## MWATSAKA v ICL ZIMBABWE 1998 (1) ZLR 1 (HC)

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

Devittie J

Chamber application

6 August 1997 1(1) Judgment No. HH-126-97

### Flynote

Appeal - interlocutory order - what constitutes - difference between interlocutory order that requires leave to appeal and interlocutory order that is not appealable even with leave

### Headnote

In a civil case, the court took the view that there were material disputes of fact which could best be resolved by hearing oral evidence and it made an order referring the factual disputes to trial. The applicant, who represented himself, appealed against this order. The respondent argued that as the order being appealed against was effectively an interlocutory order the applicant was not entitled to appeal without first obtaining the leave of the High Court to do so.

*Held*, that the practice of the courts was to afford the self-actor in litigation a degree of tolerance and, within permissible limits, to eschew too rigid an adherence to procedural requirements in respect of such self-actor.

*Held*, that a distinction is drawn between interlocutory orders having final effect (which orders are appealable) and those which do not have final effect, in the sense that they do not irreparably preclude some of the relief which might be granted in the main action. The latter are referred to as simple or purely interlocutory orders. Simple interlocutory orders are further sub-divided into those that are appealable before the completion of the trial with leave of the court and orders that are mere procedural rulings which are not appealable before the completion of the trial, even with leave of the court. The main reasons for disallowing appeals in respect of procedural rulings are that, if they were to be appealable, this would lead to a multitude of expensive and inconvenient subsidiary appeals and no hardship is caused to the aggrieved party by disallowing an appeal, because he can raise the issue of the erroneous ruling on appeal after completion of trial.

*Held*, further, that precluding an appeal in respect of a simple interlocutory order that was a procedural ruling could lead to injustice, as in some cases to allow such an appeal might result in a more expeditious and less expensive determination of the dispute between the parties. A better approach would be to allow the court to decide whether or not the balance of convenience and expense lies in favour of or against the granting of leave to appeal; the fact

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that the order can be classified as a ruling should be merely one factor to be taken into account in deciding this issue.

*Held*, further, that the order in question was an interlocutory order as it did not have final effect. It was a procedural ruling that was not appealable even with leave.



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Cases cited:

*Bell* v *Bell* 1908 TS 887

*Boya* v *Shweni* 1995 (1) SA 147 (Tk)

*Dickinson & Anor* v *Fisher's Exors* 1914 AD 424

*Globe & Phoenix GM Co Ltd* v *Rhodesia Corp* 1932 AD 146

*Heyman* v *Yorkshire Ins Co Ltd* 1964 (1) SA 487 (A)

*Jesse* v *Chioza* 1996 (1) ZLR 341 (S)

*Pretoria Garrison Institutes* v *Danish Variety Products* 1948 (1) SA 639 (A)

*Priday t/a Pridi Paving* v *Rubin* 1992 (3) SA 542 (C)

*SA Motor Industry Employees Assn* v *SA Bank of Athens* 1980 (3) SA 91 (A)

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

*Umfolozi Co-op Sugar Planters Ltd* v *SA Sugar Assn* 1938 AD 87

*Union Govt (Min of the Interior) & Anor* v *Naidoo* 1916 AD 50

*van Streepen & Germs (Pty) Ltd* v *Tvl Provincial Administration* 1987 (4) SA 569 (A)

*Zweni* v *Min of Law & Order* 1993 (1) SA 523 (A)

## Case Information

Applicant in person

## Judgment

**DEVITTIE J:** Our legal system does not provide comprehensive legal aid to the litigant without sufficient or with moderate means. It comes as no surprise therefore that the self-actor is becoming a frequent presence in the courts. He has to grapple with the intricacies of the law in which he has little or no learning. He relies in the main on his perception of justice. At times he bombards the courts with a multitude of actions which border on a deliberate abuse of the court process. Happily, such instances are not common. The practice of our courts has always been to afford the self-actor a degree of tolerance and, within permissible limits, to eschew too rigid

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an adherence to procedural requirements. I have borne these considerations in mind in ruling on this application.

The applicant is a self-actor. He complains that the order I made on 16 October 1996, referring certain factual disputes to trial, has caused him ``grave injustice''.

I make no suggestion the applicant is not motivated by a desire to redress what he genuinely perceives to be an injustice. As the factual background to the present application demonstrates, he has been relentless in the pursuit of his claim.

Up until March 1991, the applicant was in the respondent's employ. His job title, if not the functions he performed, was that of a systems analyst. He was dismissed from employment and took the matter on appeal to the Supreme Court. He appeared in person and succeeded. The Supreme Court ordered his reinstatement with effect from the date of his suspension, without any loss of benefits. A dispute then arose as to whether his benefits should be calculated on the scale applicable to a systems analyst or on that applicable to a computer programmer. The applicant brought an application seeking an order that his



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benefits be calculated on the scale applicable to a computer programmer, on the basis that, although his job description was that of a systems analyst, he performed the functions of a computer programmer in terms of the relevant statutory instrument and ought to be paid at that scale. The respondent disputed that the applicant had performed the duties of a programmer. The matter came before me and on 16 October 1996, I made an order referring certain factual disputes to trial and reserved the question of costs. The view I took was that there was a material dispute of fact which could best be resolved by hearing oral evidence. That view I still hold. The applicant appealed against the order.

In response to the notice of appeal, the respondent's legal practitioners wrote to the Registrar of the Supreme Court in the following terms:

> ``We are of the view that the appellant has sought to appeal against what was effectively an interlocutory order of the High Court and accordingly, that he is not entitled to do so without seeking leave of the High Court ...''

The applicant was undeterred. He persisted in prosecuting his appeal.

When the matter came before the Supreme Court on 16 May 1997 the appeal was struck off the roll without argument being heard and the applicant ordered to pay the wasted costs. On 20 May 1997, the applicant brought this chamber application for leave to appeal. In his founding affidavit the applicant, who has been a self-actor throughout these proceedings, makes the following averments:

> ``I appealed against the judgment of this court. I did not believe leave was necessary. The appeal was struck off the roll for want of leave to appeal. I attach the Supreme Court order. I am therefore applying for leave to appeal to the Supreme Court. If I cannot obtain leave to appeal from the High Court, I will seek same from the [*sic*] judge of the Supreme Court.
>
> This is a matter in which a grave injustice was done on me. I presented an application the High Court with all the

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necessary supporting information. The judge referred the matter to trial. There is absolutely nothing that a trial will assist except prolonging my suffering through the unjust and unlawful actions of the respondent.

I made an application to the High Court for the enforcement of the Supreme Court order and not a retrial. If the judge was of the view that the evidence before him was insufficient to made a decision he should have called for more documentary evidence."

The respondent's legal practitioners were requested, through the registrar of this court, to respond to the application for leave to appeal. They declined to do so. They took the view that, as the application was devoid of merit, they did not wish to incur unnecessary costs.

I must confess that upon receipt of this application, my inclination was not to give detailed reasons for dismissing it. The reason is that the appeal had been struck off the roll, not on the grounds that leave to appeal was required, but on the basis that the referral to trial was not an ``order'' but a mere ruling and as such not appealable even with leave. See *Jesse* v *Chioza* 1996 (1) ZLR 341 (S),



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where it was held that a ``ruling'' is not appealable even with leave. Accordingly, I considered that I had no jurisdiction to hear the matter. I decided upon this judgment, having come to the conclusion that, although the matter was struck off the roll on the grounds that my order was a ruling and as such not appealable even with leave, the interesting question raised in the application merited detailed consideration. The question concerns the utility of the distinction between ``rulings'' and ``simple interlocutory orders'' in determining an application for leave to appeal.

Before considering this question I propose to make some observations on the rationale behind the restriction of the right of appeal.

I have little doubt that the applicant's sentiment that there has been a ``grave injustice'' stems in part from the requirement to apply for leave against an order which he perceives to be patently wrong. That the requirement for leave may be perceived as an injustice in some cases was recognised by SCHREINER JA in *Pretoria Garrison Institutes* v *Danish Variety Products* 1948 (1) SA 839 (A) at 867 where the learned JUDGE OF APPEAL discussed the rationale of the rule requiring leave in appeals against interlocutory judgments. He said:

``Where a hierarchy of courts exists it is perhaps natural to regard what we are accustomed to call the right of appeal from any order whatsoever made by a lower court as, to some extent, a refusal of justice. Under an ideal system, it might be expected that whatever error an inferior court has committed will be promptly corrected by a higher court, and so on, until the highest tribunal in the pyramid has pronounced on the matter. But history shows that it has generally been thought advisable to limit appeals in certain respects.

A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. For, apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics. This latter consideration has, I imagine, been the predominant one in leading legislators to try to restrain the bringing of appeals from orders of a preparatory or procedural character arising in the course of a legal battle. The chief object has naturally been to bring about a just and expeditious decision of a major substantive dispute between the parties. Experience from the earliest times has shown the need for rules of procedure to prepare the way for the ultimate decision and it has been

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found necessary for judicial officers during the period of preparation to make orders of various kinds that will enable the parties to benefit from the existence of these rules. But desirable as it would be to ensure that all such orders are properly made, it has been widely felt, in different ages and countries, that a line between appealable and non-appealable orders of this preparatory or procedural character ought to be drawn somewhere, for if they were all appealable, the delay and expense might be excessive, while if they were none of them appealable the injustice resulting from wrong orders might be intolerable.''

The practical reasons which gave rise to the rule are grounded in the need to ensure the efficient administration of justice. Considerations of equity and justice are not necessarily a factor in determining appealability. As the learned JUDGE OF APPEAL observed at p 869:



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``If, as appears to be the case, there is no single principle which has in the past been uniformly applied in deciding which of these procedural orders are to be appealable and the most that you can find are enumerations of the factors that have led different commentators to support different tests, the further question may be asked whether there is any test that is specially indicated by considerations of justice. I do not think that there is. There is, for instance, no reason to adopt a particular dividing line because it favours appealability, for it does not seem possible to foretell whether more hardship or unfairness would be produced by allowing the right of appeal in a particular class of case than by refusing such a right. Some hard cases there will inevitably be, whichever way the problem is resolved, and there seems to be no principle which points the way to the most equitable solution.''

The High Court Act [*Chapter 7: 06*] limits the right of appeal in civil cases. It provides as follows in s 43:

``(1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court whether in the exercise of its original or its appellate jurisdiction.

(2) No appeal shall lie -

...

(d) 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.''

Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed p 877 define an interlocutory order as:

``An order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. Such an order may be either purely interlocutory or an interlocutory order having final or definitive effect.''

It admits of no doubt that the order I made was interlocutory. It is clearly embraced by the above definition. It may seem therefore from the apparently clear wording of s 43 that the question at hand is a simple one: as the order I gave was interlocutory it is accordingly appealable with leave in terms of s 43. All I have to do, therefore, is to apply the time-honoured test for leave to appeal. However, as the decided authorities show, this apparent clarity conceals the obscurity of the term ``interlocutory order''. Firstly, a distinction is drawn between interlocutory orders having a final effect and those which do not have a final effect, termed ``simple'' interlocutory orders. In the case of the former no leave is required. Then there is a further category of decisions which fall within the broad definition of simple interlocutory orders, but which the

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courts have termed ``rulings'' that are not appealable, even with leave. The order I made falls into this category. Thus, in *Jesse* v *Chioza supra* at 346 GUBBAY CJ held that a referral to trial was not appealable:

> ``It was merely a procedural ruling that oral evidence was necessary before the factual



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> disputes could be determined. Consequently, and by virtue of s 43(1) of the Act, it was not appealable.''

The learned CHIEF JUSTICE defined the question for his decision as -

> ``... whether the `order' referring the matter to trial for hearing of oral evidence amounts to a `judgment' (defined in s 2 of the Act to include a decision or order), and is decisive or definitive of the rights of the parties and has the effect of disposing of the whole, or at least a portion of the relief claimed by one of them. See *van Streepen & Germs (Pvt) Ltd* v *Transvaal Provincial Administrator* 1987 (4) SA 569 at 586I-J. Or is it a mere ruling which is a direction as to the manner in which the case should proceed? See *Dickinson & Anor* v *Fisher's Executors* 1914 AD 424 at 427-428; *Tropical (Commercial and Industrial) Ltd* v *Plywood Products Ltd* 1956 (1) SA 339 (A) at 344F-G.''

The distinction between rulings and simple interlocutory orders was first drawn, as far as I am aware, in *Dickinson & Anor* v *Fisher's Executors supra.* In that case certain disputes between the parties had been the subject of arbitration. An application was made by the respondent to make the award an order of court. A cross-application was made to have the award set aside. The question arose whether regard should be had only to the deed of partnership, or whether reference could be made to all the evidence led at the arbitration. The court held that in considering the challenge to the award the objector was limited to the evidence before the umpire in relation to the deed of partnership. That decision was taken on appeal. The relevant provision provided that ``No interlocutory order shall be subject to appeal save by leave of the court or judge making the order''. INNES CJ dealt with the question before him as being a jurisdictional one, namely whether the Act gave the court jurisdiction to grant leave to appeal in respect of a ``ruling''. In other words, if the court's decision on the point of evidence did not amount to an ``order'' within the meaning of the statute, the court had no jurisdiction to entertain an application for leave to appeal. At p 426 the learned CHIEF JUSTICE said:

> ``But every decision or ruling of a court during the progress of a suit does not amount to an order. That term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, or it may be of great importance, but the court must be duly asked to grant some definite and distinct relief, before its decision upon the matter can properly be called an order. A trial court is sometimes called upon to decide questions which come up during the progress of a case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin. The court decides it, and the hearing proceeds. But the decision, though it may be of considerable practical importance, is not an order from which an appeal could, under the circumstances, lie apart from the final decision on the merits. So also, in a case like the present, the parties differed as to what portion of the evidence could properly be referred to in support of the applicant's contention that the award was bad. The court gave its ruling on the point. But that was not an order in the legal sense, it decided no definite application for relief, for none had been made. It was a mere direction to the parties with regard to the lines upon which their contentions upon the merits should proceed.''



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The reasoning of INNES CJ may be summarised thus:

(a) the relevant provision gives the court jurisdiction to grant leave to appeal against orders only;

(b) the court's ruling on the admissibility of evidence was a ruling and not an order. Consequently, the court had no jurisdiction;

(c) the term ``order'' implies that there must be a distinct application for relief. The court must be asked to grant specific relief, before its decision upon a matter can be called an order;

(d) there are undesirable consequences to allowing rulings to be appealable with leave. It would lead to a multitude of expensive and inconvenient subsidiary appeals. They may turn out to be useless because the party challenging them may succeed in the main action;

(e) no hardship is caused because the party aggrieved can raise the erroneous ruling on appeal after completion of the trial.

That the ``order'' I made did not have a final effect is clear. In accordance with the decision in *Jesse*'s case *supra* a referral to trial is a ``ruling'' and consequently not appealable even with leave.

The distinction between simple interlocutory orders and rulings causes me some difficulty. I have no doubt that a perception of injustice may arise where an order for referral to trial is premised on an erroneous finding on the law, which, if correctly decided, would effectively dispose of the case and render unnecessary the expense and inconvenience of further litigation. The formal distinction in such a case, between ``rulings'' and ``orders'', may not be conducive to just and speedy determination of the dispute between the parties.

The question that requires consideration is whether the fact that an ``interlocutory order'' is a ruling should be a factor to be taken into account along with other considerations, in deciding whether to grant leave. This is in contrast to the approach in *Dickinson*'s case, which our courts have followed, where, if a finding is made that an interlocutory order is a ruling, the court does not enter upon an inquiry as to whether leave should be granted, on the grounds that it has no jurisdiction to entertain the appealability of a ``ruling''.

CORBETT JA (as he then was) in *South Cape Corp* v *Engineering Mgmt Svcs* 1977 (3) SA (A) 534 at 549 recognised the difficulty in defining the phrase ``interlocutory order'':

> ``The question raised by the point *in limine* is not an easy one. Even in 1911 L*awrence* J felt constrained to remark upon the `vast amount of ingenuity and research' which had been expended by courts and commentators `at sundry times and in divers manners' on the meaning of the words `interlocutory order' and similar phrases.''

After reviewing the authorities on the point the learned JUDGE OF APPEAL continued:



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``I think, nevertheless, the general effect of this series of decisions, together with consistent judgments of other Courts, may be summarised as follows:

(a) In a wide and general sense, the term `interlocutory' refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes:

(i) Those which have a final and definitive effect on the main action; and

(ii) those known as simple (or purely) interlocutory orders proper, or `interlocutory orders proper' which do not (see generally *Bell* v *Bell* 1908 TS 887 at p 890; *Steytler NO* v *Fitzgerald supra* at pp 303, 311, 325-6, 342; *Globe & Phoenix Gold Mining Co Ltd* v *Rhodesian Corp Ltd* 1932 AD 146 at pp 153)."

The test as to whether an order is a simple interlocutory one which the courts have applied with consistency over the years was stated by SCHREINER JA in the *Pretoria Garrison* case at 870:

``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, which amounts, I think, to the same thing, unless it, `irreparably anticipates or precludes some of the relief which would or might be given at the hearing'."

It is of significance that the question before the court in the *Pretoria Garrison* case was whether the order in question had `final effect'. If it had final effect, it was appealable with leave. The court was not dealing with a provision that required it to consider whether simple interlocutory orders were appealable.

In *Bell* v *Bell* 1908 TS 887 at p 890 INNES CJ examined the origins of interlocutory orders in Roman Dutch law:

``The Roman-Dutch lawyers gave to the term *interlocutoire sententie* a very wide, but, regard being had to the derivation of the words, a very correct and logical meaning. They applied it to any order made at any stage between the inception and the conclusion of the litigation upon any incidental matter which did not finally determine the original dispute ...

All orders comprised within these general limits are in theory merely ancillary to the settlement of the main dispute. But it is obvious that in practice the differences in degree between them must be so great as to approximate to a difference in kind. Some would have little or no bearing on the merits of the action; others might involve consequences practically decisive of the ultimate issue. This was fully recognised by the practitioners of Holland, and we find that all the authorities divide decisions of this kind into two classes - interlocutory orders proper and interlocutory orders which have the effect of definitive or final decrees ... "

The following cases serve to illustrate the orders that have been held to be simple interlocutory orders appealable with leave. In the *South Cape* case *supra*, the court held that a decision to grant leave to execute was a simple interlocutory order appealable with leave. The court applied the *Pretoria Garrison* test. At p 551 it said:

``Next, the question is whether an order for leave to execute is a simple interlocutory order or an interlocutory order having a final definitive effect on the main action. If the test laid



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> down in the *Pretoria Garrison Institute*'s case *supra*, be applied, then, in my view, it must be held to be a 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 judgement 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 by the security *de restituendo* which was ordered to be furnished."

In *Boya* v *Shweni* 1995 (1) SA 147 (Tk) at 149, PICKERING J, in dealing with the provisions of the Transkei Supreme Court Act, which provide, as our High Court Act does, for leave to appeal in respect of interlocutory orders, reasoned as follows:

> "In the present matter, the order setting aside the notice to anticipate was clearly not such as to `dispose of any issue or any portion of the issue in the main action or suit', nor does it irreparably anticipate or preclude some of the relief which would or might have been granted at the hearing. It is a simple interlocutory order which is only appealable with leave."

In *South African Motor Industry Employees Association* v *South African Bank of Athens* 1980 (3) SA 91 (A), an order upholding an exception was held to be a simple interlocutory order. The *Pretoria Garrison* test was applied. In that case the defendant had excepted to the plaintiff's particulars of claim on the grounds that they were vague and embarrassing. The court upheld the exception. The plaintiff appealed without leave of the court *a quo*. It was held that the order was a simple interlocutory order appealable with leave and accordingly, as the appeal was not properly before the court, it was struck off the roll.

In *Globe & Phoenix Gold Mining Co Ltd* v *Rhodesia Corp* 1932 AD 146 an inspection order was held to be a simple interlocutory order which requires leave. At p 163 the court stated:

> ``It is a pure and simple interlocutory order given as a step of procedure between the initiation and conclusion of the action ... The order is in effect on the same footing as a discovery order or any other similar simple interlocutory order and is not a final or definitive order either in form or in effect."

Interlocutory orders therefore, which do not comply with the criteria set out in the *Pretoria Garrison* test, are termed simple interlocutory orders appealable with leave in terms of s 43 of the High Court Act. From the review of the case law on simple interlocutory orders, the test that emerges is that a simple or purely interlocutory order is one that does not have final effect, in the sense that it does not irreparably preclude some of the relief which might be granted in the main action.

I turn now to examine decisions in which leave to appeal was declined on





the basis that the orders concerned were ``rulings'' and consequently not appealable at all.

In *Heyman* v *Yorkshire Insurance Co Ltd* 1964 (1) SA 487 (A) the relevant statute conferred a right of appeal in respect of a ``judgment or order given or made''. The parties agreed that the validity of the suretyship agreement be determined as a separate issue. Both counsel took the view that the court had jurisdiction to grant leave to appeal. The parties agreed that if the

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separate issues were determined in favour of defendant, it would have the effect of putting an end to plaintiff's claim or, if determined in favour of the plaintiff, of putting an end to that defence. The intention was to avoid a lengthy trial.

The trial judge dealt with the separate issue and ruled that the deed of suretyship was not void. On appeal, STEYN CJ, applying *Dickinson*'s case, held that the decision was not an order but a ``ruling'' and consequently not appealable. At p 490 he said:

> ``In the present case, the relief claimed in the action is the payment of a sum of money, alternative relief and costs. The ruling given by the court *a quo* on the issue in question, does not decide whether any such relief is to be granted in any form. As indicated above, it left undecided a number of other issues which had been raised. No such relief could be granted until they had been determined by the court or settled by the parties. If the appeal should fail, the matter would, as agreed by the parties, have to be reinstated on the roll of the court below for the trial of these issues, and it is only on the conclusion of the resumed trial that the court would be able to give judgment on the relief sought in the action.''

In interpreting the provision governing the right of appeal in civil cases the court gave the following restrictive interpretation at p 493:

> ``It is highly improbable, moreover, that Parliament, by the mere use of the word `decision' in s 21(1), in contradistinction to the phrase `judgment or order' in s 20, intended to confer for the first time, and without any defined limitation, a right of appeal and a jurisdiction which would open the door to the fractional disposal of actions and other proceedings and the piecemeal hearing of appeals on each part so disposed of.''

In *Umfolozi Co-operative Sugar Planters Ltd* v *South Africa Sugar Association* 1938 AD 87, the applicants brought proceedings seeking a declaration of rights. The respondent's counsel, at the commencement of the hearing, raised certain defences involving questions of law in the opposing affidavits. The court heard argument on the defences raised and gave its decision thereon. It held against the respondent on all the defences raised. Prior to the case commencing, it was accepted that the matter would have to be postponed in any event, as the evidence was incomplete. The court decided to hear argument as, if any one of the defences raised were sustained, it would have had the effect of putting an end to the proceedings and would consequently have avoided the need to obtain further evidence. In an appeal against the ``rulings'', the respondents took the point that the rulings did not amount to an order or final judgment and were consequently not appealable.

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At p 91 STRATFORD JA stated:

> ``Now, in my judgment, none of the three rulings fall in the above described category of appealable matters. They represent the court's view on the meaning of the agreement and on a question of law submitted at that stage as part of, but not the whole of, the respondent's defence to the applicant's claim. No order was made binding on either party and no relief was given to either party. The only relief prayed was that which the applicants sought and that was still *sub judice.*
>
> 'One thing, however, is clear, and that is that no order can be made except upon an application to the court for relief'' (*per* SOLOMON JA in *Dickinson & Another* v *Fisher's Executors* 1914 AD at 428). Indeed, the decisions of this court in *Dickinson*'s case and in *Nxaba* v *Nxaba* 1926 AD 392 are, I think, conclusive against the appealability of these three rulings of the Provincial Division ... ''

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In *Union Govt (Minister of the Interior) & Anor* v *Naidoo* 1916 AD 50, the respondent was the victim of legislation involving the Act of Union in 1910. He contested his deportation warrant on the ground that he had been born in Natal. Section 21 exempted persons born in any part of South Africa which now fell within the geographical boundaries of the Union. The Registrar of Asiatics disputed that respondent had been born in Natal. The judge directed that oral testimony be adduced and for that purpose adjourned the hearing. The applicant appealed. INNES CJ held at p 51:

> ``As a fact, no order of court has been made out. Is there under these circumstances any decree in existence against which we should be justified in granting leave to appeal? In *Dickenson*'s case ... a ruling upon evidence was held not to be an order against which leave to appeal could be granted, because it did not constitute a decision upon an application for specific relief.''

In *van Streepen & Germs (Pty) Ltd* v *Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 583 C*orbett* JA makes reference to the difficulty in drawing the distinction between ``rulings'' and simple interlocutory orders:

> ``So far as I am aware, the correlation between this distinction and the distinction between judgements and orders, which in terms of s 20(1) are appealable, and rulings which are not has not hitherto been judicially investigated.
>
> I do not propose to do so in any depth. I shall confine myself to a few observations on matters which appear to be relevant in the context of the present case.
>
> An interlocutory order which has a final and definitive effect on the main action must, in my view, be regarded as an appealable judgment or order ... The position in regard to a simple interlocutory order, which term would comprehend all orders pronounced by the court upon matters incidental to the main dispute preparatory to or during the progress of litigation other than those having a final and definitive effect on the main action (*Southgate Corp* case *supra* at 549G), is not so clear. There is much to be said for the view that some such orders would constitute judgments or orders which under s 20(1), read with s 20(2)b, of the Act before the amendments introduced by the Appeals Amendment Act 105 of 1982 would have been appealable with leave; others would constitute mere rulings, unappealable even with leave (see *Dickinson*'s case *supra*).''

CONRADIE J in *Priday t/a Pride Paving* v *Rubin* 1992 (3) SA 542 (C) at 545 is critical of the ``formalism'' in *Dickinson*'s case, where, in distinguishing



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between a ruling and an order, regard is to be had to whether there was a distinct application for definite relief. He mentions the cases of *Heyman* and *Umfolozi supra* as examples of instances where ``*Dickinson* formalism'' has led to major decisions on points of law which disposed of claims or defences or major portions thereof, being regarded as rulings and consequently unappealable:

> ``Although these decisions sometimes satisfied the requirements of interlocutory orders having a final effect (which made them appealable without leave), the courts, fearful of being left at the mercy of litigants insisting on the piecemeal resolution of cases, classed them as `rulings' relying, for this purpose, on the *dicta* in *Dickinson*'s case *supra*, which, and I say so with great respect, was not meant to cover judicial pronouncements on the merits of a case. The anomaly created by this approach was that, although a simple interlocutory order was appealable with leave, what in effect amounted to an interlocutory order with final effect was held not to be appealable at all.''

The learned judge expressed the view that there was a trend to move away from the formal

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classification of ``rulings'' in *Dickinson*'s case. He cites the following passage from *van Streepen*'s case *supra* as an instance where, in finding that an order was not a ruling, the court relied not on the approach in *Dickinson*'s case, namely, that the finding was in response to a definite application for relief but on the ``utility of an appeal under the circumstances'':

> ``Where, however, the decision relates to a question of law or facts, which, if decided in a particular way, would be decisive of the case as a whole or of a substantial portion of the relief claimed, then a somewhat different position arises, and indeed in that event the advantages of expense and convenience may favour a final determination of the question on appeal even though the proceedings in the court *a quo* may not have been concluded.''

(*per* CORBETT J in *van Streepen*'s case *supra* at 585).

In making reference to South African decisions after 1982, I should mention the following. Prior to the amendment to the South African Supreme Court Act, s 20, which dealt with the right of appeal, was worded in terms similar to s 43 of the High Court Act. It provided, as s 43 does, that interlocutory orders were appealable with leave. The present s 20, introduced by the Appeals Amendment Act 105 of 1982, reads as follows:

> ``(1) An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings ... shall, subject to the provisions of subsection (3), be heard by the Appellate Division.
>
> ...
>
> (4) No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings ... except ...
>
> (a) ...
>
> (b) ... with the leave of the court against where judgment or order the appeal is to be made, or where such leave has been refused, with the leave of the Appellate Division.''

South African decisions which deal with the amendment are nonetheless



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relevant to the question of appealibity of interlocutory orders. In *Priday*'s case *supra* CONRADIE J interpreted the effect of the amendment thus at p 545:

> ``In my view, the legislature has now given to the courts in respect of all judgments and orders that degree of control and flexibility which is necessary to avoid the anomalies caused by the earlier s 20. All judgments and orders, whether final in effect or not, are now appealable with leave.''

The views of CONRADIE J have not met with the approval of the Appellate Division. In *Zweni* v *Minister of Law and Order* 1993 (1) SA 523 (A) H*arms* JA stated that the practical effect of the amendment was to create two categories of decisions, namely, judgments or orders which were appealable with leave, and rulings which were not appealable. The learned JUDGE OF APPEAL stated at p 534:

> ``It is no longer necessary or conducive to clear thinking to consider, in this context, whether a decision is a simple interlocutory order. As for the remainder of the argument, I can also not agree with it. As I read the case law, it classified an interlocutory order with a final and definitive effect as a `judgment or order' because that is the

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> attribute that typifies all `judgments and orders'. The fact that there was a right of appeal (with leave) in respect of simple interlocutory orders by virtue of a special provision in the old s 20(2)(b) which, in an indirect manner, created this class of appealable decisions, does not mean that those decisions were deemed to be true `judgments or orders'."

In South Africa the practical result of the decision in *Zweni*'s case is that simple interlocutory orders (which under our law are appealable with leave) are no longer appealable at all. H*arms* JA stated at 536 that his interpretation gave effect to the intention of the legislature to limit the number of piecemeal appeals.

> ``In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. It is not in dispute that the decision of GOLDSTEIN J is characterised by all three negative integers.
>
> I am aware that the consequence of this conclusion is that a number of decisions which were appealable with leave prior to the amendment of 20 of the Act by the Appeals Amendment Act 105 of 1982 are no longer appealable at all. It was the intention of the legislature in effecting that amendment to reduce the number of appeals."

It is evident that the restrictive interpretation which the courts generally give to statutory provisions dealing with appealability is motivated by the desire to avoid a multiplicity of piecemeal appeals.

Thus in *Dickinson*'s case *supra* INNES CJ gave, as a reason for ascribing the term ``rulings'' to certain decisions, that that was the way in which the courts could control a multiplicity of piecemeal appeals. With respect to the learned CHIEF JUSTICE, I consider that the requirement for leave constitutes a





sufficient safeguard against the danger of the courts being inundated with piecemeal appeals. INNES CJ addressed this aspect but, regrettably, formed the view that the danger still existed that some judges would nevertheless grant leave.

It seems to me that the considerations which the courts must have regard to in determining whether leave should be granted are an effective mechanism against the danger of a multiplicity of piecemeal appeals. If the danger may be so controlled, the question that arises is whether the classification of certain interlocutory orders as ``rulings'' should go to jurisdiction or should be a factor to be considered in determining whether leave should be granted. CONRADIE J in *Priday*'s *supra* drew attention to the dangers inherent in the test applied in classifying some orders as ``rulings'', in that it has led to decisions that ought to be appealable being held to be unappealable even with leave.

It has to be accepted that the term ``interlocutory orders'' encompasses ``rulings''. The term ``ruling'' was defined in *Dickinson*'s case for the sole purpose of limiting the class of interlocutory decisions which are appealable. I make no suggestion that the term ``ruling'' should be discarded. It is a useful analytical tool in determining whether to grant leave to

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appeal.

The approach which commends itself to me is one where the question is not whether the decision is a ruling or not, but whether leave ought to be granted - and that whether an interlocutory order is a ruling or not is a question to be asked in deciding whether to grant leave to appeal and not, as is the practice, in determining the question whether the court has jurisdiction to consider leave to appeal. This enables a proper consideration of the nature and effect of the ``ruling'' sought to be appealed against. As MILLER JA stated in *South African Motor Industry Employees Association* v *South African Bank of Athens supra* at p 96:

> ``Allied to or embraced by the general principle or test thus enunciated is the principle that not merely the form of the order must be considered but also, and predominately, its effect. Thus, an order which appears in form to be purely interlocutory will be appealable without leave 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 order which might appear according to its form to be finally definitive in the above sense may nevertheless be purely interlocutory in effect and thus fall within the meaning and purpose of s 20(2)(b).''

I would accordingly decline leave to appeal, based on authority which binds me that the order for referral to trial is not appealable even with leave. I consequently have no jurisdiction to entertain the application. Were I not bound by authority, I would have entertained the application for leave to appeal, but would have declined leave to appeal on the ground that the balance of convenience does not favour the granting of leave.

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## MASUKA *v* CHITUNGWIZA TOWN COUNCIL & ANOR 1998 (1) ZLR 15 (HC)

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

Devittie J

Application for declaratory order

16 July & 29 October 1997 1(2) Judgment No. HH-165-97

### Flynote

Administrative law - review - void and voidable acts - distinction between - allegation that administrative act is a nullity - whether can be dealt with by way of declaratory order rather than review - non-suiting of litigant because of delays - whether validates an otherwise invalid act - public and private law - distinction between

Practice and procedure - review - late institution of review proceedings - need to comply with r259 of High Court Rules - application - to set aside proceedings of administrative body - requirements to state grounds relied on

### Headnote

The applicant had been employed by the respondent council. On 23 January 1995, she was suspended from duty on allegations of negligently mishandling money for which she was responsible. A board of inquiry found her guilty and on 4 April the council applied for the consent of the Minister of Labour to dismiss her. The Minister's approval was given on 22

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August 1995. On 31 August, the council wrote to advise the applicant accordingly; she received their letter on 9 September. Some seven months later she instituted proceedings to declare her dismissal to be a nullity. The grounds in which she relied were (1) that the council's decision to seek the Minister's approval was unnecessary as she was not a senior employee, alternatively (2) that her dismissal was a nullity because the council failed to discharge her within the period of 6 months prescribed by s 90(14) of the Urban Councils Act.

The applicant was opposed *in limine* as being out of time due to non-compliance with r 259 of the High Court Rules, which requires proceedings by way of review to be instituted within 8 weeks of the termination of the action where the irregularity or illegality complained of occurred. It was argued for the applicant that the act complained of was void *ab initio*, rather than voidable, and thus open to challenge by way of a declaratory order, which was not subject to the time limitations of reviews.

*Held*, that the present application fell within the category of proceedings known as common law review. It was beyond question that the ambit of judicial review extended to dismissal cases such as this one, where the exercise of dismissal powers has a statutory basis. The fact that the relief sought was a declaration did not change the character of the proceedings.



*Held*, further, that there were practical difficulties in the proposition that if the act challenged was a nullity, there need be no compliance with r 259. The decision as to whether the administrative act was illegal is one that had to be made by the court, not by the litigant. If the litigant were to delay instituting proceedings he ran the risk of the court finding that the act complained of was voidable, not void, and that relief would have to be denied, irrespective of the merits of the claim.

*Held*, further, that the distinction between void and voidable acts, while relevant to private law, had no place in administrative law. It was not a proper basis for deciding which matters fall outside the purview of r 259. All illegal administrative acts were *ultra vires* regardless of the nature of the illegality.

*Held*, further, that it is not open to a litigant seeking to challenge an administrative action on the grounds that it is void *ab initio* to disregard review procedures by seeking a declaration of nullity. Rule 259 is peremptory in its effect where the application is for common law review and therefore concerns the infringement of public rights. Any judicial tendency to disregard non-compliance with r 259 may arise in part from a concern not to validate invalid acts. This can be dealt with by way of the proper exercise of a discretion to condone non-compliance.

*Held*, further, that it would be a positive development for the courts to recognise public law as a separate area of law with exclusive procedures. Public law rights demand a special focus where the extra-judicial mechanisms of redressing the improper use of administrative power are not well developed.

*Held*, further, that the council had not acted unlawfully in seeking the Minister's approval. That approval was a necessary requirement. The fact that the applicant was discharged after her suspension had been in effect for more than 6 months did not nullify the dismissal. All that s

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90(14) of the Urban Councils Act required was that once the six-month period was over, and if the employee had not been dismissed, she was entitled to reinstatement and the full amount of her salary and allowances. It did not preclude subsequent dismissal.

Cases cited:

*Bayat & Ors* v *Hansa & Anor* 1955 (3) SA 547 (N)

*Bruiwil Konstruksie Bpk* v *Whitson NO* 1980 (4) SA 703 (T)

*Bulawayo Bottlers (Pvt) Ltd* v *Min of Labour & Ors* 1988 (2) ZLR 129 (H)

*Chrmn, National Tpt Co & Anor* v *Safcor Forwarding (Jhb) (Pty) Ltd* 1981 (3) SA 504 (T)

*Deputy Min of Tribal Authorities & Anor* v *Kekana* 1983 (3) SA 492 (BS)

*Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S)

*Geekie's Est* v *Union Govt & Anor* 1948 (2) SA 494 (N)

*Gumbo* v *Norton-Selous Rural Council* 1992 (2) ZLR 403 (S)

*Harnaker* v *Min of Interior* 1965 (1) SA 372 (C)

*Hira & Anor* v *Booysen* 1992 (4) SA 69 (A)

*Jockey Club of SA* v *Forbes* 1993 (1) SA 649 (A)

*Johannesburg Consol Invstms Co* v *Johannesburg Town Council* 1903 TS 111

*Maketo* v *Chrmn, PSC & Ors* S-164-97 (not reported)

*Masasi* v *PTC* 1991 (2) ZLR 73 (H)

*Matsambire* v *Gweru City Council* S-183-95 (not reported)

*Murwara* v *Valeta* 1996 (1) ZLR 67 (S)

*Musara* v *Zinatha* 1992 (1) ZLR 9 (H)

*O'Reilly* v *Mackman* [1983] AC 237

*R* v *Greater London Council* ex p *Blackburn* [1976] 1 WLR 550

*R* v *Paddington Valuation Officer* ex p *Peachey Property Corp Ltd* [1966] 1 QB 380



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*R* v *Sec of State for the Environment* ex p *Ostler* [1977] QB 122

*Sec for the Interior* v *Scholz* 1971 (1) SA 633 (C)

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Legislation referred to:

High Court Rules 1971 (RGN 1047/71), r 259

Urban Councils Act [*Chapter 29:15*], s 90

## Case Information

Mrs *R Makarau*, for the applicant

*E Matinenga*, for the respondent

## Judgment

**DEVITTIE J:** The applicant seeks an order declaring her dismissal from the first respondent's employ unlawful. The first respondent is a statutory body. Its powers of dismissal are conferred by statute. The applicant's main contention is that her dismissal is a nullity because respondent did not comply with the statutory dismissal procedures prescribed in the Urban Councils Act [*Chapter 29:15*].

Before I deal with the merits of the application, there is a matter that has to be disposed of. It concerns the point raised *in limine* by Mr *Matinenga*. It is that, as the application seeks a review of the first respondent's decision, it ought to be dismissed for want of compliance with r 259 of the Rules of Court. Rule 259 provides:

> ``Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred.
>
> Provided that the court may for good cause shown extend the time.''

The present application was instituted on 26 February 1996, approximately six months after the illegality complained of occurred.

On behalf of the applicant, it was submitted that the application was not a review, as the relief sought was a declaratory order concerning the applicant's contractual rights. Where an administrative decision is a nullity, it was argued, proceedings seeking declaratory relief as to a litigant's rights are distinct from review proceedings and in consequence the time limit prescribed in r 259 did not apply. It was submitted that the decision challenged was a nullity in the sense that the Minister had no power to approve the applicant's dismissal. The applicant's counsel further contended that, although review proceedings were competent, the applicant was not precluded from seeking a declaration of nullity as a form of proceedings alternative to and falling outside the ambit of review proceedings.

In submitting that challenges to void administrative acts were not subject to the time limit prescribed for review proceedings, the applicant's counsel based her argument on the decision in *Musara* v *Zinatha* 1992 (1) ZLR 9 (H). In that case, a distinction was drawn between voidable and void administrative decisions. Acts which are void *ab initio*, that is, where the authority had no



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jurisdiction to make the decision challenged, according to the decision in *Musara*'s case, are open to challenge by way of ordinary application for a declaration of nullity without the need to comply with the time limit for review proceedings. On the other hand, voidable acts, where the irregularity complained of is unrelated to an absence of jurisdiction, are the legitimate subject of review.

Mr *Matinenga*'s submission - that if I rule that the application is a review then, in the absence of an application for condonation of non-compliance with r 259, I am bound to dismiss the application - is well grounded in authority.

In *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S) at 260D-261B, in dealing with non-compliance with r 259, GUBBAY CJ stated:

> ``I entertain no doubt that, absent an application it was erroneous of the learned judge to condone what was, on the face of it, a grave non-compliance with r 259. For it is the making of the application that triggers the discretion to extend the time. In *Matsambire* v *Gweru City Council* S-183-95 (not reported) this court held that where proceedings by way of review were not instituted within the specified eight week period and condonation of the breach of r 259 was not sought, the matter was not properly before the court. I can conceive of no reason to depart from that ruling. One only has to have regard to the broad factors which a court should take into account in deciding whether to condone such non-compliance to appreciate the necessity for a substantive application to be made ... This conclusion effectively disposes of the appeal against respondent.''

Mr *Matinenga* submitted that the application is a review because it seeks to bring under the scrutiny of the High Court alleged irregularities by the first respondent. In support of this contention, he cited the following passage from the judgment of GUBBAY CJ in *Matsambire* v *Gweru City Council supra*:

> ``It was quite wrong to hold that the application before him was not in the nature of review proceedings. It was clearly one designed at bringing the claimed irregularities in the procedures adopted by the Gweru City Council under the scrutiny of the High Court and for the exercise of that court's review powers.''

Mr *Matinenga* further submitted that if I found that the termination of applicant's employment is void *ab initio* then compliance with r 259 was not necessary. His argument in this regard may be summarized thus:

(a) where the decision is sought to be impugned on the grounds that it was tainted with procedural irregularity, then the decision is voidable and accordingly reviewable.

(b) in respect of void acts, which he defined as those cases where there was no jurisdiction at all to exercise the power, he conceded that it was competent to seek a *declaratur* as the act in question would be void *ab initio*. In such cases, he conceded, compliance with the time limit in r 259 was not required. The decision of the respondent in the present application,





he submitted, was voidable because the Council had the jurisdiction to make the

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decision challenged and accordingly compliance with r 259 was required.

In drawing a distinction between void and voidable administrative acts, Mr *Matinenga* too cited *Musara*'s case *supra* as authority. The questions I have to decide on the point raised *in limine* are whether the application before me is a review, and if so, whether compliance with the time limit within which review proceedings must be instituted is required, notwithstanding that the decision challenged is a nullity or is claimed to be a nullity. This involves a consideration of the validity of the distinction which was drawn in *Musara*'s case between void and voidable administrative acts.

It is convenient to begin the inquiry as to whether these are review proceedings by examining the meaning and scope of review proceedings in administrative law. The *locus classicus* in South African law on the scope of the word review is *Johannesburg Consolidated Investments Co* v *Johannesburg Town Council* 1903 TS 111. INNES CJ at 115 described common law review of administrative action in the following terms:

> ``Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them. These is no special machinery created by the legislature; it is a right inherent in the court, which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal. The non performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of the court. And it will, when necessary, summarily correct or set aside proceedings which come under the above category.''

CORBETT CJ in *Hira & Anor* v *Booysen* 1992 (4) SA 69 (A) at 84, observes that the above formulation is not to be regarded as exhaustive:

> ``It is clearly established by a long series of cases that, for instance, common-law review applies also to cases where the statute creates a power rather than a duty; where the duty or power is vested in an individual official, as distinct from a public body; where the decision under review is taken without proceedings, in the sense of a hearing, having occurred; and where the duty or power is created not by statute but consensually, as in the case of a domestic tribunal. Over the years, too, the grounds of review have been elaborated and defined.''

That the present application bears all the hallmarks of common law review is clear from the provisions of the High Court Act [*Chapter 7:06*] which deal with the review jurisdiction of this court. The nature of the bodies whose proceedings and decisions may be reviewed are described in s 26:

> ``Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justices, tribunals and administrative authorities within Zimbabwe.''



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Section 27 of the Act sets out the grounds upon which the review jurisdiction of the court may be invoked:

> "(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be -

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(a) absence of jurisdiction on the part of the court, tribunal or authority concerned;

(b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;

(c) gross irregularity in the proceedings or the decision.''

It bears emphasis that the term ``absence of jurisdiction'' in s 27(a) includes acts which are void *ab initio* or a ``nullity''.

From the above, it is tolerably clear that the present application falls within the category of the proceedings known as common law review which, as CORBETT J (as he then was) stated in *Harnaker* v *Minister of Interior* 1965 (1) SA 372 (C) at 377:

> ``... is generally regarded as applying in the case where an individual has exceeded the statutory powers conferred upon him or has done some act or taken some decision which is assailable upon what are often referred to as `review grounds'.''

It seeks to impugn a decision made by an administrative authority on a recognised ground of review, namely, that the respondent exceeded its statutory powers. I am therefore unable to accept the argument that the applicant is not seeking a review of the respondent's decision but a declaration as to her contractual rights in terms of her contract of employment. It is beyond question that the ambit of judicial review extends to dismissal cases such as the present where the exercise of the power of dismissal has a statutory basis.

I now turn to consider whether, if I find that the dismissal was a nullity, it follows that r 259 is not peremptory. In *Musara*'s case *supra* at p 13 the learned judge stated this proposition thus:

> ``It being trite law, for which I see no need to cite any authority, that something done by an official in excess of the power conferred upon him is null and void *ab initio*, it follows that, in the present case, the petitioner's suspension is null and void.
>
> That being the case, it is arguable that any interested person should be at liberty and entitled, at any time, to approach this court for an order declaring the act in question to be null and void.''

The brief facts of that case are that the applicant was a member of a private association of traditional healers. He applied for an order declaring null and void his suspension from the association. The court found that the suspension had been unlawful in that the Board of Management had no authority to suspend the applicant. I accept that in that case the body whose decision was challenged was a domestic tribunal. I do not consider that the operation of r259 is to be excluded on that account. Section 26 of the High Court Act



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refers to the decisions of ``all tribunals and administrative authorities'' as being subject to review. These words are wide enough to include a domestic tribunal.

With respect to the learned judge, it cannot be correct to say that where the act challenged is *ultra vires* compliance with r 259 is not required and an interested person can approach the court at any time. In my view, the fact that the relief sought is a declaration of nullity does not

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change the character of the proceedings. An applicant who is aggrieved by administrative action or inaction which is illegal may invoke the review jurisdiction of the court. In reviewing the act or proceedings sought to be impugned, the court, in the exercise of a separate aspect of its review jurisdiction, has a discretion to grant a suitable remedy: it may set aside the administrative decision, grant an interdict, award damages or grant a declaration of nullity, or decline to grant any remedy.

Baxter at p 300 is instructive on the need to distinguish and not to confuse -

> ``... the jurisdiction of the courts to review the legality of administrative action with their jurisdiction to award a remedy in consequence of the action having been found to be unlawful.''

To the same effect were words spoken by CORBETT J in *Harnaker* v *Minister of the Interior supra* at p 377:

> ``Judicial review has always been used in the widest sense to cover judicial scrutiny of the legality of all kinds of administrative action, irrespective of the nature of the remedy being sought.''

The proposition that if the act challenged is a nullity there need be no compliance with r 259 has practical difficulties. If accepted, it means that an applicant would be entitled to disregard the procedural requirements of r 259 should he form the view that the decision is a nullity; for he would then, the argument seems to run, be seeking not a review but a *declaratur* that an administrative act is void *ab initio*. But the decision as to whether the act challenged is illegal is to be made by the court and not by the litigant. This case is an example. Until I have ruled (if indeed it is necessary to do) on whether the decision challenged is void or is voidable, how can the applicant make that decision in advance and proceed to disregard the eight week limitation period? Further distinction may carry the inherent risk of prejudice to the aggrieved litigant, in that he may risk delaying instituting review proceedings at his peril, should the court subsequently rule that the decision challenged is voidable and not void; and consequently, that as the proceedings fall within the purview of r 259 the inordinate delay is such that having regard to all the circumstances, a denial of the relief sought is justified regardless of the merits.



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I can therefore conceive of no basis in logic why the fact that the remedy sought in an application to challenge the legality of administrative action is a declaration of nullity upon grounds generally recognised as review grounds should give a litigant the advantage over other litigants (whose challenges are based on wider grounds of illegality) of not having to comply with the procedural requirements in r 259.

In the present application, what is sought to be impugned is the decision of an administrative authority on grounds that have long been recognised by the courts and are expressly stated in the Act as constituting grounds of review. I am therefore of the view that, even if I were to find that the respondent acted in excess of its jurisdiction, compliance with r 259 is still necessary.

I appreciate the concerns expressed in Musara's case, namely, that the courts should not be constrained by technical rules in setting aside an act of ``glaring invalidity''. In other words, as I understand the learned judge's reasoning, the court ought not to decline to set aside an act

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which is a nullity on account of non-compliance with time limits. To do so would be to validate an invalid act.

There are several decisions of this court where it has been held that delay in making an application for review may disentitle an applicant to the order he seeks, regardless of the merits of the matter. Indeed, it is a principle firmly entrenched in our law that non-compliance with time limits may in itself be a ground for non-suiting a litigant, regardless of the merits.

Baxter at p 358 recognises that the courts do at times decline to set aside invalid acts:

> ``But when they (the courts) sometimes refer to unlawful acts as `voidable' this must be viewed within the context of their own role as the authoritative oracles of validity and legality. They do not thereby imply that the act was valid until set aside, nor do they mean to suggest that refusal to declare the act in question void thereby validates it, even though the *effect* of their refusal is that it continues to be treated as if it *were* valid."

In *Harnaker* v *Minister of the Interior supra,* CORBETT J was confronted with the argument that the delay rule did not apply to invalid legislative acts because refusal to set them aside would validate them. In rejecting this argument the learned judge stated at 381:

> ``It was further argued by Mr *Molteno* that the delay rule should not be applied to legislative acts since its effect could be to validate an invalid act. A similar argument was advanced, without success, in *Kalil & Anor* v *Min of Interior supra*. I am unable to follow the logic of this argument. It is not disputed that an aggrieved party may be precluded by delay from setting aside, upon review, the proceedings of a quasi-judicial statutory body. In such a case, the grounds of review might, for example, be that the body had exceeded its powers. If this ground were substantiated, the review would establish that the proceedings and any act following therefrom were null and void. The application of the delay rule in such a case would prevent the aggrieved party from establishing such nullity. In a sense delay would therefore `validate' a nullity. All this must necessarily be conceded by the plaintiff's



> counsel. He argues, however, that this situation should not be permitted to arise where the act assailed is legislative in character. I can see no valid basis for such a distinction, particularly in regard to subordinate legislation similar in character to Proclamation 190 of 1957. It is true that a legislative act will affect a wider section of the public: but if the affected members of public, having *locus standi* to apply to court for an order declaring the legislative act null and void, delay unreasonably in taking such action and this causes prejudice, I do not see why they should not all be precluded from obtaining relief. After all, why should they be in a better position than the individual who alone is aggrieved by the *ultra vires* act of the quasi-judicial body?"

The occasion now arises to inquire into the validity of the distinction drawn in *Musara*'s case between void and voidable administrative acts. The learned judge said at 14:

> ``Consequently, those issues are not properly before the court in the present application which seeks a declaratory order specifically and exclusively on the ground that the petitioner's purported suspension is null and void. Fortunately for the petitioner, there is just sufficient information on the papers to enable the court to consider the petition as one seeking a declaratory order in regard to the petitioner's suspension - had there not been such information so that the petition amounted to a review *simpliciter* (see *Deputy Minister of Tribal Authorities & Anor* v *Kekana* 1983 (3) SA 492 (BS)), then I would have dismissed the petition on the ground that it was out of time as a review matter and that no cause has been shown on the papers for the court, in terms of r 259 of the Rules of Court, to extend the prescribed eight week period within which a review is to be instituted."

The learned judge seems to suggest that review proceedings are appropriate when the challenge ``raises matters, such as malice, gross irrationality, the application of the *audi alteram partem* principle and bias", but that if the challenge is based on absence of jurisdiction

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declaratory relief could be obtained without compliance with r 259.

Baxter *Administrative Law* at p 355 explains the context in which reference is sometimes made to void and voidable administrative acts:

> ``Administrative action that is not authorised by law is *invalid*. This is the axiomatic consequence of the principle of legality. Thus unlawful administrative acts are generally said to be `*void*'. But the simplicity of this tautology is upset by the complicated constitutional structure within which the principle of legality operates: administrative acts are usually performed by public authorities which *appear* to possess the necessary authority; and the authoritative determination of whether those acts are within their powers can only be made by a court of law. There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are `voidable' because they have to be annulled.''

At p 356 learned author states that the terms ``void'' and ``voidable'' have no place in administrative law.

> ``These two perspectives on the principle of legality - theoretical and practical - have engendered a *dichotomy* of opinion as to whether unlawful administrative acts are `void' or merely `voidable'. In fact, this disagreement is more apparent than real, being the result



> of confusion caused by the adoption of the misleading terms `void' and `voidable' themselves.''

In *Musara*'s case, I would respectfully suggest, the learned judge drew upon a concept more appropriate to private than public law in distinguishing between void and voidable administrative acts. This is demonstrated by his use of a matrimonial cause to illustrate his point.

> ``That being the case, it is arguable that any interested person should be at liberty and entitled, at any time, to approach this court for an order declaring the act in question to be null and void. In this connection, I would refer to the case of *Morrison* v *Morrison* 1972 (3) SA 185 (C), which concerned the granting of a declaratory order at the instance of a guilty party, that a purported marriage was void on the ground that is was bigamous. In that case at p 186 VOS AJ said that where a party seeks to obtain clarity about his own status and that of his purported wife, the court should be slow to turn him away. By the same reasoning, this court should be slow to turn the petitioner away where he seeks a declaratory order about his status in the respondent, so that it is known whether he can stand as a candidate for election within that organisation, especially where, *ex facie* the papers before this court, it is clear that the petitioner's suspension was invalid and, therefore, null and void *ab initio*.''

As Baxter correctly observes at p 356:

> ``These terms and their distinction originate in private law where they are particularly relevant to the legal force of contracts, marriages, dispositions by insolvents and acts of companies. The significance of the distinction is that, whereas void contracts, for example, have no legal consequences at all, irrespective of the wishes of the parties, voidable acts are fully effective until set aside, and they may even traject legal effects which endure after they have been set aside. Thus children of a void marriage are illegitimate, while children of a voidable marriage are legitimate and remain so even after the marriage has been set aside. However, even in private law the dichotomy is more apparent than real, and it has to be qualified to accommodate the interests of third parties and the public in general.
>
> In administrative law, the dichotomy is wholly inappropriate; here the question of validity has to be looked at from two points of view; namely, the principle of legality itself, and the application of that principle within the constitution. In so far as an unlawful act contravenes the principle of legality, being therefore unauthorised, it may be said to be `void'; but for the purposes of the practical application of the principle of legality, `void' can very seldom, if ever mean `absolutely void' since legal uncertainty, the acquiescence in unlawful action and the refusal of judicial

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remedies may all leave unimpugned a formally void act, and the presumption of validity renders the act legally effective. The use of the term `voidable' to describe these latter acts is fundamentally misleading.''

In *Musara*'s case, reliance was placed on the following passage from *Bayat & Ors* v *Hansa & Anor* 1955 (3) SA 547 (N) at 552 to support the proposition that where an act is null and void, declaratory relief may be granted at any time without the need to comply with r 259:

``Consequently the situation, as I see it, is that if the second respondent did decide the question of contractual rights adversely to the applicants, it remained open to them either to review the decision of the second respondent, notwithstanding that they had taken part in a contest before second respondent on the very question, or, ignoring the second



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respondent's decision on that question and treating it as a nullity as being beyond the powers of the second respondent, to bring proceedings for a declaration of rights or otherwise to enforce the claim, which they maintain they have against the first respondent ...''

ROBINSON J interpreted the above *dictum* to mean that where an administrative act is a nullity, a litigant has a choice of either bringing review proceedings, or ``proceedings'' for a declaration of nullity and that as regards the latter course, compliance with r 259 is not required.

