test will do much to achieve it."

I venture to express the opinion that this modernising approach can only be welcome on the basis that the contract sought to be reviewed should contain a provision, express or tacit, to the effect that the rules of natural justice apply. To hold otherwise would be tantamount to destroying the time honoured acknowledgment of the sanctity of contract, hence Baxter Administrative Law p 342 remarks that:

> "The divergence of views concerning the scope of judicial review of domestic tribunals is partly a reflection of divergent beliefs concerning the sanctity and genuine existence of freedom of contract."

In casu I have come to a conclusion which makes it unnecessary to determine whether or not the audi alteram partem rule applies in the field of contract. Suffice it to say that there seems to be little justification for excluding from the process of review a contract in which the parties have by their voluntary agreement provided that the rules of natural justice should apply.

The Labour Relations Act [Chapter 28:01] (the Act) provides in s 3 thereof that all employers and employees not provided for under the Constitution shall be governed by that Act. The suspension and dismissal of employees is in turn specifically regulated in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/85) (the termination regulations) which provide that no employer shall terminate the contract of employment of an employee unless he has obtained the prior written approval of the Minister responsible for the

administration of the Act. Section 1A of the termination regulations provides that ss 2 and 3 thereof, which deal with dismissal, shall not apply to those employees to whom the provisions of a registered employment code of conduct apply. Codes of conduct are prepared and registered in terms of the Labour Relations (Employment Codes of Conduct) Regulations 1990 (SI 379/90) (codes of conduct regulations). Section 4(1) of the codes of conduct regulations stipulates nine specific matters which should be provided in a code of conduct. In s 4(1)(f), (g) and (h) it is provided as follows:

> "4.(1) A code shall provide for the following matters:
>
> (a) ...
>
> (b) ...
>
> (c) ...

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(d) ...

(e) ...

(f) the notification in writing to any person who is alleged to have breached any of the rules or procedures of the code of the nature of the misconduct or breach alleged against him and the date when proceedings are to be convened against him; and

(g) the right of a person referred to in paragraph (f) to have his case heard by the appropriate person, committee or authority referred to in paragraph (e) before any decision in his case is made; and

(h) a written record or summary to be made of any proceedings and decisions taken in terms of the code, which record or summary shall be made at the time such proceedings and decisions are taken, and shall be kept for a period of not less than 12 months" (my emphasis).

Two things emerge clearly from these provisions. The first is that the code of conduct in terms of which the applicant was dismissed is more than an embodiment of contractual terms governing applicant's employment with respondent. It represents a product of the statutory provisions contained in the codes of conduct regulations. Implementation of the provisions of the code of conduct is in turn a process of effecting compliance with the provisions of the code of conduct regulations. The existence of these regulations places the applicant's case on an entirely different plane from the ordinary master and servant category. The regulations give to the applicant a status buttressed by statute. The situation in this case is analogous to that in Malloch *supra* where Lord Wilberforce, relying on Lord Reid's dictum in Ridge v Baldwin [1963] All ER 66 (HL) at 71, observed that:

> "... first, there are pure master and servant cases - these are governed by the law of contract and there is no right to be heard; but this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss him ..."

That is so here. The relationship between applicant and respondent, in so

far as it is governed by the codes of conduct regulations, is of a sufficiently public character to be said to have an administrative law element. As such, it is one to which the administrative law remedy of review is available.

The second point arises in this way.

It is common ground that the code of conduct, like the regulations under which it was framed, provides expressly that the rules of natural justice apply. It will be remembered that one of the major complaints of the applicant is that her request for an oral hearing was wrongly denied. Her request, which was not acceded to, is contained in a letter written to the respondent by her legal practitioners on 14 April 1997 and it is in these terms:

> "It is our position that our client has been wrongly accused and therefore wrongfully suspended. She should be immediately reinstated or, in the alternative, a full hearing should be arranged to enable our client to more fully state her case. Failing this, our client will have no choice but to seek legal redress."

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An oral hearing was sought but was not granted.

Ordinarily, the right to be heard does not always entail an entitlement to an oral hearing. As Colman J pointed out in Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor 1980 (3) SA 476 at 486D:

> "It is clear on the authorities that a person who is entitled to the benefit of the audi alteram partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing; or allowed representation by an attorney or counsel; and he is not entitled to the discovery of documents."

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

The present case however, does not fall to be determined according to the common law. One must look to the codes of conduct regulations to discover if an oral hearing was obligatory. To my mind, it matters not how the code of conduct itself is worded. It is the regulations to which one must turn for an answer because the code of conduct cannot curtail the peremptory provisions of the regulations. In para (f) of s 4(1) of the regulations it is specifically provided that the person who has been accused of misconduct must be notified of the date when proceedings are to be commenced against him. The reference to the commencement of proceedings against the person connotes the setting in train of an oral hearing, otherwise there would be no point in advising the person of the date when such proceedings are to begin. Paragraph (g) of the same section provides that the person affected has a right to have his case heard by the committee or authority concerned. The wording of this provision admits of no doubt. It point unmistakably to a requirement to hold an oral hearing. Had the law maker intended something else, a different wording would have been employed, such as that the affected person would be entitled to make representations before a decision is made. The reference to a right to have one's case heard can only mean that there has

to be a hearing at which the affected person can attend and present his case. Then para (h) stipulates that a written record or summary of the proceedings ought to be made and that such record must be kept for 12 months. The need to maintain a record is in keeping with proceedings in which there is an oral hearing.

I am satisfied that it is not permissible for an authority constituted in terms of the codes of conduct regulations to arrive at a decision adverse to a person without granting an oral hearing to such a person. The respondent's disciplinary committee's action in making a decision against the applicant without affording her an oral hearing was contrary to the clear provisions of the codes of conduct regulations. The decision to which they came was consequently irregular and cannot be allowed to stand. The dismissal should be set aside. However, this decision affects only the dismissal and not the suspension. As it is open to the respondent to dismiss the applicant after following the laid down procedures, I cannot order the reinstatement of the applicant.

Accordingly, it is ordered as follows:

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1. The dismissal of the applicant be and is hereby set aside.
2. For the avoidance of doubt, it is recorded that the applicant remains on suspension.
3. The respondent shall pay the costs of this application.

Honey & Blanckenberg, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

MUWENGA v PTC 1997 (2) ZLR 483 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

11 & 20 November 1997 Judgment No. S- 200-97

Flynote

Administrative law - review - grounds for - unfair decision - failure to promote employee - whether employee had legitimate expectation that he would be promoted

Employment - unfair labour practice - failure to promote employee - whether failure to promote amounted to unfair labour practice - whether employee had legitimate expectation that would be promoted

Headnote

The appellant had been the acting telephone supervisor at an exchange for a long period and had given good service during this time. When the substantive position was filled, however, the appellant was not appointed to the post, which went to someone else. The Labour Relations Tribunal found that the failure to promote the appellant to the post of superintendent did not amount to an unfair labour practice. On appeal:

Held, that the Minister of Public Service, Labour and Social Welfare is empowered to prescribe, by statutory instrument, the acts or omissions which constitute unfair labour practices. Regulations have been passed spelling out what are unfair labour practices. The situation surrounding the failure to promote the appellant is not one of the specified unfair labour practices.

Held, further, that in the circumstances the employer had not created a situation which caused the appellant legitimately to expect that he would be promoted into the post in which he was acting. Most importantly, although the appellant had experience in the post, he lacked the required academic qualifications for it. The decision to appoint a person with the required qualifications had not been unfairly arrived at. There is a need for the courts to avoid undue interference in the administration of public authorities. Indeed, it could be contended with some persuasion that the promotion of an employee is a privilege, left to the discretion of the employer. It is not a right an employee is entitled to claim, unless his contract of employment so

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provides.

Cases cited:

Admin, Tvl & Ors v Traub & Ors 1989 (4) SA 731 (A)

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

Taylor v Min of Higher Education \& Anor 1996 (2) ZLR 772 (S)

Case Information

L T Biti, for the appellant

A N B Miles, for the respondent

GUBBAY CJ

Judgment

Gubbay CJ: This is an appeal against the decision of the Labour Relations Tribunal, brought under s 92(2) of the Labour Relations Act [Chapter 28:01] ("the Act"), in which it was held that the omission of the respondent ("the PTC") to promote the appellant to the post of superintendent did not amount to an unfair labour practice.

The factual background giving rise to the dispute, and upon which the question of law has been debated before this court, was succinctly outlined by the learned Chairman in his judgment. It may be restated as follows:

On 10 October 1984, the PTC invited applications for the post of telephone superintendent at its Gateway exchange in Gweru. Four such posts were to be filled by the lateral transfer of serving superintendents or, if not available, by promotion from the grade of supervisor. The respondent was a supervisor. He applied. After undergoing a two week training course in April 1985, the appellant and one Mahachi, a fellow supervisor, were transferred permanently to Gateway exchange with effect from 28 June 1985.

In April 1986, the appellant and Mahachi, having by then acted for nine months, wrote to the regional telecommunications manager requesting that they be appointed superintendents, as the two substantive posts at Gateway exchange had not been filled. The immediate response to their veiled complaint was to offer them the choice of remaining in an acting capacity or being relieved of their positions. Both resolved to continue as acting superintendents.

During February 1987, the appellant and Mahachi raised with the senior superintendent, Gweru, their concern at still awaiting substantive appointments; but to no avail. New posts, vacancies and regradings were under freeze pending a review of the PTC's establishment.

Later that year, when the freeze was lifted, an exercise was undertaken by the PTC to fill the vacant substantive posts of superintendent at Gateway exchange. Candidates were required to have attained five "O" level passes, including English language and mathematics, in the

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General Certificate of Education examination. There were no applicants with the stated qualification. Neither the appellant nor Mahachi had obtained an "O" level pass in mathematics.

In January 1988, the promotions board of the PTC requested, and was granted a waiver of the mathematics requirement for the post of superintendent. The appellant and Mahachi thus qualified for promotion. In the event, it was Mahachi alone who was appointed. The appellant was not, because at that point in time he was under investigation on charges of misconduct.

In September 1990, the PTC decided to advertise several posts, one of which was for a superintendent at Gateway exchange. The notice issued by it stated explicitly that "O" level passes in English language and mathematics

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GUBBAY CJ

were required of the applicants. The appellant applied, notwithstanding that he still lacked the mathematics qualification. A supervisor from Harare main exchange also applied. He happened to satisfy the educational requirements. And so it was he who secured the appointment.

Shortly thereafter, on 5 February 1991, the appellant was informed that as a superintendent had now been appointed to Gateway exchange, he was no longer needed to act in that capacity and was to be transferred back to Harare main exchange as a supervisor.

This was indeed a bitter pill for the appellant to swallow. He had acted as superintendent at Gateway exchange for a period of five years and seven months and was not prepared to comply meekly with the instruction that he revert to the grade of supervisor. He immediately referred what he believed to be an unfair labour practice to a labour relations officer in terms of s 93(1) of the Act. A hearing was convened on 8 February 1991. The labour relations officer came to the conclusion that:

"The person who was appointed to fill the vacant post at Gateway exchange was eligible for the post in terms of the Postmaster General's Circular No. 8 of 1986 and in terms of the vacancy notice No. 45 of 1990 the PTC acted within the parameters of its laid down policy, and it was thus not guilty of an unfair labour practice in this regard."

Thereafter followed appeals to the regional hearing officer and from him to the Labour Relations Board.

Section 8 of the Act specifies those acts or omissions which constitute an unfair labour practice by an employer. Under s 10, the Minister of Public Service, Labour and Social Welfare is empowered to prescribe, by statutory instrument, acts and omissions which constitute unfair labour practices and may vary, amend of repeal any such notice. Initially such provision was made by the Minister in the Third Schedule to the Labour Relations (General) Regulations 1985 (SI 368 of 1985); and more recently in the Second Schedule to the Labour Relations (Settlement of Disputes) Regulations 1993 (SI 30 of 1993).

Those, then, are the particular acts or omissions deemed to be unfair labour practices which a labour relations officer is mandated by s 93 of the Act to deal with.

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It was not in contention, and rightly so, that the omission by the PTC to promote the appellant to the post of superintendent, despite his long and good service when acting in that capacity, was one of the unfair labour practices specified in the legislation. Nonetheless the argument advanced was that the PTC had created a situation which caused the appellant to legitimately expect that he would be promoted to the post in which he was acting. The landmark judgment of Corbett CJ in Administrator, Transvaal, & Ors v Traub & Ors 1989 (4) SA 731 (A) was prayed in aid.

GUBBAY CJ

In the above cited decision, at 761D-G, the learned Chief Justice elaborated upon the doctrine of legitimate expectation in these words:

> "There are many cases where one can visualise in this sphere ... where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by pblic authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration."

The extension of the principle of natural justice as enunciated in Traub has been accepted by this court. See *Health Professions Council v McGown* 1994 (2) ZLR 329 (S) at 333G-334C; Taylor v Minister of Higher Education & Anor 1996 (2) ZLR 776 (S).

Even if it be assumed (without in any way deciding the point) that it was permissible for the labour relations officer to accept the appellant's reference, albeit falling outside those definitive acts or omissions specified as constituting unfair labour practices, the particular facts seem to me to exclude a finding that the appellant had a tangible natural law right to be promoted to the post of superintendent.

Most importantly, at the date the appellant was appointed an acting superintendent it must have been known to him that he lacked the necessary academic level in mathematics to secure the substantive post. It was only because there was no qualified applicants that the requirement for an "O" level pass in mathematics was waived in 1988. Hence Mahachi was promoted. But for the pending investigation the probability is that the appellant would have been appointed as well, since there remained a vacancy at Gateway exchange. Colloquially speaking, that was a "one off" situation. The waiver of mathematics was dictated by the prevailing circumstances. It was not to be a permanent relaxation. And when in September 1990 the PTC advertised the vacancy at Gateway exchange, an "O" level pass in mathematics was once more a pre-requisite. The appellant had the experience but not the academic qualification. How could he therefore, legitimately or reasonably expect to obtain the appointment? The decision not to promote him, inmy opinion, was not one unfairly arrived at.

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If the PTC had again waived the requirement of mathematics, the appellant's position might have been different. However, it is unnecessary to decide the outcome. I would merely emphasise, as cautioned by CORBETT CJ, that the

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need to avoid undue judicial interference in the administration of public authorities must always be placed in the balance. Indeed, it could be submitted with some persuasion that the promotion of an employee is a privilege, left to the discretion of the employer, to be conferred when deemed fit. It is not a right that an employee is entitled to claim unless, of course, his contract of employment so provides.

For the aforegoing reasons I would dismiss the appeal with costs.

KORSAH JA: I agree.

MUCHECHETERE JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

MURINGI v AIR ZIMBABWE CORPORATION & ANOR 1997 (2) ZLR 488 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Muchechetere JA

Civil appeal

13 & 20 November 1997 Judgment No. S-201-97

Flynote

Costs - deprivation - successful party - failure by respondent on appeal to take decisive point which would indicate futility of appeal - point raised in supplementary heads of argument - responsibility on appellant to ensure that he had a valid appeal

Review - powers of court on review - determination on merits not competent - review of decision approving termination of employment - decision set aside on grounds of bias and breach of requirement of natural justice - not competent for reviewing court to deal with claim for reinstatement

Headnote

The appellant had been suspended from duty as managing director of the respondent airline and an application made to the Minister of Labour for a decision approving the termination of the appellant's contract of employment. The Minister had given her approval. The appellant took the matter on review to the High Court, seeking an order setting aside the Minister's decision on the grounds of bias and a breach of the rules of natural justice. In addition, an order for the

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appellant's reinstatement was sought. The High Court (Robinson J) granted the order setting aside the Minister's decision but ordered that, in the event of the respondent not persisting with the termination of the contract, the application for reinstatement be dismissed. 1(76) The appellant appealed, initially praying for an order for reinstatement and later altering the prayer to one for an order declaring that the appellant's contract of employment continued until lawfully terminated.

Held, that as this was what the High Court had ordered, the appeal was misconceived.

Held, further, that as the application before the High Court was one of review, the court was obliged to determine the decision of the Minister only on the grounds of procedural irregularity and bias. The court should not have delved into the merits of the matter. The order refusing reinstatement thus lacked legal validity.

Held, further, that the first respondent had not taken the crucial point against the appellant, the question of the validity of the High Court's order having been raised only in supplementary heads of argument. Although a modicum of blame attached to the first respondent in omitting to indicate to the appellant the futility of the appeal, the responsibility of ensuring that he had a valid appeal rested with the appellant. Consequently, it would not be right to deprive the first respondent of its costs.

GUBBAY CJ

Cases cited:

Chief Constable of North Wales Police v Evans [1982] 3 All ER 141 (HL)

Commercial Careers College \(1980\) \(Pvt\) Ltd v Jarvis 1989 (1) ZLR 344 (S)

Hama v NRZ 1996 (1) ZLR 664 (S)

Jesse v Chioza 1996 (1) ZLR 341 (S)

National Foods Ltd v Kare \& Ors 1990 (1) ZLR 223 (H)

Winterton\, Holmes \& Hill v Paterson 1995 (2) ZLR 68 (S)

Case Information

P Nherere, for the appellant

A P de Bourbon SC, for the first respondent

No appearance for the second respondent

Judgment

Gubbay CJ: Consequent upon an application for review to set aside the decision of the Minister of Public Service, Labour and Social Welfare approving the termination on notice of the

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appellant's contract of employment with the first respondent, the High Court granted, with costs, the relief sought. In addition, it was ordered that:

> "(2) In the event of the first respondent 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 the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985, the applicant's claim for an order for his reinstatement by the first respondent as its general manager be and is hereby dismissed."

It was against this second paragraph of the order that an appeal was noted. The substantive ground was that:

> "The court *a quo* erred in holding that the relationship between the appellant and the first respondent had soured to such an extent that reinstatement was inappropriate."

The notice of appeal ended with the prayer that:

> "the appeal be allowed with costs and para 2 of the order be set aside and replaced by an order granting the appellant's claim for reinstatement without loss of salary and other benefits."

The hearing of the appeal was set down for 17 July 1997. Heads of argument were filed well in advance of that date. In its heads the appellant challenged the correctness of the decision of the learned judge declining to order his reinstatement. In its written submissions the first respondent, on the other hand, supported the finding made that the relationship between the parties had broken down to a degree that no prospect existed of their being able to work in harmony.

On the day of the hearing, Mr Nherere, who appeared for the appellant, requested a postponement. He advised that it was his intention to raise a constitutional issue. The application was not opposed. It was granted subject to the appellant paying the wasted costs.

Supplementary heads of argument were then filed on behalf of the appellant, together with an application to amend the relief claimed in the notice of appeal to read:

GUBBAY CJ

> "Wherefore the appellant prays that his appeal be allowed with costs and para 2 of the order granted by the court *a quo* be set aside and replaced by an order declaring that the appellant's contract of employment continues to subsist until lawfully terminated."

At the outset of the resumed hearing, it was pointed out to Mr Nherere that the basis of the appeal appeared to be misconceived. The very relief sought of this court had been granted by the learned judge. There was nothing therefore to appeal against. Little debate was necessary to convince counsel of this position.

It would seem that the cause of the confusion in the minds of the appellant's advisers arose, to some extent at least, from the consideration given to the issue of reinstatement by the learned judge. He too was misled by the contention addressed to him that this was part of the relief to which the appellant was entitled.

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In the first place, the learned judge held that the Minister had breached the requirement of natural justice by failing to provide the appellant with the documentary evidence relevant to the first respondent's application, and to invite him to make written submissions in response to that evidence, before approving the termination of his contract of employment; and, in the second place, that the Minister's decision was also vitiated by a perception of bias. He concluded this aspect of the judgment in these words:

"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" (emphasis added).

The learned judge then went on to deal with what he believed to be the remaining issue of whether the appellant was deserving of an order for his reinstatement; or, failing reinstatement, of an award of damages.

It was in this respect that in an otherwise carefully reasoned judgment the learned judge fell into error. The application before him was one of review. What was claimed was the impeachment of a decision of an administrative official, exercising a quasi-judicial function, on the grounds of procedural irregularity and bias. He was obliged to determine that issue alone and not to delve into the merits of the matter. Judicial review, as the phrase implies, is concerned not with the correctness of the decision but with the decision-making process. See Chief Constable of North Wales Police v Evans [1982] 3 All ER 141 (HL) at 155c; National Foods Ltd v Kare & Ors 1990 (1) ZLR 223 (H) at 232D-233A; Herbstein & van Winsen The Civil Practice of the Supreme Court of South Africa 4 ed at 933.

There is no suggestion to be found in any of the three cases referred to by the learned judge that, having set aside the decision of an administrative tribunal, it is permissible for the reviewing court to embark upon a factual determination as to whether the employee should be reinstated in the event

of the employer electing not to persist with the termination of the contract of employment. Both Commercial Careers College (1980) (Pvt) Ltd v Jarvis 1989 (1) ZLR 344 (S) and *Winterton\, Holmes \& Hill v Paterson* 1995 (2) ZLR 68 (S) were applications brought under the common law for reinstatement on the ground of unlawful termination or suspension. Neither involved the exercise by the court of its inherent power of review. And in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) this court's ruling was simply that an employer who suspends an employee by recourse to the Labour Relations Regulations is not compelled to reinstate him in employment without the option of paying damages, should the determinationof the misconduct alleged go against him.

Clearly, the learned judge should not have gone beyond setting aside the decision of the Minister. What he held thereafter was quite outside the purview of the application for review. It necessarily follows that the order that was made contingent upon the first respondent deciding

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not to reapply for approval to terminate the appellant's contract of employment on notice, lacked legal validity.

Although cognisant of the inevitability of the appeal having to be dismissed, Mr Nherere urged that the appellant should not be penalised by an order for costs. He submitted that the first respondent had not taken the crucial point against the appellant, and had not re-applied to the Minister for termination.

In response, Mr de Bourbon stressed that the first respondent had been made a party to the appeal. Heads of argument had been prepared and filed countering the ground initially relied upon by the appellant. Pending the fate of the appeal, the first respondent considered that it was prohibited from taking any steps toward the termination of the appellant's employment.

I think a modicum of blame attaches to the first respondent for omitting to indicate to the appellant, upon receipt of the supplementary heads of argument, the futility of the appeal. Nonetheless, I am not disposed to deprive it of any of its costs. In my view, responsibility to ensure that he had a valid appeal rested with the appellant. See my remarks in *Jesse v Chioza* 1996 (1) ZLR 341 (S) at 347E-F.

The appeal is accordingly dismissed with costs.

KORSAH JA: I agree.

MUCHECHETERE JA: I agree.

Kantor & Immerman, appellant's legal practitioners

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

PTC v MODUS PUBLICATIONS (PVT) LTD 1997 (2) ZLR 492 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

6 & 25 November 1997 Judgment No. S-199-97

Flynote

Delict - actio injuriarum- defamation -plaintiff- statutory corporation -Posts and Telecommunications Corporation - whether can sue for defamation in its corporate name

Practice and procedure -locus stands - slatutory corporation- whether has locus standi to sue for defamation

Headnote

The Posts and Telecommunications Corporation, a statutory corporation, sought to sue a newspaper for defamation. The trial court held that as the corporation is an organ of the State, it

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did not have locus standi to sue for defamation. Dismissing the appeal:

Hold, that although trading and non-trading corporations can normally sue for defamation, for policy reasons corporations that are part of the governance of the country are not entitled to sue for defamation. The main policy reasons for denying to State organs the right to sue for defamation are these:

(1) State bodies should be open to public criticism. As part of the general right of freedom of expression, the public should have the right freely to criticise the activities of these State bodies.

(2) The State should not be able to stifle or silence criticism by mounting defamation actions against its critics using State funds, derived from its subjects, to finance such actions. The State's normal remedy in such a case is a political one and not by way of litigation.

Such State bodies are not, however, wholly deprived of a remedy in the event of scurrilous attacks upon their reputations. They have the right to bring actions for economic loss resulting from injurious falsehood, in our law referred to as malicious making of false statements. Unlike an action for defamation, where the onus lies on the maker of the defamatory statement to prove the truth of his assertions, with malicious falsehood, the onus of proof lies on the body complaining of the loss to prove the falsity of the statement. As this matter is adequately covered by the common law. it is not, therefore, necessary to rely on the constitutional provisions relating to freedom of expression.

Held, further, it is not wise or desirable to attempt an exhaustive definition of the category of artificial persons which should be denied the right to sue for defamation because they are State organs, because concepts and techniques of government are developing and changing 'Me law in this regard has to he developed on an incremental basis. However some of the criteria that are to be taken into account are:

· whether the statutory body has any discretion of its own and, if it does, what degree of control the executive exercises over that discretion;

McNALLY JA

· whether the property vested in the corporation is held by it for and on behalf of, the Government;

· whether the corporation has any financial autonomy;

· whether the functions of the corporation are government functions;

· whether, if the body is not a statutory trading corporation, it performs govemmental functions either at a local or national level; and

· whether, if the body concerned is, at least largely or effectively, a monopoly providing what are generally regarded as essential services traditionally provided by government,

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it would be contrary to public policy to muzzle criticism of it.

Held, further, that applying these criteria to the Posts and Telecommunications Corporation, the Corporation is an organ of the State and thus has no locus *standi in judicio* to sue in this matter.

Cases cited:

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

Baloro & O*rs v University of Bophuthaswana & Ors* 1995 (4) SA 197 (B)

Banco de Moçambique v Inter-Science Research & Development Svcs (Pty) Lid 1982 (3) SA 330 (T)

Derbyshire CC v Times Newspapers Lid [1992] 3 All ER 65 (CA)

Derbyshire CC v Times Newspapers Ltd [199311 All ER 1011 (HL)

Dhlomo *NO v Natal Newspapers (Ply) Ltd & Anor* 1989 (1) SA 945 (A)

Die *Spoorbond & Anor v SA Rlys; van Heerden & Ors v SA Rlys* 1946 AD 999

Directory *Advertising v Min for Posts* 1996 (3) SA 800 *M*

du Plessis & Ors v de Klerk & Ors 1996 (3) SA 850 (CC)

McNally v M&G Media (Ply) lid & Ors 1997 (4) SA 267 (W)

Metropolitan Saloon Omnibus Co Lid v Hawkins [1843-60) All ER Rep 430

NSSA v Min of Defence 1994 (2) ZLR 162 (S)

*Rajagopal & A*nor v *State of Tamil Nadu [199413* LRC 369

S v Zimbabwe United Freight Co Ltd 1990 (1) ZLR 138 (S)

SA Assoc *Newspapers & A*nor v Est Pelser 1975 (4) SA 797 (A)

Shipping Corporation of India v Evdomon Corp 1994 (1) SA 550 (A)

*Theophanous v The Herald and Weekly Times Lid & A*nor [199413 LRC 369

Case Information

P Nherere, for the appellant

E W W Morris, for the respondent

Judgment

McNally JA: This is an appeal against a decision by DEVITTIE J *(77) in the High Court allowing an exception to the plaintiff's (PTC's) claim on the ground that:

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"the plaintiff is an alter ego of the State, has no fama, and has no locus standi in judicio to sue for defamation."

The respondent (Modus), in its newspaper the *Financial Gazette,* had on three occasions in the first half of 1995 published articles which were allegedly defamatory of the PTC. The latter, alleging general damage to its

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reputation, sued for $20 000 in each instance, a total of $60 000. The granting of the exception effectively defeated the claim.

The PTC now submits, on appeal, that the court erred, first by holding that the PTC was an *alter* ego, department or organ of the State, secondly that as such it had *no fama,* and thus thirdly that it had no *locus standi.* In fact tile learned judge did not make a finding that the PTC had no fama, but he did make the other two findings.

It will be noted that the exception has nothing to do with whether or not the words complained of are reasonably capable of conveying a meaning defamatory of the plaintiff. We are concerned solely with the capacity of the plaintiff to bring such an action.

There are three questions which arise here. The first is "can an artificial person sue for defamation?" The second is "can the State sue for defamation?" Then arises the third and vital question "Is the PTC covered by the phrase 'the State? ' " The answer to the first question is "yes", and to the second question is "no". But it is useful to look briefly at how these answers developed.

In the law of England, there has been a gradual development. In 1859 it was held by POLLOCK CB that "a corporation at common law may maintain an action for a libel by which its property is injured" - Metropolitan Saloon *Omnibus Co Lid v Hawkins [1843*-60] All ER Rep 430 at 43this reference to1.

Although this reference to injury to properly might be seen to limit the right to trading corporations, it is clear that non-trading corporations too may sue for defamation. In *Derbyshire CC v Times Newspapers Lid [199213* All ER 65 (CA) at 75h, BALCOMBE. U said:

" ... any corporation, whether trading or non-trading which can show that it has a corporate reputation (as distinct from that of its members) which is capable of being damaged by a defamatory statement, can sue in libel to protect the reputation ... "

That view was upheld in general terms, in tile speech of LORD KEITH OF KINKEL at p 1017 e-h of the same case on appeal - Derbyshire *CC v Times Newspapers Lid [1993]* 1 All ER 1011 (HL).

The same is true in South Africa. In *Dhlomo NO v Natal Newspapers (Ply) Lid & Anor* 1989 (1) SA 945 (A), the Appellate Division concluded that:

"... a non trading corporation can sue for defamation if a defamatory statement concerning the way it conducts its affairs is calculated to cause it financial prejudice".

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(See also *Argus P & P Co Lid v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 5 81 E).

The learned ACTING CHIEF JUSTICE went on however:

> "It is accordingly unnecessary to consider the further question whether a non-trading corporation can sue for defamation if the defamatory matter of which it complains relates to the conduct of its affairs but is not calculated to cause it financial prejudice."

So clearly, an artificial person can sue for defamation. But with the

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development of democracy there has evolved a jurisprudence which denies that right to certain artificial persons which are loosely (and 1 stress the word "loosely") described as "the State" or, in earlier days "the Crown".

Mr *Nherere,* who appeared for the PTC, did not dispute the broad proposition that the State cannot sue for defamation. He concentrated his attack upon the proposition that tile PTC was the State, or was an *alter ego* of the State. 1 think it necessary, therefore to analyse the reasoning for the denial of the right. By doing so, we may come to understand more clearly the class of artificial persons to whom that right is denied.

The leading judgment was delivered in South Africa in 1946 in the cases of *Die Spoorbond & Anor v South African Railways* and *van Heerden & Ors v South African Railways* 1946 AD 999. The two cases were heard together before WATERMEYER CJ, TINDALL JA, GREENBERG JA, SCHREINER JA and DAVIS MA. The judgments were delivered by the CHIEF JUSTICE and SCHREINER M.

In each case, the South African Railways and Harbours had sued for defamation. In each case, the defendants had excepted that:

> "... the plaintiff was not in law entitled to sue for damages for the alleged defamation."

The exceptions were overruled in the court of first instance. The decisions were reversed on appeal.

The CHIFF JUSTICE after an interesting excursus on the intricacy of the English law of libel and slander, about which he quoted Sir Frederick Pollock "the law went wrong from the beginning in making the damage and not the insult the cause of action", went on to rule as follows:

1. Assuming that a business or trading corporation could recover damages for such (defamatory) publications without proof of damage, die Crown had never, anywhere in the Commonwealth, exercised such aright. This was evidence that such a right never existed.

2. If the courts had a power "to modify existing principles to keep in touch with the expansion of legal ideas and to keep pace with the requirements of changing conditions", considerations of fairness and convenience did not demand such an extension.

3. Independently of considerations of fairness and convenience, the position of the Crown was

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very different from that of a business or trading corporation. Its reputation was "invulnerable to attacks of this nature".

4. If actual damage or loss to the Administration had been caused by the false and malicious statements, such loss can be recovered, not on the basis of injury to the reputation of the Crown, "but upon a wrong done which causes loss."

5. Accordingly, the actions were misconceived.

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SCHREINER JA started by noting that it was not yet clear in South African law whether the right to sue for defamation was available to all corporations or only to trading corporations.

But the Crown, he said, was different from other corporations. Because some corporations could sue for defamation, and the Crown could sue its subjects in many kinds of action based on delict, it did not follow that the Crown could sue for defamation.

The learned JUDGE or, APPEAL went on to set out the reasons why it was undesirable that the Crown should be allowed to sue for defamation. I summarise them as follows (see generally at p 10 13):

1. The Crown's normal remedy is political action and not litigation.

2. The Crown has the remedy of criminal prosecution (where, be it noted, the onus of proof is on the State, which is not the case in a defamation action).

3. Freedom of expression is important.

4. The wealth of the State, derived from its subjects, should not be used to silence its critics.

5. "It would be difficult to assign any limits to the Crown's right to sue for defamation once its right in any case were recognised."

1 pause to observe that in those pre-Thatcherite days it was a relatively simple matter to define what "the Crown" was. "Privatisation" was a word as yet uncoined. Moreover, there was no developed jurisprudence of Human Rights, certainly no Bill of Rights.

In conclusion SCHREINER JA said:

> "It is sufficient for the decision of these appeals to say that an action for defamation has not in the past been accorded to a sovereign against its subjects, and there are good practical reasons why such an action should not now be recognised in South Affica."

We should bear in mind too that the decision was one in respect of a national public utility corporation, the Railways; no different in broad principle from any other national public utility corporation such as the PTC. The Railways was a corporation with the right to sue and be sued.

The principle in the Spoorbond case *supra* was recognised, albeit hesitantly, in the case of *SA Associated Newspapers & Anor v Estate Pelser 1975 (4) SA 797 (A)* (a decision which has

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been the subject of criticism, and which may perhaps best be seen as a reflection of its times). But at least it affirmed the principle that the government cannot be defamed. (See also *McNally v M & G Media (Ply) Ltd & Ors* 1997 (4) *SA* 267 (W) at 276G.

The same may be said of the *DhIomo* decision *supra*. Here the learned

ACTING CHIEFE JUSTICE, RABIE ACJ, conceded (with some apparent reluctance)

that:

> "It is conceivable, 1 think, that such a corporation (he was actually speaking of non-trading

> corporations) may, in certain circumstances, be denied the right to sue on the ground of considerations of public or legal policy."

But he did not deny that right to Inkatha Yesiswe, the predecessor of the current Inkatha Freedom Party. The *Argus Printing* decision *supra* in 1992 confirmed that decision. So a political party is not an organ of State.

The English learning may best be seen in the two *Derbyshire CC* cases *supra* where both the Court of Appeal and the House of Lords were unanimous that:

> "under the common law of England a local authority does not have the right to maintain an action of damages for defamation." ([1993] 1 All ER at 1020e).

LORD KEITH OF KINKEL reached that conclusion "upon the common law of England, without finding any need to rely upon the European Convention". (Article 10 of the European Convention on Human Rights.)

It is worth noting here that the headnote, which 1 think accurately reflects the opinion of the learned LAW LORD, records the *ratio* of die decision as:

> "It would be contrary to the public interest for the organs of government, whether central or local, to have that right."

I mention this because it is quite obvious that the Derbyshire County Council is not a part of the central government; it has no governmental relationship with any citizen outside Derbyshire; and it maybe controlled by a political party other than the party in power in Westminster. It is thus apparent that the principle which denies to certain artificial persons the right to sue for defamation, does not deny it on the basis that the artificial person is "the State" in the sense of "the central government", but on a wider basis, which includes local government authorities. 1 sought to express my understanding of the position, during die course of argument, by reference to the currently fashionable word "governance".

Thus I would seek to support the proposition that the right to sue for defamation is not available to those artificial persons which are part of the governance of the country. In deciding what is meant by "part of the governance of the country" the question whether the entity is a *legal personal* .separate from central government maybe a criterion, but 1 venture to suggest, a small

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one.

The Supreme Court of India has held that:

> "Government, local authority and other organs and institutions exercising governmental power can not mantain a suit for damages for defamation"

and in the process adopted the ratio in the *Derbyshire CC* decision in the House of Lords: *Rajagopal & Anor v State of Tamil Nadu* [19951 3 LRC 566 (S).

The *Derbyshire CC decision* was also cited without apparent dissent in the majority judgment in the High Court of Australia in *Theophanous v The*

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Herald and Weekly Times Ltd & Anor, reported in [199413 LRC 369 at 386-387. That case however dealt with the somewhat different question of the right of a member of Parliament to sue for defamation.

Much was made by Mr Nherere of the decision of this court in NSSA v Minister of Defence 1994 (2) ZLR 162 (S). In that matter, as a result of a collision between two motor vehicles owned respectively by the National Social Security Authority and the Army, the Authority sued die Minister for damages. A judge ruled that one organ of the State could not sue another. But on appeal this court reversed the ruling. We held that the NSSA was not an entity completely severed from the State. It was under close Ministerial control. But it was sufficiently separated in identity to enable it to sue the State. In particular, it had the power to sue and be sued, and numerous other autonomous powers.

So, argued Mr Nherere, what is true of the NSSA is true of the PTC. If an army lorry runs down a postman's bicycle, the PTC will have an action. It is a separate entity from the State. Ergo it is not an "alter ego" of the State.

To this argument, I respond with confession and avoidance. 1 accept that the PTC is a separate entity from the State, in the limited sense that it is itself a separate legal persona. But 1 say that fact is of very limited relevance. After all, the Derbyshire County Council is a separate legal persona from the British Government. 1 am sure that a collision between a county council van and a British Army lorry could give rise to litigation between them. The question is not whether the 'public corporate entity (be it a Rural District Council, a Municipality, a statutory corporation, a body corporate, or a parastatal) is a separate legal persona. The question is whether it is a part of the governance of the country. Or, to put it another way, whether it is a body such that the reasoning in the leading cases applies to it, so as to warrant the denial of the right to sue for defamation.

I do not wish to go into a detailed analysis of the similarities and differences between the NSSA and the PTC, insofar as their independence from, and control by, central government is concerned. 1 am content to accept that, like the NSSA, the PTC has an individual legal personality, and is an artificial persona in its own right.

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The Posts and Telecommunications Corporation Act [Chapter 12:031 (The Act), created the PTC as a body corporate capable of suing and being sued in its own right. It is really unnecessary to go further than that. Its individual legal personality is indisputable.

But by no means does it follow that because the PTC is a separate and distinct artificial persona, it cannot be a "government instrumentality" as the phrase is used by Moorthy in his article "The Malaysian National Oil Corporation- Is it a Government Instrumentality?" in the International and

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Comparative Law Quarterly (198 1) vol 30 part 3 p 638. In fact, he concludes that Petronas, despite being incorporated under the Malaysian Companies Act, 1965, is indeed a government instrumentality.

One must be careful not to confuse distinctions made for one purpose with distinctions made for another. An entity such as die PTC may fall on one side of the line for one purpose, and on the other side for a different purpose. More exactly, one must he careful to appreciate that die conclusion may be different because the question is different. If one asks "Is the PTC a legal *persona* separate and distinct from the State?" - the answer is "yes".

But if one asks: "Given the policy considerations which require the law to deny the right to sue for defamation to instruments of governance (or instrumentalities of government), is the PTC such an instrument or instrumentality?" - the answer may also be "yes".

Indeed, it is instructive to note that if one had asked whether the Derbyshire County Council had a legal personality separate from that of the State, the answer would be "yes". And if one asked whether in 1946 the South African Railways could sue and be sued in its own name, the answer would be "yes". Yet in both the cases cited involving [hose parties, the decision was that they could not sue for defamation.

Accordingly, I do not find helpful, in this context, the judgments cited by Mr Moorthy in the article referred to, nor the learned and lucid judgment of GOLDSTONE J in *Banco de Moçambique v Inter-Science Research and Development Svcs* 1982 (3) SA 330 (T). Indeed in a subsequent South African Case, CORBETT CJ (with whom GOLDSTONE, by then JA, was sitting) cautioned against the danger of applying principles developed in relation to one situation, to a different situation. In *Shipping Corp of India v Evdomon Corp* 1994 (1) SA 550 (A), the question was whether SCI "should be regarded as an organ, department or instrumentality of the Government of India", for the purpose of attachment to found or confirm jurisdiction (558G-H). He answered the question in the negative.

The vast majority of cases in which the question had arisen, he noted, dealt with the doctrine of sovereign immunity (564C-D). Different considerations applied when one was dealing with attachment to found jurisdiction (565H-J). Similarly, 1 note the differences of approach to the definition of "executive organ of State" in *Baloro & Ors v University of Bophuthaswana & Ors* 1995 (4) SA 197 (B) on the one hand, and *Directory Advertising v Minister for Posts and Telecoms* 1996 (3) SA 800 (7) on the other. In the latter, it was decided that Telecom, a wholly

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owned government company, was an organ of the State. In the former, it was held that "organs of State" in the interpretation of s 7(1) of the South African Constitution must be interpreted very widely to include *inter alia* universities

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and law societies.

I conclude therefore that the phrases *"alter ego* of the State" and "organ of the State" are not terms of art which have a specific legal definition. They must be defined in their contexts.

In the context of defamation, I do not consider it wise or desirable to attempt an exhaustive definition of the category of artificial persons which should be denied the right to sue for defamation because they are "the State", "the *alter ego* of the State", "an organ of the State", "an instrumentality of the State", "an instrument of governance".

The common law, as KENTRIDGE AJ remarked in du *Plessis & Ors v de Klerk & Ors 1996* (3) SA 850 (CC) at 884F, is developed on incremental lines. Concepts and techniques of government are developing and changing. The functions of government differ from country to country. I propose therefore merely to set out some criteria which I think are helpful in deciding whether the PTC, in this context, is "the State". I start with the criteria set out by Moorthy op *cit,* and used by GOLDSTONE J and CORBETT CJ in the cases to which I have referred.

They are as follows:

1. Whether the body has any discretion of its own; if it has, what is the degree of control by the executive over the exercise of that discretion?

2. Whether the property vested in the corporation is held by it for and on behalf of the government.

3. Whether the corporation has any financial autonomy.

4. Whether die functions of the corporation are government functions. I pause here to point out that Mr Moorthy set out these tests to determine whether a statutory trading corporation was a government instrumentality. They are not very useful in deciding whether a local government body falls within the criteria. 1 would therefore add

5. Whether, if the body is not a statutory trading corporation, it performs governmental functions either at local or national level. And, to ensure that the policy of the law does not promote defamatory statements having the effect of hampering a governmental body in its competitive trading position, I would also add

6. Whether, if the body concerned is, at least largely or effectively, a monopoly, providing what are generally regarded as essential services traditionally provided by government, it would be contrary to public policy to muzzle criticism of it.

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I turn finally to examine the position of the PTC vis-à-vis these criteria.

1. It is a statutory corporation. The statute is administered by the Minister of Information, Posts and Telecommunications. (s 2)

2. The Minister appoints the Board which governs it (s 5). The Postmaster

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General, who is a member of the Board, is appointed by the Board with the approval of the Minister (s 22).

3. The Minister may give directions to the Board "in the national interest" (s 24).

4. The Minister has to approve the charges and levies for its services (Schedule: Item 25).

It is clear therefore that the Minister has extensive control over the PTC.

The funds of the PTC come partly from its own operations and partly from moneys appropriated by Act of Parliament (s 27). Deficits may be met by the State (s 30).

The State is thus finally responsible for the funds of the PTC.

The PTC's financial policy is basically dictated by the State (s 26), and as earlier pointed out, its pricing policy is subject to the approval of the Minister,

Its financial autonomy therefore exists only within the parameters laid down by, and amendable by, Parliament.

The functions of the PTC, as set out in s 19, are to provide postal and telecommunications services, to regulate radio stations, to establish radio ñ communication services, to provide the services necessary in connection with the Post Office Savings Bank; and to provide certain other services.

These are clearly essential public services. traditionally provided by government.

Finally, and in a general sense, the PTC provides essential services which no other agency provides. It has a monopoly. See S *v Zimbabwe United Freight Co Ltd 1990 (1)* ZLR 138 (S). Criticism should not be muzzled. It uses the peoples' money.

The key to the law's approach is summed up by SCHREINER JA in the *Spoorbond* case, *supra*, aptly cited by DEVITTIE J in the court below, when he said.

> "I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in the country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the .country."

It is a question of balancing the State's right to defend itself against calumniators against the right of the citizen to freedom of expression in respect of the manner in which he is being

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governed. LORD KEITH OF KINKEL, in die *Derbyshire CC* case, made the same point when he said at 1017:

> "It is of the highest public importance that a democratically elected governmental body, *or indeed any governmental body,* should be open to uninhibited public criticism" (my emphasis).

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And later at 1018f-g:

> "What has been described as 'the chilling effect induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving these facts is not available."

It must also be said that the governmental body is not wholly deprived of a remedy. It has always the action for economic loss resulting from what the English law calls injurious falsehood, or what we would call malicious or negligent statements. But there die onus of proof lies upon the body complaining of the loss. It is the peculiar remedy of defamation, requiring the alleged defamer to prove the truth of his assertions, which the law regards as inappropriate in the hands of an "organ of government".

I have not referred, in this judgment, to the constitutional provisions relating to freedom of expression (s 20). 1 believe the common law of Zimbabwe covers the matter adequately, without the need to rely upon constitutional provisions. 1 echo, with respect, the words of LORD KEITH OF KINKEL:

> "My Lords, 1 have reached my conclusion upon the common law of England, without finding any need to rely upon the European Convention (on Human Rights)."

I agree with DEVITTIE J that it is unnecessary and undesirable to rule that the PTC has no fama or reputation capable of injury. But 1 am satisfied that it falls into the category of "organs of State" for the purposes of the law of defamation, and thus has no locus *standi in judicio* to sue in this matter.

The appeal is dismissed with costs.

GUBBAY W: 1 agree.

KORSAH JA: 1 agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

AFRICAN DISTILLERS LTD v MATABELELAND TRACTOR SERVICES (PVT) LTD 1997 (2) ZLR 503 (SC)

Court **Supreme Court, Harare**

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McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

17 & 27 November 1997 Judgment No. S-205-97

Flynote

Sale - cancellation - property of a third party - third party claiming restitution - whether buyer obliged to put up vigorous defence before being allowed to recover from seller

Headnote

The appellant bought a motor vehicle from the respondent. An employee of the appellant drove the vehicle to South Africa, where it was impounded by the police because it had been stolen in South Africa some years earlier. The appellant claimed the return of the purchase price from the respondent, which raised the defence that the appellant had failed to conduct a virilis defensio, that is, to resist strongly the true owner's claim.

Held, that, whatever may have been the position under the Roman law, the law today is that the buyer is not obliged to put up any, let alone a vigorous, defence against the true owner on pain of being unable to recover from the seller. If the true owner's claim is shown on a balance of probabilities to be good, a virilis defensio would achieve nothing. As the facts in this case showed that the true owner's claim was clearly good, the appellant was entitled to succeed.

Cases cited:

Adler v Elliott 1988 (2) ZLR 283 (S)

DD Tpt (Pvt) Ltd v Abbot 1988 (2) ZLR 92 (S)

Garden City Motors (Pvt) Ltd v Bank of the OFS Ltd 1983 (2) SA 104 (N)

Lammers & Lammers v Giovannoni 1955 (3) SA 385 (A)

Moyo v Jani 1985 (1) ZLR 112 (H)

Case Information

R Y Phillips, for the appellant

D P Carter, for the respondent

Judgment

McNally JA: This is an appeal from a decision in the High Court on 4 September 1996.*(78) The facts may be stated briefly as follows:

In 1991, vehicles were difficult to obtain. There was price control on second hand vehicles. A representative of the appellant (Afdis) heard that the respondent (MTS) had a Toyota Hilux pick-up for sale. He bought it for

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McNALLY JA

Afdis. He paid cash. It was a vehicle of South African origin. No receipt was issued. Change of ownership was not effected for two years, during which the vehicle was kept in storage. I assume this was because of the two year restriction on transfer of ownership of imported vehicles. The registration book was in the name of MTS. Eventually, ownership was transferred early in 1993. No question of the legality of these transactions has been raised in the proceedings.

Soon thereafter an employee of Afdis drove the vehicle to South Africa. At the border on the way back on 29 June 1993 it was impounded by the South African Police Service (SAPS). They said it was a stolen vehicle. This allegation was based on its chassis number. The employee, Mr Metcalfe, felt unable to dispute the allegation. He was given a hand-written note by a Sergeant Smit of the SAPS confirming the seizure. He was shown the details on a computer.

Afdis then sued MTS for the return of the purchase price. It alleged eviction from possession by the SAPS relying on the claim of the true owner, which eviction and claim, it said, were unassailable.

MTS admitted the unassailability allegation (it said it was not disputed, which, in terms of r 104(2) is an admission). It put up the defence that it was not the seller. Its managing director, one Peter Staak, personally sold the vehicle, acting as the duly authorised agent of one Jacobus Oberholtzer, whose identity as owner was revealed to the purchaser's representative at the time of sale.

That defence was rejected by the learned trial judge for sound reasons which have not been challenged. The trial was decided on a different issue.

What happened was this. Shortly, before the trial someone must have read the informal handwritten notice of seizure with care. So, in the defendant's sum-mary of evidence dated 7 March 1996, the point was taken that the document was self-evidently faulty. Accordingly, it was intended to apply to withdraw the admission made as to the validity of the police action and of the identity of the true owner. The application was made at the hearing on 11 March 1996.

There were two apparent errors in the document. One was that the vehicle reported stolen was allegedly NNY 152T, whereas the vehicle in question was NNN 152T. Nothing actually turns on this because the number was false, whichever it was. The other was that it was alleged that the vehicle had been reported stolen on 16 August 1993. That was clearly impossible, since it had been in Zimbabwe since March 1991. Even if one assumed, because of a reference in the document to "Kliptown CR 280/8/92", that the date should have been 16 August 1992, the impossibility remained.

The learned judge, after hearing argument, allowed the withdrawal of the admission. The case then turned on the new issue whether the title of the true owner had been shown to be unassailable, and whether Afdis should have resisted the action of the SAPS.

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McNALLY JA

Clearly, Afdis was given very little notice of this fundamental about-turn by the defence. So the case proceeded on the issue of the identity of the seller, while Afdis attempted to obtain evidence from the SAPS. At the resumption on 24 June 1996, a Sgt de Beer in the SAPS was called by the plaintiff, Afdis.

Sgt de Beer worked at the Organised Crime, Vehicle Theft Unit in Pretoria, and had access to all computerised information on stolen vehicles in South Africa. He stated that there was a record of the vehicle impounded in this case. He said that where a vehicle was impounded there was a procedure whereby the engine and chassis numbers were checked to see if they had been tampered with. If they had, a test was carried out to reveal the true original numbers.

In this case, such a check had been carried out, and it had been revealed that the numbers were false. The original numbers showed that the vehicle was one stolen in 1990, reported stolen to John Vorster Square Police Station on 23 November 1990 by the owner Mr M B Smith. After the theft, its engine and chassis numbers had been altered. It was therefore pure coincidence that it had been impounded at Beitbridge. The coincidence was that the vehicle, whose numbers were on the vehicle in question, was itself subsequently stolen.

However, cross-examination revealed that the electro-acid process, by which the original numbers were revealed, was carried out by a different South African policeman, one Sgt Makhongele. Mr Carter argued that his evidence was inadmissible.

The learned judge decided that Sgt Makhongele's evidence could not be admissible, even in terms of the amended Civil Evidence Act [Chapter 8:01], and thus the court could not be satisfied as to who the true owner was. Therefore Afdis had not proved eviction by the true owner. Therefore he granted absolution from the instance, with the plaintiff to pay the costs.

On appeal, Mr Phillips did not contest the inadmissibility of Sgt Makhongele's evidence. He submitted that, even without his evidence, the evidence of Sgt de Beer was adequate.

He also applied, rather belatedly, to amend his grounds of appeal, to challenge the decision to allow MTS to withdraw its admission. We reserved judgment on the application after hearing argument from both parties.

I do not think we can interfere with the decision of the learned judge to allow the withdrawal of the admission. First, because, with respect, I agree with his decision. Second, because even if I thought I might have come to a different conclusion, his decision was not so clearly a wrongful exercise of discretion as to warrant interference.

The principles upon which a withdrawal of an admission may be permitted were discussed in *DD Transport \(Pvt\) Ltd v Abbot* 1988 (2) ZLR 92 (S) and in Adler v Elliott 1988 (2) ZLR 283 (S).

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McNALLY JA

The overwhelming reason for allowing it in this case is that the mistake which led MTS to make the admission was induced by Afdis, whose employees were at all times in a position to know about the mistake. It was they who obtained the piece of paper from Sgt Smit at the border. A reasonably careful perusal of that document would have revealed its inherent contradictions. Each side was equally to blame for failing to read it carefully. But Afdis was the first to err. It misled MTS.

Accordingly, the application to amend the grounds of appeal is refused. It has no prospect of success.

I turn therefore to deal with the defence based on the failure to conduct a virilis defensio. The cases relied upon by Mr Carter and by the learned judge *a quo* were Lammers & Lammers v Giovannoni 1955 (3) SA 385 (A), and Garden City Motors (Pvt) Ltd v Bank of the OFS Ltd 1983 (2) SA 104 (N). On appeal reference was also made to *Moyo v Jani* 1985 (1) ZLR 112 (H).

In Moyo *supra* Mfalila J said at p 121:

> "The most important factor which a purchaser must establish before he can successfully proceed against his vendor is that the third party's title is legally unassailable; a mere demand which has been accepted as valid by the purchaser is (the word "not" has surely been omitted here) enough to entitle the purchaser to sue his vendor upon the warranty against eviction."

In that case, the Controller of Customs had seized a video, but had provided a notice of seizure which "meticulously informed the plaintiff of his rights". The plaintiff had not pursued those rights. He lost his case against the vendor.

In Lammers *supra*, the Appellate Division was concerned with the sale and resale of a car possessed by the original seller under a hire-purchase agreement. The eventual buyer, who had bought the car as a shell, and spent a large sum of money reconstructing it, protested vigorously when he was dispossessed by the messenger of court. He handed it over only when threatened with arrest.

Schreiner JA, who handed down the majority judgment, was dealing essentially with the right to claim for improvements. But he was more than luke warm when it came to the requirement of a virilis defensio and the alleged requirement to give notice to the seller.

On the issue of virilis defensio, he said (at 391H):

> "But whatever may have been the position under the Roman Law, it is clear from what has been said above that today the buyer is not obliged to put up any, let alone a vigorous, defence against the true owner on pain of being unable to recover from the seller" (So long, of course, as the true owner's claim is clearly good).

On the issue of notice to the seller, he said (at 391A):

> "Under the early law too, the buyer could not recover from the seller unless he had given him notice of the owner's claim. But the giving of notice has ceased to be a condition precedent to the buyer's claim; he can in his action against the seller free himself from the

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> criticism that he had given no notice to the seller by proving that the latter had no title that could have made resistance to the true owner possible."

Finally, in the Garden City Motors case *supra*, the full bench of the Natal Provincial Division had to deal with a similar but even more complex series of transactions involving a car illegally sold while on hire-purchase. The case turned on the question whether the claimant had been evicted. It was held there was no eviction. The decision is not of assistance in the present case.

I do not think it necessary to go into the niceties of the Civil Evidence Act, [Chapter 8:01], in view of Mr Phillips's concession that Sgt Makhongele's evidence was not admissible in terms of s 27 of that Act. Nor do I find it necessary to consider whether, were an appropriate application lodged, Sgt Makhongele's evidence could be submitted on affidavit or whether his personal appearance would be necessary. Affidavits from South Africa were not admissible until 12 September 1997, when SI 186 of 1997 was published.

I prefer to deal with the matter on the basis of Mr Phillips's submission that we can ignore what is said by Sgt de Beer about the tests carried out by Sgt Makhongele. The facts that emerge from Sgt de Beer's evidence are:

1. The vehicle bore false engine and chassis numbers when it was impounded.
2. SAPS investigations have revealed that in fact the vehicle was stolen in Johannesburg in November 1990.
3. The true owner of the vehicle was a Mr M B Smith, and the vehicle had been surrendered by the SAPS to his insurance company.

These facts have been established on a balance of probabilities by the admissible evidence. There was nothing Afdis could have achieved if it had put up a virilis defensio. There was nothing MTS could have done had it been given formal notice (apart from the summons) of the alleged defect in its title. The true owner's claim was clearly good.

In the result, the appeal is allowed with costs. The order of the court *a quo* is set aside and in its place the following order is substituted:

"Plaintiff is awarded damages in the sum of $100 000 together with interest from 17 May 1993 and costs of suit."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

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(2) ZLR 508 (HC)

Court **High Court, Harare**

Smith J

Civil application

14 March 1996 & 3 December 1997 Judgment No. HH-191-97

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 23 - freedom from discrimination - gender discrimination - whether prohibited by Constitution - regulations requiring expulsion from training course of pregnant women - whether contrary to Constitution

Headnote

The rules of a teacher training college provided that a student who is pregnant during her course would be required to withdraw from the course. The applicant, a married woman, had become pregnant during the last year of her course. She had given birth about a month before she was due to write her final examinations. Five days before she was due to write her examinations she was expelled because of her pregnancy. She applied to the court to have her expulsion set aside and to be allowed to write her final examinations.

Held, that at that time that the expulsion had occurred s 23 of the Constitution did not prohibit discrimination on the grounds of sex or gender and therefore the expulsion of the applicant could not be impugned on the basis that it was ultra vires the Constitution. However, s 23 was subsequently amended to incorporate a prohibition against discrimination on the grounds of gender.

Held, however, that the rule upon which the college based its expulsion required that a student must be pregnant when she was withdrawn from the course. By the time that the college decided to act in this matter the applicant had already given birth and she was no longer pregnant. The purported expulsion was therefore invalid and the applicant was entitled to be given the chance to write the examinations that she had been prevented from writing due to her expulsion.

Cases cited:

Admin, Tvl & Ors v Traub 1989 (4) SA 731 (A)

Admin, Tvl v Zenzile 1991 (1) SA 21 (A)

In re Munhumeso & Ors 1994 (1) ZLR 49 (S); 1995 (1) SA 551 (ZS)

Govt of the Republic of Namibia v Cultura 2000 1994 (1) SA 407 (NmS)

Mfolo & Ors v Min of Education & Anor 1992 (3) SA 181 (B)

Mokgoko & Ors v Acting Rector, Setlogelo Technikon & Ors 1994 (4) SA 104 (B)

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Rattigan \& Ors v Chief Immigration Officer \& Ors 1994 (2) ZLR 54 (S); 1995 (1) BCLR 1 (ZS)

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

SMITH J

Case Information

L T Biti, for the applicant

Mrs J Zindi, for the respondent

Judgment

Smith J: In January l993, the applicant (hereinafter referred to as "Wazara") enrolled at the Belvedere Technical Teachers' College to embark on a three-year teacher training programme. She is a married woman, having married in l992. She was due to complete her studies in l995. The final examinations commenced on 30 October l995. On 22 September l995, she gave birth to a baby girl. On 25 October, five days before she was due to write the examinations, the first respondent (hereinafter referred to as "the Principal") told her that she had been expelled from the College because of her pregnancy. The Principal acted in terms of s 15 of the rules and regulations of the College which provides as follows:

> "PREGNANCY
>
> This is governed by Chief Education Officer's Circular Minute No. 29 of l983. 'Pregnant Students' (as amended) which reads:
>
> 15.1 All students who are pregnant or are involved in some behaviour unbecoming of a teacher shall be withdrawn from the course. In cases where a male student is involved, action shall be taken to withdraw both the male and female students.
>
> 15.2 This ruling shall apply even if the student is on teaching practice. Teachers on closed temporary appointment are not eligible for the grant of maternity leave. It follows therefore that students on teaching practice may not be granted maternity leave.
>
> 15.3 On learning of ones pregnancy, a female student is duty bound to inform the Principal, in writing, without delay.
>
> 15.4 Students withdrawn under these circumstances may be re-admitted at a subsequent date at the discretion of the Ministry of Higher Education."

The Chief Education Officer's Circular No. 38 of l986 applies to Government Teachers' Colleges and the Associate College Centre at the University of Zimbabwe. It does not apply to the University of Zimbabwe or any other university. It provides that a student who falls pregnant at any stage of her course must immediately inform the college authorities of the fact and will be required to withdraw from the college forthwith. She can apply to be accepted as a repeat student at the beginning of the year or term following her delivery. The circular also provides that the male student who is responsible for the pregnancy, but is not the legal husband of the female student, will also be required to withdraw from college at the same time. He, too, can apply to be accepted as a repeat student the year or term following the date the pregnant

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student delivers.

Wazara claims that the Principal's action in dismissing her from the College was unlawful and unreasonable and was discriminatory. She also claims that the policy of the respondents with regard to the expulsion from teacher training colleges of women who are pregnant is ultra vires ss 11 and

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23 of the Constitution of Zimbabwe and that the relevant rules and regulations are also repugnant to the principles of natural justice and fairness and are archaic and anachronistic. Wazara also claims that she has been treated unfairly, since she was expelled after she had given birth, and therefore she was not pregnant at the time she was expelled. She was not summoned to appear before any hearing and she was not given an opportunity to present her case. She wants to be allowed to write the examinations she was prevented from writing because she cannot afford to finance another three-year stay at the College.

The respondents oppose the application. They submit that the relevant rules and regulations are not ultra vires the Constitution and that discrimination on the grounds of gender is not *per* se unconstitutional. They insist that the policy of withdrawing female students who are pregnant is not irrational. It is justified on practical and medical grounds. Furthermore, they claim that the requirement that pregnant women be withdrawn from teacher training colleges is gender neutral in that a male student who is responsible for the pregnancy and is not the legal husband of the pregnant student will be visited with the same administrative action. A male student who was the legal husband of a pregnant student would, however, be exempt from withdrawal in order to minimise the prejudice caused by the pregnancy. If a male student impregnated a female who was not a student and he was not married to her, he would not be withdrawn.

Mr *Biti* argued that s 23 of the Constitution of Zimbabwe protects the right of women against gender discrimination, and that s 11 thereof specifically incorporates gender protection. Mrs Zindi, on the other hand, argued that s 23 does not prohibit discrimination on the grounds of sex.

Section 11 of the Constitution, which is the preamble dealing with the fundamental rights and freedoms of the individual, used to read as follows:

> "Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation ... "

This section is not merely a preamble without any legal effect - see *Rattigan \& Ors v Chief Immigration Officer \& Ors* 1994 (2) ZLR 54 (S); l995 (1) BCLR 1 (ZS) at 6A-C. In In re

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Munhumeso & Ors 1994 (1) ZLR 49 (S); l995 (1) SA 551 (S) at 556 A, Gubbay CJ said:

> "In Dow v Attorney-General [1992] LRC (Const) 623 (CA, Botswana) Amissah JP considered the identically worded s 3 of the Constitution of Botswana. He viewed it, most

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> aptly, as 'the key or umbrella provision' in the Declaration of Rights under which all rights and freedoms must be subsumed; and went on to point out that it encapsulates the sum total of the individual's rights and freedoms in general terms, which may be expanded upon in the expository, elaborating and limiting sections ensuing in the Declaration of Rights.
>
> This analysis of the scope and impact of s 3 is particularly apposite to that of s 11 in the Constitution of Zimbabwe, and I respectfully associate myself with it."

Section 23 (1) of the Constitution provides that, subject to the provisions of that section, no law shall make any provision that is discriminatory either of itself or in its effect and that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. Subsection (2) of that section, at the time this case was argued, defined what was meant as discriminatory, for the purposes of subs (1), as follows:

> "(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced -
>
> (a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or
>
> (b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;
>
> and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour or creed of the persons concerned."

In s 113(l) of the Constitution the term "law" is defined as follows:

> "'law' means -
>
> (a) any provision of this Constitution or of an Act of Parliament;
>
> (b) any provision of a statutory instrument; and
>
> (c) any unwritten law in force in Zimbabwe, including African customary law."

In Rattigan's case *supra* at p 57F-H Gubbay CJ said:

> "This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interests of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits,

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should be narrowly or strictly construed."

In similar vein, Mahomed CJ in Government of the Republic of Namibia v Cultura 2000 l994 (l) SA 487 (Nm S) at 418F-G said:

"A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government."

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However, the court is not free to adopt whatever interpretation it considers to be just and equitable in the case of any particular provision of the Constitution. I accept that judges do have a certain amount of freedom or latitude in the process of interpretation. This concept is, with respect, well expressed in Zimnat Ins Co Ltd v Chawanda l990 (2) ZLR 143 (S) where, at 154A-D Gubbay CJ said:

"Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The judiciary can and must operate the law so as to fulfil the necessary role of effecting such development. It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of judicial process."

A judge cannot, however, in interpreting a provision of the Constitution, ignore words which have been inserted into that provision, neither can he ignore the omission of words, especially where the word or words omitted could be expected to have appeared. When one looked at s 11 of the Constitution, in the form it then took, one saw that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, whatever his or her "race, tribe, place of origin, political opinions, colour, creed or sex". However, when one turned to s 23(2) of the Constitution, as it then read, which defined what was regarded as discriminatory, one saw that the provision referred to "persons of a particular description by "race, tribe, place of origin, political opinions, colour or creed". Thus the list of descriptions faithfully followed the list set out in s 11 with the exception of the last word in the list in s 11 which is "sex". The omission of that word is significant and cannot be ignored. It must hae been intended, when the Constitution was drafted, that discrimination on the grounds of sex or gender would not be regarded as being inconsistent with s 23 of the Constitution.

In Mfolo & Ors v Minister of Education & Anor, Bophuthatswana l992 (3) SA 181 (B) it was held that in Bophuthatswana a regulation that seeks to discriminate against female pregnant women was ultra vires the Constitution of Bophuthatswana. At 187D-H Comrie J said:

"In the light of the aforegoing analysis of s 9 of the Constitution I revert to reg 13(2). The regulation applies to women only. It expressly refers to female students and in any event only females can fall pregnant. It singles out an identifiable class of women for special treatment, namely pregnant female students (at teachers' training colleges).