The facts in *Bayat*'s case were that the first respondent held a trading licence in respect of premises which he occupied in terms of a lease agreement with the applicants. Upon expiry of the lease the respondent became a statutory tenant. He then vacated the premises. Prior to vacating the premises, the first respondent had made an application to the licensing board for a trading licence to be issued in respect of new premises he intended to move to. The applicants opposed the granting of the licence upon the grounds that the terms of the lease agreement precluded respondent from transferring his licences to a new site. His contractual obligation, it was argued, was to surrender the licence to the applicants upon vacating. The licensing board granted the respondent a licence for a conditional removal of the licence to new premises. The applicants brought proceedings before CANEY J seeking an order (a) setting aside the order of the board (the second respondent) and (b) that the licences held in respect of the applicants' property be surrendered to the applicants. When the matter came before CANEY J, the claim for an order setting aside the decision of the board was not pursued. The applicants sought only an order that the licence be surrendered to them.

CANEY J was faced with the question whether the applicants were precluded from seeking the relief sought on the grounds that the ouster clause in the relevant legislation provided that the decision of the respondent was not open to review. He came to the following conclusion at 552:

``The conclusion to which I come in the present case, as it is now presented, is that the applicants are not now seeking to review the decision of the second respondent. Their prayer against the first respondent is that he be ordered to surrender to them the licences held in respect of their premises.

I do not understand that they contend for this so long as he continued to carry on business on their premises, but it is because he has vacated them and ceased to carry on business in them that they claim the right to have him surrender the licences to them. This cessation on his part took place in January 1955, some months after the second respondent had come to its decision on his application for licences in respect of the premises to be erected on the farm `Plessis Laager'. The applicants' claim in this respect is based upon what they contend are

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their contractual rights against the first respondent, and the claim has arisen subsequently to the second respondent's decision, namely upon his vacating their premises and ceasing to carry on business in them. Their case now is not that second respondent exceeded its



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jurisdiction on 13 October 1954 but that on 31 January 1954, the first respondent became obliged to surrender the licences to them."

The *dictum* upon which ROBINSON J relied was thus not part of the *ratio* of the decision in *Bayat*'s case.

In my view, the *dictum* relied on by ROBINSON J is not to be interpreted in support of proposition that a litigant seeking to challenge administrative action on the grounds that the act is void *ab initio* can disregard review procedures by seeking a declaration of nullity. Having placed that *dictum* in its factual context, to my mind it means no more that this - firstly, that where an administrative body acts without authority in deciding private law rights, the aggrieved party may institute review proceedings to have the decision set aside. Secondly, that it is competent to obtain a declaration as to the private law rights which the administrative body purported to decide without jurisdiction, or to otherwise enforce these rights. Regardless of the relief sought in *Bayat*'s case, to the extent that the application brought under scrutiny the proceedings of the board on the recognised ground of review that the board had no jurisdiction, then, in granting the relief sought, the court exercised its review jurisdiction. I have some reservation, though, as to the correctness of the statement that the applicants could simply ignore the decision made without jurisdiction. The presumption in favour of validity would tend to suggest that a void act cannot be left unimpugned. I do not, however, propose to express a firm opinion on the matter.

It is my view, therefore, that *Bayat*'s case affords no support for the proposition that void administrative acts can be challenged by way of separate ``declaratory'' proceedings which are outside the ambit of review proceedings.

It seems to me that the distinction drawn in *Musara*'s case *supra* between void and voidable administrative acts may derive some influence from a turbulent period in English administrative law. In that period English courts drew a distinction between administrative acts which were void for want of jurisdiction and acts where the irregularities complained of were committed ``within jurisdiction'' and were consequently voidable and good until set aside. See *R* v *Paddington Valuation Officer* Ex p *Peachey Property Corp Ltd* [1966] 1 QB 380 at 402. In *R* v *Secretary of State for the Environment* Ex p *Ostler* [1977] QB 122 at 135 L*ord* DENNING MR drew the distinction thus:

``I would add this: if this order were to be upset for want of good faith or for lack of natural justice, it would not to my mind be a nullity or void from the beginning. It would only be voidable.''

LORD DENNING has since retracted his opinion and in his book *The Discipline of the Law* has accepted that a decision contrary to natural justice is void and not voidable:

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> ``I confirm that at one time I used to say that such a decision was not void but only voidable. But I have seen the error of my ways.''

I now need to make brief reference to *Bulawayo Bottlers (Pvt) Ltd* v *Minister of Labour & Ors* 1988 (2) ZLR 129 (H) in which *Bayat*'s case was cited with approval. The court was dealing with an application brought by way of petition to set aside the proceedings of a regional hearing officer on the grounds that it was a nullity. Counsel for the respondent took the point that the petitioner had failed to comply with r 259. The learned judge, relying on *Bayat*'s case, took the view that because a declaration of nullity was sought an ordinary application was appropriate; and further, that if the petitioner could have brought review proceedings ``it was optional for it to also apply for a declaratory order''. At p 142 MUCHECHETERE J (as he then was) stated:

> ``From the above, my understanding of the law is that there is nothing to prevent the petitioner from applying for and obtaining a declaratory order, even if it is open to him to commence review proceedings, provided that the court is satisfied that the applicant is an interested person in an existing future or contingent right or obligation and that the case is a proper one for the exercise of its discretion in granting the order.
>
> In this case, my view is that it was really not open to the petitioner to commence review proceedings because that would have been an acceptance by it that the re-hearing by Mr Chinduta was regular or lawful. Its whole position is that the re-hearing was irregular or unlawful and therefore a nullity. The proper application was, therefore, for a declaratory order. However, if I am wrong and the correct position is that the petitioner could have applied for a review then I would still hold, in accordance with the view expressed in the last quoted passage, that it was optional for it to also apply for a declaratory order. The case of *Art Printers* v *Regional Hearing Officer & Anor supra* does not rule out other alternative proceedings. I am satisfied that the petitioner in this case is a person interested in an existing or contingent right - a decision in its favour had purportedly been cancelled by the re-hearing and a declaratory order would confirm or restore it.''

In my view, the decision in *Bayat*'s case must be limited to the facts of that case. It is not authority for the proposition that, if the relief sought in a challenge to administrative action is a declaration of rights, then the proceedings are not review proceedings.

I therefore find myself unable to agree with the reasoning in *Musara*'s case. The distinction drawn between ``voidable acts'' which are challenged on the grounds of bias, or non-compliance with the rules of natural justice on the one hand, and ``void acts'' which are void *ab initio* for want of jurisdiction is not a proper basis for deciding which matters fall outside the purview of r 259. The distinction suggests that because some administrative acts are more unlawful than others then in cases of ``glaring invalidity'' compliance with r 259 is not obligatory. In my view, the approach that is consistent with the logic of administrative law is stated in Wade on *Administrative Law:* that the *ultra vires* doctrine is a ``procrustean bed'' into which *all* administrative actions that do not comply with the requirements of validity fall; and an



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administrative at that does not comply with *any* of the grounds of review is illegal and therefore *ultra vires*. Baxter on *Administrative Law* adopts the same view.

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MILNE AJ (as he then was) said in *Estate Geekie* v *Union Govt & Anor* 1948 (2) SA 494 (N) at 502 that all illegal acts in administrative law are subsumed under the *ultra vires* doctrine. Thus, all illegal acts are *ultra vires,* regardless of the nature of the illegality:

> ``In considering whether the proceedings of any tribunal should be set aside on the ground of illegality or irregularity, the question appears always to resolve itself into whether the tribunal acted *ultra vires* or not. This is very lucidly set out in the following passages from the judgment of WARRINGTON LJ (as he then was) in *Short* v *Poole Corporation* [1926] Ch 66 (CA); [1925] All ER Rep 74 which was applied in this court in *Greene* v *Pietermaritzburg Corp* 1928, NPD 86 at pp 92-93:
>
> > `... Thus no public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be that of the body, but proved to be committed in bad faith or from corrupt motives would certainly be held to be inoperative.
>
> It may also possible to prove that an act of a public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any act which should be held ultra vires under this head ...
>
> My view then is that the only case in which the court can interfere with an act of the public body which is, on the face of it, regular and within its powers, is when it is proved to be in fact ultra *vires* and that the references in the judgments in the several cases cited in argument to bad faith, corruption, alien and irrelevant motives, collateral and indirect objects, and so forth, are merely intended when properly understood as examples of matters which if proved to exist might establish the *ultra vires* character of the act in question'."

The conclusion I have arrived at - that the present application is a review requiring compliance with r 259 - raises the broader question whether compliance with all the review procedures prescribed in order 33 is peremptory.

I am aware of the South African authorities that have held that to proceed by way of application is not mandatory. See *Jockey Club of South Africa* v *Forbes* 1993 (1) SA 649 (A) at 662; *Bruiwil Konstruksie Bpk* v *Whitson NO* 1980 (4) SA 703 (T) at 710.

There are authorities to the contrary. See *Chairman National Transport Co & Anor* v *Safcor Forwarding (Jhb) (Pty) Ltd* 1981 (3) SA 504 (T). In *Secretary for the Interior* v *Scholz* 1971 (1) SA 633 (C), the applicant proceeded by way of summons in an action seeking an order declaring null and void her re-classification as a Coloured and declaring her to be a member of the White race. The respondent's counsel raised an objection *in limine* that the application ought to have been brought by way of review because the equivalent of s 27 of the High Court Act made it peremptory for review



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proceedings be brought by notice of motion. The court found that the applicant's averments amounted to an allegation that the administrative authority had committed a gross irregularity and consequently fell within the ambit of review proceedings. In the circumstances the court held that compliance with review procedures was mandatory.

In *Deputy Minister of Tribal Authorities* v *Kekana* 1983 (3) SA 492 (BS) the question again arose whether proceedings by way of summons were appropriate. The court reasoned that as the

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decision by the Minister to depose Kekana as Chief was an administrative one, and the decision was challenged on review grounds, namely that the Minister had exercised his discretion incorrectly, compliance with review procedures was mandatory.

South African decisions which have held that compliance with the procedures prescribed for review are not mandatory can be distinguished on the grounds that the rules of court in South Africa do not stipulate a fixed time limit within which review proceedings shall be brought.

In *O'Reilly* v *Mackman* [1983] AC 237 LORD DENNING was concerned with the English review procedures. The rules regarding judicial review provided that an application for review be brought within a period of three months. The applicant, who was well outside the time limit, instituted proceedings by way of writ. Had he proceeded by way of application he would have been subject to the three month time limit. LORD DENNING took the view that since all the remedies for the infringement of right protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court to seek redress by ordinary action in a case involving the infringement of public rights.

At p 254 he stated:

> ``Where a good and appropriate remedy is given by the procedure of the court - with safeguards against abuse - it is an abuse for a person to go by another procedure - so as to avoid the safeguards.''

And at p 257:

> ``If such actions were to be permitted (as an alternative to judicial review) it would open the door to great abuse. Nearly all these people are legally-aided. If they were allowed to proceed by ordinary action, without leave, I can see that the public authorities of this country would be harassed by all sorts of claims - long out of time - on the most flimsy of grounds.''

The above *dictum* by LORD DENNING focuses on the protection of public authorities as a reason for enforcing an exclusive procedure in challenges to administrative action. It is clear, though, that r 259 serves wider interests. Herbstein & van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed state at p 957:



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> ``There are two principal reasons for the rule that the court should have the power to refuse to entertain a review at the instance of an aggrieved party who has been guilty of unreasonable delay. The first is that unreasonable delay may cause prejudice to other parties. The second is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions.''

Administrative law has as its central concern the protection of the individual against the illegal exercise of administrative authority. It is in the collective interests of the body politic that illegal administrative action be speedily redressed. One looks therefore not solely at the individual rights of the aggrieved litigant. The general public too has an interest in good administration and therefore the speedy resolution of illegal administrative action. Delay in setting aside the illegal exercise of public power has cost implications. In the case of public authorities that derive

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funding from the public fiscus, it is the general public who invariably bear the cost.

The position in our law is that if the application is one for common law review and therefore concerns the infringement of public rights as opposed to private law rights, then r 259 is peremptory, subject, of course, to the court's discretion to condone upon good cause being shown. The tendency to disregard non-compliance with r 259 in respect of void acts may arise in part from a judicial concern not to validate invalid acts. This can be dealt with by the proper exercise of the discretion to condone non-compliance. If such discretion is not properly exercised then there is always the remedy of appeal. In appropriate cases, the matter may be postponed to allow an application for condonation to be made. See *Murwara* v *Valeta* 1996 (1) ZLR 67 (S).

According to the decision in *Matsambire*'s case *supra*, compliance with r 259 is mandatory in review proceedings.

The High Court had dismissed a point raised *in limine* by the respondent's counsel that the application was a review; and, as the application had been instituted after eight weeks, the matter was not properly before the court as no condonation had been sought. The High Court held that:

> ``This application was valid in May 1993, and it is like any other application. I see no reason why the court should not hear the application and I rule that this court can entertain the application.''

GUBBAY JA, as he then was, held that the application was a review because it was ``clearly designed at bringing the claimed irregularities in the procedures adopted by the Gweru City Council under the scrutiny of the High Court and for the exercise of that court's review powers.'' Further, that, in the absence of a substantive application for condonation, the matter was not properly before the court and should be dismissed. In *Maketo* v *Chrmn, PSC & 3 Ors S*-164-97 the Supreme Court held that compliance with r 257 was mandatory. Rule 257 provides in relation to review proceedings that:

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> ``The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for.''

The learned *C*HIEF JUSTICE stated the following at p 3:

> `The consequence attendant upon non-compliance with this particular rule was underlined in *Minister of Labour, Manpower Planning & Social Welfare & Ors* v *PEN Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) and *Rimayi* v *Minister of National Supplies & Anor* S-86-90 (not reported). It is a bar to the grant of relief.''

The principle of our law - that in proceedings definable as falling within the review jurisdiction of the court, compliance with prescribed review procedures is mandatory - requires for its realisation an acceptance of the distinction between public and private law. It means that in cases involving challenges to the illegal exercise of a statutory power review procedures are peremptory. We arrive therefore at a position that dictates the recognition of two separate fields of law.

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In recent times the English courts have moved towards a theoretical and practical distinction between public and private law. In *O'Reilly* v *Mackman supra* at p 255, LORD DENNING said:

> ``In modern times, we have come to recognise two separate fields of law: one of private law, the other of public law. Private law regulates the affairs of subjects as between themselves. Public law regulates the affairs of subjects *vis-à-vis* public authorities. For centuries there were special remedies available in public law. There were the prerogative writs of certiorari, mandamus and prohibition. As I have shown, they were taken in the name of the sovereign against a public authority which had failed to perform its duty to the public at large or had performed it wrongly. Any subject could complain to the sovereign: and then the King's Courts, at their discretion, would give him leave to issue such one of the prerogative writs as was appropriate to meet his case.''

Baxter at p 57 discusses some of the considerations which weigh in favour of maintaining a distinction between public and private law:

> ``Whenever individuals are engaged in disputes with particular public authorities, there are not two but three interested parties: the individual, the public authority, and the `general public'. It is simplistic to assume that the general interest of the public is automatically represented by the public authority concerned just because the latter has been established in order to fulfil the public interest. The public authority might have been acting out of misguided motives, or it might be interpreting its powers erroneously. In neither case will the public interest be on its side. On the other hand, it might be `in the public interest' for individual rights to take precedence over collective goals. Again, the public interest will not be on the side of the public authority. The coincidence of the *actions of the public authority* and the *interest of the public* is a theoretical ideal but it is by no means automatic in practice.
>
> 'Disputes in administrative law are thus trilateral and not bilateral. They are correspondingly more complex than disputes between private individuals and are not always amenable to settlement by means of the same standards.''

To my mind, it would be a positive development for our courts to recognise public law as a separate area of law with exclusive procedures. Administrative



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law is concerned with the lawful exercise of administrative power and the protection of the individual against excesses of statutory power. It is thus concerned with rights whose observance is in the interest of the public. Public law rights thus demand a special focus, nonetheless so, where the extra-judicial mechanisms of redressing the improper use of administrative power are not well developed. Until alternative political processes evolve, judicial review will continue to be the most effective means of redressing the irregular exercise of such power. The courts can best meet these new challenges in the context of a clear conceptual distinction between public and private law. I am aware that the distinction is not easy to draw. But the disadvantages attendant upon such difficulty are overweighed by the consideration that the distinction fosters a greater awareness of the competing interests that have to be placed in balance in public law. Furthermore the public or private law distinction can serve as a useful spur in alerting the judicial mind to the need to recognise the broader concerns relating to the public interest on public law litigation. In this way, the quality and uniformity of administrative case law will improve and a significant contribution made to our human rights jurisprudence.

LORD DENNING, in espousing values that he considered best served and developed in the context of a distinction between public and private law procedures, stated in *R* v *Greater London*

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*Council* ex p *Blackburn* [1976] 1 WLR 550 at 559:

> ``I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is trespassing the law, or is about to trespass it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.''

I must now deal with the merits of the present application. Mr *Matinega* in his argument on the point *in limine* submitted that if I found that the dismissal is a nullity, then compliance with r 259 is not required. I have indicated my disagreement with this reasoning. If I were of the view that the dismissal is unlawful, I would postpone the matter to allow a substantive application for condonation in accordance with the approach in *Valeta*'s case *supra*. I would have adopted such a course on the basis that as the application is a review compliance with r 259 is required, regardless of the nature of the illegality. The decision I have reached on the validity of the dismissal renders it unnecessary for me to pursue such a course.

The applicant was employed by the Chitungwiza Town Council as a crèche supervisor. On 23 January 1995, she was suspended on allegations that she failed to receipt monies and to give a satisfactory explanation for a shortfall which an audit had revealed. She was given until 25 January 1995 to admit



or deny the allegations. A board of inquiry was convened on 22 February 1995. It found applicant guilty of negligence in the performance of her duties. The board recommended that she be reinstated and reprimanded. But the Council resolved to terminate her services and to this end sought the consent of the Minister on 4 April 1995. The approval of the Minister is contained in a letter dated 22 August 1995. On 9 September, she received a letter from the Council advising her of her dismissal from employment. The letter is dated 31 August 1995. It states that the termination of her employment was approved by the Minister of Local Government, Rural and Urban Development in terms of s 90(9) of the now repealed Urban Councils Act. The present proceedings were instituted on 26 February 1996, approximately seven months after she was advised of her dismissal. She seeks an order declaring her dismissal a nullity.

The applicant's counsel relied on two grounds. Firstly, she states that the Council's decision to seek the ``approval'' of the Minister was not required as she was not a senior employee. She contends that as the Minister had no power to approve her dismissal, it was a nullity. In the alternative, it is argued that her dismissal is also a nullity because the Council failed to discharge her within the mandatory period of six months prescribed in s 90(14) of the Act. These contentions are of course disputed by Mr *Matinenga* for the respondent. He submitted that if the Minister's consent was required, the applicant suffered no prejudice because the substantive decision to dismiss was taken by Council. In regard to the second ground relied on by the applicant, he submitted that there was substantial compliance in that the decision to dismiss was only a month outside the 6 month statutory limit to the period of suspension. In regard to the merits, I deal firstly with the contention that in seeking the approval of the Minister,

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the first respondent acted unlawfully. The consent of the Minister was not sought ``out of abundance of caution'' as Mr *Matinenga* submitted. It was a necessary requirement in terms of the law. See *Gumbo* v *Norton-Selous Rural Council* 1992 (2) ZLR 403 (S) and *Masasi* v *PTC* 1991 (2) ZLR 73 (H), where S*mith* J stated that s 90(9) of the repealed Urban Councils Act overrode the provisions of the Labour Relations Act 1985:

> ``... In that case, however, he was dealing with a section of the Urban Councils Act [*Chapter 214*], as amended, which contained a specific provision, inserted after the enactment of the Labour Relations Act 1985, that, notwithstanding any other law to the contrary, if the consent of the Minister to whom the administration of that Act had been assigned had been obtained for the discharge of an employee of a council, the council need not obtain the consent of any other Minister or authority. The intention of the legislature to override the relevant provision of the Labour Relations Act 1985 or regulations made thereunder could not be more clearly expressed.''

Section 90(9) of the repealed Act provided that:

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> ``Notwithstanding any other law to the contrary, if the consent of the Minister has been obtained for the discharge of *any employee* of a council, the council need not obtain the consent of any other Minister or authority'' (emphasis is my own).

It is clear that, even though the applicant was not a senior employee, the consent of the Minister was required.

As to the second ground upon which it is contended that the dismissal was a nullity, it is not in dispute that the applicant was discharged when the six months statutory limit had expired. Section 90(14) provides that:

> ``Where an employee has been suspended in terms of subsection (10) or (11) -
>
> (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 the sooner;
>
> (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 allowances that would otherwise have been paid to him in respect of the period of his suspension, less any allowance paid to him in terms of paragraph (b).''

Accordingly in terms of the above provision, the suspension lapsed when the six month period expired. I cannot accept the argument that there was substantial compliance.

The effect of the provision is that once the six month period of suspension had run and lapsed, the applicant became entitled to her reinstatement and to the full amount of her salary and allowances that would have otherwise been paid to her during her period of suspension.

Does non-compliance with s 90(14) nullify the dismissal? I do not think so. The council does not have to suspend an employee whom it has resolved to dismiss. It may dismiss with or without notice. The provision in terms of which applicant was suspended provided that:

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``(10) If it appears to a senior official that any employee of the council who is not a senior official has been guilty of such conduct that is desirable that that senior official should not be permitted to carry on his work, he -

(a) may suspend the senior official from office and require him forthwith to leave his place of work.''

Provision is then made for an inquiry to be held, leading to a decision by the council, after considering the results of the inquiry, on whether to lift the suspension or to discharge. If the council decided to discharge, it would then have to obtain the consent of the Minister. In the instant case, the council decided to discharge, and sought the consent of the Minister. The Minister approved the discharge. But it was after the six month period had elapsed. It is evident, therefore, that the decision to suspend is taken for reasons of practical convenience and, to facilitate an inquiry in appropriate case. The



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council could have dismissed the applicant without suspending her, subject of course to the Minister's consent.

In these circumstances, the fact that the applicant's suspension lapsed by operation of law, does not affect the validity of the dismissal proceedings which were regular in all respects. I find therefore that the applicant's dismissal was lawful.

I would therefore dismiss the application, but order that applicant be paid her full salary and allowances from the date of her suspension, up to the date of receipt of the Minister's consent.

In the result, I would order as follows:

1. That the application is dismissed with costs.

2. That first respondent pays to applicant her full salary and allowances, from the date of her suspension to 9 September 1995.

*Makarau & Gowora,* applicant's legal practitioners

*Scanlen & Holderness,* first respondent's legal practitioners



## MASEDZA & ORS *v* MAGISTRATE, RUSAPE & ANOR 1998 (1) ZLR 36 (HC)

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

Devittie J

Application for order to stop criminal proceedings

3 December 1997 1(3) Judgment No. HH-181-97

### Flynote

Criminal procedure - review - uncompleted proceedings - refusal by judicial officer to recuse himself -

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review of decision - power of superior court to intervene in unterminated criminal proceedings - whether court can set aside wrong interlocutory decision on review

## Headnote

The applicants were being prosecuted for a criminal offence in the magistrates court. During an adjournment of the proceedings, the applicants became aware of certain facts and, based on these facts, they applied for the recusal of the presiding magistrate. The magistrate refused the application. The trial was postponed to enable the magistrate's decision to be taken on review. The applicants applied to the High Court for an order stopping the criminal proceedings in the magistrates court, pending a review of the decision in relation to the application for recusal.

*Held*, that in determining the power of a superior court to intervene in unterminated criminal proceedings, a distinction must be drawn between an appeal and a review.

*Held*, further, that although appeals against conviction in the magistrates court are now heard by the High Court, there is no provision for an appeal to the High Court against an interlocutory decision in the magistrates court before the proceedings have terminated. Thus it is only after the proceedings have terminated that an appeal can be brought in which the appellant raises the issue of the correctness of the interlocutory ruling.

*Held*, further, that the power of the High Court to review the proceedings in the magistrates court is exercisable even where the proceedings in question have not yet terminated. However, it is only in exceptional circumstances that the court will review a decision in an interlocutory decision before the termination of the proceedings. It will do so only if the irregularity is gross and if the wrong decision will seriously prejudice the rights of the litigant or the irregularity is such that justice might not by other means be attained.

*Held*, further, that if in the present case the application for recusal had been well founded, the court would have been prepared to grant an order stopping the trial pending review, as no purpose would have been served by putting accused through motions of a trial that would have been abortive. If there had been a reasonable apprehension of bias then justice will have failed and it might not be attained by other means.

*Held*, further, however, that the grounds upon which recusal was requested did not give rise to a reasonable apprehension of bias and thus the application for stopping the criminal proceedings must fail.

**1998 (1) ZLR p37**

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Cases cited:

*Appel* v *Leo & Anor* 1947 (4) SA 766 (W)

*Ellis* v *Visser* 1956 (2) SA 117 (W)

*Ginsberg* v *Additional Magistrate, Cape Town* 1933 CPD 357

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*Ishmail & Ors* v *Additional Magistrate, Wynberg & Anor* 1963 (1) SA 1 (A)

*Lawrence* v *Assistant Magistrate, Johannesburg* 1908 TS 525

*McComb* v *Assistant Resident Magistrate & A-G* 1917 TPD 717

*Metropolitan Properties Co (FGC) Ltd* v *Lannon & Ors* [1969] 1 QB 577

*Ncukutwana* v *Acting Additional Magistrate, Lady Frere* 1968 (1) SA 140 (E)

*Public Utilities Commission, District of Columbia* v *Pallack* 343 US 451 (1952)

*Rascher* v *Min of Justice* 1930 TPD 810

*R* v *Silber* 1952 (2) SA 475 (A)

*S* v *Bailey* 1962 (4) SA 514 (C)

*S* v *Burns* 1988 (3) SA 366 (C)

*S* v *Herbst* 1980 (3) SA 1026 (C)

*S* v *Radebe* 1973 (1) SA 796 (A)

*S* v *Tekere* 1980 ZLR 441 (A)

## Case Information

*G C Chikumbirike*, for the appellants

No appearance for the respondents

## Judgment

**DEVITTIE J:** In this application, an order was sought stopping criminal proceedings in the magistrate's court pending a review of the refusal by first respondent to recuse himself. The matter came before me by way of an urgent application. The application was not served on the first and second respondents. The applicants' legal practitioner stated in his certificate of urgency that there was insufficient time to serve the application as the trial was due to continue later that day. I dismissed the application and indicated that my detailed reasons would follow.

As this application raises questions of some importance regarding the power of a superior court to intervene in unterminated criminal proceedings, this judgment is not confined to the narrow grounds on which I dismissed the application.

In determining the power of a superior court to intervene in unterminated criminal proceedings a distinction must be drawn between an appeal and a review. Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed p 932 explain the distinction:

> ``The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or

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rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not a review,



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upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity."

Where, in unterminated proceedings, an interlocutory decision is sought to be set aside on grounds that the court has made a wrong decision in the proper discharge of its functions the appropriate procedure is by way of appeal. The general principle is that an appeal will be entertained only after conviction. In *Ellis* v *Visser* 1956 (2) SA 117 (W) at 119 MURRAY J (as he then was) applied the distinction between ``review'' and ``appeal'' grounds in proceedings to set aside a magistrate's decision to overrule a plea that the prosecutor had no title to prosecute.

``The position I have to deal with now is one where the regional magistrate is properly seized of a case and has given a considered judgment on a matter properly placed before his court by way of plea. The normal course therefore is for the accused to await the result of his trial on the merits and if the conviction follows to appeal thereafter not to this court but to the provincial division, where a quorum of two judges is required. There is no allegation or suggestion that the regional magistrates court had no jurisdiction or that the regional magistrate was personally interested in the issue, or actuated by malice or bias. There is no allegation that any irregularity, gross or otherwise, occurred in the hearing of the plea, or that there was any improper rejection or admission of evidence. It is clear from a number of cases (I need only refer to *Doyle* v *Shenker & Co Ltd* 1915 AD 233) that the incorrectness of a judgment based on an erroneous view of the law does not constitute a gross irregularity; so that even if this court possesses jurisdiction to review regional magistrates court proceedings (and as indicated above it does not) then - as indicated - no grounds for the exercise of the power are set forth in the present application.

That an appeal to the appellate tribunal after conviction is a normal course is clear from several cases which have been cited before me in argument and I propose to refer very briefly to a few of them.''

The power of a superior court to entertain an appeal in pending criminal proceedings is governed by statute. One looks therefore to the relevant statutory provisions to determine the court's jurisdiction to entertain appeals against interlocutory orders.

Prior to the enactment of the High Court Act [*Chapter 7:06*] the Supreme Court did not have jurisdiction to entertain appeals against interlocutory decisions by the High Court in criminal proceedings. In *S* v *Tekere* 1980 ZLR 441 the accused faced charges of murder and attempted murder. He raised a special plea to the jurisdiction of the court, relying on s 4 of the Indemnity and Compensation Act 1975. The trial judge ruled that the accused should plead to the indictment and that the question whether they fell within the terms of the Indemnity Act would be decided together with all the issues which arose from the plea of not guilty. The judge's ruling was taken on appeal. F*ieldsend* CJ ruled that the Appellate Division (now the Supreme Court) had no jurisdiction to entertain a criminal appeal against interlocutory decisions. At p 444 the learned CHIEF JUSTICE stated:



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``Criminal appeals from the General Division are dealt with primarily in s 18 of the Act. This limits the right of appeal to cases where there has been a conviction. Although subs (3) of s 18 provides for an appeal by the Attorney General on a point of law decided by the General Division, there is a proviso to the effect that the decision of the Appellate Division on any such appeal shall in no way affect the finality of the judgment of the General Division in a case so brought on appeal.''

The High Court Act has since been amended. Jurisdiction has been conferred on the Supreme Court, subject to leave being granted, to entertain appeals against interlocutory matters. Section 44(5) of the High Court Act [*Chapter 7:06*] provides as follows:

``Subject to the rules of court, where a judge of the High Court has made an interlocutory order or given an interlocutory judgment in relation to any criminal proceedings before the High Court -

(a) the person against whom the criminal proceedings are being or will be brought; or

(b) the Attorney General;

may, with the leave of a judge of the High Court, or if a judge of that court refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against the interlocutory order or interlocutory judgment.''

In *Tekere*'s case *supra*, *Lawrence* v *Assistant Magistrate of Johannesburg* 1908 TS 525 was cited with approval. The facts of that case were that the accused raised a plea objecting to the territorial jurisdiction of the court. The trial magistrate overruled the objection. An application was made to interdict the continuation of the proceedings before the magistrate's court. INNES CJ held:

``This is really an appeal from the magistrate's decision upon the objection and we are not prepared to entertain appeals piecemeal. If the magistrate finds the applicant guilty, then let him appeal, and we shall decide the whole matter. There has been no authority quoted which would justify our interference under these circumstances.''

In regard to appeals from the magistrate's courts, no provision is made for interlocutory remedial procedures. In terms of the amendment to s 60 of the Magistrate's Court Act [*Chapter 7:10*] by Act 9 of 1997, all appeals from the magistrate's courts in criminal proceedings now lie to the High Court. Prior to that amendment, appeals from the magistrate's courts lay to the High Court only in respect of appeals against sentence. Section 60 of the Act now provides that:

``Subject to this section and any other enactment, any person who is convicted of any offence by a court may appeal to the High Court against the conviction, and additionally, or alternatively, any sentence or order of the court following upon such conviction ...''

The position has always been that the right of appeal against an interlocutory decision of a magistrate's court is limited to cases where there has been a conviction. The justification has been stated in several case authorities. In *Ellis* v *Visser & Anor supra*, MURRAY J stated at p 124:

``If the applicant's contention in this case is correct, then in every one of these cases where a decision is taken by a magistrate there would be just as much reason as in the present case



for the accused person to claim that this matter must be decided *in limine* without awaiting the

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results of the merits of the case. The result would, I think, create chaos - one envisages a succession of appeals from the Local Division to the Provincial Division and the Appellate Division, whereas it is desirable that the actual merits should be speedily disposed of; and any decisions which are wrong in law should be corrected in the ordinary way by appeal, as there can be no miscarriage of justice, no abuse of process of the court, if the ordinary procedure is followed."

The applicants in this case seek to invoke the review jurisdiction of the court in unterminated criminal proceedings. I turn therefore to consider the power of the High Court to review an interlocutory decision in unterminated criminal proceedings. Section 26 of the High Court Act deals with reviews from the magistrates courts. It does not limit the right of appeal to cases where these has been a conviction. But it is not every type of irregularity that will justify the court intervening by way of review. *McComb* v *Assistant Resident Magistrate & Attorney-General* 1917 TPD 717 was a case where the magistrate had refused to allow certain questions to be put to a State witness. The matter was postponed in order to allow an application to be made for a *mandamus* that the magistrate allows the questions. This is what the court said at 718:

> ``Moreover, as pointed out by my brother GRWGOROWSKI, if the court is called upon to intervene whenever a magistrate disallows a question in cross-examination, it might protract the hearing of the case indefinitely. After having got the court's ruling on the question, when the matter comes up before the magistrate again, the attorney may wish to put other questions which the magistrate deems wholly irrelevant and the magistrate may disallow them, and an application may again be made to this court for a *mandamus* to compel the magistrate to allow the questions. That only shows how undesirable it is for the court, in the absence of good reasons, to intervene in the middle of (or rather, as in this case, at the beginning) of criminal proceedings upon an application of this nature."

In *Ishmael & Ors* v *Additional Magistrate, Wynberg & Anor* 1963 (1) SA 1 (A) the applicants faced criminal charges under a proclamation in terms of the Group Areas Act. This prohibited Indians from occupying an area reserved for Coloured occupation. They applied for a stay of proceedings pending a decision on an application in separate proceedings, to have the proclamation declared null and void. The magistrate refused the application. His decision was taken on review before the Cape Provincial Division on the ground of gross irregularity. The application for review was dismissed. On appeal before the full Bench of the Appellate Division, the applicants contended that the refusal to stay the proceedings was a gross irregularity, in that the magistrate had improperly exercised his discretion in failing to take into consideration that the only defence they had was the invalidity of the proclamation - and that they would suffer prejudice if they were convicted and the proclamation was subsequently declared invalid in the separate proceedings they had instituted. Secondly, the applicants argued that the





refusal to stay proceedings was a gross miscarriage of justice because their conviction under the Group Areas Act would lead to their eviction - and this would not be affected even if the proclamation was subsequently declared invalid in the civil application.

STEYN CJ at p 4 declined to intervene in these words:

> ``It is not every failure of justice which would amount to a gross irregularity justifying intervention before

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completion. As was pointed out in *Walhaus & Ors* v *Additional Magistrate, Johannesburg* 1959 (3) SA (A) at p 119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate's decision under appeal at a stage when no appeal lies.

Although there is no sharply defined distinction between the illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A superior court should be slow to intervene in unterminated proceedings in a court below and should, generally speaking, confine the exercise of its powers to `rare cases where grave injustice must otherwise result or where justice might not by other means be attained' (*Walhaus*' case *supra* at p 120)."

In *Ginsberg* v *Additional Magistrate of Cape Town* 1933 CPD 357 the magistrate had overruled an objection that the charge put to the accused did not constitute an offence in the law of the Cape. On review, an application was made for an order ordering the magistrate to strike out the charges objected to. GARDINER JP stated at 360:

``Now as a rule the court's power of review is exercised only after termination of the criminal case, but I am not prepared to say that the court would not exercise that power, or, at any rate, a similar power, and grant a *mandamus* even before the termination of a case, if there were gross irregularity in the proceedings."

In *Ncukutwana* v *Acting Additional Magistrate, Lady Frere* 1968 (1) SA 140 the magistrate's refusal to allow defence counsel to use a device to record the evidence in the applicant's trial was taken on review. This was held to be a gross irregularity justifying interference in pending proceedings:

``In my view, the magistrate's order in this case is plainly wrong and unreasonable and the only question is whether the court should interfere at this stage. I think it must do so. The effect of the order is to deny the applicant his right to have what he considers the best presentation of his defence. If that is so, intervention at this stage is necessary. If relief is refused at this stage, the applicant is left to seek redress if and when he is convicted. It may then be impossible for him to show that a failure of justice has resulted from the irregularity. That he must show in view of the provisions of s 103 (4) of Act 32 of 1944. In short, the prejudice is apparent now but may not be and probably will not be demonstrable after conviction. This is, therefore, in my view one of the rare cases where the court must intervene in unterminated proceedings because `justice might not by other means be attained'."

In *Rascher* v *Minister of Justice* 1930 TPD 810 KRAUSE J held that a wrong decision by a magistrate which would seriously prejudice the rights of a litigant would justify the Supreme Court in interfering by way of review at any time during the course of proceedings. In that case, it was necessary for





the accused to know the identity of the complainant in order to prove certain defences. His application to the magistrate for the disclosure of the complainant's name was declined. He applied to the Supreme Court for an order that the Minister of Justice make the disclosure. It was held that, because of the exceptional circumstances of that case, the order prayed for should be granted.

The principle that emerges from the foregoing is that a superior court will exercise its review jurisdiction to intervene in unterminated criminal proceeding where the irregularity is gross or

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where it is such that ``justice might not by other means be attained''.

The factual background to the present application is as follows. The applicants are members of a religious sect. They faced charges of public violence. The charges arise from a violent altercation between the complainants and the applicants. The complainants are members of the same sect. The applicants' trial was due to commence on 16 June 1997 before the provincial magistrate at Rusape. At the commencement of the trial and before the charges were put to the applicants, their counsel applied for the recusal of the trial magistrate. He argued that there was a reasonable likelihood of bias. He relied on the ground that in a previous bail application, the trial magistrate had made adverse findings of credibility against some of the applicants. In those bail proceedings, oral evidence had been led to determine whether there had been a breach of the conditions of bail. The breach alleged was that the applicants had, whilst on bail, committed acts of public violence involving the same complainants on the charges that they were facing. At the conclusion of that hearing the magistrate had estreated bail and remanded the applicants in custody.

In the application for recusal on the above grounds, the trial magistrate recused himself but gave a direction that the trial would proceed on that day at 2.15 pm, before a different magistrate.

The court reconvened later that morning before the first respondent. He too was faced with an application for recusal. The grounds on which the application was based are as follows. The first ground relied on was the allegation that the first respondent had exhibited bias against the applicants in imposing a default fine at a previous remand hearing. It is common cause that the applicants and their counsel had arrived late for the remand hearing. The likelihood of bias was sought to be inferred from the decision to impose a default fine. It was suggested that this gave an appearance of bias because the magistrate had been given a reasonable explanation for the default. In elaborating this ground applicants' counsel in his founding affidavit stated that -

> ``An arrangement had been made with the prosecutor in charge of Rusape to have the





> remand proceedings of the applicants to start at 11.30 am on 16 April 1997. I proceeded to Rusape and had a breakdown of my motor vehicle at Macheke. I made communication with my office who in turn communicated with the prosecutor to advise him of the little mishap I had on the way and that I was on my way but would not make it on time. In the meantime, the applicants had also had a breakdown of their bus some 40 km or so before Rusape. They did not have access to any communication facilities as I had and could not phone the prosecutor or any of the officials. They however arrived at about the time the matter was being dealt with by the magistrate. I also arrived, apologised to the court for the delay and tendered the explanation for the delay. The prosecutor did not dispute the arrangement which had been made and was at a loss why he had called the matter before the court with the information which had been communicated to him. He however did not ask the court to penalise the applicants as he accepted or must be taken to have accepted the explanation for their non-timeous appearance.
>
> However, despite the decision or approach by the State, the learned magistrate went into a diatribe of the powers of the court and how it was only he who could change the time for the remand. It was pointed out to him that the applicants and their counsel would not know that the arrangement made with the State had not been communicated to the presiding magistrate ...

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> The presiding magistrate *mero motu* proceeded to fine the accused persons $50. It was pointed out to him that by so doing he was showing total bias against the applicants or if it was not bias it was so unreasonable to have come to that conclusion that a reasonable man would not be blamed for coming to the conclusion that such behaviour exhibited bias. This is the position which confronted the accused persons when they realised that the first respondent was to preside at their trial. They inevitably have to make an application for his recusal."

The second ground relied on was that the first respondent had knowledge of the findings of credibility made in the bail proceedings conducted by the trial magistrate who had recused himself in the first application for recusal. The first respondent declined to recuse himself. I was not apprised of the reasons for his decision. He adjourned the trial to the following day, 17 June at 2.15 pm. On the morning of 17 June at 11.00 am, the present application was placed before me. The order sought was in the following terms:

1. that the trial at Rusape set down for 2.15 pm today be and is hereby stopped.
2. that the clerk of court be immediately ordered to send the record to the High Court for urgent review of the application made before the magistrate on 16 June 1997.
3. that the record of proceedings be brought immediately to this Honourable Court and that this court review the decision by the magistrate on 16 June 1997 not recusing himself.
4. In the event that the decision by the court is not upheld, the matter be remitted to another magistrate.

Before I deal with the merits of the application for recusal I wish to make the following observations. The application was brought as an urgent chamber application some five hours before the criminal trial was due to





resume. Because of the haste with which the application was brought, the application was not served on the first respondent, and his reasons were not placed before me. It seems to me that the proper course to adopt was to make an application before the first respondent to adjourn the proceedings pending an application for a review of his decision. If the first respondent declined to adjourn the proceedings, it would then have been proper to make the application in the present form.

The second observation I wish to make is called for because of the disparaging references to the first respondent in the founding affidavit. Judicial officers must be accorded dignity. The applicants' legal practitioner may wish to heed the remarks of SCHREINER JA in *R* v *Silber* 1952 (2) SA 475 (A) at 481:

> ``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 so long as it is being honestly exercised. But if the right is abused and if, under the guise of an application for recusal, the applicant is in truth insulting the court wilfully, summary committal may be appropriate.''

It is settled law that in an application for recusal the court is not concerned with actual bias - it is concerned with whether an appearance of bias would be created in the mind of a reasonable person apprised of all relevant facts. That was the test applied in *S* v *Bailey* 1962 (4) SA 514

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(C). The facts were that the accused, during the adjournment of the trial, became aware of certain facts and applied for the recusal of the magistrate. The application was declined. The matter was then postponed to enable the decision of the trial magistrate to be taken on review. One of the grounds on which the recusal was sought was that the trial magistrate had personal knowledge of some of the issues which he had to try. JENNETT JP approached the matter in this way at p 517:

> ``The test to be applied is not actual bias but whether there is, by virtue of Mr Midgley's knowledge, a real likelihood of bias, or whether a reasonable man may form the impression that the trial will not be a fair one ...
>
> In terms of the decision in *R* v *T* 1953 SA (2) 479 (A), a judicial officer is not disqualified from trying a case by reason of the fact that he has already tried a case in which he has heard and evaluated evidence which will be produced in the later trial.
>
> In the present case the position is quite different. Mr Midgley has actual knowledge of many of the facts which will be in dispute before him. No amount of judicial experience can enable a judicial officer in those circumstances to avoid allowing himself, quite unconsciously, to be affected in deciding what evidence on the various disputed facts he should accept.
>
> It seems to me therefore that in the special circumstances of the present case the test is satisfied in both respects. Also that this is a case in which the court should interfere at this stage.''

At the heart of the test for recusal lies the principle that justice should not only be done but be seen to be done. See *Appel* v *Leo & Anor* 1947 (4) SA

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766 (W); *S* v *Radebe* 1973 (1) SA 796 (A). LORD DENNING MR in *Metropolitan Properties Co (FGC) Ltd* v *Lannon & Ors* [1969] 1 QB 577 at 599 puts it succinctly:

> ``In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or to the mind of the chairman of the Tribunal, or whoever it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as unbiased as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit ...''

The first ground of recusal amounts to no more than this - that the conduct of the first respondent in imposing a default fine for the late arrival of the applicants gives rise to a reasonable apprehension of bias when regard is had to the explanation that was proffered.

One is dealing therefore with an allegation that the conduct of the proceedings shows bias, as opposed to a situation where the allegation of bias is unrelated to the conduct of the proceedings by the first respondent. If the application for recusal were well founded, I would be prepared to grant an order stopping the trial pending review, subject of course to a direction that the record of the proceedings be transcribed within a period of not more than two weeks. I would not be prepared to have the applicants go through the expense and inconvenience of a trial that may be abortive.

*R* v *Silber supra* concerned an application for recusal grounded in the main on the several rulings adverse to the accused that the trial court had made in the course of protracted

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proceedings. The trial court declined an application for recusal. The applicants' counsel appealed. The court ruled that the normal recourse where the ground of bias is related to the conduct of proceedings is by way of appeal or review after the proceedings are complete.

> ``Neither counsel has been able to find any reported case in which an application for recusal has been made in the course of a trial on the ground that the judicial officer has shown bias by his conduct of the proceedings. And this is not surprising , since the ordinary way of meeting any apparent bias shown by the court in its conduct of the proceedings would be by challenging his eventual decision in an appeal or review. Bias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the court thinks that at that stage one or the other party has the better prospects of success. It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other and, although normally it is not desirable to give such an impression outward manifestation, no suggestion of bias could ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person, least of all a person trained in the law would think of ascribing this provisional attitude to, or identifying it with, bias.''



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As I have indicated the first ground of refusal is based on an adverse ruling. It is clear from *Silber*'s case that an inference of bias cannot properly be drawn from the fact that an adverse ruling has been made. The judicial process would not function smoothly if that were the case. I find therefore that the first ground for recusal is without merit.

I do not however understand the above *dictum* to lay down the principle that where the test for recusal is satisfied and the allegation of bias arises from the conduct of proceedings (and not from facts outside the proceedings), the accused must be confined to his remedies on appeal or review. In *Bailey*'s case *supra*, the court exercised its review jurisdiction because, having found that the magistrate ought to have recused himself, there seemed no purpose in putting the accused through the motions of a trial in respect of proceedings that were abortive, if a conviction were to result. JENNETT JP expressed himself thus at p 516:

> ``In the present case, the hearing before the magistrate has lasted two days but the further hearing is expected to continue for a least four days. If the magistrate was wrong in refusing to recuse himself, the applicants will be put to considerable expense in respect of proceedings that will be abortive if the conviction results. Interference is therefore desirable if the application for recusal is well founded.''

It is true that the allegation of bias in *Bailey*'s case was unrelated to the conduct of proceedings by the magistrate. I do not think that the distinction is material. If gross irregularity is revealed in the conduct of the proceedings giving rise to a reasonable apprehension of bias, then justice has failed and, to use the words in *Walhaus*'s case *supra*, ``it might not by other means be attained''. It would be an injustice to confine the accused to his remedy on appeal and thus put him through the motions of a trial and appeal proceedings in cases where the misconduct in the course of a trial satisfies the test for recusal.

In *S* v *Burns* 1988 (3) SA 366 (C) the accused, during the course of the trial, filed an application for the recusal of the trial magistrate. He alleged bias, partiality, the hostile attitude of the bench and the extreme difficulty of trying to cross-examine in the face of the impression given by the

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court that cross-examination should be hurried along. The trial magistrate stopped the proceedings and arranged for a transcript of the proceedings to be sent on review. CONRADIE J considered that the matter ought not to have been brought on review. The proceedings, he held, were not reviewable in terms of the relevant statute because the accused had not been convicted. He nonetheless recognised that the court had the power to interfere with unterminated proceedings in a magistrate's court in the exercise of its review jurisdiction.

> ``It will only exercise this power in rare instances where grave injustice might otherwise result or where justice might not otherwise be attained by other means. I do not believe that



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> the accused were suffering any prejudice which, if it existed, could not be adequately redressed upon the termination of the trial.''

With respect to CONRADIE J, if the record of the proceedings demonstrated misconduct such as would lead right-minded people to conclude that the magistrate was biased, then the test for recusal is satisfied. In such circumstances, it would be wrong to decline to intervene. In the *Metropolitan Properties* case *supra* at 599 LORD DENNING said:

> ``There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: `The judge was biased'.''

If an allegation of bias has been proved the proceedings are a nullity. Therefore it would be unjust to require that the accused go through the motions, if he is convicted, of the sentencing process, followed by an appeal or review in respect of proceedings proved to be abortive at the stage of the application for recusal. Thus, in *S* v *Herbst* 1980 (3) SA 1026 (C), where the facts showed that the magistrate's conduct of the proceedings might have created the impression ``in the mind of the right-minded layman that he was unfavourably disposed towards the applicant'', the court intervened in unterminated proceedings by setting aside the proceedings and referring the matter for hearing *de novo* before another magistrate. It was not necessary, the court stated, to show that the magistrate was in fact biased. At p 1035 EKSTEEN J stated:

> ``As I have shown, the magistrate's actions in questioning the applicant, the nature of his questions and the manner in which they were put, were not only unwarranted in law but also amounted to unfairness to the applicant at the very outset of his case and before any evidence had been led at all. In the light of these considerations, I am of the view that the magistrate ought to have recused himself.''

At p 1036 the learned judge stated:

> ``In the interests of the administration of due and fair justice, and to ensure that that confidence in which justice should always be rooted in no way be shaken in the minds of right-thinking persons, I do not think that I should refuse to entertain this review at the present time.''

The confidence which right-minded persons have in the administration of justice would be undermined if proceedings that were abortive by virtue of an appearance of bias having been demonstrated were permitted to continue to finality. I would cite the following statement of

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FRANKFURTER J in *Public Utilities Commission of the District of Columbia* v *Pallack* 343 US 451 (1952) at 466:

> ``The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal



DEVITTIE J

> of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through ... professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact.''

The second ground of recusal is that the first respondent had knowledge of the bail proceedings in which a different magistrate had made adverse findings of credibility against the applicants. I shall assume that the first respondent had knowledge of those proceedings.

In *R* v *T* 1953 (2) SA 479 (A) the question of recusal to which the Appellate Division had to apply its ingenuity arose from charges preferred against a ``non-European woman'' of contravening the Immorality Act. The allegation was that she had permitted the appellant, a ``European male, to have carnal intercourse with her''. The magistrate had convicted the woman in earlier proceedings and thereafter refused to recuse himself from trying the case against the man in which the convicted female was a witness. On appeal, it was argued that the magistrate should have recused himself. It was contended that the likelihood of bias arose because the magistrate would tend to come to the same decision against the appellant as he had against the woman because of his reluctance to admit that he had come to a wrong decision in the first trial. Secondly, that his sense of fairness would rebel against acquitting the appellant after he had convicted the woman. C*entlivres* CJ stated at p 483:

> ``A magistrate is a trained judicial officer and he knows that he must decide every case which comes before him on the evidence adduced in that case. He knows that a decision on the facts in one case is irrelevant in respect of any other case and that he must confine himself to the evidence adduced in the case he is actually trying. It would be wrong to assume that because the magistrate convicted the woman he would not weigh up carefully in his mind the evidence adduced in the case against the European man.''

Applying the principle in the above case, I am satisfied that in the minds of right-thinking people, the fact that the first respondent had knowledge of the findings of a different magistrate in bail proceedings, would not give rise to a perception that the first respondent would be biased.

It is for these reasons that I dismissed the application.

*Chikumbirike & Associates*, legal practitioners for the applicants



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## HENKS CONSTRUCTION (PVT) LTD *v* ZIMBABWE DEFENCE (PVT) LTD 1998 (1) ZLR 49 (SC)

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

Korsah JA, Ebrahim JA & Muchechetere JA

Special case stated by arbitrator

28 October & 19 December 1997 Judgment No. S-224-97

### Flynote

Arbitration - law governing proceedings - proceedings commenced before coming into effect of Arbitration Act 1996 - whether governed by new Act or by or by Arbitration Act [Chapter 7:02] - award - interest payable - whether payable from date of dispute

### Headnote

Arbitration proceedings were commenced whilst the old Arbitration Act [*Chapter 7:02*] was in effect. In terms of s 6(2) of the new Act (the Arbitration Act 1996) the parties were allowed to continue such proceedings in terms of the old Act. This they did.

After the arbitrator had made his award, the parties were unable to agree on whether or not interest was payable on the award from the date of the dispute and, in terms of s 31 of the old Act, the question of interest was referred to the Supreme Court for determination.

*Held*, that the Arbitration Act [*Chapter 7:02*] had not changed the common law principles that were applicable in relation to arbitration. It only provided a better and more efficient means of having disputes submitted to arbitration and the enforcement of the awards of arbitrators. As the Arbitration Act was not intended to oust the common law, it must be an implied condition that the arbitrator was to resolve the dispute between the parties in accordance with the existing law of contract.

*Held*, further, that it did not automatically follow that the arbitrator was imbued with the discretionary power to award interest. Under the common law prior to the 1994 amendment to the Prescribed Rates of Interest Act, the court had no power to allow interest on illiquid claims, save from the date of judgment. The statutory provision that amended the law so as to provide for the payment of interest from the date that the cause of action arose came into effect in 1994 whereas the cause of action in this case had arisen in 1990 when the matter was referred to arbitration. The question was thus whether this legislative provision had retrospective effect.

*Held*, further, that it is presumed that the legislature does not intend to make any change to the existing substantive law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question. The effect of the 1990 amendment to the Prescribed Rate of Interest Act was to alter the substantive common law in a material respect and it was not merely procedural in effect. The amendment contained no language that indicated that this provision had, expressly or by necessary implication, altered the existing common law with retrospective effect.

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*Held*, therefore, that the common law still applied in respect of the matter of interest and as under the common law interest was only claimable from the date of judgment, the claim for interest from the date of the dispute must fail.



KORSAH JA

Cases cited:

*Adampot (Pty) Ltd* v *Admin Tvl* 1989 (3) SA 800 (A)

*Athlumney* Re [1898] 2 QB 547

*Bater & Anor* v *Muchengeti* 1995 (1) ZLR 80 (S)

*Chandris* v *Isbranstein Moller Co Inc* [1950] 2 All ER 618 (CA)

*CIR* v *First National Industrial Bank Ltd* 1990 (3) SA 641 (A)

*Craxfords (Ramsgate) Ltd* v *Williams & Steer Mfg Co Ltd* [1954] 1 WLR 1130

*Doleman & Sons* v *Ossett Corp* [1912] 3 KB 257 (CA)

*Gardner* v *Lucas* (1878) 3 App Cas 582

*Hama* v *NRZ* 1996 (1) ZLR 664 (S)

*R* v *Leach* [1912] AC 305

*Nkuke* v *Kindi* 1912 CPD 529

*River Wear Commissioners* v *Adamson* (1876) 1 QBD 546

*Rhodesia Rlys Ltd* v *Mackintosh* 1932 AD 359

*Union Government* v *Jackson & Ors* 1956 (2) SA 398 (A)

*Victoria Falls & Tvl Power Co Ltd* v *Consolidated Langlaagte Mines Ltd* 1915 AD 1

*X* v *Y Co* 1979 RLR 1 (A)

*West Rand Ests Ltd* v *New Zealand Ins Co Ltd* 1926 AD 173

*Windsor Diesels (Pvt) Ltd* v *Shangani Saw Mills (Pvt) Ltd* 1969 (2) RLR 128 (G); 1969 (3) SA 145 (R)

*Zimbabwe Newspapers (1980) Ltd & Anor* v *Bloch* 1997 (1) ZLR 473 (S)

## Case Information

*A P de Bourbon SC*, for the applicant

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*J C Andersen SC*, for the respondent

## Judgment

**KORSAH JA:** This matter comes before this court by way of a special case stated by the arbitrator at the request of the parties. The background to the case is outlined in the applicant's heads of argument as follows:

> ``1. In terms of a contract concluded in 1987, the applicant was to construct various buildings for the respondent. Disputes that arose were referred to arbitration. There were various delays in dealing with the arbitration, but eventually an award was given by the arbitrator on 15 December 1995.
>
> 2. The arbitration in question was commenced whilst the Arbitration Act [*Chapter 12*], later [*Chapter 7:02*] was the law of this country.
>
> The arbitrator noted that the parties had agreed that the matter of interest should be referred to this Honourable Court (wrongly termed the High Court in the award) for decision in terms of the Arbitration Act.
>
> The law as it stood at that time provided as follows:
>
> `Section 31. *Special cases stated by umpire, referee, arbitrator or officer*
>
> Any such officer, referee, arbitrator or umpire may at any stage of the proceedings, under a reference, and shall, if so directed by the Supreme Court or a judge, state in the form of a special case for the opinion of the Supreme Court any question of law arising in the course of the reference.'
>
> 3. Section 6(2) of the Arbitration Act 1996 provides as follows:
>
> `This Act shall apply to every arbitration agreement, whether made before, on or after the date of commencement of this Act (13 September 1996), and any reference in any such agreement to the Arbitration Act [*Chapter 7:02*], shall be construed as a reference to this Act:



> Provided that, where arbitral proceedings were commenced in terms of the Arbitration Act [*Chapter 7:02*], they may be continued and completed in terms of that Act which shall, for such purpose, be deemed to continue in operation'."