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In my view, the regulation is not on that account invalid. It seems to me that there may be good reason for a regulation which caters for pregnant female students at teachers' training colleges. My difficulty is with the uniform sanction, namely that pregnancy during the academic year always means suspension for the remainder of that year. It matters not whether the student is married or unmarried, or whether pregnancy occurs early in the academic year or later. It matters not

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whether the student resides in the college hostel or elsewhere. The ability of the pregnant student to continue with her studies is not a factor. Nor is her academic and personal record. Her financial circumstances are not taken into consideration. Nor is the effect of suspension on her future. As I have mentioned earlier, the principal or rector has no discretion to deal with individual cases according to their own exigencies. He must suspend. I have been unable to think of a satisfactory explanation or justification for this fixed rul. Very little is said in the affidavits filed on behalf of the respondents. The affidavit for the first respondent was made by the Deputy Minister. The regulations were published quite recently, in August l989, so that he should have been able to tell me why reg 13(2) takes this form. He merely supports the second respondent who states:

> 'I aver that the regulations are necessary for the smooth and healthy running of the college and are necessary to uphold good moral standards and discipline of the college.'

During argument counsel for the respondents said that according to his information the purpose or main purpose of the regulation is to encourage morality. That is less than plain, since reg 13 as a whole deals with health, whereas misconduct and discipline are governed by regs 15,16 and 18 et seq. But assuming a moral purpose, and assuming this to be a proper purpose in relation to student teachers, that purpose is not served in the case of married female students, such as the first applicant. Instead, she is visited with a harsh penalty for an event which is a natural and normal and morally approved consequence of marriage. As I recall, the procreation of children is one of the purposes for which the institution of marriage was ordained.

I cannot think that married female students are so rare that it was not reasonably necessary to make an exception to the general rule in their case. Moreover, the burden of pregnancy falls on the woman alone. The regulation is silent on the responsibility of male student teachers who father children in or out of wedlock by female student teachers. If the promotion of morality is the purpose, why should the men be immune to some penalty? Despite s 9 of the Constitution, is it still a man's world?"

There is a great deal of merit in the views so eloquently expressed by Comrie J. However, s 9 of the Bophuthatswana Constitution provided that:

"All people shall be equal before the law, and no one may because of his sex, his descent, his race, his language, his origin or his religious beliefs be favoured or prejudiced."

It was clearly expressed in that provision that discrimination based on sex was not permitted. As I have pointed out above, s 23(2) of our Constitution had the glaring omission of the word "sex".

I accept that, since the Constitution was adopted for Zimbabwe in l980, great strides have been taken in many countries of the world, including Zimbabwe, towards the abolition of discrimination on the basis of gender. Zimbabwe has adhered to a number of conventions aimed at raising the status of women and outlawing gender discrimination. However, at the relevant time, s 23(2) of the Constitution had not been amended to elevate Government's attitude to "gender discrimination" into a constitutional right or protection.

Section 15 of the rules and regulations of the College is, in my opinion, discriminatory against females. It subjects women to a penalty to which

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males are not subjected. For the reasons set out above, however, I do not consider that the discrimination was, at the relevant time, unconstitutional because s 23(2) of the Constitution did not outlaw discrimination based on sex or gender.

Mr Biti argued, strenuously, that circular minute 29/83, although not a statutory instrument, was a legislative act as opposed to an administrative one. I agree that the rules and regulations of the College are legislative acts. However they do not fall within the definition of "law" in s 113(1) of the Constitution. Therefore the rules and regulations themselves could not be held to be in contravention of s 23(l)(a) of the Constitution because they are not "laws". However, a person such as the Principal, when acting in the performance of the function of his public office, would be contravening the provisions of s 23(l)(b) of the Constitution if he treated female students in a discriminatory manner.

Mr Biti submitted that Wazara was entitled to be heard before the punishment was meted out. This principle has been enunciated in a number of cases and cannot be disputed - see Admin, Tvl & Ors v Traub l989 (4) SA 731 (A) at 748G, Admin, Tvl v Zenzile l99l (1) SA 21 (A) and Moligebo & Ors v Acting Registrar, Setlageto & Ors l994 (4) SA 155 (T). It is clear from the opposing affidavits, however, that Wazara was given every opportunity to be heard.

Section 15 of the rules and regulations of the College provides that all students who are pregnant shall be withdrawn from the course. That, to my mind, means that the student must be pregnant when she is withdrawn. Thus, if a student falls pregnant and duly informs the principal and then, before any steps are taken to withdraw her from the course, she miscarries and loses the foetus, it would not be lawful for the principal to withdraw her because she would no longer be pregnant. Likewise, in this case, by the time the principal decided to do anything about withdrawing Wazara she had delivered her child and was no longer pregnant. In the circumstances I consider that her withdrawal from the course was not justified in terms of s 15 of the rules and regulations. It follows, therefore, that Wazara should now be permitted to write the examinations she was prevented from writing.

It must be noted that the Constitution of Zimbabwe Amendment (No. 14) Act l996 (No. 14 of l966), which was promulgated and came into operation on 6 December l996, amended both s 11 and s 23 of the Constitution. A new preamble to the Declaration of Rights was substituted which reads as follows:

> "11. Whereas persons in Zimbabwe are entitled, subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in this Chapter, and whereas it is the duty of every person to respect and abide by the Constitution

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> and the laws of Zimbabwe, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not

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prejudice the public interest of the rights and freedoms of other persons."

Section 23(2) was amended by adding to the list of descriptions on the basis of which differential treatment was to be regarded as discriminatory, the word "gender". In addition, the following new subsection was inserted in s 23:

"(5) Nothing contained in or done under the authority of any law that discriminates between persons on the ground of their gender shall be held to be in contravention of subsection (1)(a) or (b) to the extent that the law in question-

(a) gives effect to section 7(2) or any other provision of this Constitution; or

(b) takes due account of physiological differences between persons of different gender; or

(c) makes provision in the interests of defence, public safety or public morality;

except in so far as that law or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

Thus, in line with Government's policy to enhance the status of women and ensure that they are entitled to equality of treatment, the Declaration of Rights has been amended and discrimination based on gender is no longer permitted, save to the extent permitted by subs (5) of s 23. In my view, subs (5) would not permit a public official, such as the Principal, to withdraw automatically from the course at the College a student who is pregnant. It may well be that, because of the "physiological differences" referred to in the new subs (5), in certain circumstances it may be necessary to withdraw a pregnant student from the course because she would be unable to do some practical training or fulfil some part of the course. Each case would, however, have to be dealt with on its merits.

It is ordered that:

1. The first respondent sets new examination papers for Wazara before 31 December l997.

2. The second respondent makes the necessary arrangements for Wazara to write the examinations on or before 31 January 1998 and that she be advised before 25 December l997 of the date, time and venue set for the various examinations.

3. The first and second respondents pay costs of suit.

Honey & Blanckenberg, applicant's legal practitioners

Civil Division of the Attorney-General's Office, first & second respondents' legal practitioners

1997 (2) ZLR p516

NYONI v SECRETARY FOR THE PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE & ANOR 1997 (2) ZLR 516 (HC)

Court **High Court, Harare**

Gillespie J

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Application for review

7 May & 3 December 1997 Judgment No. HH-193-97

Flynote

Administrative law - natural justice -observance of rules of- extent of - delay in administrative action - remedies for - review - grounds for -unreasonableness as a ground of review - scope of- whether includes allegation of insufficiency of evidence to support finding of fact

Public service-public servant-discipline-suspension -proper method of- maximum period- allegation that servant's acts caused financial prejudice - meaning -reinstatement - whether necessarily to be ordered where misconduct proceedings irregular - delay whether necessarily entitles suspended party to reinstatement

Review - grounds - irregularity - delay in instituting disciplinary proceedings -whether delay may constitute a reviewable irregularity - whether delay necessarily entitles suspended party to reinstatement - unreasonablenesswhen established- decision having no basis in evidence may be good ground for review - reinstatement of employee dismissed irregularly - when may be ordered

The applicant, a public servant, was the subject of disciplinary proceedings arising out of an allegedly fraudulent act. He was suspended from duty without pay in November 1995 but no formal inquiry was held. A meeting at which the matter was, after a fashion, investigated was held in October 1996. The applicant objected to the proceedings and demanded reinstatement. In response, a further species of proceedings was held, about which the applicant also objected. In January 1997, he was notified in writing that he had been found guilty of misconduct. He sought a review of the proceedings on the grounds of procedural improprieties and the irrationality of the decision. He also argued that his suspension should have expired in February 1996.

Held, that there had been several procedural irregularities and breaches of the Public Service (Disciplinary) Regulations. The charge was not brought timeously. The appropriate reports were not prepared and handed to the appropriate officials. The proccedings held did not constitute an inquiry properly so-called. The applicant's case should have been concluded by the end of 1995, but he was still awaiting a decision in December 1996.

Held, further, that the delays constituted a serious infringement of the applicant's rights under

GILLESPIE JA

both the Regulations and the Constitution. However, a delay in itself did not amount to a reviewable irregularity, entitling the applicant to reinstatement or to a reversal of a dismissal. The remedy of an employee in this situation is to apply for an order to enforce due compliance with that which is timeous.

Held, further, that a decision may be set aside on [he grounds of unreasonableness where there is no evidential basis for the conclusion arrived at. This may be not only where there was no evidence at all, but where the evidence, though present, was so inadequate that no finding could reasonably be based thereon. Or, put another way, that no person properly applying his mind to the issue could reach the conclusion that was reached. The evidence in this case was

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so inadequate that the finding of misconduct could not reasonably be based on it.

Held, further, that the relief of reinstatement was not available solely by reason of a decision to set aside an order of dismissal. In this case, it could not be said that a proper inquiry would not lead to the same result and rein statement could not he ordered.

Held, further, that although suspension for more than three months was permitted by the relevant regulations where the allegation involved financial prejudice to the Government, the allegation in this case was of potential prejudice only. The applicant's suspension ought to have expired in February 1996. The applicant would be entitled to claim for his unpaid salary or even for damages.

Cases cited:

Archipelago (Pvt) Lid & Anor v LLB 1986 (1) ZLR 146 (H)

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

Bridges & Hulme (Pvt) Lid v Magistrate, Bulawayo & Anor 1996 (1) ZLR 542 (H)

CCSU & Ors v Min for the Civil Svc [198413 All ER 935 (HL)

Metsola v Chrmn, PSC & Anor 1989 (3) ZLR 147 (S)

Min of Home Affairs & Anor v Dabengwa 1983 (2) ZLR 346 (S)

Min of Labour & Ors v PEN Tpt (Pvt) Lid 1989 (1) ZLR 293 (S)

Re *Mlambo* 1991 (2) ZLR 339 (S)

National Foods Lid v Kare & Ors 1990 (1) ZLR 223 (H)

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

Rushwaya v Min of Local Govt 1987 (1) ZLR 15 (S)

Tenesi v PSC 1996 (1) ZLR 196 (H)

Theron v Ring van Wellington van die NG Sendingkerk in SA 1976 (2) SA 1 (A)

The court considered the following statutory provisions:

Public Service (Displitiary) Regulations 1992 (SI 65 of 1992), ss 4,7,8,10,13,14,16,17

Case Information

The applicant in person

Mrs L *Mutambara,* for the respondent

Judgment

Gillespie J: Thomas Nyoni was a clerk in the pensions office in the Ministry of the Public

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Service, Labour and Social G Welfare. He was responsible for handling files of pensioners whose surnames began with an initial letter in the range D-G. In or before November *1995,* there was presented to a commercial bank for encashment a cheque issued by the pensions office and made out to one Samson Gurure for an amount of *$152 662.98.* It appears that the code pensions number *329292A* might have been reflected on the cheque.

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The bank had retained this cheque and, being suspicious, had submitted it to the drawer for investigation. Nyoni was called into the presence of his superior officer, Mr Mumbamarwo, and was asked to present for inspection the relevant file in which should be found documents supporting the issue of such a cheque. The only file having any relevance proved to be one pertaining to a pensioner, Shepherd Gurure, who had the pension number 329389X. This file showed that a pension and commutation had been duly processed and paid to the pensioner in an amount very similar to that reflected on the cheque. It also contained one particular document. It is an instruction generated for the purposes of regulating deductions from pensions. It purports to direct that no tax shall be deducted from the payment of a commutation of pension to which it refers. It refers a pension number 329292A. There is no such pension number issued to any pensioner. There is no pensioner named Samson Gurure. From this document, and from the cheque, investigators have been able to deduce that a fraud has been committed. Someone having access to the files has fraudulently issued the number 329292A to a non-existent person and has thereby caused the issue of a cheque in an amount based upon the pension due to the real Shepherd Gurure. None of the usual documents required for the issue of a cheque are in existence. It is therefore assumed that they must have been destroyed after the cheque was issued. By an oversight on the part of the perpetrator, it would seem, the false deduction input form was retained on die file of the genuine pensioner upon whose identity the ghost pensioner was created.

Nyoni has been identified as the person responsible. The grounds for this accusation are that he had access to the file. And that a signature that appears to be his is on the false deduction input form. There is nothing else. On this basis, Nyoni was declared to be the "suspect number one" in an audit report compiled by a Mr Chikowore, and his prosecution was recommended. He was suspended from duty without benefits on 14 November 1995 and was informed that the suspension would be indefinite pending the conclusion of the case. The statement was made in die instrument of suspension that the alleged misconduct entails potential financial prejudice to the state. On 25 January 1996, lie was charged with misconduct on an allegation that he had falsified an official document. On 8 February, Nyoni requested particularity as to how it was alleged that he had falsified a document. There was no response. Nyoni claims that he made a personal approach to a superior, Mrs Makore, who assured him that the Ministry would abide the results of the prosecution. This is denied by the respondents. After a lengthy hiatus, on 2 October 1996 criminal charges against Nyoni were withdrawn. He applied for reinstatement. This caused considerable activity. A type of inquiry was arranged and was held on 15 October.

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Mr Chikowore, Mrs Makore and a Mr Mukandiwa conducted the proceeding. A Mr Tigere was present. He was described as a witness, but he did not give evidence - he may have been an observer. There are two documents purporting to record the proceedings. One is a form entitled a misconduct report, the other is identified as minutes of the proceeding. No evidence was led. Nyoni was presented with documents and an explanation was demanded of him. Each of the records shows simply that after denying the charge, Nyoni came to admit, under cross-examination, that he had committed the offence. Mrs Makore signed the record. The report has space at its foot for signature by three officials and by Nyoni. Only one person, whose signature is unidentified, signed it. Shortly after the proceeding on 21 November 1996, Nyoni wrote a long submission attacking the proceedings. He complained of die lengthy delays prior to the proceeding; of the failure to reinstate him following the withdrawal of criminal charges; of the short notice of the proceeding; of the partiality of the officials conducting the proceeding; of the lack of evidence presented at the procceding. He threatened to sue for reinstatement unless proper proceedings were not completed within 14 days of his letter.

This drew a surprising response. A further species of proceeding was instituted. On 18 December, a Mr Dangaiso was instructed to verify the signatures on the input forms and to give a report on his findings by not later than the 20 December. In order to do so he evidently visited Nyoni at his brother's house. He took with him Mr Chikowore, Mrs Makore and Mr Tigere. His report describes his "methodology" as follows:

> "The method that was used was to produce all the papers that were signed by Mr Nyoni and ask him to comment. The papers that were produced included those that had been correctly processed and those that had been fraudulently prepared by him."

One cannot fail to notice the apparent prior assumption that Nyoni was guilty of fraud. Nyoni evidently acknowledged the similarity between his signature and the signature on forged forms but quite clearly did not admit signing the forged documents. Even when Tigere purported to identify Nyoni's signature, the latter insisted on the need for an expert evaluation of the handwriting in order to determine whether the signature were his. Dangaiso's findings were that:

> "The signature appearing on the fraudulently prepared forms is Nyoni's. By denying that he may not have signed the forms, Nyoni is just trying to be difficult and probably trying to buy time. Mr Tigere who worked with Nyoni in the same section confirmed that it was Nyoni who had signed the forms."

Curiously, no-one challenged Nyoni with having admitted before the previous proceeding that the disputed signature was his.

Immediately following this unusual proceeding on 20 December, Nyoni

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wrote again a very full complaint. He challenged the regularity of the event on many grounds; among them: that he had been given only one day's notice; that it was held at his place of residence while he was on his sick bed; that no investigation into the matter had occurred; that the persons present, and in particular Chikowore and Makore, were not impartial; and that the

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authenticity of the signature had not been examined by an expert.

On the same day as this complaint, the under-secretary for the Ministry wrote a letter recommending Nyoni's dismissal. The decision still had not been communicated to Nyoni by 15 January. He wrote again threatening legal action if his case were not finalized. On that same day, Dangaiso, writing for the Permanent Secretary, informed Nyoni's superior, the acting pensions officer, that Nyoni had been discharged. Not until 4 February did the acting deputy pensions officer inform Nyoni of this result. He wrote in these terms:

> "I have to inform you that the head of Ministry, after having carefully assessed your case, found you guilty of misconduct ... "

In the meantime, these proceedings were instituted on 29 January.

Nyoni seeks a review of the proceedings effectively on two grounds. The first is the alleged procedural improprieties adumbrated above. The second is the alleged irrationality of the decision, I first address the allegations of procedural improprieties. The procedure provided for the dismissal of a civil servant varies depending upon the grade of employment of the person concerned. The initial step is the discretionary one of a suspension order, which may be imposed by the head of office, head of department, or head of Ministry, depending upon the seniority of the member being investigated. 1(79) The discretion to impose such a sanction depends on the existence of one or more of the specified grounds. 2(80) A suspension having been ordered, an investigation must be instituted forthwith. 3(81) The suspension itself endures until it is cancelled or is deemed to have been cancelled. 4(82) It will be deemed to have been cancelled if the member is found not guilty of misconduct or after three months. Where financial prejudice is caused to the Government, or where the Public Service Commission so directs, the suspension will remain in force. 5(83)

The regulations oblige an investigation to be undertaken. These investigations must be complete within fourteen days of their commencement or within any further period directed by the relevant superior officer. If after

the investigation it is desired to charge the member with misconduct, then a written charge is to be delivered with relevant documents annexed. At the least, the member is to be given the prior opportunity to inspect relevant documents. A written response must be given by the member within a further fourteen days. The relevant superior officer then has fourteen days more within which to submit to his superior a written report.6(84) It follows that, in the absence of any extension of time, the immediate superior of the member being disciplined must complete his investigations and place a report before his superior by no later than forty-two days after the suspension of the member or the commencement of investigations, as the case may be.

The officer receiving the report has the function of ordering a further investigation; or of directing an inquiry to be held. Or of determining the allegation of misconduct. 7(85) A head of department may only determine an allegation against a member who is an employee. A head of Ministry may decide a case against a member who is an officer below the rank of assistant

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secretary. The Commission must determine the charge against any officer of higher grade.8 (86) In the absence of an inquiry, the determination is to be made upon the reports placed before the relevant officer; the findings of any other tribunal; and even upon the determining officer's own knowledge. 9(87) No time limits are specified for the completion of further investigations; the determination of the charge; or the holding of an inquiry, as the case may be. This, however, does not justify delay. The constitutional protection of a speedy determination of rights 10(88) still mandates due celerity in the proceedings. A summary and expeditious proceeding is anticipated.

A careful consideration is required as to whether or not to hold an inquiry. Where it is directed that an inquiry should be held, then the Commission must appoint the presiding officer, give the member concerned not less than one week's notice and undertake the other necessary arrangements. 11(89) The inquiry is to be informal provided that substantial justice is done. 12(90) This latter provision imports the common law rule *audi alterem partem.* Specific provision entitles the member to legal representation at tile hearing. 13(91)

In this case, the charge, which did not see the light of day until 25 January 1996, should have been preferred by 28 November 1995. The head of office should have obtained a reply from Nyoni and placed his report before the

head of department by 26 December. In effect, this was not done until November 1996. The proceedings of 15 October 1996 were not an inquiry properly so-called. No such inquiry had been ordered. They were further investigations. The form of report, which was submitted to the head of department following those proceedings, is the form of report routinely submitted to the superior officer after the completion of investigations. The further proceedings of December 1996 were not an inquiry. They must be rationalized as further investigations ordered by the relevant superior officer.

The conclusion, therefore, is that Nyoni, who might reasonably have expected to have had his case determined by the end of 1995, was still awaiting a decision in December 1996. At the time of his complaint of 20 December, no decision had yet been taken as to whether to order an inquiry, or to determine the allegation summarily. Far less had such a determination been made.

These delays themselves seem to me to constitute a serious infringement of Nyoni's rights, both under the provisions of the regulations, to the extent to which they set time limits, and under the Constitution. Whether they amount to an irregularity justifying interference in the result is a different question. The delays cannot be seen as themselves impinging directly on the actual hearing given to the aggrieved party. They do not constitute a breach of the rules of natural justice. These are recognised as being subsumed under two main headings represented by the maxims: *audi alterem partem* which enshrines the right to a fair hearing - and *nemo iudex in sua causa* by which is stressed the right to an impartial decision. Although the aphorism tells us that justice delayed is justice denied, 1 know of no authority for the proposition that delays encountered in the course of administrative procedures are themselves reviewable irregularities. Such cases as *Sterling Products v* Zulu 14(92) do not propose that any delay in administrative

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disciplinary hearings renders a suspension or those bearings void. They are rather concerned with an interpretation of the relevant enactment, which is so worded as to invalidate any prior suspension of a worker where a subsequent disciplinary proceeding is not pursued forthwith. No such interpretation is available on the present regulations.

It seems to me that the true situation is this. The subject of disciplinary investigations does have certain rights pertaining to the time within which the various proceedings are commenced or completed. Just as a detainee, whose case is not reviewed forthwith where he is validly detained in the first place, is not entitled to an interdict *de libero homine exhibendo;* 15(93) *so* an employee

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validly suspended does not, because of delay alone, become entitled to reinstatement nor to a reversal on review of a subsequent dismissal. Instead, they each have available to them the remedy of mandamus to enforce due compliance with that which is timeous. Whether in any particular disciplinary case the delay is such that a constitutional point can be taken 16(94) mandamus is a question that can only be decided according to the facts of the individual matter where such constitutional protection is invoked. In itself, however, delay in following procedures and failure to observe fixed time limits is no ground for a successful review of proceedings held after such delays.

A further impropriety dwelt upon by Nyoni is his allegation of bias pertaining to the persons who investigated and reported on his case. Had it been that these persons were conducting an inquiry, or purporting to determine a charge of misconduct, I might well have been constrained to hold the ground established. The regulations are designed to ensure that the immediate superior of, and the officers investigating, the member are not involved in any actual determination. The need to maintain a distance between the investigating authorities and the determining authorities has also been stressed by this court. 17(95) As it is, however, these officers were merely investigating. Their partiality or prejudgment of any issue is not relevant as a procedural impropriety. Similarly, the lack of notice of inquiry, of which Nyoni complains, is not a material point. The proceedings to which he was subjected were not inquiries.

I turn to deal with the allegation that the decision to find Nyoni guilty of misconduct is irrational. Baxter makes the following comments concerning unreasonableness as a ground of review:

> "The Roman-Dutch authorities appear to lend support to the notion that administrative decisions. may be set aside on the ground of unreasonableness. This has been relied upon by judges in cases concerning both delegated legislation and 'purely judicial' administrative acts.
>
> Contemporary writers adopt conflicting interpretations of the cases and hold divergent views as to what they believe the law ought to be. One or two have supported the apparent judicial reluctance to recognize unreasonableness as a ground for review; their support seems to be based upon the view that review of administrative action on the grounds of unreasonableness would constitute a breach of the barrier between review and appeal. And one commentator has argued that the *Kruse* formulation creates an exception which is more apparent than real, since it really only expresses other grounds of review in a different way.
>
> On the other hand, there are writers who argue that administrative acts should be reasonable and that unreasonableness should be a ground of review. It is said that the consequences or effects of an administrative

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act ought to be distinguished clearly from its other elements, such as formal, procedural and purposive facets of the act, and if the

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distinction is maintained it Aill he seen that it is the effects of the act in question that the law does and should require to be reasonable." 18(96)

Our courts have long applied a doctrine of unreasonableness as a ground for review in a manner consistent with die first of the two schools of thought thus explained.

Hence, one encounters dicta such as the following in this court:

"It has been traditional to say that a matter can be reviewed, in this context, on the grounds of unreasonableness. In the book *Judicial Review of Administrative Tribunals in South Africa* at p 212, LA Rose Innes comments as follows on the connection between the concepts of irregularity and unreasonableness:

> 'Whether or not an inference of bad faith, improper purpose, failure to consider a matter which requires to be considered, or some other irregularity, will be drawn by the court from the unreasonableness of a derision depends upon various considerations. It has been held that the unreasonableness of a decision, however gross, is not sufficient, standing by itself, to justify a finding of *mala fides,* ulterior motive or failure to consider the case, but may afford some evidence of such irregularities. On the other hand, the unreasonableness may be so extreme that little further evidence is needed for proof of irregularity.'

It is clear, therefore, that in order for the present case to be brought within the review jurisdiction of this court it must be shown that the Board's decision was not merely unreasonable but that this unreasonableness was evidence of a misuse of its powers. In *Union Government v Union Steel Corp* 1928 AD 220, STRATFORD JA stated the position thus (at p 237):

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

See also *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 at 310; *Clan Transport Co Lid v Rhodesia Railways* 1956 R&N 120; 1956 (3) SA 480 (FS) at 488; Cone *Textiles (Pvt) Lid v Ayres & Anor* 1980 ZLR 347 (A) at 358G-H; 1980 (4) SA 728 (ZA) at 734A." 19(97)

It is generally said that for the ground to succeed, a decision must be shown to be:

.'unreasonable to so striking a degree as to be inexplicable except on the assumption of something else, of *fides mala* (*sic*) or ulterior motive or failure by the labour relations officer to apply his mind to the matter - a formidable onus - any examination by way of judicial review was not open to die employer. It is not enough simply to show that the decision was wrong or unreasonable. Special grounds must exist before a court will enquire into the merits. One does not readily impute dereliction of duty to a responsible quasi-judicial body or official. Rose Innes in his work *Judicial Review of Administrative Tribunals in South Africa* at p 215 had this to say:

> 'The frequency with which the courts have refused to sit upon the merits of decisions

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which are entrusted to the determination of extrajudicial bodies, precludes unreasonableness by itself, from being

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a ground for review at common law'." 20(98)

Similarly, in the Supreme Court, the following has been said:

"If the employer considered that the finding was unreasonable on the 'evidence', as it obviously did, then its remedy lay in the right to appeal against it to a regional hearing officer. Under its inherent right at common law to review the proceedings of inferior courts and tribunals the High Court does not exercise an appellate jurisdiction. Unless, therefore, the averment was made, which advisedly it was not, that the determination that the employee had not been engaged for a period of fixed duration was unreasonable to so striking a degree as to be inexplicable except on the assumption of something else, of *mala fides* or ulterior motive or failure by the labour relations officer to apply his mind to the matter - a formidable onus - any examination by way of judicial review was not open to the employer. It is not enough simply to show that the decision was wrong or unreasonable. Special grounds must exist before a court will enquire into the merits. One does not readily impute dereliction of duty to a responsible quasi-judicial body or official.

The very point was underlined almost a century ago by MASON J in *Ellis v Morgan; Ellis v Desai 1909 TS 576* at *587,* in these words:

'A distinction is made in some cases *Brownv Cocking (1868)* LR *4* QB *4; Joseph v Henry 19 LJ* QB *369* between jurisdiction dependent upon a mere question of fact which the lower court was competent to inquire into and has decided, and jurisdiction dependent upon a question of law; in the former event the reviewing tribunal will almost invariably refuse to examine into the merits of the decision attacked ... '

There is a wealth of authority which reaffirms this principle. I shaft content myself by citing only a few decisions in this jurisdiction. They are: *Clan Transport (Pvt) Ltd v Swift Transport Services (Pvt) Lid 1956* R&N *120; 1956 (3) SA 480 (FS)* at *489B; Edwards & Sons (Pvt) Ltd v Stumbles NO & Anor 1963 R&N 68 (SR)* at *73; 1963 (2)* SA *140 (SR)* at *143E-H; Cone Textiles (Pvt) Lid v Ayres & Anor 1980 ZLR 347* (A) at *358G-H; 1980 (4) SA 728 (ZA)* at *734.*

Rose Innes, in his work *Judicial Review of Administrative Tribunals in South Africa* at *p 215,* accurately reflects the position thus:

'The frequency with which tile courts have refused to sit upon the merits of decisions which are entrusted to the determination of extrajudicial bodies, precludes unreasonableness, by itself, from being a ground for review of common law'**. 21(99)**

These formulations, and the authorities cited, are such as lend weight to the notion that unreasonableness as a ground for review is no more than a restatement of other grounds in a different way. They tend to suggest that unreasonableness has an extremely limited, even an insignificant, role as a ground of review in our law.

This conclusion, however, might be perceived as being somewhat at odds with the oft-cited adoption by the Supreme Court of the general statement of the grounds of review made in *Council of Civil Service Unions & Ors v*

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Minister for the Civil Service. 22(100) The tests for condemning subordinate legislation laid down in *Kruse v Johnston supra* by LORD RUSSELL OF KILLOWEN CJ have stood the test of time. But many years have passed since they were enunciated and in that time judicial review of executive and administrative acts has developed to such an extent that only a few prerogative actions remain untouched by the process of judicial review.

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More recently the House of Lords laid down the grounds upon which administrative actions are subject to judicial review. These grounds appeal to me not only because they were pronounced by an eminent Law Lord, but also because they make clear the wide extent of the theatre of operation in which courts can test the validity of prerogative actions

> "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Lid v Wednesbury Corp* [194712 All ER 680, [194811 KB 223). it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system To justify the court's exercise of this role, resort 1 think is today no longer needed to VISCOUNT RADCLIFFE's ingenious explanation in *Edwards (Inspector* of Taxes) v *Bairstow [1955*] 3 All ER 48, [1956] AC 14 of irrationality as aground fora court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision- maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review." 23(101)

The significance of this formulation is perhaps more a matter of degree than an alteration of principle. Instead of emphasizing the need to establish mala fides before the decision attacked can be successfully reviewed, the basis for interference is sufficiently established if the *per*-verse decision is one which could not be arrived at by a person who properly applies his mind to the issue. This is not strictly an enlargement of the ground of review, which even on the statements above included failure on the part of the decision maker properly to apply his mind, but it remains a statement supporting a more expansive application of the ground than is often recognised.

Baxter, 24(102) writing in favour of a more expansive rather than a more restrictive application of the ground of review, suggests that the unreasonableness of a decision may be considered from three different perspectives which can be grouped into three general beads of an abuse of discretion, namely: the basis of die decision., its purpose and motive; and its

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effect. This is not the occasion to embark upon a discourse of the whole subject of the abuse of a discretion. The particular abuse alleged in this case relates to the basis of the decision: it is alleged that there was no basis in fact upon which the officer concerned could have come to the decision had he properly applied his mind to it. It is therefore my endeavour to discover whether this is in our law a sufficient ground for review and if so to determine the extent to which such a ground may be investigated in the light of the undoubtedly correct dicta showing that a review does not and should not address the merits of a decision.

There are judgments which constitute direct authority for the proposition that a decision may be set aside on the grounds of unreasonableness where there is no reasonable basis for the conclusion arrived at. In *Blue Ribbon Foods Ltd v Dube NO & Anor* 25(103) a decision of a labour relations regional hearing officer was set aside on the ground of unreasonableness specifically because the evidence led could not reasonably support the finding reached:

> "The third ground of review and now of appeal is that the RHO committed gross irregularities. But in his heads of argument Mr *Chatikobo* seems to have included part of his argument under this head with his submission on bias, with which I have dealt. The remainder of his submissions fall under the allegations of gross unreasonableness. I

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shall therefore deal with this aspect under the fourth ground.

The fourth ground is gross unreasonableness. Here it does seem to me that the appellant has a valid point. It seems that the RHO took refuge in generalisations. He was bombarded with vast quantities of paper and with very long - but very closely reasoned submissions by Mr *Lloyd* ...

I am satisfied that the findings of the RHO were completely untenable on the evidence. The guilt of Gonyora was established in painstaking detail and beyond any doubt. The finding to the contrary can only be described as perverse."26(104)

The dictum contains nothing of a statement of principle as to the application of the ground of review but is a clear example of its being put into effect. The use of the term "perverse" is a clear indication that the concept of "Wednesbury unreasonableness" was in the mind of the learned JUDGE OF APPEAL. In *Metsola v* Chrmn, *Public Service Commission* & Anor 27(105) the following was said to be the test to be applied to whether a disciplinary punishment imposed ought to be interfered with on the grounds that it was irrational:

"It was argued by the appellant's counsel that the punishment imposed, in its cumulative effect, evidences the exercise of a power by the Commission in so unreasonable a manner as to render it open to judicial review on the ground of 'irrationality'.

In the CCSU case *supra* at 95 1 a-b, LORD DIPLOCK defined irrationality (also referred to as *'Wednesbury unreasonableness')* as:

'a decision which is so outrageous in its defiance of logic or of accepted moral standards

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that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

This test was adopted by DUMBUTSHENA CJ in *Patriotic Front-ZAPU v Minister of Justice, Legal & Parliamentary Affairs 1985 (1) 71-R 305 (S)* at *327-8; 1986 (1) SA 532* (ZS) at *548D,* and I propose to apply it to the resolution of this issue." 28(106)

In the event, die ground was unsuccessful, it being held that the punishment was not so excessive as to justify the conclusion that no reasonable person applying his mind carefully to the issue could have come to the same conclusion.

These two local decisions effectively apply what is described as the extended formal standard". This refers to unreasonableness as a ground of review where the evidence was not of such a nature that the finding could reasonably be based thereof. The extended formal standard stands in contrast to the formal standard, which allows the ground only where the decision was based on no evidence whatsoever. The general application of the extended formal standard was recognised in the judgment of JANSEN JA in *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika.* 29(107) The learned JUDGE OF APPEAL remarked that the application of this extended standard nevertheless preserves the important distinction between appeal and review because even on it the material test is not whether the reviewing court would have decided differently. 30(108) Thus it can be seen that where the *Tenesi, Archipelago, National Foods* and *PEN Transport* cases 31(109) might be said to have pronounced the format standard, in the cases of *PF-ZAPU, Blue Ribbon Foods* and *Metsola* 32 (110)there was an

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undoubted application of the extended formal standard. 33(111)

One is able therefore to state that the irrationality of a decision, in that it has no basis in evidence, is an acceptable ground of review. It will be established not only where there is no evidence upon which the decision can be based, but also where the evidence, although present, was so inadequate that no finding could reasonably be based thereon. Or, put another way, that no person properly applying his mind to the issue could reach such a conclusion. It is not necessary to go so far as to conclude that the decision is such that there must have been improper motive. In no case, however, may the inquiry degenerate into a mere re-evaluation of the merits of die decision. The mere

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fact that the reviewing judge might have come to a different conclusion is no ground for interference.

Applying this test to the facts of the case, I am completely satisfied that no person properly applying his mind to the issue could have come to the conclusion which was reached. The evidence is so inadequate that the finding of misconduct could not reasonably be based thereon. The evidence, while some evidence is present, is wholly inconclusive. The access to the file enjoyed by the applicant was never shown to have been his exclusive prerogative. Many clerks on the same level, not to mention persons senior to him, may have had similar opportunity to tamper with the files. The signature has not been shown to have been his. There has been inadequate inquiry into the signature. Any reasonable person applying his mind fairly to the point would require far more than the equivocal signature and [lie potential access before finding die applicant guilty of a very serious fraud.

In fact, one can go further. There is reason to suspect the motive of the person who made the decision. Not 'only is the decision inadequately supported, but also there is no affidavit from the person who did make it. In fact, there is no direct statement (aside from the letter of dismissal) that the decision had even been made. Supposing it was made, it was made in circumstances where the second respondent, alarmed by the applicant's complaints, was pressing the first respondent fora prompt decision. 1 am very much inclined to the conclusion that the decision was taken hastily, with inadequate or with no advertence to the evidence, in order to pre-empt any complaint of delays. 1 cannot regard this as a decision made in good faith, particularly in the absence of any explanation from the person, presumably the first respondent, who would have made tile decision.

I am therefore of a mind to set aside the decision of the respondents dismissing the applicant, and to remit die question to the first respondent. This brings me to the question of reinstatement. The applicant has specifically claimed an order of reinstatement with no loss of benefits. Such relief is not available by reason solely of a decision to set aside on review an order of dismissal. There are circumstances when a court on review will itself make the order that should have been made. It will only do so, however, where tile end result is a foregone conclusion rendering remittal a waste of time. Or where further delay would be unduly prejudicial to the applicant. Or where the lower functionary has exhibited marked bias or

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incompetence such as renders remittal oppressive to the applicant. Or where the court is in just as good aposition as the lower functionary to detennine the point. While in casu the delay in remittal is undoubtedly extremely prejudicial to the applicant, I cannot possibly decide thei ssue here. There has been inadequate investigation. The evidence does not support the decision, but that is not to say that a proper

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inquiry would not lead to the same result. The end result is by no means a foregone conclusion.

If reinstatement cannot be ordered as a result of a substantive decision on the merits, it could conceivably be ordered on the grounds that the earlier suspension were invalid. The effect of such an order would be to restore the applicant to his position while leaving the issue of his misconduct to be tried again. The applicant has indeed, albeit indirectly, attacked the validity of his suspension. The ground of attack is that it should have expired after three months. The validity of this criticism depends upon whether or not financial prejudice was caused to the state. Alternatively upon an extension having been ordered by the appropriate superior officer.

There is considerable merit in the proposition that validity of the suspension expired by operation of law three months after it was imposed, that is to say on 9 February 1996. As the applicant submits, there was no financial prejudice involved in the allegation. The respondents counter this submission with the argument that there was potential prejudice involved in that a cheque was issued which, had it not been intercepted, might have been encashed to the considerable actual prejudice of the fiscus. Resolution of this issue depends upon an interpretation of s 10(c) of the regulations, which reads:

> "A suspension order -
>
> (c) shall be deemed to be cancelled after three months from the date of its imposition if the allegation has not been determined:
>
> Provided that this paragraph shall not apply where the allegation involves financial prejudice to the Government or where the Commission directs that the suspension remain in force"

The question is whether the words "financial prejudice" in the proviso include potential prejudice or refer only to actual prejudice.

Although the concept of prejudice as a term of art in the criminal law includes both actual and potential prejudice, I do not consider that that is the meaning to be ascribed to the words financial prejudice" in this enactment. The word "prejudice" has in additional to is specialized meaning in that context, its normal meaning of harm actually suffered. There is therefore an ambiguity in the use of the term "financial prejudice". The provision is one which is calculated to protect the rights of an individual not to suffer the exceedingly deleterious effects of suspension without pay for an extended period pending disciplinary proceedings. It gives protection too to his right to a prompt determination of his rights. The ambiguity that exists ought therefore to be

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resolved according to the normal presumption which favours a construction which is the least burdensome to an individual. The applicability of this presumption is reinforced by the use of the word "financial" which in itself tends to exclude the wider concept of potential prejudice in favour of a more narrow meaning of financial loss. I conclude that the proviso excludes

GILLESPIE JA

The automatic lapsing of an order of suspension only where the allegation is that actual financial prejudice has been caused by the misconduct.

There is no suggestion in the papers that the Commission has directed that the suspension should remain in force. I am therefore faced with a situation where I cannot avoid finding on the papers before me that the suspension lapsed by operation of law on 9 February 1996, three months after its imposition. This leaves me with the question of what relief, if any, to order in consequence of the applicant's unlawful suspension for an extended period.

Reinstatement is a remedy that is available. It is, however, as many cases have decided, discretionary relief. Any order of reinstatement that I might make could be effectively avoided by a fresh order of suspension. Such an order could persist beyond three months if lawfully extended by the Commission. In addition, the applicant remains subject to disciplinary proceeding. I do not consider, therefore, that reinstatement pending the conclusion of the disciplinary proceedings would in this case be appropriate. The applicant has an alternative remedy. He may sue, either for unpaid salary, or even for damages, during the period of unlawful suspension. It appears to me, therefore, that the preferable approach would be to declare the unlawfulness of the extended suspension and leave the applicant to pursue such relief, alternative to reinstatement, flowing from that unlawfulness, as he may be best advised.

Since there is undoubtedly prejudice to the applicant in awaiting the determination of the remitted disciplinary proceedings, I propose to order the completion of those proceedings within a limited period of time. The applicant did pray alternative relief in an order remitting the matter to the first respondent for his decision and obliging that decision to be made within days of the order. It does not appear to me that ten days is a reasonable period. As my analysis of the facts has showed, there has been no proper inquiry and no apparent application by the first respondent of his mind to the various options he has on receipt of misconduct. It will be remembered that he may either determine the allegation or mandate a further investigation or the holding of an inquiry. 34(112) I consider that the best course is to order him to decide which of these course to take, and to order both respondents in any event to conclude the disciplinary proceedings by no later than the end of February next year, which seems a reasonable period to me.

In the event, the applicant will have achieved substantial success and is entitled to his costs, such as they may be, he being a self-actor. I therefore order:

GILLESPIE JA

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1. The decision of the first respondent to dismiss the applicant be and is hereby set aside.

2. It is declared that the validity of the suspension of the applicant without pay lapsed by operation of law on 9 February 1996 and that his continued suspension without pay beyond that date was unlawful.

3. The disciplinary proceedings against the applicant are remitted to the first respondent who is hereby enjoined forthwith to decide in terms of s 7 of the Public Service (Disciplinary) Regulations 1992 whether to order further investigations, or to hold an inquiry, or to determine the allegation of misconduct.

4. In any event, the first and second respondents be and are hereby enjoined to conclude the disciplinary proceedings against the applicant by no later than 28 February 1998.

5. The first and second respondents shall pay the applicant's costs of suit.

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

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MUSAKWA v RUZARIO 1997 (2) ZLR 533 (HC)

Court **High Court, Harare**

Smith J

Civil action

5 & 6 November & 3 December 1997 Judgment No. HH-189-97

Flynote

Delict - actio injuriarum - defamation - privilege - qualified privilege - communication to permanent secretary of ministry - complaint of misconduct by magistrate - defence of qualified privilege raised - when necessary for defendant to establish truth of statement as well

Headnote

In an affidavit to the Secretary of Justice and the Commissioner of Police the defendant alleged that the plaintiff, a magistrate, had solicited a bribe. In an action for defamation, the defendant raised the defence of qualified privilege.

Held, that where the defence of qualified privilege is raised it is not necessary to establish that the defamatory statement is true. Dicta in the case of Ruzario v Modus Publications (Pvt) Ltd HH-111-97 suggesting the contrary are not a correct reflection of the law. The degree of truth in the defamatory statement is only relevant to the issue of whether the bounds of privilege have been exceeded or the statement was motivated by malice.

Held, further, that the statement had been published on a privileged occasion. The defendant had a duty to publish the statement, or a legitimate interest in doing so, and the recipients had a similar duty or interest to receive the information.

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Held, further, that where the defendant has established that the statement was made on a privileged occasion, the onus is then on the plaintiff to prove that the defence of privilege does not apply because the statement was motivated by malice or the bounds of the privilege have been exceeded.

Held, further, that the plaintiff had failed to establish that the defendant had abused the privilege and had acted from malice. The defendant had acted on the basis of a genuine suspicion and had communicated his suspicion to the appropriate authorities.

Claim dismissed.

Cases cited:

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

Nyandoro v Kachira 1997 (1) ZLR 522 (H)

Parsons v Cooney 1970 (2) RLR 75 (A); 1971 (1) SA 165 (RA)

Ruzario v Modus Publications (Pvt) Ltd HH-111-97

Zvobgo v Modus Publications (Pvt) Ltd 1995 (2) ZLR 96 (H)

Case Information

K Matsikiti, for the plaintiff

Miss H Zhou, for the defendant

SMITH J

Judgment

Smith J: The plaintiff (hereinafter referred to as "Musakwa") issued summons claiming that the defendant (hereinafter referred to as "Ruzario") had defamed him in an affidavit in which Ruzario stated that Musakwa had wrongfully and corruptly solicited a bribe. Musakwa contended that the "addressees" understood, and were meant to understand, Ruzario to mean that Musakwa was dishonest in that, as a judicial officer, he corruptly solicited bribes or underhand favours in the discharge of his official functions. Musakwa claimed damages in the sum of $200 000 but, at the commencement of the trial, he reduced his claim to $100 000.

Musakwa was asked who the addressees of the affidavit were and he said that they were Thembani and Kamhuka, who were senior police officers.

Ruzario denied that the statement was made wrongfully or with the intention to defame or injure Musakwa in his reputation or at all. He claimed that the affidavit was made on a privileged occasion in that the statement was, in essence, true and publication was to the then Secretary for Justice and the then Commissioner of Police and was in the public interest. Furthermore, he had a duty to make the publication and the two addressees had a corresponding right to

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receive the information and a duty to investigate the contents of the statement. In replication, Musakwa submitted that the publication of the defamatory matter was done maliciously.

The basic facts in this case are not in dispute. Joseph, the young brother of Ruzario, was facing a charge of culpable homicide. His trial took place at the Masvingo magistrates court before the plaintiff who was then a senior magistrate. It commenced on Wednesday 4 May l988 and continued until Friday 6 May, when the case was adjourned to enable Musakwa to consider the evidence and prepare his judgment. The case resumed on 6 June when Musakwa convicted Joseph and sentenced him to four months' imprisonment and prohibited him from driving for six months. Ruzario went to Masvingo with Joseph for the trial. He met Musakwa at the magistrates court before the trial started and they embraced as they had not seen each other for some years. Musakwa was reluctant to preside over the trial of Joseph because of his friendship with Ruzario. However, because the case had taken more than four years to come to trial and any further delay would be undesirable and as there was no other magistrate available at the time who was uitable to handle the case, Musakwa eventually agreed to preside at the trial. Sometime during the period 4 to 6 May the two men met in the corridor at the magistrates court and Ruzario told Musakwa that he would be going to Chinhoyi on the Saturday. Musakwa, whose wife is a nurse who was then stationed in Chinhoyi, said that he was broke for the weekend and needed money. He asked Ruzario if he could give the former's wife a note

asking her for money. Ruzario agreed. Musakwa then got a piece of paper from the receptionist and wrote the following:

> "B. Musakwa
>
> 9070682723
>
> Please can you help me with $50."

The parties then separated. Ruzario did not go to Chinhoyi over the weekend so did not give the note to Musakwa's wife.

After Joseph's conviction on 6 June, Ruzario wrote a letter dated l4 June 1985 to the then Secretary for Justice which was headed:

> "Irregular Conduct : Distinct Indication of Looking for a Bribe : Masvingo Magistrate : Billiard Musakwa"

In that letter, Ruzario mentioned the letter to Musakwa's wife and the circumstances in which it was given to him. He then said that he viewed Musakwa's conduct as irregular and constituting a distinct indication of looking for a bribe. He also said that the final outcome of the trial (ie the conviction) could, at least, be described as "vindictive and of personal profit of some sort." This letter was then referred, presumably by the Permanent Secretary, to Mr Thembani at CID headquarters in Masvingo who questioned Musakwa about his conduct and the allegations made by Ruzario. Musakwa responded in a letter dated 2 August l988 (exhibit 1) denying any misconduct and sent copies of his letter to the Provincial Magistrate and the Chief Magistrate. Ruzario then wrote the affidavit which resulted in this action for defamation. It is a l9 page

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document with 9l paragraphs and is headed:

> "State versus (l) B. Musakwa (2) O. Mashonganyika."

The Ministry took no action against Musakwa. However Ruzario was subsequently charged with contempt of court, alternatively criminal defamation. The charges were based on his letter to the Permanent Secretary and his affidavit. He was found guilty on the main charge and sentenced to a fine of $800.

Musakwa's claim is that Ruzario's affidavit was defamatory, in that it stated that Musakwa had wrongfully and unlawfully solicited a bribe. That is the only defamation pleaded and so the court does not have to consider the other allegations made in the affidavit. There can be no doubt that the allegations made in the affidavit are defamatory, as claimed by Musakwa. Ruzario's defence is that the affidavit was made on a privileged occasion and that it was, in essence, true and publication to the addressees was in the public interest. The law on this aspect of defamation was set out in Nyandoro v Kachira 1997 (1) ZLR 522 (H) as follows. Where a person publishing defamatory matters is under a legal, moral or social duty to do so or has a 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.

In my opinion, where the defence of privilege is raised it is not necessary for the defendant to establish that the defamatory statement is true. The defendant bears the onus of establishing the two elements of that defence, namely that he had a duty or interest in publishing the statement and the person or persons to whom he published it had a similar duty or interest to receive it. If, however, the defence is that the statement is true and in the public interest, then of course there is an onus on the defendant to establish, not only that there is a public interest, but also that the statement is true. A similar view was expressed by Hoexter JA in Neethling v The Weekly Mail & Ors l994 (1) SA 708 (A) at 769-70:

> "In my view, the substantive law governing defamation prescribes not only what facts the plaintiff must prove, but also what facts must be established by a defendant whose defence involves confession and avoidance. If the defendant raises the defence of qualified privilege then he must prove his duty or right to communicate the defamatory matter to another; and the latter's reciprocal interest to receive the communication. These are matters which need to be established on a balance of probabilities. The requirements of the substantive law cannot here be satisfied by a mere equiponderance of evidence which leaves the court unable to say whether or not either element of the defence has been established. To hold otherwise would be subversive of principles governing a law of defamation deeply entrenched in our legal system.
>
> The earlier cases cited by KotzŽ JA in Joubert v Venter *supra* at 696D-G all dealt with qualified privilege. But also in regard to the defence of truth in the public benefit there is venerable authority in this Court for the proposition that the defendant likewise bears a full onus. In Johnson v Rand Daily Mails l928 AD 190 Stratford JA (at l96) remarked of the publication there in issue:
>
> > 'As to the whole statement, the words were undoubtedly defamatory, and it was for the defendant to prove their truth.'
>
> For a more recent but no less outright affirmation by this court that in regard to the defence in question truth of the

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defamatory matter has to be established by the defendant 'on a balance of probability'. See the remarks of Steyn CJ in South African Associated Newspapers Ltd & Anor v Yutar l969 (2) SA 442 (A) at 451G-452A. Moreover, as pointed out by Jansen JA in Marais v Richard *supra* at 1166 in fin - 1167A), the defence of qualified privilege, fair comment and truth in the public benefit all relate to 'die onregmatigheidselement' of the delict of defamation.

Apart from the fact that in principle all three defences should be governed by the same onus, there are in the case of the defence of truth in the public benefit cogent policy considerations for burdening the defendant with the full onus of proof. In the case of qualified privilege the defendant who transmits the defamatory matter is generally thus impelled by considerations of duty or of protection of an interest. The matter stands rather differently in regard to the defence of truth in the public benefit. Here no form of compulsion operates on the mind of the defendant whose decision to put the character of the plaintiff in jeopardy proceeds entirely from his own volition. The rationale of the defence seems to be that the law will not allow a person to recover damages in respect of

an injury to a reputation which he does not, or at any rate should not, possess; coupled with the fact that society has an interest in correctly estim!ating the true character of its members."

In Ruzario v Modus Publications (Pvt) Ltd HH-111-97, where the defendant raised the defence of qualified privilege, the learned judge held at p 27 of the cyclostyled judgment that:

" ... the article's otherwise privileged occasion was undermined by the lack of veracity in the document relied upon. The lack of truth in fact deprives the defence of the essential requirement that the report should be for the public benefit or in the public interest."

With all due respect, I cannot agree with that view. Establishing the truth of a defamatory statement is obviously essential where the defendant claims that the statement is true and that publication is in the public interest. Where, however, the defendant claims privilege, it seems to me that the degree of truth in the defamatory statements only becomes relevant when the plaintiff alleges that the defendant has exceeded the bounds of the privilege or has been motivated by malice. The truth or otherwise of the statement would be relevant in determining whether or not the defendant acted animo injuriandi.

In this instance, the event which led up to the affidavit took place during the period 4 to 6 May l988. That is when Musakwa gave Ruzario the note, which he said was intended for his wife, asking for $50. Subsequently, in a letter dated l4 June l988, Ruzario wrote to the Secretary for Justice saying that in his opinion Musakwa had solicited a bribe. Musakwa did not institute an action claiming that that letter was defamatory. However, Musakwa did respond to the allegations in that letter and it was in reply to his response that Ruzario made his affidavit. That affidavit was sent to the Secretary for Justice and the Commissioner of Police. The publication of the affidavit to the two office holders is admitted and the defamatory nature of the publication cannot be disputed. However Ruzario, in my opinion, has established that the affidavit was published on a privileged occasion. He had a duty to make the affidavit, or a legitimate interest in doing so, in that he felt he had to reply to Musakwa's response to hi original letter. The recipients of the affidavit had a similar duty or interest to receive the affidavit. See too *Zvobgo v Modus Publications \(Pvt\) Ltd* l995 (2) ZLR 186 (H). There is no evidence that the affidavit was addressed to the senior police officers, Thembani and Kamhuka, as alleged by Musakwa.

As the privileged occasion has been duly established there is an onus on Musakwa to prove

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affirmatively that Ruzario was motivated by *animus* injuriandi, or malice, and so abused the privilege. If he does not discharge that onus, then he cannot succeed.

It is accepted that Musakwa gave Ruzario a note saying that he needed $50 and giving the number of his account with a building society. The note was

given, according to Ruzario, on the Wednesday morning before the trial started but according to Musakwa it was given on the Friday morning. Whichever version is accepted, the note was given before the trial was concluded. Ruzario admitted that Musakwa asked him to give the note to Musakwa's wife but said that he got the impression that Musakwa was soliciting a bribe. I do not find that to be completely unreasonable. For a judicial officer to tell the brother of an accused person, just before or half way through the trial of the accused, that he is desperately in need of money is, to say the least, very indiscreet. Then, as Ruzario said, the note itself was also calculated to increase his suspicions. There was no indication in the note that it was intended for Musakwa's wife. She is not mentioned by name or by any endearment as one would expect in a note from husbnd to wife. There is no suggestion of any family news. There is no question asking the wife how she is faring or whether her finances are in order. There is just the one short sentence asking for help in the form of $50. The note was not enclosed in an envelope. On Musakwa's version, he handed the note to Ruzario on the Friday and expected Ruzario to travel by road from Masvingo to Chinhoyi on the Saturday, then, when he got to Chinhoyi, to go to the hospital and seek out Musakwa's wife and give her the note. She would then have to get the money and go into town to deposit it in Musakwa's account. He would then go to the building society branch in Masvingo and withdraw the money. He expected to be able to withdraw the money on the Saturday because he needed it for the weekend. He was expecting to be paid on the Tuesday for his travelling and subsistence claims so his need for the money was only over the weekend.

Ruzario wrote to the Permanent Secretary telling him of his suspicions that Musakwa had solicited a bribe. In the letter he did say that Musakwa had asked him to convey the note to Chinhoyi and give it to Musakwa's wife. Had he been mala fide, he could easily have withheld that information. He could have said that Musakwa had intended the note for himself. There was nothing in the note to contradict such a version. It could have been intended for anyone. Furthermore, Musakwa did not institute proceedings claiming defamation in respect of the letter Ruzario wrote to the Permanent Secretary. Musakwa responded to that letter and thereafter Ruzario made his affidavit which is the subject of Musakwa's claim. In that affidavit Ruzario added many details which were not contained in his letter to the Permanent Secretary. Musakwa does not plead that any of the other details are defamatory. It is only the allegation that he solicited a bribe that has been pleaded as constituting defamation.

In my opinion, for the reasons set out above, I do not consider that Musakwa has established that Ruzario abused the privileged occasion and

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acted animo injuriandi. There is no question of the court drawing any inference of malice on the part of Ruzario as was done in *Parsons v Cooney* l970 (2) RLR 75 (A). I would point out that I am not saying that Musakwa did solicit a bribe. His actions, however, were so ill-advised and indiscreet that Ruzario cannot be criticised for coming to the conclusion that Musakwa was trying to solicit a bribe. Ruzario reported his suspicions to the Permanent Secretary who had them investigated. The Permanent Secretary is the person to whom he could be expected to voice his suspicions. Musakwa did not claim that the initial letter was defamatory; it was only the subsequent affidavit that sparked off the claim.

The plaintiff's claim is dismissed with costs.

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners

Winterton, Holmes & Hill, defendant's legal practitioners

S v NDLOVU 1997 (2) ZLR 540 (SC)

Court **Supreme Court, Harare**

Gubbay CJ

Criminal appeal

4 December 1997 Judgment No. S-225-97

Flynote

Court - judicial officer - duties - unrepresented accused - charge under statute creating presumption against accused - court's duty to explain effect of presumption and record explanation

Criminal procedure - trial - unrepresented accused - charge under statute creating presumption against accused - court's duty to explain effect of presumption and record explanation

Headnote

Where the accused in a criminal case is undefended and the charge is one under a statute which creates a presumption in favour of the State and casts an onus on the accused, the procedure to be adopted by the courts should be as follows:

(1) the nature of the presumption or onus should be read out to the accused.

(2) an explanation should be expressly given that the presumption or onus could be met or discharged by acceptable evidence given orally by himself or from any other source.

(3) the manner in which the explanation was given should be recorded verbatim.

Non-compliance with this procedure means that an overseeing court has the duty to scrutinise the evidence in order to satisfy itself that the accused has not been prejudiced by the

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irregularity.

The appellant was charged with permitting an animal under his charge to stray onto a tarred road. The legislation created a presumption against the accused unless he proved that he had taken reasonable steps to prevent the animal from straying onto the road. The State proved the presence of the cattle on the road on question. Although the appellant elected to give evidence, the magistrate did not explain the effect of the presumption and the appellant did not give evidence on the crucial issue of whether the measures he had taken to prevent straying were reasonable.

Held, that the omission by the magistrate resulted in a failure of justice and the conviction should be set aside.

Cases cited:

S v Bkenele 1983 (1) SA 515 (O)

S v Fizikolo 1978 (2) SA 676 (NC)

S v Gunya 1990 (4) SA 282 (Ck)

S v Kekwana 1978 (2) SA 172 (NC)

GUBBAY CJ

R v Lebang 1965 RLR 169 (G)

S v Maketi & Anor 1979 (4) SA 569 (C)

S v Malgas 1987 (1) SA 194 (NC)

S v Radebe; S v Mbomani 1988 (1) SA 191 (T)

S v Shangase & Ors 1972 (2) SA 410 (N)

S v Zulu 1990 (1) SA 655 (T)

Judgment

Gubbay CJ (in chambers, in terms of s 10 of the Supreme Court Act): In this matter, the Attorney-General has given notice to the registrar of the Supreme Court that he does not support the conviction of the appellant. As the concession was properly made, the appeal was withdrawn from the roll to be dealt with in chambers in terms of s 10 of the Supreme Court Act [Chapter 7:13].

The appellant was convicted in the magistrates court of a contravention of s 23(1), as read with s 23(2), of the Roads and Road Traffic (Rules of the Road) Regulations 1974 (RGN 308 of 1974) ("the Regulations"). These subsections read:

> "(1) No person shall cause or permit any animal owned by him or under his charge to graze on any road having

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a bituminous coated surface of six metres or more in width if such road has been fenced on both sides.

(2) If any animal is found straying on any road referred to in subsection (1), the owner or person under whose charge such animal is, shall be guilty of an offence unless he proves that he has taken reasonable measures to prevent such animal from straying onto such road" (emphasis added).

The specific allegations were that during the early hours of 22 April 1996 the appellant, who was employed by the owner of Annandale Farm as a herdsman, permitted fifteen head of cattle to stray on to the Mbalabala- Zvishavane road, which was fenced on both sides.

The State proved the presence of the cattle grazing on the side of the fenced Mbalabala-Zvishavane road, and that the road in question fell within the jurisdiction of a local authority (see s 23(3) of the Regulations). It also established that the cattle were in the charge of the appellant and that they had strayed from a paddock on the farm. The case was then closed by the prosecutor.

The appellant, an unsophisticated farm labourer, was not represented by a legal practitioner. He elected to testify. The trial magistrate advised him, pursuant to s 199 of the Criminal Procedure and Evidence Act [Chapter 9:07], of the consequences of refusing to answer questions without just cause for so refusing. What was not explained to the appellant was the operation in favour of the State of the presumption and onus contained in s 23(2) of the Regulations. Justice and common sense required that the appellant be appraised that the onus was on him to prove on a balance of probabilities that he had taken reasonable measures to prevent the cattle from straying on to the

road. That this is the duty of every judicial officer was underscored in S v Shangase & Ors 1972 (2) SA 410 (N) where, at 432D-F, Harcourt J pertinently pointed out that:

> "It is in general undesirable and unfair to permit definitions of extensions, inferences and statutory presumptions to operate to the prejudice of an accused without his being aware of the potential danger to which he is subjected. If he is legally represented it can be expected that his representative should make him aware of the threat. If, however, he is unrepresented, the court should see that by means of a properly framed and explained charge sheet and by supplementary explanation during the proceedings (which should be recorded) the accused is effectively alerted to such dangers and to the manner in which he can seek to meet or avert them."

In agreeing with these sentiments, Berman AJ (as he then was) said in S v Maketi & Anor 1979 (4) SA 569 (C) at 572A-B:

> "Now whatever 'advantage' an accused enjoys under our system of law by having a presumption of innocence operating in his favour is more often than not lost in circumstances where he finds himself in unfamiliar surroundings, unlettered, unsophisticated and unrepresented, and confronted by an adversary who is skilled, experienced and on familiar ground. And where the charge with which the accused is faced is a statutory one where presumptions have been enacted expressly in order to assist the State in proving its case, the dice are inevitably heavily loaded against him. Justice must be done, it must be seen to be done and indeed it must be understood to be done."

See also R v Lebang 1965 RLR 169 (G) at 170F-G; S v Malgas 1987 (1) SA 194 (NC) at 195G-H; S v Radebe; S v Mbomani 1988 (1) SA 191 (T) at 194G-I; S v Zulu 1990 (1) SA 655

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(T) at 661E-G; S v Gunya 1990 (4) SA 282 (Ck) at 285E-F.

I consider that where the accused is undefended the procedure to be adopted by the courts should be as follows:

(1) The nature of the statutory presumption or onus which rests upon the accused should be read out to him.

(2) An explanation should be expressly given that the presumption or onus could be discharged by acceptable evidence given orally by himself or from any other source.

(3) The manner in which the explanation was given should be detailed verbatim on the record.

What then is the effect of non-compliance with this procedure?

It seems to me that where an accused was not warned, or was inadequately warned, of the presumption, it is the duty of the overseeing court to scrutinise the evidence in order to satisfy itself that the accused has not been prejudiced by the irregularity.

It was for that reason that van den Heever J (as she then was) in S v Kekwana 1978 (2) SA 172 (NC) set aside the conviction and sentence on a charge that the accused had allegedly dealt in dagga, because the explanation given by the magistrate with respect to the presumption was insufficient.

GUBBAY CJ

Again, in S v Fikizolo 1978 (2) SA 676 (NC) at 682H-683A it was held that a failure of justice had occurred because the relevant presumption was not properly explained to the accused. See also S v Bkenele 1983 (1) SA 515 (O) at 518A-519G.

In the present case, no explanation and warning was given to the appellant. Evidence was not therefore forthcoming from him on the critical issue of whether the measures he had taken to prevent the cattle straying from the farm to the road, were reasonable. How the cattle gained access to the road was not investigated. Did they escape through a gate inadvertently left open or, because a part of the fencing securing the property was broken? Certainly, it could not be expected of the appellant that he remained tending the cattle all night.

Hence, I am satisfied that the omission by the magistrate was prejudicial to the appellant. It resulted in a failure of justice. In that situation, the verdict cannot stand. The appeal is allowed. The conviction is set aside together with the sentence.

Ebrahim JA agrees.

SMYTH v USHEWOKUNZE & ANOR 1997 (2) ZLR 544 (SC)

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Court **Supreme Court, Harare**

Gubbay CJ, McNally JA, Korsah JA & Ebrahim JA

Constitutional application

13 November & 9 December 1997 Judgment No. S-214-97

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - interpretation - aim to move away from formalism and make human rights provisions a practical reality - s 13(2) - right to personal liberty - derogation from that right where there is a reasonable suspicion that person has committed a criminal offence - test to be applied - s 18(2) - right to fair hearing within a reasonable time - includes right to impartial prosecutor - delay of 7 months from when officially notified that charges were to be preferred - not sufficient to trigger enquiry into whether rights infringed - unreasonable delay preceding date on which accused formally notified - may give grounds for redress

Criminal procedure - remand - grounds for - when remand justified - test - not necessary that accused's guilt be established, even on balance of probability

Legal practitioner - prosecutor - conduct and ethics - duty of impartiality and detachment - interdict against prosecutor who had demonstrated personal involvement, vindictiveness and bias

Interpretation of statutes - declaration of rights - approach to interpretation - right designed to secure a protection - court should expand reach of right rather than attenuate its meaning and content

Headnote

The applicant ran an organisation which held camps for pupils during their school holidays. At one of these camps held in December 1992 one of the campers drowned in the swimming pool. In respect of the drowning, the State alleged that the applicant was guilty of culpable homicide. At a later camp, held in April 1993, the applicant was alleged to have committed five counts of criminal injuria in respect of boys who attended the camp. He was arrested on these charges in September 1997 and remanded on bail.

The first respondent was the public prosecutor who was dealing with the case. During the investigation, he had, without any grounds for saying so, accused the applicant of being

responsible for the loss of the sudden death docket relating to the pupil who had drowned. He had, while the applicant was outside the country on holiday, told the applicant's lawyer that if the applicant did not return immediately to Zimbabwe, he would seek the assistance of Interpol. After the applicant's return, in spite of negotiations being conducted with the applicant's lawyer, the first respondent caused the applicant to be arrested. At the remand hearing, he made a number of incorrect or unfounded allegations against the applicant and his lawyer.

The applicant sought relief under s 24(1) of the Constitution, claiming that -

(1) his right to a fair trial would be denied if the first respondent were to continue to be in charge of and to deal with the case against him, because the first respondent had involved himself in a personal crusade against the applicant, lacked the necessary

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objectivity, detachment and impartiality, and had exhibited bias;

(2) his right to trial within a reasonable time of being charged was being violated;

(3) he would not be afforded a fair hearing due to the lapse of time since the commission of the alleged offences; and

(4) his right to liberty under s 13 of the Constitution had been infringed, because there was no reasonable suspicion of his having committed a criminal offence.