The effect of this proviso, submitted Mr *de Bourbon* for the applicant, is to allow the parties herein a continuance of the arbitration, commenced before 13 September 1996, in terms of the previous law, and as if the Arbitration Act [*Chapter 7:02*] had not been repealed. The present matter is, accordingly, properly before this court and it becomes necessary, in terms of s 31 of the repealed Act, to examine the question of law that arises in the present matter.

As stated earlier, the arbitrator made his award on 15 December 1995. However, the applicant and the respondent were not able to agree on whether or not interest was payable on the award from the date of the dispute, and the final determination of the arbitral proceedings has been deferred, pending a decision by this court on that single issue.

The claim for interest arises from two awards which were made by the arbitrator. By way of explanation he said:

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(a) *Additional Preliminary and General Payments*

``I calculate that Henks Construction claimed extra P & G costs amounting to $478 282. The architect accepted $179 595 of these claims for payment. I have allowed a total of $264 652 on account of the increased volume and value of work, and another $59 786 on account of the extension of the contract period of 2.08 months, a total of $324 438, which is $144 843 in excess of the architect's measurement of $179 595.''

(b) *Method of Measurement of Road Works*

``I award Henks Construction an additional payment of $46 600, over and above the amount of $51 182 measured by the architect and relative to the net award of $90 970 sought, this being my interpretation of the amount due in terms of the SMBW.''

(c) ``An arithmetical adjustment was made to the calculations in respect of Additional Preliminary and General Expenses covering the period 10 March 1989 to 31 March 1990 which resulted in an extra payment of $506 in favour of Henks Construction.''

The position of the parties as matters stand is summed up thus in the respondent's heads of argument:

``Applicant initially claimed an additional amount of $680 706 of which respondent paid $249 000 as certified by the architect. Of the remainder of $431 706 the arbitrator awarded $191 949 and rejected $239 757. Respondent paid the amount awarded together with interest from the date of the award to the date of payment which was shortly after the award.''

I think it of paramount importance to appreciate that the Arbitration Act [*Chapter 7:02*], with which we are here concerned, made no attempt to change the common law. Nothing in its various sections is indicative of an intention on the part of the law giver to abolish the common law principles



KORSAH JA

in relation to arbitration. It only provided a better and more efficient means of having disputes submitted to arbitration and the enforcement of the awards of arbitrators: *Nkuke* v *Kindi* 1912 CPD 529; *Doleman & Sons* v *Ossett Corp* [1912] 3 KB 257 (CA); *Rhodesia Railways Ltd* v *Mackintosh* 1932 AD 359 at 371.

Arbitrators are bound to act within, and apply, the existing law to submissions made to them. The Act under consideration contains no provision for the award of interest by an arbitrator. Since the Act was not intended to oust the common law it must be an implied condition that the arbitrator was to resolve the dispute between the parties in accordance with the existing law of contract; for as TUCKER LJ reasoned in *Chandris* v *Isbrandsten Moller Co Inc* [1950] 2 All ER 618 (CA) at 621D: ``by reason of the submission, the arbitrator has been clothed with authority to deal with this matter in the same way as that in which it could have been dealt with by a court of record.'' And, pertinent to the issue under consideration at p 623A of the report the learned LORD JUSTICE expressed himself thus:

``I cannot see why any distinction should be drawn between the duty of an arbitrator to give effect to such statutes as the Statute of Limitations and his jurisdiction in his discretion to award interest. An award of interest is only a part of the damages recoverable, and adapting to the facts of this case the language of LORD SALVERSEN in the case to which I have just referred (*Ramdutt Ramkissendass* v *E D Sassoon & Co* (1929) ILR 55 Calc 1048; 98 LJ

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PC 58; 140 LT 542) - language which was approved by LORD MAUGHAM - it would read as follows:

> 'Although the Law Reform (Miscellaneous Provisions) Act 1934, does not in terms apply to arbitrations, I think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute *according to the existing law of contract*, and that every right and discretionary remedy given to a court of law can be exercised by him. To that there are certain well-known exceptions, such as the right to grant an injunction, which stand on a different footing. One of the reasons why an arbitrator cannot give an injunction is that he has no power to enforce it, but such an objection does not apply to an award of interest'."

It does not automatically follow that, in the case under consideration, the arbitrator was imbued with the discretionary power to award interest. In England the power of the court to award interest on debt or damages - ie liquid or illiquid claims - derives from the Law Reform (Miscellaneous Provisions) Act 1934, s 1(1). Under our common law, prior to the promulgation of the Prescribed Rate of Interest Amendment Act 2 of 1994, a court had no power to allow interest on damages or illiquid claims except from the date of judgment. See *West Rand Estates Ltd* v *New Zealand Insurance Co Ltd* 1926 AD 173 at 195 where KOTZÉ, JA stated the law as follows:

> ``In connection with a claim for interest, we have to consider the question of *mora,* and the distinction between an action for liquidated and unliquidated damages. Liability for the



> payment of interest through delay in the performance of his obligation or duty by the defendant may arise in one of two ways. Interest may be due from the nature of the case, where, for instance, the time for performance is fixed either by agreement or the law (*mora ex re*); or where, in the absence of such agreement, the defendant has been called upon to perform his obligation (*mora ex persona*). In the former case, no interpellation is necessary; in the latter the debtor must be formally called upon for performance. *But we must bear in mind that a defendant cannot be said to be in mora unless he knows the nature of his duty or obligation; that is to say when and how much he has to pay. Hence a claim for unliquidated damages, which have to be investigated and ascertained does not bear interest*. But, *as certum est quod certum reddi potest*, circumstances may occur to take a case out of the operation of this rule'' (emphasis added).

See also *Windsor Diesels (Pvt) Ltd* v *Shangani Saw Mills (Pvt) Ltd* 1969 (2) RLR 128 (G); 1969 (3) SA 145 (R); *Victoria Falls & Transvaal Power Co Ltd* v *Consolidated Langlaate Mines Ltd* 1915 AD 1 at 32-3; *X* v *Y Company* 1979 RLR 1 (A); *Union Government* v *Jackson & Ors* 1956 (2) SA 398 AD at 412; *Adampot (Pty) Ltd* v *Administrator Transvaal* 1989 (3) SA 800 (A) at 804 H. This common law rule was applied and not overruled in *CIR* v *First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 659.

It was contended by Mr *de Bourbon*, in reliance upon the decision in *CIR* v *First National Industrial Bank Ltd supra,* that even if interest is not payable in terms of the legislation, in law such interest is payable by virtue of the default of the creditor in meeting the demand of 8 March 1989.

My perception of the *CIR* case *supra*, is that the amount claimed by the Bank was paid by the Bank to the Commissioner under the protest that it was not due. Every payment made under protest implied that the Commissioner would be obliged to refund the sums so paid should it be found that the duties had never been due. The easy and ready ascertainment of the amount

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claimed took it out of the ambit of illiquid claims and made it a liquid claim amenable to the payment of interest thereon. The decision in that case, far from departing from the principles of the common law relating to *mora* interest was, in fact, confirmatory of those principles.

This substantive rule of the common law, that the courts have no power to award interest on illiquid claims save from the date of judgment, was effectively repealed by s 6 of the Prescribed Rate of Interest Act [*Chapter 8:10*] which provides that:

> ``(1) Subject to this section and unless otherwise agreed, every debt arising out of an unliquidated claim shall bear interest calculated at the prescribed rate on the amount of the debt *from the date when the cause of action arose*, whether or not the amount of the debt is fixed by agreement between the parties, by arbitration or by the judgment of a court."

This provision came into force on 20 May 1994.

I was party to the unanimous judgment in *Zimbabwe Newspapers 1980 Ltd & Anor* v *Bloch* 1997 (1) ZLR 473 (S) wherein this court, as then constituted,



KORSAH JA

relied on the following statement of the law to be found at p 320 of *Maxwell on the Interpretation of Statutes*:

> ``Enactments *regulating the procedure in courts are usually construed as imperative*, even where the observance of the formalities in question is not a condition exacted from the party seeking the benefit of the statute, but a duty imposed on a court or public officer when no general inconvenience or injustice seems to call for a different construction,"

in arriving at the conclusion that s 6(1) of the Prescribed Rate of Interest Act was retroactive in its operation. However, upon mature reflection, I am of opinion that s 6(1) is not a mere procedural alteration of the law. If it were, then the principle that no person has a vested right in any course of procedure would apply. L*ord* B*lackburn* succinctly stated this principle in *Gardner* v *Lucas* (1878) 3 App Cas 582 at 603 thus:

> ``Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be ...
>
> But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid - to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding - I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require reasons to show that is not the case."

See also *Craxfords (Ramsgate) Ltd* v *Williams & Steer Mfg Co Ltd* [1954] 1 WLR 1130.

On the other hand, it is presumed that the legislature does not intend to make any change in the existing substantive law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question: *River Wear Commissioners* v *Adamson* (1876) 1 QBD 546 *per* M*ellish* LJ at 534; *Leach* v *R* [1912] AC 305 *per* E*arl of* H*alsbury* at 310-311; *Bater & Anor* v *Muchengeti* 1995 (1) ZLR 80 (S) at 84G-85A.

Applying these principles to s 6 of the Prescribed Rate of Interest Act, the first thing to note is

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that under the common law the right to claim interest, or to be awarded it, on an illiquid claim did not exist. See Jacobs *The Law of Arbitration in South Africa* p 85 footnote 47b. It was introduced for the first time in this country by s 6. Its effect was not merely procedural, but to alter the substantive common law in a material aspect. Where there was before no legal right under the common law, a legal right is now born - the right to claim and be awarded interest on an illiquid claim from the date of accrual of the cause of action; the nascence of that right is to be attributed to s 6 of the Prescribed Rate of Interest Act. That courts may now award such interest may be a procedural change, but the grant of the right to claim and be awarded such interest was an abrogation of the common law principle which forbade it, and was thus an alteration in the common law of the land by the law giver. Secondly, nothing in the language employed by the draftsman exhibits an



KORSAH JA

intention by the legislature, nor is there anything from which a necessary implication may follow, that the provisions of s 6 effecting a change in the common law, are retroactive in effect. The logical conclusion is that s 6 is prospective in effect and may be invoked only in cases where the cause of action arose after the promulgation of the section.

No contention to the contrary was advanced in the applicant's heads of argument that the applicant's claim was an illiquid one. I now return to the agreement between the parties and the events giving rise to this application.

In terms of clauses 22 and 25 of the agreement concluded by the parties in 1987, the respondent was only obliged to make such payments as were certified by the architect within the period stated and thereafter, in the event of a dispute regarding the architect's certificate, when the matter is determined by the arbitrator. There is no gainsaying that the certificate of the architect was a condition precedent to any action by the contractor.

The date of practical completion was 30 March 1989. On 7 December 1990, the applicant sought a ruling from the architect in terms of clause 25 of the agreement. The final certificate was issued by the architect on 4 April 1991. However, on 16 November 1990, due to delays in obtaining the architect's final certificate, the applicant had opted to have the dispute between the parties submitted to arbitration. The matter was duly referred to arbitration on 7 December 1990. It is not in dispute that the matter was submitted to arbitration well before the coming into force of s 6 of the Prescribed Rate of Interest Act.

It was contended by Mr *Andersen* for the respondent that since arbitration is the product of agreement by the parties and not the law, the agreement of the parties cannot be supervened by an alteration in the law. As already stated, to alter a clearly established principle of the common law a distinct and positive legislative enactment is necessary: *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S). Statutes are not presumed to make any alteration in the common law save as the Act does expressly declare. Section 6 of the Prescribed Rate of Interest Act does not give any indication of retroactivity to its abrogation of the common law principle that interest does not accrue on illiquid claims except from the date of judgment. That there is, other than express statutory provision, a vested interest in the law existing at the time

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of an agreement could not have been better put than did W*right* J in Re *Athlumney* [1898] 2 QB 547 at 551-2 as follows:

> ``Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.''



KORSAH JA

*See Nkomo & Anor* v *A-G & Ors supra*; *Bater & Anor* v *Muchengeti supra*.

To put it in more graphic terms: generally speaking, whereas there is no vested right in procedure, there is a vested right in the substantive law extant at the time an agreement was entered into, unless the legislation affecting such agreement uses words that point unmistakably and by necessary implication to the contrary. So also said BOWEN LJ in Re *Cuno* (1898) 43 ChD 12 at 17:

> ``In the construction of statutes you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature.''

Since s 6 of the Prescribed Rate of Interest Act [*Chapter 8:10*] had no retrospective effect, the parties' vested rights at common law, as they existed at the time the cause of action arose in 1990, were not affected by any legislation in 1994 whose operation had not been made retroactive either expressly or impliedly.

It follows that the application for the award of interest, from the time the cause of action arose until the award was made, must fail.

The application is accordingly dismissed with costs.

I have sought the opinions of the CHIEF JUSTICE and MCNALLY JA and have obtained their permission to say that they agree with the view expressed in respect of the prospective effect of s 6 of the Prescribed Rate of Interest Act.

**EBRAHIM JA:** I agree.

**MUCHECHETERE JA:** I agree.

*Gill, Godlonton & Gerrans*, applicant's legal practitioners

*Atherstone & Cook*, respondent's legal practitioners



**S *v* JAKATA & ORS 1998 (1) ZLR 57 (HC)**

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

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Smith J

Criminal review

7 January 1998 Judgment No. HH-1-98

## Flynote

Criminal law - common law offences - public violence - elements - family altercation resulting in violence

## Headnote

There had been a family altercation during which the three accused had assaulted two females to whom they were related and had damaged some property belonging to one of the complainants. The accused had been convicted of public violence. On review:

*Held*, that the crime of public violence consists of the unlawful and intentional commission, by a number of persons acting in concert, of acts of sufficiently serious dimensions which are intended violently to disturb the public peace or invade the rights of others.

*Held*, further, that in the present case the crime of public violence had not been committed because the number of persons involved was small and the locality and nature of the quarrel was private and restricted.

*Held*, further, that it was not competent on a charge of public violence to convict the accused of both assault with intent to do grievous bodily harm *and* malicious injury to property. A conviction for only one of those crimes could be substituted on a charge of public violence and in this case a conviction for assault with intent to do grievous bodily harm should be substituted.

Cases cited:

*R* v *Cele* 1958 (1) SA 144 (N)

*R* v *Nxumalo* 1960 (2) SA 442 (T)

## Judgment

**SMITH J:** The accused were charged with public violence. They pleaded guilty and were convicted. The accused, who are all related to each other, assaulted the two complainants, to whom they are also related, in the morning of 8 November and then later in the day they damaged some property belonging to one of the complainants and again assaulted the two complainants. The complainants are two females, one aged 32 years and the other 70 years. The amount of the damage caused to the property was $2 515.

The record of proceedings shows that the trial was very brief. The accused were asked if they understood the statement of agreed facts and agreed with it and they said they did. They were then asked if they had assaulted the complainants and damaged property valued at $2 515. They again agreed that they had. When asked why, they said that the son of the older of the two



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complainants, who was married to a sister of the four accused, had assaulted their sister. The accused were then convicted and were each sentenced to 15 months' imprisonment.

In my opinion, the conviction is improper. The accused should have been charged with four counts of assault with intent to do grievous bodily harm and with malicious injury to property, but not public violence. According to the learned author of *South African Criminal Law and Procedure* 3 ed vol II at p 74, public violence consists of the unlawful and intentional commission, by a number of people acting in concert, of acts of sufficiently serious dimensions which are intended violently to disturb the public peace or to invade the rights of others. It penalises persons who are part of a crowd or mob which violently disturbs the peace or interferes with the rights of others. It is essential, therefore, that there must be a crowd or mob. To my mind, a group of four people would not be sufficient to constitute a crowd or mob. As mentioned at p 76 of that work, public violence may overlap with assault, malicious injury to property, arson and other crimes but it is the ``dimension'' factor and the requirement of a ``number of people acting in concert'' which serve to indicate when conduct amounting to the lesser ingredient offences move up into the category of public violence.

The essential elements of the crime of public violence are (a) unlawfulness; (b) a number of people acting in concert; (c) acts intended forcibly to disturb the public peace or security or to invade the rights of others; (d) which are of sufficiently serious dimensions; (e) intention. At p 83 of *South African Criminal Law and Procedure* 3 ed vol II the author refers to several cases where it was held that groups of 3, 4, 6 and 8 persons were held to be insufficient. In *R* v *Nxumalo* 1960 (2) SA 442 (T), ten was considered a borderline number, though the court doubted whether ten could be called ``a considerable number of persons''. There have been cases where groups of 3 or 4 persons were held to be sufficient but, in those cases where less than 10 people were held sufficient, the courts have gone on to hold that the ``dimensions'' of the affair were insufficient to take it out of the category of assault and into that of public violence. In *R* v *Cele* 1958 (1) SA 144 (N) at 152-3 the following two propositions were enunciated with reference to public violence in general:

> ``(3) if the numbers involved are small and the locality and the nature of the quarrel is private and restricted, the acts will not constitute public violence ...; conversely
>
> (4) ... acts, which if committed by individuals might be regarded as mere assaults, whether venial or otherwise, will, if they assume gravely dangerous proportions because of the numbers involved, take on the quality of public violence.''

In this case, the number of persons involved was small and the locality and nature of the quarrel was private and restricted. Accordingly, I consider that





the offences committed by the accused cannot be elevated into the category of public violence.

The convictions of the accused on the charge of public violence cannot stand. Unfortunately, convictions for both assault with intent to do grievous bodily harm *and* malicious injury to

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property cannot be substituted. The accused can only be convicted on one count. Apparently the complainants were not seriously injured. According to the outline of the State case the complainants were assaulted with ``clenched fists and booted feet'' and, as a result of the assault, the younger complainant sustained swollen legs and an open wound on the right arm and the other complainant sustained an open wound on the lower lip. However, the trial magistrate did not ask any questions to elucidate the gravity of the assaults, what force was used or the extent of the injuries caused. It is not clear what caused the swollen legs of the one complainant and the nature or cause of the open wounds referred to is not disclosed. There are no medical reports in the record, but in his judgment the magistrate said that when the complainants realised that they might be severely assaulted they fled.

As I have said, the accused should also have been charged with malicious injury to property and part of the sentence then suspended on condition they paid compensation for the damage caused. Unfortunately, that cannot be done at this stage. The complainants will have to be left to their civil remedies.

The convictions and sentences are set aside and the following substituted:

> ``Each accused is convicted of assault with intent to do grievous bodily harm and sentenced to 4 months' imprisonment of which 3 months' imprisonment is suspended for 5 years on condition that the accused does not, within that period, commit any offence involving assault for which he is sentenced to imprisonment without the option of a fine.''

As the accused have served the effective term of imprisonment they are entitled to their immediate release from prison. A warrant of liberation has been issued.

**BARTLETT J** agrees.

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## MAHOMED *v* DIRECTOR OF CUSTOMS & EXCISE 1998 (1) ZLR 60 (HC)

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

Adam J

Civil application

11 September 1997 &

14 January 1998 Judgment No. HH-11-98

### Flynote

Customs and excise - duty - rebate of duty -- - immigrant's rebate - motor vehicle donated to immigrant before arrival in Zimbabwe - not subject to duty

### Headnote

The applicant married a Zimbabwean resident in July 1996. The wedding ceremony was held in India. Before the marriage took place, the applicant's husband's uncle had offered to buy her a vehicle of her choice as a wedding present. The vehicle selected was a Mercedes Benz. The

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uncle made payment for the car and it was shipped out from Germany. As she was an immigrant to Zimbabwe, the applicant applied to the respondent for a rebate of duty on the car, on the grounds that it was part of her effects as an immigrant. The respondent refused the application, saying that for any goods to qualify for the immigrants rebate they must have been owned and fully paid for by the immigrant before his arrival in Zimbabwe. Donated goods did not qualify.

*Held*, that the immigrant's rebate would apply to personal and household effects and other goods acquired in the form of a prize or a gift; such goods would be regarded as belonging to the immigrant even though he had not paid for them himself. The purpose of the regulations as they relate to rebate of duty on immigrant's effects is that the effects must have been in physical existence and that the goods were fully paid for, in the sense that no payments are outstanding. It is not necessary that the effects must be paid for by the immigrant personally; ownership can be acquired in numerous ways.

Legislation referred to:

Customs and Excise (General) Regulations 1991 (SI 344 of 1991), s 86(2)

## Case Information

*A J Dyke*, for the applicant

Mrs *L Goredema*, for the respondent

## Judgment

**ADAM J:** On 18 April 1996, the uncle of the applicant's husband to be had his account debited by his bank in favour of Mercedes Benz AG in Stuttgart, Germany. On 11 July 1996, the applicant entered into a marriage in India and again on 29 August 1997 before a marriage officer at the magistrates court in Harare. On 8 October 1996, the applicant wrote to the respondent that she had been recently married, been granted residence in Zimbabwe, had been presented upon their marriage with a Mercedes Benz E320 as a wedding gift



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by her uncle and that the vehicle was for her personal use and so she requested that the vehicle be cleared under immigrants rebate. On 18 December 1996, the applicant was informed on behalf of the respondent that because she had not paid for the vehicle but had got it as a gift their Regulations dictate that the vehicle must have been fully paid for by the immigrant and therefore gifts were excluded. On 19 December 1996, on the applicant's behalf, her then legal practitioners requested that the respondent reconsider his decision especially in light of the fact that she became owner of the vehicle in April 1996, which she obtained solely for her own use, that whether her uncle, father or mother bought it for he did not detract from the fact that the property became hers for her own use, that she was entitled to bring the vehicle on the immigrants rebate and that she owned it at least 4 months prior to her marrying a Zimbabwean. On 18 February 1997, the respondent replied that as there were no new facts advanced he was

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not prepared to vary the decision given as the vehicle did not qualify for rebate under the Customs & Excise (General) Regulations because the applicant did not pay for the vehicle and added:

> ``One other observation is that in her letter to their Department dated 8 October 1996, Mrs Bano Mahomed said `upon our marriage I was presented with the vehicle as a wedding gift'. The vehicle was bought in April 1996 and the marriage took place on 29 August 1996. This to me does not make sense and your client and the husband's uncle must tell you the truth so we do not waste time.
>
> As far as their Department is concerned, duty is payable on this vehicle.''

On 7 March 1997, the applicant's then legal practitioners responded that the applicant's customary or religious marriage took place in April and at the time the vehicle was given to her as a present. The then legal practitioner observed:

> ``Our client has been very open in this matter but as you have chosen to dismiss his appeal we ask that you kindly consent to the vehicle being sent back out of the country as our client will not be able to afford the duty.''

On 25 March 1997, the respondent replied that the vehicle can be exported in bond or on lodgment of a bank guarantee. On 5 May 1997, the applicant's present legal practitioners wrote to the respondent that they had counsel's advice that under the Customs & Excise (General) Regulations 1991 the goods were owned by her at the time of her arrival and intended for personal use, that she met the criteria set out in s 86(3) of those Regulations and that the respondent should reconsider his decision, failing which the applicant would lodge an application for a declaratory order in terms of the High Court Rules.

In this application of June 1997, in her founding affidavit, the applicant averred that in January 1996 she met for the first time her husband to be when she agreed to marry him; that they exchanged jewellery and rings in



accordance with their custom; that they celebrated their engagement and that having become betrothed she considered herself married. Her husband to be told her that his uncle had offered to buy her a vehicle of her choice as a wedding present if she agreed to marry him. After their engagement, the husband-to-be's uncle called her in India to congratulate her when she accepted his offer. Her husband to be selected a Mercedes Benz, forwarding to his uncle all the details. The uncle made payment in April 1996 with instructions to ship the vehicle to Zimbabwe. On 11 July 1996, the Muslim wedding ceremony was conducted in India and she moved to Zimbabwe on 30 July 1996. After their honeymoon on 29 August 1996, a marriage in Harare under the Marriage Act [*Chapter 5:11*] took place and on 5 October 1996 she was awarded new immigrant status. Documents pertaining to all this were attached to her affidavit as exhibits. She applied to the respondent but was informed that the vehicle did not qualify for immigrant rebate because she had not paid for it from her own account but got it as a donation. She asserted that she was a new immigrant to this country and was entitled to import the motor vehicle under a new immigrant's rebate.

In the opposing affidavit, the respondent made no comment about averments in her founding

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affidavit of events that happened outside Zimbabwe. But he averred that the applicant's motor vehicle did not qualify for immigrant's rebate because it did not meet the criteria laid down in the Customs & Excise (General) Regulations 1997 (SI 106 of 1997); that for any goods to qualify for this rebate they must have been owned and fully paid for by the immigrant before his time of arrival in Zimbabwe; that the applicant did not own the vehicle and did not pay for it; that the full amount was paid by one Ahmed Mahomed from his Lloyds Bank in London; that this type of transaction is not acceptable for purpose of rebate; that the law requires an immigrant to have paid for the vehicle; and that donated goods of this type are not allowed under this rebate. In her answering affidavit, the applicant maintained that her vehicle qualified for immigrant's rebate; that the respondent did not dispute that the vehicle was in existence and that the vehicle was purchased from the factory in Stuttgart and shipped through Zimoco, their agent.

In the applicant's heads of argument, it was submitted that the vehicle was donated to the applicant by her husband's uncle, that it was fully paid for in April 1996, that it became her absolute property; that she accepted the donation and the vehicle was delivered to her. It was also submitted that the clear intention of s 86(2) is to ensure firstly that the goods physically exist, in the sense that have been manufactured or assembled and are not subject to some future arrangement. Secondly, the idea that it must be fully paid for is to ensure that there is no residual obligation to the manufacturer, assembler or other supplier so far as the goods are concerned. The deeming provision



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in s 86(2) was clearly intended to deal with the situation where a person sought rebate in respect of goods that had still to be manufactured, or which were being paid for by some other person. The concept was first introduced by SI 123 of 1990, obviously to deal with abuses that were taking place in the system of immigrant's rebates. But where it is accepted that the goods were a *bona fide* gift to an immigrant, the provision was not intended to deprive such an immigrant of the rebate. The situation is really no different from that which would prevail if a person had many years ago inherited goods and had the goods in his possession ever since, or in respect of a prize won at school or at sport. On the respondent's argument, those goods would never qualify for rebate since the immigrant who inherited the goods, or won the prizes, would not have paid for them. To interpret the legislation in that manner without examining what mischief was intended to be covered by the legislation would be wrong. Clearly, the goods are being imported through Zimoco as local agents. It is not intended that they will be the owner of the vehicle and the bill of entry makes it clear that they are importing it on behalf of the applicant as it has been pointed out the vehicle was brought in through the local agent in order to maintain the guarantee given by the manufacturers.

In the respondent heads of argument, it was submitted that generally donations are not covered by s 86 as the wording is clear and that an immigrant cannot own any goods in terms of that section which has not been paid for by him.

At the hearing, it was correctly conceded by Mrs *Goredema*, counsel for the respondent, that immigrant's rebate of duty would apply to personal and household effects and other goods acquired in the form of a prize in a competition or in a raffle, or in a sweepstake would certainly

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be regarded as being owned by him although not fully paid for by the immigrant himself. She agreed that it was not the intention of the legislation to exclude them.

It becomes pertinent for us to review the subsidiary legislation as it relates to rebate of immigrant's effects. At first, the Customs and Excise (General) Regulations 1980 (SI 310 of 1980), prior to subsequent amendments, had provisions dealing with personal and household effects and other goods and motor vehicles. In respect of everything except motor vehicles, rebate of duty may be granted if it was shown to the satisfaction of the Controller that they were owned by an immigrant at the time of his arrival and at the time of importation; or owned at the time of importation but subject of a binding contract of purchase made prior to his arrival; or to be the subject of a hire-purchase contract made prior to his arrival and binding on him at the time of their importation. This legislation did not exclude gifts, etc and also permitted goods under hire-purchase. But in the case of a motor vehicle it was to be shown to the satisfaction of the Controller that it was owned by him at the time



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of importation and to have been purchased by him or to have been the subject of a binding contract to purchase made within 4 months after the time of his arrival and to have been paid for by him from his own funds held outside Zimbabwe. This legislation expressly excluded gift or donation of a motor vehicle or where it was won as a prize in a competition, etc.

The Customs and Excise (General) (Amendment) Regulations 1989 (No. 31) (SI 184 of 1989) repealed the above provisions concerning rebate or duty on immigrant's effects. Henceforth, from personal and household effects and other goods, cash registers, photocopiers, computers, office typewriters, telex and telefax machines were excluded from rebate of duty. This legislation did not exclude gifts, etc. But in the case of a motor vehicle a rebate of duty may be granted if it was shown to the satisfaction of the Director that it was owned (like personal and household effects and other goods) by him at the time of his arrival and at the time of importation and the motor vehicle was covered by an import licence unless it qualified for an open general import licence. This legislation was mostly concerned with ownership and not whether the goods had been paid for, etc. It did not exclude a motor vehicle obtained as a gift, etc. The Customs and Excise (General) (Amendment) Regulations 1990 (No. 33) (SI 123 of 1990) repeated the foregoing and provided that for purpose of rebate of immigrant's effects, goods shall be treated as being owned by a person only if such goods are fully paid for. Also excluded were items previously excluded like cash registers, etc from personal and household effects and other goods which attracted rebate of duty if they were shown to the satisfaction to have been owned by the immigrant at the time of arrival and at the time of importation but with the proviso that in the case of motor vehicles whose ownership could not be readily ascertained the Director could call upon the Reserve Bank of Zimbabwe to determine the source of funds used in the acquisition of the motor vehicle. This 1990 amendment continued to exclude goods on hire purchase, etc, but did not prevent gifts etc of personal and household effects and other goods including motor vehicles. Such goods, however, henceforth had to be owned by the immigrant at the time of his arrival and at the time of importation. In other words, ownership of goods must be established although the goods were still in the process of manufacture. Further,

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these goods must be fully paid for before it could be held as being owned by the immigrant. The 1990 amendment by providing that such goods be fully paid for was to remedy the mischief caused by those goods that were owned but not paid for or subject to hire-purchase contract.

The Customs and Excise (General) Regulations 1991 (SI 344 of 1991) repealed the original 1980 Regulations and all its amendments. It also in s 86(2) provided that for purposes of rebate of duty on immigrant's effects



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goods shall be treated as being owned by an immigrant only if such goods were in physical existence and fully paid for by the immigrant before the time of his arrival. It repeated the exclusion of items like photocopiers, etc and provided that immigrant's rebate may be granted if such personal and household effects and other goods are shown to the satisfaction of the Director to have been owned by him at the time of his arrival and at the time of importance. Like the previous legislation that had been repealed, the 1991 Regulations were remedying the same mischief and now required that the goods be in physical existence before the time of his arrival as well as be fully paid for by that time. It cannot be seriously suggested that by the insertion that the goods had to be in physical existence and fully paid for by the immigrant the 1991 Regulations was now for the first time, particularly after a long period, excluding gifts, etc of those goods genuinely owned by the immigrant and was now remedying some new mischief.

From the above review, it is most clear that from 1980 gifts, etc of personal and household effects and other goods attracted rebate of duty on immigrant's effects. The provisions in that legislation was mostly concerned with ownership and not whether it was acquired by purchase or gift, etc. It must be noted that in the 1980 Regulations in the case of a motor vehicle it was in express and specific terms provided that the immigrant had to have owned the motor vehicle at the time of importation and to have been purchased by him or to have been the subject of a binding contract to purchase made within 4 months after his arrival and to have been paid for by him from his own funds held outside Zimbabwe. This legislation expressly excluded a gift or donation, etc of a motor vehicle but did not exclude gifts of other personal and household effects and goods. If the intention of the 1991 Regulations was now to exclude all personal and household effects and other goods owned or acquired by means of a gift, etc it should have done, as was done in the case of a motor vehicle in the original 1980 Regulations, in most explicit terms. It could not have been asserted on behalf of the respondent that a day or a week before 15 November 1991 (when the 1991 Regulations came into effect) that a new immigrant who arrived then with gifts, etc of personal and household effects and other goods including a motor vehicle given to him and so owned by him could bring these on immigrant's rebate of duty. But this would not similarly apply to another new immigrant who came with the same items as gifts, etc after 15 November 1991.

The Customs and Excise (General) Regulations 1997 (SI 106 of 1997) repealed the 1991 regulations. The 1997 Regulations provided as follows:

> ``92 (2) For the purpose of this section, goods shall be treated as being owned by an immigrant only if such goods were in physical existence and fully paid for by the immigrant before the time of his arrival.

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(3) Subject to this section, a rebate of duty may be granted in respect of personal and household effects and other goods, imported by an immigrant if such effects and other goods -

(a) are shown to the satisfaction of the Director to have been owned by such an immigrant at the time of his arrival and at the time of their importation;

(b) are intended for personal use in Zimbabwe by such immigrant but not for trade or commercial purpose;

(c) are imported at the time of arrival of such immigrant or at such time as the Director may, in his discretion approve.''

Let us imagine a situation where two adult brothers are taken by a wealthy aunt to a motor vehicle dealership in Britain where the aunt is prepared to give each of them a gift of a motor vehicle costing a fixed amount. One brother selects a car which costs more than the aunt's fixed amount, and pays the excess by adding cash to the cheque made out by his aunt to the dealership. The other brother wants a model of car from another dealership so his aunt makes out a cheque in his name for that fixed amount promised by her which he puts in his bank account. The other brother purchases a car by issuing his own cheque costing a little less than the fixed amount given by his aunt. Both brothers arrive here a few months later as immigrants. According to the respondent, the brother who was given a gift of the car, but towards which he contributed, would not be entitled to an immigrant's rebate of duty since it was a gift and also not fully paid for by him. But the respondent would allow the other brother an immigrant's rebate of duty for his car since he had fully paid with his cheque for the car. Further, it would have been shown to the satisfaction of the Director that both owned their vehicle at the time of their arrival and at the time of their importation and was intended for personal use by both immigrant brothers. To the ordinary person, the attitude of respondent to allow a rebate in the case of the immigrant brother who was given a cheque in his name by his aunt and not to the other immigrant brother where the cheque was made out to dealership by his aunt would be regarded as artificial and not worthy of the respondent. The same would apply where a would-be immigrant won a certain amount at a raffle draw with which amount a car was purchased by him and another would-be immigrant instead won a car costing the same amount at a raffle draw.

The purpose of s 92 as it relates to rebate of duty on immigrant's effects surely is that the effects must have been in physical existence and not still to be manufactured; that those effects must be fully paid for in the sense that nothing is outstanding or subject to hire-purchase contract, etc; that it has to be shown to the satisfaction of the Director that those effects had been owned by the immigrant at the time of his arrival and at the time of their importation and that the effects are intended for his personal use in Zimbabwe. Further, s 92(3) states ``goods imported by an immigrant'' which means that goods



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have to be imported either by himself personally or by his agent on his behalf. That s 92(3) cannot be said to have excluded an agent of the immigrant importing the goods on his behalf

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since the agent acts for the immigrant and not on his own behalf.

It is true that the grant of rebate of duty on immigrant's effects is discretionary. However, once it has been shown to the satisfaction of the Director as provided for under s 92(3) the immigrant is entitled to a rebate of duty on his effects. It is the Director that has to be satisfied about this and not this court. The respondent's contention that goods given under a gift or donation and so owned by an immigrant do not attract rebate of duty is not correct. The 1997 Regulations require that the goods must not still be in the process of manufacture and that no amount is still outstanding as far as those goods are concerned. It cannot be said to be the true position that in all cases those goods must have been fully paid for by him as ownership of them can be acquired in many ways and that must be the reason why s 92(9) requires any immigrant claiming a rebate of duty shall give to the proper officer a certificate stating that the goods were owned by him at the time of his arrival and at the time of their importation. In his letter of 18 February 1997, the respondent made an observation about the applicant's letter of 8 October 1996. In light of this, as indicated, it is the respondent that has to be satisfied that the Mercedes Benz E 620 was a genuine gift to the respondent and so owned by her at the time of her arrival and at the time of their importation and that it was for her personal use in Zimbabwe.

Accordingly, it is therefore ordered as follows:

1. That it is declared that the respondent's contention that in terms of s 92 of the Customs and Excise (General) Regulations 1997 (SI 106 of 1997) in every instance the law requires the immigrant to have paid for the goods himself and that such goods given as a gift or donation, etc, do not qualify for rebate of duty on immigrant's effects cannot be sustained;

2. That the respondent bear the costs of this application.

*Rainor Robinson*, applicant's legal practitioners

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

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## KANONHUWA *v* COTTON CO OF ZIMBABWE 1998 (1) ZLR 68 (HC)

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

Garwe J

Civil application

10 October 1997 & 14 January 1998 Judgment No. HH-10-98

### Flynote

Administrative law - review - grounds for - legitimate expectation rule - applicability to administrative and contractual matters - decision to transfer employee to another town - whether reviewable

### Headnote

The applicant, who worked for the respondent as a clerk, had been stationed at the

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respondent's Sanyati depot. When she got married, she requested and was granted a transfer to Harare, where her husband lived. She asked for an inter-departmental transfer; this was also granted. After she had been in Harare for some time, she was ordered, at short notice, to transfer to the company's Manoti depot in the Gokwe area. She protested but the order was confirmed.

It was argued on her behalf that the legitimate expectation rule applies to both quasi-judicial and purely administrative acts and that she was entitled to be heard before the decision was made.

*Held*, that the old distinction between quasi-judicial and purely administrative acts has been swept away. The legitimate expectation rule applies in a contractual context as well as to quasi-judicial and administrative actions. The only limiting factor to the application of the rule is fairness. The operation of the *audi alteram partem* rule is not limited only to those cases where the parties have expressly or impliedly agreed that the rule should apply.

*Held*, further, that in the circumstances of this case the applicant had a legitimate expectation to be heard. The respondent had agreed to transfer her to Harare because of her personal circumstances, and before transferring her elsewhere she should have been heard as her circumstances remained essentially the same.

Cases cited:

*Admin Tvl & Ors* v *Traub & Ors* 1989 (4) SA 731 (A)

*Cargo Carriers (Pvt) Ltd* v *Zambezi & Ors* 1996 (1) ZLR 613 (S)

*Embling* v *Headmaster, St Andrew's College (Grahamstown) & Anor* 1991 (4) SA 458 (E)

*Gemi* v *Min of Justice, Transkei* 1993 (2) SA 276 (Tk)

*Hlongwa* v *Min of Justice, Kwazulu* 1993 (2) SA 269 (D)

*Lamprecht & Anor* v *McNeillie* 1994 (3) SA 665 (A)

*Langeni & Ors* v *Min of Health & Welfare & Ors* 1988 (4) SA 93 (W)

*Logan* v *Morris NO & Ors* 1990 (2) ZLR 65 (S)

*Lunt* v *University of Cape Town & Anor* 1989 (2) SA 438 (C)

*Machiya* v *BP Shell Mktg Svcs* 1997 (2) ZLR 473 (H)

*MMCZ* v *Mazvimavi* 1995 (2) ZLR 353 (S)

*Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H)



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*Nyangani* v *Forestry Commission* HH-169-96

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*Taylor* v *Min of Higher Education & Anor* 1996 (2) ZLR 772 (S)

*Tutani* v *Min of Labour & Ors* 1987 (2) ZLR 88 (H)

## Case Information

*O Ziweni*, for the applicant

*A P de Bourbon SC*, for the respondent

OPPOSED APPLICATION

## Judgment

**GARWE J:** This is an application for review in which applicant seeks an order to the following effect:

1. that the decision to effect restitution from the applicant's salary be and is hereby set aside and applicant be repaid the sum of $500 deducted from her salary.

2. that the decision of the respondent to transfer the applicant to Manoti in Gokwe and the suspension of the applicant be and is hereby set aside.

3. that the respondent pays the costs of application.

In her founding affidavit, the applicant says the decision to recover the sum of $15 267 through monthly deductions of $500 from her salary was made in her absence and without being heard. She states that, although in terms of the respondent's code of conduct the prescribed penalty following a finding of negligence was a final warning, the respondent, without reference to her, proceeded to make a decision to deduct the sum of $500 every month from her salary. She states further that the decision was made by the management, which is not a disciplinary committee. There is no provision in the code of conduct for restitution. As regards the decision by the respondent to transfer her to Manoti in Gokwe, the applicant states that the decision is grossly unreasonable. She had previously been stationed at Sanyati depot as a clerk. She got married and requested a transfer to join her husband in Harare. She was then transferred to Harare. In Harare, she requested for an inter-departmental transfer as she intended to pursue a field of study as a receptionist typist. This was granted. She says she was surprised when advised by the Acting Human Resources Manager that she was being transferred forthwith from administration back to the finance department on the basis that she had failed to perform her duties as a receptionist-typist properly. She queried the transfer and the failure by management to follow the provisions of the code of conduct. She was then advised by the General Manager Finance that she could not be accommodated in the finance section as there were no vacant posts in that section. The respondent's Acting Resources Manager then advised her that she was to be transferred to Manoti Depot as a data capture secretary. She says she protested against this decision. She was given a mere ten days to relocate to Manoti, some four



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hundred kilometres away, in a new portfolio of data capture clerk, the responsibilities of which post she has not been trained. When she did not transfer as directed, a letter of suspension was served on her. She believes the decision to transfer her was actuated by malice and that the respondent did not apply its mind to all the relevant facts. She is married. Her husband stays in Harare. She has children attending school in Harare and the decision to transfer her to Manoti is therefore unreasonable.

In its opposing papers, the company secretary of the respondent says the decision to recover the sum of $15 267.20 from the applicant was reversed on 10 June 1997 and is no longer an issue. He does not elaborate.

On the transfer of applicant to Manoti, he submits that this was a purely administrative and not judicial or quasi-judicial decision. For that reason, he submits that the decision is not subject to review. The applicant was initially suspended in October 1996 on another allegation and the disciplinary proceedings completed in December 1996. As a consequence she was only able to commence her three months probation in the administration section early in 1997. Unfortunately, she did not make it in that section. In the meantime her position in the accounts office was filled as it could not remain vacant on account of the workload. The only available vacancy was at Manoti in Gokwe. He points out that in terms of the applicant's conditions of service, she could be transferred from one post to another according to the needs of the respondent. He is aware that the applicant appealed to the managing director of the respondent against the transfer. The managing director confirmed the transfer. The applicant was then suspended and asked to explain her conduct. Her response was to bring the present application. He submits that the application is without merit and is a strategy to avoid disciplinary proceedings.

In her answering affidavit, the applicant states that the letter reversing the decision to recover the money was only served on her legal practitioners on 3 June 1997. That change of decision remains unexplained. She further states that the respondent's administrative decisions are subject to review by this court. In particular, she submits that her position in the finance department was filled after her refusal to transfer to Manoti. Although the respondent can transfer employees, the applicant states that before doing so the employee must be heard ie the position and circumstances of the person must therefore be objectively considered.

THE ISSUE OF DEDUCTIONS

The respondent has conceded this issue. The question, however, is one of costs. The applicant states that the letter advising of the cessation of





deductions was only received on 3 July 1997 after she had filed the present application. In any event she states that the money previously deducted has still not been re-imbursed.

The respondent has not indicated in these papers the reason for its change of decision. Clearly, however the decision to deduct money from applicant was not sustainable.

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I am satisfied that the applicant is entitled to her costs on this claim.

THE LEGITIMATE EXPECTATION RULE - WHETHER IT APPLIES IN PURELY ADMINISTRATIVE AND CONTRACTUAL MATTERS

The respondent argues that the decision to transfer the applicant is its sole responsibility, which decision it can make without reference to the applicant, as long as no reduction in salary takes place. The contract of employment gives the respondent this authority.

The respondent further submits that the applicant has no right to be heard before a decision to transfer her is made. The legitimate expectation and right to be heard are matters applicable to proceedings before a public body or quasi-judicial tribunal. As an employment relationship has no public law element, there is no presumption that the *audi alteram partem* rule has to be observed. The respondent also submits that the proper course would have been for the applicant to have raised the issue as to the validity of the transfer during the disciplinary proceedings and thereafter follow the disciplinary appeal route before bringing the matter before this court.

The applicant, on the other hand, states that the respondent has been *mala fide* in its dealings with her. She submits that the legitimate expectation rule is applicable both to quasi-judicial and purely administrative actions. The moment a decision is made which affects the rights or interests of an individual, then such individual has a legitimate expectation to be heard prior to the decision being made. Since she had been transferred to Harare on marital grounds, she should not have been transferred to Manoti several hundred kilometres away without account being had to her known personal circumstances. Since the conditions of service say nothing about consent, the applicant submits that the *contra proferentem* rule should apply.

Having considered the various authorities to which attention has been drawn, I am satisfied that, despite earlier authorities to the contrary, the position now appears settled that the old distinction between quasi-judicial acts on the one hand and purely administrative acts on the other, has been swept away. That distinction has been held to be of no real assistance. See *Logan* v *Morris NO & Ors* 1990 (2) ZLR 65 (S); *Langeni & Ors* v *Minister*



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of *Health & Welfare & Ors* 1988 (4) SA 93 (W); *Administrator, Transvaal & Ors* v *Traub & Ors* 1989 (4) SA 731 (A).

But what is the legitimate expectation rule and does it apply in the field of contract?

In *Administrator, Transvaal & Ors* v *Traub & Ors supra* it is stated that:

> ``The legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing at p 758D-E.''

Traditionally, the enquiry has been limited to the prejudicial effect upon the individual's liberty, property and existing rights but under modern circumstances it is appropriate to include also his

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legitimate expectation (at p 763I-J).

In *Lamprecht & Anor* v *McNeillie* 1994 (3) SA 665 (A) at 668, after considering *dicta* in a number of cases that the employment relationship has no public law element and that therefore administrative law does not apply in such cases, the South African Appellate Division left the question unanswered whether the legitimate expectation doctrine operates in the field of contract.

In *Lunt* v *University of Cape Town & Anor* 1989 (2) SA 438 (C) at 449, H*owie* J remarked at F-H:

> ``In my opinion, the very understandable and indeed natural appeal to 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."

However in *Embling* v *Headmaster, St Andrew's College (Grahamstown) & Anor* 1991 (4) SA 458 (E), it as held that the rules of natural justice are not applicable to the field of contract and that the *audi alteram partem* rule is not applicable to ordinary contracts of master and servant.

In *Machiya* v *BP Shell Marketing Services* 1997 (2) ZLR 473 (H) at 479, the conclusion was reached that:

> ``there seems 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 learned judge in the above matter (CHATIKOBO J) was of the view that in a contract, there is no presumption that the *audi alteram partem* is to be observed and that the obligation to afford a hearing according to natural justice must be either an expressed or necessarily implied term of the contract.

In *Hlongwa* v *Minister of Justice, Kwazulu* 1993 (2) SA 269 (D), the applicant, a public prosecutor on the staff of the respondent, was transferred from Pietermaritzburg to the Nkandla court by the respondent. In an application



to review the respondents' decision, the applicant contended that she had not been given an opportunity to make representations concerning the transfer. The respondent denied that she was entitled to such an opportunity. The applicant alleged, *inter alia*, that she suffered from a medical condition which required access to medical and hospital facilities more readily accessible in Pietermaritzburg than Nkandla and that she had recently become engaged to a man who was permanently stationed in Pietermaritzburg. In reaching the conclusion that the *audi alteram partem* rule applied, DIDCOTT J stated:

> ``Generally speaking, it seems to me, however, people such as the applicant, people on the professional staff of concerns like the respondent's organization, would not one thinks be transferred willy-nilly and unilaterally without any consideration at all of their personal circumstances and wishes ... Indeed, one cannot imagine that it would be conducive to a feeling of satisfaction and well-being on the part of such officials if they were liable to summary transfer without any opportunity for being heard at all on the point. The applicant's complaints about her transfer, apart from the ones of victimisation, ulterior motives, disguised punishment and the like, which I put aside for

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> reasons already given, involve two aspects which I would have thought, by any token and any reckoning, were of some importance to her and persons similarly placed. Firstly, she does not enjoy good health ... Her second reason is that she has recently become engaged to and expects to marry, a man who is permanently stationed in Pietermaritzburg ...
>
> Now these are, to my mind, factors which are by no means trivial, factors which ought to be taken into account by any wise bureaucracy that handles matters of this kind. I do not for one moment suggest that they are the end of the matter or that they are decisive of the question. The respondent has also to take account of its staffing problems. It has also to take account, as it is said, of the circumstance that these remote rural posts are not popular ones and that if one let every prosecutor have his or her way, not to say every interpreter, magistrate and everyone else ... one would have no staff for rural areas ...."

The learned judge goes further at p 273:

> ``So one can well conceive of situations in which anyone like the respondent could not be faulted for going ahead with a proposed transfer, despite the personal inconvenience, even hardship perhaps, to the transferee, provided however the transferee has had the opportunity to have his or her say in the matter, so that what there is to be said the other way may be fairly taken into account together with the pressing needs of the department concerned. There is no doubt in my mind that a person in the applicant's position, and I say nothing about people who are in positions different from hers, does enjoy at present a benefit or advantage or privilege of being posted where she is which she could reasonably have expected to retain and which it would have been unfair to deny to her without prior consultation, and the opportunity to make representations.''

In *Gemi* v *Minister of Justice, Transkei* 1993 (2) SA 276 (Tk), the applicant, an assistant administrative clerk in the office of the Attorney-General, applied for a transfer to Butterworth, which was nearer to his home, allegedly to assist sick or ailing family members. Without hearing him, the decision was taken to transfer him not to Butterworth but to Mount Frere, 100 km in the opposite direction. PICKERING AJ held that as the applicant had not been heard prior to the making of the decision, the *audi alteram partem* rule



GARWE J

had been violated, and accordingly declared the transfer invalid.

I do not, with respect, share the view expressed in *Machiya* v *BP Shell Marketing Services supra* that the *audi alteram partem* principle applies in the field of contract only in those cases where the parties have expressly or impliedly agreed the rule should apply. I am inclined to agree with the remarks made by PICKERING AJ in *Gemi* v *Minister of Justice, Transkei supra* that fairness is always the limiting factor to the application of the rule. The learned judge remarks at pp 288-9:

> ``It follows therefore that I must, with respect, disagree with the conclusion reached by LEVINSOHN J in *Ngema*'s case *supra* and H*all* AJ in *Maqungo*'s case *supra*, that a legitimate or reasonable expectation may only arise either from an express promise given by a pubic authority or from the existence of a regular practice which the applicant can reasonably expect to continue. I am satisfied, with deference to the learned judges, that these decisions are clearly wrong. That the applicant *in casu* was not promised that he would not be transferred does not, with respect, drive one to the conclusion that he was not entitled to be heard before he was so transferred. In my view, the absence of an assurance that applicant would not be transferred has no bearing on the reasonableness of his expectation that he would be accorded a hearing before a decision adverse to his interests was taken ..."

Whilst I appreciate that the *Hlongwa* and *Gemi* cases *supra* involved decisions made by public officials, I see no reason why the same considerations cannot be extended to the present

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matter. In *Hlongwa*'s case *supra*, D*idcott* J left the question open. He stated thus:

> ``Government departments in particular have officers and employees of all categories, from the most humble to the most senior in their ranks, and questions of transfers must frequently arise. Whether one draws a line, and if so where, between officials employed by some government department on the one hand and the employees of private concerns, large corporations or small, on the other, is likewise a question that fortunately can wait for future occasions for a decision.''

In this case, the respondent is a statutory corporation, employing many people. Questions of transfers must arise frequently, considering that the respondent operates depots and offices in many parts of the country. The relevant conditions of service provide that any employee can be transferred from one post to another or one place to another. The only restriction to such transfer is that the employee should not suffer a reduction in salary. The conditions say nothing about the right of the employee to make representations before a transfer.

Although the conditions of employment say nothing about consent or the right to be heard before a transfer, this does not mean that such transfer should nevertheless be processed without the applicant being heard. Even if the employee is eventually transferred after the employer has taken into account its own staffing problems, the employee must nevertheless be heard in one way or another before a decision is taken to transfer him. See *Hlongwa*'s case



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*supra* p 273D-E. Attention is also drawn to *Taylor* v *Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S).

Despite *dicta* to the contrary in other decided cases, I reach the conclusion that, in the particular circumstances of this case, the legitimate expectation rule does apply in a contractual context and in both quasi-judicial and purely administrative actions. The underlying principle is fairness. Even where a contract of employment is silent on the entitlement of an employee to be heard before transfer, this does not mean that such transfer should be processed without the employee being heard.

DID THE APPLICANT HAVE A LEGITIMATE EXPECTATION OF BEING HEARD?

Clearly, the applicant in this case had a legitimate expression of being heard before the decision was made to transfer her to Manoti, more than four hundred kilometres away. The facts of this case show that applicant had previously been stationed at Sanyati. She requested a transfer to Harare to join her husband, a businessman in Harare. The transfer was approved by the respondent on that basis. At the time the respondent decided to transfer her to Manoti, she was still married and, according to her papers, had minor children attending school in Harare. To suggest that in these circumstances she did not have a legitimate expectation to be heard is untenable. No-one is saying a full inquiry should have been conducted. The right to be heard may be confined to submission of written representations.

The applicant had been transferred to Harare on account of her personal circumstances. The respondent was aware of those personal circumstances and in particular that she is a married woman and that she has children. Before deciding to relocate her some 400 kilometres away

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from her family, she expected to be given the opportunity to make submissions on why she should not be transferred. This was not done and a decision was nonetheless made transferring her to Manoti. Moreover, she was being transferred to a new post in respect of which she had not been trained. The conditions of service provide that an employee can be transferred from one place to another. Those conditions do not indicate that the employee should be consulted prior to such transfer. I have already reached the conclusion that, in the particular circumstances of this case, the respondent should have heard the applicant before making a decision. By agreeing to transfer the applicant from Sanyati to Harare on account of her personal circumstances, it was understood that, before the respondent could transfer the applicant to another place, the applicant was to be heard before a final decision was made to transfer her elsewhere as her circumstances remained essentially the same.



GARWE J

I have no difficulty in reaching the conclusion that in a case such as this one ``the views, wishes and personal circumstances of the applicant were relevant and ought to have been taken into consideration before the decision to transfer was made'': *per* Gubbay CJ in *Taylor* v *Minister of Education &* Anor *supra* at 785B.

DOES THIS COURT HAVE JURISDICTION TO ENTERTAIN THIS APPLICATION?

The position is now settled that, in determining whether judicial review of the decision of an administrative tribunal is excluded or deferred and whether an applicant should first exhaust his domestic remedies, the court will have regard to a number of factors: *Tutani* v *Minister of Labour, Manpower Planning & Social Services* 1987 (2) ZLR 88 (H).

In *Cargo Carriers (Pvt) Ltd* v *Zambezi & Ors* 1996 (1) ZLR 613 (S) the Supreme Court held that a party has the right to approach the High Court for relief even before exhausting domestic remedies provided special circumstances exists. See also *Nyangani* v *Forestry Commission* HH-169-96; *MMCZ* v *Mazvimavi* 1995 (2) ZLR 353 (S); *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H).

In this case, whilst the respondent argues that the applicant should have exhausted her domestic remedies, it is unclear on the papers what those remedies are. However, there is evidence the Managing Director has already endorsed the decision of his managers to transfer the applicant, following what appeared to be an appeal by the applicant to the acting Human Resources Manager. Her failure to comply resulted in the suspension. It is apparent from para 2.6.7 of the applicant's answering affidavit that she believes any subsequent hearing will be meaningless in view of the fact that the persons involved in the hearing are the same persons who have already made the decision in this matter. In other words, the applicant is saying that following the domestic channels will not provide an effective redress in respect of her present complaint.