Held, that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the court what the State considers to be credible evidence relevant to what is alleged to be a crime. The prosecutor has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. The duty of the prosecutor, to place before the court all material essential for the investigation of the truth, is justified on the ground that the prosecution has all the resources of the State, including finances, the police and vital information, at its disposal. But it is not for the prosecutor toinvolve himself in the investigations.

Held, further, that the undisputed facts spoke for themselves and revealed that the first respondent's behaviour had fallen far short of the customary standards of fairness and detachment demanded of a prosecutor. They instilled a belief that if the case were to remain in his hands there was, at the very least, a real risk that he would not conduct the trial with due regard to the basic rights and dignity of the applicant. The instruction to arrest the applicant portrayed a biased and vindictive approach.

Held, further, that in arriving at the proper meaning of a constitutional provision guaranteeing a right, the court should endeavour to expand the reach of the right rather than attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as the letter of the provision, one that takes full account of changing conditions, social norms and values. The aim must be to move away from formalism and make human rights a practical reality.

Held, further, that the right to a fair hearing by an independent and impartial court embraces a requirement that the prosecution exhibit fairness and impartiality, since the prosecutor, as an officer of the court, forms an indispensable part of the judicial process. Accordingly, an interdict would be granted restraining the first respondent from taking any further part in the preparation or presentation of the trial.

Held, further, that although the applicant had been made aware as early as June 1993 that there had been complaints about his conduct of the camp in April, and had been made aware in August 1995 that he was the subject of a culpable homicide investigation, he was not

notified officially until 12 February 1997 that criminal charges were being brought against him;

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and the 7 months from that date until the date of arrest was insufficient to trigger the enquiry into whether his right to a fair hearing had been infringed.

Held, further, that s 18(2) of the Constitution will permit of redress when an unreasonable delay on the part of the State in commencing the trial precedes the date on which the accused was officially notified that he was alleged to have committed an offence. However, there must be real prejudice to the accused's ability to mount a full and fair defence, resulting from that delay. Here, the facts showed that the applicant's ability to deal at his trial with the charges had not been affected to any significant extent by the delay. In respect of the possible lapse of memory on the part of the witnesses, it was necessary for evidence to establish real prejudice; it was not enough to show a possibility of prejudice.

Held, further, that in order to justify the applicant's deprivation of freedom on the grounds of reasonable suspicion that he had committed an offence, it was not necessary to establish his guilt beyond a reasonable doubt or even on the balance of probabilities. The test was the same as that for arrest without a warrant. There had to be sufficient information to warrant a prudent person in suspecting that the applicant was legally responsible for the death of the pupil who drowned and that he had committed the crime of criminal injuria. In respect of the allegation of culpable homicide, there was not sufficient evidence, though in respect of the other allegations there was. Consequently, his detention on those charges did not breach his constitutional rights.

Cases cited:

Antonie v Prokureur Generaal, Witwatersrand Plaaslike Afdeling (unreported, 1 March 1996)

A-G v Blumears & Anor 1991 (1) ZLR 118 (S)

Bate v Regional Magistrate, Randburg & Anor 1996 (7) BCLR 974 (W)

Boucher v The Queen [1955] 110 CCC 263 (Supreme Court of Canada)

Chibi v Min of Internal Affairs 1970 (1) RLR 88 (G); 1970 (2) SA 606 (R)

Coetzee & Ors v A-G, Kwazulu-Natal & Ors 1997 (8) BCLR 989 (D)

du Preez v A-G, Eastern Cape 1997 (3) BCLR 329 (E)

Eckle v Germany (Federal Republic) (1983) 5 EHRR 1

Foti v Italy (1983) 5 EHRR 313

Land & Agricultural Bank of SR v Jameson 1970 (1) RLR 146 (G); 1970 (3) SA 281 (R)

Leopard Rock Hotel Co \(Pvt\) Ltd \& Anor v Walenn Construction \(Pvt\) Ltd 1994 (1) ZLR 255 (S)

Martin v A-G & Anor 1993 (1) ZLR 153 (S)

In re Mlambo 1991 (2) ZLR 339 (S), 1992 (4) SA 144 (ZS)

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Moeketsi v A-G, Bophuthatswana & Anor 1996 (7) BCLR 947 (B)

Phato v A-Gl, Eastern Cape & Anor 1994 (2) SACR 734 (E)

Rattigan \& Ors v Chief Immigration Officer \& Ors 1994 (2) ZLR 54 (S); 1995 (1) BCLR 1 (ZS)

S v Banga 1995 (2) ZLR 297 (S)

R v Banks [1916] 1 KB 621

R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 (Supreme Court of Canada)

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

S v Demba S-194-94

R v Filanius 1916 TPD 415

S v Hassim & Ors (2) 1971 (4) SA 492 (N)

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S v Jija & Ors 1991 (2) SA 52 (E)

R v John 1969 (2) RLR 23 (A); 1969 (2) SA 560 (R A)

S v Masinda en 'n Ander 1981 (3) SA 1157 (A)

S v Mateya S-13-96

S v Mhlungu & Ors 1995 (7) BCLR 793 (CC)

S v Msane 1977 (4) SA 758 (N)

S v N 1988 (3) SA 450 (A)

R v Nakedi & Anor 1942 OPD 162

S v Nassar 1995 (1) SACR 212 (Nm)

R v Nigrini 1948 (4) SA 995 (C)

S v Nkushubana 1972 (4) SA 633 (E)

R v Riekert 1954 (4) SA 254 (SWA)

S v van Rensburg 1963 (2) SA 343 (N)

S v Xaba 1983 (3) SA 717 (A)

Shumba v A-G 1997 (1) ZLR 589 (S)

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The court considered the following statutory provisions:

Constitution of Zimbabwe 1980, ss 13(2) and 18(2)

Case Information

A P de Bourbon SC, for the applicant

Miss B Hammond, for the respondents

Judgment

GUBBAY CJ:

INTRODUCTION

The applicant is a British national and Queen's Counsel of the Bar of England and Wales. In 1984 he gave up legal practice and came to Zimbabwe with his family on a temporary immigration permit to do Christian teachings. For the initial two years he devoted himself to a mission organisation known as Africa Enterprise. Then, in 1986, he founded Zambesi Ministries, a body whose primary objective is to work in conjunction with High Schools throughout the country and establish camps for pupils during the school holidays. These camps are known as Zambesi Holidays.

The first such camp was held in August 1986 at Lake Chivero. Since that time the applicant has directed camps for Grade 7 to Form 6 pupils every school holiday, with the venue changing after a few years to Ruzawi School, in Marondera, and more recently, to Zambesi Ministries' own centre on Cotter Farm, ten kilometres from Marondera. The camps are normally attended by about ninety boy-campers and thirty leaders, usually senior pupils who have exhibited strong leadership qualities. The applicant is in overall charge. He is assisted by the leaders as well as by a small number of permanent staff members of Zambesi Holidays.

During the evening of 15 December 1992, sixteen year old Guide Nyachuru,

who was one of the campers, drowned in the swimming pool at Ruzawi School. His body was discovered at the bottom of the pool the following morning. This fatality is the subject matter of a charge of culpable homicide preferred against the applicant by the Attorney-General, who is the second respondent in these proceedings.

The applicant's alleged conduct at the camp held over the period 14 to 21 April 1993 has given rise to five counts of criminal injuria. There is an alternative charge of contravening s 7(1) of the Children's Protection and Adoption Act [Chapter 5:06]. The complainants are the brothers JL and RL and AC, who were pupils at a school in Bulawayo, BH, a pupil at a school in Harare and DF, who was in the fourth form at a country school. The particular allegations, as disclosed in the charge sheet, are that the applicant made the complainants walk naked to the swimming pool at night; that he took showers with them in the nude; that he talked to them about

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masturbation and told them to be proud of their "dicks" as Jesus Christ had one; and that he assaulted them on their "rear bare buttocks" with a table tennis bat or jokari. The alternative charge alleges that the applicant, being "in loco parentis" to the complainants, ill-treated or neglected them in a manner likely to cause unnecessary suffering, or to injure or etrimentally affect their health or morals.

On the morning of 15 September 1997, the applicant was arrested on the above charges. He was taken immediately before a magistrate for initial remand. The first respondent was the prosecutor. Despite the objection of the applicant's legal practitioner, one David Drury, to the justification for placing the applicant on remand, followed by a request that the proceedings be adjourned to the afternoon to enable other counsel to appear as Drury proposed to testify, the magistrate remanded the applicant on the single charge of culpable homicide and the five charges of criminal injuria. The applicant was admitted to bail upon payment of the sum of $10 000 and on the additional conditions of weekly reporting, the surrender of his passport and the obligation to remain residing in Harare until the termination of the trial.

Within ten days of the applicant's arrest and remand, an application was lodged with this court pursuant to s 24(1) of the Constitution of Zimbabwe. The terms of the redress sought denote the three substantive issues which fall for determination. It is to these that I now turn.

THE ISSUES

(1) Whether the applicant will be afforded a fair hearing in the event of the first respondent prosecuting the charges against him at the trial

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GUBBAY CJ

Concerns have been expressed to the second respondent, through his Director of Public Prosecutions, that the applicant will be denied a fair trial if the first respondent is to continue to be in charge of and to deal with the case against him. Yet, the Director has declined to assign the prosecution of the applicant to another legal officer.

It is specifically alleged against the first respondent that he has involved himself in a personal crusade against the applicant and that he lacks the objectivity, detachment and impartiality necessary to ensure that the State's case is presented fairly. It is said further, that the first respondent has exhibited bias against the applicant. Before considering the particular features of the first respondent's conduct upon which reliance is placed, it is as well to outline what society expects of a prosecutor.

A prosecutor must dedicate himself to the achievement of justice. See R v Banks [1916] 2 KB 621 at 623. He must pursue that aim impartially. He must conduct the case against the accused person with due regard to the traditional precepts of candour and absolute fairness. Since he represents the State, the community at large and the interests of justice in general, the task of the prosecutor is more comprehensive and demanding than that of the defending practitioner. See R v Riekert 1954 (4) SA 254 (SWA) at 261C-E. Like Caesar's wife, the prosecutor must be above any trace of suspicion. As a "minister of the truth" he has a special duty to see that the truth emerges in court. See R v Riekert *supra* at 261F-G; S v Jija & Ors 1991 (2) SA 52 (E) at

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67J-68B. He must produce all relevant evidence to the court and ensure, as best he can, the veracity of such evidence. See S v Msane 1977 (4) SA 758 (N) at 759A; S v N 1988 (3) SA 450 (A) at 463E. He must state the facts dispassionately. If he knows of a point in favour f the accused, he must bring it out. See S v van Rensburg 1963 (2) SA 343 (N) at 343F-G; Phato v Attorney-General, Eastern Cape & Anor 1994 (2) SACR 734 (E) at 757d. If he knows of a credible witness who can speak of facts which go to show the innocence of the accused, he must himself call that witness if the accused is unrepresented; and if represented, tender the witness to the defence. See R v Filanius 1916 TPD 415 at 417; S v Nassar 1995 (1) SACR 212 (Nm) at 218a. If his own witness substantially departs from his proof, he must, unless there is special and cogent reason to the contrary, draw the attention of the court to the discrepancy, or reveal the seriously contradictory passage in the statement to the defending practitioner. See S v Hassim & Ors (2) 1971 (4) SA 492 (N) at 494B; S v Masinda en 'n Ander 1981 (3) SA 1157 (A) at 1162F; S v Xaba 1983 (3) SA 717 (A) at 728H-729A.

The duty of the prosecutor to place before the court all material essential for the investigation of the truth, is justified on the ground that the prosecution has all the resources of the State, including finances, the police and vital

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information, at its disposal. But it is not for the prosecutor to involve himself in the investigations. See R v Nakedi & Anor 1942 OPD 162 at 163; R v Nigrini 1948 (4) SA 995 (C) at 996; S v Nkushubana 1972 (4) SA 633 (E) at 633F.

There is, to my mind, hardly a better summation of a prosecutor's function than is expressed in the following passage of the judgment of Rand J in Boucher v The Queen [1955] 110 CCC 263 (Supreme Court of Canada) at 270:

> "It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

Expectedly, it is denied by the first respondent that he has lost objectivity in relation to the applicant and that it is his wish to harass and embarrass him. Yet the undisputed facts speak for themselves. Regrettably, they reveal that the first respondent's behaviour has fallen far short of the customary standards of fairness and detachment demanded of a prosecutor. They instill a belief that if the case were to remain in his hands there is, at the very least, a real risk that he will not conduct the trial with due regard to the basic rights and dignity of the applicant. I draw attention to occurrences which have not been denied:

(1) The first respondent, without any foundation, accused the applicant of being responsible for the disappearance of the sudden death docket relating to Guide Nyachuru.

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(2) During February 1997, when the applicant was on holiday in South Africa, the first respondent informed Drury that if his client did not return to Zimbabwe immediately he would seek the assistance of Interpol.

(3) The first respondent instructed the police to effect the applicant's arrest on 15 September 1997 and to bring him to the magistrate's court for remand, without the courtesy of pre-warning Drury of his intention.

(4) At the remand proceedings, the first respondent omitted to correct allegations contained in the request for remand form handed to the magistrate, which he knew were untrue and which aggravated the seriousness of the charges. More particularly, he failed to mention to the magistrate that the deceased Guide Nyachuru was a competent swimmer (whereas the form stated he could not swim) and that the applicant was not present at the pool on the evening in question (whereas the impression given in the form is that he was there). And with regard to the criminal injuria charges, he allowed the allegation that the applicant assaulted the complainants "on their bare buttocks" to go uncorrected.

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(5) During the course of his address at the remand proceedings, the first respondent informed the magistrate that on occasions subsequent to February 1997 "police officers were sent to the accused person's residence in Highlands at either Zambesi House or at No. 6 Wilmar Close, Greendale where police officers were not allowed either by Mr Drury or his client to effect a lawful arrest". The imputation that Drury and the applicant were guilty of obstructing the course of justice was totally unwarranted.

Three other features are of significance.

It was conceded by Miss Hammond, who appeared for both respondents, that the applicant ought not to have been arrested and remanded on bail and other conditions which affected his personal liberty. Only the issue of a summons for trial on a pre-arranged date was required. In my opinion this concession was properly made. After the aborted attempt to arrest the applicant Mr Drury wrote to the second respondent on 13 February 1997. The closing paragraph of the letter reads:

> "We wish to obtain your firm undertaking that Mr Smyth who intends to return to the country from holiday (as has always been his intention) will not be detained in police custody pending the formality of agreeing a trial date. Your Mr Ushewokunze has advised that he has no intention of holding Smyth in custody. Given that assurance, we fail to understand the necessity of appearing in court for purposes of remand as the matter should proceed by way of summons. If there is reason for the appearance on remand please so advise."

No disagreement was advised. A few days later, Drury addressed another letter to the first respondent expressing the view that "this is a summons case". The response received was:

> "Please note that whatever arrangements your Mr Drury would prefer to make between the State and himself on behalf of Mr Smyth, those arrangements would best be made and agreed upon in open court.
>
> Please inform me of the day Mr Smyth is likely to be in Zimbabwe so arguments can be made about a possible

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new trial date. This will also be to avoid the possibility of the ZRP effecting the warrant of arrest."

Thereafter there appears to have been no communication from either side, until the action of the first respondent in having the applicant arrested took Drury completely by surprise. In his own words:

"The usual practice of law officers in such circumstances is to advise the legal practitioner of their intention and to agree a suitable date and time if a remand is deemed necessary. First respondent did not contact me at any stage after my taking delivery of various documents from him in February 1997. I would have expected the courtesy of a prior telephone call to be made concerning any arrangements for the applicant's presence in court. In any event, I cannot accept that a remand was necessary in this matter, and it could have proceeded - if necessary or proper - by the issue of a summons for a trial on a pre-arranged date."

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I find it difficult to credit that the arrest of the applicant was simply the result of over zealousness on the part of the first respondent. He must have been aware that the applicant had been a leading member of the English Bar. To suggest, as the first respondent has done, that there was a risk of the applicant absconding if summoned on the charges or if asked to appear in court to be remanded for trial, lacks cogency. To become a fugitive from justice would place in jeopardy his membership of the Bar. Be that as it may, the applicant returned from South Africa voluntarily. He prepared a lengthy reply to the charges in May 1997 and left and re-entered the country in June 1997. In short, the instruction to arrest the applicant portrays a vindictive and biased approach.

The second feature to which regard is to be paid is that the first respondent's brother, Tafi, attended the camps in December 1992 and April 1993. He is thus a potential witness in respect of all the offences. Subsequent to his remand, Tafi telephoned the applicant to say that the first respondent was putting pressure upon him to provide information about the camps and to involve himself. Tafi has also told a trustee of Zambesi Ministries, John Brien, that the first respondent was "determined to get Smyth".

It has not been denied that Tafi contacted the applicant and Brien and communicated to them the information that they have deposed to. Nor is it disputed that there are letters from Tafi to Brien mentioning that he is being "pressured" by the first respondent.

The applicant believes that what has been said to him by Tafi, and by the latter to Brien, is the truth. In the circumstances the applicant's perception, which is entirely understandable and reasonable, is that if the first respondent maintains his position as prosecutor he may well not act towards him with the fairness and impartiality that the administration of criminal justice demands. See *Leopard Rock Hotel Co \(Pvt\) Ltd \& Anor v Walenn Construction \(Pvt\) Ltd* 1994 (1) ZLR 255 (S) at 271F-G.

Finally, the resolve of the first respondent to continue with the prosecution could lead to a conflict of interest in the event of Tafi, who is a potential witness, being called to testify either on behalf of the State or the defence.

I have no difficulty in acknowledging the inherent danger of unfairness to the applicant attendant

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upon the first respondent prosecuting at the trial. Hence the question that arises is whether the applicant's right to a fair hearing by an independent and impartial court established by law, as enshrined in s 18(2) of the Constitution, is likely to be contravened. To put the enquiry more pertinently, whether the words "impartial court" are to be construed so as to embrace a requirement that the prosecution exhibit fairness and impartiality in its treatment of the person charged with a criminal offence.

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In arriving at the proper meaning and content of the right guaranteed by s 18(2), it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the court should always be to expand the reach of a fundamental right rather than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people. See *Rattigan \& Ors v Chief Immigration Officer \& Ors* 1994 (2) ZLR 54 (S) at 57F-58E, 1995 (1) BCLR 1 (ZS) at 4I-5D; S v Mhlungu & Ors 1995 (7) BCLR 793 (CC) at para 8; R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 (Supreme Court of Canada) at 359-360.

Section 18(2) embodies a constitutional value of supreme importance. It must be interpreted therefore in a broad and creative manner, so as to include within its scope and ambit, not only the impartiality of the decision making body, but the absolute impartiality of the prosecutor himself whose function, as an officer of the court, forms an indispensable part of the judicial process. His conduct must of necessity reflect on the impartiality or otherwise of the court. See generally Chaskalson et al Constitutional Law of South Africa at 27-18 to 19.

To interpret the phrase "impartial court" literally and restrictively would result in the applicant being afforded no redress at this stage. It would mean that in spite of prejudicial features in the conduct of the first respondent towards him, the applicant would have to tolerate the first respondent remaining the prosecutor at the trial. I cannot accede to the obvious injustice of such a situation.

I am satisfied that the applicant has shown that his right under s 18(2) of the Constitution to a hearing by an independent and impartial court is in jeopardy if the first respondent proceeds as the prosecutor in this matter.

(2) Whether the delay that has accrued from the date the applicant was charged with the criminal offences is sufficiently long to trigger the enquiry mechanism into whether his right to a fair trial within a reasonable time has been violated

The issue 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), 1992 (4) SA 144 (ZS), where at 346E-H (ZLR) and 149G-J (SA), I said:

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> "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 (ZLR) and 150A-D (SA) to approve the ruling of the European Court of Human Rights in Eckle v Germany (Federal Republic) (1983) 5 EHRR 1 at 31 and in Foti 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 needs to protect in providing for a speedy trial, is affected.

The approach outlined was again adopted by this court in Shumba v Attorney-General 1997 (1) ZLR 589 (S) and has found favour in the South African courts in Moeketsi v Attorney-General, Bophuthatswana & Anor 1996 (7) BCLR 947 (B) at 963H-964E, Bate v Regional Magistrate, Randburg & 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. In the last mentioned case, Zietsman JP held at 338D-F 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 levelled against him. He was only "charged" in August 1996 when told he was to be prosecuted.

In all these decisions, the meaning of "charged" was applied to the particular facts. In the present matter I am unable to conclude, within the meaning of that word, that the applicant has shown that he was officially notified, either expressly or by implication, that criminal charges were to be brought against him prior to 12 February 1997. It was on that day, while the applicant was on holiday in South Africa, that Drury was advised by the first respondent that it had been decided to prosecute his client on a charge of

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culpable homicide and various charges of criminal injuria, and that a warrant had been issued for his arrest. The information was then conveyed to the applicant and it was agreed that on his return to Zimbabwe he would not be placed under arrest.

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As early as 28 June 1993, the applicant had been made aware that a Bulawayo legal practitioner, one David Coltart, had been consulted about the events at the camp over the period 14 to 21 April 1993. On 16 December 1994, the applicant was informed by the Minister of Home Affairs that complaints of crimes committed in the running of the camps had been referred to the second respondent. The applicant reacted by delivering to the second respondent a detailed statement in defence of the allegations made against him. On 30 August 1995, Inspector Khumalo, the officer-in-charge at Marondera, advised the applicant that he was the subject of a culpable homicide investigation into the death of Guide Nyachuru. He asked for a written statement which the applicant furnished the next day. Nothing further occurred.

The fact that the applicant must have realised that he was under suspicion in relation to allegations of criminal injuria and culpable homicide and that investigations were being undertaken on behalf of the second respondent, did not start the clock ticking against the State. Even the request for a statement concerning the drowning did not amount to an official notification that the applicant had committed a criminal offence. He was merely asked to provide his explanation for the tragedy. Inspector Khumalo was doing no more than carrying out an investigation into suspected criminal conduct by the applicant. See Shumba v Attorney-General *supra*; Antonie v Prokureur Generaal van die Witwatersrand Plaaslike Afdeling (an unreported judgment dated 1 March 1996).

On this scenario, I am satisfied that the resultant delay of seven months, from the official notification that charges were to be brought to the date of arrest, is of insufficient duration to trigger the enquiry mechanism into whether the applicant's fundamental right to a fair hearing has been infringed.

(3) Whether the applicant will not be afforded a fair hearing due to the lapse of five years since the commission of the alleged offences

I agree with the submission that the reach of s 18(2) of the Constitution will permit of redress where an unreasonable delay on the part of the State in commencing the trial, preceded the date upon which the accused person was officially notified that he had committed a criminal offence. See Coetzee & Ors v Attorney-General, Kwazulu-Natal & Ors 1997 (8) BCLR 989 (D) at

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999G-1000A. What has to be decided is whether the facts show that a contravention has occurred.

The first intimation received by the applicant concerning accusations of misconduct at the camp held during April 1993 was in Coltart's letter to him of 28 June 1993. Shortly thereafter, they met in Bulawayo. Both the content of the letter and the discussions with Coltart would have enabled the applicant to recall the complainants and assess the veracity of what was alleged against him. Only two months had expired. The day after the meeting the applicant recorded a statement of what had been discussed with Coltart. And on 19 December 1994 and 2 May 1997 he furnished two further lengthy written statements. What these reveal are admissions that

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corporal punishment was administered as a disciplinary measure with a table tennis bat or "jokari", but never upon the bare buttocks; that the applicant was in the habit of showering in the nude with the boy-campers; and that at each camp he gave a talk to the new campers, primarily on the topic of masturbation, entitled "Enjoying Adolescence".

During February 1997, Drury obtained from the first respondent the affidavits deposed to by the complainants. The applicant has had sight of them. The allegations therein are explicit.

The events I have mentioned satisfy me that the applicant's ability to deal at his trial with the charges of criminal injuria has not been affected to any significant extent.

It is true that with respect to the charge of culpable homicide the applicant was first appraised that he was under suspicion as late as the end of August 1995, some thirty-two months after the drowning occurred. However, he was able within a day to provide a very detailed statement to Inspector Khumalo and, subsequently, set out his defence in a warned and cautioned statement dated 2 May 1997. In his own words, "the tragedy of the drowning will be forever etched on my mind". Here again I am unable to hold that the applicant has been prejudiced in his capability to recall the incident with clarity.

The applicant's real grievance is that he has been prejudiced in his defence to the charges because many of the campers and leaders who attended the camps in December 1992 and April 1993 are now resident outside Zimbabwe. Yet most are no further distant than South Africa, and, if need be, their evidence could be taken on commission.

There is also the complaint that, with the passing of the years, the memories of these persons are bound to have faded. It would be surprising if this were not so. But whether these potential witnesses are simply unwilling, or because of employment commitments unable, to come to Harare for the trial, or whether their memories have dimmed to an extent that they have no recall of the happenings in question, is not known.

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What is established is that since becoming aware that he was to be charged, the applicant has taken no steps to contact any of the non-resident persons he regards as potential witnesses. That exercise should have been carried out. The applicant cannot speak for them. See S v Demba S-194-94 (not reported, at p 2 of the cyclostyled judgment). It is for them to state an unpreparedness to return to Zimbabwe for whatever reason, or that they now suffer an absence of material recollection. Without their personal say so, no actual prejudice to the applicant's defence has been shown. An apprehension that there may be prejudice does not suffice. There must be real prejudice to the applicant's ability to mount a full and fair defence resulting from the inordinate delay on the part of the State in charging him with the offences. See In re Mlambo *supra*, at 352E (ZLR); 153I (SA); S v Banga 1995 (2) ZLR 297 (S) at 301A; S v Mateya S-13-96 (not reported, at p 3 of the cyclostyled judgment).

For these reasons, I reject the applicant's claim of the existence of prejudice to his defence caused by any delay which preceded the date upon which he was advised of a prosecution.

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(4) Whether the deprivation of the applicant's personal liberty, protected under s 13(1) of the Constitution was justified by a reasonable suspicion of his having committed the offences of culpable homicide and criminal injuria

Section 13(1) of the Constitution provides that:

> "No person shall be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2)."

One of the cases specified in subs (2)(e) is:

> "upon reasonable suspicion of his having committed, or being about to commit, a criminal offence."

The impact of s 13(2)(e) came before this court for consideration in *Attorney-General v Blumears \& Anor* 1991 (1) ZLR 118 (S) where, at 122A-E, it was said:

> "The standard for the deprivation of personal liberty under s 13(2)(e) of the Constitution are facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed, or was about to commit, a criminal offence. This standard represents a necessary accommodation between the individual's fundamental right to the protection of his personal liberty and the State's duty to control crime. It seeks, on the one hand, to safeguard the individual from rash and unreasonable interference with liberty and privacy, and from unfounded charges of crime; yet on the other, to give fair leeway for enforcing the law in the community's protection. The criterion of reasonable suspicion is a practical, non-technical concept which affords the best compromise for reconciling these often opposing interests. Requiring more would unduly hamper the legitimate enforcement of the law. To allow less would be to leave law-abiding persons at the mercy of the whim or caprice of the authorities.
>
> Viewed in the context of s 13(2)(e) of the Constitution, the remand procedure which

> precedes the trial offers the accused person a neutral and detached determination of the existence of 'reasonable suspicion' by someone independent of the police and prosecution. It is a most meaningful administrative step consequent upon arrest; for it should never be overlooked that to remand an accused in custody, or even out of custody but subject to burdensome conditions, awaiting trial, may prejudice his employment, interrupt or diminish his source of income, and impair his family and social relationships."

See also *Martin v Attorney-General \& Anor* 1993 (1) ZLR 153 (S) at 159B-D.

With this approach in mind it is to be decided whether the State has offered facts upon which objectively it can be held that reasonable suspicion existed that the applicant had committed the offences for which he was placed on remand.

In relation to the offence of culpable homicide, the request for remand form contained the allegations that the applicant was present (certainly by clear implication) at the swimming pool on the evening of 15 December 1992 when the boys were swimming; that Guide Nyachuru could not swim; and that the applicant left him unnoticed over night whilst the remaining children walked back to their dormitories naked at his command. It was accepted by Miss Hammond that there was no factual foundation for these allegations. The applicant was not in attendance at the swimming pool and the deceased was well able to swim.

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The magistrate's attention was not directed to these incorrect facts. It is necessary, therefore, to determine whether on the allegations remaining in the request for remand form - facts which, at this stage, it must be assumed the State is able to prove - the magistrate would have found there to be sufficient information to warrant a prudent man in suspecting that the applicant was legally responsible for the death of Guide Nyachuru; and so justifying the deprivation of his personal liberty.

The test to be applied is the same as that for arrest without warrant. It does not require the firm resolution of conflicting evidence that guilt beyond a reasonable doubt demands; nor even a preponderance of probability. Certainty, as to the truth is not involved, for otherwise it ceases to become suspicion and becomes fact. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking. See *Attorney-General v Blumears \& Anor supra* at 122B-C.

Putting myself in the position the magistrate should have been in at the hearing, I consider that the paucity of the information left in the request for remand form does not even disclose the commission of the offence of culpable homicide.

Swimming is not a particularly dangerous activity. It is a pleasurable pursuit engaged in by children of fairly tender ages. The bald allegation of the failure "to provide adequate safeguards" must be viewed in the context of the

fact that Guide Nyachuru was a competent swimmer. He was not alone in the pool. There were other boys in his company. The pool was not in total darkness, but was without adequate lighting. No one noticed what happened to the deceased. He must have drowned quietly. The cause is speculative. Did he suffer an epileptic fit or severe cramp or, what is more likely, was he rendered unconscious by hitting his head at the bottom of the pool upon diving in?

Absent the features of an inability to swim and the applicant's attendance at the pool, no culpable act or omission on the latter's part is pointed to. Accordingly, the allegations made are inadequate to attribute the factual cause of the death to the applicant let alone the legal cause. See *R v John* 1969 (2) RLR 23 (A) at 30F-I, 1969 (2) SA 560 (RA) at 566A-D; *S v Chipinge Rural Council* 1988 (2) ZLR 275 (S) at 281E-H, 1989 (2) SA 342 (ZS) at 347C-E. Indeed, I did not understand Miss Hammond to contend the contrary.

It follows that on the charge of culpable homicide the applicant ought not to have been remanded pending trial.

With respect to the five charges of criminal injuria the facts set out in the request for remand form read:

> "In that on the 14 April 1993, and 21 April 1993 and at Ruzawi School, Marondera, the accused did unlawfully and intentionally injure and impair the dignity of five school children (names supplied). The accused forced the school children to walk naked to a swimming pool at night for what the accused termed 'skinny dipping'. The accused forced the school children to shower with him naked. During these sessions the accused spoke of sexually explicit matters: that is: masturbation in that the complainants should be proud of their dicks (*sic*) as Jesus Christ had one. The accused will then assault the school children on their bare buttocks with a table tennis bat. The accused

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had no right to cause them unnecessary suffering or to injure or detrimentally to affect their health or morals or any part or function of their mind or body."

The single fact admitted to be false was that the assaults were to the bare buttocks of the children.

I do not think that the omission of this somewhat aggravating adjective would cause a prudent judicial officer, upon a close examination of the remaining facts, to refuse to remand the applicant on these five charges.

In my opinion, the facts presented do constitute the crime of criminal injuria and sufficiently link the applicant with the commission of the offences charged, in the sense that they create a reasonable suspicion of his having committed them. Both the actions and words of the applicant are such as to *prima facie* impair the self respect, tranquillity and privacy of the youthful complainants, thereby leading to an inference that the dignity of each was in fact impaired. See *South African Criminal Law and*

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Procedure vol III, *Common Law Crimes* 3 ed at 506; *Snyman Criminal Law* 3 ed at 430.

Consequent upon the justification for placing the applicant on remand, s 13(1) of the Constitution was not contravened. However, as the applicant ought not to have been remanded on the culpable homicide charge, consideration should be given by the second respondent to a reduction of the amount of the recognizance, and to either a withdrawal or relaxation of the other conditions fixed by the magistrate. The applicant has succeeded on the first issue debated. Whether he is entitled to an order for costs against the first respondent is dependent upon a finding that the latter was correctly cited in these proceedings in his personal capacity. I consider that he was.

The first respondent acted in a wholly unreasonable manner towards the applicant and Drury. He allowed himself to lose objectivity and impartiality in his handling of the case against the applicant. And his failure to correct facts in the request for remand form which he must have known were false, was inexcusable. His conduct lacked that measure of justness and candour so essential to the role of a prosecutor. Compare *Chibi v Minister of Internal Affairs* 1970 (1) RLR 88 (G) at 91C-G, 1970 (2) SA 606 (R) at 608F-H; Land & Agricultural Bank of Southern Rhodesia v Jameson 1970 (1) RLR 146 (G) at 151H-I, 1970 (3) SA 281 (R) at 286B-C.

Thus, the order affording relief must be against the person of the first respondent. It is he who is to be prevented from any further involvement in the prosecution of the applicant. Nonetheless, some blame attaches to the second respondent for declining, despite Drury's legitimate complaints, to assign the matter to another legal officer. And then for opposing the entirety of the application.

In the circumstances, the fairest order would be that the applicant's costs on this issue be paid by the respondents jointly and severally, the one paying the other to be absolved.

The applicant's argument on the second issue has not been accepted. And although on the third

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issue it has been found that the applicant ought not to have been remanded on the charge of culpable homicide, his remand on the charges of criminal injuria was not in contravention of s 13(1) of the Constitution.