The applicant has deposed to the fact that the decision to transfer her was in fact a disciplinary measure disguised as a purely administrative measure. Paragraph 1 of her heads is relevant in this regard. This allegation is denied by the respondent. It is not possible for me to make a

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determination in this regard but I would venture to indicate that the manner in which the decision was made to transfer the applicant in these circumstances does not seem to accord with fairness.

For the avoidance of doubt, this judgment is not to be construed as directing that no further transfers may be considered. The respondent is a big organisation



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with branches in various parts of the country. There will, no doubt, be cases when the respondent has to consider the transfer of some of its employees to enhance operational efficiency. But in the particular circumstances of this case, and in particular the fact that applicant had been transferred to Harare on account of her personal circumstances, the decision to transfer the applicant to a depot about four hundred kilometres away without reference to her cannot stand.

I would accordingly find for the applicant.

In the result, it is ordered as follows:

1. that the sum of $500 previously deducted from the applicant's salary be and is to be refunded.
2. the decision of the respondent to transfer the applicant and her subsequent suspension be and are hereby set aside.
3. the respondent is to pay the costs of this application.

*Mutezo & Partners*, applicant's legal practitioners

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



## JOLLY *v* SHANNON & ANOR 1998 (1) ZLR 78 (HC)

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

Malaba J

Civil trial

23 January 1998 Judgment No. HB-3-98

### Flynote

Ownership - movables - vindication - property disposed of - damages - assessment of value

Trust - creation - transfer of immovable property - transferee entrusted with property, to re-transfer on demand - proof of existence of trust - oral trust - nature of transaction entered into - sale of property for unrealistically low price - not a genuine sale - real nature of arrangement - rights of transferor - personal

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right against trustee - breach of trust - property sold to innocent third party - damages - how to be assessed

## Headnote

In 1988 the plaintiff reached an agreement with the second defendant, his sister, in terms of which he transferred a farm to her for the sum of $14 500. He was living in South Africa and she and her husband, the first defendant, were living in Zimbabwe, mainly in Bulawayo, but sometimes staying at the farm, which was in the Kwe Kwe district. There were certain payments due to a bondholder for the purchase of the farm and in order to liquidate the outstanding payments the plaintiff arranged for his sister to pay the sum. She would then take over the bond and the house would be transferred into her name. Subsequently the defendants sold the property to a third party. The plaintiff claimed the difference between the purchase price and the sum she had paid to clear the bond. The basis of the claim was that a trust had been formed in terms of which the second defendant bound herself to hold the property on the plaintiff's behalf and to re-transfer it to him on demand.

The plaintiff also claimed the return of certain items of movable property which he said the defendants had taken possession of, alternatively, the value of the property.

*Held*, that a trust in the wide sense would exist whenever one person transfers property to another who is bound to hold or manage it for the transferor and not on his own behalf. In the narrow sense, it exists when the creator of the trust (the ``founder'') hands over to another (the ``trustee'') the control of property which, or the proceeds of which, is to be administered or disposed of for the benefit of some person other than the trustee or for some impersonal object.

*Held*, further, with regard to the existence or otherwise of a trust, the onus was on the plaintiff to prove its existence. As this was an oral trust, it would usually be difficult to prove. In this case the sale was clearly not genuine, because the price bore no relation to the value of the property. It was determined by the amount of the debt owed to the bondholder. More realistic offers had previously been rejected by the plaintiff. The real arrangement between



the plaintiff and his sister was thus not a sale; it was a trust in the wide sense. The fact that the property was registered in the second defendant's name did not affect the rights and obligations *inter partes* flowing from the trust.

*Held*, further, that by agreeing to hold the immovable property on behalf of the plaintiff, the second defendant bound herself to re-transfer it to him on demand. By selling it to a third party, she breached the trust duty and the plaintiff's remedy was a claim against the second defendant for damages for breach of trust. Although his right was a personal right, the damages had to be assessed on the basis of which the property would have been worth to him if it had been transferred back to him.

*Held*, further, in respect of the movables, that the two remedies of *actio rei vindicatio* and *actio ad exhibendum*, on which the claim was based, are not alternative forms of the same relief, though they can be brought as alternatives in the same action. In regard to the first, the plaintiff must prove that he is the owner of a clearly defined asset and that the defendant was in

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possession of it at the commencement of the action. The defendant then has the onus of proving a right of retention. To succeed in the second action, the plaintiff must prove that he is the owner of the property and that the defendant took possession of it but disposed of it before the action. Loss by negligence would not be enough to make him liable under this action; *mala fides* was required.

*Held*, further, that the evidence established that the plaintiff did not surrender ownership to the defendants. There was no donation and there was no evidence that the property had been abandoned. The defendants' unilateral act of taking possession did not confer on them the right of ownership.

*Held*, further, that the value of the property to be taken as damages is, in a vindicatory action, the value at the time of judgment; in the *actio ad exhibendum* it is the value from the time of wrongful disposal. The values had to be based on estimates made by an independent auctioneer.

Cases cited:

*Adam* v *Jhavary* 1926 AD 147

*Alderson & Flitton (Tzaneen) Ltd* v *E G Duffeys Spares* 1975 (3) SA 41 (T)

*Boyce NO* v *Bloem & Ors* 1960 (3) SA 855 (T)

*Chaplin* v *Hicks* [1911] 2 KB 786

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

*Comr of C & E* v *Randles Bros & Hudson Ltd* 1941 AD 369

*CIR* v *Saner* 1927 TPD 162

*Crookes NO* v *Watson* 1956 (1) SA 277 (A)

*Frankel Pollak Vinderine Inc* v *Stanton NO* [1996] 2 All SA 582 (W)

*Kilburn* v *Kilburn's Est* 1931 AD 501

*Lucas' Trustee* v *Ismail & Amod* 1905 TS 239

*McCullough* v *Fernwood Ests Ltd* 1920 AD 205

*Mainhard* v *Salmon* 164 NE 545 (NYCA) (1928)

*Makumborenga* v *Marini* S-130-95

*Mlombo* v *Fourie* 1964 (3) SA 350 (T)

*Philip Robinson Motors (Pty) Ltd* v *N M Dada (Pty) Ltd* 1975 (2) SA 420 (A)

*Phil Morkel Ltd* v *Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C)

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*Soci,t, des Hôtels Le Touquet Paris-Plage* v *Cummings* [1922] 1 KB 451

*Strydom* v *de Lange* 1970 (2) SA 6 (T)

*Thornycroft* v *Vas* 1957 R & N 376; 1957 (3) SA 754 (FS)

*Turkstra Ltd* v *Richards* 1926 TPD 276

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*Vulcan Rubber Works (Pty) Ltd* v *SAR&H* 1958 (3) SA 285 (A)

*White* v *Collins* 1914 WLD 35

## Case Information

*T A Cherry*, for the plaintiff

*R M Smethwick*, for the defendants

## Judgment

**MALABA J:** On 3 April 1996, the parties agreed at a pre-trial conference to have the two matters - HC-236-92 and HC-2281-92 - joined and heard together as the facts in both actions are closely related.

In HC-236-92, the plaintiff (whom I shall now on call ``Mr Jolly'') issued summons on 28 January 1992 claiming against the defendants (whom I shall call ``Mr Shannon'' and ``Mrs Shannon'') who are husband and wife, jointly and severally, the return of the movable assets listed in the declaration, alternatively the payment of damages in the sum of $199 298, being their value and costs of suit.

In case H-2281-92, the plaintiff issued summons against second defendant, his sister, claiming the payment of $190 000 as damages for the loss of a piece of land, sold and transferred by her to third parties in breach of trust, and costs of suit.

The declaration in HC-236-92 set forth that Mr Jolly was the owner of the movables listed therein, that Mr and Mrs Shannon jointly had possession of them at the time of institution of the action. In the alternative, it alleged that they had possession of the movables but with knowledge of Mr Jolly's claim or title, wrongfully disposed of them before 28 January 1992.

In case HC-2281-92, the declaration alleged that in October 1988, Mr Jolly entered into an oral agreement with Mrs Shannon in terms of which he transferred ``Mount Ash Farm'' to her name and she bound herself to hold the property in trust for him. It further set forth that, without Mr Jolly's consent or knowledge and in breach of the trust duty, Mrs Shannon sold and transferred the immovable property to Mr and Mrs van Blerk in October 1990 for an amount of $190 000. It was alleged that Mrs Shannon failed to account to Mr Jolly for the proceeds of the sale of the property.

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In their plea to the declaration in case HC-236-92, Mr and Mrs Shannon denied that Mr Jolly had ownership of the movable assets. They averred that certain movables were donated to Mrs Shannon by Mr Jolly, that some were destroyed by natural causes and that they had no knowledge of others. They put Mr Jolly to the proof of the value of the movables.

In case HC-2281-92, Mrs Shannon's plea was that she bought the immovable property from her brother for $14 500. She said she was entitled to sell it without Mr Jolly's consent or knowledge and was not under any obligation to account to him for the proceeds of the sale. She denied the allegation of the existence of an oral trust.

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MALABA J

[The learned judge then considered the facts in detail and continued:]

I now decide the question whether the *causa* of the transfer by Mr Jolly of the immovable property to Mrs Shannon was a trust or a sale. I have considered it to be more convenient to first resolve the issues in case HC-127-92. A finding of the existence of a trust or sale does not alter the fact that the registration of the property in Mrs Shannon's name gave her the right of ownership. A finding of the existence of a trust would, however, mean that upon transfer of the immovable property to Mrs Shannon, Mr Jolly acquired personal rights and potential real rights enforceable against her. In binding herself to hold the immovable property on Mr Jolly's behalf, Mrs Shannon undertook to re-transfer the real rights to him on demand. She vested in him the personal rights in her performance of the act of re-transfer.

The onus was on Mr Jolly to prove the existence of a trust. The alleged legal relationship on which the transfer was based was not set forth in any written document. The trust would be an oral trust which is usually difficult to proof.

The difficulties in proving an oral trust are not *prima facie* evidence of its non-existence. Each case must depend on its particular circumstances. Oral trusts were upheld in *Adam* v *Jhavary* 1926 AD 147 and *Strydom* v *de Lange* 1970 (2) SA 6 (T).

A trust is a fiduciary relationship which has been found to exist in the wide and narrow sense. It has been found to be in existence in the wide sense, whenever one person transfers property into the name of another who is bound to hold or manage it on behalf of the transferor or some other person and not for his own benefit: Honor, *South African Law of Trusts* 4 ed p 2 J C Shepherd *The Law Of Fiduciaries* (Toronto 1981) writes at p 21:

> ``There are three traditional classifications of fiduciaries. From the law of trusts, we have a class which we will call here property-holders, that is, those who hold, or manage property on behalf of another.''

In the strict or narrow sense a trust exists -

> ``When the creator of the trust, whom we will call the founder, has handed over or is bound to hand over to another the control of property which or the proceeds of which is to be administered or disposed of by the other (the trustee or administrator) for the benefit of some person other than the trustee as beneficiary, or for some impersonal object. A trust in this sense creates a fiduciary obligation and is a species of the genus `trust', in the wide sense. Its special feature is that the trustee or administrator acts not in his private but in an official capacity''

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(Honor, *supra* p 3).

The approach to be adopted involves the movement from the proved fact situation to the finding of the trust.

The evidence in this case proved that there was one agreement between Mr Jolly and Mrs Shannon, on which the transfer of the immovable property into her name was based. Only the evidence adduced by Mr Jolly contained facts



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of the terms and conditions of the agreement. He said it was a term of the agreement that he would transfer the property to Mrs Shannon who bound herself to hold it on his behalf. His evidence of the fact that Mrs Shannon agreed to hold the immovable property on his behalf is supported by the contents of the letter he wrote to her on 23 October 1988. In the letter, Mr Jolly reminded Mrs Shannon to send him something to say she held the property in trust for him. The statement reveals an intention on his part to create a trust and that Mrs Shannon accepted the arrangement.

No evidence was led by Mrs Shannon to contradict Mr Jolly on the terms and conditions of the oral agreement entered into by the parties during the telephonic conversation on 19 October 1988. She did not say Mr Jolly agreed to sell and she agreed to buy the immovable property. Her evidence of the telephone conversation was vague. She said Mr Jolly explained saying the immovable property would have passed to her by way of inheritance.

He was said to have rhetorically asked whether she did not realise the harm a civil judgment would do to his professional reputation as an accountant. The impression one got from her evidence is that she inferred from what Mr Jolly said (on her version) that he was prepared to sell the property to her. On her evidence there was no agreement of sale between the parties. Mr Jolly denied that he told Mrs Shannon what she alleged he said in her evidence.

The balance of probabilities supports a finding of the fact that there was no agreement of sale. The vagueness of the evidence of Mrs Shannon on what was discussed in the telephonic conversation of 19 October 1988 left the evidence of Mr Jolly as the only reliable evidence of the terms and conditions of the oral agreement reached by the parties on that day. She did not deny that there were enough movable assets which Mr Jolly could have sold to raise $14 500. Given the right to choose between entering into a transaction involving the surrender of all his worldly possessions as consideration for her payment of a paltry sum of $14 500 to discharge his debt to the bondholder and selling movables to raise the same amount, Mr Jolly would probably choose the latter course of action.

In the absence of proof of an agreement of sale, the documents of conveyance of the immovable property to Mrs Shannon contained a sale in the air; a mere simulated sale.

We must look at the substance and not the form of the transaction. A mere paper sale does not become a real sale. It was stated in *Kilburn* v *Estate Kilburn* 1931 AD 501 at p 507 that -

``a court of law will not be deceived by the form of a transaction, it will rend aside the veil in which the transaction

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is wrapped and examine its true nature and substance."

There was no negotiation preceding transfer that would have affected the price of the land. The alleged price of $14 500 was determined, not by



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reference to the actual value of the property, but by reference to the debt Mr Jolly owed to the bondholder. Mrs Shannon conceded, under cross examination, that she was not influenced by consideration of the value of the land. That suggested that she was motivated by consideration of matters of fraternity. Those motives are consistent with her having held the immovable property in trust for her brother and not for her own benefit.

The amount of $14 500 for which Mrs Shannon claimed she bought the immovable property was not a real and serious price to be evidence of a sale. It was common cause at the trial that Mr Jolly had already received, from people who wanted to buy the immovable property, offers in the respective amounts of $60 000, $80 000, and $100 000. He had rejected the offer made by Mr Shannon to buy the property for $40 000, because the amount was far below its market value. Mr Desfontaine said immovable properties at the time were appreciating in value at the rate of 25% *per annum*.

In *Commissioner For Inland Revenue* v *Saner* 1927 TPD 162 T*indall* J said at pp 172-173:

> ``As was pointed out by *de Villiers* JA in *McAdams* v *Fiander's Trustee & Bell* 1919 AD 207 at p 224 there can be no contract of purchase and sale without the *animus emendi* on the part of the purchaser and the *animus vendendi* on the part of the seller and it must be a genuine *animus* of the one to sell and of the other to buy. It is not enough for the parties to think that they have the intention: the intention must be proved as a fact apart from what they thought and the price must be real and serious.
>
> Burge (1 ed Vol 2 p 473) in commenting on the rule that in a contract of sale the price must be real and serious, stated that it cannot be said to be real or serious when it bears no proportion whatever to the value of the property sold. (See also *Pothier on Sale* Part 1 s 2 art 2 paras 19-21)."

Mr Desfontaine said the sum of $14 500 was totally unrealistic as the purchase price for the immovable property. From the evidence of the offers that had been made to Mr Jolly by people interested in buying the property, it is clear that $14 500 was considerably disproportionate to the value of the land.

In *Commissioner Of Customs & Excise* v *Randles Brothers & Hudson Ltd* 1941 AD 369 WATERMEYER JA at pp 395-396 pointed out that a simulated contract of sale is a dishonest transaction:

> ``... dishonest, in as much as the parties to it do not really intend it to have *inter partes,* the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties."

The transaction between Mr Jolly and Mrs Shannon was, in essence, a trust in the wide sense and not a sale.

The fact that the property was registered in Mrs Shannon's name in her private capacity did not

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affect the rights and obligations *inter partes* flowing from the trust in the wide sense. In *McCullogh* v *Fernwood Estates Ltd* 1920 AD 204 at 209 INNES *CJ* said the word ``trustee'' is ``appropriate to a case



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where the person described acts in his own name and on his own responsibility though for the benefit of another''.

Where there has been a failure, as happened in this case, to register the immovable property in the name of the ``trustee'' in the narrow sense, there is still a ``trust'' in the wide sense if evidence proved that the transferee held the property on behalf of another. It matters not that the beneficiary is the transferor. The beneficiary in such a relationship in which the property was registered in the name of the holder in a private capacity, had an unsecured personal right against the property holder.

He does not, for example, have a stronger claim to the property than any concurrent creditor nor does he have a claim against a *bona fide* purchaser of the property for value without notice of the trust: *Lucas' Trustee* v *Ismail & Amod* 1905 TS 239 at 243 and 248.

The next step is the determination of whether the trust duty was breached. In accepting to hold the immovable property on behalf of Mr Jolly, Mrs Shannon bound herself to re-transfer it to him on demand. It was decided in *White* v *Collins* 1914 WLD 35 at 37 that a promise by A, to hold freehold property registered in her name in trust for B, is a contract to deliver such property to B on demand. Mr Jolly acquired personal rights to call upon Mrs Shannon to re-transfer the immovable property to him. He also acquired potential real rights in the real expectation of the performance by her in future of the act of re-transfer.

It is clear from decisions in *Adam* v *Jhavary supra* and *Strydom* v *de Lange supra* that where an oral trust has been proved and the immovable property is still registered in the name of the defendant at the time of action, the court will not hesitate to protect the plaintiff's personal rights by ordering re-transfer of the property.

In this case, the immovable property had been sold and transferred to Mr and Mrs van Blerk at the time of action. Mr and Mrs van Blerk were *bona fide* purchasers for value without notice of the oral trust.

Mrs Shannon breached the trust duty. Mr Jolly's remedy was properly a claim against Mrs Shannon personally for damages for breach of trust.

In *Lucas' Trustee* v *Ismail & Amod supra*, the respondents, who were prohibited by law from owning immovable property, had land registered in the name of Lucas who bound himself to hold it on their behalf. Lucas became insolvent and the immovable property passed, just like any of his private estate, into the hands of his trustee in insolvency who held it for the creditors. INNES CJ and SOLOMON J (as he then was) held that the respondents had personal rights enforceable against Lucas for breach of trust. INNES CJ said at 243:

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``They knew that they could not help themselves and therefore they were satisfied that



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> Lucas should hold being a man they trusted. They were bound to look for their security to a person they trusted and not to any legal right they could obtain under the law. They had no *jus in re* but they accepted a *jus in persona* against Lucas as the best thing they could secure under the circumstances."

It is stated by Silberberg and Schoeman *The Law of Property* 3 ed p 68 n 20 that:

> ``If A acquires a personal right to have a real right to an immovable thing, belonging to another, transferred to him ... he would have a potential real right ...
>
> It is of course not the personal right itself which is regarded as being potentially real, but the personal right envisages the transfer of a real right by means of registration."

Mr Jolly proved the breach of trust by Mrs Shannon. He is entitled to some damages. A trust involves a contract in its creation but is not simply a contract: *Crookes NO* v *Watson* 1956 (1) SA 277 (A). Breach of trust gives rise to delictual damages. Honor, *South African Law of Trusts supra* states at pp 298-299:

> ``The main civil remedy against a trustee who fails to carry out his duties properly is an Aquilian action for breach of trust. The action is based on the duty owed by one who deals or meddles with the property of another to exercise due care in doing so. It is immaterial that the `property' in the case of a trust beneficiary normally consists only of personal rights against the trustee. The trustee is not merely an ordinary debtor but holds a quasi-public office, like that of an executor, tutor or curator which imposes on him a duty to safeguard the personal rights."

This is obviously not a case of mere infraction of a legal right. The court was therefore entitled to presume substantial damages. Personal rights, unlike real rights, have no market where the owners offer them for sale and other people buy them.

No one has ever suggested that, because there is no active and ready market, there are no damages. It is therefore a difficult task, largely a matter of guesswork, to assess damages for the infringement of personal rights. The loss must nonetheless be assessed on reasonable probability revealed by the evidence led and not on speculative possibility. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for the breach of trust.

In the assessment of damages in this case, I have considered, amongst other things; the nature of the personal rights, their value to the plaintiff, the effect of their infringement by the defendant, the nature of the relationship between the parties, the culpability of the defendant and any contributory factor on the plaintiff's part. The object is to arrive at an amount of damages that would place Mr Jolly in as good a position as he would have been had Mrs Shannon not committed the wrongful act of selling and transferring the trust property to Mr and Mrs van Blerk.

Mr Jolly had a personal right to call upon Mrs Shannon to re-transfer the immovable property to his name. In undertaking to re-transfer the property,

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Mrs Shannon gave Mr Jolly a potential real right in the performance by her of the act of re-transfer. He entertained real expectation of acquiring real rights on re-transfer. Mr Jolly had interest in his ``property''. He wanted to use the personal rights to acquire real rights that were vested in Mrs Shannon.

The personal rights were of substantial value to him in that they were potentially as valuable as the real rights. These were rights which almost to a certainty were available for his acquisition. The acquisition of real rights was a very probable event. That is the reason why he entered into a trust arrangement: to preserve his claim to the real rights. Mrs Shannon was aware of his interests and of her duty to protect them. It was not as if his interests were dependent upon the exercise by her of unrestricted volition. If Mr Jolly were to sell the personal rights he would probably have valued them with reference to the value of the real rights. Mr Jolly's right was, of course, a personal right and incapable of transfer, but there is nothing wrong in the assessment of damages in taking the view that such a right, if it could have been transferred, would have been of such a value that everyone would recognize that a good price could be obtained for it: *Chaplin* v *Hicks* [1911] 2 KB 786 at 792-3.

The infringement of the personal rights caused Mr Jolly substantial loss. He lost the right to call upon Mrs Shannon to re-transfer the real rights to him. He lost the opportunity or chance to acquire the real rights. It is clear that he could not claim the real rights from Mr and Mrs van Blerk. Where he did not have to take the trouble to negotiate a contract of sale before re-transfer of the real rights he now had to do so. He now had to negotiate the creation of the personal rights as opposed to the mere enforcement of them.

Mrs Shannon deprived Mr Jolly of something which had monetary value. Before Mrs Shannon sold and transferred the immovable property, Mr Jolly only had to institute an action claiming performance by way of obligation to re-transfer the real rights to him. The duty of the court is to estimate the pecuniary value of that advantage which was taken from him by Mrs Shannon.

The essence of the relationship between Mr Jolly and Mrs Shannon was the special confidence Mr Jolly reposed in Mrs Shannon. Mr Jolly entered into the arrangement in which he entrusted her with the property to hold it on his behalf because he believed that she would act honestly and in good faith. This was not a mere commercial relationship. Mr Jolly was entitled to rely on the trustworthiness of Mrs Shannon for the protection of his rights.

In *Meinhard* v *Salmon* 164 NE 545 (NYCA) (1928) (quoted by Shepherd *Law of Fiduciary supra* p 126) CARDOZO J said at p 546:

> ``Many forms of conduct permissible in a work-a-day world, for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter



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> than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive, is then

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> the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate ...
>
> Only thus the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

Mrs Shannon should not be allowed to derive a benefit from her own bad faith. The damages to be given must be equivalent to the substantial injury or loss suffered by Mr Jolly.

Mrs Shannon's breach of trust was deliberate. She knew that she was holding the immovable property on behalf of Mr Jolly and that she had no right to alienate it to third parties without his consent. Mrs Shannon knew of Mr Jolly's reliance on her to protect his property interests. She had suggested the idea of a trust to Mr Jolly. Mr Shannon told Mr van Blerk, in her presence, four days before she entered into the agreement of sale with Mr and Mrs Galleymore, that the property was being held for someone else. There is no evidence that she disagreed with her husband. She told Mr Jolly she had sold and transferred the property to Mr and Mrs van Blerk to raise money to solve her family's financial problems. That was abuse of power.

The damages I have assessed as resulting from the loss of the personal right to call upon Mrs Shannon to re-transfer real rights and the loss of real expectation of acquiring the real rights, are a mere peg on which to hang the quantum and have no existence in point of quantity: *Soci,t, des Hôtels Le Touquet Paris-Plage* v *Cummings* [1922] I KB 451 at 457.

In settling for the quantum of the damages, I have considered that the amount should not exceed what Mr Jolly claimed.

The amount of damages claimed by Mr Jolly is a result of a subjective assessment of the value of his personal rights and the potential real rights he had before breach of trust by Mrs Shannon. There is no absolute measure of damages in a case like this where damages are at large. That does not mean that in the proper exercise of my discretion, I should not award Mr Jolly damages in the sum he claimed if I consider it to be a fair compensation for the loss he suffered. In my view, an amount of $190 000 would be a fair compensation for the loss suffered by Mr Jolly in this case. He tendered to Mrs Shannon the sum of $14 500.

There will therefore be judgment for the plaintiff in case HC-2281-92 for $175 500, with interest thereon at the prescribed rate, from the date Mrs Shannon transferred the immovable property to Mr and Mrs van Blerk.

I now turn to consider the claim for the return of the movables, alternatively payment of their value in case HC-236-92. The two remedies of *actio rei vindicatio* and *actio ad exhibendum*, on which the claim is founded, are not alternative terms of the same relief, although they are and can be brought as





alternatives in one action: *Vulcan Rubber Works (Pty) Ltd* v *SAR&H* 1958 (3) SA 285 (A) at 289D-E.

The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of

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his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention: *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20A-C; *Makumborenga* v *Marini* S-130-95 p 2. It follows that the action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings.

The *actio ad exhibendum* deals with a situation that prevailed before the commencement of the action. To succeed, the plaintiff has to allege and prove that he is the owner of the property and that the defendant took possession of it at some time before the institution of the action but disposed of the property, for example by its consumption, sale, or destruction, with knowledge of his claim or title over the property: *Alderson & Flitton (Tzaneen) Ltd* v *E G Duffeys Spares* 1975 (3) SA 41 (T).

In *Frankel Pollak Vinderine Inc* v *Stanton NO* [1996] 2 All SA 582 (W) WUNSH J said that negligence was not sufficient to find a defendant liable in an *actio ad exhibendum. Mala fides* in the form of *dolus* was required. This would exist when the defendant's state of mind constituted *dolus eventualis*.

There would be no *mala fides* in the absence of subjective knowledge (actual or constructive) unless such knowledge was not acquired because the defendant deliberately shut his eyes to the facts.

Mr Jolly proved that Mr and Mrs Shannon were in possession of the movables in categories 1 and 4, at the time of the commencement of the action on 28 January 1992. They admitted the possession. He also proved that they took possession of the movables in category 2 before the commencement of the action. They admitted taking possession of the movables. They also admitted that the movables in category 2 were disposed of before the time of the institution of the action. I shall later determine their state of mind at the time of disposal of the movables.

Mr Jolly did not in my view prove that Mr and Mrs Shannon had possession at any time of movables in category 3. They denied any knowledge of these movables. I will not say anything more about the movables in category 3.

I am also satisfied that evidence proved that Mr Jolly was the owner of the movables at the time Mr and Mrs Shannon took possession of them. To





establish the loss of the right of ownership by Mr Jolly it must be shown that he entered into an agreement with Mr and Mrs Shannon in terms of which he agreed to surrender ownership of the movables to them. It must be shown that in pursuance of that agreement Mr Jolly performed the act of delivering the movable assets to them.

Mr Jolly said he never discussed with Mrs Shannon delivery of the movables. During the

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telephone conversation of 19 October 1988, they discussed the transfer of the immovable property only. The conveyance documents made no reference to movable assets. The evidence showed Mr Jolly's aversion to the idea of surrendering ownership of the movables to Mr and Mrs Shannon. He declined an offer by Mr Shannon to buy the Isuzu pick-up truck, lounge suite and deep freezer. On discovering that Mr and Mrs Shannon had possession of the movables, Mr Jolly took their possession as theft and reported it to the Criminal Investigation Department. He would not have taken that attitude if there was a legal agreement between him and Mr and Mrs Shannon in terms of which he delivered the movables to them. The institution of the vindicatory action against them suggests that Mr Jolly did not surrender ownership in the movables to Mr and Mrs Shannon.

Mr and Mrs Shannon alleged that Mr Jolly donated the movables to Mrs Shannon when he transferred the immovable property to her. There was simply no basis for the allegation. The onus was on them to prove the donation. They did not allege express donation. The deed of transfer and the declaration signed on behalf of Mr Jolly to transfer immovable property to Mrs Shannon made no reference to movables. A donation cannot be presumed.

Voet 39.5.5 states:

> ``... a donation is not presumed in doubt so long as another inference can be drawn. Thus he who sets it even by way of defence ought to prove it for the reason that no one is believed to be readily willing to sacrifice what is his and to donate is nothing else than to sacrifice and to abandon.''

See also *Thornycroft* v *Vas* 1957 R&N 376; 1957 (3) SA 754 (FS).

The defendants had alleged in their plea that Mr Jolly abandoned the movable assets. It is clear from the evidence that Mr and Mrs Shannon took possession of the movables rather than Mr Jolly delivering the property to them. Their taking would amount to *occupatio* as they took the movables without the co-operation of Mr Jolly. For *occupatio* to be a means of acquisition of ownership, it must be shown that the movables taken possession of by Mr and Mrs Shannon were *res nullius*. Mrs Shannon made no mention of this aspect of the defence in her evidence. There was therefore no evidence placed before the court to prove that the movables had been abandoned by Mr Jolly. Their unilateral act of taking possession of the movable assets could not





confer on them the right of ownership. That right remained with Mr Jolly. They had naked possession of the objects without the right.

It follows that at the time Mr and Mrs Shannon disposed of the movables in category 2, they had the requisite state of mind for the purposes of the *actio ad exhibendum*.

They knew that Mr Jolly was the owner of the property. Mrs Shannon sold the 12 delivery bicycles at a public auction she organized at Mount Ash Farm. She knew that Mr Jolly had an interest in his books and magazines but nonetheless set them on fire. Mr Jolly had authorised them to use the Isuzu pick-up truck on condition it was returned to him on his return to

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Zimbabwe. Mrs Shannon said they gave it to Mr Baxter. She admitted that they dismantled the tractor.

I now consider the value of the movables in categories 1, 2 and 4 for the purposes of damages as an alternative relief in the *actio rei vindicatio* and for the purposes of the *actio ad exhibendum*.

In ascertaining the value of the movables, the court is not bound to accept the amount to which the plaintiff has sworn by oath. It must have regard to all the circumstances of the case, including the plaintiff's evidence of value. The price at which the possessor sold the property is not to be taken as the true measure of damages recoverable by the plaintiff: *Mlombo* v *Fourie* 1964 (3) SA 350 (T) at 357H-358D; *Philip Robinson Motors (Pty) Ltd* v *N M Dada (Pty) Ltd* 1975 (2) SA 420 at 428D-G.

For purposes of the *actio rei vindicatio*, the value of the property to be taken as damages is the value at the time of judgment whilst in the case of the *actio ad exhibendum* is the value from the time of wrongful disposal.

The evidence of the value of the movable assets in categories 1, 2 and 4 came from Mr Desfontaine.

His evidence was not challenged. In fact, it was conceded by Mr *Smithwick* for the defendants that Mr Desfontaine was a credible witness. He had seen the movable assets before they were taken possession of by Mr and Mrs Shannon. With that knowledge of their physical condition, he was able to estimate the prices the movables would have fetched at a public auction sale. That is a particular market. The goods were all second-hand. They had been in use for a long time. Some of them had not been used since Mr Jolly departed from the country in 1982.

It is clear from the evidence that the values given by Mr Desfontaine were estimates. In *Turkstra Ltd* v *Richards* 1926 TPD 276 STRATFORD J said at pp 279-80:

> ``In the very nature of things damages of this kind must be conjectural: must be based upon an estimate of some sort ... It is necessary to ascertain what the articles cost when new to ascertain their present value ... The difference then in value would represent depreciation

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> ... so that the problem really would resolve itself into the attainment of three figures, the original cost, the present value and the normal depreciation.
>
> Now, two of these values depend purely upon the estimate of a valuer and the plaintiff has put herself forward in this instance as the valuer ... She may be a very bad valuer but she is the only one called ... It is not a valid argument to say that the valuation of a poor expert is no valuation at all ...
>
> It being necessary to rely upon an estimate of some sort the magistrate cannot be blamed for having awarded half of the only estimate he had before him.''

See also *Phil Morkel Ltd* v *Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C) at 257; *Boyce NO* v *Bloem & Ors* 1960 (3) SA 855 at 871C and 872B.

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Mr and Mrs Shannon were asked to produce the movables they had in their possession at the time of action but refused to do so. They had the movables but failed to have them valued. The values given by Mr Desfontaine were the only estimates available. The estimates were, however, based upon the conditions in which the movables were at the time Mr Desfontaine last saw them. He said he last saw some of them in 1990 when Mrs Shannon gave him the mandate to offer Mount Ash Farm for sale. He made the estimates on or about 1 November 1991.

In instances where the items were known not to be ordinarily available from public auction, Mr Desfontaine estimated the value on what would cost Mr Jolly to buy a new item. Mr Desfontaine did not indicate in his evidence which particular movables had values estimated on the costs of replacing them with new items. In 1987, Mr Jolly wrote to Mr Desfontaine asking that he should offer the Pontiac Parisienne for sale at a purchase price of $5 000. Mr Desfontaine estimated its value in 1991 at $10 000. It was a non-runner but its value was estimated on the assumption that it was a runner.

He conceded that he estimated the value of the tractor at $15 000 on the assumption that it was a runner. It was proved to be a non-runner.

Notwithstanding the inherent limitations in the method of valuation used by Mr Desfontaine, his evidence was the best evidence available which Mr Jolly could place before the court. Mr Jolly proved that he was entitled to some damages. I have awarded Mr Jolly half of the values estimated by Mr Desfontaine.

There will therefore be judgment for the plaintiff in case HC-236-92 with respect to movables in categories 1, 2 and 4. There will be an absolution from the instance with respect to movables in category 3.

It is accordingly ordered as follows:

1. That in case HC-2281-92 the defendant is to pay to the plaintiff the sum of $175 500 with interest thereon at the prescribed rate from 12 December 1990 to the date of payment and costs of suit.

2. (a) That in case HC-236-92 the defendants, jointly and severally, are to restore to the plaintiff all the movable assets listed in categories



1 and 4 within 30 days of the order, failing which pay to him the sum of $68 029, being their value, with interest thereon at the prescribed rate from the date of judgment to the date of payment.

(b) That in case HC-236-92 the defendants, jointly and severally, are to pay the plaintiff the sum of $20 235, being the value of the movables in category 2, with interest thereon at the prescribed rate from the date of service of the summons to the date of payment.

(c) That the defendants in case HC-236-92, jointly and severally, are to pay the costs of

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suit.

*Danziger & Partners*, plaintiff's legal practitioners

*Coghlan & Welsh,* defendants' legal practitioners



## F W WOOLWORTH & CO (ZIMBABWE) (PVT) LTD *v* THE W STORE & ANOR 1998 (1) ZLR 93 (HC)

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

Gillespie J

Civil application

17 March, 12 & 13 May 1997;

28 January 1998 Judgment No. HH-25-98

### Flynote

Delict - passing off - requirements - likelihood of deception - businesses with similar names but very different premises, clientele, quality of goods, etc - likelihood of confusion - plaintiff's reputation - goodwill - meaning - need to establish reputation and goodwill - name - use by defendant of own name - defendant's right use own name

Intellectual property - trade names - businesses with closely similar names but very different premises, goods, clientele, etc - no likelihood of confusion.

### Headnote

The original Woolworths stores were started in the United States by the late F W Woolworth. The success of his stores led to the incorporation of F W Woolworth and Co Ltd in the United Kingdom but it also led to other persons incorporating trading companies in other parts of the world. These companies used the name Woolworth in their names, even though no-one of that name was actually involved.

The applicant company was originally incorporated in this country in 1956. It was owned by Woolworth International Ltd, a British company, and associated with the similarly named British company. It thus had the right to use the name of F W Woolworth. It was bought from its previous owners in 1987 by a coalition of three companies. One of the conditions of sale was that the new owners acquired not only the right to the exclusive use of the name of F W Woolworth, but also an obligation to ensure that the name was not used wrongfully by others. In 1991 the holding of the entire coalition was acquired by one family. The company has 4 branches, three in Harare and one in Bulawayo.

In South Africa there is a chain of stores known as Woolworths, operated by Woolworths (Pty) Ltd, a company incorporated in 1931. It is associated with the British retailer Marks and Spencer and is a member of the Wooltru group of companies. It has shops in several other African countries and in the Gulf. It wished to open a store in Zimbabwe and sought an agreement with

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the applicant regarding the use of the company name. No agreement could be reached. The decision was made to trade under the title of ``The W Store'', the name used in Mauritius and Bahrain. A new store was opened in a prestigious shopping complex on the outskirts of Harare. Advertising material was distributed which brought about an association between the name and brand ``Woolworths'' and the W Store.



The W Store is a spacious and well-appointed shop, which sells expensive and good quality merchandise. Every item sold is exclusive to the Wooltru group. All the goods carry a label with a trade mark ``The W Store''. Every garment bears a label with the name ``Woolworths'' and a logo gram on it. The price tags and till slips are printed with the name ``The W Store''. Every article carries a disclaimer, stating that there is no connection with the Woolworths companies of Zimbabwe. Similar disclaimers are displayed prominently at the entrances.

The applicant's shops, on the other hand, are shabby and down-at-heel in appearance and give a general impression of neglect. There is no single house brand of clothing; and only a small proportion of the goods for sale have a ``Woolworths'' label.

Both parties had a logogram. That of the applicant was a stylised curve reminiscent of a W, while the respondent's was a capital W, formed of two interlinked Vs.

The applicant sought an interdict, on the grounds of passing off, restraining the respondent from opening and using the applicant's name, trade-mark, logogram or get-up; from using the name Woolworths; and from selling goods with the trade mark Woolworths.

*Held*, that in determining whether there has been 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 one is, or is concerned with, that of another. This may be done by using a trade mark or get-up so closely resembling that of another as is calculated to cause confusion. The right to protect a trade name or get-up arises only where the name or get-up has acquired a repute and where, as a result of the acquired repute, use by others might result in a deception which will cause injury to the goodwill enjoyed by the plaintiff. It is thus necessary for the plaintiff to establish a goodwill or reputation enjoyed by him in connection with the mark or get-up copied by the defendant.

*Held*, further, that the applicant had done nothing to establish a goodwill attached to any name, mark or get-up which it claimed was being infringed by the respondent. Although there had been an attempt by the applicant to create an exclusive mark, there was no proof whether any reputation had been successfully generated.

*Held*, further, that even assuming that the name ``Woolworths'' has considerable recognition value attached to it, there was no evidence that in Zimbabwe today the name had any power to attract customers to the applicant's stores, nor that the applicant had any established clientele.

*Held*, further, that the use by the first respondent of the name ``The W Store'' could not be regarded as imitative of the applicant's name nor as representing that the respondent's business was connected with the applicant's. Indeed, the name had been adopted to avoid making such a representation. Undoubtedly the first respondent had used the name

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``Woolworths'' to some extent, but it is the first respondent's own name.

*Held*, further, that even if on the face of it the first respondent's conduct could be construed as a representation, there was no reasonable likelihood of confusion between the two businesses. The parties moved in very different spheres or classes of business. The quality, class and price of merchandise sold by the applicant differed beyond recognition from the same attributes of the goods sold by the first respondent.

*Held*, further, that a party, including a company, is entitled to use its own name, subject to the usual principles of passing off, and provided that it does not give rise to a reasonable likelihood of confusion with the business of an established competitor with the same or similar name, in which case steps must be taken to remove the likelihood of confusion.

Cases cited:

*Atlas Organic Fertilisers (Pty) Ltd* v *Pikkewyn Ghwano (Pty) Ltd & Ors* 1981 (2) SA 173 (T)

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GILLESPIE J

*Bon March, (Pvt) Ltd* v *Brazier & Anor* 1984 (2) ZLR 50 (S)

*Brian Boswell Circus (Pty) Ltd & Anor* v *Boswell-Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (A)

*Burnkloof Caterers (Pty) Ltd* v *Horseshoe Caterers (Pty) Ltd* 1974 (2) SA 125 (C)

*Capital Est & General Agencies (Pty) Ltd & Ors* v *Holiday Inns Inc & Anor* 1977 (2) SA 916 (A)

*Car Guard (Pvt) Ltd* v *Mallard Auto (Pvt) Ltd t/a Autogard* HH-123-97

*CIR* v *Muller & Co's Margarine Ltd* [1901] AC 217 (HL)

*Dun & Bradstreet (Pty) Ltd* v *SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C)

*Erven Warnink BV* v *J Townsend & Sons (Hull) Ltd & Ors* [1979] AC 731 (HL)

*F W Woolworth & Co Ltd* v *Woolworths (Australasia) Ltd* (1930) 47 RPC 337

*Horseshoe Caterers Ltd* v *Burnkloof Caterers Ltd* 1975 (2) SA 189 (C)

*Kellogg Co* v *Cairns Foods Ltd* 1997 (2) ZLR 230 (S)

*Lorimar Productions Inc & Ors* v *Sterling Clothing Mfrs (Pty) Ltd* 1981 (3) SA 1129 (T)

*Polakov Bros (Pty) Ltd* v *Gershlowitz* 1976 (1) SA 863 (E)

*Policansky Bros Ltd* v *L & H Policansky* 1935 AD 89

*Reckitt & Colman SA (Pty) Ltd* v *SC Johnson SA (Pty) Ltd* 1993 (2) SA 307 (A)

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*Royal Beech-Nut (Pty) Ltd* v *United Tobacco Co Ltd* 1992 (4) SA 118 (A)

*Saybrook (1978) (Pvt) Ltd & Anor* v *Girdlestone* 1986 (2) ZLR 185 (S)

*Stellenbosch Wine Trust Ltd & Anor* v *Oude Meester Group Ltd* 1972 (3) SA 152 (C)

*Truck & Car Co Ltd* v *Kar-N-Truck Auctions* 1954 (4) SA 552 (A)

*Woolworths (Pty) Ltd* v *Coetzer* 1934 CPD 198

## Case Information

*A P de Bourbon SC*, for the applicant

*J C Andersen SC*, for the first respondent

## Judgment

**GILLESPIE J:** ``What's in a name?''

wondered the virgin Capulet:

> ``that which we call a rose
>
> By any other name would smell as sweet.'' 1(4)

Or in the case of a retail outlet, by any other name should be as profitable. Not, so it would seem, if that name happens to be ``Woolworths''. This is a name over which have been fought litigious battles as intractable as those feuds attending the names of Montague and Capulet. The present case is just such a battle.

The late Mr Frank Winfield Woolworth, who has given his name to the applicant, is, I think, known to the reasonably well-informed person as the originator of the very successful and profitable ``five and dime stores'' in the United States of America and which made him into a millionaire. The concept of a store where each article of merchandise could be acquired at a fixed price (the five or ten cents alluded to in the name ``five and dime'') was adopted in Great Britain by F W Woolworth & Co Ltd, a company incorporated



in that country in 1909. The success of those companies has inspired other persons to make use of the name ``Woolworth'' in incorporating trading companies in other parts of the world, even where no-one of that name is in fact involved in these other companies. 2(5)

The applicant was incorporated in this country in 1956 as F W Woolworth & Co (Southern Rhodesia) (Pvt) Ltd. It was owned by Woolworth International Ltd, a company registered in London. It was associated with the British company which I have mentioned in the previous paragraph and had the derivative right to use the name of that giant of commerce who founded the American company. In 1980 the company name was changed to its present form. The applicant was in 1987 purchased from its previous owners by the A Adam Syndicate, a coalition

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of three companies which allied themselves for the purpose of effecting that purchase. It was a term of the agreement of sale that:

> ``The purchaser hereby covenants, subject to completion for itself, its successors in title, and its assignees that it will procure that the name F W Woolworth & Co (Zimbabwe) (Private) Limited or any name or names identical or similar thereto or capable of confusion therewith or any colourable imitation thereof is used only by the Company and only in Zimbabwe and that it shall procure that as a condition precedent to any dealing in the shares or the business, assets or undertaking of the Company that an identical covenant is obtained from any purchaser, successor in title or assignee.''

The new owners thereby acquired not only the exclusive right to the use of the name of F W Woolworth in this country but also an obligation to ensure that it was not wrongfully used by others. Thereafter, in 1991, the holding of the entire syndicate was acquired by the Adam family. The applicant has since its inception operated a chain of retail department stores in Zimbabwe. At present it has four branches, three in Harare and one in Bulawayo. I shall describe in greater detail two of these branches in due course. The stores are generally known by the name ``Woolworth''.

As all Zimbabweans who travel to South Africa know, there is in that nation a chain of retail stores known as ``Woolworths''. These stores are operated by Woolworths (Pty) Ltd, a company incorporated in South Africa in 1931. It is associated with the British retailer, Marks and Spencer. It is a member of the Wooltru group of companies in South Africa. Its business includes the sale of merchandise under the trade mark ``Woolworths''. In addition to the outlets in South Africa it has shops in Namibia, Botswana, Swaziland, Lesotho, Bahrain, Mauritius, Kenya and Dubai. As I shall describe in due course, it now has a store in Zimbabwe as well.

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GILLESPIE J

Before commencing business in Zimbabwe, Woolworths South Africa sought to clear the way for itself by reaching an agreement with the applicant. Being aware of the operations and name of the applicant, an approach was made to the applicant or its shareholders. In the latter part of 1993, a Mrs Blanchfield, the managing director of Truworths Zimbabwe Ltd, a local retail chain with some links to the Wooltru Group, intimated to Mr Adam for the applicant, the interest of the South African company in acquiring the business or assets of the applicant. Protracted discussions and negotiations followed but did not result in any agreement. The South African company apparently concluded that the requirements of the applicant for any agreement that would permit its operations in Zimbabwe under the name Woolworths were excessive.

It accordingly looked elsewhere for its entry into Zimbabwe - to the first respondent, Sunray Stores (Pvt) Ltd. The first respondent in due course acquired from Woolworths South Africa its sole franchise for Zimbabwe. In August 1995, Mr Peech, the managing director the first respondent, approached the applicant's Mr Adam. He offered to acquire from the applicant the rights to use the name ``Woolworth'' in Zimbabwe. Again, agreement could not be reached. It was accordingly decided by the first respondent and its foreign franchisers that the proposed Zimbabwean outlet would trade under the name ``The W Store''. This name is a trade mark for retail services by Woolworths South Africa through its franchises in Mauritius and Bahrain. The name has been registered as a trade mark in Zimbabwe. Applications for the registration by the

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first respondent of the trade mark ``Woolworths'' were the subject of objections by the applicant.

Plans went ahead apace for the opening of the new W Store. It was to be located in a large and prestigious suburban shopping complex on the outskirts of Harare, to be named Westgate, which was then under construction. In February 1997 there appeared in the local press a report concerning the imminent opening of this centre. It was stated, among other things, that

> ``Other prominent tenants within the $205 million centre's 33 000 sq m of lettable space will be the South African Woolworths family store ....''

In the same month, the new store started soliciting account customers by means of a circular letter enclosing a glossy brochure and an application for credit facilities. The brochure outlines a history of Woolworths South Africa and refers throughout to the business and products of Woolworths. It uses the name ``The W Store'' wherever it refers to the new outlet. It thus brings about a clear association between the name and the brand ``Woolworths'' and the W Store. At the same time it contains on its first page the following:

> ``Welcome to the W Store in Zimbabwe. A franchise of Woolworths South Africa - to whom all reference, in this document, the name `Woolworths' relates.''

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This publicity came to the attention of Mr Adam of the applicant. In addition, there were also delivered to F W Woolworth a number of invoices pertaining to shop fittings for the W Store and addressed to ``Woolworths, Harare''.

On Monday 17 March 1997, that is three days before the proposed grand opening of the W Store on Thursday 20 March, the applicant brought these proceedings as an urgent chamber application. It averred that it possesses a goodwill pertaining to its trade and the use of the name, ``Woolworth''; that the first respondent intends trading under a name closely resembling that of the applicant; that it intends adopting or imitating the trade name or mark of the applicant's goods; that it intends to adopt or imitate the get-up of the applicants merchandise; and that the whole basis of the store to be opened at the Westgate Centre so nearly resembles that of the applicant that it is likely to deceive or cause confusion in a substantial section of the public if not the whole of the country. It accordingly claimed a battery of interdicts, on the grounds of passing-off, restraining the first respondent from opening and using or imitating the applicant's name, trade mark, logogram or get-up; from using the name, Woolworths; from selling goods with the trade mark, Woolworths. In addition, there was sought a restraint against the second respondent, the registrar of trade marks and patents, from registering the trade marks under dispute.

I refused to deal with the application as an urgent *ex parte* application. I gave instead directions that the papers be properly served on the first respondent and set down in due course as a court application, with leave to advance *viva voce* evidence if so desired and to set the matter down in vacation. On 12 May 1997, proceedings commenced with an inspection *in loco* of the premises of the W Store and of two Harare branches of the applicant: the Bank Street branch, and the main branch in the First Street mall in the city centre. I read into the record a detailed

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statement of observations at the scene, from which neither of the two learned advocates appearing demurred. The following is an abbreviated summary of those observations.

The W Store is a spacious shop, well appointed and with an atmosphere of comfort and leisure. The extensively carpeted areas, the air-conditioned luxury and the neatly uniformed shop assistants all combine to give an air of subdued elegance, no doubt calculated to induce the well-heeled to spend their money. The goods on display include clothing and footwear; household and kitchen appliances and utensils; linen and bathroom goods. The merchandise is all relatively pricey and of good quality. Every item of merchandise sold in the shop is exclusive to the Wooltru Group and to the first respondent as franchisee. All the goods examined carry a label bearing a trade mark. The trade mark is either ``The W Store'' or ``Woolworths''. Where the goods bear a label ``Woolworths'', an adhesive cloth label, ``The W Store'',



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has been placed over the name ``Woolworths''. Isolated instances could be found where the adhesive tag had slipped off or had not been affixed. Every garment bears a label with the name ``Woolworths'' and a logo gram, ``W'' on it. Each hangar for garments is of moulded plastic and bears the name Woolworths embossed in its centre. The price tags proclaim ``The W Store''. The till slips are printed with the name, ``The W Store''. Every article carries a disclaimer, whether as a label or an adhesive tag, which I reproduce:

``The W Store

is the sole

Zimbabwean

franchise of the

Wooltru Group

of South Africa

---

We have no

connection with

the Woolworth

companies of

Zimbabwe''

Inescapable as one enters the store are two large standard notices exhibiting at eye level the disclaimer which I have duplicated above. One walks between these two signs on coming

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through the shop entrance.

The shops of the applicant are very different. The Bank Street branch is situated in a very busy part of the city, one that carries extremely heavy vehicular and pedestrian traffic. Years of use have not passed without leaving their mark on the premises. They are dirty and shabby in appearance. Wide display windows giving onto the pavement are devoid of display and in many cases full of empty cartons and fly-spotted hand written advertising posters. Window panes are broken. Within, there is little apparent order to the layout of the merchandise. The floors are dirty and badly worn, the walls stained and the merchandise shop-soiled. Although into the middle of May, the shopping area was festooned with tattered makeshift signs advertising an April sale. Empty and broken cardboard boxes impede shoppers' access between gondolas of goods. The shop fittings themselves are in many cases rusty and rather dilapidated - torn cardboard is placed at the edge of some shelves to prevent goods falling off.

The main branch on the First Street mall is much cleaner but still presenting a somewhat down-at-heel appearance. The counters and shop fittings are built in, with signs indicating the wares exposed for sale; yet these signs are all effete throughout the shop, bearing no relation to the goods actually on display. The impression of lack of organization that this gives is reinforced by the fact that aisles between displays are blocked by cardboard boxes and



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broken shopping trolleys. Floor tiles are worn, broken or missing throughout. An escalator between floors is unserviceable. In the basement, damage to the roof has the wall stained with damp. The impression of neglect is heightened by an area designed to display to advantage a variety of light fittings being virtually unused: only a few fly-spotted light bulbs are dangling from worn electric flex. Upstairs is a clothing department and supermarket. A wide variety of labels were present on many different styles of clothes. There was no one house brand. A very small proportion of goods was on display under a ``Woolworth'' label. The supermarket presents a most unhygienic appearance; the freezers in particular are stained and rusty with panels missing and ice escaping from them. The till points and parcel counter are old, worn and unsightly.

Samples of the goods on display and of shopping bags were taken from the various stores. Their relevance is to the issue whether or not either shop has any identifiable get-up. The same exhibits show the various logograms upon which the applicant relies as forming part of its identifiable image and which it claims the first respondent is copying. Thus the W Store has as its logogram on all its labels, brochures and other documents, and indeed as the W in its name, a letter as a capital W formed of two interlinked Vs, the whole in a box. Thus:



Occasionally, the mark appears as white lettering on a black background, thus:

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The applicant, on the other hand, boasts a logogram that consists of a stylized curve reminiscent of a W. Thus:



There is, in addition, in evidence at the entrances to the First Street Shop a logogram being a capital W thus:



It was agreed among the parties that this more formal style had been in use by the applicant up to 1956 when the stylized curve was adopted, which had been in use ever since. This curved mark appears on some shopping bags used by the applicant and on those few goods that are sold under a label exclusive to the applicant.

A document entitled a profile study of The Store and F W Woolworth

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has been prepared by the first respondent and handed to me by consent. It lists a number of differences between the two retailers; the location, appearance and appointments of their shops; the nature and prices of their merchandise; guarantees given and other observations. The contents of the document are not admitted as evidence, they are more in the nature of submissions. Nevertheless, my observations on inspection persuade me that the contents are accurate. Mr *de Bourbon* has drawn no instance of inaccuracy to my attention.

The law protects the trader from unlawful competition. The source of this protection is to be found, where no recognised action in respect of a well-defined wrong is relied upon, within the ``broad and ample basis of the Lex Aquilia''. 3(6) This does not mean that a trader is to be cocooned from all competition. One seeks to strike a balance between the conflicting interests of parties competing for a share of the same market. On the one hand, is a person's right to engage in trade and to augment his customer base and goodwill, and even to do so aggressively at the expense of a competitor's business. On the other hand, a trader is entitled to protect his business, reputation and goodwill from unfair attack by his competitor. The yardstick of that which delineates tolerable competition from unfair invasion may be found in ``the general sense of justice of the community, the *boni mores*, manifested in public opinion''. 4(7)

In addition to this statement of general principles, there are a number of well-defined specific instances of unlawful competition, involving both direct and indirect attacks upon the legitimate interests of competitors, in respect of which particular principles are recognized and applied. One of these is passing-off, the cause advanced by the applicant.

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``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 one is, or is concerned with, that of another." 5(8)

The ``representation'' referred to may be any act by one trader that is calculated to deceive or cause confusion between his goods or business and those of a rival. The act might include the adoption of a trade mark, a get-up or any distinguishing sign or slogan. Where a trader does use a mark so closely resembling that of another as is calculated to cause confusion,



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``a trader may be held to have impliedly represented that his goods are those of his rival or that they are connected in some way with his rival. If such conduct causes or is calculated to cause his rival damage, either in the form of diversion of custom or damage to or misappropriation of his goodwill, then the delict of passing-off is committed ... " 6(9)

The right to protect a trade name or get-up is said to arise:

``only ... when the name or get-up has acquired a repute and where as a result of the acquired repute use by others might result in a deception which will cause injury to the goodwill or business to which the goodwill attaches." 7(10)

The existence of some goodwill enjoyed by the plaintiff would therefore seem to be required if such a complaint is successfully to be brought. Indeed the question whether the plaintiff's trade or business has acquired goodwill is unquestionably at least a factor of importance.

``The importance of the acquisition by the plaintiff of a reputation in the trade name is twofold. Firstly, whether the general public will be confused or deceived into thinking, because of identity or similarity of names, that the business of the defendant is that of the plaintiff, or is connected therewith, must, as a matter of logic, depend on the extent to which that name is associated in the minds of members of the public with the business carried on by the plaintiff, ie the extent to which plaintiff has acquired a reputation in that trade name. Secondly, as the rationale of the wrong of passing-off is the protection of the plaintiff's trade and goodwill, a valid cause of action would seem to postulate the existence of a goodwill, ie reputation, attaching to that trade name." 8(11)

So inexorable does this logic seem that it is perhaps a little surprising that there has been some debate as to whether a plaintiff in a passing-off action must establish some reputation or goodwill. 9(12) The point made by those who have questioned the requirement of proof of a reputation is that a reputation or goodwill is only one of the factors to be considered; that it is difficult to see why a person who, although he is unable to establish a reputation attached to any mark of his, should be without remedy in the face of unconscionable trade conduct by a rival.

A full bench of the Cape Provincial Division considered the issue 10(13) and all three learned judges held that the plaintiff must prove a reputation. In the words of VOS J:

``In my view, it is a requirement in an action for passing-off that the defendant must pass



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> his business of as being that of the plaintiff. In order to achieve this the clientele on whom the passing-off is perpetrated must be led to believe that the defendant's business is that of the plaintiff. It seems to me to be a logically unassailable proposition that before such clientele can be confused, they must know of the plaintiff's business." 11(14)

The issue was considered by VAN DIJKHORST J who reached the following conclusion after a review of authorities:

> ``In my view, the decisions overwhelmingly support the requirement of a reputation or goodwill on the part of a plaintiff in a passing off action. This does not mean that a party will be without relief should he have no reputation. The general principles of the delict of unlawful competition are wide enough to encompass his case." 12(15)

It is true that after this decision, CORBETT JA found it unnecessary to decide whether goodwill in the sense of a reputation attached to a trade name is a *sine qua non* for a successful passing-off action. 13(16) However, I do not consider that caution as throwing any doubt upon the proposition. Indeed in a subsequent case, the same learned judge stated:

> ``One of the elements which a plaintiff in a passing-off action must establish is a reputation in such trade mark. By this is meant that by user or advertising or some similar means the trade mark has become associated in the mind of the purchasing public with goods emanating from the plaintiff and has thus become distinctive of his goods. Because only if there is such a reputation will the user by the defendant, on his own goods, of this mark, or one deceptively similar, be capable of amounting to an implied representation that defendant's goods emanate from the plaintiff or are connected in some way with the plaintiff and thus be capable of causing consequential damage to the plaintiff." 14(17)

The *dictum* is unequivocal.

The principle that a plaintiff must be able to show such an element of goodwill is the *ratio decidendi* in all those many cases wherein a foreign plaintiff has been refused relief on the grounds that he has established no reputation within the jurisdiction where the alleged passing-off is occurring. 15(18) In the English law, upon which our law of passing-off has leaned heavily, the element of proof of goodwill appears to be acknowledged as necessary. Furthermore, in this jurisdiction, the necessity of proving some element of





goodwill has been acknowledged by the Supreme Court. 17(19) Despite some subsequent hesitation on the point in our Supreme Court, 18(20) it appears to me that the point is settled. In a claim for relief on the grounds of passing-off, it is necessary for the plaintiff to establish a goodwill or reputation enjoyed by him in connection with the mark or get-up copied by the defendant. In cases where no sufficient degree of reputation can be established then the cause of action must be sought not in the specific cause of passing-off but in the general action for unlawful competition.

Applying this principle to the facts of the present case, it seems to me that the applicant has done nothing to establish a goodwill attached to any name, mark or get-up which it claims is being infringed by the first respondent. The W mark is one that has been out of use since 1956. It only appears at the outside of the First Street branch where it is far less prominent than the

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other marks to which I will refer. It has not been shown to have any particular recognition value or goodwill attached to it.

The  device is undoubtedly in use being displayed at various porticos on the applicant's shops and on some labels attached to a few garments exposed for sale by the applicants. These labels bear in addition the mark ``new bond from Woolworth'' and the statement ``garments bearing the new bond label are specially made for Woolworth''. There is an attempt to create an exclusive mark and to establish for it a reputation, but there has been absolutely no proof tendered of whether any such reputation has been successfully generated.

The name ``Woolworth'' is the final device to which the applicant claims a reputation attaches. No evidence has been led of goodwill or reputation. Nevertheless, given the lengthy period throughout which the applicant has been established in this country, and given the history surrounding the name, I would be prepared to assume that the name has considerable recognition value attached to it. This does not necessarily mean that there is attached to it any goodwill. Goodwill has been said to be:

> ``A thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is





> worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates.'' 19(21)

The applicant has quite properly not attempted to establish, far less to rely upon, any goodwill that might historically and elsewhere have been attached to the name it has inherited. There has been no evidence led according to which I might find, nor any circumstance adduced from which I might infer, that today in Zimbabwe the name ``Woolworth'' has any power to attract customers to the applicant's places of purveyance, nor that the applicant has any established clientele. On the contrary, the overwhelming impression created by the overall appearance of the applicant's stores and the stock therein is that it relies not on any goodwill or secure customer base but on a passing trade.

I would therefore hold that no goodwill or business reputation has been proven by the applicant. Lest such a conclusion be factually incorrect, I consider next whether the first respondent can be said to have misrepresented that its goods or services are, or are associated with, those of the applicant. The applicant has submitted that the first respondent has copied its get-up, used its name and adopted colourable imitations of its (unregistered) trade mark.

The first of these submissions is utterly vain. Neither the applicant nor its stores nor goods have any recognisable get-up to speak of. Certainly, the somewhat seedy appearance of the outlets examined and the shop-soiled look of merchandise on display is nothing that the first respondent has contrived to imitate.

The use by the first respondent of the name ``The W Store'' cannot, I think, be regarded as

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imitative of the applicant's name nor as a representation that the first respondent's business is connected with that of the applicant. Indeed that name has been adopted precisely in order to avoid the representation that might be said to have been made by the use of the name ``Woolworths''. Despite forswearing that name as the name of its store and business, the first respondent has undoubtedly used it to some extent in connection with its goods and services. It is a name that is all but indistinguishable from the name ``Woolworth'' used by the applicant. The name that has been used is, however, the first respondent's own name. True it is that, historically, the name may well have come into being in South Africa in imitation of the name then used elsewhere in the world by the original owners of the business now held by the applicants. At this time and in this place, however, it must be regarded as a name proper to the first respondent. The question therefore is



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whether by the use of its own name, ``Woolworths'', the first respondent is to be taken as representing that its goods and services are connected with those of the applicant, ``Woolworth''. On the face of it, the conduct of the first respondent could be construed as such a representation. I will therefore embark upon the next stage of the inquiry, which is whether such a representation is likely to cause confusion.

Before doing so there is one more potential representation to consider. That is whether the first respondent has used a colourable imitation of a trade mark of the applicant. The difference between the  mark and the  sign is such that it cannot be said that there is any imitation. There is a much greater similarity between the  of the first respondent's and the disused W of the applicant. Because of that similarity I will assume that the former could be regarded as an imitation of the latter and could theoretically be taken as a representation concerning a connection between the goods of the two protagonists. I will therefore take this issue too to the next stage of inquiry, which is whether such a representation is likely to cause confusion.

In respect of both potential representations, as I have already intimated, the issue is whether by the use of its own name, ``Woolworths'', or its mark,  , the first respondent is reasonably likely to deceive the ordinary members of the purchasing public, or a substantial section thereof, to associate the first respondent's W Store with the applicant or to confuse the goods and services of the former with those of the latter. 20(22) Specific principles have been enunciated where an aggrieved trader is attempting to prevent the use by a rival of the rival's own name.

The right of a trader to trade under his own name is said to be ``firmly entrenched in our law'', 21(23) subject to certain limitations. These limitations are:

> ``(a) If he has contracted not to do so.
>
> (b) If the business is started for the fraudulent purpose of imitating another's goods and so filching his trade ...
>
> (c) If the defendant has garnished the use of another's name by imitating the get-up of the latter's goods ... or by imitating his labels, etc, so as to deceive ...
>
> (d) If a person has previously through his advertisements and through the quality of his of goods made his name valuable as a trade name so that his name has become distinctive both of his goods and of himself

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as the manufacturer of those goods, and if his goods have come to be universally known in the market by his name then his name is said to have obtained a secondary meaning. When this is the case then another cannot use that name in connection with a similar class of goods unless he makes it perfectly clear to the public that he is not selling the goods of the original manufacturer - `for the plaintiff by the reputation he has acquired in the business has really come to denote the goods by his personal name just as he might denote them by some fancy name that he might choose to use' ...



(e) If it is manifest from the advertisements, the get-up of the articles or other acts of the later manufacturer that he is representing that the goods are the goods of the earlier manufacturer, then it does not matter whether he is doing so with a deliberate intention to deceive or not. He must carry on his business in such a way as to lead those who deal with him in that business to believe that that are buying goods of the earlier manufacturer of the same name ... " 22(24)

It is true that these rules are stated in connection with the use by a natural person of his given name in his or his firm's or company's business, but I think that in the analogous situation of an established company wanting to use itself, or by franchise, its own acknowledged name or mark, a similar principle must apply. In any event, it can be seen that the detailed rules are but an application of the general principles of passing-off.

It seems to me, after close consideration of all the facts and legal principles, that there is no reasonable likelihood of confusion between the businesses of the two parties. Undoubtedly, some degree of initial confusion is inevitable. Although the first respondent has deliberately eschewed the use of the name ``Woolworths'' for its store's name, it has nevertheless in publicity emphasised its connection with the name. It must, I think, be expected that The W Store may quickly become popularly known as ``Woolworths''. This name is, as I have said, all but indistinguishable from the applicant's ``Woolworth''. Similarly, the applicant's W (to the extent it has any recognition value at all) and the first respondent's  are likely to be associated simply as the initial letter of the name ``Woolworth'' or ``Woolworths'' without differentiation.

I cannot accept, however, that any such initial confusion is likely to persist or to detract from whatever goodwill the applicant may enjoy, or to damage its business. My reasons for holding this very firm view are as follows. Although the parties both conduct the same type of trade, they move in very different spheres or classes of business within that trade. The quality, class and price of merchandise purveyed by the applicant all differ beyond recognition from the like attributes of the goods moved by the first respondent. Where the applicant's ware is cheap and, for the most part, readily available from any number of competitors, that of the first respondent is pricey and exclusive to the W Store. The divergence in character, style and locality of the shopping surroundings in the outlets of the two rivals is even more marked, as my detailed description has very clearly shown. There is no question of the applicant's name having acquired a secondary meaning synonymous with its goods and services.

The misdirection to the applicant of invoices pertaining to the first respondent does not weigh very heavily with me. All businesses are subject to this sort of mistake and such an error in the diversion of mail does not itself



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suggest the likelihood of business being diverted. This circumstance is rarely regarded as indicative of the probability of confusion amongst customers. 23(25) This error is perhaps consistent with the initial confusion the possibility of which I have acknowledged but of no more than that. Any likelihood of lasting confusion amongst the shopping public is amply negated by the strenuous measures taken to dispel any such eventuality.

This last consideration I regard as decisive. The first respondent has in fact done all it possibly can to ensure that any such initial deception is completely dispelled. The plethora and clarity of disclaimer is most impressive and must surely be effective.

Consider an hypothetical customer of the applicant's. He might indeed hear of the new ``Woolworths'' out in Westgate and decide to undertake an expedition to inspect it. On arrival, from the outside he cannot fail to see that this is a very different type of store from that he has been used to shop in. Supposing that he still believes that the merchant he favours has simply established a new, and far more salubrious, branch, he might enter the shop where he will encounter the brace of disclaiming signs in all their unmistakable prominence. He will not fail to notice the entirely different layout and ambiance of this shop, compared with what he is used to. Assume, nevertheless, that he is inattentive enough to be blind to all these obvious manifestations and decides to buy an article, say, of clothing. He will select his garment and look for its price; he will be faced with an array of labels including a repetition of the disclaimer he has already overlooked. Even if he still fails to notice it he will finally encounter the price tag. The price will be higher than anything he has paid for a garment in the applicant's stores. It will be most unexpected. If that does not deter him from his transaction, he will take the garment to the till. There once again he will encounter signs telling him, as plainly as can be, that he is not buying from F W Woolworth, but rather from a sole franchise in Zimbabwe of a South African chain. That should immediately explain to him the high price of the garment and every other ``non-F W Woolworth'' feature that he will have experienced on his little foray. He would, in my estimation, have to be engagingly naïve and crushingly unobservant to walk out of the shop with a purchase still believing that he has patronised a branch of the applicant.

In assessing the likelihood of deception one is enjoined to take into account the class of persons who are likely to be purchasers of the goods in question. 24(26)



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Here, the most that can be said on this score is that one would expect the more affluent to be patronising the W Store. If this is a valid classification, then I would suggest that the sort of person who would not take note of, or could not understand, the disclaimer, is, I would judge, the sort of person who would be deterred by the price of the first respondent's merchandise. Lest it be thought that it is not possible to classify the consumers of products sold variously by the rival traders in this suit, then one must assess the likelihood of confusion by postulating the reaction of the ordinary member of the purchasing public. I consider that I have shown how unlikely it is that such an ordinary customer would remain confused. When it is realised that the applicant must, to succeed, establish such a likelihood of confusion as affecting, not just

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idiosyncratic individuals, but the general public or a substantial section of it, then it may be perceived how far the applicant is from establishing its case. I consider that there is no probability of such confusion.

Since the applicant has failed to establish the commission by the first respondent of a passing-off, it is not entitled to the restraints it seeks against that party. In addition, I do not consider that there is any merit in restraining the second respondent from registering any trade mark that may be in dispute. The decision whether or not to register any mark applied for by the first respondent and opposed by the applicant, is one proper to that official. The applicant's remedy is to persuade the second respondent to its point of view, and should it fail, to seek normal recourse for the adverse decision. That remedy is an adequate, indeed preferable, alternative and should be pursued.

In the result, I would dismiss the application with costs.

*Ali Ebrahim*, applicant's legal practitioners

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

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## RAMVALI TRUST'S TRUSTEES *v* UDC LTD & ORS 1998 (1) ZLR 110 (SC)

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

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

15 January & 2 February 1998 Judgment No. S-10-98

### Flynote

Practice and procedure - default judgment - defaulting party seeking to appeal against judgment before first seeking rescission of default judgment - -- not permissible to do so

### Headnote

Where the High Court gives judgment against a party who is in default, the judgment is not a final judgment and is not a judgment on the merits. The party therefore cannot appeal against the default judgment to the Supreme Court until he has first made an application for rescission of the judgment. The default must be purged in the court in which it occurred and the case must then be decided on its merits before the matter can be taken on appeal. However, if the court of the first instance refuses to rescind the default judgment, the party may appeal against the refusal to rescind the default judgment.

The Supreme Court declined to adopt the course suggested by the parties, namely, to set aside the decision of the High Court by consent and remit the matter to the High Court judge with a request that he prepare a judgment, with leave to either party to make further submissions in writing. This would not be proper. The correct course would be for the parties to proceed in terms of r 63A of the High Court Rules, which deals with the procedure for setting aside of

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default judgment by consent.

Cases cited:

*Argos Fishing Co Ltd* v *Friopesca SA* 1991 (3) SA 255 (Nm)

*Sparks* v *David Polliack & Co* 1963 (2) SA 491 (T)

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

## Case Information

*A P de Bourbon SC*, for the appellants

*J C Andersen SC*, for the first, second and third respondents

No appearance for the fourth respondent

## Judgment

**McNALLY JA:** I do not propose to outline the facts or deal with the merits of this dispute. It seems to me that on purely procedural grounds the appeal is not sustainable.

The appellants (``the Trustees'') were applicants in the High Court. Their application was set down for hearing on 12 May 1997. Heads of argument were filed. At the appointed time the applicants were in default. Counsel for the first three respondents was present. The fourth respondent, the Registrar of Deeds, was content to abide the judgment of the court.



McNALLY JA

Counsel for the respondents must have known that the Trustees did not intend to abandon the application. The overwhelming probability was that there had been some mistake. And so it transpired. Compare *Zimbabwe Banking Corp* v *Masendeke* 1995 (2) ZLR 400 (S) at 402E.

No attempt was apparently made to stand the matter down so that enquiries might be made. The respondents asked for judgment in their favour. Apparently some argument was addressed to the learned judge as to the alleged hopelessness of the application. The learned judge then entered judgment in the following terms:

> ``Applicants in default.
>
> It is ordered that the claim be and is hereby dismissed with costs.''

The Trustees noted an appeal. The grounds of appeal were that the learned judge had erred in various findings, and had erred in failing to make a certain finding, and had erred in failing to order transfer of the property in dispute.

But the learned judge did not make any findings (except that the applicants were in default). When asked to provide a written judgment, she replied that since she had given judgment in default of appearance, she had made no findings, and was not able to produce a judgment on

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the merits. The order was made on the basis of the applicants' default, not on the merits. (Indeed, had she given a judgment on the merits she would surely have been in breach of the *audi alteram partem* rule).

It seems to me clear beyond dispute that the appellants' remedy was to make an application for rescission under r 63 of the High Court Rules. The default judgment was not appealable until an application for rescission had been refused. See *Sparks* v *David Polliack & Co (Pty) Ltd* 1963 (2) SA 491 (T); *Chimanzi* v *Mukange* 1966 RLR 139 (A); and *Argos Fishing Co Ltd* v *Friopesca SA* 1991 (3) SA 255 (Nm). It was not a final judgment.

The parties sought to convince us that in the circumstances we should hear the appeal on the merits. Indeed it was suggested that we would be setting a very unfortunate precedent, if not depriving the appellants of their right to appeal, if we declined to do so.

We are unmoved. Indeed, in our view, to hear the appeal would set a bad precedent. The fact is that there is no decision on the merits. There is nothing to appeal against. What there is, is a default, which must be purged in the court in which it occurred. The merits of the application do not arise before us. The only issue after the order was made was whether the default should be excused. That required an explanation as to why it occurred. That explanation should have been placed before the court in which the default took place.

If we were to hear argument on the merits we would be acting as a court of first instance. The parties would be bypassing the High Court. That cannot be permitted.

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McNALLY JA

Faced with the determination of this court not to hear the matter, the parties proposed that we should set aside the decision by consent and remit the matter with a request that the learned judge prepare a judgment, with leave to either party to make further submissions in writing.

I do not think its proper for this court to give such directions. The matter is adequately covered by r 63A of the High Court Rules. The parties should proceed in terms of that rule.

As to costs, we were asked to make the costs of the appeal costs in the cause. As a matter of practice this court does not make such an award where the effect will be that the costs in this court will be awarded by a judge in another court. It seems to us that each party should bear its own wasted costs of the abortive appeal. Both counsel urged us to hear the matter.

Since this judgment deals with a matter of practice, I have shown the draft to the CHIEF JUSTICE who authorises me to say that he agrees with it.

Accordingly, the following order is made:

1. The appeal is struck from the roll, with no order as to costs.

2. It is recorded that the parties appearing have consented to an order setting aside the default judgment.

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3. The parties are directed to proceed in terms of Order 63A of the Rules of the High Court.

**EBRAHIM JA:** I agree.

**MUCHECHETERE JA:** I agree.

*Coghlan, Welsh & Guest*, appellants' legal practitioners

*Atherstone & Cook*, respondents' legal practitioners

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## MHASHU *v* THOMAS MEIKLE CENTRE (PVT) LTD trading as TM SUPERMARKETS 1998 (1) ZLR 113 (HC)

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

Blackie J

Civil application

22 July 1997 and 4 February 1998 Judgment No. HH-24-98

### Flynote

Contract - formation - offer of prize to winner of competition - subject to tacit term that the prize would only go to person who had done the act that entitled him to the prize - whether winner had done such act

### Headnote

A supermarket ran a competition for its customers. During the competition, customer till slips had logos pre-printed on them at certain intervals. The customers' purchases would then be printed out onto these till slips. In order to enter the competition a customer had to obtain ten of the logos from his till slips and stick them on the entry form. The applicant submitted a number of entries for this competition in the name of his daughter. One of these entries was drawn as a prize-winner and the name of the applicant's daughter was announced as the winner of this prize. The supermarket, however, refused to hand over the prize to her because it said that the entry was fraudulent and in breach of the rules of the competition.

*Held*, that the supermarket had made an offer of a prize and those entering the competition were accepting the offer. This contract, however, was subject to the tacit term that the prize would only be awarded to a person who had complied with the rules of the competition and had done the act that entitled him to the prize. It was clearly one of the rules of this competition that the logos on the entry forms must be obtained from slips issued through the till after the purchase of goods.

*Held*, further, none of the logos contained in the entries of the applicant had been overprinted with till information and according to expert evidence it was virtually impossible that this could happen. Therefore the probabilities were totally against the applicant and he had failed to discharge the onus that rested upon him to prove that he had done the act that entitled him to the prize, namely, that he had submitted logos taken from till slips issued through the till after

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the purchase of goods.

## Case Information

*C K Hungwe*, for the applicant

*A P de Bourbon SC*, for the respondent

## Judgment

**BLACKIE J:** In November and December 1996, the respondent, a supermarket chain, ran a competition for its customers. The competition was called the Bargains, Benz and Bakkie Bonanza. The first four prizes were a Mercedes Benz and three Mazda bakkies. The competition worked this way. The Mercedes Benz logo was printed onto the payment slips issued at the tills



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in the respondent's supermarkets. The logo appeared approximately every 30 centimetres on each till slip. Over the competition period, a customer, who received a till slip with a logo on it, could stick that logo onto an entry form. When the entry form had ten logos on it, the customer posted it to the respondent. Any number of completed entry forms could be submitted. At the end of the competition period, there was a draw of all the received, properly completed, entry forms and the prizes were distributed to those who had won them.

It is common cause that the applicant submitted four entry forms in the name of his minor daughter, each with ten logos stuck onto them. None of the logos on any of the entry forms submitted by the applicant had on them any printing from any of the respondent' tills. One of the applicant' entry forms was drawn as winning one of the bakkies. The applicant' daughter was announced as being the winner of that bakkie. However, the respondent refused to hand over that prize to the applicant. In this application, the applicant seeks an order to compel the respondent to hand over the bakkie.

The respondent refuses to hand over the bakkie to the applicant because, it says, the applicant, fraudulently and in breach of the rules of the competition, obtained the till slips, from which it cut the logos, other than through a till after purchasing goods in the respondent's stores.

The applicant denies that the rules of the competition required the logos to come from a till slip issued from one of the respondent's tills after buying goods in the respondent' stores. He further states that, in any event, he did obtain the logos from till slips given to him after buying goods from the respondent stores. His final submission is that, even if he is wrong on his first two submissions, his daughter is entitled to the bakkie because the respondent awarded it to her and announced her as the winner of it.

The law on this subject is set out in *LAWSA* vol 5(1) (reissue), revised by Christie, in para 134 and especially footnote 6.

> ``An offer may further be made to a group of persons or to the public at large, in which case any one of the group

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or any member of the public can accept it. 6

6 eg where a reward or a prize in a competition is offered. The construction which the courts place on such cases appears to be that only one contract arises, ie between the offeror *and the person who does the act that entitles him to the reward or who wins the competition*: *Sephton* v *American Swiss Watch Co* 1913 CPD 1024. De Wet and van Wyk *Kontraktereg* 36, on the other hand, submit that as many contracts arise as there are people who react to the offer and by so doing accept it; *each of those contracts, however, embodies the tacit term that the reward or prize will go to the person who does the act which entitles him to the reward or who wins the competition*'' (my emphasis).

There are three issues in this application. These are, firstly, whether the competition rules required the applicant to submit only logos from till slips issued after purchasing goods from the respondent and, secondly, if so,



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whether the applicant has complied with the rules. The third issue is, whether, in any event, the applicant' daughter is entitled to the vehicle because she was announced as its winner.

The onus is on the respondent in respect of the first issue and on the applicant in the second and third issues.

The respondent relies upon its advertisement for the competition to establish the rules of the competition. It points to three relevant statements in that advertisement. ``Shop at any TM branch in Zimbabwe.'' ``The Mercedes stars are positioned randomly on the *till slips* (average interval 30 cm). Everyone, therefore, has a chance of winning and *success is not determined by what you spend*.'' ``All you have to do is to is to cut out ten Mercedes stars that may appear on your *till slip,* stick them on an entry form ... and drop the entry into the in store postbox'' (my emphasis). It seems to me that the wording of the advertisement clearly establishes that entry into the competition was limited to logos obtained from slips issued through a till after the purchase of goods.

The applicant says that his logos were from two large purchases made by him from the respondent but that, on the till slips so obtained, the logos were not overprinted by the operation of the till. He has attached to his papers a photocopy of another till slip, which he says he obtained after buying goods from the respondent and on which he which he says the logo has not been overprinted by the till. Unfortunately, the photocopy of that till slip is of such poor quality as to be generally unreadable and it cuts the relevant logo in half. It is impossible for me to discern from that photocopy the accuracy or otherwise of the submission made him. However, even if the applicant did obtain a till slip from the respondent in which one logo was not overprinted by the till, that does not help his case. The respondent has submitted evidence from an actuary, which is not challenged, that the empirical probability of obtaining one logo from the respondent's tills which has not been overprinted is 22.8%. However, it is common cause that the ten logos on the relevant entry form are not overprinted and, further, the entire 40 logos on all the entries made by him are not overprinted. The unchallenged evidence of the same actuary is that ``the probability of getting 40 logos without an overprint would be less than ten in a billion billion billion, ie, a virtual impossibility''. He also estimated that ``the probability of a single individual getting four cards out of four entries without an overprint to be about 1: 48

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000 000". His conclusion is that it is ``highly improbable, in the normal course of events for a single individual to have all forty logos without an overprint."

In respect of this issue, on the evidence before me, the balance of probability is totally against the applicant. He has not discharged the onus,



BLACKIE J

which is on him, to prove ``that he has done the act, which entitles him to the reward".

The final issue concerns the announcement of the applicant's daughter as the winner of the vehicle. That announcement does not seem to me to affect the determination of this case. If the applicant has not done the act, which entitles him to the reward, the respondent's initial mistaken belief that he had done so does not alter the position. The applicant's daughter is not entitled to the vehicle.

In the result, the application is dismissed with costs.

*Musunga & Associates*, applicant's legal practitioners

*Honey & Blanckenberg,* respondent's legal practitioners



## BRIGHTSIDE ENTERPRISES (PVT) LTD *v* ZIMNAT INSURANCE CO LTD 1998 (1) ZLR 117 (HC)

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

Chinhengo J

Civil action

29 September 1997, 9 & 23 January

4 February 1998 Judgment No. HH-14-98

### Flynote

Insurance - insured - claim arising out of theft of vehicle - plaintiff company not owner of vehicle, which was owned by director - whether plaintiff had insurable interest - policy - exclusion clause - clause excluding liability when vehicle in custody of garage for repair - vehicle stolen by robbers when in transit from one garage to another - whether liability excluded

### Headnote

A director of and shareholder in the plaintiff company entered into an agreement with the plaintiff company in terms of which the company would use for business purposes a motor owned by the director in return for which the plaintiff would insure and repair the vehicle and replace it when necessary. The plaintiff company insured the vehicle against theft and various

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other risks. The certificate of insurance issued by the defendant insurance company reflected that the vehicle was owned by the director but was insured by the plaintiff company.

The director was travelling in South Africa in the motor vehicle. The vehicle was damaged at a garage when he was refuelling the vehicle. The garage accepted responsibility for the damage and an employee was taking it to another place to have it repaired when the vehicle was car-jacked. The plaintiff company sought to claim under the insurance policy for the theft of the vehicle. The defendant denied liability on two grounds. Firstly, it argued that since the plaintiff company was not the owner of the vehicle it had no insurable interest. Secondly, it argued that liability was excluded by a clause in the insurance policy that provided that the defendant would not be liable if, when the vehicle was stolen, it was in the custody of a member of the motor trade for the purposes of repair.

As regards whether the plaintiff had an insurable interest:

*Held*, that ``insurable interest'' is widely defined. An insurable interest does not only arise from ownership, in whole or in part, of the thing insured. A person has an insurable interest if he has an interest of appreciable commercial value in the thing insured, such that he will be prejudiced if the peril insured against occurs, provided that the contract is not a betting or wagering contract. A person also has an insurable interest where he derives a benefit or advantage from the existence of the thing, such that he will lose something of appreciable commercial value if the thing insured is lost, damaged or destroyed.

*Held*, further, that an insurable interest can only be determined with reference to the conditions prevailing at the time that the policy of insurance is taken out. It is at that time that the



insured perceives a risk against which he wishes to guard and the insurer issues a policy of insurance on the basis of the risk contemplated. At the time of entering into the contract of insurance the insured's interest is to cover himself against the prejudice that will ensue from the thing being lost, damaged or destroyed.

*Held*, further, that as the plaintiff had assumed the obligation or liability towards the director to replace his vehicle if it was stolen, lost, damaged or destroyed, it had a sufficient insurable interest to be compensated by the defendant for the total sum of the loss which was represented by the director's proprietary interest in the motor vehicle.

As regards whether liability was excluded by the terms of the exclusion clause:

*Held*, that the clause excluded liability if the vehicle is stolen or damaged when the motor vehicle was in the custody or control of a garage for the purposes of repair. The clause therefore did not apply in the present case as the vehicle was stolen by car-jackers whilst it was being driven by the employee of one garage to another garage in order to have the vehicle repaired at the other garage. Thus when the vehicle was stolen it was not in the custody or control of the garage which was to repair the vehicle.

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Cases cited:

*Browning* v *Phoenix Assurance Ltd* [1960] 2 Lloyds Reports 360

*Gray* v *Blackmore* [1934] 1 KB 95; (1934) 47 Ll L Rep 69

*Green* v *Heyman* 1963 (3) SA 390 (T)

*Littlejohn* v *Norwich Union Ins Soc* 1905 TH 374

*Lucena* v *Craufurd* (1806) 2 Bos & PNR 296, HL

*Manderson t/a Hillcrest Electrical* v *Standard General Ins Co Ltd* 1996 (3) SA 434 (D)

*Phillips* v *General Accident Insurance Co (SA) Ltd* 1983 (4) SA 652 (W)

*Steyn* v *AA Onderlinge Assuransie Assosiasie* 1985 (4) SA 7 (T)

*van Achterberg* v *Walters* 1950 (3) SA 734 (T)

## Case Information

*E W W Morris*, for the plaintiff

*A J Dyke*, for the respondent

## Judgment

**CHINHENGO J:** This matter was set down on my continuous roll for the week beginning 29 September 1997. At the hearing counsel for the parties agreed that the matter did not have to be argued in court as the facts were common cause. They therefore decided, and I agreed, that the matter should be dealt with as a stated case. I directed that counsel were each to prepare their written submissions and forward them to me by 10 October 1997. While counsel had by 10 November 1997 prepared and forwarded their submissions to the Registrar of the High Court, it was not until 9 January 1998, and after a lot of trouble locating the papers, that the last of these submissions were handed to me.

The facts as agreed between the parties are the following:

The plaintiff has a farmer's master insurance policy with the defendant. In terms of this policy of insurance, a motor vehicle, being a Toyota Hiace Super 10, registration no. 522-827P, was insured by the plaintiff under comprehensive cover, against all risks, including that of theft, during the period 1 June 1995 to 31 May 1996. The insured value was $160 000.



CHINHENGO J

This motor vehicle, insured by the plaintiff as it was, was actually owned by a Mr Roy Michael Durham, a director/shareholder in plaintiff company. Mr Durham and the plaintiff had entered into an agreement in terms of which the plaintiff would use the motor vehicle for its business purposes and in return for such use the plaintiff agreed to insure, replace and repair the motor

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vehicle whatever the cause necessitating such replacement and repair. The defendant was aware that the motor vehicle belonged to Mr Durham even though it was insured by the plaintiff. The certificate of insurance issued by the defendant reflected that the motor vehicle was owned by Mr Durham but insured by the plaintiff.

On 11 January 1996, Mr Durham was in this vehicle at Killarney Toyota Garage in South Africa where he was refuelling when an employee of Killarney Toyota Garage damaged the motor vehicle. Killarney Toyota Garage accepted responsibility and undertook to make good the damage at their own expense. An employee of the garage was instructed to drive the vehicle to some other place to have it repaired. The vehicle was stolen by car-jackers whilst in the possession of Killarney Toyota Garage's employee. The plaintiff notified the defendant of the claim timeously and complied with all of defendant's requirements for making a valid insurance claim.

The defendant has denied that it is liable to the plaintiff on the ground that as the plaintiff was not the owner of the vehicle, it has no insurable interest. In the alternative, the defendant denied liability on the ground that the policy of insurance specifically excludes liability where in s 14 part 4, it is provided that defendant's liability is excluded if at the time of the loss or damage or other similar mishap, the motor vehicle was ``being used for any purpose in connection with motor trade which use shall include any operation of the vehicle while in the custody or control of a member of the motor trade for the purpose of overhaul upkeep or repair ... ''

I am called upon to determine the two questions: whether the plaintiff has a insurable interest; and, if so, whether liability is not excluded by the special condition in the policy document. A negative answer to either of these questions disposes of the dispute between the parties.

Mr *Morris* argued that the agreement between the plaintiff and Mr Durham that the plaintiff was to replace the vehicle or repair it in the event of any of the insured risks taking place establishes the plaintiff's insurable interest in the vehicle. He also argued that the policy of insurance and the certificate thereof in terms of which the plaintiff insured its own goods and those of its directors amply demonstrate the existence of an insurable interest. In the alternative, Mr *Morris* argued that the plaintiff and the defendant agreed to enter into a contract of insurance for the benefit of Mr Durham, which benefit Mr Durham accepted and as such an *stipulatio alteri* exists.



CHINHENGO J

Mr *Dyke* argued that even admitting that Mr Durham and the plaintiff agreed that should the motor vehicle be damaged or lost the plaintiff would repair or replace it, that in itself does not indicate an insurable interest on the part of the plaintiff. The fact that the plaintiff would sustain a loss in having to replace or repair the vehicle was immaterial. Mr *Dyke* argued further that to establish an insurable interest the party concerned must show that the damage or loss has been occasioned to him arising from a risk against which it insured the property. He also argued that the fact that defendant insured Mr Durham's motor vehicle, knowing fully well that the vehicle belonged to him, does not establish an insurable interest in respect of it (the plaintiff). In regard to the submission that the plaintiff and defendant entered into a contract of insurance for the benefit of a third party, Mr *Dyke* contended that Mr Durham is not entitled, by

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virtue of such an arrangement, to sue on the contract for indemnity and for this reason it cannot be said that the contract between the plaintiff and the defendant was for his benefit.

An insurable interest in a thing does not arise only from ownership of the thing in whole or in part. It arises chiefly from a relation to the thing which occasions prejudice to the person concerned if the peril insured against occurs. Where the insured derives a benefit or advantage from the existence of a thing, that too constitutes a sufficient insurable interest in that thing, as prejudice or loss of the benefit or advantage is occasioned to him if the thing is lost, damaged or destroyed. Thus insurable interest is very widely defined to cover instances in which the insured is so circumstanced in respect of a thing as to produce a detriment or prejudice to him should the risks insured against occur (in this regard, see the definition in *Lucena* v *Craufurd* (1806) 2 Bos & PNR 296, HL, quoted with approval by E R Hardy Ivamy in *General Principles of Insurance Law* 4 ed at p 20).

An insurable interest has been found to exist in respect of a husband who insured the property of his wife which was under his management and from which he derived a benefit. This was the decision in *Littlejohn* v *Norwich Union Insurance Society* l905 TS 374 in which WESSELS J, after examining a number of court decisions in England, South Africa and America, said at 380-381:

> ``The principles to be derived from these cases appears to be this : If the insurer can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a *jus in re* nor a *jus ad rem* to the thing insured, his interest will be an insurable one.''

In that case, the husband and wife were married out of community of property. They depended for the well-being of their joint household on a business owned by the wife, but under the entire control and management of the husband. The husband had insured in his own name the goods in the



business and they had been destroyed by a fire. At p 381 WESSELS J went further to say that in these circumstances the husband was ``interested in the preservation of the property because he has a benefit from its existence and a prejudice from its destruction''.

In *Green* v *Heyman* 1963 (3) SA 390 (T) the court upheld the termination of a lease of a tenant who had not himself taken a plate glass window cover under a lease agreement obliging him to do so. The tenant, who was permitted to sub-let the premises, had had the cover taken by and in the names of the sub-tenants. In the judgment of BOSHOFF J at 397C-F it is stated that the liability on the tenant to repair the plate glass windows as required under the tenancy agreement was itself an insurable interest. He said:

> ``Under the provisions of clause 6 the lessee shall, on assuming occupation of the premises, satisfy himself that the premises are in a good state of repair. Thereafter the lessee shall be responsible for the maintenance of the interior of the premises in good order and condition and shall return the premises to the lessor, on the expiration of the lease in the same good order and condition, fair wear and tear excepted. This clause imports an obligation on the lessee to repair the plate glass windows should they become damaged. *This liability to repair the plate glass windows is in itself an insurable interest.* Clause 13 which provides that the lessee shall insure the plate glass

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> windows, therefore relates to this obligation in the lease. There is no provision that the money recovered under the insurance should be paid to the lessor, with the result that there is no means of compelling the lessee to apply the proceeds of the policy to the repair of the windows. He also has no claim of any kind against the proceeds of the policy in the name of the lessee. The lessor is limited to a personal remedy against the lessee for any breach of his obligation to repair the plate glass windows ... " (emphasis added).

These words, which were not necessary for the decision in that case but which correctly laid the basis of the lessee's obligation to take out the insurance cover in his name, undoubtedly underline the principle that where a person who is in possession of another's property is obliged to repair that property should it be damaged, that person has an insurable interest in the property and may therefore take out cover to protect himself in respect of the liability that may arise. See also *van Achterberg* v *Walters* 1950 (3) SA 734 (T) at 740-741.

In *Phillips* v *General Accident Insurance Co (SA) Ltd* 1983 (4) 652 (W) it was held that a husband had an insurable interest in his wife's engagement ring, as in the event of loss he had a moral duty to replace it and, in any case, if hard times befell them the wife may sell the ring in order to provide for household necessities. This case indicates that it is too restrictive an interpretation to determine the existence of an insurable interest on the basis that the insured has a legal duty or obligation as opposed to any other duty to replace or repair the thing which he has insured. The principles underlying a policy of insurance are more accommodative of various situations in which an insurable interest is found to exist.

**1998 (1) ZLR p122**

CHINHENGO J

The view I take of what constitutes an insurable interest is that articulated in *Steyn* v *AA Onderlinge Assuransie Associasie* 1985 (4) SA 7 (T) (which unfortunately is in Afrikaans and I have had to rely entirely on its headnote translated into English) and *Phillips'* case *supra* at 659E-G. It is that the concept of insurable interest serves not so much to assist in the determination thereof but more in distinguishing between an enforceable as against an unenforceable contract or a betting or wagering agreement as against one which is not. Taken from that perspective, one can see clearly that if a person has some interest in a thing and such interest is sufficient to occasion prejudice to him if the thing is lost or destroyed, then that person has an insurable interest in the thing, provided that the contract is not a betting or wagering agreement.

Mr *Dyke*'s argument was based squarely on the case of *Manderson t/a Hillcrest Electrical* v *Standard General Ins Co Ltd* 1996 (3) SA 434 (D). In that case, the plaintiff and the defendant entered into an agreement of insurance in terms of which the plaintiff insured a motor vehicle belonging to an independent contractor, a Mr Sieg, whom the plaintiff employed under certain terms to carry out repairs to domestic appliances of plaintiff's customers. In carrying out this work, the independent contractor supplied his own vehicle which was insured by the plaintiff. The insurance had been contracted through a broker, who had not asked the plaintiff to specify whether he was the owner of the vehicle or not. The vehicle was stolen and, although this risk was covered by the policy, the defendant refused to compensate the defendant for the loss of the vehicle, arguing that the plaintiff had no insurable interest in the vehicle.

It is not necessary for the purpose of the point I wish to make to go over the arguments of both

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counsel in *Manderson*'s case. It suffices that I quote from the judgment that portion which raises the issues which I wish to address.

At 439G-I, the learned judge, MCCALL J, said:

> ``It appears to have been generally accepted in South Africa that the requirement of an insurable interest for contracts of insurance is based on considerations of public policy. The principle of public policy involved is said to be the law's distaste for, and refusal to recognise, wagering, gaming or gambling agreements. See *Gordon and Getz* (*op cit* at 92). This led DE VILLIERS J, in two leading cases on insurable interest, to take the view that too much emphasis is placed on the concept of the insurable interest and that the inquiry ought to be whether the agreement `amounts to a betting or wagering agreement'.''

The learned judge quotes a passage in *Phillips*' case *supra* at 659F-G and refers to *Steyn*'s case *supra* at 10-12 and concludes at 440B that -

> ``With respect to DE VILLIERS J, I find this approach to be unhelpful. It leaves unanswered the question what it is, other than an insurable interest which determines whether or not a contract of insurance amounts to a wager ... ''

MCCALL J refers to various authorities to advance the contention that ``an



insurable interest is inextricably interwoven with the question of loss''. He continues at 442C-E and says:

> ``It follows from the aforegoing that I agree with the view taken by the authors of the title of `Insurance' in Joubert (ed) *The Law of South Africa* vol 12 para 102 that -
>
> > `In the insurance context, ``loss or damage'' is therefore defined with reference to insurable interest, insurable interest is employed, as a yardstick for loss or damage'.''

They add that:

> ``As matters now stand an insurable interest exists whenever a particular event involves a person in damage in the ordinary sense of the word.''

The judge applied these principles to the case before him and decided that the plaintiff had not suffered any loss capable of being valued as a result of the theft of the vehicle belonging to the contractor. He said further in elaboration at 442E-I:

> ``He (the plaintiff) has not suffered a loss represented by the market value of the vehicle and the tools which were stolen. That is the loss which has been suffered by Mr Sieg (the contractor). As appears from the evidence of the plaintiff and Mr Sieg which was not disputed, what the plaintiff had in mind was that if Mr Sieg's vehicle was stolen or damaged and could not be replaced the plaintiff would suffer a loss representing the loss of profit or loss of goodwill suffered by his business as a result of his being unable to supply his customers with the service performed by Mr Sieg. That may well have been an insurable loss and a loss giving him an insurable interest in Mr Sieg's motor vehicle, but that was not a loss insured under the policy. What was insured against was the loss of or damage to the vehicles described in the Schedule, including that owned by Mr Sieg, not the loss caused to the plaintiff as a result of the unavailability of that vehicle or the tools which were contained in it when it was stolen. If one applies, therefore, the test of proof of loss or damage, in order to ascertain whether the plaintiff had an insurable interest in the motor vehicle and the tools at the time of the theft of them, I am of the opinion that the plaintiff did not have an insurable interest to the extent of the motor vehicle and tools.''

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And at 443D:

> ``Here, the plaintiff's interest in the vehicle was, as I have said, an interest in ensuring that his business did not suffer as a result of the loss of or damage to the vehicle but what he is seeking to recover in this case is not his interest, but the value of Mr Sieg's proprietary interest in the motor vehicle. That in my view is not permitted.''

I have expressed my opinion that I am entirely in agreement with the proposition that the requirement of insurable interest is but only a consideration in the real inquiry whether or not the agreement in question is a betting or wagering agreement. I am unable therefore, with all due respect, to agree with MCCALL J's persuasive argument that loss or damage to the party concerned is the determinant as to whether or not that party has an insurable interest.

In my view, an insurable interest can only be determined with reference to the time that the policy of insurance is taken out. It is at that time that the insured perceives a risk against which he wishes to guard and the insurer issues a policy of insurance on the basis of the risk contemplated. The loss



may occur or it may not occur, save in life assurance. But at the time of entering into the contract of insurance, the insured's interest is to preserve the thing from which he derives a benefit or advantage and to cover himself against prejudice that may arise as a result of damage or loss of the thing. The insured at that moment would invariably be interested in the preservation of the thing in its entirety and in the condition in which it has utility value to him. His interest in the preservation of the thing insured need only be sufficient to meet the test laid down in *Littlejohn*'s case *supra* that he would stand ``to lose something of appreciable commercial value''. To give an example: if my interest in a motor vehicle given to me by a friend is to use it for a period of, say, one month, I cannot see any reason in logic or law why I should not insure against the loss of that vehicle and why, should the vehicle be lost, I cannot recover the value of the vehicle whose loss has occasioned prejudice to me in my failure to use it for the period I intended. This should be so, quite apart from any moral or legal obligation that I may have to repair or replace the motor vehicle. I do not see why my interest should not be regarded as being in the preservation of the whole motor vehicle up to its value and when it is lost or stolen why I should be restricted to the perceived loss which according to the logic in *Mandelson*'s case would be the use value of the vehicle to me.

The value of a thing cannot be measured only in relation to the direct benefit I derive from its use. The benefits are numerous. For example, in the example I have given, the benefit may be to bolster my ego, comfort and other intangibles. There may be cases in which MCCALL J's approach may be applicable but I think they are far and few between. On the facts in *Mandelson*'s case, the plaintiff's interest was identified as being the loss of profit and goodwill which the judge held was not covered by the policy. The policy, he said, covered Mr Sieg's proprietary interest in the vehicle and not the plaintiff's interest that his business operations would not be interrupted. I find the reasoning hair-splitting and technical for the reasons I have stated above. Without an assessment of the plaintiff's loss, granted that it was restricted to loss of profit and loss of goodwill, which I do not agree with, one is hard put to say that that loss of

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goodwill or profit did not equal or exceed the insured value of the motor vehicle.

In my view, where an insured has an insurable interest in a thing, that interest, provided it is of appreciable commercial value to him, extends to the preservation of the thing as a whole and so when the thing is lost or damaged it is sufficient to establish only that the insured has suffered loss and not the extent and nature of such loss. In this sense, the fact that loss has been occasioned to the insured only and not its extent serves to buttress the existence of an insurable interest in respect of him. I must also say that in my view it is a false argument to distinguish the underlying insurable interest



from the thing insured so as to say, as in *Mandelson*'s case, that what was insured was Sieg's proprietary interest in the motor vehicle and not the loss of profit and goodwill. Sieg's proprietary interest in the vehicle and the plaintiff's loss of goodwill and profit were inextricably linked, the latter risk being the very reason that the plaintiff insured Sieg's proprietary rights in the motor vehicle. I have digressed somehow, only because Mr *Dyke* made extensive reference to *Mandelson*'s case to support his argument that in the case before me the plaintiff did not suffer any loss arising from the theft of the motor vehicle.

It is undisputed that the agreement between the plaintiff and Mr Durham was that if due to any calamity, including theft, the motor vehicle was lost, the plaintiff would replace it. This was the obligation and liability which the plaintiff assumed in return for his use of Mr Durham's vehicle. The obligation to replace or repair the vehicle in the event that it is lost or damaged in my view constitute a sufficient insurable interest. On the facts of the present case, *Manderson*'s case is clearly distinguishable, even assuming I am wrong in the view I take of it. I am therefore satisfied that the plaintiff, having assumed the obligation or liability to replace the vehicle, has an insurable interest and is entitled to be compensated by the defendant in the total sum of the loss which is represented by Mr Durham's proprietary interest in the motor vehicle.

The determination that the plaintiff has an insurable interest in the motor vehicle does not, of course, dispose of this matter. In view of the decision I have reached on insurable interest I do not think that it is necessary to examine Mr *Morris*'s other arguments that the plaintiff undertook to insure the personal chattels of its directors or that a *stipulatio alteri* exists. I have, however, to deal with the second ground on which the defendant bases its denial of liability. The defendant submits that s 14 part 4 of the policy of insurance is an exclusion clause in terms of which, if the motor vehicle is lost or damaged whilst it is being used in connection with the motor trade, the defendant is not liable. The defendant argues that at the time of its loss the motor vehicle was in the possession and control of Killarney Toyota Garage for the purpose of repair and a loss in these circumstances is affected by the s 14 part 4 of the policy which provides as follows:

> ``Part 4 - OTHER INSURING CLAUSES
>
> (1) *Description of use*
>
> Use for social domestic and pleasure purposes and in connection with the insured's business as a farmer excluding:
>
> any accident injury loss damage and/or liability caused by or to any vehicle described in the Schedule whilst being used for any purpose in connection with motor trade which use shall include any

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operation of the vehicle while in the custody or control of a member of the motor trade for the purpose of overhaul



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upkeep or repair or driving instruction of paying pupils or whilst let out on hire or whilst used as a taxi plying for public or private hire or whilst racing or pacemaking or in any speed contest or any trial or being driven in a match for a wager or whilst being used for the carrying of fare paying passengers or of guests of an hotel private hotel or boarding house if the insured is the keeper of such hotel private hotel or boarding house or whilst being used for the carriage of explosives or whilst carrying a load in excess of that for which it is constructed to carry or whilst being used for any unusual or specially hazardous purpose.''

Mr *Morris*'s argument on this exclusion clause was, with due respect, unduly dismissive of the plaintiff's contentions. It amounted to this: that the exclusion clause cannot possibly mean that every time an insured's vehicle is at a garage for repair it is not covered in terms of the policy; that part 4 deals only with the use of the vehicle for certain purposes including use in the motor trade; and that what the clause clearly means is that if a vehicle is used for the purposes of the motor trade it is not covered even if at the time of the occurrence the vehicle was under repair and not actually used to convey passengers. He wraps up his argument by saying:

``In other words, a taxi does not cease being a taxi just because it is broken down and being repaired.

By the same token, a farmer's vehicle does not become a taxi, just because it has broken down and needs repair!''

Mr *Dyke*'s submissions are a serious attempt to show that the exclusion clause is applicable. He says that the liability of the defendant is excluded by virtue of the clause in that at the time of its theft, the vehicle was being used in connection with motor trade. The vehicle was in the possession and control of Killarney Toyota Garage, having been damaged by its employees and the employer having undertaken to repair it free of charge to Mr Durham. The purpose for which it was in the possession of Killarney Toyota was its repair.

He explains that good reason exists for the exclusion clause in relation to the motor trade or activities connected therewith. When undergoing repair, upkeep or overhaul, he submits, the vehicle is out of the control of the owner or insured and in the hands of the repairers, who themselves normally carry or should carry their own insurance against loss or damage to motor vehicles in their charge or possession. An insurer would not wish to assume the extra risk over the vehicle whilst it is in the hands of third parties not bound by the terms of the policy and having no real interest in the vehicle other than repairing, upkeeping or overhauling it, as the case may be. He submits further that the ordinary plain meaning of the clause is to exclude liability for the insurers in the circumstances.

The exclusion clause in s 14 part 4 of the policy is essentially dealing with permissible uses of the motor vehicle which are specified as being social, domestic and pleasure purposes and use in connection with the insured's



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business as a farmer. The uses to which a motor vehicle may be put are numerous. A private family vehicle may be used for the purpose of carrying fare paying passengers, it may be used for driving instruction or it may be used for hire as a taxi. The insurer would naturally wish to protect itself against loss of or damage to the motor vehicle arising out of any such uses, and policies of insurance relating to personal use vehicle, invariably contain exceptions or exclusion clauses to limit the insurer's liability or exclude it altogether if the motor vehicle is put to certain specified uses. For the purposes of the present case, the clause specifies the uses to which the vehicle may be put and excludes any loss of the vehicle whilst the vehicle is being used for any purpose in connection with the motor trade. Such use, the clause defines, includes ``any operation of the vehicle while in the custody or control of a member of the motor trade for the purpose of overhaul upkeep or repair''.

There is no need in my view to examine the meaning and scope of the words ``motor trade''. If those words were not susceptible to a clear meaning the purposes for which the vehicle may be in custody or control of a member of the motor trade, ie overhaul upkeep or repair, make it crystal clear what ``motor trade'' in this context encompasses. I have no doubt therefore that if the motor vehicle is in the custody or control of a garage for purposes of repair, overhaul or upkeep the liability of the defendant to compensate the plaintiff is excluded. This is a conclusion which is inescapable on a construction of s 14 part 4 of the policy document. Mr *Dyke* referred me to the case of *Browning* v *Phoenix Assurance Co Ltd* [1960] 2 Lloyds Rep 360 which case is discussed by Hardy Ivamy *Fire and Motor Insurance* at 256-257. I was also referred to *Gray* v *Blackmore* [1934] 1 KB 95; (1934) 47 Ll L Rep 69 (KB). Both these cases discuss the phrase ``use for any purpose in connection with the motor trade''. The general principle which emerges from these cases is that if a motor vehicle is in the custody and control of a member of the motor trade for purposes of repair and the liability of the insurer is specifically excluded, then the insurer is not liable to compensate the insured for any loss arising in such circumstances. What is important is not the prospect which may surprise all owners of insured vehicles that ``every time an assured vehicle is at a garage for repair it is not covered in terms of the policy'' but that the particular policy issued in respect of the motor vehicle contains an exclusion clause similar in effect to s 14 part 4 of the policy under consideration. If such exclusion clause is a term of the contract of insurance then if an insured's vehicle is stolen or damaged whilst in the custody or control of a garage owner for purposes of repair, then the insurer is not obliged to compensate the insured for the loss.

Is the situation in the present case one that is contemplated by the exclusion





clause? I do not think so. In his heads of argument (para 15), Mr *Dyke* clarifies the facts in this case. He says:

> ``In the current case, the vehicle was being driven by the employee of a garage to a firm of panel beaters for the purposes of repairing the damage it has (*sic*) sustained whilst in the custody of the garage.''

Mr *Morris* also, in outlining the agreed facts in this case, says (at para 8) that the motor vehicle

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was stolen by car-jackers whilst Killarney Toyota Garage's employee was driving the motor vehicle to have it repaired by another garage.

It is apparent from this that when the motor vehicle was stolen it was not in the custody or control of a garage for the purposes of repair, overhaul or upkeep. Killarney Toyota Garage was not the garage which was to repair the motor vehicle. The repairs were to be undertaken by another garage and the vehicle was stolen *en route* to that garage. The position of Killarney Toyota Garage was no different from the situation of any person who, after causing damage to another's motor vehicle and accepting responsibility for such damage, is, with the owner's permission, driving the motor vehicle to a garage to be repaired when the vehicle is stolen. Whilst such person is driving it for that purpose, the motor vehicle is obviously not in the possession of the repairer.

With this finding therefore, I consider that the exclusion clause in s 4 part 4 of the policy of insurance is not applicable.

In the result, I find that the plaintiff has not only succeeded in establishing that it has an insurable interest in the motor vehicle but also that the exclusion clause does not apply.

Accordingly, judgment with costs is entered in favour of the plaintiff against the defendant in the sum of $160 000 together with interest a *tempore morae* at the rate of 25% *per annum*.

*McNaught Wickwar*, plaintiff's legal practitioners

*Atherstone & Cook*, defendant's legal practitioners

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## S *v* MUNECHAWO 1998 (1) ZLR 129 (HC)

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

Devittie J

Criminal review

4 February 1998 Judgment No. HH-20-98

### Flynote

Criminal procedure (sentence) - general principles - factors affecting - plea of guilty - weight to be attached to plea of guilty - court's discretion to select appropriate sentence then reduce that sentence because of the plea

### Headnote

Our courts have long recognised the principle that a plea of guilty is a factor in mitigation of sentence, and proper regard should always be paid to a plea of guilty. The fact that the accused pleaded guilty must be weighed against other relevant factors, which may outweigh the mitigating effect of a plea of guilty.

In other jurisdictions, the practice is that proper effect may be given to a plea of guilty by

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pronouncing the discount to be given on account of the plea, and the adoption of such a practice in our courts would not be a radical change from the present sentencing policy. The approach of the courts should therefore be:

(a) considerations of public policy demand that recognition be given to a plea of guilty by reducing the sentence below the level appropriate to the facts of the offence;

(b) it is within the sentencing discretion of the court, should it so choose, to give effect to the policy consideration by first selecting an appropriate sentence before reducing it by a specified amount on account of a plea of guilty;

(c) a bare plea of guilty usually justifies a discount in its own right; it for the court to evaluate the weight to be given to the plea. No fixed discount can be prescribed. In some cases the court may decide that no discount is justified.