To my mind, the second respondent has achieved substantial success on the second and third issues. He is deserving of an award of costs as neither of the orders sought by the applicant on these issues are granted.

THE ORDER

Section 24(4) of the Constitution reposes in this court a wide and unfettered

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discretion to make any order it considers appropriate for the purpose of enforcing a provision of the Declaration of Rights. The most appropriate form of relief in this matter is to subject the first respondent to an interdict. Accordingly, I would order as follows:

1. The first respondent is hereby interdicted from taking any further part in the preparation or presentation at the trial of the charges of culpable homicide and criminal injuria brought against the applicant.

2. The costs occasioned in the grant of the interdict are to be borne by the respondents jointly and severally, the one paying the other to be absolved.

3. For the rest, the application is dismissed with costs.

McNALLY JA: I agree.

KORSAH JA: I agree.

EBRAHIM JA: Iagree.

MUCHECHETERE JA: I agree.

Gollop & Blank, appellant's legal practitioners

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

ZIMNAT INSURANCE CO LTD v NYAKAMBIRI FARM (PVT) LTD 1997 (2) ZLR 562 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

18 November & 9 December 1997 Judgment No. S-216-97

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Flynote

Fire - offences - burning standing vegetation without giving notice - what is standing vegetation - piles of cut chaff left by combine harvester and isolated remnants of standing vegetation covered by piles - not standing vegetation in terms of section

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

Headnote

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

After the respondent's wheat had been harvested, the combine harvester left continuous piles of cut wheat straw, some two feet high. Underneath these piles there was dead wheat stubble. The respondent's employees, without giving notice to anyone, set fire to the piles of straw. The fire spread to the adjoining property and caused damage to a neighbour's property, for which the respondent was liable. When the respondent sought to claim under the policy, the insurer sought to repudiate liability on the basis of the exemption clause, claiming that the plaintiff had breached ss 67(2) and 78(b)(ii) of the Forest Act [Chapter 19:05], in that he did not give notice to occupiers of adjoining land and to the police and that he allowed the fire to spread to the adjoining land.

Held, that the respondent had not breached the law relating to burning of fires on land. Section 67(2) only applied when there was burning of growing or standing vegetation. The piles of straw did not constitute standing or growing vegetation, and the presence of wheat stubble underneath the piles was incidental and insignificant.

Held, further, that although s 78(b)(i) of the Act imposed absolute liability for a person who lights a fire that spreads and causes damage, the section was not one with which an insured was required to "comply". To comply with a statute means to do what the statute requires. The statute did not require a landowner not to be negligent; it imposed a penalty on him if he was negligent. The policy was designed to cover the insured if he was negligent, though not if he acted wilfully or recklessly.

1997 (2) ZLR p563

McNALLY JA

Decision of Chidyausiku J in *Nyakambiri Farm \(Pvt\) Ltd v Zimnat Insurance Co Ltd* 1996 (2) ZLR 67 (H) upheld.

Cases cited:

King v Dykes 1970 (2) RLR 138 (G)

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King v Dykes 1971 (2) RLR 151 (A)

The court referred to the following statutory provisions:

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

Case Information

D P Carter, for the appellant

J B Colegrave, for the respondent

Judgment

McNally JA: This case involves the interpretation of a contract of insurance. I will speak of the parties as "the insurer" and "the farmer". The farmer was insured with the insurer for a variety of risks including public liability. The limit of the public liability cover was $500 000.

On 5 November 1991, a fire started by the farmer's employees (in his absence, but in the course of their duties) spread to a neighbour's farm and caused damage there. In the result the farmer had to pay the neighbour $171 748,98 which the farmer then claimed from the insurer, with interest a *tempore morae* and costs.

The insurer repudiated liability on the grounds of non-compliance with s 7q of the policy reading as follows:

> "The Company shall not be liable in respect of:
>
> 7. Injury or damage directly or indirectly caused by or arising out of or in connection with:
>
> (q) veld or forest fire or the clearing of land by fire unless the insured shall have complied with all legislation relating to the burning of vegetation."

The insurer contended that the farmer had failed to comply with the provisions of the Forest Act [Chapter 125], specifically ss 57 and 68 (b)(ii). So the issue was - had the farmer complied with all legislation relating to the burning of vegetation?

The definition of vegetation in the Act is a very wide one. It reads:

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

The two sections of the Act to which I have referred are, in the 1996 Revised Edition, ss 67 and 78 (b)(ii) of [Chapter 19:05]. I will deal with each section in turn.

Section 67 is headed "Notice of intention to burn standing vegetation to be given to occupiers of adjoining land". The section, in its material part, reads:

> "Subject to subsection (4) no person shall burn growing or standing vegetation on any land

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except in accordance with notice given in terms of subsection (3) to the occupiers of all adjoining land and to a police officer at the nearest convenient police station."

The farmer did not give notice to anyone. So the question is whether he failed to comply with this legislation relating to the burning of vegetation.

The first point to note is that the requirement does not arise where vegetation is being burned which is not standing or growing vegetation. The farmer contends he was burning the cut stalks of his wheat crop which were piled up in "windrows" after his harvester had been through the land. These windrows are long lines of wheat straw ejected from the machine in what was well descried as a "continuous pile". The straw is what is left after the standing wheat is cut and then threshed to remove the grain, which is collected into a bin.

These continuous piles were some two to four feet high and either fourteen or sixteen feet apart, depending on which of two combine harvester reaped that particular part. Those piles of loose straw were what his employees were burning. They were clearly not "standing or growing vegetation".

The argument is, however, that the wheat stubble still remained standing in the field. The stubble between the windrows had been harrowed in, but obviously the stubble under the windrows had not. So, it was argued, he was burning standing vegetation.

The evidence was that this stubble was about one to four or five inches high. It was dead. It was not growing. But it was standing. It would not of itself burn, in the sense that fire would not spread from one stalk to another, but of course it would burn if contained within a burning windrow.

The farmer did not consider that he was burning "standing vegetation". That is why he did not notify his neighbours or the police. The learned judge agreed with him.

It seems to me that there is a great deal to be said for the learned judge's common sense approach. If a farmer is not legally required to give notice of his intention to burn piles of straw some two to four feet high, even if these piles stretch in continuous lines to the farm's boundary, why should he give notice because under those piles there are entirely harmless remnants of standing vegetation? What if he burned a haystack, underneath which happened to be a solitary weed? The haystack was not notifiable. Was the weed?

Since the burning of the standing vegetation without notice is a criminal offence (s 67(4)) a court is justified in applying an interpretation in favour of the individual when there is doubt. In this case, the presence of the stubble under the windrows was incidental and insignificant. The danger arose from the burning windrows. No doubt the wind picked up loose straws, and blew them on to the next door farm. It would not have picked up the standing

stubble. The dominant intent in the mind of the farmer was to burn the windrows. Technically, perhaps, he had a constructive intent to burn the underlying stubble. If he had been asked "Is the underlying stubble going to be burned when the windrows are burned?" He would have said

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"well, of course".

But whether one proceeds upon the basis of "de minimis non curat lex" or on the basis of the farmer's dominant intent, the answer is the same. He was burning windrows. He intended to burn windrows. Windrows are not standing vegetation. The fact that underneath the windrows were small pieces of standing vegetation is irrelevant.

I do not find any failure to comply with the provisions of s 67.

Section 78 (b)(ii) is headed "offences and penalties". It reads:

> "Any person who ... in the open air or on any land ... with or without authority, has lighted or assisted in lighting or used or rekindled or added fuel to a fire which spreads or causes injury ... shall be guilty of an offence and liable ..."

The section, strictly interpreted, imposes an absolute criminal liability in circumstances such as the present. But to my mind, whether the liability is absolute (which seems to me doubtful) or depends upon *dolus* or *culpa*, the section is not one with which an insured is required to "comply". It imposes a penalty for certain conduct. It is straining language to say that a person is required to comply with an Act which makes certain conduct a crime. In a very broad sense we are all required to comply with the law. But to comply with a statute means to do what it requires you to do (as in s 67, previously discussed). This statute did not require the farmer not to be negligent. It imposed a penalty on him if he was negligent.

Approaching the question from the other end, one asks "what liability would be covered under the Public Liability section of the policy of insurance, if liability for negligence is excluded?" If the farmer had not been negligent at all he would not be liable, and would have no need to have recourse to his insurer - see, for example, the facts in *King v Dykes* 1970 (2) RLR 138 and on appeal 1971 (2) RLR 151. If he had been willful, his insurer would be entitled to refuse to cover him. So his public liability policy essentially covers him for negligence, whether personal or vicarious. We can surely not interpret the policy as saying - "you are covered for negligence, except of course if you are negligent".

This point is made in similar words in Gordon and Getz on Insurance 4 ed pp 482-3:

> "A policy covering 'sums which the assured shall become legally liable to pay to any other person ... as compensation for accidental personal injury' protects the insured against losses caused by his own negligence, although such negligence is criminal. But the insured cannot claim an indemnity for the consequences of a criminal offence, where his own deliberate intent is an essential ingredient in it" (p 482).

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And later:

> "A liability policy frequently requires the insured 'to take all reasonable steps to prevent accidents'. This means the insurer says, not 'I will insure you against your liability for negligence on condition you are not negligent' but 'understand that you are not to regard yourself, because you are insured (against negligence) as free to carry on your business in a reckless manner ... ie in a manner which invites negligence" p 483).

I conclude therefore that it is not open to the insurer to say that because the farmer might have

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been charged with an offence under s 78 involving vicarious liability for negligence, therefore he failed to comply with s 78.

Indeed, there may be a further argument that, even if the policy did require "compliance" with s 78, it did not require vicarious compliance. But it is unnecessary to go so far.

In my view, the learned judge came to the right conclusion. The appeal is dismissed with costs, including by consent the costs of the abortive appeal hearing on 7 July 1997.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

SCOTFIN LTD v NGOMAHURU (PVT) LTD 1997 (2) ZLR 563 (HC)

Court **High Court, Harare**

Smith J & Gillespie J

Application for default judgment

28 February, 2 September &

10 December 1997 Judgment No. HH-171-97

Flynote

Costs - uncontested debt or liquidated demand - agreement to pay costs and collection commission - whether debtor may be required to pay both - taxation - what costs are claimable in addition to collection commission - attorney and client costs - whether claimable where collection commission must be charged

Practice and procedure - uncontested debt or liquidated demand - collection commission - whether competent to claim collection commission as well as costs

Headnote

It is commonplace in hire-purchase and other agreements for the purchaser to agree, in the event of default, to be liable to reimburse the seller for all expenses incurred in respect of any legal action to recover the debt, including collection commission and costs on the legal practitioner and client scale. This does not mean that the debtor must pay both, since the creditor who seeks to recover the debt through the services of a legal practitioner is not exposed to payment of both collection commission and his legal practitioner's costs. The charging of collection commission replaces other fees and charges, with certain limited exceptions. The present legal position is this:

(a) a legal practitioner who is instructed to collect an uncontested trade debt, as defined in by-law 70 of the Law Society by-laws, is obliged to charge his client collection

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commission;

(b) collection commission may only be charged on monies actually collected or movable property recovered;

(c) save where the debt is collected in one lump sum, the legal practitioner may recover, in addition to collection commission, the minimal fees provided for in provisos (ii) and (iii) to by-law 70(2), these fees being -

- in respect of magistrates court collections, fees for services rendered, as referred to in the relevant part of the magistrates court tariff; and
- in respect of High Court collections, fees for professional services rendered in regard to the obtaining of judgment and all forms of execution proceedings;

(d) any collection commission which a creditor is obliged under those provisos to pay to his legal practitioner may be recovered from the debtor, together with the minimal costs referred to, if there is an agreement to that effect;

(e) if there is no such agreement between the creditor and debtor, the debtor is not obliged

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to pay collection commission, though he is obliged to pay the costs referred to previously.

Cases cited:

Blaikie-Johnstone v D Nell Developments (Pty) Ltd 1978 (4) SA 883 (N)

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

D & DH Fraser Ltd v Waller 1916 AD 494

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

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

Sapirstein & Ors v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 (A)

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

SA Mutual Life Assurance Soc v Uys 1970 (4) SA 489 (O)

SA Permanent Bldg Soc v Powell & Ors 1986 (1) SA 722 (A)

Tselentis House (Pvt) Ltd v Southern African P & P House (Pvt) Ltd 1995 (1) ZLR 56 (H)

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

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Yeoman Products (Pvt) Ltd v City of Harare HH-78-95 (not reported)

The court considered the following statutory provisions:

Law Society of Zimbabwe By-laws 1982 (SI 314/1982), by-law 70

Case Information

A P de Bourbon SC, for the plaintiff

Defendant in default

Judgment

Smith J et Gillespie J: This application by Scotfin for default judgment first crossed the table of Robinson J in chambers. The relief claimed is an order declaring cancelled an agreement of hire-purchase previously entered into between the parties and the delivery to the plaintiff by the defendant of the affected goods. Ancillary relief is sought in an order directing the sale by the plaintiff at public auction of the goods and the retention by it of sufficient of the proceeds to cover the outstanding balance due in terms of the agreement. In the event of the successful bid at the auction being insufficient to clear the indebtedness, there is a claim for judgment in an innominate amount, being the anticipated deficit between the price realised and the outstanding indebtedness, together with collection commission on that amount, whatever it may be, and costs of suit. Quite apart from any other cause for criticism in the manner of formulating the relief claimed, the learned judge was concerned about the claim or collection commission. There are judgments by different judges of this court which are perceived as being in conflict as to the principle of collection commission and the need for clearer guidance on the subject is felt by the profession. The learned judge accordingly made a direction in terms of rr 246(1) and 446 that counsel appear to argue the claim before a bench of two or more judges. This direction led, in the fullness of time, to appearance before us of Mr *de Bourbon* for the plaintiff. The defendant was in default, having failed to enter appearance to

defend the summons. The point at issue was solely the question of recovery of collection commission, an order pertaining to the main relief having been signed by Smith J on 30 January 1997.

If one thing is certain in this dispute it is that commission on the collection of a debt by an attorney is not recoverable as part of the costs of suit. If it is not immediately clear why this is so, the following explains the situation perfectly:

> "And in the first place I do not think that there can be any doubt that by the word 'collection' is meant the getting in of the debt otherwise than by legal process. The word is one in common use in business and is ordinarily understood in that sense." 1(113)

This observation remains true today. Collection of a debt is a task that does not necessarily require recourse to law. Where payment is secured without litigation the function is one that

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may be accomplished by a debt collector who is not a legal practitioner. The commission that such an agent customarily charges is related to his mandate and not to any legal costs. Even where the debt collector fails in his task and legal process must be resorted to, any expense which the creditor may have incurred in respect of the failed attempts of his debt collector remains a charge as between the creditor and the collection agent and is not part of the costs of suit as between the creditor and his attorney.

> "The attorney who conducts the case recovers the money at law, and is remunerated by the costs awarded him. He cannot claim against his principal a commission upon the amount of the judgment; nor can the agent; for neither of them has collected the debt. And it would make no difference should the capacities of collecting agent and attorney happen to be united in the same individual." 2(114)

In evidence of the continued correctness of this proposition the various tariffs set out in the rules of court do not provide, among the various charges which a lawyer may make, for any commission on the collection of debts through the legal process.

The principle is therefore to be seen enunciated in many decisions, including decisions in this jurisdiction:

> "Collection commission is essentially a charge made by an attorney or a commission agent when payments have been obtained through his services prior to judgment. If the matter has to proceed to judgment, then what is recovered is not recovered as a result of collection by the attorney, but as a result of the judgment of the court and the process that follows thereafter." 3(115)

It is this process of reasoning which led to the decision in SEDCO v Guvheya 4(116) in which Smith J summarised his conclusion as follows:

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> "In my view, having regard to the views expressed by Davies J, with which I respectfully concur, collection charges at the rate so prescribed may be recovered but only in respect of payments obtained through services prior to judgment, unless, however, there has been a judgment and the debtor is unable to satisfy the judgment debt at once and he agrees to pay the judgment debt in instalments together with the collection charges.
>
> To sum up, therefore, once summons has been issued for any debt, the legal practitioner is entitled to claim his costs but not collection commission unless subsequent to the service of the summons the debtor has agreed to pay collection commission. Collection commission can only be charged on moneys actually collected by the legal practitioner." 5(117)

This dictum is substantially in accordance with the principle thus far considered, although its phraseology in two respects - that is, reference to services prior to judgment and to a debtor's agreement subsequent to summons - may call for elucidation.

Collection commission is thus not recoverable as part of the costs of suit. In every case where a creditor seeks to recover from the defaulting debtor expenses incurred as commission on the collection of the debt, he must, therefore, be able to rely upon a specific cause of action in respect of that commission. That cause of action must be a contract between the debtor and creditor that obliges the debtor to pay to the creditor commission charges thus incurred. The agreement according to which collection commission is claimed as part of a judgment is almost invariably a term in the main agreement giving rise to the debt, that in the event of the debtor

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failing to make payments in terms stipulated in the contract, then he will be obliged to pay any legal costs incurred and collection commission. The legal costs are frequently agreed to be payable on the attorney and client scale. This case is no exception. The hire-purchase agreement between the parties contains the following provision:

> "22. Notwithstanding any costs, charges and expenses made payable by the Purchaser to the Seller as hereinbefore stipulated, it is expressly agreed that in the event of the Seller exercising any of its rights under these terms or taking any legal action, which shall include writing a letter of demand, under or arising out of this agreement or in respect of the goods or repossessing the goods if voluntarily surrendered by the Purchaser, then the Purchaser shall be liable to reimburse the Seller for all expenses which it has incurred therefor including tracing charges, collection charges, storage charges, maintenance charges for the goods, legal fees and disbursements which shall include all those legal costs on the attorney and client scale."

Hence a claim for collection commission, when based upon any term such as this, is obviously a claim for the enforcement of the particular term. Here one encounters the second point of principle that is an obstacle to the recovery of collection commission.

A term providing for the debtor to bear collection commission incurred by his creditor is, by eminent authority, a penalty stipulation.

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> "It is in essence a penalty imposed to ensure the timeous performance of the principal obligation. And its object being to compensate the creditor not for the absolute non-performance of the principal obligation, but for the delay in performance, it constitutes an exception to the general rule that the creditor cannot exact both the principal obligation and the penalty ... Stipulations of this nature have been treated as of a penal character by South African courts for more than 80 years. And in regard to them the well-known principle of our law has been invoked that the courts will only award under a penalty clause such loss or damage as the plaintiff has actually sustained." 6(118)

Also:

> "The current of decisions is strongly in favour of the view that the stipulation should be treated as a penalty, and that the plaintiff is entitled to recover only the actual loss which he has sustained through the defendant's breach of contract." 7(119)

The same principle has been followed in this jurisdiction:

> "There is no evidence before me and no allegation that the plaintiff has incurred the amount claimed or any amount by way of collection. It is certainly not possible or desirable to speculate, as I was invited to do, concerning collection charges which defendant expects to incur." 8(120)

The perception of a stipulation for collection commission as a penalty has, as one would expect, also led to the result that the plaintiff may be given the opportunity to show that the penalty does not exceed the prejudice that he is likely to incur, which is to say, to lead evidence of collection charges which he will have to pay.9(121)

Where the collection charges at issue are due to an attorney, that attorney may have charged collection commission in accordance with an obligation to make such a charge in terms of rules of professional conduct. Should that be the case, then it would be the logical extension of the reasoning considered thus far, that damage in the amount of collection charges according to

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the tariff in force is regarded as sufficiently established without the need for further proof that the penalty does not exceed the actual damage. Indeed, this was the conclusion reached in Claude Neon Lights (SA) Ltd v Schlemmer:10(122)

> "[I]n terms of the by-laws and regulations of the Incorporated Law Society of Natal, the plaintiff's attorneys will be obliged to charge the plaintiff collection commission on any amounts collected from the defendant in pursuance of the judgment ... It follows from this that if the defendant makes any payment of the amounts claimed in the judgment then, unless the plaintiff is awarded judgment for collection commission, it will be out of pocket in the amount of the commission payable to the plaintiff's attorneys in respect of such amount collected ... " 11(123)

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It was made clear in that case, however, that:

> "The form of the order must, however, obviously make it clear that the commission is only recoverable in the circumstances and to the extent that the plaintiff will, in terms of the Law Society Regulations, be obliged to pay such commission." 12(124)

This reasoning was followed in the matter of Blaikie-Johnstone v D Nell Developments (Pty) Ltd, 13(125) although in that case collection commission was not actually ordered because the by-laws permitting its recovery by the attorney were held to be ultra vires. In this jurisdiction, the decision of Malaba J in Tselentis House (Pvt) Ltd v Southern African P & P House (Pvt) Ltd 14(126) embodies all these principles. The learned judge identified the following general points from his survey of authority:

> "(a) That stipulations for collection charges in contracts constitute conventional penalties ...
>
> (b) That courts will interpret penalty clauses strictly and allow collection charges where there is evidence that the principal sum has been collected by the legal practitioner or agent and the collection charges incurred by the creditor ...
>
> (c) That where the principal sum has been collected by the legal practitioner and the costs of collection incurred before judgment, collection charges are claimable from the debtor regardless of service of summons. It is the judgment and not service of summons that is the determinant factor." 15(127)

The dictum is supported by ample authority, although one aspect of point (c) may require comment; namely, the apparent limitation of the principle to situations where the costs of collection have actually been incurred before judgment.

The principles which one may abstract from the decided cases, therefore, are these. Collection commission is not claimable by a creditor from a debtor unless the debtor has entered into an agreement to pay any collection charges incurred in the event of his default. Even where such an agreement has been reached, however, the clause permitting the recovery of collection commission is a penalty clause and is only enforceable to the extent to which damages in respect of charges for collection have actually been incurred by the creditor. Where the collection commission claimed is payable to an attorney who is obliged to raise such a charge in terms of professional by-laws and rules, then damage in the amount chargeable by the attorney may be presumed to have occurred.

This statement of principle must obviously be affected by the view that the general law takes of

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penalty stipulations and, in cases involving attorney's

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charges, by the wording of any professional regulations covering the charging by attorneys of collection commission. As to the first of these points, although the common law regarded a penalty clause as *prima facie* unenforceable, the Contractual Penalties Act 16(128) renders a penalty stipulation enforceable subject to the court's discretion to reduce the penalty to the extent of any prejudice suffered by the claimant or to grant such other relief as may be fair and just. This alteration of approach does not bring about any difference of substance to the manner of dealing with claims for collection commission. Of course in theory it means that the approach to the penalty clause in question is not one of presumptive unenforceability. Nevertheless, it is of the essence of this penalty not only that the breach of contract be committed but also that the debt be collectd in the proper sense of that word, which is, as has been shown above, an extra-judicial collection. The plaintiff therefore must still prove an actual collection and the incurring of charges for collection commission. A claim for collection commission due to an attorney who enforces payment only through court process does not meet these requirements and can therefore only succeed where that attorney is professionally obliged to levy a charge, called collection commission, on the amount of the payment enforced by litigation and which he will have collected through execution.

The effect of the attorneys' professional rules is the next area of concern to be addressed. As with all aspects of a lawyer's professional conduct, the charging of collection commission on debts recovered by attorneys for clients is regulated by legislation. The Law Society is empowered to make by-laws:

> "Fixing a tariff of charges and commissions or minimum or maximum charges and commissions for services rendered by legal practitioners in matters not provided for by the rules of the Supreme Court, High Court or of magistrates courts:

Provided that no by-laws made in terms of this paragraph shall prohibit any registered legal practitioner from acting in any proper case or matter without making any charge therefor." 17(129)

Purportedly made in terms of this power are the Law Society of Zimbabwe By-laws 1982 (SI 314 of 1982), Part IX of which provides for charges and commissions for professional services. The by-law concerning commission on collection of debts is by-law 70. This reads in sub-by-law (2):

> "(2) A legal practitioner instructed to collect an uncontested claim for a trade debt shall be entitled and obliged, in lieu of any other fees and charges, save for disbursements, and save as is hereinafter provided, to charge his client a collection commission [at a specified rate] ..."

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Sub-by-law (1) of this by-law gives a definition of the terms 'trade debt' and 'uncontested claim'.

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The former is defined as meaning:

> "a liquidated claim for money or for the delivery of movable property against a debtor in default which arises directly or indirectly from any trade ... or other gainful occupation publicly carried on by the creditor ..."

The latter is defined as including the following situations, but it appears to be a comprehensive definition:

> "(a) any claim not involving the issue of process; and
>
> (b) any claim commenced by the issue of a summons where the defendant does not enter an appearance to defend; and
>
> (c) any judgment debt, not the subject of a pending appeal, which has not been paid in full within seven days after demand ...; and
>
> (d) any claim which, after an appearance to defend is entered but prior to judgment, is settled upon terms providing for payment in instalments or for a single instalment which is not, in fact, paid in terms of the settlement ..."

It is clear, then, that in terms of by-law 70 collection commission cannot be charged unless the claim is both for a trade debt and is uncontested. Any other appearance of clarity in these provisions is, however, deceptive.

Difficulty arises in the interpretation of this provision for the following reasons. First of all, there is room for argument as to whether or not work in respect of the collection of uncontested trade debts, and the charging of collection commission, is regulated by tariffs in the rules of court and accordingly susceptible of governance by the Law Society.

Second, the primary formulation of the rule concerning collection commission stresses that attorneys are "entitled and obliged" to charge collection commission in certain circumstances. These circumstances are the occasions of uncontested claims for trade debts. This commission, moreover, is said to be "in lieu of any other fees and charges", with the exception of disbursements, and with the important proviso, "save as is hereinafter provided." Leaving aside the provisos for the moment, the plain meaning of this subsection would appear to be that an attorney prosecuting an uncontested claim for a trade debt may not charge a fee but must charge only a collection commission and may recover disbursements. Clear as things may be thus far, the provisos, however, then intervene to list circumstances where the charging of a collection commission may be coupled with the recovery of certain costs. Proviso (i) in itself creates no difficulty. It entitles the attorney to recover a maximum of $500 as collection commissio in lieu of any other charges save for disbursements, where a debt is recovered in one lump sum in response to a letter of demand. Proviso (ii), which refers to magistrates court matters, goes further. In an apparent contradiction of the underlying rationale of the rule, it permits the recovery, in addition to collection

commission, of the appropriate fees for services rendered as referred to in the relevant part of the magistrates court tariff. This detracts considerably from the notion of commission being an

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alternative to fees. Proviso (iii), which deals with High Court collections, effects an even greater inroad into the concept. It provides that the lawyer is entitled to charge in such cases not only his collection commission but also fees for professional services rendered in regard to "the obtaining of judgment" against the debtor and all forms of execution proceedings instituted on the client's instructions. Proviso (iv), finally, allows the charging of a commission and fees in any circumstance where uch a duplication is not otherwise permitted, where the client gives his agreement to such a duplication.

The possible perception that this regulation was ultra vires accordingly struck us. Such invalidity might arise on the grounds that the power to make by-laws does not arise since the matter is governed by a tariff. On the other hand, it might arise out of unreasonableness on the following ground. The by-laws appear to state a principle: no duplication of charges. They then seem to detract completely from that principle by enacting a series of exceptions. These exceptions are arguably so all-pervading as to destroy the principle. If that is not the true meaning, nevertheless the breadth of wording might be thought to be such as to render the by-laws, in their vagueness, conducive to such an interpretation.

This concern caused us to afford an opportunity to the Law Society to make such application as it considered best advised to intervene in the matter in order to make any appropriate submissions as to the validity and interpretation of the by-laws. Leave to intervene and to file an affidavit from the secretary of the Law Society was given. Mr de Bourbon again appeared, this time for the Law Society of Zimbabwe, and presented argument on heads prepared by Mr Sayce, instructing him.

The affidavit of Mr Mapombere, the secretary of the Law Society, discloses that the function of debt collection, as practised by attorneys, involves a considerable administrative establishment that plays no part in the normal legal work of a firm of attorneys. A bookkeeping staff and cashiers; staff devoted to attendances upon clients and debtors, deputy sheriffs, clerks of court and others; secretarial staff preparing correspondence and accounts and attending to diarisation: all must be maintained. The constant output of reminder letters, accounts, cheques, receipts and the like is inevitable. The calculation of accounts that are up to date, so as to deal with constant enquiries from debtor and creditor alike, is essential. The point is made that the items, dealt with in provisos (ii) and (iii) to by-law 70(2), which are susceptible of the charging of fees do not even begin to cover the many expenses involved in an attorney maintaining a debt collection practice.

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In this respect the affidavit of Mr Mapombere mirrors the evidence placed before Leon J in Blaikie-Johnstone 18(130) which caused the learned judge to conclude:

> "It is clear from Mr Hart's affidavit that, just as attorneys have to do work in 'collecting' monies before legal proceedings are instituted, they may have to do work in 'collecting' monies after judgment has been granted. As I have already pointed out the Natal by-law envisages that collection commission may be charged on monies collected after judgment and, in terms of the allegations in the summons, the first defendant clearly bound himself to pay such collection commission. Unless, therefore, there is anything in law which prevents a court from granting such an order, it would seem to follow in principle that the claim for collection commission should succeed."

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19(131)

There is also urged upon us, as a matter of policy, the suggested desirability of encouraging lawyers to undertake such work in order to provide a regulated and ethical alternative to the similar services provided at no little cost by commercial debt collectors.

Argument for the Law Society contrasts these services rendered in debt collecting with the work done in order to justify a fee in terms of the tariff for work referred to in provisos (ii) and (iii) to by-law 70(2). Whereas the former embraces the multifarious activities described by Mr Mapombere, the latter are strictly circumscribed. In the case of magistrates' court work dealt with in proviso (ii), fees may only be charged, in addition to collection commission, in respect of the items described, and to be remunerated, according to the tariff as follows:

"	1.	Demand	$13
	2.	Summons commencing action where particulars of claim do not exceed one folio	$44
		Where additional particulars of claim exceed one folio, an additional $9,00 *per* folio shall be charged after the first folio	
	3.	Applying for and obtaining default judgment	$19
	4.	Warrant of execution, ejectment or arrest and civil imprisonment summons	$23
	5.	Applications for garnishee order including affidavit	$44
	6.	Attending court in civil imprisonment and garnishee proceedings and on applications for suspension of warrant of arrest each attendance *per* quarter hour excluding waiting time	$32
	7.	Any application not elsewhere provided in this Part or in Part II	$38" 20(132)

Similarly with proviso (iii). That applies only to "professional services

rendered" in the "obtaining of judgment" and "in regard to all forms of execution proceedings". Whatever the apparent breadth of potential meaning in that clause, it was submitted for the Law Society that it must be strictly interpreted as applying only to the extent that is reasonable and does not give rise to any contradiction or repugnance. Such an interpretation is available and would limit the fees recoverable to such matters as issuing summons, arranging service and preparing and submitting an application for default judgment and to formal proceedings in respect of enforcing the judgment.

The High Court tariff does not make itemised charges for different individual acts. It rather breaks down the attorney's work into the following headings: attendances, attendance at court, preparation, drafting, copying, travelling and bills of costs. 21(133) None of these items, except possibly the first, "attendances", could conceivably apply to the various kinds of work done

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pertaining to the collection of uncontested trade debts. The item "attendances" provides a rate for three separate activities: attendance by a legal practitioner, formal attendance by a legal practitioner and formal attendance by an employee of a legal practitioner. "Attendance" is defined as comprising telephonic communications, searches in offices of record, dealings with government or local government authorities other than formal attendances, sorting papers, disclosure of documents and making entries in the Chamber Book. This plainly does not comprise the activities involved in collecting an uncontested trade debt.

Formal attendance is defined as comprising all matters of an administrative nature and is said to include telephonic communications, issue and service of process and delivery of documents, making appointments, setting matters down for hearing, settling of witnesses' and officials' expenses and charges and arranging signatures on affidavits. Clearly, this is not an exhaustive list, neither is it one in which one can discern any obvious genus other than the vague "all matters of an administrative nature". That general description, and the instances it is found necessary to mention specifically, do not, however, appear to cover the bulk of the work of debt collecting as described by Mr Mapombere. That would appear to us to be consultative and accounting work rather than administrative work.

We therefore find as follows. The full extent of work done in respect of the collection of uncontested trade debts is not provided for elsewhere in the tariffs pertaining to the magistrates' courts and the High Court. 22(134) The power to provide for a commission on such work may therefore be exercised by the

Law Society, as indeed it has been. The regulations are therefore not ultra vires on the first ground postulated.

The contrast between the limited work and formalistic charges, which in terms of provisos (ii) and (iii) to by-law 70(2) may be charged in addition to collection commission, with the extensive infrastructure and potentially exhaustive attendances intended to be rewarded by a collection commission is such that it cannot be thought that there is effectively any duplication in charges involved in recovering the paltry fees permissible on that tariff and provided in provisos (ii) and (iii) and the commission on collection. The regulations are therefore not vague or unreasonable.