In evaluating the weight to be given to a plea of guilty, some of the factors which a court should consider are:

- the stage at which the offender pleaded guilty;
- the extent of co-operation with the authorities;
- the extent to which there is evidence of remorse and contrition: in some cases the plea is not an indication of contrition but acceptance of the inevitable;
- the strength of the prosecution case;
- the fact that the victim in a sexual case has been saved the burden of reliving her ordeal;
- the nature and length of the trial avoided as a result of the plea of guilty.

Cases cited:

*R* v *Buffey* (1992) 14 Cr App R 511

*S* v *Buka* 1995 (2) ZLR 130 (S)

*R* v *Davies* [1989] Tas R 167



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*R* v *Harris & Anor* (1992) 59 SASR 300

*R* v *Jabaltjari* (1989) 46 A Crim 47

*S* v *Matida & Ors* HH-180-97

*R* v *Pavlic* [1995] S Tas R 186

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*S* v *Sidat* 1997 (1) ZLR 487 (S)

The court referred to the following legislation:

Criminal Justice and Public Order Act 1994 (England)

## Judgment

**DEVITTIE J:** There is a resettlement scheme in the Beatrice area about 32 kilometres from Harare, known as Village 2 Resettlement. The scheme utilises irrigation equipment. The accused, who is aged 26, lives in the high density area of Mbare where, like many urban dwellers, he carries on business as a vendor. On 20 October 1997, he travelled to the Village 2 Resettlement area. Apparently, his purpose was to steal the irrigation equipment. He removed 38 water taps from the irrigation pipes.

The following morning the villagers saw that the water taps had been removed. They traced footprints to a dwelling in the vicinity where they found the accused, who attempted to flee but without success. They recovered the stolen water taps.

Upon his arrest, the accused confessed to his guilt. He appeared at the Chitungwiza magistrate's court on 11 November 1997 and pleaded guilty to the charge.

In mitigation, the accused stated that he is married with two children and earns an income of about $800 per month.

The trial court's approach to sentence was in these terms:

> ``In assessing your sentence, the court has considered your mitigation especially that you are a youthful first offender who pleaded guilty which is a sign of contrition. It is also mitigating that all the property was recovered. Against you is the fact that the offence is deemed serous by the courts and is also highly prevalent. It is further aggravated by the fact that the value was on the high side. In the circumstances of this case, a custodial sentence is appropriate."

It proceeded to impose a sentence of 20 months' imprisonment of which 6 months were suspended.

My concern is whether the sentence imposed gives due weight to the fact that the accused pleaded guilty. I am not satisfied that due weight was given to the plea of guilty. But the trial court's approach to sentence is not to be faulted. It determined the penalty in accordance with the accepted practice. It allegedly took into account all relevant factors in exercising its sentencing discretion. In determining the weight to be given to the plea of guilty, the trial court necessarily has to weigh the fact that the accused pleaded guilty against other relevant factors. It may decide that other factors outweigh the mitigating effect to be given to a guilty plea. On the facts of the present case, the fact that





the theft of the water taps may potentially have had dire consequences for a vast number of villagers and their families may be a factor that the trial court considered, although it did not

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expressly state so. The trial court may not have attached much weight to the plea of guilty because the accused was found in possession of the stolen property and therefore had little choice but to plead guilty. Indeed, the circumstances in which a plea of guilty is entered are not fixed, nor are the motivations for doing so. It seems therefore that I have no way of analysing with any degree of precision the weight, if any, given to the plea of guilty.

It is beyond question, though, that our courts have long recognised the principle that a plea of guilty is a factor in mitigation of sentence.

Recently, BARTLETT J in *S* v *Matida & 3 Ors* HH-180-97 exhorted magistrates to pay proper regard to the mitigating effect of a plea of guilty:

> ``Magistrates must pay proper regard to the mitigating effect of a plea of guilty. Magistrates when deciding that imprisonment is the only appropriate sentence must impose the minimum effective period appropriate to do justice to both the offender and the interests of society.
>
> These are the two basic principles at the heart of the sentencing process. Failure to understand them and give effect to them can only result in people being sent to prison who should not be sent to prison or people spending much more time in prison than is fair and just.
>
> These failures are, however, I believe, commonplace within the sentencing process in Zimbabwe - see *S* v *Buka* 1995 (2) ZLR 130 at 134G-135A, *S* v *Sidat* 1997 (1) ZLR 487 (S) at 493 and *S* v *Katsaura* HH-127-97 at pp 2-3 and p 7.
>
> Unless magistrates address these failures seriously, Zimbabwe's prisons will be crowded with offenders who should either not be there at all or who should be there for substantially shorter periods - in this regard see the analogous observations by M*acdonald* JP (as he then was) in respect of equating fines to means in *S* v *Manwere* 1972 (4) SA 425 at 428A-B.''

I share the sentiments expressed by BARTLETT J. His remarks have prompted me, in this judgment, to consider whether his concerns would be addressed if a sentencing court were to state the amount by which the sentence it imposed was less than it would ordinarily have considered appropriate to the facts of the case.

Australian courts have in recent times grappled with the philosophical problems attendant upon giving special recognition to a plea of guilty by advertising the amount of the reduction in sentence. There is much learning on the subject and I propose to confine myself to giving a brief summary of some of the issues that have been the subject of debate in regard to the desirability of quantifying a ``discount'' on account of a plea of guilty.

The first difficulty is that the giving of a discount in consequence of a plea of guilty gives rise to a two-tier sentencing process. In other words, the court is required to state firstly the level of sentence appropriate to the facts of the





offence and then, secondly, to state the actual sentence arrived at by giving a discount for a plea of guilty. The two-tier approach is demonstrated by the court's approach to sentence in a matter which was the subject of appeal in the Tasmanian Supreme Court case of *R* v *Pavlic*

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[1995] Tas R 186:

> ``I consider that a sentence of 5 years is appropriate but I will reduce that by six months in recognition of the co-operation which the accused extended to the police and in particular of the fact that some of the crimes to which he had pleaded guilty would not have been solved were it not for the fact that he volunteered his involvement.''

WRIGHT J in the *Pavlic* case *supra* expressed disapproval of the two-tier approach in these words:

> ``To achieve a just result in any case, all relevant facts must be considered and weighed in the balance along with the facts, circumstances and features of aggravation (if any) relied on by the prosecution. Included in the process is the fact, if it be a fact, that the offender has pleaded guilty. The weight of the plea may vary greatly in the evaluative process taken by the court. It would be clearly wrong, in my view, to assess sentence on the basis of all known facts excluding the plea of guilty, arriving thereby at an appropriate sentence and then, as a separate process, to discount that sentence by an identifiable percentage or fraction to produce the final or effective sentence ... ''

The contrary view is that the administration of criminal justice would grind to a halt if every case was contested; public policy therefore demands that the discount be advertised in order to encourage pleas of guilty. This view finds expression in the dictum of KING CJ in the South Australian Supreme Court decision of *R* v *Harris & Anor* (1992) 59 SASR 300:

> ``It is very important, I think also, that the extent of the discount which is given should be made clear by the sentencing judge. The Court of Criminal Appeals has said on earlier occasions in relation to the discount for a plea of guilty, that it not only ought to be given, but that the judge should indicate so far as is possible, and wherever possible the extent of the discount which he is giving for the plea of guilty.''

The two-tier approach, KING CJ stated, permits an analysis of the extent to which the plea of guilty was afforded weight.

SLICER J in *Pavlic*'s case *supra* offered as a solution an approach where, in the second stage of the two-tier process, the court gives weight to the policy objectives behind a guilty plea which are unrelated to the subjective considerations:

> ``It is not unreasonable to adopt a two stage process. The determination of the initial sentence could be made by reference to the intrinsic characteristics of the case in accordance with the methodology of `intuitive synthesis' - the second stage would be by reference to external factors of social utility and public policy. It would not pay regard to subjective characteristics. Its value determined by questions of public policy could be expressed in quantitative terms.''

A second and related difficulty in giving a quantifiable discount for a plea of guilty, which the Australian courts have debated, is whether a bare plea of guilty justifies a discount. A bare plea of guilty is said to arise where the State



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case is unassailable. In such cases the view has been expressed that the plea of guilty is not an indication of contrition but an acceptance of the inevitable.

SLICER J, in *Pavlic*'s case *supra*, stated that the objections that have been expressed against

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giving recognition to a bare plea of guilty include the following: that it is no more than an acceptance of the inevitable; that an accused's co-operation with the authorities may be evidence not of remorse but of an exercise in damage control; that it is difficult to justify a lesser sentence for one who pleads guilty than that imposed on an offender who exercises his right to plead not guilty; and that it introduces an element external to the subjective circumstances of the victim or the offender.

In *R* v *Jabaltjari* (1989) 46 A Crim 47, a decision of the Northern Territory Supreme Court, ASCHE CJ gave forceful expression to the view that a bare plea of guilty should not be mitigating:

> ``I would reject the pragmatic view that a plea of guilty can justify mitigation on the sole basis that there is a saving of court time and public expense. If adopted at all this would seem to become no more than a disguised form of plea bargaining with undue pressure being put upon the accused to plead guilty.''

The opposing view is grounded in policy considerations. Its proponents argue that a bare plea of guilty merits a reduction in sentence because, by encouraging pleas of guilty, the following policy objectives are achieved: young victims in sexual cases are relieved of the burden of giving evidence and reliving their trauma, time and expense is saved and the congestion on the courts is reduced.

The objections to giving weight to a bare plea of guilty do not in my opinion pay sufficient heed to the dictum of WRIGHT J in *R* v *Davies* [1989] Tas R 167 at 184:

> ``To my mind, it is distasteful and contrary to generally held notions of fairness and justice to contend that genuine contrition and remorse can and should be taken into account in mitigation, but at the same time to claim that the mere fact of a plea of guilty is of neutral effect. A prisoner rarely speaks for himself and usually engages counsel to do so. Are we to give weight to the persuasive oratory of counsel expressing regret on behalf of his client, but to ignore the undeniable fact that by pleading guilty the prisoner has entirely relinquished all prospects of acquittal?''

In my view, the above considerations are more compelling in a system such as ours where the majority of offenders are unrepresented. An unrepresented accused rarely has the confidence to speak on his behalf. It is not mere speculation to say that a large number of serving prisoners may well have received lesser sentences had their pleas in mitigation been articulated by a legal practitioner.

I now propose to examine briefly the practice in England. It seems that the courts there have not been embroiled in the philosophical questions that have occupied the minds of the Australian judiciary. As I understand it the English practice is as follows:



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- a discount is allowed in recognition of a plea of guilty from what would have been an appropriate sentence in the particular circumstances the a case. This practice is based on policy considerations;
- the extent of the discount will vary according to the circumstances in which the plea is entered. A plea of guilty offered in the face of overwhelming evidence of guilt may not

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necessarily attract as great a discount as a plea tendered in other circumstances;

- cases where the court explicitly makes the distinction between appellants, and a reduction in sentence is made in respect of the one appellant who pleaded guilty, appear to support the inference that, as a general rule, a plea of guilty without more will justify a discount of between 1/4 and $^{1}/_{3}$ of the sentence which would have been passed if there had been a contest;
- a court may decline to grant a discount if it considers that to be necessary for the protection of the public;
- the English courts have rejected the notion that there be a fixed percentage discount.

In the case of *Buffrey* (1992) 14 Cr App R 511, the L*ord Chief Justice* said:

> ``It would be quite wrong for us to suggest that there was any absolute rule as to what the discount should be. Each case must be assessed by the trial judge on its own facts and there will be considerable variance as between one case and another. But as general guidance, and I shall emphasise only as general guidance, this court believes that something of the order of one third would very often be an appropriate discount from the sentence which would otherwise be imposed in a contested trial.''

The English Criminal Justice and Public Order Act 1994 now provides as follows:

> ``(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court a court shall take into account -
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which the indication was given.
>
> (2) If, as a result of taking into account any matter referred to in subsection (1) above, the court imposes a punishment it would otherwise have not imposed, it shall state in an open court that it has done so.''

It is clear that the intention behind the Act is to give effect to the policy considerations that dictate that a plea of guilty be accorded sufficient weight.

The foregoing review of the practice in other jurisdictions leads me to the conclusion that there is recognition in those jurisdictions of the compelling policy considerations which dictate that proper effect may be given to a plea of guilty by pronouncing the amount of the discount.

The adoption of such a practice in our courts would not be as radical a change from present sentencing policy as it may seem. The principle that a



plea of guilty justifies a reduction below the level appropriate to the facts of the case is deeply rooted in our system of criminal justice. As MCNALLY JA said in *S* v *Sidat* 1997 (1) ZLR 487 (S) at 493:

> ``Similarly, a plea of guilty must be recognised for what it is - a valuable contribution towards the effective and

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efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded; otherwise, again, why plead guilty?"

The pronouncement of a discount from an otherwise appropriate sentence merely serves to ensure that proper effect is given to the principle stated by BARTLETT J in the *Matida* case *supra*. The policy considerations that have weighed in favour of the ``discount'' approach in England and Australia are even more compelling in this jurisdiction, given the greater scarcity of resources with which to service the administration of criminal justice.

I would summarise my conclusions in this way:

(a) considerations of public policy demand that recognition be given to a plea of guilty by reducing the sentence below the level appropriate to the facts of the offence;

(b) it is within the sentencing discretion of the court, should it so choose, to give effect to the policy consideration by first selecting an appropriate sentence before reducing it by a specified amount on account of a plea of guilty;

(c) a bare plea of guilty usually justifies a discount in its own right; it is for the court to evaluate the weight to be given to that plea and no fixed discount can be prescribed. In some cases, the court may decide that no discount is justified.

Some of the factors to which the court may have regard in evaluating the weight to be given to a guilty plea include the following: the stage at which the offender pleaded guilty; the extent of co-operation with the authorities; the extent to which there is evidence of remorse and contrition; the strength of the prosecution case; the fact that a rape victim has been saved the burden of reliving her ordeal; the nature and length of the trial avoided as a result of the plea of guilty.

I turn now to apply the above principles to the facts of the present case.

The trial magistrate imposed a sentence of 20 months' imprisonment with 6 months suspended on the usual conditions. The value of the water taps is $4 000 and they were all recovered. The accused is aged 26 and is a first offender. He has a family to support and earns a relatively meagre income from his activities as a vendor. The irrigation equipment he stole is vital for the livelihood of the villagers at the irrigation scheme. It is not likely that they would have had the means to replace it without imposing an undue burden on their resources. I consider that to be aggravating. In addition there is a





degree of deliberation revealed in the fact that the accused travelled a considerable distance to steal the water taps. Taking all the above factors into account, I consider that a sentence of 12 months' imprisonment would be appropriate.

In assessing the weight to be given to the plea of guilty, I take into account that the accused was found in possession of the stolen property and that a conviction would in all probability have ensued. I will reduce the effective sentence by 3 months in recognition of the fact that the

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accused pleaded guilty. I also consider it appropriate to suspend part of the prison sentence in the hope that the suspended sentence hanging over his head will have a deterrent effect.

The sentence of the trial court is set aside. The accused is sentenced to 9 months' imprisonment, of which 3 months are suspended for 5 years on condition that the accused does not within that period, commit an offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

In conclusion, I should state that this judgment goes no further than to state that it is within the sentencing discretion of the court to pronounce the amount of the reduction in sentence from what would have otherwise been appropriate had the accused pleaded not guilty and that it is generally desirable for a court to do so. It is for the Law Development Commission to consider whether it is necessary to introduce legislation on the subject.

**BARTLETT J:** I am in full agreement with the innovative approach suggested by my brother DEVITTIE. His suggestion, based on his research and thorough analysis of the approaches adopted in England and Australia in according the proper weight to be given to a plea of guilty, will enable practical effect to be given to the observations made by EBRAHIM JA in *S* v *Buka* 1995 (2) ZLR 130 (S) at 134H-135B and myself in the *Matida* case *supra*. That will indeed be a welcome change - and should result in the imposition of a greater number of sentences which are more in accord with justice and fairness.

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## ZFC LTD *v* GEZA 1998 (1) ZLR 137 (SC)

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

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

27 January & 10 February 1998 Judgment No. S-14-98

### Flynote

Administrative law - natural justice - observance of - disciplinary proceedings by private company - whether must be conducted along accusatorial rather than inquisitorial lines - whether chairman at disciplinary hearing had also acted as prosecutor such that there had been a breach of natural justice

Appeal - interlocutory orders - what constitutes - High Court setting aside decision made after disciplinary proceedings against employee and remitting matter for rehearing - whether interlocutory order such that leave to appeal required - when appeal court will interfere with exercise of discretion of hearing judge to condone lateness in bringing matter on review

### Headnote

After the holding of disciplinary proceedings, an employee had been dismissed by the appellant, her employer. On review the High Court found that there were certain irregularities in the disciplinary proceedings and ordered that the matter be remitted for a rehearing. The appellant, who was dissatisfied with this order as the respondent had sought an order that her company

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reinstate her or pay damages, a remedy which was one that could only be obtained on appeal and not on review, then appealed to the Supreme Court. Dismissing the appeal:

*Held*, that the order granted by the High Court had not been an interlocutory order requiring leave to appeal in terms of s 43(2)(d) of the High Court Act. The High Court had not made a mere ruling as to the manner the case should proceed. It had resolved the matter by, in effect, setting aside the dismissal of the appellant. The appellant was thus not required to obtain leave to appeal.

*Held*, further, that although the judge on review had been generous in condoning the lateness in bringing the review, the appeal should not be allowed on this ground as condonation is a matter for the discretion of the hearing judge and the exercise of such a discretion can only be overturned where it is grossly unreasonable, capricious or *mala fide.* In the present case, it was none of these.

*Held*, further, that, unlike a court of law where accusatorial procedures are used, it is permissible for a disciplinary tribunal to conduct its proceedings along more inquisitorial lines and for the tribunal to play an active part in gathering of evidence.

*Held*, further, that although normally it is not permissible during tribunal proceedings for a person to be both a prosecutor and a judge in the same matter, inroads can be made into this



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principle where authorised by statute or contract. In the present case the chairman of the disciplinary tribunal had not acted both as prosecutor and judge. He had acted more as an evidence gatherer than as an investigator. The investigation had been carried out by the auditor and the auditor's report was then placed before the disciplinary tribunal. Additionally, the applicable code of conduct, which is both a statute and a contract in this case, provided for a very flexible approach and nothing that was done was contrary to the disciplinary procedures provided for in the code of conduct. The matter was fully investigated and the employee was given the opportunity to respond to the allegations.

*Held*, further, that although there had been certain flaws in these disciplinary proceedings by way of the failure to provide the employee with adequate information on some of the counts, these flaws were irrelevant as the employee had been provided with proper particulars of the two counts alleging that she had stolen money and these two counts, which had been established, were a sufficient basis for her dismissal. It was therefore not necessary or desirable to reopen the disciplinary proceedings as there was enough evidence to justify the dismissal.

Cases cited:

*Cluff Minerals Exploration (Zimbabwe) Ltd* v *Union Carbide Mgmt Svcs (Pvt) Ltd & Ors* 1989 (3) ZLR 338 (S)

*de Wet* v *Patch NO* 1976 (1) RLR 65 (G)

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

*Jesse* v *Chioza* 1996 (1) ZLR 341 (S)

*Minerals Marketing Corp of Zimbabwe* v *Mazvimavi* 1995 (2) ZLR 353 (S)

Legislation referred to:

High Court Act [*Chapter 7:06*], s 43(2)(d)

## Case Information

*F Girach*, for the appellant

*T Chitapi*, for the respondent

## Judgment

**McNALLY JA:** This is a labour dispute which has reached this court via the High Court. An application for review of the internal company disciplinary proceedings was brought before the High Court out of time.

The High Court condoned the delay and reviewed the proceedings. It ordered that the matter be remitted to the company with directions that Miss Geza be provided with specific charges with particulars, and that a proper disciplinary proceeding be conducted in terms of the Code of Conduct, SI 66 of 1994, Sixth Schedule. Effectively, therefore, it set aside her dismissal.

Review proceedings are regulated by Order 33 of the High Court Rules. The High Court's powers of review were discussed in *Fikilini* v *Attorney-General* 1990 (1) ZLR 105 (S) at 109. They are contained in ss 26-28 of the High Court Act [*Chapter 7:06*], so far as civil proceedings are concerned. The grounds of review are set out in s 27. They are, in brief:

1. absence of jurisdiction;

2. interest, bias, malice or corruption;

3. gross irregularity.



McNALLY JA

The relief available on review is that the proceedings or the decision may be ``set aside or corrected'' (s 28). Miss Geza asked for a great deal more than that. She wanted an order that ZFC Ltd reinstate her or pay damages. That is the kind of relief one seeks on appeal, not on review. She was not granted that relief.

The complaints in her affidavit however were *prima facie* legitimate grounds for relief by way of review. She complained of -

1. lack of clarity and particularity in the charges against her;

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2. lack of opportunity to prepare a defence;

3. lack of opportunity to explain the deficiencies pointed out in the audit report;

4. denial of her right to appeal by delaying the posting of her letter of dismissal until the time for appeal had lapsed (but in fact her appeal was heard, and dismissed).

She also claimed that the public prosecutor had declined to prosecute her and therefore ``the court system had cleared me''. That point was rightly not pressed on appeal.

The learned judge in the court *a quo* condoned her lateness. In terms of r 259 he was quite generous. The eight weeks period for review began to run, at best for her, on 6 September 1995, the date the general manager advised her that her appeal was unsuccessful. The time for review therefore expired in early December 1995. Yet, her application for review was lodged on 22 July 1996.

But condonation is essentially a matter for the discretion of the hearing judge. I would with respect echo the words of DUMBUTSHENA CJ in *Cluff Mineral Exploration (Zimbabwe) Ltd* v *Union Carbide Mgt Svcs (Pvt) Ltd & Ors* 1989 (3) ZLR 338 (S) at 344-5 when he said:

> ``... I cannot say that there was no basis upon which the learned judge *a quo* exercised his discretion ... It would not be proper for me to substitute my own discretion for that of the learned judge *a quo*.''

I would not therefore allow the appeal on the ground that the learned judge erred in granting condonation. His decision in that regard, being discretionary, can be overturned only where it is grossly unreasonable, capricious or *mala fide*. It was none of these.

The appellant then took the point that, on the procedural merits, the learned judge had erred. Certainly, it would seem that the learned judge did not think much of the grounds of review set out by her, which I have attempted to summarise earlier. He granted relief on a different ground, ordering that a ``proper disciplinary proceeding'' be held. But then he seemed to go back to her first complaint. He ordered ``specific charges with particulars''.

Miss Geza was a debtor's clerk, who made entries in the books of account



of the company. The essence of the charges against her was in relation to her own personal staff account. It was alleged that debits on that account (incurred when she bought company products for her own account on credit) were offset by credit entries made by her without authority or justification. In other words, she was cancelling her debts to the company by making fraudulent fictitious entries on the credit side of her staff account. So it was alleged.

A number of examples of this conduct were put to her on three occasions - 7 June 1995, 14 June 1995, and 27 June 1995. On the last of these occasions, she was handed an audit report which referred to fifteen separate credits to her account which appeared to be unjustified. On each occasion, she was asked if she could give an exculpatory explanation. She never did.

It is true that only the first two *prima facie* unlawful credits were particularised. They were

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mentioned on all three occasions, and were not explained.

When we bear in mind that the credits were all to her own personal staff loan account it will be appreciated that she should have been able to offer an explanation, if there was one. The fact is that the auditor's report was *prima facie* damning. The request that she offer an explanation was almost rhetorical.

It is worth quoting from the audit report to illustrate what I mean:

``FINDINGS

| | | | | |
|---|---|---|---|---|
| 1) | Credit 1 | Dr | Early Bird 002391 | $408.10 |
| | | Cr | E Geza 615560 | $408.10 |

This entry was initiated by Jnl # 630323 dated 20.02.94. The journal could however not be located hence we have no proof as to whether or not it was authorised and what exactly it relates to.

| | | | | |
|---|---|---|---|---|
| 2) | Credit 2 | Dr | Mutoko Cash Group 018791 | $213.84 |
| | | Cr | E Geza 615560 | $213.84 |

This entry was initiated by Jnl # 630323 dated 16.03.94. The journal could however not be located hence we have no proof as to whether or not it was authorised and what exactly it relates to.

3) The remainder of the credits to Miss Geza's staff account which were investigated all relate to transfers from cash sales at Coventry Road, Aspindale and Msasa, all accounts for which Miss Geza has the responsibility of performing monthly reconciliations. We reviewed the reconciliations for credits 3-15 and found the following:

- The cash transfers made from the cash sale account (appearing as a debit on the statement) were made by a D.P. (Debtors Posting), not journalised as per normal procedure.
- The transfers were not reflected on either the debit or credit side of the reconciliation (ie the transfer is not reflected anywhere on the reconciliation).



McNALLY JA

- When the debtors cash receipt listing is produced the transfer does not affect the overall amount of cash received and banked as the transfer out of cash sales is offset by a corresponding credit to Miss Geza's account.
- The majority of the transfers were made from Fertilizer Cash Sale accounts. However, for credit 15 the debit was split between fertilizer and crop chemicals.
- When investigating credit 15 we came across a suspiciously large debit of $38744.90 initiated by Jnl # 633651. We located the journal and found it was initiated by Miss Geza (but unauthorised). The journal related to the transfer for several invoices from Coventry Road cash sales to the unidentified cash sale account (000108). Miss Geza should be asked to explain this journal.

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- Miss Geza should also explain why the amount on the computer printout and the manual journal differ by $1 000.

- Whilst reviewing Miss Geza's cash sale reconciliation files, we came across an unbanked cheque ($309.70 dated 12/07/94 M G Agricultural Consultants). Miss Geza should explain why the cheque was not presented to the cashier for banking, or exactly what the cheque is doing in her files.

CONCLUSION

Unless appropriate explanations can be obtained from Miss Geza with respect to the transfers from cash sales, we have reason to believe that she took advantage of the fact that the cash sale reconciliations were not being properly checked and used this as a mechanism for passing credit to her staff account which would never be detected unless her staff debtor statement was closely reviewed.''

If Miss Geza had an answer she would have said: ``Right, give me the books and I'll show you''. But she did not. She hedged and prevaricated. She had no answer. She admitted her answers were unsatisfactory. She suggested she be allowed to pay back $3 429.67.

The point is that it does not really matter whether all the charges were proved or not. Even if only the first two were adequately particularised, as they were, they added up to a fraud on the company of some $620. What need was there of more? Why is it necessary to prove exactly how much she stole, so long as it was proved that she certainly could not explain the missing $620? We are not dealing with a criminal charge, but with an issue of misconduct warranting dismissal.

The learned judge did not support her grounds for review. He did not say why he came to this conclusion. He went on to consider a point not raised by her, namely the alleged impropriety of the proceedings themselves. In particular he ruled that the secretary/accountant, Mr Musvaire, should not have acted both as investigator-cum-prosecutor on the one hand, and presiding officer at the disciplinary hearing on the other. That, he ruled, was contrary to natural justice.

I have already made the point that that particular submission was neither raised nor argued by Miss Geza. So we do not have the benefit of submissions



McNALLY JA

in the court *a quo*. In this court no authority was cited either way. No other point was taken as to the composition of the Disciplinary Committee. Compare *Minerals Marketing Corporation of Zimbabwe* v *Mazvimavi* 1995 (2) ZLR 353 (Z).

I think it is important to bear in mind what Baxter *Administrative Law* p 249 calls ``the central principles of flexibility and fairness'' in administrative law. He goes on to say:

``A leading English administrative lawyer (Wade) has argued that one fundamental principle which should govern tribunal procedure is that it should be adversarial, not inquisitorial. It is submitted that this view is mistaken. It casts tribunals too rigidly in the mould of courts of law. *An active role on the part of the tribunal in the gathering of evidence* and assisting of unrepresented parties *does not make the tribunal partisan*, even though such a role might not be appropriate in a court of law. What is essential is that the tribunal should be impartial, and that persons affected by the tribunal's decision be given a full opportunity to present their cases and controvert those against them; this is the essence of fairness'' (my emphasis).

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I find Baxter's view strongly compelling.

True, it is a fundamental rule of our law that the role of judge and prosecutor be clearly separated. But inroads may be made into these well-recognised principles, as was accepted in *de Wet* v *Patch NO* 1976 (1) RLR 65 (G) at 82, where authorised by statute or contract in quasi-judicial tribunals.

It seems to me that if one examines the role of Mr Musvaire, one finds that he was far from being a prosecutor. He was the chairman of an inquiry which was held on two occasions - 7 and 14 June 1995 - to try to establish the facts about anomalies in Miss Geza's personal account. As a result of the first inquiry, and her failure to answer questions satisfactorily, she was suspended to facilitate investigations. A further inquiry was held a week later. She had had time to consider her position. She was still unable to explain the anomalies. During the inquiry, Mr Musvaire said to her:

> ``Eunice, you have not told us the truth and I think it's time you started telling us the truth.''

He was quite right. Her answers made no sense. She replied:

> ``I admit that my explanation is not satisfactory. It is entirely up to management to decide on appropriate action to take.''

She was asked by the personnel officer:

> ``What do you want management to do?'',

and she replied:

> ``I don't know, but I would suggest I pay back the money.''

It was not as if she was being asked complex accounting questions about the company's affairs. She was being asked how it was that a number of apparently unauthorised sums of money were being credited, *by her*, to her own personal account.

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McNALLY JA

Mr Musvaire was, in the words of Baxter *supra*, more an evidence gatherer than an investigator. The investigation was carried out by the auditor. His (the auditor's) report was before the third meeting which Mr Musvaire chaired, the disciplinary hearing of 27 June 1995. It was given to Miss Geza at that meeting. But she was already aware of its general contents.

Moreover, the Sixth Schedule to SI 66 of 1994, the Industry's Code of Conduct, which is both a statute and a contract in this case, provides for a very flexible approach. I find nothing that was done that was contrary to the ``disciplinary procedures'' set out in clause 5 of the Sixth Schedule. The matter was fully investigated; Miss Geza was told of the allegations; she was given an opportunity to deal with them; she was accompanied by workers' representatives (who agreed that she should be dismissed); she was advised of her right of appeal. She was dismissed for a serious offence, ie theft.

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As I have already indicated, the only possible procedural flaw was the omission to set out in itemised detail the counts 3-15 referred to in the auditor's report. Coupled with this was a failure to do what Mr Musvaire undertook to do, namely, to give her ``a breakdown of all transactions relating to the $3 429.67''.

That was a flaw in the proceedings. It is also a flaw that other allegations - the ``suspiciously large debit of $38 744.90''; the difference of $1 000 on the computer printout and the manual journal; and the unbanked cheque for $309.70 - were not followed up. But, as I have indicated, the two counts that were particularised were enough to justify dismissal. The flaws in the proceedings were thus irrelevant.

In my view, and with respect, it was not necessary or desirable to reopen the disciplinary proceedings. There was already enough evidence to justify dismissal. A reopening could only provide more. It is noteworthy that she has at no stage attempted to explain the anomalies. She contents herself with saying, in her affidavit, that she believes she can explain them. Over twelve months after her dismissal, she should have been able to do better than that.

Having said all this, I return to a point which I raised with the parties at the start of the hearing. Why is this matter on appeal? Was the order of the learned judge not an interlocutory order?

Section 43 of the High Court Act [*Chapter 7:06*] provides, in subs (2)(d), that 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.

No leave was applied for or given. So it remains to decide whether or not we are dealing with an interlocutory order or judgment. If we are, the appeal must be struck from the roll.

The question has been dealt with fairly recently in this court by the CHIEF



McNALLY JA

JUSTICE in *Jesse* v *Chioza* 1996 (1) ZLR 341 (S). At 344F, the following appears:

> ``The question is whether the `order' referring the matter to trial for the hearing of oral evidence amounts to a `judgment' (defined in s 2 of the Act to include `a decision or order') and is decisive or definitive of the rights of the parties and has the effect of disposing of the whole, or at least a portion, of the relief claimed by one of them. Or is it a mere ruling which is a direction as to the manner in which the case should proceed?''

There is a difference, of course, between referring a matter to trial, and remitting a matter for rehearing. In the former case, there is in effect a decision not to decide. The matter was unresolved when it came before the court, and it remained unresolved. In the latter case, the matter was resolved when it came before the judge. Miss Geza had been dismissed. That dismissal has now, albeit not in so many words, been set aside.

In my judgment, this was not ``a mere ruling as to the manner in which the case should proceed''. The case had been finalised. Miss Geza had been dismissed, and had not appealed beyond the general manager. The decision of the learned judge reversed that situation. It reopened a matter which was closed. Part of the relief sought - that her dismissal be set aside

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- was granted. Compare the words of HARCOURT J cited in *Jesse supra* at 346C:

> ``No final word was said and none of the relief prayed for in the application was granted or refused."

That is not true of the present case.

Accordingly, I accept that the matter was properly before us by way of appeal without leave.

In the circumstances, and in the light of what has been said above, I conclude that the matter should not have been reopened. The appeal is allowed with costs and the order of the court *a quo* is altered to read:

> ``The application is dismissed with costs."

**EBRAHIM JA:** I agree.

**MUCHECHETERE JA:** I agree.

*Gill, Godlonton & Gerrans*, appellant's legal practitioners

*Gollop & Blank*, respondent's legal practitioners

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## MUDAKUREVA *v* GRAIN MARKETING BOARD 1998 (1) ZLR 145 (SC)

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

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

29 January & 10 February 1998 Judgment No. S-156-98

### Flynote

Employment - contract - termination - dismissal - constructive dismissal - resignation to avoid dismissal - appeal against - failure on appeal to raise question of effect of resignation - effect

### Headnote

The appellant was been charged by the respondent, his then employer, with various disciplinary offences. A hearing took place and the appellant was told that the charges had been proved and that he was to be dismissed. However, he was told, he could resign to avoid the stigma of dismissal. He chose to resign and wrote a letter of resignation the same day.

Afterwards he wrote a letter of appeal to the management, who considered the appeal but rejected it because the appellant had resigned. He said, in a later letter to the management, that he only resigned because he was forced to do so. About a year later, he applied to the High Court for an order that he be reinstated. The basis on which he applied was unclear. He had not appealed to the Labour Relations Tribunal, as he was entitled to. Nor did he expressly raise the issue of whether the resignation should be deemed to be a dismissal. The High Court dismissed

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the application.

*Held*, that the appellant should have taken to the Tribunal the question of whether his resignation amounted to a constructive dismissal. Had he done so, the Tribunal could have considered the facts and the law. Since the real issue was not properly placed before the High Court, the judge could only rely on the fact of resignation and so had to reject the application for reinstatement.

Cases cited:

*Fonda* v *Mutare Club* HH-40-91

*Martin* v *MBS Fastenings (Glynwed) Distribution Ltd* [1983] IRLR 198; [1983] ICR 511

*Pascoe* v *Hallen & Midway* [1975] IRLR 116

*Robertson* v *Securicar Tpt Ltd* [1972] IRLR 70

*University of Liverpool* v *Humber & Birch* [1985] IRLR 165

## Case Information

*L T Biti*, for the appellant

*H Simpson*, for the respondent

## Judgment

**McNALLY JA:** This appeal raises for the first time in this court the question: ``Can a letter of resignation in certain circumstances be deemed to be, or to amount to, a dismissal?''. Unfortunately, as I will indicate, it has not been properly raised.

The appellant (``Mudakureva'') used to be employed as a purchasing



McNALLY JA

assistant by the respondent (``the GMB''). On 8 May 1995, he was suspended without pay and benefits on the grounds that he was suspected of fraud in his capacity as a purchasing agent. On 27 June 1995, certain specific allegations were put to him in writing, and he was advised to attend a disciplinary hearing on 5 July 1995.

The hearing took place and immediately thereafter he was advised that the charges had been proved and that he was to be dismissed. (He says he was dismissed, but it is clear from the Code of Conduct, Part II, Stage 4, that the disciplinary committee merely recommends).

Mr Mudakureva was also advised that if he wished to avoid the stigma of dismissal he could resign. He chose to resign. He wrote a letter of resignation on the same date. The letter, in his own hand, tendered his resignation with immediate effect. It went on:

> ``I would also like to thank the Grain Marketing Board management and staff for the good working relationship that

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I have enjoyed during my working period. Should there be need for my services I shall always be glad to serve (?) the Board.

Once again, thank you, but mostly to the purchasing staff."

Some time later (and, strangely, his letter is undated, though his other letters are clearly dated) he wrote a letter of appeal. This letter was apparently written shortly before 25 August 1995. This letter of appeal did not mention his resignation at all. It dealt entirely with the merits of the accusations considered by the disciplinary committee. He claims, in another letter he wrote on 25 August 1995, that he was told that the appeal was not considered because he had already resigned. Management, however, said it was considered, but rejected because he had resigned. These are really two ways of saying the same thing.

In that letter of 25 August 1995, to the deputy general manager (finance), he goes on to say that he only resigned because he did not know he could appeal, and because he was forced to do so. He must have known he could appeal, if only because there is specific provision for that in the Code (Stage 5, p 7). The management emphatically deny he was forced by anyone. He may have thought that he was forced by circumstances. He may have been right in that, but is that a basis for claiming constructive dismissal?

Then, almost a year later, on 14 August 1996, Mudakureva applied to the High Court for an order that he be reinstated. The learned judge, in passing, commented that no attempt had been made to comply with the rules of court. But since he had decided to dismiss the matter on the merits he took this aspect no further.

There seems to be a tendency in labour relations matters, when all else fails and all other avenues are time-barred, to fly to the High Court. It seems to me that the learned judge was right to query the basis on which the application



was made. If it was an application for review, there was no application for condonation; and anyway how can one ask for reinstatement by way of review? If it was an application for a declaration of rights, on what basis was it made? Why did Mudakureva not proceed as in Stage 7 of the Code (p 8) to appeal to the Labour Relations Tribunal, as clearly provided in s 101(7)(b) of the Labour Relations Act [Chapter *28:01*]? Compare the remarks of ROBINSON J in *Musara* v *Zinatha* 1992 (1) ZLR 9 (H) at 14-15.

The learned judge was, with respect, also right in saying that the real issue - whether in the circumstances the resignation should have been deemed to be a dismissal - was never raised in the appeal to the chief executive officer. Mr Mudakureva asked, in the High Court, for ``a *declaratur* to the effect that the respondent unlawfully dismissed me by denying me a hearing by ... the chief executive officer''. But in fact to this day he has not been expressly dismissed. He has resigned. The disciplinary committee did not discharge him. It intended to recommend his dismissal, but refrained from doing so because of his resignation.

In short, the declaration that he sought depended upon a factual investigation which had never

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been undertaken, because the issue had never been raised. And that issue was: did his resignation, in the circumstances, amount to a constructive dismissal? That is the issue he should have taken before the Tribunal - as indeed the learned judge advised him to do.

On that basis alone, the decision of the learned judge must be right.

Had Mudakureva appealed to the Labour Relations Tribunal in terms of s 101(7)(b) of the Act, and had he put his appeal on the basis that he should have been deemed to have been dismissed, and therefore that his appeal should have been considered on the merits, he might have found a great deal of learning on the point.

I refer to the following authorities which are available to this court (which is not well supplied with authorities on labour matters): *Selwyn's Law of Employment* 7 ed para 8.81; *Bowers on Employment Law* p 184 para 10.3.5.3.; Upex *Termination of Employment* 2 ed p 35; Anderman *Unfair Dismissal* 2 ed pp 50-51; *Labour Law Cases and Materials* by Benedictus and Bercusson at 301-3.

As far as case law is concerned, the issue has been considered in the High Court in *Fonda* v *The Mutare* Club HH-40-91. The references in the text of that judgment are all references to English cases, despite the mistaken use of the letters ``RLR''. *(27) The most recent English authority to which I have indirect access through the *Cases and Materials* volume *supra* is *Martin* v

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McNALLY JA

*MBS Fastenings (Glynwed) Distribution Ltd* [1983] IRLR (Industrial Relations Law Reports) 198; [1983] Industrial Cases Reports 511. It is a judgment of SIR JOHN DONALDSON MR in the Court of Appeal. His Lordship made it clear that it was a question of fact whether:

> ``... on the evidence, the reality of the situation was that the employer terminated Mr Martin's employment, or that Mr Martin did. Plainly, the fact that Mr Martin signed a letter of resignation is a factor, and an important factor, in reaching a conclusion on this issue, but it cannot be conclusive.''

See also *University of Liverpool* v *Humber & Birch* [1985] IRLR 165 at 172.

In my view, the real issue was not properly placed before the learned judge. The real issue was whether, *as a matter of fact*, in all the circumstances the GMB was right in refusing to regard the resignation as a constructive dismissal. But that issue was not raised in the appeal to the general manager. As a result, it was not dealt with. As a further result it was not properly raised before the High Court. The GMB was not called upon to put its case on that basis. In the circumstances, the High Court could not give a ruling on that issue. It could rely only, as the judgment indicates, on the fact of the resignation. This court must take the same view.

The appeal is dismissed. Since the appellant was represented in *forma pauperis*, there will be no order as to costs.

**EBRAHIM JA:** I agree.

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**MUCHECHETERE JA:** I agree.

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



## ECONET (PVT) LTD *v* TELECEL ZIMBABWE (PVT) LTD 1998 (1) ZLR 149 (HC)

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

Smith J

Application for leave to execute pending appeal

2 & 10 February 1998 Judgment No. HH-26-98

### Flynote

Appeal - execution pending - leave to execute pending appeal - when may be granted

Practice and procedure - execution - pending appeal - suspension of - locus standi - *litigant not party to original suit - effect of noting of appeal by such party on execution of order appealed against - declaratory order - effect - whether confers rights*

### Headnote

The two parties had been in competition with each other over the right to establish a cellular telephone network in Zimbabwe. In March 1997, the Minister of Information issued a licence to Telecel, despite rulings from the Supreme Court in favour of Econet. Econet sought an order setting aside the licence and declaring Econet to be duly licensed. Telecel was not a party to that suit. On 31 December 1997, the *Judge President* ordered that Econet be deemed to be licensed and that the licence granted to Telecel was void. The Posts and Telecommunications Corporation was ordered to conclude an interconnection agreement with Econet on reasonable terms and conditions.

On 22 January, Telecel noted an appeal to the Supreme Court against the *Judge President*'s order. Econet sought leave to execute the order pending the determination of the appeal and an order that any appeal by Telecel against such an order should not suspend the operation of the order. The application was accompanied by a certificate of urgency.

*Held*, on the facts, that the matter was indeed one of urgency. The element of uncertainty had been reintroduced by the noting of the appeal. It was essential, in the public interest, to eliminate the uncertainty as soon as possible.

*Held*, further, that as Telecel was not a party to the proceedings before the *Judge President*, it did not have *locus standi* to appeal against the order and so the noting of the appeal would not suspend the application of the order made.

*Held*, further, that the ruling of SANDURA JP was declaratory in its effect: he was enunciating the legal rights of the parties consequent upon the Minister's failure to complete the administrative procedures within the timetable specified by the Supreme Court. Since the order

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did not confer any rights, the noting of an appeal could not have the effect of suspending the effect of the ruling.

*Held*, further, that Telecel's prospects of success on appeal were virtually nil. Many improprieties had taken place. There was no appeal by the respondents to the application before SANDURA JP. It was clear that the appeal was noted merely for the purpose of delay and harassment.

*Held*, further, that it was unnecessary to order that the appeal by Telecel should not suspend the



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operation of any order granted. Any order granted would be interlocutory and leave to appeal would be required.

*Quaere*: whether the system whereby the noting of an appeal automatically suspends the judgment should be changed to follow the practice in England, where it is for the unsuccessful party to have to seek leave for the judgment to be suspended.

Cases cited:

*The Annot Lyle* (1886) 11 PD 114 (CA)

*Fox & Carney (Pvt) Ltd* v *Carthew-Gabriel (2)* 1977 (4) SA 970 (R)

*Gillespie's Monumental Works (Pvt) Ltd* v *Zimbabwe Granite Quarries (Pvt) Ltd* 1997 (2) ZLR 436 (H)

*Malan* v *Tollekin* 1931 CPD 214

*Monk* v *Bartram* [1891] 1 QB 346

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

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

*United Steelworkers' Union of Central Africa* v *Rhodesian Iron & Steel Co Ltd* 1961 R&N 443; 1961 (2) SA 437 (SR)

*Wood NO* v *Edwards & Anor* 1966 RLR 336 (G); 1966 (3) SA 443 (R)

*ZDECO (Pvt) Ltd* v *Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H)

## Case Information

*T Nyambirai*, with him Miss *J S McNally*, for the applicant

*M R D Stonier*, for the respondent

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## Judgment

**SMITH J:** The applicant (hereinafter referred to as ``Econet'') and the respondent (hereinafter referred to as ``Telecel'') have battled with each other since 1996 over the right to operate a cellular telecommunication service in Zimbabwe with Econet having started its war for such a right some four years ago . In case No. S-204-96 *(28) the Supreme Court, in an effort to obtain finality with the least possible delay, directed that certain administrative procedures necessary before a licence to operate a cellular telecommunication service could be issued should be completed within fixed time limits - see S-251-96. The Supreme Court directed that specifications for such a service had to be prepared by14 January 1997 and that the Minister of Information, Posts and Telecommunications (hereinafter referred to as ``the Minister'') was to issue a licence by 28 February 1997. That date was subsequently extended to 7 March. The Minister failed to publish specifications by 14 January. As a result, Econet applied for an order that it be deemed to have been issued with a licence - case No. HC-1297-97 (hereinafter referred to as ``the first application''). The only respondent in that case was the Minister. The basis of the first application was that the Minister had failed to issue specifications by 14 January 1997. Telecel was not a party to the case. The Minister issued a licence to operate a cellular telecommunication service to Telecel on 7 March 1997. On 4 April, Econet made an application for an order



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setting aside the licence issued to Telecel and declaring Econet to be duly licensed - case No. HC-3049-97 (hereinafter referred to as ``the second application''). The respondents in that case were the Minister, the Chairman of the Technical Committee, the Chairman of the Government Tender Board, the Posts and Telecommunications Corporation (hereinafter referred to as ``PTC'') and the Attorney-General.

Econet made an application for directions which was heard by G*illespie* J - case No. HC-6962-97. The learned judge granted the order sought, which was that the Registrar of the High Court should set the two applications down for hearing on the same date. There was no order consolidating the two cases. The two applications were heard by S*andura* JP on 18 and 19 1>September 1997 and he gave judgment on 31 December - judgment No. HH-205-97. The order granted was set out as follows. In para 1 it was declared that, in both applications, Econet has since 7 March 1997 been deemed to be a licensed cellular telecommunication service operator. In para 2 it was ordered that in the second application the licence purportedly granted to Telecel was void, that the PTC was to conclude an interconnection agreement with Econet on reasonable terms and conditions and that the costs were to be paid by the Minister and Telecel. In para 3, it was ordered that in the first application the costs were to be paid by the Minister.

On 22 January, Telecel noted an appeal to the Supreme Court against the order granted by S*andura* JP - case No. S-7-98. Econet then filed this urgent chamber application seeking an order that Econet is entitled to establish and operate a cellular telecommunication service. Alternatively, Econet sought leave to execute the order granted by S*andura* JP pending the determination of the appeal. Econet also sought an order that any appeal by Telecel against the order granted in this application shall not suspend the operation of the order. The application

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was accompanied by a certificate of urgency. Telecel has submitted that there is no urgency in the matter and therefore the application should not be entertained as a chamber application. Telecel also opposed the application on the merits. I will deal separately with each of the points raised by Econet in its application.

URGENCY

Econet claims that the matter is urgent because it intends to launch its network on 31 March 1998. In order to enable it to do so, there are many things which have to be attended to. I find it incredible that Telecel should argue that the matter is not urgent. In the affidavit setting out the grounds of opposition, Mr Makamba denies that the matter is urgent and sets out the reasons why he considers that Econet will not be able to launch its network on 31 March 1998. He also says that he will set out more fully, later in his



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affidavit, the reasons for submitting that the matter is not urgent. Needless to say, they are not set out later in the affidavit.

From the time of its establishment in 1970, the PTC enjoyed a monopoly in the provision of telecommunication services. In 1995, the Supreme Court declared that the PTC did not have a monopoly in relation to the establishing and operating of cellular telecommunication services. This gave Econet the green light to embark on establishing its network which it proceeded to do, importing equipment valued at US$10.5 million, recruiting personnel, obtaining approval to construct antenna masts, leasing areas for base stations and registering subscribers. Its activities came to a halt when the Presidential Powers (Temporary Measures) (Cellular Telecommunication Services) Regulations 1996 came into operation on 5 February 1996. Thereafter there was a standstill as far as establishing Econet's network was concerned, no doubt with serious financial consequences, until the order by S*andura* JP on 31 December 1997. Thereafter Econet resumed its activities in order to launch its network as soon as possible. The effect of the order is that Econet is deemed to be licensed for three years from 7 March 1997. Almost a third of that period has already elapsed. Moreoever, before it can launch its network, Econet must conclude an interconnection agreement with the PTC. Any hold- up in the discussions between Econet and the PTC could have harmful effects.

In the opposing affidavit, Telecel concedes that it has not yet started to operate, even though it had indicated that it would launch its network in November 1997 and, in terms of the licence granted by the Minister, it was supposed to commence operations on 6 December 1997. It says that one of the main reasons for the late implementation of its network is the pending court case, ie the second application, ``resulting in hesitancy from financial institutions and banks to proceed''.

With the noting of the appeal by Telecel and the lodging of this application, the element of uncertainty and hesitation has been reintroduced. Both parties have obviously committed vast sums of money to their projects as well as employing staff and entering into negotiations and agreements with third parties. Moreover, the introduction of the proposed network, whether by

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Telecel or Econet, is long overdue and eagerly awaited by members of the public. I consider that it is essential that the uncertainty be eliminated as soon as possible. The matter is clearly one of great urgency.

In its opposing affidavit, Telecel gives several reasons for the late implementation of its network. They include the following: delay in obtaining approval from the Zimbabwe Investment Centre; the considerable time taken to effect customs clearance of the equipment it imported; delays in obtaining approval from the Reserve Bank of Zimbabwe of its supply and management





contract. Similar complaints of bureaucratic delays have been heard for many years in this country. It seems that no steps are taken to obviate these delays. If the allegations by Telecel are true, one wonders why greater efforts are not made by the authorities concerned to assist investors expeditiously. Telecel obviously has the support of people in high places and yet even it cannot overcome the bureaucratic delays.

*LOCUS STANDI* OF TELECEL TO APPEAL

Telecel has noted an appeal against the order granted by S*andura* JP. There is no appeal by the Minister or any other party. It is trite to say that a person who took no part in the proceedings before a court of first instance has no right to appeal against the court's decision. This principle was recognised in *United Steelworkers' Union of Central Africa* v *Rhodesian Iron & Steel Co Ltd* 1961 R&N 443; 1961 (2) SA 437 (SR) where, at 447A-C (440A-C) LEWIS J (as he then was) said:

> ``After the hearing of this matter was concluded, I entertained doubts as to whether, in the event of my upholding the respondent's contentions on the legal issues, it would be proper for me to make a finding to the effect that the administrative action of the Minister of Labour ... was *ultra vires* and null and void, without first affording the Minister an opportunity of intervening, either in order to advance further argument in respect of the action taken by him or in order to give himself *locus standi to appeal to the Federal Supreme Court*'' (emphasis my own).

Telecel was not a party to the first application. Mr *Nyambirai* submitted that for that reason Telecel does not have *locus standi* to appeal against the order granted by SANDURA JP in so far as it relates to the first application, and therefore the appeal is, to that extent, invalid. Mr *Stonier*, on the other hand, argued that the order granted by SANDURA JP dealt with both applications and was so framed that the learned JUDGE PRESIDENT clearly intended that they should both be treated as one application. Therefore the effect of the order was that both applications were joined and, in effect, Telecel became a party to both. I cannot accept Mr *Stonier*'s submissions. In his judgment, SANDURA JP mentions that there are two applications which were heard together. After setting out the events leading up to the two applications, he then deals with the issues in the first application and makes his conclusions. Then he deals with the issues in the second application. The order also clearly deals separately with each application. I fail to see how Telecel can be regarded as a party to the first application and therefore as having a right of appeal against the order insofar as it relates to the first application.

It is of course for the Supreme Court to decide on the validity of the notice of appeal insofar as it relates to the first application. However, until the Supreme Court holds otherwise, I would

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declare that the noting of the appeal



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does not suspend the application of the order granted by S*andura* JP insofar as it relates to the first application.

DECLARATORY ORDER

In *Mushaishi* v *Lifeline Syndicate & Anor* 1990 (1) ZLR 284 (H) at 288 G, GREENLAND J said:

> ``My ruling is, in effect, declaratory, ie to declare what the law provides. The applicant now enjoys nothing that he did not enjoy before launching the proceedings except the comfort of having had the court confirm his legal opinions. Still, as the facts reveal a competition for rights in respect of the claims, justice, common sense and good order require judicial confirmation on this issue and the seeking of a declaratory order was indicated.''

Mr *Stonier* conceded that the above correctly sets out the effect of a declaratory order. He also accepted that para l of the order by SANDURA JP was framed as a declaratory order. He argued, however, that the substance of the order was such that it gave rights to the parties and did not merely declare what the legal position is. Once more, I cannot accept the submission. S*andura* JP was clearly enunciating the legal rights of the parties consequent upon the failure by the Minister to complete the administrative procedures within the timetable specified by the Supreme Court. He did not purport to grant a licence to Econet. He merely declared that that was the effect of the order of the Supreme Court once the Minister failed to do what she was required to do.

Accordingly, in my view, since para l of the order granted by SANDURA JP was merely confirming the rights of Econet, the noting of the appeal could not suspend the effect of that paragraph as it does not confer any rights.

LEAVE TO EXECUTE PENDING APPEAL

In determining an application for leave to execute pending an appeal, the court must have regard to the ``preponderance of equities'', the prospects of success on the part of the appellant and whether the appeal has been noted without ``the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose eg to gain time or to harass the other party'': see *Fox & Carney (Pvt) Ltd* v *Carthew- Gabriel* (2) 1977 (4) SA 970 (R) and Z*DECO (Pvt) Ltd* v *Commercial Careers College (1980) (Pvt) Ltd* 199l (2) ZLR 61 (H).

With regard to the preponderance of equities, it is obvious that both parties have much to gain if they are permitted to continue with their preparations for establishing their respective networks pending the outcome of the appeal and, likewise, that both have much to lose if they are prohibited from carrying



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on with their preparations in the interim. Both have expended large amounts of money and

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entered into contractual agreements with other persons in the expectation of being granted the necessary licence. It seems to me that the equities are fairly evenly balanced.

Consequently, one must look at the prospects of success on appeal. On this aspect, it appears to me that Econet wins hands down. I consider that the prospects of success on the part of Telecel are virtually nil. In his judgment SANDURA JP set out in great detail the many improprieties that had taken place. There is no appeal by the Minister, the Chairman of the Technical Committee or the Chairman of the Government Tender Board against his findings. In her opposing affidavit in the second application, filed on 2 June 1997, the Minister conceded that the licence she had issued to Telecel should be set aside. In view of the manipulation of the Tender Board's recommendation to the Minister by its chairman, Dr Mahlahla, the attitude adopted by the Minister is not surprising. Furthermore, there is no appeal against the order insofar as it relates to the first application.

Finally, on this issue, Econet has submitted that the appeal was noted for the purposes of delay and is not a *bona fide* appeal. In support of this contention, it referred to a statement made by Mr Chiyangwa in an interview he gave to the Press. Mr Chiyangwa is the President of the Affirmative Action Group, which is a shareholder of Telecel. At the interview, Mr Chiyangwa confirmed that the order had been granted by the High Court and then went on to say:

> ``We can appeal to the Supreme Court. It will take a very very long time for Mr Masiyiwa to go on air. But once we do appeal, we set aside his licence, okay! Now he (Masiyiwa) knows that. Anybody who knows law knows that. What we are saying is that we don't want to do that. We don't want to be forced to do that. So the only way we can be enticed not to do so is lets come to some kind of reasonable sensible business agreement."

Telecel does not deny that Mr Chiyangwa made the statement set out above. It submitted, however, that Mr Chiyangwa was not speaking on behalf of Telecel. However, Telecel does not say that it ever refuted the statement made by Mr Chiyangwa. With friends like him, who needs enemies? Having regard to the limited prospects of success, I am satisfied that the appeal was noted merely for the purpose of delay and harassment.

In the circumstances, I am satisfied that Econet is entitled to the order it is seeking.

APPEAL AGAINST ORDER GRANTED IN THIS APPLICATION

In the draft order, Econet sought a declaration that any appeal by Telecel against the order I grant shall not suspend the operation of it. I do not consider that it is appropriate or necessary for me to make such an order. As I held in *Gillespie's Monumental Works (Pvt) Ltd* v *Zimbabwe Granite Quarries*



SMITH J

(Pvt) Ltd 1997 (2) ZLR 436 (H), any order granted by me in this application is an interlocutory order. Therefore, Telecel will not be able to appeal against my order without obtaining leave to appeal from me or, if that is refused, from a judge of the Supreme Court.

EFFECT OF APPEALS IN CIVIL CASES

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In this country, as in South Africa, the noting of an appeal in a civil case automatically suspends the execution of any judgment or order granted by the court of first instance. In *South Cape Corp* v *Engineering Mgmt Svcs* 1977 (3) SA 534 (A) C*orbett* JA (as he then was) said at 544 :

> ``... 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 ... The purpose of the rule is to prevent irreparable damage from being done to the intending appellant.''

An application may however be made to the trial court for leave to execute pending the appeal and in any such application the onus is on the applicant to show special circumstances (see *South Cape Corp supra* at 545 and 548).

In *Wood NO* v *Edwards & Anor* 1966 RLR 336 (G); 1966 (3) SA 443 (R) LEWIS J (as he then was) made it clear that the general rule, as stated above, also applies in Zimbabwe and he referred with approval to *Reid* v *Godart* 1938 AD 511 when it was also stated that ``The foundation of the common law rule ... is to prevent irreparable damage to the intending appellant''.

In relation to magistrates courts, the matter is dealt with by statute. Section 40 (3) of the Magistrates Court Act [*Chapter 7:10*] provides that where an appeal has been noted the court may direct that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. If the court makes no order the ordinary common law rule applies and execution is automatically suspended. ``It seems to me that when neither party applies and neither of those orders is made (namely staying or carrying out execution), the ordinary common law rule governs the matter and execution is automatically suspended'': *per* GARDINER JP in *Malan* v *Tollekin* 1931 CPD 214 at 214.

In England the position is different. On appeal, the execution of the judgment appealed against is not automatically stayed. There must be special circumstances existing which entitle the appellant (the unsuccessful party) to apply for a stay of execution. The rationale for the position in England appears to be that ``a successful litigant [should not be] deprived of the fruits of his litigation'': *per* BOWEN LJ in *The Annot Lyle* (1886) 11 PD 114 (CA) at 116. See also *Monk* v *Bartram* [1891] 1 QB 346.

In any event, the matter is settled now in the Rules of Court in England since

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SMITH J

Order 59 rule 13 provides that a stay of execution pending appeal to the Court of Appeal is not automatic but must be applied for to the courts. See *Supreme Court Practice 1988* vol 1 p 893.

It seems to me that there would be merit in changing our law on this aspect so as to follow the English system. If a party has obtained a judgment or order from a court of first instance, then *prima facie* that party should be entitled to the benefit of that judgment or order. It should be for the unsuccessful party to have to seek leave for the judgment to be suspended if an appeal is noted. That party should be the one required to show that special circumstances exist which justify the suspension sought. The system that prevails in Zimbabwe must have the effect of

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encouraging some debtors or persons with doubtful claims to appeal simply in order to play for time, as in this case. In other words, since an appeal automatically suspends execution, a debtor who wants to delay may as well appeal even if he knows the appeal is hopeless or even if he knows that he will abandon it. At least it will buy him time.

In civil cases in the High Court, apart from some exceptions, there is no need even to obtain leave to appeal as there is an automatic right to do so. See s 43 of the High Court Act [*Chapter 7:06*].

Accordingly, if the present position were to be altered then one would expect that frivolous or vexatious appeals would be eliminated.

It is interesting to note that the principle that applies in England has been adopted in Zimbabwe in relation to maintenance orders. Section 27 (3) of the Maintenance Act [*Chapter 5:09*] provides that the noting of an appeal against a decision of a maintenance court shall not, pending the determination of the appeal, suspend the decision appealed against unless the maintenance court, on application being made, directs otherwise.

I would recommend that consideration be given to amending the law insofar as it provides for the automatic suspension of the execution of any judgment or order granted by the High Court or the Magistrates Court where an appeal is noted.

ORDER

It is ordered that the noting of the appeal by Telecel Zimbabwe (Pvt) Ltd shall not suspend the operation of the order granted by SANDURA JP on 31 December 1997.

The costs of this application shall be borne by the respondent.

*Kantor & Immerman*, applicant's legal practitioners

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

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## MUHWATI *v* ZIMBABWE NEWSPAPERS (1980) LTD & ANOR 1998 (1) ZLR 158 (HC)

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

Smith J

Civil action

3 November 1997 &

11 February 1998 Judgment No. HH-17-98

### Flynote

Costs - deprivation - successful party - grounds for depriving of costs - four out of five claims dismissed - excessive claim for damages

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## Headnote

In a defamation action the plaintiff had claimed damages for defamation in respect of five articles published in a newspaper. The trial court dismissed the plaintiff's claim in respect of all five articles. On appeal, the Supreme Court decided that although the trial court had correctly dismissed the claim in respect of four of the articles, the plaintiff should have succeeded in his claim arising out of the fifth article. It therefore allowed the appeal in respect of this article. The Supreme Court referred the matter back to the trial court for that court to determine the amount of damages in respect of the one defamatory article and the costs of the trial. The parties agreed on the quantum of damages for the successful portion of the claim and the trial court was left to determine what costs should be awarded to the plaintiff.

*Held*, that the general rule is that the successful party in litigation should be awarded his costs and this rule should only be departed from where there are good grounds for so doing.

*Held*, further, that two of the recognised grounds for depriving the successful party of a portion of his costs are that the plaintiff has only succeeded in respect of a portion of his claim and that the plaintiff has claimed an excessive amount of damages.

*Held*, further, that in the present case the fact that the plaintiff had claimed damages for defamation in respect of five defamatory articles had undoubtedly lengthened the trial and placed the burden on the defendant to defend himself against the allegations in respect of all five articles. This justified apportioning the costs between the parties and it was appropriate to reduce the costs to be awarded to the plaintiff by 20%.

*Held*, further, that in the light of comparable awards being made at that time, the amount claimed by the plaintiff was grossly excessive and therefore the plaintiff should be deprived of a portion of his costs to show the court's disapproval of the plaintiff's cupidity in trying to extract a grossly excessive amount from the defendant. It was appropriate to deprive the plaintiff of 20% of his costs on this ground.

*Held*, therefore, that defendant should be ordered to pay 60% of the costs of the plaintiff on the main action, but that the defendant should be ordered to pay all the costs of the hearing in respect of costs.

Cases cited:

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



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*Galion (Pty) Ltd* v *Burger* 1972 (4) SA 652 (C)

*Genticuro AG* v *Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A)

*Golding* v *Torch P & P Co (Pty) Ltd & Ors* 1949 (4) SA 150 (C)

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

*Giuliani* v *Diesel Pump Injector Svcs (Pvt) Ltd* 1966 RLR 345 (G); 1966 (3) SA 451 (R)

*Innes* v *Visser* 1936 WLD 44

*Maceys Consol (Pvt) Ltd & Anor* v *TA Hldgs Ltd (2)* 1986 (2) ZLR 331 (S)

*Muhwati* v *Zimbabwe Newspapers (1980) Ltd & Anor* S-187-96

*Ramakulukasha* v *Commander, Venda National Force* 1989 (2) SA 813 (VS)

*Rowles* v *Isipingo Beach Revision Court & Anor* 1966 (3) SA 751 (D)

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

*Tvl & OFS Chamber of Mines* v *General Electric* 1967 (2) SA 32 (T)

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

*Zvobgo* v *Modus Publications (Pvt) Ltd* 1995 (2) ZLR 96 (H)

## Case Information

*J C Andersen SC*, for the plaintiff

*A P de Bourbon SC*, for the defendants

## Judgment

**SMITH J:** The plaintiff sued the defendant for defamation and claimed damages in the sum of $250 000. The plaintiff's case was based on five articles which the defendant had published in a daily newspaper, *The Herald*. This court held that none of the articles in question were actionable and dismissed the plaintiff's claim. The plaintiff then appealed to the Supreme Court which held that, whilst four of the articles were not actionable, the fifth was. It therefore allowed the appeal, with costs, and referred the matter back to this court for determination of the quantum of damages and costs of the trial - see *Muhwati* v *Zimbabwe Newspapers (1980) Ltd & Anor* S-187-96.

The parties have agreed on the quantum as being $25 000. However they cannot agree on the question of costs. The plaintiff claims that, as he was successful in establishing that he had been defamed and suffered damages in the sum of $25 000, he is entitled to his costs. On the other hand, the defendants contend that as the plaintiff was successful on only one of the five issues on which his claim was based and since his claim was excessive, the plaintiff is entitled to only a portion of his costs.

The general rule is that costs follow the event ie the successful party should be awarded his costs. This rule should be departed from only where good grounds for doing so exist. There are certain recognised grounds on which a successful litigant may be deprived of his costs or part thereof - see Rubin *The Law of Costs in South Africa* Chapter V. There are only two factors which are applicable in this case that might justify such a deprivation. Firstly, should the plaintiff

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be deprived of part of his costs because he claimed that he had been defamed in five articles published in *The Herald* but the court found that only one of the articles was defamatory? Secondly, was his claim excessive? I will deal with each factor separately.



SMITH J

With regard to the first ground, it is obvious that the proceedings before the High Court were extended because of the necessity to deal with five articles rather than one. Mr *Andersen* submitted that this did not have any impact on the length of the trial but I do not agree with that submission. On the other hand, I cannot accept Mr *de Bourbon*'s submission that had the plaintiff limited his action to the one article on which he was successful, the duration of the trial would have been halved. Even if he were correct in his submission, however, the limitation of the action to one article only would not have halved the work involved in preparing for the action. In *Golding* v *Torch P & P Co (Pty) Ltd & Ors* 1949 (4) SA 150 (C) at 182, HERBSTEIN J said:

> ``It seems to me to be quite wrong to award costs on a basis of counting claims on which plaintiff succeeded and those on which defendants succeeded, for to do so is to have no regard to the particular nature of the claims or the time taken up on those claims. What the court must do is to try and make a fair and just estimate of the liabilities of the parties for the costs of the action, having regard to their success or failure, and to the conduct of the case generally. There is one important fact of which the court cannot lose sight, and that is that the plaintiff succeeded. It is true he made claims on which he failed, and for the extra costs involved in these he must carry responsibility. He must also carry responsibility and liability for the wasted costs of one day. If I proceed on the basis that as he succeeded he is entitled to the general costs of the action and that he must pay any extra costs he occasioned, then I must try as best I can to estimate the time the case would have taken if the claims on which he failed had not been made and if a postponement had not been necessary.''

He concluded his assessment at 182-3 by saying:

> ``Having regard then to all the facts and circumstances, I think a fair estimate - and I emphasise that it is only an estimate - is that four out of the ten days would have been rendered unnecessary. I therefore come to the conclusion that the fairest order which I can make in this case is that the plaintiff be awarded the damages mentioned in the main judgment with costs on the basis of a six-day trial, and that he pay the defendants the costs of four days. In regard to the costs of today, each of the parties has succeeded and, therefore, it seems to me that in respect of such costs each should be left to pay his own costs. I therefore make no order in regard to today's costs.''

Similar views were expressed by GALGUT J in *TVL & OFS Chamber of Mines* v *General Electric Co* 1967 (2) SA 32 (T) at 92 where he said:

> ``I hasten to say that it can never be a rule that a successful party who fails on some of the issues raised in his pleadings should be deprived of his costs on those issues. Generally speaking, a successful party should be awarded all his costs. Each case will, however, be decided on its own facts. A party may raise issues on which he is defeated but which are so much part of the whole case that he should not be deprived of costs on those issues if in the result he is substantially successful. If the issues on which he is defeated are clearly distinct and severable from the issues on which he has succeeded different considerations may well apply. No hard and fast rule should be laid down because the court's discretion in regard to costs should not be fettered.''

Likewise in *Gründling* v *Beyers & Ors* l967 (2) SA 131 (T) at 155-6 TROLLIP J (as he then was) said:

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SMITH J

> ``The only problem is whether, because he has been only partially successful, he should get all the costs. He has failed on a substantial and one of the main issues; although it was necessary for the affidavits to deal to some extent with the background to the events and particularly the role Beyers had played in Union affairs, a substantial part of the information in Gründling's affidavits and documents was unnecessary and related solely to his dismissal, his claim for attorney and client costs, and other points on which he has failed; an appreciable portion of the time taken up by the argument on l December and final hearing was also devoted to those matters; and the respondents have, of course, incurred costs in regard thereto for which Gründling should be made responsible. In all the circumstances I think it would be equitable if the respondents were made to pay only half his taxed party and party costs.''

See too *Giuliani* v *Diesel Pump Injector Services (Pvt) Ltd* 1966 RLR 345 (G); 1966 (3) SA 451 (R), *Rowles* v *Isipingo Beach Revision Court & Anor* 1966 (3) SA 751 (D) and *Maceys Consolidated (Pvt) Ltd & Anor* v *TA Holdings Ltd* (2) l986 (2) ZLR 331 (S).

The question of apportionment of costs was again dealt with by TROLLIP JA in *Genticuro AG* v *Firestone SA (Pvt) Ltd* 1972 (1) SA 589 (A). At 668-9 he said:

> ``Certain relevant guides to the exercise of a court's discretion on costs have been indicated by the courts in the past, and some are worth noting here. Firstly, non-patent cases. In *Union Share Agency & Invstm Ltd* v *Green* 1926 CPD 129, G*ardiner* J (later JP), said at p 141 -
>
> > `Generally speaking, the party in whose favour judgment is given should get the costs of the case. But where a party, though he has succeeded in obtaining judgment, has failed on certain substantial issues, for the raising of which he was responsible, then, if the costs of those issues are severable from the general costs of the case, he should be ordered to pay the costs of those issues. The victor had no right to make defeat unnecessarily expensive for the vanquished, and if he has not been content to rely on good points, but has added to the expense by raising weak issues, he should bear the additional expense to which his adversary has been put'.''

In *Giuliani*'s case *supra* GOLDIN J held that the plaintiff's failure to admit any of the defendant's allegations contained in his plea and further particulars placed a burden on the defendant to prove the allegations which resulted in costs being unnecessarily incurred. He accordingly apportioned the costs and ordered that the defendant pay one-third of the plaintiff's costs. In this case, the fact that the plaintiff claimed that the five articles were defamatory undoubtedly lengthened the trial and increased the burden placed on the defendants to defend themselves against the allegations that all five of the articles were defamatory. That, in my opinion, justifies an apportionment and I consider that it would be appropriate for the liability of the defendants to pay the plaintiff's costs to be reduced by 20%.

It now remains for me to consider the second ground which was raised. In Rubin's *The Law of Costs in South Africa* at p 73 the learned author says that the fact that a plaintiff claims more than he succeeds in recovering is not, in



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itself, a sufficient ground for refusing him costs. To justify the court in depriving a plaintiff of his

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costs, the claim must be excessive or exorbitant. At p 74 he goes on to say:

> ``In claims for damages, even a gross disproportion between the amount claimed and the amount recovered will not necessarily justify the court in depriving plaintiff of his costs. The mere fact of a plaintiff in an action for libel or slander recovering only a farthing or shilling damages is not of itself good cause for depriving him of costs. Good cause must be something more than the mere smallness of damages. The smallness of the damages, however, is an important element to be considered if there are any other circumstances which can be taken into account. In all claims for damages, the court should examine plaintiff's conduct and the facts of the case before exercising its discretion as to costs.
>
> Where plaintiff's action is brought to assert a substantial right, although he recovers only a small amount, he will be awarded costs. Our courts have generally refused costs where contemptuous damages have been awarded, eg where plaintiff, claiming £2 500 as damages for slander, was awarded 1s.''

In the *Rowles* case *supra* at 753 MILLER J said:

> ``The mere fact that a party makes a claim in excess of the sum eventually awarded to him will not normally serve to deprive him of his costs if, in the result, he succeeds in obtaining more than his adversary offered him. But the fact that he made an excessive claim is one which the court is entitled to consider when it exercises its discretion as to costs. The degree of cupidity revealed by the claimant might be a relevant factor in regard to costs. Similarly, the mere fact that a claimant has persisted in advancing an untenable or unsound argument, although not necessarily nor even frequently a good ground for depriving him of costs if he has in fact gained substantial success, may be taken into consideration by the court on the question of costs. Sometimes persistence in advancing an unsound argument may be time-consuming and unnecessarily inflate the costs; the court might in such a case deprive the successful party of some portion of his costs.''

The learned judge went on at 754D to hold:

> ``Nor am I able to say that its conclusion that, because of the `excessive' claim made by applicant on the basis of the selling price of the property after proclamation and the greater accuracy of the second respondent's estimation of value, it was just and equitable to make no order in regard to the costs of the appeal, was one to which no reasonable person applying his mind to the matter could come.''

See too *Galion (Pty) Ltd* v *Burger* 1972 (4) SA 652 (C).

In *Argus P & P Co Ltd* v *Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590 the Appellate Division said:

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

Although in *Ramakulukasha* v *Commander, Venda National Force* l989 (2) SA 813 (VS) VAN DER SPUY J expressed surprise at the comparatively low and sometimes almost insignificant awards made in South African courts for infringements of personal safety, dignity, honour, self-esteem and reputation, the courts in this country have adopted the principle set out in the *Inkatha Freedom Party* case *supra*. As GREENBERG J commented in *Innes* v *Visser* 1936 WLD 44:



SMITH J

> ``The figure of Justice carries a pair of scales, not a cornucopia.''

In *Tekere* v *Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H), which was an

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action for defamation, Tekere claimed damages in the sum of $50 000. SANDURA JP found that very serious allegations had been made against Tekere and that an award of exemplary damages was justified. He awarded Tekere $20 000. Then there was the case of *Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H) where the plaintiff instituted an action for defamation claiming damages in the sum of $500 000. Before the trial commenced the plaintiff's claim was reduced to $40 000. He was awarded damages in the sum of $14 000. When Dr Zvobgo later sued Modus Publications for defamation and claimed $50 000 in damages, he was awarded $20 000 - see *Zvobgo* v *Modus Publications (Pvt) Ltd* l995 (2) ZLR 96 (H). In 1992, Modus Publications was ordered to pay Mr Chinengundu $23 000 when the latter sued it for defamation - see *Chinengundu* v *Modus Publications (Pvt) Ltd* HH-135-92. Then in *Chinamasa* v *Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) the plaintiff was awarded damages in the sum of $30 000 when he sued for defamation, claiming $150 000. From the above, it can been seen that the damages awarded by courts in Zimbabwe in cases of defamation have been conservative.

In *Kathrada* v *Arbitration Tribunal & Anor* 1974 (2) SA 535 (C) the court was asked to review an order of costs made by an arbitration tribunal. The applicant in that case had claimed compensation in an amount of R92 444 and was awarded R43 500. The arbitration tribunal ordered that the applicant was to pay the second respondent's costs. At 539H VAN WINSEN J said:

> ``Turning then to the circumstances under which the courts have recognised a lower tribunal's right to deprive a successful party of his costs we find that our courts have recognised an excessive *plus petitio* as a ground for depriving the party in whose favour the award is made of his costs and even for making him responsible for the payment of his adversary's costs.''

Then, after referring to the views expressed by MILLER J in *Rowles*' case *supra,* part of which I have referred to earlier, the learned judge went on at 540E-H to say:

> ``I find myself in respectful agreement with the above statement as to the effect of a *plus petitio* as justification for a departure from the ordinary rule of costs and as to the limits within which a reviewing tribunal is entitled to exercise a right to correct the lower tribunal's exercise of discretion. That the successful party was aware of the fact that his claim was in excess of what was due appears to have been recognised as a factor which could justify a departure from the general rule of awarding the successful party his costs. See *Letsitele Stores (Pty) Ltd* v *Roets* 1959 (4) SA 579 (T) at p 582 H *in fine*. See too, generally, Cilliers *Law of Costs* pp 17-18; 40-42.

Similar considerations with reference to a departure from the general rule of awarding the successful party his costs would appear to apply in England: *Heaven & Kesterten* v



SMITH J

*Sven Widaens A/D* [1958] 1 All ER 420 at p 424, and *Perry* v *Stopher* [1959] 1 All ER 713 at p 720. In the latter case, WILLMER LJ (at p 720) adopted with approval a *dictum* by DIPLOCK J in the former case, which reads as under:

> `I have no doubt that the umpire in an arbitration of this kind has power to deprive a successful claimant of his costs and, indeed, to order a successful claimant to pay the costs of the other side in appropriate circumstances. The mere fact, therefore, that on the face of the award the buyers have succeeded as to the sum of £73 but have nevertheless been ordered to pay the costs of the sellers would, in my view, of

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itself be no ground for setting aside the award'.''

The court in the Perry case went on to say:

``The position is thus that the grounds upon which the arbitration tribunal made the order it did is recognised by the courts in this country and in England as one which could justify a departure from the ordinary rule that a successful party is to be awarded costs in his favour.''

In the *Zvobgo* v *Kingstons* case *supra*, REYNOLDS J was asked to order that Zvobgo should bear all the costs incurred by both parties on the grounds of *plus petitio*. At 330B-F the learned judge said:

``This contention is based on the allegedly excessive *plus petitio* brought by the plaintiff. Accepting that this is a valid consideration, in the present case, and before the trial commenced, the plaintiff reduced his original claim of $500 000 against four defendants to one of $40 000 against the present defendant. There was nothing to suggest that the defendant's resistance to the original claim would have differed had the amended claim been substituted when these proceedings were first instituted. He does not appear to have been prejudiced in any way. Furthermore, it is my view that the mere fact that a party's claim exceeds the sum that is eventually awarded to him will not normally entail a punitive order of costs against a successful plaintiff. If this were the general rule the claims brought in such cases would invariably be too low. Would the court's wrath be visited upon the hapless plaintiff if he falls into this error as well? Surely, the very object of calling upon the court to assess an appropriate award, when liability is admitted, is that the parties are unable to agree on a figure? It would be absurd, in my view, to punish the party whose estimate is furthest from the court's eventual assessment. Furthermore, I do not think that a claim that is ultimately held to be inflated necessarily reveals `an unseemly degree of cupidity'. The difficulties experienced by courts in assessing damages in cases of this sort has already been mentioned. Why should the plaintiff, or even his legal representative, be in any better position than the court in arriving at the `correct' amount?

I do not consider that the figure of $40 000 claimed is so grossly excessive as to warrant an assumption that the plaintiff is abusing the process of the courts by exhibiting a degree of cupidity. In the circumstances, costs, as is usual, will follow the event.''

With all due respect, I do not follow the reasoning of the learned judge. It is not a question of whether the defendant's resistance to the original claim would have differed or whether the defendant is prejudiced in any way. Nor is it a question of punishing ``the party whose estimate is furthest from the court's eventual assessment'', whatever that might mean. The basis or justification for departing from the general rule of awarding the successful party his costs in the case of *plus petitio* is to show the court's disapproval of the cupidity of the plaintiff in trying to extort from the defendant an amount



SMITH J

which is so excessive as to induce a sense of shock. REYNOLDS J is indeed correct when he refers to the difficulties experienced by courts in assessing damages in defamation cases. However, any legal practitioner should be able to assess what is a reasonable amount to claim having regard to awards made by the courts in cases for defamation. Many such cases have been brought before the courts in Zimbabwe over the past ten years and the awards granted have been reasonably consistent.

REYNOLDS J, as I have mentioned, awarded Zvobgo damages in the sum of $14 000. He felt that the figure of $40 000 claimed was not so grossly excessive as to warrant an assumption

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that Zvobgo was abusing the process of the courts by exhibiting a degree of cupidity. Had Zvobgo not reduced his claim to $40 000 but left it at the amount of $500 000 initially claimed, I am sure that REYNOLDS J would have come to a different conclusion. A claim for $500 000 would have been grossly excessive.

In this case, the plaintiff claimed damages in the sum of $250 000. His claim was filed in 1992. I think I am right in saying that at that date, no award in excess of $50 000 has been given by the courts in Zimbabwe. The plaintiff has agreed with the defendants that the quantum of the damages he suffered is $25 000, which is one-tenth of the amount claimed. In my view, his claim was grossly excessive and showed a degree of cupidity which must evoke some response from the court. I accept that the plaintiff's claim was based on five alleged defamatory articles. However, he did not claim a separate amount in respect of each article. He claimed a globular sum covering all the articles and that is the sum the court looks at. I feel that it would be unduly burdensome to deprive the plaintiff of all his costs but I consider that he should be deprived of a portion of his costs as a mark of the court's displeasure at the cupidity shown. I hope that legal practitioners will take this into account when advising their clients as to the *quantum* of damages that should be claimed in similar cases. I consider that it would be appropriate to deprive the plaintiff of 20% of his costs on this ground.

In conclusion, therefore, it is my view that the defendants should pay 60% of the plaintiff's costs in the main action.

With regard to the costs of this hearing relating to the costs in the main action, Mr *de Bourbon* submitted that the order as to costs should follow the order determined in relation to the main action which would mean that the defendants would have to pay 60% of the plaintiff's costs. In my opinion, this hearing on costs should not be regarded as an extension of the litigation but rather as fresh proceedings. That is the course that was adopted in *Galion*'s case *supra,* and which I think should be followed in this case. The plaintiff had to come to court in order to get his costs and he was substantially successful.



SMITH J

It is ordered that -

(1) the defendants shall pay 60% of the costs of the plaintiff in the main action;

(2) the defendants shall pay the costs of the plaintiff in relation to the hearing as to costs.

The liability of the defendants is joint and several, the one paying the other to be absolved.

*Gill, Godlonton & Gerrans*, plaintiff's legal practitioners

*Honey & Blanckenberg*, defendant's legal practitioners



**SCOTFIN LTD *v* RPK BUSES (PVT) LTD & ORS 1998 (1) ZLR 167 (HC)**

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

Gillespie J

Civil action

23 January & 11 February 1998 Judgment No. HH-29-98

## Flynote

Contract - penalty - what is - acceleration clause in hire-purchase agreement - whether a penalty clause

Hire-purchase - instalments - failure to pay - when interest may be charged - calling up of full balance outstanding - whether interest may be charged on balance

## Headnote

The first defendant company had taken loans from Scotfin, a finance house, in terms of hire-purchase agreements. It defaulted in payment of the instalments due under the hire-purchase agreements. Scotfin claimed payment not only of the unpaid instalments, but also of the balance due, together with interest. In so doing it relied on an acceleration clause. The questions arose as to -

(1) what interest, if any, could be claimed on the amount of any instalment outstanding but not yet due other than by operation of an acceleration clause; and

(2) whether an acceleration of payments constitutes a contractual penalty.

*Held*, that the claiming of interest on arrears is entirely in accordance with the common law pertaining to interest. However, it was improper to claim interest on outstanding instalments not yet due and payable, even though the balance outstanding became due from the date on which the right to call it up was exercised. This is because the amount of the instalments thus called up already includes an element akin to interest, namely, the finance charges, which are the difference between the cash price and the purchase price of the goods.

*Held*, further, that the mere fact that a payment before due date of an instalment not otherwise payable is a payment which has to be made in consequence of a breach alone does not make it a penalty. This is because it does not bring about an increased obligation or enforce any additional payment. Interest on such a payment would, however, constitute a penalty.

Cases cited:

*Auby & Pastellides (Pty) Ltd* v *Glen Anil Invstms (Pty) Ltd* 1960 (4) SA 865 (A)

*Parekh* v *Shah Jehan Cinemas & Ors* 1982 (3) SA 618 (D)

*Western Bank Ltd* v *Woodroffe & Ors* 1976 (1) SA 482 (N)

Legislation considered:

Contractual Penalties Act [*Chapter 8:04*], s 2

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Hire-Purchase Act [*Chapter 14:09*], ss 3 and 28

## Case Information

*A P de Bourbon SC*, for the plaintiff

Defendants in default

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GILLESPIE J

## Judgment

**GILLESPIE J:** The plaintiff has called up payment of six loans which it advanced to the first defendant on the security of deeds of suretyship executed by the second and third defendants. Five of these loans were made in terms of hire-purchase agreements. The sixth is an advance of cash in terms of a loan agreement. In respect of each of the contracts of hire-purchase, the following averment is made in the particulars of claim attached to the summons:

> ``First defendant has defaulted in the payment of the instalments due in terms of the ... agreement and the balance outstanding as at the ... was an amount of ... including interest calculated to that date.''

The prayer claims, in respect of each agreement, payment of the amount so averred to be the balance outstanding, together with interest from a certain date. The date from which interest is claimed is not supported by any averment in the particulars of claim. In respect of each claim there is averred as a term of the relevant agreement an acceleration clause justifying the demand for payment of the whole balance outstanding rather than merely the overdue instalments.

The matter crossed my table as an unopposed chamber application for judgment in default of entry of appearance to defend. On perusal of the papers, I was not satisfied with certain aspects of the claim. I therefore gave a direction requiring the matter to be set down for argument on two points. On 23 January, Mr *de Bourbon* appeared before me to present argument for the plaintiff. The first point which arose for argument was whether interest had been claimed and, if so, is properly claimable, on the amount of any instalment outstanding but not yet due other than by operation of an acceleration clause.

The summons was served on 11 February 1997. In respect of each claim, the amount of the alleged indebtedness has been calculated as at 31 July 1996. Counsel's industry has resulted in the production of schedules, which show that in respect of two of the hire-purchase agreements (the first two) the final instalment had fallen due prior to the cut-off date of 31 July. In respect of the remainder of the hire-purchase agreements (the other three), some instalments only fell due after the cut-off date. The last few instalments in each case, however, would have fallen due prior to the date of service of summons, even without reliance on any acceleration clause.

Under the Hire-Purchase Act, 1(29) the amount advanced is calculated according to the ``cash price'' of the goods involved, which:

> ``in relation to any goods, means the price at which the goods may be purchased outright for cash.'' 2(30)

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This is converted into a ``purchase price'', which:

> ``means the total sum payable by the purchaser under an agreement, including any sum payable by him by way of a deposit or other initial payment or credited or to be credited to him under such agreement on account of any such deposit or payment ... '' 3(31)

The amount by which the purchase price may exceed the cash price is regulated by the Minister responsible who:

> ``shall, for all classes of agreements and goods, ... fix the maximum amount, to be determined by reference to the rate *per centum per annum* ... of the balance of the cash price remaining unpaid before the due date of each instalment.'' 4(32)

This excess is referred to by the finance companies as ``finance charges''.

All standard form agreements of hire-purchase contain provisions entitling the creditor to charge interest on instalments in arrears, and to call up the full balance outstanding where there is default in making payments of instalments on due date. The right is expressly provided for in the Act which excludes from the purchase price of goods:

> ``any sum payable -
>
> ...
>
> (d) by way of interest upon instalments which are in arrear.'' 5(33)

In any event, the claiming of interest on arrears is entirely in accordance with the common law pertaining to interest.

The schedules produced by counsel show that, despite the formulation of the claim as set out above, interest has, during the currency of the agreement, been charged only on instalments in arrear. Thus, in respect of the first two claims, where the full amount had fallen due and was in arrear, there can be no obstacle to the claiming of interest on those arrears. In respect of the other three hire-purchase agreements, however, where some instalments had not fallen due at the time the full amount was claimed, there is question. From the manner in which the claim is drafted it seems as though interest may have been claimed on instalments payment of which was accelerated on the grounds of a breach of contract.

Such a claim has indeed been made. Thus in claim three, wherein is claimed $517 278.06 together with interest from 31 July, there are included in the amount of $517 278.06 two instalments of $25 125.81, which would under the agreement only have fallen due on 23 August and 23 September 1996. In claim four, for the sum of $591 719.41 together with interest from 31 July, there are included two instalments of $27 253.85, the due dates of which would also have been 23 August and 23 September 1996. The fifth claim for



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GILLESPIE J

payment of $587 084.83 with interest from 31 July 1996 included three instalments of $30 103.47, only falling due on 6 August, 6 September and 6 October 1996.

Mr *de Bourbon* has very properly conceded that the claim, to the extent it charges interest on outstanding instalments not yet due and payable, is improper. Interest can only be claimed on instalments which are in arrear. Despite the fact that calling-up, in terms of an acceleration clause, the full balance outstanding will render that amount due from the date upon which the right is exercised, interest cannot commence to accrue on the amount thus called up. This is because the amount of the instalments thus called up already includes an element akin to interest, namely the finance charges, being the difference between the cash price and purchase price of the goods. Were interest also to be claimed on instalments payment of which was accelerated there would be a duplication of charges. 6(34)

The second point of concern follows on from the first. I asked for submissions on the question whether an acceleration of payments such as has occurred here constitutes in any respect a contractual penalty. A ``penalty stipulation'' 7(35) -

> ``means a contract or provision in a contract under which a person is liable -
>
> (a) to pay any money; or
>
> (b) to do or perform anything;
>
> (c) to forfeit any money, right, benefit or thing;
>
> as a result or in respect of -
>
> (i) an act or omission in conflict with a contractual obligation; or
>
> (ii) the withdrawal of any person from a contract;
>
> whether the liability is expressed to be by way of penalty, liquidated damages or otherwise.''

The payment before due date of an instalment not otherwise payable is, strictly speaking, susceptible of inclusion within the definition of a penalty stipulation. Nevertheless, I am satisfied that it is not an act which is intended to be dealt with as a penalty.



GILLESPIE J

The mere fact that it is a payment which has to be made in consequence of a breach does not alone make it a penalty.

> ``[N]ot all cases in which payments have to be made or forfeitures suffered on cancellation fall within the penalty or liquidated damages field ... The *lex commissoria* provides a well-known example of consequences of breach of contract that fall outside the field.'' 8(36)

It is not a penalty because accelerated payment of the outstanding balance does not bring about an increased obligation - it enforces no additional payment. It enforces only the existing contractual liability, although at an earlier date. In the absence of some additional payment

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being required, an acceleration clause *per se* does not constitute a penalty stipulation. 9(37)

If interest were, however, claimable on the amount of the accelerated payment then that additional interest would, in my estimation, be a penalty. This, therefore, is a further reason to hold that interest does not accrue, between the date on which the right to claim accelerated payment is exercised and the date upon which the payment would otherwise have been due, on the amount of an accelerated payment under a hire-purchase contract.

Finally, none of these considerations apply to the loan agreement. In terms of the repayment schedule, this would, at the time of calling-up, still have had a long time to run. Even at the time of service of summons it would still have had nine instalments outstanding. The full balance outstanding was thus only claimable in consequence of an acceleration clause. Nevertheless, interest in that case is calculated on the outstanding balance. Accordingly, there can be no question of the acceleration constituting a penalty and no doubt concerning the accrual of interest.

In the result, I hold that on those hire-purchase agreements where payments were accelerated, interest is not claimable on the accelerated payments from any date prior to the date upon which they would in any event have become due. Subject to a reduction in the amount claimed so as to disallow the excess interest claimed, the plaintiff is entitled to judgment. Its entitlement is properly reflected in the following order, where the amounts in para (a) are the outstanding balances after calling-up of the loans on 31 July 1996; the amounts in para (b)(i) are the sums that were actually due at the date of calling-up; and the amounts in para (b)(ii)-(vi) are the instalments, payment of which were accelerated, but in respect of which interest is claimable only from the contractual due date. Paragraph (c) relates to the loan.

I therefore order that:

Judgment be and it is hereby entered against the first, second and third



GILLESPIE J

defendants, jointly and severally, the one paying the others to be absolved, for the payment to the plaintiff of:

(a) the sums of $175 289.30, $150 271.55, $517 278.06, $591 719.41, $587 084.83 and $491 850.47;

(b) interest at the rate of 42% *per annum* from the date stated to the date of payment as follows:

(i) from 1 August 1996 on the sums of $175 289.30, $150 271.55, $467 026.44, $537 211.71 and $496 774.42;

(ii) from 6 August 1996 on the sum of $30 103.47;

(iii) from 23 August 1996 on the sum of $52 379.66;

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(iv) from 6 September 1996 on the sum of $30 103.47;

(v) from 23 September 1996 on the sum of $52 379.66;

(vi) from 6 October 1996 on the sum of $30 103.47;

(c) interest at the rate of 7.5% *per annum* above the minimum commercial bank overdraft lending rate to financial institutions from l August 1996 to date of payment on the sum of $491 850.47;

(d) collection commission on the amounts set out in paras (a), (b) and (c) *supra,* calculated in accordance with By-law 70 of the Law Society of Zimbabwe By-laws 1982;

(e) costs of suit on the legal practitioner and client scale to the extent such costs are permitted in proviso (iii) to By-law 70(2).

*Gill Godlonton & Gerrans*, applicant's legal practitioners

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## SCHEELITE KING MINING CO (PVT) LTD *v* MAHACHI 1998 (1) ZLR 173 (HC)

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

Gillespie J

Civil application

4, 5, 10 & 11 February 1998 Judgment No. HH-31-98

### Flynote

Court - contempt of - disobeying court order - party failing to comply with court order - when constitutes contempt of court - purpose of contempt proceedings

### Headnote

The applicant had obtained an interdict against the respondent. The respondent had flouted the interdict on two occasions and the applicant applied for the committal of the respondent for contempt of court.

*Held*, that before a person can be held to be in contempt of court for failing to comply with a court order it must be proved both that the order was not complied with and that the non-compliance was wilful. In the present case, although the respondent may not have been aware of the order to begin with, his conduct after he became aware of the order showed that he had knowingly chosen to defy not only the order of the court but also the authority of the police who were attempting to assist in its enforcement.

*Held*, further, that although the primary purpose of contempt procedure is to compel compliance with the court's order, in such proceedings the court will also have an interest in protecting and

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upholding the dignity and respect of the court and the legal process.

*Held*, further, that in order to compel compliance with the court order, that the court should impose a suspended committal to prison, as well as imposed a moderate fine as an expression of disfavour towards the respondent's conduct, particularly his failure to make any apology for his conduct.

Cases cited:

*Cape Times* v *Union Trades Directories & Ors* 1956 (1) SA 105 (N)

*Haddow* v *Haddow* 1974 (1) RLR 5 (G)

*Harare West Rural Council* v *Sabawu* 1985 (1) ZLR 179 (H)

*Lindsay* v *Lindsay* 1995 (1) ZLR 296 (S)

## Case Information

*H L Thompson*, for the applicant

*J R Tsivama*, for the respondent

## Judgment

**GILLESPIE J:** This application came before me on the motion roll of unopposed matters on 4 February this year. It is an application for the committal, for contempt of court, of the respondent. The respondent is the owner of Doxford Farm near Mazowe. On the farm, there is a mining location with certain machinery and equipment. The applicant holds this location.



GILLESPIE J

There has been dispute between the parties as to the proprietary rights in the machinery and equipment. The applicant brought motion proceedings in this court claiming an interdict restraining the respondent from doing any act to prevent the applicant from removing the equipment from the mining location and from the farm. On 29 October 1997, ZIYAMBI J made such an order in favour of the applicant. The order was given in default of opposition by the respondent and was served by the Deputy Sheriff on the respondent's then attorneys, Messrs Chihambakwe, Mutizwa & Partners.

On 2 December 1997, Mr van Rooyen Jnr, of the applicant, determined to attend at Doxford Farm in order to uplift the machinery and equipment. Before doing so, he advised Asst Insp Magaire, the officer in charge at the Mazowe police station, of his intentions and exhibited to the policeman the court order. He was given police assistance, in the form of Sgt Mushopi, and with that stalwart went out to the farm. His affidavit shows that, at the farm, van Rooyen met Mahachi, the respondent, and showed him the order and announced his intention to dismantle and to remove the equipment in question. In van Rooyen's words:

> ``On hearing of the court order, the respondent merely scoffed at it stating that as this was Zimbabwe he would

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have no difficulty in having the order reversed.''

Heated discussion followed as a result of which van Rooyen realised that Mahachi was demanding some form of compensation in respect of the activities at the mining location. He sensibly agreed to a meeting between the parties in the presence of their lawyers in order to discuss their differences.

On the following day, he wrote to Mahachi recording, in very moderate and placatory terms, the result of the attempt to remove property. He wrote, *inter alia*:

``Secondly, I appreciate the time you gave me to discuss the issue but I must admit that I was disappointed to be labeled a racist in what is only our first meeting. As I said I apologise if in any way there was any disrespect shown to you as the farm owner and I trust that we can resolve this issue in the near future without having any further unpleasantness.''

He then instructed his lawyers to arrange a meeting, as had been agreed. This was duly done, the appointed date being the 10 December. At the eleventh hour before the meeting, Mahachi's lawyers cancelled on the grounds that they had been unable to contact Mahachi.

On 27 December, having heard nothing further from Mahachi or his lawyers, van Rooyen Jnr, and his father (unsurprisingly, van Rooyen Snr), determined to attempt yet again to recover the applicant's property. The two van Rooyens, with one employee, drove to Doxford Farm. Shortly after their arrival, Mahachi appeared at the mining location. In the words of van Rooyen Snr:

``[W]hen it became apparent that I was there to remove the applicant's equipment the



respondent became enraged. The respondent then threatened both my son and I and the three workers that were assisting in the dismantling of the equipment. The respondent called me and my son white racist Boers and thieves and he stated that if we did not stop removing the equipment then he would call out his employees and we would not leave the farm alive.''

The threat was taken seriously. Van Rooyen Snr left the farm and went immediately to the Mazowe police station. He informed Ass Insp Magaire of events. That officer accompanied van Rooyen to the mining location and went to talk to Mahachi elsewhere on the farm, admonishing van Rooyen to do nothing until further advised. A short while later Magaire and Mahachi arrived at the mining location. Mahachi was still determined upon abuse. In the presence of the policeman, he told van Rooyen that should he ever return to the claim he would ``get it''. Then, in van Rooyen's affidavit:

``The assistant inspector said that there would be no resolution and that my only course of action would be to seek a further order from the High Court. My son then explained to the assistant inspector and to the family of the respondent that this would cause the respondent harm and inconvenience in that there was a strong possibility that if he were to be held in contempt of the court order he could be jailed. The persons accompanying the respondent noted this matter and said that we should proceed to obtain the order.''

The van Rooyens then left the farm. They laid a formal complaint against the respondent with the police. Still anxious to adopt a moderate approach, they requested that no criminal action be taken pending the bringing of civil court proceedings for contempt.

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The formal court application for committal was duly issued and served upon the respondent's attorneys. The respondent made default. In the motion court, the committal of the respondent for contempt was moved. Mindful of the fact that personal service had not been made upon the respondent, whose liberty was at stake, 1(38) I declined to grant the order. Noting, however, an apparently flagrant contempt and persistent defiance not only of the court order but also of the authority of the police, I ordered instead that:

``1. the Deputy Sheriff be and is hereby authorised and directed to place under arrest the person of the respondent and to bring him before this court, sitting in chambers at 3 pm on Thursday 5 February 1998,

2. the officer in charge and all police officers of Mazowe police station are commanded to render to the Deputy Sheriff such assistance as he may require in executing this order."

By making this order I hoped not only to procure the respondent's attendance, but also to demonstrate the need to comply with court orders while at the same time ensuring that he would not be deprived of liberty overnight.



GILLESPIE J

Success crowned this endeavour. The respondent attended at chambers and ventured some attempt at explanation. He blamed his attorneys for failing to comply with his instructions to oppose the original application and for failing to advise him of the issue of the order or of the application for committal. While claiming no knowledge of the contents of the application, he nevertheless denied any wrongdoing. I accordingly made the further direction that:

``1. the matter is postponed until 9.00 am Tuesday 10 February 1998.

2. the respondent is given leave either:

(a) to file affidavits in answer to the founding affidavit; or,

(b) on the date of hearing, to give evidence, on oath, in answer to the founding affidavit.

3. the respondent is released from arrest on his own recognizances on condition:

(a) that he appear faithfully before this court on that date;

(b) that he observe dutifully the terms of the interdict ordered by Mrs Justice *Ziyambi* on the 29 October 1997.

4. Costs are reserved."

The respondent elected to file an affidavit and on 10 February both parties appeared before me in order to argue the cause.

The affidavit in opposition, while it discloses some measure of excuse for the respondent's conduct, is generally unsatisfactory. In excuse, it appears that his attorneys had not advised him of the court order. Indeed, it had only been served on them on December, despite having been laid with the Deputy Sheriff for service by at least 25 November. His immediate reaction to the visit on 2 December is accordingly understandable, particularly if, as he claims, his attorneys had failed to comply with his instructions in opposing the original application. Nevertheless, this

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is not sufficient excuse for his subsequent conduct.

Undoubtedly, he became aware of the court order as a result of the visit of 2 December. He acknowledges seeing it then. Nevertheless, he claims to have entertained doubts as to whether it was genuine. These alleged doubts are not supported by convincing reasons given on affidavit. Mr *Tsivama* attempts to support in argument the allegation that Mahachi was genuinely in such doubt. He was unable, however, to give any answer to the question why, if Mahachi entertained genuine doubt, did he not immediately contact his lawyers. Similarly, he was unable to show any reasonable cause for doubt arising out of the order itself. Nor could he explain why such doubt should exist when van Rooyen Jnr was accompanied by a policeman. In the result, although I accept that Mahachi was taken by surprise, I reject any suggestion that he entertained genuine doubt as to the validity of the order. I also reject his general denial of the detailed averments of threatening and other objectionable behaviour. This denial is unacceptably non-specific and suffers



from the false claim that he entertained genuine doubt. As to the allegation that Mahachi said that he would have the order set aside, this could perhaps be understood as meaning he would take legal measures to do so. I cannot come to such a conclusion in his favour, however, since he did not advance any such explanation but merely denied having uttered the offensive words.

Whether or not a contempt is disclosed on this first occasion, the second incident of 27 December leaves me in no doubt whatsoever. By that time, Mahachi had had ample opportunity to consult his lawyers and to receive their advice if he were in any doubt as to the validity or exigencies of the order. He chose not to do so. Likewise, he did nothing himself in order to instruct his lawyers pertaining to the compromise meeting he had agreed to attend. Mr *Tsivama* was obliged to admit that this would be unreasonable behaviour in a man who was genuinely in doubt.

Mahachi's detailed answer to the allegations as to events on 27 December is equally unsatisfactory. He deposes:

> ``I then waited to hear from my legal practitioners about the proposed meeting. I was therefore surprised when on 27 December 1997, the van Rooyens came to my farm and proceeded to dismantle the equipment contrary to their suggestions on 2 December 1997. I was convinced that they were acting in bad faith all along and I lost my temper. Although an altercation did ensue I deny that I threatened them in any way. Indeed if I had threatened them as described in their founding affidavits Asst Insp Magaire would have arrested me."

This does not withstand scrutiny. He may well have been anticipating a meeting but had done nothing towards instructing his legal practitioners on the subject and can scarcely have been surprised when the van Rooyens wished to enforce. Their order. There is no basis at all for supposing that the van Rooyens were acting in bad faith. Their previous communications had all been conciliatory in the extreme and they had taken care to enlist the protection and assistance of the law at all times. Mr *Tsivama* has been unable to submit any grounds upon which Mahachi could reasonably have supposed that the van Rooyens were acting in bad faith. The denial in respect of the threatening remark is unpersuasive. It presupposes that Magaire was present

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when the threat was uttered. It was only because of the threat that Magaire was brought in, and his action was to advise the van Rooyens to have further recourse to court. Perhaps this deposition is most noteworthy for what it does not say: it does not persist in any claim that there was a genuine belief that the order was not valid or binding upon him. Furthermore, the affidavit does not deny that Magaire attempted to intervene; nor that he found it necessary to advise the van Rooyens to return to court. Nor does it explain why, in the face of the clear intimation that there would be further proceedings, Mahachi did not relent.

Before holding a person to have been in contempt of court, it is necessary to be satisfied both that the order was not complied with and that the non-



compliance was wilful on the part of the defaulting party. 2(39) The lack of compliance is undisputed. The wilfulness of the respondent is, in my judgment, indisputable. If his protestations of good faith were true then his conduct in failing to pursue legal advice was most unreasonable. Further, there is no reasonable basis upon which genuine doubt could have been entertained. The belief to which the respondent pretends would be so unreasonable in the circumstances that he could not possibly have held it. Although he may not have been aware of the order to begin with, his subsequent conduct after he must have become aware of its validity and stringency is consistent only with an intention not to comply with it. The respondent knowingly chose to defy not only the order of court but also the authority of the police who were attempting to assist in its enforcement. He is in contempt of court.

In determining how to respond to this contempt, I bear in mind the many *dicta* to the effect that:

> ``The primary object of contempt procedure is to compel compliance with the court's orders. It often follows, for this reason, that any order of committal to gaol is suspended to afford the intransigent party a powerful inducement to fulfil his obligations in terms of the order.'' 3(40)

It has been said:

> ``Generally speaking, punishment by way of fine or imprisonment for civil contempt of an order of court made in civil proceedings is only imposed where it is inherent in the order made that compliance with it can be enforced only by means of such punishment.'' 4(41)

This is not to say, however, that enforcing compliance is the only purpose of committal. There remains an interest in protecting and upholding the dignity and respect of the court. Although the contempt may be referred to as ``civil'' contempt, it remains a criminal offence wilfully to disobey the order of a court with intent to violate its dignity or authority. Where such a contempt is established, the purpose of securing compliance with the flouted order, while it may remain the main, is not necessarily the only, purpose of committal for contempt.

This is pre-eminently a case where enforcement of an interdict does require an order of committal, whether or not that order be suspended on condition of compliance with the order. In this case, I have given close consideration to committing the respondent to gaol for contempt. The applicant has

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GILLESPIE J

informed me that it seeks no effective order but appears only as an informant and in order to secure compliance. This is a laudable attitude. That, together with the principle that securing compliance is a prime objective, and with the assurance that has been given that no further resistance to the order will be essayed, move me not to deprive the respondent of his liberty. I nevertheless consider that an effective expression of disfavour is called for, particularly in that no apology has been tendered. This is a violation of the dignity of the court and of the legal process which is potentially destructive of confidence in that process and deserves some effective condign sanction.

Although the imposition of a fine in such circumstances is not usual, it is nevertheless competent. If one could not fine a contumelious party, there would be no way of dealing with artificial persons. The case cited above acknowledges the availability of a fine as a sanction for civil contempt. Indeed, the High Court Rules themselves provide for the imposition of a fine. 5(42) It appears to me that the circumstances of this case call for the imposition of a fine. The respondent is a man of means, a farmer and landowner, and can afford a moderate fine such as is consonant with the extent of his defiance of the judicial process. In order effectively to compel compliance with the order I shall in addition impose a suspended committal to prison. Finally, the costs of this application, on the higher scale, are to be paid by the respondent. Such relief was moved by the applicants who are entitled to that more effective protection in view of the respondent's lamentable conduct.

I therefore order that:

1. the respondent is fined the sum of $1 000 for contempt of court;

2. the respondent be and is hereby committed to the Harare Remand Prison for a period of three months. The warrant of committal is, however, suspended on condition that the respondent shall faithfully and dutifully comply with the order given in this court in case No. HC-9553-97 on 29 October 1997; and

3. the respondent shall pay the costs of this application on the attorney and client scale.

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

*Chihambakwe, Mutizwa & Partners*, respondent's legal practitioners



## S *v* CHARI 1998 (1) ZLR 180 (HC)

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

Blackie J

Criminal review

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11 February 1998 Judgment No. HH-19-98

## Flynote

Criminal procedure - charge - withdrawal of by prosecutor after plea - effect - court has no power to continue with trial thereafter

## Headnote

Where the prosecutor withdraws a criminal charge after plea, the court has no discretion but to accept the prosecutor's decision, whether or not the court agrees with it. If the court believes that the accused may be guilty and that the necessary evidence is available and, if properly presented, would result in the conviction of the accused, the court should tell the prosecutor so and, if necessary, complain to the prosecutor's superior. But if the prosecutor persists, the court must accept that decision. It is not open to the court to take over the case and lead the necessary evidence.

## Judgment

**BLACKIE J:** The accused was charged with contravening section 3 of the Criminal law Amendment Act [*Chapter 9:05*] (having intercourse with a girl below the age of consent).

The accused was not represented at his trial. Initially, he pleaded guilty to the charge. The trial started in terms of s 271(2)(b) of the Code. However, when the particulars of the offence were put to him, the accused admitted intercourse with the girl but stated that he did not know that she was under the age of 16. His plea was therefore changed to one of not guilty and the matter proceeded to full trial.

The girl was called to give evidence. She did not know when she was born but said she guessed she might have been 14 at the time of the offence. The prosecutor tendered an affidavit in which the girl's age was estimated. The accused objected to the production of that affidavit. The prosecutor withdrew it. The accused did not cross-examine the girl. The prosecutor called no further evidence. He told the trial magistrate that he wished to withdraw the charge against the accused.

The trial magistrate objected to the prosecutor's decision. He told the prosecutor that he objected. He took over the case himself. The prosecutor declined to take any further part in the proceedings.

The magistrate told the accused that he was put on his defence. Before the accused made any recorded reply, the magistrate asked the accused four





questions. Did he have any witnesses to call? Did he adhere to his defence outline? Did he want that defence outline to be part of his defence? Did he want to add anything? The accused is recorded as saying yes to the first three questions and no to the last one. The magistrate then cross-examined the accused. The cross-examination shows clearly that the magistrate

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considered the girl to be so child-like in appearance that he did not believe that the accused could mistake her for someone under the age of 16.

At the end of the cross-examination, the magistrate convicted the accused of the offence charged, saying that the girl was so obviously under the age of 16 that no reasonable person could have had any doubt on that point. He sentenced the accused to a fine of $1 000 (or 3 months) together with 3 months' imprisonment suspended on condition of good behaviour.

Regardless of the appearance of the girl and whether the prosecutor was idle or negligent in his presentation of the State case, the trial magistrate had no right to continue the prosecution against the accused when the prosecutor had withdrawn the case against him. The right to initiate and to continue any prosecution is exclusively that of the Attorney-General as represented, in this case, by the prosecutor. The function of a judicial officer is to determine the guilt or innocence of the accused on the evidence, which is presented against him by the prosecutor. It is not for the magistrate to search out and supplement that evidence, even if he believes that the accused may be guilty and that the necessary evidence is available and, if properly presented, will result in the conviction of the accused. If the trial magistrate believes that, he can and should tell the prosecutor so in court and, if need be, complain to the prosecutor's superior. But, if the prosecutor persists in the withdrawal of the case, the trial magistrate must accept that decision. For him to behave as he did in this case is a grave error.

In the result, the conviction of the accused cannot stand and is set aside. If the accused has paid the fine imposed, the money is to be refunded to him.

SMITH J agrees.