We have given passing thought to two other potential complaints concerning collection commission, which were addressed in the Blaikie-Johnstone case. The first of these is the notion that it is inherently undesirable that clients for whom the work of collection is relatively simple should, by the commission they pay, subsidise the very difficult collections of debts with may attend instructions from other clients. This consideration was dealt with thus by Milne J:

> "The question is whether the client whose debt is collected without much trouble should be called upon to subsidise, as it were, the client whose debt causes a lot of trouble and for which the prescribed commission would not adequately compensate the attorney. That one client should bear the loss suffered by an attorney in respect of services rendered to another seems to run counter to the whole concept of professional fees." 23(135)

This consideration undoubtedly contributed to the decision in that case to hold the Natal by-laws

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providing for collection commission to be ultra vires. It seems to us that this concern has been removed from consideration by the legislature which, as a matter of policy, empowered the Law Society to provide for such a commission where the rules of court do not otherwise apply.

Similarly, with a factor which moved van Heerden J in the same case:

> "The situations which could result in clients being charged for services not actually rendered seem all to flow directly from the charging of a compulsory general percentage commission. The charging on a percentage basis on results achieved is more commonly associated with occupations where it might act as an incentive to achieve better results but is foreign to the principle that professional men are at all times expected to give of their best and to charge clients only for and according to professional services actually rendered to them. It also smacks somewhat of champerty (pactum de quota litis). It has long been an established principle of our law that a client has a right to have his costs taxed to ensure that he does not pay excessive costs and, if he is aggrieved with the taxation, to take it on review ... The charging of fees on a commission basis leaves no room for taxation or

> review; it is based on results achieved and not on services rendered and the ultimate amount charged is merely a matter of arihmetic." 24(136)

However compelling these considerations may be, again they appear to us to be removed from the dispute by the specific power given to the Law Society to make by-laws providing for charging on a commission basis.

We therefore conclude that the charging of a commission in respect of the collection of uncontested trade debts was validly enacted by the Law Society in terms of the authority given to it by statute. Given this conclusion, it is unnecessary to consider the policy urged upon us by the Law Society to favour the doing of such work by attorneys rather than by other persons.

If an attorney is obliged to recover collection commission from his client, then to that extent the client suffers loss in recovering the debt. If the client suffers that loss, then to that extent any penalty clause in a pact between him and the debtor pertaining to the payment of collection commission is quite unexceptionable. It must therefore follow that the contract to reimburse collection commission is one that ought to be enforced by the courts, at least to the extent to which the attorney is obliged to charge his client collection commission.

In the light of this conclusion, it is necessary to re-examine the dicta in certain decisions on the point in this jurisdiction. First, SEDCO v Guvheya. As was set out above, that decision contains the statement:

> "Once summons has been issued for any debt, the legal practitioner is entitled to claim his costs but not collection commission unless subsequent to the service of the summons the debtor has agreed to pay collection commission. Collection commission can only be charged on moneys actually collected by the legal practitioner" 25(137)

It is perfectly true to say that collection commission can only be charged on monies actually collected by the legal practitioner. But this does not exclude the recovery from the debtor of collection commission properly charged to his client by the legal practitioner in respect of any uncontested claim as defined in by-law 70(1). It was therefore erroneous to hold that collection commission could not be claimed after the issue of summons. Provided the proceedings

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following the summons are properly regarded as uncontested, then commission is claimable by the legal practitioner from his client and, given an agreement to this effect, is recoverable by the creditor from the debtor. It was also erroneous to hold that such an agreement could only be enforced if entered after the service of summons. The agreement relating to the reimbursement of collection commission may properly be entered into at any time and may form part of the agreement in terms of which the principal debt arises.

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Next, the Tselentis House case. In the judgment it is, as previously set out, stated that:

> "where the principal sum has been collected by the legal practitioner and the costs of collection incurred before judgment, collection charges are claimable from the debtor regardless of service of summons. It is the judgment and not service of summons that is the determinant factor." 26(138)

The judgment as a whole is, with respect, largely correct. There is, however, error in the statement that the costs of collection must be incurred before judgment. It is true that collection commission can only be charged on payments actually collected. This is clear from a careful reading of by-law 70. Thus proviso (i) refers to the position where payment in full is recovered in a lump sum. Proviso (iv) refers to the position where a legal practitioner, who is not obliged in terms of by-law 70 to charge collection commission, is entitled, subject to agreement with his client, to charge commission on monies collected by him. The emphasis is designed to show the intention that commission is only chargeable on monies actually recovered or collected. Provisos (ii) and (iii), although they do not contain quite the same indication of intention, must be read in the same way. This is in accordance with numerous dicta to the effect that commission is only chargeable on monies collected. It follows, therefore, that whre a client requests the legal practitioner to collect an uncontested claim for a trade debt and nothing is collected, no collection commission can be charged. Nevertheless, this does not mean that judgment cannot be given unless collection has occurred and a commission has been charged before the judgment. The costs of collection are incurred throughout the proceedings from initial demand; through whatever non-litigious procedures are adopted; in the uncontested litigation; and in the execution on a judgment. What is really determinant is that the legal practitioner is obliged to, and does, bill his client for that commission. That causes the loss that, in terms of agreement, the creditor is entitled to recover from the debtor. The giving of judgment for collection commission is in anticipation of the recovery of the debt, or part thereof, in the process of execution. It is left to the legal practitioner concerned to execute the judgment and recover the debt and to charge commission in accordance with the jugment on so much of the judgment debt as is actually recovered. It would be fraudulent of him to charge his client, or to recover from the debtor, a commission in respect of a debt which, despite the judgment, is not recovered.

Finally, the unreported decision in Yeoman Products (Pvt) Ltd v City of Harare. 27(139) In that matter, ADAM J, faced with the conflict between the *SEDCO*

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case and the *Tselentis House case*, preferred the former to the latter. The learned judge stated:

> "In my view, a legal practitioner or commission agent having failed to recover what is owed by use of a letter of demand and then invokes the assistance of the court by the issue and service of summons is only entitled to claim costs for instituting proceedings but not collection commission or charges unless it can be shown there is an entirely new or separate agreement concerning this." 28(140)

That finding was entirely in accordance with the SEDCO case and with older authorities upon which the latter was based. Nevertheless the conclusion, upon reconsideration, does not reflect the enactment of the professional by-laws which, as this judgment shows, validly permit the recovery of collection commission by the lawyer from his client, notwithstanding the issue of summons and the giving of judgment, and hence, by virtue of agreement to that effect, by the client from his debtor.

This is not to say that the concern that has been expressed by the judges of this court concerning the recovery of collection commission from a debtor has been misplaced. The scrutiny that has been given the subject in this case reveals to our satisfaction that there is an area of real concern and possible duplication of recoveries. This arises from the widespread practice whereby collection commission, when it is claimed from the debtor, is claimed in terms obliging the debtor to pay "costs of suit on a legal practitioner and client basis and collection commission". This claim no doubt is so formulated because the agreement in terms of which collection commission is claimed almost invariably contains also an undertaking by the debtor to pay costs on the higher scale. That is precisely what has occurred in this case.

It must now be apparent that such a formulation is entirely unacceptable. Collection commission is only claimable in respect of uncontested collections of trade debts. It is only validly provided for where a tariff provides no other fee structure. It must be claimed by the attorney from his client as an alternative to any other fees or disbursements save those inconsiderable tariff charges for certain formal legal proceedings which are set out in provisos (ii) and (iii) to by-law 70(2). Collection commission is designed to be a means of reward that does not require the complicated and expensive procedure of formulating, and even taxing, a bill of fees in respect of innumerable attendances not provided for in a tariff. The agreement for recovery of collection commission by a creditor from his debtor is calculated to ensure that the creditor is not the loser when the debt is finally recovered after necessary resort to legal practitioners.

Attorney and client costs, in comparison, are those costs for which a client

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becomes liable to his attorney and which are not recoverable as between party and party in accordance with a normal order of costs of suit. All items that are allowed on the party and party bill will also appear on the attorney and client bill, although not necessarily at the same rate, but many items on the latter will not be permitted on the former. 29(141) As is well known, costs are awarded at this higher rate only in exceptional circumstances. They may, however, be awarded when there is agreement to such an effect. 30(142) The purpose of such agreement,

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quite obviously, is the same as the intention behind an agreement that the debtor will be liable to reimburse his creditor collection commission. It is to ensure that the creditor does not suffer the inevitable loss which will be incurred as a result of the taxation of a party and party bill, even though he recovers his costs.

It is therefore perfectly in order for a creditor to enforce against a debtor a term obliging the debtor to pay either collection commission or attorney and client costs. But can it be proper to recover both together? Although there are many reported cases where both forms of relief have been ordered, and although unopposed chamber applications have frequently successfully obtained such relief, it seems to us that it cannot be proper for a creditor to recover from his debtor both collection commission and attorney and client costs.

The fundamental reason is simple. He is not exposed to payment both of collection commission and his attorney's costs. This judgment has shown how the intention of the by-laws is that the charging of collection commission replaces any other fees or charges of the legal practitioner concerned. Collection commission is permitted to attorneys, notwithstanding the potentially valid criticisms of such a practice that were enunciated in Blaikie-Johnstone. This was, no doubt, in order to encourage the maintenance by legal practitioners of a debt collection practice. The very charging of collection commission at a flat rate for work that may or may not be done in any particular collection removes the need for a legal practitioner to formulate a bill of his attorney and client costs in order to recover those from his client. Not only does it remove the need but indeed it removes the justification. Indeed, Mr *de Bourbon* felt constrained to concede during argument that collection commission could not be recovered together with legal practitioner and client costs. In a minute addressed to us the day following the last hearing, he intimated that he had been instructed to withdraw such a concession but

nevertheless found himself unable to advance any submission in support of a contrary position.

That is entirely understandable. It seems to us incontestable that the by-laws effectively prohibit such a duplication as between the attorney and his client, save in the case of the exceptions addressed above. We must say that those exceptions, narrowly defined as they must be to avoid unreasonableness, seem particularly penny-pinching and self-serving. Nevertheless they are permitted. To the extent that they are permitted, and to that extent only, it would therefore be appropriate for the creditor client to recover such expenses from the debtor. Even if the agreement between the debtor and creditor were so phrased as to be notionally wide enough to permit a greater recovery, such a greater recovery would be an unenforceable penalty. We also think that it would be contra bonos mores in itself.

We consider it necessary and desirable to define more fully the extent to which proviso (iii) to by-law 70(2) permits legal practitioner and client costs to be recovered by the legal practitioner from his creditor client in High Court matters. The words used in the proviso permit the recovery, in addition to collection commission, of fees for "professional services" in regard to the "obtaining of judgment against the debtor". These words must be interpreted to exclude from the exception any services that duplicate any part of the generality of activities undertaken in a

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non-litigious collection. Thus, for example, a letter of demand will no doubt be dispatched in all cases, even where process is not issued. This proviso must be interpreted to apply only to those uncontested cases, as defined in by-law 70(1), where professional services in regard to court proceedings lead to the obtaining of judgment.

We have regard, therefore, to the definition of an uncontested matter in by-law 70(1). The first category of uncontested matter is that not involving the issue of process. In such a case, no legal practitioner and client costs at all can be validly recovered in terms of proviso (iii). The second category is claims commenced by the issue of a summons where the defendant does not enter an appearance to defend. Here the only legal practitioner and client costs permitted by proviso (iii) would be those incurred in the drafting, issue and service of summons; the preparation of a chamber application for default judgment; and the entry in the chamber book of that application. Attendances on the client in relation to instructions pertaining to the drafting of summons or any other matter are excluded as these must be regarded as covered by the collection commission. The third category of undefended matter is any judgment debt, not the subject of a pending appeal, which has not been paid in full within seven days afterdemand. The legal practitioner and client costs countenanced in this case by proviso (iii) are those costs pertaining to execution, where that is resorted to, as more fully examined below. They do

not include costs relative to the preceding judgment. The fourth category of undefended claim comprises those claims which, after an appearance to defend is entered but prior to judgment, are settled upon terms providing for payment in instalments or for a single instalment which is not, in fact, paid in terms of the settlement. Here the legal practitioner and client costs permitted by proviso (iii) are strictly confined to those for the drafting, issue and service of process and of pleadings. Attendances for instructions are not included.

Proviso (iii) to by-law 70(2) also permits the recovery of costs of all forms of execution proceedings instituted against the debtor on the client's instructions. We find, interpreting this provision and the expression "professional services" narrowly, that, to avoid any possibility of duplication, and in accordance with the Law Society's submission that this covers only a restricted field, this permits the recovery of legal practitioner and client costs only for the following: the drafting issue and service of formal documents of execution; the set down in court of any execution proceedings; and attendance in court to move executory relief. All other attendances, including consultations with the client, attendances on the deputy sheriff to arrange dates of execution, to receive returns of service, to give instructions, etc, must be regarded as covered by the commission which will be recovered. All that may be added to the permissible items specified in this and the preceding paragraph of this judgment are th costs of preparing and taxing a bill of costs. Any other fees or charges are not recoverable and must be regarded as being rewarded by the commission.

Since only those amounts specified above may be recovered by the legal practitioner from his client, only they may be reclaimed by the creditor from the debtor. The appropriate form of order for such relief moved in the High Court is accordingly the following, where there is an agreement between the creditor and debtor that collection commission and costs on the higher scale may

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be recovered:

> "Judgment for the plaintiff in the sum of $x together with interest thereon at the prescribed rate, presently y% *per* annum, from ... until the amount is paid in full and collection commission thereon calculated in accordance with by-law 70 of the Law Society of Zimbabwe By-Laws, 1982, and costs on the legal practitioner and client scale to the extent such costs are permitted in proviso (iii) to by-law 70(2)."

Where there is no agreement between the creditor and the debtor that the latter will be liable to pay collection commission and costs on the higher scale, the appropriate order for relief is the following:

> "Judgment for the plaintiff in the sum of $x together with interest thereon at the prescribed rate, presently y% *per* annum, from ... until the amount is paid in full and costs to the extent such costs are permitted in terms of proviso (iii) to by-law 70(2) of the Law Society of Zimbabwe By-Laws, 1982."

SMITH J et GILLESPIE J

It should be noted, however, that although by-law 70(2) refers to "payment in one lump sum" and "payments and instalments collected" and "moneys collected by him", collection commission is not confined to judgments sounding in money. The term "trade debt" is defined in sub-by-law (1) of by-law 70 as meaning not only a liquidated claim for money but also a claim for delivery of movable property. Therefore references in sub-by-law (2) to payments and moneys collected must be construed as including a reference to the value of movable property recovered. How that value is determined is not clear. Since a single item of property would be recovered at one time, it would be regarded as being recovered in a 'lump sum' and therefore proviso (i) to by-law 70(2) would apply. But what is the position where a number of items are recovered on different dates? The draft orders proposed above are accordingly susceptible of change mutatis mutandis where the claim is an uncontested trade debt for the delivery of movable propery.

In ordering judgment on the principal amount as he did in January 1997, Smith J ordered as para 6 of the order that the defendant shall pay the costs of suit on a legal practitioner and client scale. Wide as that order is, it would be inequitable to add to that an order for the payment of collection commission. No application has been made for the alteration of that order and it is not proposed mero motu to effect any alteration, particularly inasmuch as one is unaware of the extent to which a bill of costs has been prepared, taxed or enforced. Accordingly, in this instance no further order is made. Future claims, however, may reflect the direction given above.

To summarise our findings set out above, the following points emerge from our survey of the present legal position:

(a) a legal practitioner who is instructed to collect an uncontested trade debt as defined in by-law 70(1) is obliged to charge his client collection commission;

(b) collection commission may only be charged on monies actually collected or movable property recovered;

(c) save where the debt is collected in one lump sum, the legal practitioner may recover, in

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addition to the collection commission, the minimal fees provided for in provisos (ii) and (iii) to by-law 70(2);

(d) any collection commission, which, in terms of these provisos, a creditor is obliged to pay to his legal practitioner, may be recovered from the debtor, together with the minimal costs referred to, if there is an agreement between the creditor and the debtor to that effect.

We would point out that proviso (iv) to by-law 70(2) purports to permit the recovery by a legal practitioner of collection commission even on a matter that is not an uncontested trade debt where the legal practitioner has secured his client's consent to such a situation. We have not addressed the validity of

this provision, nor the enforceability of any agreement between creditor and debtor to repay any amounts of commission that the creditor is not obliged to pay his attorney. We do not intend anything we have said in this judgment to be taken as suggesting that any amount of collection commission paid by a creditor in terms of an arrangement with his lawyer, as specified in proviso (iv), is recoverable from the debtor.

In concluding, we feel constrained to express our concern that the legislature has enabled the Law Society to make by-laws authorising legal practitioners to charge collection commission in their present form. The principle of professional people charging collection commission is inherently undesirable for the reasons given in the judgments that we have earlier referred to. We consider it most unfortunate that the then Minister of Justice approved the by-laws permitting the charging of collection commission to the extent they do. Amongst the reasons for possible concern are the following: that the lawyer should be permitted to charge fees in addition to the charging of collection commission; that it is countenanced that the lawyer might secure his client's agreement to pay collection commission in matters other than uncontested trade debts; and the absence of a maximum amount of commission recoverable being stipulated. Each of these carries with it certain possibly undesirable consequences. For instance, it i not unknown for default judgment to be given for an uncontested claim for a trade debt in excess of $1 million. If the amount is not collected all in one lump sum, the collection commission that would be chargeable could be very high indeed. Even if it is thought desirable to permit, or to oblige, the recovery of collection commission, it may nevertheless be desirable to reconsider some of the aforementioned concerns.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Honey & Blanckenberg, intervenor's legal practitioners

S v MAZHAMBE & ORS 1997 (2) ZLR 587 (HC)

Court **High Court, Harare**

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Gillespie J

Criminal review

17 December 1997 Judgment No. HH-199-97

Flynote

Criminal procedure - witness - hostile - impeachment of

Evidence - witness - discrediting - hostile witness - what is - impeachment of hostile witness - procedure to be followed - effect of evidence of such witness

Headnote

If a witness for the prosecution at a criminal trial gives evidence that is inconsistent with his previous statement to the police, and the inconsistency is such as to damage the State case, the prosecutor must act in order to discredit the damaging testimony. There are two methods of so acting.

The witness may be confronted with his previous inconsistent statement. The judicial officer must be informed of the departure. Sufficient particulars must be put to the witness to designate the occasion when the statement is alleged to have been made. Thereafter, if the witness denies making the statement, the prosecutor may prove that it was made. This he may do by calling the person who recorded it and, where necessary, the person who interpreted it. The witness must then be asked which statement is true and to explain why the previous statement was made.

Proving a previous inconsistent statement does not make evidence out of the statement. If the witness admits the truth of it, the court may act on the oral evidence, but not on the statement itself. Conversely, the fact that the witness has had his evidence impeached by the production of a previous inconsistent statement does not necessarily mean that his adverse evidence must be rejected. The court must examine the evidence and decide whether or not to accept it.

Declaring a witness to be hostile is a further or alternative step, which allows the witness to be cross-examined by the party who called him. A witness may not be cross-examined unless the judicial officer is of the opinion that he is hostile. The mere fact that the witness has given evidence which is unexpected does not make him "hostile", nor does the fact that he has previously made an inconsistent statement. A witness may be declared to be hostile if he is shown to bear a hostile *animus* towards the party who calls him and shows unwillingness to speak the truth at the behest of the party who called him and an intention to damage that party's case. The effect of declaring the witness hostile is that his adverse evidence is effectively neutralised as evidence led by the party against itself; but it is not ipso facto to be disregarded. The evidence given, both under cross-examination by the party calling him and otherwise, may be considered and accepted or rejected on whole or in part, depending on the weigt to be attached to it.

1997 (2) ZLR p588

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GILLESPIE J

Cases cited:

Farmer & Farmer's Trustee v McMillan 1905 TH 134

Greenough v Eccles (1859) 5 CBNS 786

Meyer's Trustee v Malan 1911 TPD 559

Price v Manning (1889) 42 ChD 372 (CA)

S v Chari 1989 (1) ZLR 231 (S)

S v Chigadzi 1973 (2) RLR 273 (A)

R v Golder [1960] 3 All ER 457; (1960) 45 Cr App R 5

R v Joowalay 1947 SR 27; 1947 (2) SA 113 (SR)

S v Makandigona 1981 ZLR 408 (A)

S v Millar 1971 (1) RLR 159 (A); 1972 (1) SA 427 (RA)

S v Muhlaba & Ors 1973 (1) RLR 178 (G)

S v Mutsinziri 1997 (1) ZLR 6 (H)

R v Pestano & Ors [1981] Crim LR 397 (CA)

S v Steyn en Andere 1987 (1) SA 353 (W)

R v Thompson (1976) 64 Cr App R 96 (CA)

R v Twetison 1964 RLR 147 (G)

R v Wellers 1918 TPD 234

Steenkamp v Street 1923 TPD 208

Surmon v Surmon 1926 AD 47

Tomes v Sithole 1981 ZLR 494 (H)

The court referred to the following statutory provisions:

Criminal Procedure Act 1865 (England), s 3

Criminal Procedure and Evidence Act [Chapter 9:07], ss 316, 318

Judgment

Gillespie J: Molly Magoromonzi has three uncles. Her three uncles are all on trial in this case. For stealing from her. Some time ago, in about April 1996, whilst she was away from her home,

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somebody unknown broke into it and stole 26 corrugated iron sheets, 5 bags of fertilizer, 2 shovels, some shoes, 3 travelling bags or handbags and a purse, a bicycle, a primus stove, a container of paraffin, and some cash. In November last year, she was visiting her uncle Emson, the third accused. She saw at his house an iron sheet that she believed to be hers. She made a fuss about this. She called in the police. In the presence of uncle Emson, and of uncle Laiton, the second accused, the police recovered a total of seven iron sheets from the possession of uncle Emson. They were buried at his homestead. He claimed, under questioning, that he had been given them by uncle Richard, the first accused.

He later added to this. He gave an account of his coming into possession of the items which implicate uncle Richard as the actual perpetrator of the theft and himself only as the receiver of the stolen property. His version is that he found the sheets hidden in his fields and, suspecting them to have been stolen, mounted a watch over them. In the course of his observations he saw uncle Richard (to whom he had reported his find) come and remove them. He

accepted the sheets from uncle Richard as the price for his silence. He seems to have said something extra-curially which implicated uncle Laiton, but this has not been repeated in evidence. Uncle Richard and uncle Laiton both deny involvement. They claim that uncle Emson has falsely incriminated them.

The magistrate at Karoi has convicted all three men. In doing so she has relied substantially - if not exclusively - on the evidence of Molly's cousin Tongai. Tongai is the son of Laiton. It is the manner in which his evidence has been received and acted upon that prompts me to write this judgment.

Cousin Tongai is 16 years old. Police questioned him during the course of investigations. He made a statement. The contents of that statement caused the State to tender him as a witness. This is what he said in evidence:

> "I do not know anything about the case. The police came to our home, took me and tied me with a rope and told me to tell them where I had put the tiles with my father. The police officer is called Mapondera. He said he had been told by Emson that it was myself and my father who had stolen sheets. He tightened both my hands with handcuffs and he told me to lie on the ground with my stomach. He started assaulting me and then I lied to them that I had knew (*sic*) something about the offence. I told the officers that the accused had taken the roofing sheets. I pointed the house from where they had taken the sheets and complainant denied that the sheets were in that house. I told them that they took the sheets to a place I did not know. I did not witness anything. What I told police is what just came into my mind. I lied to police."

Most prosecutors would recognize in this testimony the death knell for the case. Not so this stalwart representative of the State. He persuaded the magistrate to embark upon a "trial within a trial"; to receive evidence from policemen and Molly as to whether the witness made a statement freely and voluntary; to rule the witness's proof of evidence admissible; to receive it in evidence; and to act on it in order to convict uncles Richard and Laiton. Astonishing.

When a witness departs from his prior statement then a prosecutor is placed in a position of potentially conflicting duties and responsibilities. Where the departure is not material then the

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prosecutor need not necessarily take action. That witness's changed evidence, whether it favours the accused or otherwise, will stand as the evidence for the State. The prosecutor has a considerable responsibility in making the decision whether or not the departure is material and if he has any doubt he must disclose the discrepancy.

Where the departure is material, and particularly where it tends to incriminate or to increase the evidence against the accused, then the defence must be informed. Where the accused is unrepresented the court must be informed. I have elsewhere addressed the prosecutor's duty to disclose such inconsistencies. 1(143) Where the material inconsistency is one which favours the

accused the prosecutor might still be inclined to allow that changed testimony to stand as the State's evidence, particularly where the general tenor of the evidence remains in accordance with the State case. Even here, however, the duty of disclosure to the defence (or the court as the case may be) remains. The very fact of that departure, whether favourable to the defence or not, might be such as to cast doubt on the remaining incriminatory evidence of that witness. That doubt must be revealed. Where the departure, however, is such as tends to damage the State case then the prosecutor must, if he persists in the prosecution, act in order to discedit the damaging testimony. If he does nothing that testimony remains on record and must be given proper weight by the court.

The procedure for the discrediting by the prosecutor of evidence led by him from his witness is codified in the following somewhat unhelpful terms.

> "It shall be competent for any party in criminal proceedings to impeach or support the credibility of any witness called against or on behalf of that party in any manner and by any evidence in and by which, if the proceedings were before the Supreme Court of Judicature in England, the credibility of such witness might be impeached or supported by such party, and in no other manner and by no other evidence whatever:
>
> Provided that any such party who has called a witness who has given evidence in any such proceedings, whether that witness is or is not, in the opinion of the judge or judicial officer presiding at such proceedings, adverse to the party calling him, may, after the said party or the said judge or judicial officer has asked the witness whether he has or has not previously made a statement with which his testimony in the said proceedings is inconsistent and after sufficient particulars of the alleged precious statement to designate the occasion when it was made have been mentioned to the witness, prove that he previously made a statement with which his said testimony is inconsistent." 2(144)

The law that is imported by this enactment is the law of England as stated at 1 June 1927, 3(145) unaffected by any English statute later than that date, 4(146) but subject to any subsequent English judicial decision pronouncing upon the point. 5(147) It is perhaps anomalous that the courts in an independent Zimbabwe are still bound in this respect, and in certain other similar instances, by the decisions of a foreign court.

The English law is based primarily upon an 1865 statute, 6(148) which provides:

> "A party calling a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by

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the leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such

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last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." 7(149)

The word "adverse" in this section does not merely mean "unfavourable". It means hostile. 8(150) A party may not cross-examine his own witness unless the judge is of the opinion that he is hostile. 9(151) A witness can only be considered adverse, or hostile, if he is shown to bear a "hostile *animus* towards the party calling him and so does not give his evidence fairly and with a desire to tell the truth". 10(152) Where he is "not desirous of telling the truth to the court at the instance of the party calling him". 11(153) A witness who refuses to testify may be treated as hostile. 12(154) The discretion of the judge to grant or refuse leave to cross-examine is absolute. 13(155)

Similar statutory provisions in South Africa imported the English law into that jurisdiction. The South African precedents are accordingly persuasive. These show that the mere fact that a witness gives evidence which is unexpected by the party calling him does not render him hostile. 14(156) Neither is his having made a previous inconsistent statement conclusive of the point, though it may be a factor to be taken into account; the crucial thing is the witness's "houding in die getuiebank" - his demeanour in the witness box:15(157)

"The court must come to a decision as to whether the witness is adverse, ie hostile, from his demeanour in the box, his position towards or relationship to the party calling him, and from the general circumstances of the case." 16(158)

On the meaning of the expressions "adverse" and "hostile", the following is said:

"Die neutrale begrip van ongunstige getuienis of nadelige getuienis vorm nie deel van die vyandiggesindheid van 'n getuie nie." 17(159)

And also:

"Ek het dus tot die gevolgtrekking gekom dat vyandiggesindheid 'n bedoeling van die kant van die getuie moet inhou teenoor die persoon wat hom roep, dit wil s 'n bedoeling om sy saak te benadeel." 18(160)

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The undesirability of permitting a party to cross-examine its own witness is explained as follows:

"It appears to me that the first principle as to why a party is not entitled to cross-examine his own witness as being adverse, is that if this were allowed a party may find that the witness is not giving evidence in accordance with his anticipation and then in order to bring the witness back to what he conceives to be the true statement or the statement he happens to have before him, he may put leading questions and so get the witness to give evidence in accordance with counsel's brief. That the court cannot allow. On the other hand, you may have a case where the witness in the box is giving the true statement but the counsel examining him is disappointed at the trend of

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his evidence and wishes to bring him away from the true story which he is actually telling, in order either by brow-beating or confusing him to throw a doubt on his evidence. If, therefore, counsel were allowed to cross-examine his own witness, the court might be led to doubt evidence which is really true." 19(161)

Whether or not a witness is declared hostile, and hence subjected to cross-examination, is entirely within the discretion of the judge. 20(162)

In this jurisdiction, the English and South African authorities have been followed. It has been recognised that they are to the same effect and that a witness must be shown to be adverse, in the sense of hostile, as explained above, before being exposed to impeachment. 21(163) The giving of a prior inconsistent statement does not of itself disclose hostility. 22(164)

It may therefore be said that a witness may not be cross-examined unless he has been declared hostile. The witness who gives unfavourable evidence to the party calling him; who shows, for instance, a truculent demeanour; even he who deviates from a prior statement, is not necessarily hostile. Hostility is demonstrated by a witness who shows his unwillingness to speak the truth at the behest of the party calling him and an intention to damage the case of that party. Such a witness may, at the discretion of the presiding officer, be declared hostile and only then be impeached, in the sense of be exposed to cross-examination by the party calling him.

Previously, impeachment included not only cross-examination but also being confronted with a prior inconsistent statement. The present wording of the proviso to s 316 of the local enactment, 23(165) however, permits such a confrontation without the need to have the witness declared hostile.

The procedure for confronting a witness with his previous inconsistent statement is outlined in the statute. The judicial officer must be informed of the departure and he must ask the witness whether he made a previous inconsistent statement. There must then be "mentioned" to the witness

sufficient particulars to designate the occasion when the statement is alleged to have been made. Thereafter the party calling the witness may proceed to prove the making of the previous inconsistent statement. The practical and proper manner of questioning the witness so as to accomplish this is described by Reid-Rowland. 24(166) Should the witness admit making the statement, then it will have been sufficiently proven. Should he deny it, then evidence of the party recording, and, if necessary, interpreting, the statement must be called. 25(167) Upon proof of the inconsistent statement, the witness must be asked which of the two versions is true. 26(168) He must also be given an opportunity to explain the making of that statement, 27(169) since uponthat explanation may depend not only a potential finding of hostility but also whether any weight should be attached to his evidence. If duress is alleged by the witness in the making of the statement, then that allegation must be duly considered in order to determine whether it might reasonably possibly be true.28(170)

The purpose of proving a prior inconsistent statement is to neutralize the effect of the unexpectedly adverse testimony. 29(171) The statement does not itself become evidence. The

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contents of the statement cannot be relied upon as evidence. If the witness who has already departed from the statement nevertheless on confrontation admits the truth of the statement and adheres to it, in the sense of repeating it in evidence, then the court may act on that oral evidence, although not on the previous statement. 30(172) The weight of any such evidence will of course usually be substantially affected by the equivocation of the witness. Conversely, the fact that a witness has had his credibility impeached by production of a previous inconsistent statement does not mean that his evidence, adverse to the party calling him, must necessarily be rejected. It remains evidence given in court and must be properly examined and a judicial determination reached as to whether or not to accept it.31(173) In particular, the explanation for the giving of the prior statement may be such that the credibility of the evidence actually given in court cannot be discounted. 32(174)

Similarly, where the court goes further and declares the witness hostile. The adverse evidence is effectively neutralized as evidence led by the party

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against itself. It is not, however, ipso facto to be disregarded. The evidence given by that witness, both under cross-examination by the party calling him and otherwise, may be considered and accepted or rejected in whole or in part depending upon the weight to be attached to it.33(175)

In casu, the magistrate committed the following irregularities and misdirections. She completely misunderstood the nature of the inquiry into the alleged making of the statement by cousin Tongai. This is demonstrated by the following statement in the judgment:

> "The court had to determine the admissibility of the statement the witness alleged was not freely and voluntarily extracted from him. The court ruled in favour of the state and the statement was held to be admissible at the end of the mini trial and it was produced and accepted as exhibit 1."

The issue did not involve a "mini-trial", nor a "trial within a trial" as it was elsewhere described. The point for determination was not whether the prior inconsistent statement was admissible. By misunderstanding the issue as she did, the magistrate simply admitted the statement in evidence.

Her second error was the very act of admitting the statement as evidence. Despite the prosecutor's efforts, Tongai persisted in his repudiation of the statement and gave no evidence whatsoever material to the charge. The authorities show that even if the statement were shown to have been made, and even if the explanation for its being made were unsatisfactory, nevertheless the previous unsworn, and untested, statement can never be evidence in the cause. It was a serious misdirection in principle to act on the supposed truth of that statement.

I must say in passing that the error is compounded by the fact that the statement to the police is completely unreliable. It purports to recount a nocturnal visit by the cousin Tongai, with his uncle Richard and father Laiton, to the complainant's house, and the theft by them of "the iron sheets". There is every reason to suspect that this may not be a genuine statement. The evidence discloses the theft of an enormous quantity of property. The statement is inconsistent

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with that and addresses only the property recovered. It recounts no novel verifiable fact. It has the stamp of a statement made up by a person who knows only those few facts already discovered by police at the time of its making. A further suspicious aspect of the statement is that it incriminates Tongai's father, Laiton, where even Emson has retracted that part of his apparent extra-curial admissions.

Had the magistrate not so misdirected her approach to the issue, she would have realized that even if Tongai had given false testimony, the fact remains that he gave no evidence against his father and uncles. The only other

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evidence against Richard was that given by his co-accused, Emson. The magistrate has not addressed herself to whether that evidence is acceptable or sufficient in the absence of Tongai's evidence. Clearly, it is not. There is a very real need for corroboration. No corroboration exists. There is no other evidence against Laiton since Emson retracted his extra-curial incrimination of Laiton (which in any event would not have been admissible against Laiton). The magistrate has not even adverted to the fact of this retraction, far less considered whether Emson gave acceptable evidence against Laiton.

It follows that the convictions of the first and second accused are entirely unsound and must be quashed. The sentences must be set aside.

The third accused has been convicted of the offence of receiving stolen property knowing it to have been stolen (although this is not properly reflected on the review case cover). That conviction is entirely in accordance with his own testimony. The sentence imposed of 7 months' imprisonment of which 3 months are suspended on conditions of good behaviour is not inappropriate for the offence of which he has been convicted. That verdict and sentence, then, I would confirm. He has in any event already served that portion of the effective sentence that would remain after the automatic remission for good behaviour.

I therefore order as follows:

> "The convictions of the first and second accused, Richard Mazhambe and Laiton Chitambo are quashed and the sentences imposed upon them are set aside. The proceedings in respect of the third accused, Emson Chabikwa are confirmed."

Bartlett J agrees.

INNISFAIL (PVT) LTD v POLLITT & ANOR 1997 (2) ZLR 596 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

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20 October & 19 December 1997 Judgment No. S-227-97

Flynote

Real rights - movables - accession to immovable property - inaedificatio - what constitutes - intention of annexor - how to be ascertained

Headnote

Between the years 1917 and 1919 a water wheel was installed on a farm in the Mazowe district, as part of an irrigation system. The wheel drove two pumps through a system of flywheels and pulleys. The pumps pumped water from settling tanks to the dwelling house and into the lands that were to be irrigated. The wheel was manufactured in Scotland and transported here. It was mounted on two specially designed concrete columns. Several years later the wheel was dismounted and returned to Scotland for refurbishment, then brought back to this country and reinstalled. The question arose whether the wheel had become an immovable and therefore part of the farm when it was sold, the wheel not having been specified in any way in the sale agreement. The person who originally installed the wheel was no longer available to testify as to his intentions when he installed it.

Held, that in considering whether an originally movable article has become immovable, the court must consider the nature of the article, the degree and manner of its annexation and the intention of the person annexing it. Where the article cannot be removed without causing substantial damage, it would be inferred that it was attached with the intention of permanency.

Held, further, that the wheel formed an integral part of the irrigation system. Without it, the other components were rendered non-functional. On its own, it served no useful purpose. It could, however, be removed without damage. The physical features thus were not conclusive of the inquiry. The annexor's intention was the most decisive element.

Held, further, that where the annexor was no longer available to testify, it was certainly permissible, and often necessary, to determine his original intention by inference from all the circumstances. The fact that the wheel was not removed when he sold the farm tended to show strongly that it was intended to remain in situ permanently. A functioning irrigation system would be an asset and an attraction to a future buyer. The wheel was an integral part of something much larger and plainly permanent.

Held, therefore, that the wheel was installed for a permanent purpose.

Cases cited:

Clark v Uhlmann 1943 CPD 124

Follwell v Hopkins & Nuttall Smith (Pvt) Ltd HH-123-91

Gault v Behrman 1936 TPD 37

Lewis v Ziervogel 1924 CPD 310

Macdonald Ltd v Radin NO & Anor 1915 AD 454

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GILLESPIE J

Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl) 1980 (2) SA 214 (W)

Newcastle Collieries Co Ltd v Borough of Newcastle 1916 AD 561

Salisbury Municipality v NestlŽ's Products (Rhodesia) Ltd 1962 R & N 665; 1963 (1) SA 339 (SR)

Sumatie (Edms) Bpk v Venter en 'n Ander NNO 1990 (1) SA 173 (T)

Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council 1961 (2) SA 669 (A)

Theatre Invstms (Pty) Ltd & Anor v Butcher Bros Ltd 1978 (3) SA 682 (A)

Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO 1978 (4) SA 281 (A)

Wightman & Co (Pvt) Ltd v Hadzis & Anor 1975 (1) RLR 85 (G)

Case Information

E W W Morris, for the appellant

A P de Bourbon SC, for the respondents

Judgment

Gubbay CJ: The short and undisputed facts of this appeal conceal a single issue of some difficulty. It concerns whether a waterwheel, installed many decades ago on the farm "Springvale" situate in the district of Mazowe, has become, by process of annexation, part of the realty, and so is the property of the current landowner.

The waterwheel was manufactured in Scotland. It was purchased by the then owner of Springvale and transported to this country. It was installed between the years 1917 and 1919 over a perennial stream of the Tatagura River which flowed through the farm. Two very large concrete columns were constructed to hold the waterwheel, which is fourteen feet in diameter and weighs in excess of one tonne. These columns had to be designed by an engineer to exact specifications in order to allow the waterwheel to turn freely. Attached to the waterwheel was a fixed axle which, in unison with it, rotated on bearings embedded into the concrete columns; additional bearings being bolted on top. Flywheels and pulleys designed to drive two motors were affixed to the waterwheel. A series of sediment settling water tanks were constructed together with piping that led up the hill to a dwelling and into the lands for irrigation. The function of the waterwheel was to drive the two motors which would pump water from the settling tanks t the dwelling and the lands.

In about 1930, the waterwheel was dismantled, conveyed by ox-wagon to the port of Beira, and from there shipped to Scotland for refurbishment. The round journey took between six and nine months. On its return, the waterwheel had to be positioned once again by an engineer.

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On 7 November 1952, ownership of Springvale was transferred to Makalanga Estate (Pvt) Ltd, with the entire shareholding being held by the respondents, who are brothers. In 1989, the first respondent decided to retire and settle in France (his brother had left the country many years before). So on 14 November 1989, Makalanga Estate (Pvt) Ltd entered into a lease, with

GILLESPIE J

the grant of an option to purchase Springvale, with Arthur Louis de Chazal. This agreement was overtaken by another in terms whereof the respondents sold the entire issued shareholding in Makalanga Estate (Pvt) Ltd to de Chazal Farm (Pvt) Ltd. As at the effective date of the new agreement, which was 1 October 1991, the only asset owned by Makalanga Estate (Pvt) Ltd was Springvale, together with the buildings and improvements thereon. All movables it previously owned had been purchased by the respondents. The waterwheel was regarded by both parties as part of the movables sold to the respondents. In fact, during the period of the lease, the waterweel had been gifted to Colin Nethersole, the son-in-law of the first respondent, who left it on Springvale. At a later time, de Chazal even offered to remove the waterwheel for Nethersole. But as the latter believed that the operation required professional skill, the waterwheel remained in situ. It was at this stage non-functional for the Tatagura River had dried up.

On 11 September 1992, a tripartite agreement was entered into between Makalanga Estate (Pvt) Ltd, de Chazal Farm (Pvt) Ltd and the appellant company represented by Peter Macdonald. Pursuant to this agreement the appellant purchased Springvale with all permanent improvements situate thereon (of which the waterwheel was not specified) for $980 000. And de Chazal Farm (Pvt) Ltd sold certain listed items of movable property to the appellant for $1 470 000. The waterwheel, which still remained on Springvale, was not included. Its future was not even mentioned to Macdonald.

This scenario gave rise to an action brought by the respondents in the High Court for delivery of the waterwheel from the appellant. The learned judge who presided at the trial held that the waterwheel was not affixed to the land in such a manner as to become an immovable and, accordingly, gave judgment for the respondents with costs.

It was not in contention before this court that the elements to consider in determining whether an article, originally movable, has become immovable through annexation by human agency to realty - a process known as inaedificatio - are:

> " ... the nature of the particular article, the degree and manner of its annexation, and the intention of the person annexing it. The thing must be in its nature capable of acceding to realty, there must be some effective attachment (whether by mere weight or by physical connection) and there must be an intention that it should remain permanently attached":

per Innes CJ in Macdonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd 1915 AD 454 at 466. See also the dicta of the same learned Chief Justice in both Newcastle Colleries Co Ltd v Borough of Newcastle 1916 AD 561 at 564 and R v Mabula 1927 AD 159 at 161. The test, as formulated, has been adopted in this jurisdiction. See Salisbury Municipality v

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NestlŽ's Products (Rhodesia) Ltd 1962 R&N 665 (SR) at 666G-667G;

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1963 (1) SA 339 (SR) at 340F-341D; Wightman & Co (Pvt) Ltd v Hadzis & Anor 1975 (1) RLR 85 (G) at 87E-G; Follwell v Hopkins & Nuttall Smith (Pvt) Ltd HH-123-91 (not reported, at pp 7-8 of the cyclostyled judgment).

Of the three elements, that of intention is the most important. Yet, in each the object of the enquiry is to ascertain whether the movable has been attached to the land or other immovable with the intention that it should remain permanently attached thereto. If, as explained by van Winsen AJA (as he then was) in Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council 1961 (2) SA 669 (A) at 678A-C:

> " ... the nature of the movable is such that it is readily capable of acceding to the land or other immovable and is so securely attached thereto that separation must of necessity involve substantial injury, either to the movable or to the land or immovable to which it is attached, then it must be inferred that the movable was attached with the intention of permanency and for that reason it must be held to have become and be immovable. If, however, an examination of the physical features produces an equivocal result in the sense that from an examination of such features no inferences can be drawn that the attachment was made with an intention of permanency or otherwise, the intention of the annexor may be decisive."

I proceed then to an examination of the physical features:

By its nature, the waterwheel formed an integral part of the irrigation system, for it was required to drive the motors that pumped water for the purpose of irrigating the lands. Without it the immovable components of this somewhat primitive system were rendered non-functional. On its own the waterwheel served no useful purpose either. See Lewis v Ziervogel 1924 CPD 310 at 314; Gault v Behrman 1936 TPD 37 at 43; Clark v Uhlmann 1943 CPD 124 at 128; Salisbury Municipality v NestlŽ's Products (Rhodesia) Ltd *supra* at 668B-C (R&N); 341H-342A (SA).

As regards the degree and manner of annexation, it is apparent that the intrinsic identity of the waterwheel is preserved. Although of substantial weight and size its detachment may be effected without causing any damage to itself or any of the remaining components of the irrigation system. See Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO 1978 (4) SA 281 (A) at 295D. Indeed, as stated earlier, it was removed, refurbished and replaced.

It does not seem to me that an examination of these two physical features alone is conclusive of the enquiry as to the permanency of the waterwheel. Consequently, the intention of the annexor is the most decisive element to be considered.

The learned judge in the court below declined to make a finding as to what the intention of the annexor was at the time the waterwheel was installed, since the latter was no longer available to testify. With due deference, I view that approach as erroneous. It is certainly permissible, and often necessary,

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to determine such original intention by inference from all the circumstances. That this is so emerges clearly from the following passage in the judgment of van Winsen AJA (as he then was) in Theatre Invstms (Pty) Ltd & Anor v Butcher Bros Ltd 1978 (3) SA 682 (A) at 688F-H:

> "Evidence as to the annexor's intention can be sought from numerous sources, inter alia, the annexor's own evidence as to his intention, the nature of the movable and of the immovable, the manner of annexation and the cause for and circumstances giving rise to such annexation. The ipse dixit of the annexor as to his intention is not to be treated as conclusive evidence thereof but, should such evidence have been given, it must be weighed together with the inferences derivable from the other sources of evidence above-mentioned in order to determine what, in the view of the court, was in fact the annexor's intention. In cases where no evidence is forthcoming from the annexor, a court will be constrained to determine the issue upon such inferences as may legitimately be drawn from the sources aforementioned. If a court, on a consideration of all the evidence, direct and inferential, were to conclude on a balance of probabilities that the annexor intended a permanent annexation it would hold that the movable had ecome part of the immovable. If on the other hand it were to conclude on a balance of probabilities that, in the light of such evidence, the annexor's intention was not to effect a permanent annexation or if it found itself unable to draw any inference one way or other as to the annexor's intention then it would conclude that the annexed movable had not lost its character as such."

See also Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Transvaal) 1980 (2) SA 214 (W) at 217A; Sumatie (Edms) Bpk v Venter en 'n Ander NNO 1990 (1) SA 173 (T) at 187D-188A.

The relevant objective facts to be looked to in this case are these. The waterwheel was purchased by the annexor specifically for the purpose of being installed into an irrigation system on Springvale. It was needed to irrigate the lands and provide water to the dwelling. That it was not removed when the annexor sold the farm strongly tends to show that it was intended to remain in situ, not merely temporarily, but permanently. The annexor may well have appreciated that if at some future date he decided to sell Springvale, a functioning irrigation system would enhance its value. It was a major attraction. Furthermore, the waterwheel is only of any use in the position in which it was installed. The fact that it is detachable without causing any damage may be accountable by the manner in which it was designed to operate in the system. It was an integral part of something much larger and plainly permanent.

Under all the circumstances, I am of the opinion that the appellant established on a balance of probabilities that the waterwheel was installed by the annexor for a permanent purpose; that its attachment to the immovable components of the irrigation system was made with the intention of permanency.

It follows that the appeal must be allowed. The costs are to be paid by the respondents jointly and severally, the one paying the other to be absolved.

1997 (2) ZLR p601

The applicable part of the order of the court *a quo* is altered to read:

> "The claim for delivery of the waterwheel is dismissed with costs to be paid by the plaintiffs jointly and severally, the one paying the other to be absolved."

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McNALLY JA: I agree.

KORSAH JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Coghlan, Welsh & Guest, respondents' legal practitioners

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Endnotes

1 (Popup - Popup)

The judgment, though dated 4 June 1997, was not published until August 1997 and so is included in Part 2 of the 1997 Reports. - *Editor.*

2 (Popup - Popup)

And still so provides: see Order 30 rule 2(1) of the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980). - *Editor.*

3 (Popup - Popup)

Glanville Williams *The Proof of Guilt* 3 ed pp 158-9. The mis-spelling is in the original. - *Editor.*

4 (Popup - Popup)

R v Rautenbach 1949 (1) SA 135 (A) at 143 *per* SCHREINER JA. - *Editor.*

5 (Popup - Popup)

The judge (MUBAKO J) did reconsider the matter and concluded that the conviction for housebreaking was nevertheless in order. - *Editor.*

6 (Popup - Popup)

Reported at 1996 (1) ZLR 71 (H). - *Editor.*

7 (Popup - Popup)

See also J Reid-Rowland *Criminal Procedure in Zimbabwe* 24-1.

8 (Popup - Popup)

Criminal Law of South Africa 6 ed p 399.

9 (Popup - Popup)

Op cit at p 28-6.

10 (Popup - Popup)

Subject of course, to any impled power that may e bestowed extending jurisdiction for any purpose; see *Mondewa Farm (Pvt) Ltd v BJB Kirstein (Pvt) Ltd* 1993 (2) ZLR 82 (S).

11 (Popup - Popup)

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1978 (1) SA 659 (O) at 660.

12 (Popup - Popup)

1959 (2) SA 220 (T).

13 (Popup - Popup)

1948 (1) SA 81 (N).

14 (Popup - Popup)

1957 (3) SA 12 (T).

15 (Popup - Popup)

1975 (2) RLR 75 (G); 1976 (1) SA 169 (R). See also *S v Chigumbu* 1979 RLR 527 (G).

16 (Popup - Popup)

BECK J (as he then was) in *Makoni* and GUBBAY J (as he then was) and NEWHAM J in *Chigumbu.*

17 (Popup - Popup)

1962 R&N 382 (SR) at 384B.

18 (Popup - Popup)

In Case No. H-1539-95.

19 (Popup - Popup)

In Case No. H-7244-95.

20 (Popup - Popup)

Bernmac Engineering (Pvt) Ltd v Angelique Entprs (Pvt) Ltd 1988 (2) ZLR 52 (H) at 55G and 58A.

21 (Popup - Popup)

Per INNES CJ *McCullogh v Fernwood Estate Ltd* 1920 AD 204 at 207.

22 (Popup - Popup)

Ibid, *per* DE VILLIERS AJA at 215.

23 (Popup - Popup)

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[*Chapter 24:03*].

24 (Popup - Popup)

Per TROLLIP JA in *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 397E.

25 (Popup - Popup)

Per LEWIS J in *Martian Entertainments (Pty) Ltd v Berger* 1949 (4) SA 583 (E) at 590A.

26 (Popup - Popup)

Per CLAYJDEN J (as he then was) in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

27 (Popup - Popup)

BY OGILVIE THOMPSON (as he then was) in *Gool v Minister of Justice & Anor* 1955 (2) SA 682 (C) 688E.

28 (Popup - Popup)

See, for instance, *Agricultural Finance Corp v Pocock* 1986 (2) ZLR 229 (S) 232F.

29 (Popup - Popup)

Christie *The Law of Contract in South Africa* 3 ed at 300.

30 (Popup - Popup)

Gardner v Richardt 1974 (3) SA 768 (C) at 772F.

31 (Popup - Popup)

Ibid 773 *in fine.*

32 (Popup - Popup)

See also *Brown's Executrix* v *McAdams* 1914 AD 231 at pp 235-6.

33 (Popup - Popup)

Blower v *van Noorden* 1090 TS 890.

34 (Popup - Popup)

Peak Lode Mining Co Ltd v Union Government 1932 TPD 48 at 51, distinguishing *Kelner* v *Baxter* LR 2 CP 174.

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35 (Popup - Popup)

Per LEON J in *Nordis Construction Co (Pty) Ltd* v *Theron, Burke & Isaac* 1972 (2) SA 535 (D) at pp 544-5.

36 (Popup - Popup)

Per BEADLE CJ in *Francis* v *Roberts* 1972 (2) RLR 238 (A) at 248F.

37 (Popup - Popup)

Beecham Group Ltd v *B-M Group (Pty) Ltd* 1977 (1) SA 50 (T) at 57 *in fine.*

38 (Popup - Popup)

Mr *Nherere* in reply gamely countered that the law to be applied in this court is not thelaw of the jungle where the lion always wins. He was, however, at a loss for an answer to my enquiry as to whether he considered that in my court it is always the jackal which wins.

39 (Popup - Popup)

As in *Crundell Bros (Pvt) Ltd v Lazarus NO* 1991 (2) ZLR 125 (S) at pp 131-5.

40 (Popup - Popup)

Where the court does not wish the accused to perform labour, it may specify that the sentence is to be withour labour. See s 76 of the Prison Act [*Chapter 7:11*]. - *Editor.*

41 (Popup - Popup)

See p 77 of this volume - *Editor.*

42 (Popup - Popup)

See 1996 (1) ZLR 123 - *Editor.*

43 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 351 (2).

44 (Popup - Popup)

Per CENTLIVRES CJ, *R v K* 1956 (3) SA 353 (A) at 356.

45 (Popup - Popup)

R v T 1962 R & N 168 (SR) at 169I.

46 (Popup - Popup)

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Per BEADLE J (as he then was) in *R v Mahwahwa & Anor* 1955 SR 296 at 298.

47 (Popup - Popup)

Cf Reid-Rowland *Criminal Procedure in Zimbabwe* 13-2 to 13-3.

48 (Popup - Popup)

1967 RLR 113 (G), *per* DAVIES J (as he then was).

49 (Popup - Popup)

I am actually reproducing a minute which I, as state counsel, caused to be placed before HORN AJ in response to a query addressed in connection with a similar matter on automatic review before the learned acting judge in December 1980 and which reflects the practice then and now. The submission was acted upon and the conviction of a juvenile confirmed, despite the absence of a prior written authority to prosecute.

50 (Popup - Popup)

Cf the remarks of BARTLETT J in *S v M* 1994 (2) ZLR 13 (H) at 14F where, relying on *Eva supra*, the learned judge characterised the omission as a serious irregularity.

51 (Popup - Popup)

As is correctly observed by Reid-Rowland *op cit* at 13-7.

52 (Popup - Popup)

In *S v F* (a juvenile) 1988 (1) ZLR 327 (H) at 330D.

53 (Popup - Popup)

Constitution of Zimbabwe s 18 (2)

54 (Popup - Popup)

Ibid s 18 (3) (c).

55 (Popup - Popup)

By s 351(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

56 (Popup - Popup)

S v Wakiri 1981 ZLR 51 (A) at 53A-B; also *S v Gorogodo* 1988 (2) ZLR 378 (S) at 381E.

57 (Popup - Popup)

[*Chapter 5:06*].

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58 (Popup - Popup)

Ibid s 17.

59 (Popup - Popup)

See p 186 of this volume - *Editor.*

60 (Popup - Popup)

I trust it could not be said, as story tells of CURLEWIS J, that I was opposing all the unopposed applications - see Ellison Kahn *Law, Life aand Laughter* p34, *sub voce* John Stephen Curlewis.

61 (Popup - Popup)

Of the High Court Rules 1971.

62 (Popup - Popup)

See Herbstein & Van Winsen *Civil Practice in the Supreme Court of South Africa* 4 ed by van Winsen Cilliers Loots & Dendy at pp 425-6; also *Hunt v Engers* 1921 CPD 754.

63 (Popup - Popup)

Bernstein v Bernstein 1948 (2) SA 205 (W) at 207.

64 (Popup - Popup)

Beaton v Venter 1949 (1) SA 1051 (O) at 1054. See also *Molala v Minister of Law and Order & Anor* 1993 (1) SA 673 (W) and the trenchant and pertinent remarks of FLEMMING DJP at 676-679 concerning delay generally.

65 (Popup - Popup)

High Court Rules 1971, r 11 (c)

66 (Popup - Popup)

Who was not Mr *Gijima.*

67 (Popup - Popup)

What is required is exemplified in *Minister of Defence \& Anor v Jackson* 1990 (2) ZLR 1 (S)

68 (Popup - Popup)

Molala supra (n 5) at 678H-679D.

69 (Popup - Popup)

Per DIEMONT JA in *Esso Standard S A (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 968 (*in*

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fine)-969.

70 (Popup - Popup)

Per GREENBERG JA in *Arendse v Maher* 1936 TPD 162 at 165.

71 (Popup - Popup)

Cf n 8 *supra*.

72 (Popup - Popup)

Per STRATFORD J in *Herman v Shapiro & Co* 1926 TPD 367 AT 379.

73 (Popup - Popup)

See the decision of BARTLETT J in *Ebrahim v Pittmann NO* 1995 (1) ZLR 176 (H) at 187 *et seq* and cases cited therein.

74 (Popup - Popup)

Of the High Court Rules 1971.

75 (Popup - Popup)

Cf *Jesse v Chioza* 1996 (1) ZLR 341 (S) at 344G-346F; also *Mwatsaka v ICL Zimbabwe Ltd* HH-126-97 at 26.

76 (Popup - Popup)

The High Court's decision is reported in 1997 (1) ZLR 357. - *Editor.*

77 (Popup - Popup)

See 1996 (2) ZLR 707 (11). -*Editor*.

78 (Popup - Popup)

See *African Distillers Ltd v Matabeleland Tractor Svcs \(Pvt\) Ltd* HH-120-96, *per* GARWE J. - *Editor.*

79 (Popup - Popup)

Section 8, Public Service (Disciplinary) Regulations, SI 65 of 1992.

80 (Popup - Popup)

Ibid s 8(1).

81 (Popup - Popup)

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Ibid s 8(3)(b).

82 (Popup - Popup)

Ibid s *10.*

83 (Popup - Popup)

Ibid s 10 proviso.

84 (Popup - Popup)

Ibid s 4.

85 (Popup - Popup)

Ibid s 7.

86 (Popup - Popup)

Ibid s 16.

87 (Popup - Popup)

Ibid s 17.

88 (Popup - Popup)

Constitution of Zimbabwe, s 18.

89 (Popup - Popup)

As specified in s 13.

90 (Popup - Popup)

Ibid s 14(1).

91 (Popup - Popup)

Ibid s 14(2).

92 (Popup - Popup)

1988 (2) ZLR 293 (S).

93 (Popup - Popup)

Minister of Home Affairs & Anor v Dabengwa 1983 (2) ZLR 346 (S) at 363B-G

94 (Popup - Popup)

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Analogous to the point in In re *Mlambo* 1991 (2) ZLR 339 (S).

95 (Popup - Popup)

Per MALABA J in *Tenesi v Public Service Commission* 1996 (1) ZLR 196 (11) at 203A-E, 205E.

96 (Popup - Popup)

Administrative Law 480-1.

97 (Popup - Popup)

Per EBRAHIM J (as he then was) *in Archipelago (Pvt) Ltd & Sarah's Invstms (Pvt) Ltd v LLB* 1986 (1) ZLR 146 (11) at 151.

98 (Popup - Popup)

Per MTAMBANENGWE J in *National Foods Lid v Kare & Ors* 1990 (1) ZLR 223 (H) at *232G-233A.*

99 (Popup - Popup)

Per GUBBAY JA (as he then was) in *Minister of Labour, Manpower Planning & Social Welfare & Ors v PEN Transport (Pvt) Lid* 1989 (1) ZLR 293 (S) at *297E-298A.*

100 (Popup - Popup)

[1984] 3 All ER 935 (HL) at 950h-951d.

101 (Popup - Popup)

Per DUMBUTSHENA CJ in *Patriotic Front-Zimbabwe African People\'s Union v Minister of Justice\, Legal \& Parliamentary Affairs* 1985 (1) ZLR 305 (S) at 325-6. See also *Rushwaya v Minister of Local Government and Town Planning \& Anor* 1987 (1) ZLR 15 (S) at pp 18-19.

102 (Popup - Popup)

Op cit, pp 496 *et seq.*

103 (Popup - Popup)

1993 (2) ZLR 146 (S).

104 (Popup - Popup)

Per MCNALLY JA at 153C & 155A.

105 (Popup - Popup)

1989 (3) ZLR 147 (S) at 158.

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106 (Popup - Popup)

Per GUBBAY JA (as he then was) at 158B-D).

107 (Popup - Popup)

1976 (2) SA 1 (A) at *20F-21C* (official translation - 269-270).

108 (Popup - Popup)

At *20F.*

109 (Popup - Popup)

Nn 17, 19, 20 & 21 *supra*.

110 (Popup - Popup)

Nn 25 & 27 *supra*.

111 (Popup - Popup)

A consistent approach is taken by our courts where the basis of a decision is attacked on the grounds of gross unreasonableness where it is alleged that a mistake in law has occurred. See *Bridges \& Hulme \(Pvt\) Ltd v Magistrate\, Bulawayo \& Anor* 1996 (1) ZLR 542 (11).

112 (Popup - Popup)

Cf n 7 *supra*.

113 (Popup - Popup)

Per SOLOMON JA (as he then was) in *D & DH Fraser Ltd v Waller* 1916 AD 494 at 505.

114 (Popup - Popup)

Per INNES CJ *D & DH Fraser (supra*) at 501.

115 (Popup - Popup)

Per DAVIES J (as he then was) in *UDC Rhodesia Ltd v Ushewokunze* 1972 (2) RLR 97 (G) at 100F.

116 (Popup - Popup)

1994 (2) ZLR 311 (H).

117 (Popup - Popup)

Ibid at 316B-D.

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118 (Popup - Popup)

Per INNES CJ in *D & DH Fraser supra* at 499.

119 (Popup - Popup)

Per SOLOMON JA *ibid* at 506.

120 (Popup - Popup)

Per GOLDIN J (as he then was) in *Dan Perkins & Co (Pty) Ltd v Mather* 1968 (1) RLR 60 (G) *in fine.*

121 (Popup - Popup)

See *South African Mutual Life Assurance Society v Uys* 1970 (4) SA 489 (O).

122 (Popup - Popup)

1974 (1) SA 143 (N).

123 (Popup - Popup)

Ibid at 152 F-H.

124 (Popup - Popup)

Ibid at 153C.

125 (Popup - Popup)

1978 (4) SA 883 (N) at 886F and 888F.

126 (Popup - Popup)

1995 (1) ZLR 56 (H).

127 (Popup - Popup)

Ibid at 61C-62B.

128 (Popup - Popup)

[*Chapter 8:04*].

129 (Popup - Popup)

By s 63(2)(i) of the Legal Practitioners Act [*Chapter 27:07*].

130 (Popup - Popup)

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Supra n 13 at 865H-886C.

131 (Popup - Popup)

At 886D-E.

132 (Popup - Popup)

Magistrate Court (Civil) Rules 1980 (SI 290 of 1980), 2 Sch, Table A Part I. NB: only Part I applies, since Part II covers contested matters which by definition do not attract collection commission.

133 (Popup - Popup)

High Court (Fees and Allowances) Rules 1994 (SI 164B of 1994).

134 (Popup - Popup)

It is not necessary to examine Supreme Court tariffs, because work in that court cannot include the collection of uncontested trade debts.

135 (Popup - Popup)

In *Blaikie-Johnstone supra* at 891 *in fine - 892A.*

136 (Popup - Popup)

In *Blaikie-Johnstone supra* 892G-893A.

137 (Popup - Popup)

Supra nn 4 & 5.

138 (Popup - Popup)

Supra nn 14 & 15.

139 (Popup - Popup)

HH-78-95.

140 (Popup - Popup)

At pp 6-7 of the cyclostyled judgment.

141 (Popup - Popup)

A C Cilliers *Law of Costs* 2 ed.

142 (Popup - Popup)

Santam Bank Bpk v Kellerman 1978 (1) SA 1159 (C); *Sapirstein & Ors v Anglo African Shipping*

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Co (SA) Ltd 1978 (4) SA 1 (A); *South African Permanent Building Society v Powell & Ors* 1986 (1) SA 722 (A).

143 (Popup - Popup)

See *S v Mutsinzuri* 1997 (1) ZLR 6 (H).

144 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*], s316.

145 (Popup - Popup)

Ibid s318.

146 (Popup - Popup)

Ditto; see also Hoffman & Zeffertt *South African Law of Evidence* 4 ed pp 10-11, an *Tomes v Sithole* 1981 ZLR 494 (H) 497E.

147 (Popup - Popup)

Surmon v Surmon 1926 AD 47, also Hoffman & Zeffertt *op cit,* 10.

148 (Popup - Popup)

Criminal Procedure Act, 1865, known as *Denman's Act,* applicable to all courts of criminal justice.

149 (Popup - Popup)

Ibid s 3.

150 (Popup - Popup)

Greenough v Eccles (1859) 5 CB (n.s) 786.

151 (Popup - Popup)

Price v Manning (1889) 42 ChD 372 (CA).

152 (Popup - Popup)

Archbold *Criminal Pleadings, Evidence and Practice* 43 ed pp 4-305.

153 (Popup - Popup)

Stephen *Digest of the Law of Evidence* 12 ed art 147.

154 (Popup - Popup)

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R v Thompson (1976) 64 Cr App R 96 (CA).

155 (Popup - Popup)

Price v Manning supra R v Thompson *supra*.

156 (Popup - Popup)

Farmer & Farmer's Trustee v McMillan 1905 TH 134; see also Hoffman & Zeffertt *op cit,* 454-5.

157 (Popup - Popup)

S v Steyn en andere 1987 (1) SA 353 (W).

158 (Popup - Popup)

Per DE VILLIERS JP in *Meyer's Trustee v Malan* 1911 TPD 559 at 561.

159 (Popup - Popup)

Per LE ROUX J, *ibid* 355F - trans: "The neutral concept of adverse or damaging evidence does not form part of the hostile intent of the witness".

160 (Popup - Popup)

Ibid 355 *in fine* - trans: "I have therefore come to the conclusion that hostility must entail as *animus* on the part of the witness contrary to the party which calls him, ie an intention to damage his case."

161 (Popup - Popup)

Per WESSELS J (as he then was) in *R v Wellers* 1918 TPD 234 at 237.

162 (Popup - Popup)

Steenkamp v Street 1923 TPD 208.

163 (Popup - Popup)

R v Joowalay 1947 SR 27.

164 (Popup - Popup)

S v Chari 1989 (1) ZLR 231 (S) at 233C-F.

165 (Popup - Popup)

*Cf*n 1 *supra*.

166 (Popup - Popup)

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Criminal Procedure in Zimbabwe at p 18-30.

167 (Popup - Popup)

S v Chigadzi 1973 (2) RLR 273 (A) at 277A-D.

168 (Popup - Popup)

S v Muhlaba & Ors 1973 (1) RLR 178 (G); *S v Chari supra*.

169 (Popup - Popup)

S v Chari supra.

170 (Popup - Popup)

S v Makandigona 1981 ZLR 408 (A) at 411B.

171 (Popup - Popup)

R v Tweitson 1964 RLR 147 (H) at 148G.

172 (Popup - Popup)

Ibid at 149D; see also *R v Golder* [1960] 3 All ER 457; (1960) 45 Cr App R 5 at 11 and Archbold *op cit* 4-306.

173 (Popup - Popup)

S v Millar 1971 (1) RLR 159 (A) at 160E-H.

174 (Popup - Popup)

As, for instance, where the prior statement is obtained through duress.

175 (Popup - Popup)

R v Pestano & Ors [1981] Crim LR 397 (CA).

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