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## MUNYUKI *v* CITY OF GWERU 1998 (1) ZLR 182 (SC)

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

Gubbay CJ, McNally JA & Muchechetere JA

Constitutional application

12 & 19 February 1998 Judgment No. S-20-98

### Flynote

Constitutional law - Constitution of Zimbabwe - Declaration of Rights - s 18(9) - right to fair hearing - holding of disciplinary proceedings concerning alleged misconduct when criminal proceedings pending in respect of the misconduct in question - whether disciplinary hearing had prevented the fair hearing of the criminal case - whether rights contained in Declaration of Rights provide protection against infringement by private agencies as well as government agencies

Human rights - right to receive fair hearing -- - when holding of disciplinary hearing before criminal case may prejudice the criminal case

### Headnote

A municipal council suspended the applicant, an employee of the council, because of suspected

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misconduct. This suspected misconduct had also led to criminal charges being brought against the applicant. Before the criminal proceedings had begun, the municipality held a disciplinary hearing to determine whether he had been guilty of misconduct. Prior to the disciplinary hearing, the applicant had submitted to the disciplinary committee a document in which he denied the charges and set out his defence to each of the allegations. He had, however, declined to take any part in the disciplinary hearing because he said that this hearing was likely to prejudice him at his criminal trial, in that he might be compelled to disclose incriminating information during the disciplinary hearing. The disciplinary committee decided that the disciplinary hearing must proceed and notified the applicant of when the hearing would take place. The applicant did not attend. The presiding officer postponed the hearing to give the applicant another opportunity to attend and participate. Again the applicant did not attend. The hearing proceeded in his absence and the charges were elaborated. Taking account of the applicant's defence outline, the committee decided that the applicant was guilty of misconduct and recommended his dismissal.

The applicant applied to the Supreme Court in terms of s 24(1) of the Constitution for a *declaratur* that his right to fair hearing enshrined in s 18(9) of the Constitution had been violated as a result of the holding of the disciplinary proceedings prior to the criminal trial.

*Held*, that before bringing the constitutional issue for determination by the Supreme Court, the applicant must first exhaust his other remedies. The applicant therefore should have first taken the disciplinary proceedings on review to the High Court. However, as the applicant had undertaken not to resort to any further litigation with respect to his dismissal should his application fail, the Supreme Court was prepared to make an exception to this rule and to entertain the application.

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GUBBAY CJ

*Held*, that it was not necessary to determine the questions as to whether the respondent was a private or a state agency and, if it was a private agency, whether the provisions of the Declaration of Rights in the Constitution provided protections against private agencies as well as Government agencies. It was not necessary to decide these matters because even it were assumed that the respondent was a Government agency, the application would still have failed.

*Held*, further, that there is no immutable rule that once a criminal prosecution concerning the same or related matter is pending against a person any civil proceedings must be stayed until the criminal proceedings have been concluded. The correct position is that the court has a discretion to stay the civil proceedings if the defendant is able to satisfy the court that it is likely that he will suffer prejudice in the pending criminal proceedings. As the right to silence carries less weight in Zimbabwe than it does in South Africa and England, the defendant has a somewhat daunting task to establish that he might be compelled to disclose information in the civil proceedings which would prejudice him in the criminal trial. The statement of defence produced to the disciplinary committee was an unambiguous denial by the applicant of the charges. It contained no admissions of an incriminatory nature. Thus if the applicant had attended the hearing and had maintained the defences he had outlined, he would not have prejudiced in any way his position in the pending criminal proceedings. On the other hand, if he

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admitted the misconduct, this would have prejudiced his ability to deny his guilt at the criminal proceedings but to be shown by prior conduct to have falsely have denied a criminal charge cannot constitute prejudice.

*Held*, further, that although a person charged with misconduct has a right to be heard in his own defence, by persistently failing to attend the disciplinary hearing, the applicant had abandoned or waived his right to be heard.

Cases cited:

*Food & Beverage Workers Union & Ors* v *Hercules Cold Storage (Pty) Ltd* (1990) 11 ILJ 47 (LAC)

*Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S)

*Macfarlane* v *Sengweni NO & Anor* 1995 (1) ZLR 384 (S)

*Mfazwe* v *SA Metal & Machinery Co Ltd* (1987) 8 ILJ 492 (IC)

*Reckitt & Coleman (SA) (Pty) Ltd* v *Chemical Workers Industrial Union & Ors* (1991) 12 ILJ 806 (LAC)

*Zinyemba* v *Min of the Public Svc & Anor* 1989 (3) ZLR 351 (S)

Legislation considered:

Constitution of Zimbabwe 1980, s 18(9)

## Case Information

*G T Chapwanya*, for the applicant

*G Chagonda*, for the respondent

## Judgment

**GUBBAY CJ:** On 29 May 1996, the applicant, who was in the employ of the respondent municipal council, was suspended without pay from the department of engineering services and required forthwith to leave his place of work. Notification thereof was issued by the departmental head pursuant to s 141(4) of the Urban Councils Act [*Chapter 29:15*]. The suspension pended the outcome of an investigation into suspected misconduct concerning the irregular procurement of electric light bulbs and the failure to maintain an accurate inventory.



GUBBAY CJ

The arrest of the applicant upon four counts of fraud followed. The charges were based on the allegations of misconduct raised by the respondent.

On 1 August 1996, the chamber secretary to the respondent informed the applicant that a disciplinary hearing was to be held on 9 August 1996. The specific charges which were the

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subject matter of the inquiry were particularised as follows:

(1) The issuing of requisitions for the supply of forty-two electric light bulbs for Ascot Stadium without obtaining a works order.

(2) The failure to maintain a proper inventory.

(3) The unnecessary procurement of the forty-two electric light bulbs which caused an over-expenditure of $214 232.23.

Five days later the applicant submitted to the respondent his ``defence outline''. In it the charges were denied and the merits of the defence to each set out. The conduct of a disciplinary hearing was not objected to. Shortly thereafter, however, the applicant's attitude changed. He announced that he was not prepared to attend the proposed hearing and partake in the proceedings until such time as the criminal trial pending against him terminated or the charges were withdrawn. The reason given was that the disciplinary hearing was likely to prejudice him at the trial, in that he might be compelled to disclose incriminating information.

After close consideration of the objection, the chamber secretary advised the applicant that a disciplinary hearing was still to take place. It was rescheduled for 10 September 1996, the time and place being provided.

On that day neither the applicant, nor the legal practitioner he had engaged to represent him, appeared before the disciplinary committee. Nonetheless, the presiding officer postponed the hearing to 20 September 1996 in order to give the applicant another opportunity to attend and participate. The indulgence was ignored; yet again the applicant was absent. So the hearing commenced without him. The charges were elaborated with account being taken of the applicant's defence outline. The proceedings were then adjourned to 26 September 1996 to allow the presiding officer time to consider his decision.

At the resumed hearing, the applicant was found guilty of having ordered an excessive number of electric light bulbs when only three were needed as replacements at Ascot Stadium - such misconduct having caused the respondent to expend $214 232.23 unnecessarily. The penalty recommended was dismissal.

The proceedings of 20 and 26 September 1996 were recorded and copies sent to the applicant with an invitation that he comment thereon. He declined to do so.

On 19 December 1996, the applicant was informed in writing that the respondent had approved of his dismissal with effect from the date of suspension.



GUBBAY CJ

Some twelve weeks later, on 5 March 1997, there was lodged with this court an application purporting to be brought in terms of s 24(1) of the Constitution of Zimbabwe. The relief sought was a *declaratur* that, in conducting the misconduct hearing in his absence, and in the face of an objection that criminal proceedings founded on much the same allegations were pending, the respondent's disciplinary committee had violated the applicant's fundamental right to a fair

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hearing as enshrined in s 18(9) of the Constitution.

Soon after the application was enrolled, the Registrar of this court was requested to direct the applicant's attention to the proviso to s 24(4) of the Constitution; and to the practice approved and adopted in *Zinyemba* v *Min of the Public Service & Anor* 1989 (3) ZLR 351 (S) at 355A-B, to the effect that an applicant must exhaust all other remedies before a constitutional issue will be determined. It was pointed out that the applicant should have brought his complaint of an irregularity in the disciplinary proceedings on review before the High Court. In other words, that adequate means of redress for the contravention alleged were available to him under the common law.

By reason, however, of a written undertaking that the applicant would not resort to any further litigation with respect to his dismissal should a determination by this court be adverse, it was decided to make an exception and entertain the application.

At the hearing, it was put to counsel that the application raised the threshold question of whether the provisions of the Declaration of Rights give protection only against governmental agencies; or whether they may be invoked as well against private individuals or bodies. To put the proposition in context, if the respondent is to be regarded in law as a private body divorced from any connection with government, is it permissible to subject it to constitutional scrutiny? Thus the nub of the issue is whether human rights should be afforded protection if the immediate violation is by private individuals or agencies (the ``horizontal application'' of constitutional rights) as opposed to public officials or the State (the ``vertical application'').

It is unnecessary in this application to determine the issue to which, of course, no argument was addressed. For even if it be assumed in favour of the applicant that the respondent is an organ of the State - a government instrumentality - or, if not, that it is nonetheless permissible to apply the provisions of the Declaration of Rights to its actions, I remain wholly unpersuaded that an infringement by it of s 18(9) has been established.

In advancing the contention that it was incumbent upon the disciplinary committee of the respondent to stay the enquiry into the alleged misconduct pending the resolution of the criminal proceedings, the applicant placed reliance upon this court's judgment in *MacFarlane* v *Sengweni NO & Anor*



GUBBAY CJ

1995 (1) ZLR 384 (S). The adamant refusal to attend the hearings was based upon a perception of what that case decided. It is clear to my mind, however, that the applicant's understanding was erroneous.

*MacFarlane*'s case does not lay down that once a prosecution concerning the same or related subject matter is pending against a defendant it is an immutable rule that the civil suit against him must be stayed until termination of the criminal proceedings. What I said at 388B-C was this:

> ``Although there is no fixed rule of law in either South Africa or England, the usual practice of the courts in those

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countries is that if it is shown that the civil proceedings are likely to prejudice the defendant in related criminal proceedings, the court has a discretion to order a stay until the criminal proceedings have been concluded."

It is, I think, apparent from this passage, that the court or, for that matter, the adjudicating body, has a *discretion* to stay the civil proceedings if the defendant is able to satisfy it of the likelihood of prejudice being suffered in the pending criminal trial. But as the right to silence in this country carries less weight than it does in South Africa and England, it seems to me a somewhat daunting task for a defendant to be able to establish that he might be compelled to disclose information in the civil proceedings which would prejudice him at the criminal trial (see at 389E-G).

The statement of defence produced to the disciplinary committee was an unambiguous denial by the applicant of the charges. It contained no admissions of an incriminatory nature. If, therefore, the applicant had attended the hearing and maintained the defences he had outlined, he would not have prejudiced in any way his position in the pending criminal proceedings. Certainly, had he admitted the misconduct, he would have jeopardised an ability to sustain a denial of guilt at the criminal proceedings. But to be shown by prior conduct to have falsely denied guilt of a charge laid at a criminal trial cannot constitute prejudice.

Although it is a fundamental legal principle that an employee charged with misconduct by the employer has a right to be heard, I have no difficulty in accepting that such right may be abandoned or waived. There is no compulsion upon the employee to attend the hearing. Non-attendance is not a disciplinary offence unless specified in the pertaining code of conduct. If the employee does not attend, however, he abandons his right to be present and the hearing may proceed *in absentia*. See *Forestry* v *Moyo* 1997 (1) ZLR 254 (S) at 262.

This commonsense approach was applied in *Reckitt & Coleman (SA) (Pty) Ltd* v *Chemical Workers Industrial Union & Ors* (1991) 12 ILJ 806 (LAC) where the facts were these. Employees engaged in disruptive behaviour by blowing hooters on the factory floor were summoned to a disciplinary hearing. They refused to attend. Harms J (as he then was) presiding in the Labour Appeal Court (Transvaal Division) said at 813A-D:



GUBBAY CJ

``It is a principle of fairly general application that a party should utilise his domestic remedy and procedures before approaching a court. There is no reason in principle why such a rule should not be applicable to proceedings before the industrial court. That court has a duty to apply equitable principles in assessing what is fair between employer and employee. If the employer and the employee have entered into an agreement regulating disciplinary enquiries and providing for internal appeals, it would appear that under normal circumstances an employee who is to be disciplined has to attend and partake in those proceedings. If he refuses to do so, he could hardly allege that the proceedings and the outcome of the proceedings were unfair or amounted to an unfair labour practice. There may obviously be occasions when employees with reason could refuse to attend such proceedings. However, in this case no reasons were proffered why the first eight employees (the parties to the first application) refused to attend the disciplinary enquiry and refused to use their right of appeal."

See also *Food & Beverage Workers Union & Ors* v *Hercules Cold Storage (Pty) Ltd* (1990) 11 ILJ 47 (LAC) at 51D-F *per Spoelstra* J. Indeed, it would appear permissible (though perhaps inadvisable) in certain circumstances to dispense entirely with a disciplinary hearing. See, for

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instance, *Mfazwe* v *S A Metal & Machinery Co Ltd* (1987) 8 ILJ 492 (IC) at 493D-G; Riekert's *Basic Employment Law* 2 ed at 107-108.

In this matter the disciplinary committee acted with commendable patience and propriety. The procedural steps suggested by J and R Piron in their work *Managing Discipline and Dismissals* at 16-17 were followed.

Although the disciplinary committee regarded the reason for the applicant's non-attendance as invalid, it postponed the hearing once. The applicant was advised of the postponement and that the hearing was rescheduled for 20 September 1996. He was given an opportunity to reconsider his attitude with a warning that if he still chose not to attend, the hearing would proceed in absentia. Still he did not appear. The consequent hearing, conducted in his absence, was fair. A copy of the record of the proceedings was sent to the applicant for comment. After he had declined the invitation, the council approved the recommendation that he be dismissed from employment.

In sum, I entertain no doubt that by his misconceived appreciation of the law the applicant brought his present predicament upon himself.

The application is accordingly dismissed with costs.

**McNally JA:** I agree.

**MUCHECHETERE JA:** I agree.

*Tizirai-Chapwanya & Partners*, applicant's legal practitioners

*Danziger & Partners*, respondent's legal practitioners

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## KUVAREGA *v* REGISTRAR-GENERAL & ANOR 1998 (1) ZLR 188 (HC)

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

Chatikobo J

Civil application

23 February 1998 Judgment No. HH-48-98

### Flynote

Elections - Electoral Act Chapter [2:01] - *s 118(1)(c) - wearing of apparel emblazoned with party emblems or slogans - whether person wearing such apparel contravenes law prohibiting uttering of slogans near polling stations*

Practice and procedure - application - chamber application - requirement to serve chamber application on other parties - effect of failure to do so - provisional order - provisional order having same practical effect as final order - undesirability of allowing such relief - urgent application - certificate of urgency - delay in making application certified as being urgent - explanation for delay required

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## Headnote

Section 118(1)(c) of the Electoral Act [*Chapter 2:01*] prohibits the ``uttering'' of slogans within 100 metres of a polling station. In this context, the word ``utter'' denotes the making of a sound, rather than displaying a written or pictorial communication. It means to shout one's catchword or war cry or motto. Wearing of attire displaying a party's slogans or symbols or pictures of a party's candidate would not offend against the prohibition against uttering slogans.

Where a chamber application is made, the High Court Rules require that the application be served on the other party or parties, subject to certain exceptions and to the certificate of the applicant's legal practitioner that there are grounds for dispensing with service. Failure to comply with this requirement will bring the risk of being non-suited for non-compliance with the Rules.

Interim relief is meant to be precisely that, and can be obtained by the mere showing of a *prima facie* case. Consequently, if the effect of interim relief is to obtain the substantive relief sought, the litigant would obtain final relief without proving his case. This is clearly undesirable, and practitioners should be careful in framing the interim and final relief sought, to avoid such incongruities.

Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is also urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. If there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non-timeous action.

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**1998 (1) ZLR p189**

CHATIKOBO J

Cases cited:

*R* v *Sachs* 1953 (1) SA 392 (A)

Legislation considered:

Electoral Act [*Chapter 2:01*], s 118(1)(c)

High Court Rules 1971 (RGN 1047/71), r 242

## Case Information

*M Hogwe*, for the appllicant

Mrs *J Zindi*, for the first respondent

No appearance for the second respondent

## Judgment

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**CHATIKOBO J:** This matter came before me through the chamber book. The papers were first placed before me on Friday 20 February 1998. At that stage the second respondent was not a party to the proceedings. I indicated that the application must be served in compliance with r 242(1) of the High Court Rules. I also directed that the second respondent should be cited and the papers should be served on him. I must point out that this is one of numerous cases where legal practitioners pay scant or no regard to r 242, which requires that all chamber applications must be served on the other party or parties, unless one of the things specified in that rule is shown to exist and the practitioner concerned certifies that there are grounds upon which he believes that service should be dispensed with. I must sound a warning that those practitioners who continue to offend against this requirement run the risk of their applications being dismissed, without being heard, for non-compliance with the rules.

The papers were resubmitted on the same day after service had been effected on the first respondent but although the second respondent had by then been included as a party, no service had been effected upon him. Counsel for the applicant advised me that an attempt was made to serve the papers at the provincial offices of the party which sponsors his candidacy in the by-election but an official at those offices declined to accept service. Notwithstanding the non- service of the application on the second respondent, I was prepared to proceed with the matter, principally because I was of the view that the second respondent would not be prejudiced. After I had dismissed the application and intimated that my reasons would follow, I learnt through the media that there was a third candidate contesting the election. He too should have been cited. Practitioners who bring such applications must always ensure that all interested parties are made aware of the proceedings. It takes a mere modicum of diligence to ascertain the number and identities of all candidates contesting a by-election. Regrettably, all I can do now is give reasons for the decision I made.

The crisp question which I was asked to determine is whether s 118(1)(c)



CHATIKOBO J

of the Electoral Act [*Chapter 2:01*] (the Act) outlaws the wearing or use of apparel adorned or emblazoned with campaign slogans, pictures or symbols of any candidate to an election within a radius of one hundred metres of any polling booth on a polling day. The question arises in this way.

The applicant is a councillor for ward 5 in Chitungwiza. She is a candidate in the by-election for the vacant parliamentary seat in the St Mary's constituency. The election, which is set to take place on 23 and 24 February 1998, is being contested by two other candidates, one of whom is sponsored by the ruling party, ZANU (PF). In the recent past an election for the position of mayor was held in Chitungwiza. The applicant claims to have observed that during the course of that election ZANU (PF) supporters were wearing T-shirts with election slogans and/or their candidate's picture adorned thereon. These supporters patrolled the perimeters of the polling stations and queued and voted wearing these offending T-shirts. This, so the applicant contends, eroded the secrecy of the ballot.

During the run-up to the by-election now under way, the applicant's house has been attacked

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and so have the houses of some of her supporters. Although she stops short of naming the alleged assailants, the inescapable implication is that this was done by ZANU (PF) supporters. She therefore fears that the presence of ZANU (PF) supporters in labelled attire at the polling stations will scare away her supporters as they will feel intimidated. She does not say that she harbours any reasonable apprehension that ZANU (PF) supporters or any other persons will disrupt the proceedings at the polling stations. She simply fears that the mere presence of people wearing labelled attire will intimidate her supporters. Had there been a reasonable apprehension that some people might try to disrupt the elections and had there been evidence to substantiate such apprehension, there may have been room for arguing that she is entitled to protection. Even then her prospects of success would have been pretty dim, bearing in mind that the duty to ensure that the orderliness of an election lies on the State under the watchful eye of the Electoral Supervisory Commission. Her application is based squarely on the premise that the conduct she complains of is outlawed by s 118(1)(c) of the Act.

Section 118(1)(c) of the Act provides as follows:

> ``Without derogation from any other provision of this Act or any other enactment, no person shall, within one hundred metres of any polling station on any polling day -
>
> (a) ...
>
> (b) ...
>
> (c) utter slogans; or
>
> (d) ...
>
> (e) ...
>
> (f) ...''



CHATIKOBO J

By s 118(2) failure to observe the terms of s 118(1) is made an illegal practice.

It is contended on behalf of the applicant that the phrase ``utter slogans'' includes the wearing of T-shirts emblazoned with slogans, symbols or pictures of one's candidate.

According to the Shorter Oxford English Dictionary, to ``utter'' means to ``give vent to (joy, etc) in sound; to burst out to (a cry, etc); to give out in an audible voice''. The *Concise Oxford Dictionary* adds the meaning ``express in spoken or written words''. This extension of the meaning of the word ``utter'' to include written communication appears to have been necessitated by the need to convey one of the meanings often attributed to the word utter, namely, to ``utter'' a forged document by putting it into circulation. I am convinced that in the context of s 118(1)(c) the word ``utter'' is used to denote the making of sound. If the intention of the legislature was to prohibit written or pictorial communication it is unlikely that it would have been conjoined with the word slogan, which ordinarily connotes a war cry.

Clearly, to utter a slogan is to shout one's catchword or war cry. A diagrammatic or pictorial representation of one's motto cannot be equated to chanting one's motto. I am fortified in the

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view that the legislature did not intend, by enacting s 118(1)(c), to outlaw the wearing of labelled T-shirts by the fact that, in s 117(2) of the Act, the wearing, possession, display or publication of a thing which consists of or incorporates a prohibited symbol is made an illegal practice if it is worn, possessed or published to further the objects of a candidate or party for an election. In s 117(3) it is provided that the prohibition contained in s 117(2) shall extend to the use, possession, display, publishing, or wearing of banners, flags, badges, uniforms, T-shirts, dresses or other items of clothing. This can only mean that before a person is prohibited from wearing any piece or item of clothing for the purposes of furthering the objects of a candidate or a party in an election, the item concerned must first be proscribed in terms of s 117(1) of the Act. Anything which has not been so proscribed can be worn anywhere.

Generally speaking, the meaning of the words of a statute is the same as their ordinary meaning, but, this notwithstanding, a court faced with the interpretation of the words must examine the words in their linguistic context and their wider legal and jurisprudential context. See, generally, Devenish *Interpretation of Statutes* Chapter 13.

The existence of comprehensive provisions in s 117 dealing with what items may be prohibited for purposes of an election is, in my view, a compelling pointer to the conclusion that those items which have not been banned cannot, by an extension of the meaning of the words employed



CHATIKOBO J

in s 118(1)(c), be treated in the same way as those items which have been banned in terms of s 117(1) of the Act.

According to the provisions of s 118(2) of the Act, it is an illegal practice to utter a slogan within the defined perimeter and such conduct is punishable by a fine of $2 000 (s 123). In addition, if such person is convicted by the High Court, he can be declared to be incapable of registering as a voter or of voting at an election for up to five years or of filling any public office whose tenure is regulated exclusively by the Constitution. Where the offender already holds such office the High Court may declare that the office shall be vacated by him as from the date of conviction. It can thus be seen that not only can the breach of s 118 be visited with criminal sanctions, but the penalties to which an offender is liable upon conviction are severely disabling. If there was any doubt as to what meaning to ascribe to the phrase ``utter slogans'', hallowed tradition would have demanded that a restrictive interpretation be placed upon it. Cf *R* v *Sachs* 1953 (1) SA 392 (A).

Sight should not be lost of the fact that these provisions are intended to ensure that peace and orderliness prevail during an election. They are not meant to discourage people from openly supporting their party or candidate. Any voter would be aware that at the polling station there would be people who support rival candidates, whether or not they go to vote clad in T-shirts emblazoned with portraits of candidates or emblems of parties of their choice. It is more than probable that not every ZANU (PF) supporter will go to vote draped in that party's regalia. The secrecy of the ballot lies not in the facelessness of the voter but in the opportunity to make a secret choice. The ascendancy of a nation to the sublime ideals of democracy demands of each

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contestant in a national election a valiant demonstration of a high degree of tolerance and fair play. The role of the courts remains that of a disinterested umpire to provide redress and protection to those who are denied a level field of play.

Before concluding this judgment I must deal with a procedural matter which, regrettably, seems to present difficulty to many practitioners.

The applicant applied for the issue of a provisional order calling upon the respondents to show cause on the return day why the wearing of T-shirts within the prohibited distance of a polling booth should not be declared unlawful. In addition, the applicant prayed the court to issue an interim interdict prohibiting the use of such T-shirts. As already pointed out, the application was filed on the Friday immediately preceding the Monday on which the election commenced. If the interim relief had been granted, the applicant would have obtained the substantive relief claimed before the return date and after the election she would not have had any reason to move for the confirmation of the order. There was nothing interim about the



provisional relief sought. It would have provided the applicant with the relief she sought on the day of the election. The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. This, to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day. The point I am making will become clearer if I put it another way. If, by way of interim relief, the applicant had asked for a postponement of the election pending the discharge or confirmation of the provisional order she would not in that event gain an advantage over the respondents, because the point she wanted decided would have been resolved before the election was held. But, if the interim relief were granted in the form in which it is presently couched, she would get effective protection before she proves her case and the election would be conducted on the basis that it is unlawful to wear T-shirts emblazoned with party symbols and slogans. Thereafter it would be fruitless for the respondents to establish their entitlements to wear such T-shirts. Care must be taken in framing the interim relief sought as well as the final relief so as to obviate such incongruities.

There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency. In the present case, the applicant was advised by the first respondent on 13 February 1998 that people would not be barred from putting on the T-shirts complained of. It was not until 20 February 1998 that this application was launched. The certificate of urgency does not explain why no action was taken until the very last working day before the election began. No explanation was given about the delay. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by

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the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay. *In casu,* if I had formed the view that it was desirable to postpone the election I may nevertheless, have been dissuaded from granting such an order because, by the time the parties appeared before me to argue the matter, the election was already under way. Those who are diligent will take heed. Forewarned is forearmed.



CHATIKOBO J

I did not however non-suit the applicant because of the procedural flaws dealt with in this judgment. I was satisfied, for the reasons I have given, that there was no merit in the application and I dismissed it with costs.

*Mangwana, Hogwe & Partners*, applicant's legal practitioners

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



## INTERCEPTOR (PVT) LTD *v* TRISON CONSTRUCTION (PVT) LTD 1998 (1) ZLR 195 (HC)

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

Mungwira J

Civil application

2 October 1997 & 25 February 1998 Judgment No. HH-37-98

### Flynote

Practice and procedure - summary judgment - plaintiff obtaining summary judgment for portion of total amount claimed and then seeking to bring separate action for remainder - whether res judicata *applies*

### Headnote

The plaintiff instituted action against the defendant for a sum of money which he said was owed to him by the defendant. The defendant admitted owing the plaintiff a portion of the total amount being claimed. The plaintiff applied for summary judgment for the portion of the amount admitted to be owing. He indicated in his founding affidavit that, after he had obtained summary judgment, he intended to refer to trial his claim in respect of the remainder of the amount. When he sought to claim the remainder in a separate action, the defendant raised the defence of *res judicata*, arguing that this defence applies where there is a confession of indebtedness in respect of a portion of the claim in a single cause of action and the judgment is granted pursuant to that confession. The plaintiff argued that the order granting summary judgment did not seek to determine the defendant's indebtedness in the full amount and neither did it seek to determine questions of law or issues of fact as to whether the defendant had a valid claim to the balance of the claim. As no determination had been made as to the balance in dispute the

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defence of *res judicata* could not be invoked.

*Held*, that the rule dealing with summary judgment cannot be used to obtain summary judgment in respect of something less than the total amount claimed in the summons. Once a judgment is granted the entire claim contained in the summons becomes *res judicata*. The special plea of *res judicata* must therefore be upheld.

Cases cited:

*Abdurahman's Est* v *Abdurahman* 1956 (3) SA 295 (C)

*African Farms & Townships Ltd* v *Cape Town Municipality* 1963 (2) SA 555 (A)

*Blaikie-Johnston* v *P Hollingsworth (Pty) Ltd & Ors* 1974 (3) SA 392 (D)

*Jno G Teale & Sons (Pty) Ltd* v *Vrystaatse Plantediens (Pty) Ltd* 1968 (4) SA 371 (O)

*SWM Electrical (Pvt) Ltd* v *Electrical & Pulley Component Suppliers (Pvt) Ltd* 1996 (1) ZLR 696 (S)

*Wilmot* v *Zimbabwe Owner Driver Organisation (Pvt) Ltd* 1996 (2) ZLR 415 (S)

Legislation considered:

High Court Rules 1971 (RGN 1047/71), r 64

## Case Information

Mrs *B T Mtetwa*, for the applicant

*A J Dyke*, for the respondent



MUNGWIRA J

## Judgment

**MUNGWIRA J:** The plaintiff in this matter instituted action against the defendant for payment of the sum of $92 684.74 in respect of goods sold and delivered during the period November 1996 to March 1997.

The defendant admitted owing the plaintiff a portion of the amount claimed, more specifically the sum of $55 961.78. The plaintiff proceeded to apply for summary judgment in such sum indicating in its founding affidavit that it intended upon grant of the summary judgment application to have the balance referred to trial.

Paragraph 6 of the founding affidavit deposed to by the managing director of the plaintiff company reads:

> ``I contend that the respondent has no basis whatsoever for defending the amount which is admittedly owing and I believe that this amount should be paid to the applicant as soon as possible as clearly the respondent

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(defendant) has fully admitted that this is the amount owed.

The matter can thereafter go to trial for the balance owing which would considerably shorten the proceedings.''

In a letter to the plaintiff's legal practitioners by the defendant's legal practitioners, dated 8 August 1997, the defendant advised that there would be no opposition to the application and that he would consent to an order being made in terms of the draft.

The defendant has in its founding affidavit submitted that the plaintiff secured a final judgment and as such the plaintiff is now barred from proceeding against the defendant in respect of the same cause of action for any further sums. In particular, the defendant argues that where there is a confession of indebtedness in respect of portion of the claim on a single cause of action, as *in casu*, and judgment is granted pursuant to that confession of indebtedness the defendant will become entitled to raise the defence of *res judicata*.

Cited in support of this contention is a passage of HOWARD J in the case of *Blaikie- Johnston* v *P Hollingsworth (Pty) Ltd & Ors* 1974 (3) SA 392 (D) at 395A-C:

``Even if the judgment on confession did not have the effect of a novation I am satisfied that once it was granted the entire claim contained in the summons became *res judicata*. See Grotius 3.49, 1-3; Hoffmann *South African Law of Evidence* 2 ed at p 239, Caney *Law of Novation* 2 ed at p 76; and *Custom & Credit Corp (Pty) Ltd* v *Shembe* 1972 (3) SA 462 (A) at p 472 (A), where VAN WINSEN AJA said:

`The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords upon such cause. This is the ratio underlying the rule that, if a cause of action has previously been finally litigated between parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae.*'

The same applies, I think, to a case such as the present in which the plaintiff with a single cause of action takes a final judgment for part of the claim and then attempts to proceed with the same action for a judgment in respect of the balance of the claim.''



MUNGWIRA J

This case was cited with approval by G*ubbay* CJ in *SWM Electrical (Pvt) Ltd* v *Electrical & Pulley Component Suppliers (Pvt) Ltd* 1996 (1) ZLR 696 (S).

The plaintiff company, on the other hand, submits that the defendant's plea in abatement is totally misconceived and ill informed. The plaintiff argues that the defendant, having consented to the order and the terms of the application, is now estopped from ``stopping the balance of the claim being proceeded with''.

The plaintiff further argues that the order granting summary judgment did not seek to determine the defendant's indebtedness in the full amount and neither did it seek to determine questions of law or issues of fact as to whether the defendant has a valid defence to the balance of the claim. No determination had been made as to the balance in dispute and that amount never having been adjudicated upon, the defendant cannot now invoke the plea of *res judicata*. In support of this submission, the plaintiff has cited *African Farms & Townships Ltd* v *Cape Town Municipality* 1963 (2) SA 555 (A) where at 562C-D, STEYN CJ remarked:

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``The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a `*causa petendi*' of the same thing between the same parties cannot be resuscitated in subsequent proceedings."

The plaintiff submits that it cannot seriously be argued that there has been a resuscitation of the issues pertaining to the disputed amount on which no decision has as yet been made.

The respondent places further reliance on a passage in Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed at p 436 wherein it is set out that where a defendant admits his liability in respect of a portion of a claim the plaintiff is entitled to claim summary judgment in respect of the sum admitted (*Jno G Teale & Sons (Pty) Ltd* v *Vrystaatse Plantediens (Pty) Ltd* 1968 (4) SA 371 (O)).

The attention of this court was further drawn to another judgment of GUBBAY CJ in *Wilmot* v *Zimbabwe Owner Driver Organisation (Pvt) Ltd* 1996 (2) ZLR 415 (S). The issue in that case was whether a plaintiff who in a summons makes three entirely separate claims, each in respect of a debt or liquidated demand, and then applies for summary judgment on one or two of such claims in an amount less than the total of the three, must be denied the relief sought by virtue of the provisions of Order 10 r 64(1) of the High Court Rules 1971.

The issue raised in that case do not assist in the determination of the present case.

On the question of *res judicata,* the respondent submits that the order granted at the summary judgment stage did not determine questions of law or issues of fact as to whether the defendant had a valid defence to the balance



MUNGWIRA J

of the claim. The issue before the court in the summary judgment application was in respect of the sum of $55 961.78 which the defendant had admitted to owing. I am urged, in the light of the aforegoing, to find that the applicant has failed to establish that the subject of the summary judgment application related to the whole amount in the summons.

In order to determine these issues, it is necessary to advert to the relevant rule which deals with summary judgment. That rule is 64. In particular paras (1), (2) and (3) provide:

``(1) Where the defendant has entered appearance to a summons, the plaintiff, may at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for *what is claimed in the summons and costs*.

(2) A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein verifying *the cause of action and the amount*, if any, and stating that in his belief there is no *bona fide* defence *to the action*.

(3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify the plaintiff's *cause of action* or his belief that there is no *bona fide* defence *to the action*'' (my emphasis).

Can it be said that this rule entitles a plaintiff on a single cause of action to take final judgment for part of the claim and then attempt to proceed with the same action for a judgment in respect of the balance of the claim? GUBBAY CJ in the *Wilmot* case *supra* cited with approval the

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remarks of van WINSEN J in *Abdurahman's Estate* v *Abdurahman* 1956 (3) SA 295 (C):

> ``Can (he) seek to use this procedure to obtain summary judgment in respect of something less than his whole cause of action and less than the full amount demanded? Regard being had to the terms of the rule, I should say *prima facie* not. No authority was quoted to the court in regard to an interpretation of r 22 on this point, and I have been unable to find any authority directly on the rule. Nevertheless, assistance may be obtained from the interpretation of the English Rules of Court and the Magistrates Courts Rules, both substantially in the same form as r 22.
>
> In regard to the Rule of Court in England, namely Order 14 Rule 1(a), it is instructive to note that the authors of the *Annual Practice* 1956 at p 175 state that Order 14 is not intended to apply to a case where plaintiff seeks judgment only as to a part of his claim, though if defendant shows a defence as to part, the plaintiff may under Rules 3 and 4 (which correspond to r 22(1) have judgment for the part to which no defence is shown. The learned authors say that the affidavit filed verifying the claim must go to the whole claim and application should be made for the full amount of the claim, although once the condition precedent of verifying the whole claim has been fulfilled in good faith subsequent admission of a defence as to part will not preclude judgment as to the residue of the claim.''

The defendant has urged this court to find that the *Wilmot* case is on all fours with the present case. I do not accept that submission. In the above case, the court was dealing with three different claims on the same summons. The learned CHIEF JUSTICE was of the view that, having regard to the provisions of r 73(b)(i), if the court can in the exercise of its discretion give leave to

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MUNGWIRA J

defend part of the claim and enter judgment against the defendant as to the balance of the claim, *a fortiori* it would be able to grant judgment in favour of the plaintiff on some but not all of the claims to which liability is admitted, which is what the learned judge in the court *a quo* had done.

The respondent has not here advanced the argument that in granting summary judgment the court exercised its discretion in terms of r 4C(a) which permits a departure from any of the provisions of the Rules if considered necessary in the interests of justice.

There is an attempt to raise for the first time in the heads of argument the issue that the claim was based on various causes of action. This however is not borne out by the pleadings.

In the light of the *Wilmot* case as well as the *SWM Electrical (Pvt) Ltd* case *supra,* I reach the conclusion that once a judgment was granted the entire claim contained in the summons became *res judicata*. I can do no better than make reference to the following passage by Spencer Bower on *Res Judicata*:

> ``[W]here there is substantially only one cause of action and it is a case not of splitting separable demands but of splitting into two quantitative parts, the plea is sustained. In homely phrase, a party is entitled to swallow two separate cherries in successive gulps but not to take two bites of the same cherry. He cannot limit his claim to a part of one homogenous whole and treat the inseparable residue as available for future use, like the good parts of a curates egg.''

The special plea is accordingly upheld with costs.

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*Kantor & Immerman*, plaintiff's legal practitioners

*Lofty & Fraser*, defendant's legal practitioners



## CHIREMBA *v* BARKHUIZEN 1998 (1) ZLR 200 (HC)

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

Gillespie J

Civil action

26 January & 25 February 1988 Judgment No. HH-33-98

### Flynote

Practice and procedure - pauper - in forma pauperis proceedings instituted - when person should be debarred from continuing in forma pauperis

### Headnote

A system of legal aid attempts to balance two conflicting principles. On the one hand, persons who cannot afford to pay for the services of a lawyer must be given reasonable assistance in obtaining legal representation and in exercising their right of access to the courts. On the other hand, a small economy can only afford limited assistance of this nature.

Under the current in *forma pauperis* system a legal practitioner may only act gratuitously for a person if he has satisfied himself that the person is indigent and that he has a sustainable cause of action and a fair prospect of success in respect of his claim or his defence to the claim. Just as a person should not be entitled to commence proceedings as a pauper unless he can show that he has a good cause, so he may not continue as a pauper in proceedings that have started once it becomes clear that the cause is not a good one.

In terms of r 396 of the High Court Rules the opponent of a person proceeding in *forma pauperis* may at any time apply for an order debarring that person from continuing *in forma pauperis*. There is a good reason for permitting such an application to be brought. The person brought to court by a pauper is at a disadvantage as to costs, as the court may exercise its discretion not to award costs against a pauper and, even if it does award costs against the pauper, the successful party will be unlikely to be able to recover such costs.

The grounds upon which a party may apply to debar a person from continuing in *forma pauperis* are not enumerated, but they would include the fact that the pauper has come into means, the absence of any fair prospect of success and the abuse by the pauper of the proceedings.

In the present case, the court ruled that the plaintiff should be debarred from continuing in *forma pauperis* at the expense of others because the litigation had no realistic prospect of success and his litigation had proceeded in a dilatory and desultory fashion, to the prejudice of the defendant.

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Cases cited:

*Attwell* v *Guisman* 1949 (3) SA 991 (E)

*Bonne* v *Bonne* 1964 (1) SA 291 (SR)

*Chichoni* v *Food Industrial (Pvt) Ltd* HH-63-91

*Hendricks* v *van Biljon* 1940 SR 118

*Hippo Valley Ests Ltd* v *Chisi* 1992 (1) ZLR 346 (S)

## Case Information

*J Dondo*, for the plaintiff

Defendant in person

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GILLESPIE J

## Judgment

**GILLESPIE J:** A system of legal aid attempts to balance two conflicting principles. On the one hand, persons who cannot afford to pay for the services of a lawyer must be given reasonable assistance in obtaining legal representation and in exercising access to the courts. On the other hand, a small economy can only afford limited assistance of this nature. Prior to the fusion of the legal profession, in civil cases principle was balanced against finance by two expedients. A strict means test had to be satisfied, and there had to be some reasonable prospect of success.

The existence of sufficient merit in the claim used to be investigated by an advocate. Only if he were prepared to certify, after personal consultation with the person seeking legal assistant, that *prima facie* the would-be litigant had a good cause of action or defence, 1(43) would he be able to petition the High Court of Zimbabwe for leave to proceed *in forma pauperis.* Subsequently the need to petition the court for leave was removed and provision was made for the registrar to handle applications for the appointment of attorney and counsel *in forma pauperis.* Still, an advocate had to be prepared to give a certificate of *probabilis causa*, to put his name to an assurance that there was disclosed a cause of action that would probably succeed.

Even now, the requirement of some investigation into the merits of the defence exists. The person seeking assistance applies to the registrar who refers him to an attorney. That attorney is then obliged to:

> ``inquire into such person's means and the merits of his cause, and upon being satisfied that the matter is one in which he may properly act *in forma pauperis* he shall proceed to take instructions in the matter.'' 2(44)

It is true that he does not have to certify to the registrar the existence of a probable cause. Nevertheless, by his having taken instructions and lodged with the registrar a statement of means and his own statement that he will act gratuitously, 3(45) he is taken to have satisfied himself that the indigent litigant has a sustainable cause of action or defence. Indeed, it has

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been held in this court that it is improper for a legal practitioner to undertake to act gratuitously for an indigent litigant where that litigant has no good case to advance:

> ``It would appear ... that the legal practitioner in question, after interviewing the applicant was satisfied that the applicant had no cause of action. If I am correct in this regard then that should have been the end of the matter. No instructions should have been taken from the applicant. In my view, it is improper for a legal practitioner to proceed to take instructions from an applicant without a cause of action and to lodge with the registrar the statement that he is acting gratuitously in any proceedings. Rule 393 of the High Court Rules enjoins the legal practitioner to enquire into the means and merits of an application for



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> *in forma pauperis* assistance. The purpose of such an enquiry can only be for the legal practitioner to satisfy himself that the applicant has a cause of action and is without means." 4(46)

The degree of cogency in his claim or defence which the postulant for legal aid should show has been variously stated as ``*prima facie* a good cause of action or defence'', or ``*probabilis causa*'' or otherwise. All that is intended is that he should be able to show a fair prospect of success. 5(47)

Just as a person should not be entitled to commence proceedings as a pauper unless he can show a good cause, so he may not continue as a pauper in proceedings once started once it becomes revealed that there is no good cause. Thus it is provided that a legal practitioner who has commenced acting gratuitously in terms of this rule may not cease to act without the leave of a judge. On application for such leave, one of the grounds upon which it may be granted is the lack of any prospect of success. 6(48) Similarly, the opponent of a person who is permitted to proceed *in forma pauperis* has the right -

> ``at any time to make a court application for an order debarring such person from continuing *in forma pauperis*; and upon the hearing of such application, the court may make such order thereupon, including any order as to costs, as to it seems just." 7(49)

The need to permit of such an application is evident. Although there is no rule against making an order of costs against an unsuccessful pauper litigant, 8(50) a person who is brought to court by a pauper is at a disadvantage as to costs. Not only is there a practice according to which costs might, at the court's discretion, not be awarded against an unsuccessful pauper, 9(51) but even if costs are awarded to him, there is generally little likelihood that the successful party will be able to recover them from the impoverished litigant. 10(52)

The grounds upon which a party might successfully apply; to depauperize one who has leave to sue *in forma pauperis* are not enumerated in the rule. They would include, however, the fact of the pauper having come into means; the absence of any fair prospect of success; and abuse by the pauper of proceedings. 11(53)

In this case, at the pre-trial conference, the defendant, a self-actor, made oral application for an order debarring the plaintiff from continuing to sue *in forma pauperis*. In the interests of economy and expedition, I permitted

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GILLESPIE J

the application to be made in that fashion rather than insisting upon a formal court application being made. The application was made in the following circumstances. The plaintiff commenced proceedings by summons in May 1995. An application for summary judgment was made in July 1995 and subsequently withdrawn in November 1995. There was no tender of costs and no order was made. Pleadings closed at the end of November 1995 and discovery was complete in the second week of January 1996. Up to that time, the defendant was legally Brepresented, a luxury he appears no longer to be able to afford. Nevertheless, he is not so poor as to qualify for assistance. There then followed considerable delay on the plaintiff's part. Not until March 1997 did he apply for a pre-trial conference. When it was held, he failed to appear on three separate occasions. He only appeared after I made an order requiring him to attend in person on pain of having his claim strike out. While one cannot say that an abuse of proceedings is disclosed, nevertheless the manner of proceeding is dilatory and lackadaisical and prejudicial to the defendant.

The claim is for payment of the balance of the purchase price in respect of property allegedly sold by the plaintiff to the defendant's brother and which indebtedness the defendant allegedly assumed. The plea, and the papers on summary judgment, disclose that the assumption of indebtedness was in writing in these terms:

> ``This is to confirm that I, A M Barkhuizen, agree to pay Mr Francis Chiremba the balance of $13 000 (thirteen thousand dollars) owing to him by my brother who purchased a boat from him.
>
> This money will be paid from Mr B Barkhuizen's fixed deposit of which I am arranging for clearance at present.''

In addition, it seems common cause that B Barkhuizen is not in fact the defendant's brother but rather his estranged adoptive brother who was in prison at the time of the undertaking and whose affairs the defendant was attempting to manage. There is no response pleaded by the plaintiff to the defence. Even the plaintiff's summary of evidence contains the statement that the defendant undertook -

> ``to pay for and on behalf of Brian [the adoptive brother].''

On the pleadings there is no defence to the clear terms of the undertaking and there is no realistic probability of success for the plaintiff. His legal representative (who did not seek leave to withdraw) has been unable to make any submission to the contrary.

It has proven impossible to curtail proceedings at the pre-trial conference. The defendant faces the prospect of a full trial during which he might have once again to seek the services of a lawyer at considerable cost to himself. If the plaintiff truly is indigent, then the defendant will have been considerably prejudiced.



GILLESPIE J

At the close of argument on the point, I reserved my decision and postponed the pre-trial

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conference for that purpose.

Upon consideration, it seems to me that the plaintiff cannot expect to be afforded the luxury of containing at the expense of others with litigation which does not have sufficient prospect of success, particularly where the litigation has proceeded thus far in so dilatory and desultory a fashion. This lack of timeliness in the plaintiff's proceedings is itself something that requires to be corrected by direction. I therefore order:

(1) that the plaintiff be and is hereby debarred from proceeding further *in forma pauperis*;

(2) that the plaintiff shall, if so advised, make application on notice to the defendant, for a resumption of the pre-trial conference within 15 days of the date of handing down of this order, failing which the defendant may, without further notice to the plaintiff, make chamber application for the striking out of the plaintiff's claim and for judgment in his favour with costs of suit.

*Chinamasa, Mudimu & Chinogwenya*, plaintiff's legal practitioners



## STANBIC BANK ZIMBABWE LTD *v* DICKIE & ANOR 1998 (1) ZLR 205 (HC)

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

Smith J

Application for summary judgment

10 & 25 February 1998 Judgment No. HH-35-98

### Flynote

Practice and procedure - summary judgment - application - withdrawal of application and subsequent filing of fresh application on same grounds - not permissible without a good explanation justifying substitution of fresh application - delay in making application for summary judgment - if made more than a few months after plea has been filed, reasons for delay should be given

### Headnote

Summary judgment is a procedure that should not lightly be entered upon. It is an extraordinary relief and an applicant must bring himself clearly within the rules. The claim must be substantiated in the founding affidavit. Further evidence is not permitted without leave and then only to traverse new matter raised by the defence which could not reasonably have been anticipated at the time of the application. The plaintiff therefore is putting all his eggs in one basket. If he were to be allowed to withdraw the application and file a fresh application with a different founding affidavit, he could circumvent the restrictions imposed by the rules. Consequently, in the absence of a good explanation justifying the substitution of a fresh application, it would be wrong for the court to permit the withdrawal of the application and the immediate filing of a fresh application.

Although an application for summary judgment may be made at any time up to the pre-trial

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conference, where the application is made more than two or three months after the defendant has filed his plea, the plaintiff should indicate why the application has been delayed.

Cases cited:

*Beresford Land Plan (Pvt) Ltd* v *Urquhart* 1975 (1) RLR 260 (G); 1975 (3) SA 619 (R)

*Delmas Milling Co Ltd* v *Jacobs* GS-53-72

*Omarshah* v *Karasa* 1996 (1) ZLR 584 (H)

*Timnda Truck Parts (Pvt) Ltd* v *Autolite Distributors (Pvt) Ltd* 1996 (1) ZLR 244 (H)

Legislation considered:

High Court Rules 1971, rr 64(2) and 67

## Case Information

*F Girach*, for the applicant

*E W W Morris*, for the respondents

## Judgment

**SMITH J:** This is an application for summary judgment. On 15 October 1996, the applicant (hereinafter referred to as ``Stanbic'') issued summons



SMITH J

against the respondents claiming payment of the sum of $5 258  832. The basis of the claim was that the respondents had agreed to stand as sureties and co-principal debtors for all amounts owed to Stanbic by Langston Enterprises (Pvt) Ltd (hereinafter referred to as ``LE''), subject to a maximum of the amount claimed. The respondents entered notice of opposition and filed opposing affidavits. Then on 4 July 1997 Stanbic filed an application for summary judgment. The  respondents filed their opposing affidavits on 17 July. Nothing further transpired until 29 October when Stanbic withdrew its application for summary judgment, tendering the respondents' wasted costs, and at the same time it filed a second application for summary judgment. The respondents opposed the second application. There is nothing in the papers to explain why Stanbic withdrew the first application and then  filed the second. The affidavits supporting the two applications are made by different employees of Stanbic. The second contains virtually all the basic allegations made in the first application but there are some differences, the significance of which is not evident.

In the particulars of claim, it is stated  that LE owes Stanbic $6 787 951.59. In the further particulars that were requested by the respondents, it is stated that as at 8 May 1996 (the date of liquidation of LE) the amount LE owed was $8 777 962.59, made up of a bridging loan ($2 105 000) and interest due thereon ($2 053 110.31) and a medium term loan ($2 403 832) and

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interest due thereon ($2 216 020.28).

The respondents oppose the application on a number of grounds, only two of which I consider to have any substance. They argue that the filing of two applications constitutes a fatal procedural irregularity and then go on to submit that the particulars of the claim are not sufficiently specific. They also raise the defences that there was no *justa causa* for the signing of the suretyship agreements, that certain paragraphs of the loan agreement between Stanbic and LE are penalty stipulations which entitle them to relief in terms of s 4(2) of the Contractual Penalties Act [*Chapter 8:04*] and that the said loan agreement is a consumer contract as defined in the Consumer Contracts Act [*Chapter 8:03*] and should be struck down in terms of that Act.

Ordinarily, I would find nothing wrong if a party filed a court application, withdrew it and then filed a second application seeking substantially similar relief. As long as wasted costs were paid, and in such a case I consider that they should be paid on a legal practitioner and client scale, the respondent would have little to complain about. However, where the application is for summary judgment, different considerations apply. The courts have held that summary judgment procedures should not be lightly entered upon. It is an extraordinary relief and the applicant must bring himself clearly within the rules: see *Delmas Milling Co Ltd* v *Jacobs* GS-53-72. The High Court Rules



SMITH J

provide that the application must be supported by an affidavit verifying the cause of action and the amount claimed: see r 64(2). In *Timnda Truck Parts (Pvt) Ltd* v *Autolite Distributors (Pvt) Ltd* 1996 (1) ZLR 244 (H), CHATIKOBO J spelled out that an applicant for summary judgment must adduce in his founding affidavit evidence in substantiation of his claim. The plaintiff is not permitted to adduce further evidence save with the leave of the court: see r 67 and *Beresford Land Plan (Pvt) Ltd* v *Urquhart* 1975 (1) RLR 260 (G); 1975 (3) SA 619 (R).

In *Omarshah* v *Karasa* l996 (l) ZLR 584 (H) at 587A-D GILLESPIE J said:

> ``The first issue to address is an application by the plaintiff for leave to adduce a further affidavit in response to the notice and affidavit of opposition. By r 67 of the Rules of this court no evidence may be led in support of an application for summary judgment otherwise than by the founding affidavit. The opportunity which is afforded by para (c) of the proviso to this rule, namely, the filing with leave of an affidavit to traverse new matter raised in the opposition, is one which is expressly limited to the circumstance where the opposing papers advance matter which could not reasonably have been anticipated at the time of the application. In *Lincoln Court (Pvt) Ltd* v *Axis International (Pvt) Ltd* HH-54-94 it has been explained that the purpose of this provision is not to enable a reply in the usual sense to the opposing affidavit. It remains the policy to limit the evidence adduced for the plaintiff to that which is in the founding affidavit. The purpose of this is to maintain the distinction properly drawn between summary judgment and other opposed proceedings on application. The latter frequently permit of a robust approach which is anathema to the concept of summary relief given only to an unanswerable claim. The deponent of this affidavit is expected, given his awareness of the facts and of correspondence between the parties relating to the issue, to anticipate in his application the defence that is relied upon and to show why it is untenable. Only where the opposition contains a departure which could not have been reasonably expected is he entitled to seek leave to respond. It is in addition axiomatic that the leave is only to be given where it is necessary to file the further papers."

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It is clear from the above that the policy is that an applicant for summary judgment cannot have two bites at the cherry. He must put all his eggs into the one basket. If the applicant were to be allowed to withdraw his application and then file a fresh application and a different founding affidavit it would mean that he could circumvent the restrictions imposed by r 67. If in the opposing affidavit it was submitted that the cause of action or the amount claimed was not adequately verified and the plaintiff realised that the submission was justified, he could salvage his position by withdrawing his application and filing a fresh application which remedied the defects. Accordingly, I am satisfied that it would be wrong for the court to permit the withdrawal of an application for summary judgment and the immediate filing of a fresh application in the absence of a good explanation justifying the substitution of a fresh application. In this case, Stanbic has not given any explanation. In the circumstances, I consider that I am not able to grant the application.

With regard to the argument raised by Mr *Morris* that the debt owed by the



respondents has not been adequately verified, I consider that there is merit in his submissions. Stanbic has merely stated baldly the amount owed by LE and specified the loans that were made and the amount of interest that had accrued. There was no mention made of the income received from the sale of the weld-mesh machine for $1.05 million and the rivet machine for $500 000. Mr *Girach* invited me to forget about the interest factor and to grant summary judgment for the loan capital outstanding. Even if I thought that the second application should be considered, I would have been reluctant to accept that invitation. The application should verify the amount claimed.

In this case, the first application for summary judgment was filed some eight and a half months after the summons was issued. The second application was filed just over one year after the summons was issued. It seems to me that if a plaintiff genuinely believes that the defendant does not have a *bona fide* defence and has entered opposition merely for the purposes of delay and therefore that summary judgment should be sought, he should make his application therefor within a reasonable period after sight of the defendant's plea to the summons. I appreciate that, in terms of the High Court Rules, application for summary judgment may be made at any time before the pre-trial conference. However, where the application for summary judgment is made more than two or three months after the defendant has filed his plea, then I consider that the plaintiff should indicate why his application is delayed.

Mr *Morris*, notwithstanding his fertile imagination, found difficulty in advancing any arguments to support the defences raised by the respondents as to lack of *justa causa*, penalty stipulations and the protection of the Consumer Contracts Act [*Chapter 8:03*]. I am not surprised. I do not consider that there is any merit in any of those defences that were raised.

The application is dismissed with costs. It is ordered that the applicant pay the costs incurred by the respondents in respect of the application that was withdrawn on the legal practitioner and client scale.

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*Gill, Godlonton & Gerrans*, applicant's legal practitioners

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



## *In re* J & ANOR (juveniles) 1998 (1) ZLR 209 (HC)

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

Gillespie J

Review of order of juvenile court

25 February 1998 Judgment No. HH-38-98

### Flynote

Family law - child - child in need of care - what is - inquiry by juvenile court into whether child is in need of care - temporary placement of child in place of safety - maximum period - probation officer's recommendations - weight to be given to

### Headnote

Where a child has, in terms of a warrant, been removed to a place of safety, he must be brought before a juvenile court as soon as possible. The juvenile court must then hold an inquiry to determine whether the child is in need of care and, if so, the proper order to be made for his care. During any postponement or adjournment of the inquiry, the order may order that child remain or be placed in a place of safety. The postponement may not be for more than 14 days, so an order that the child remain indefinitely in the place of safety is unlawful.

In conducting the inquiry and deciding on how to deal with the child, the juvenile court may take account of the recommendations of a probation officer. The probation officer has a duty to give as full a recitation as possible of the child's circumstances and the reasons for any recommendations made. The court should give independent consideration to the acceptability of the probation officer's recommendations and not simply endorse them without question.

Legislation considered:

Children's Protection and Adoption Act [*Chapter 5:06*], ss 14, 15, 17, 19, 21 and 27

### Judgment

**GILLESPIE J:** Young J-, who is now nearly sixteen years old, has, since he was about fourteen or fifteen, been failing to attend school. He smokes cigarettes and has been known to consume alcohol. His mother, as any parent might be, is very worried about him. She fears that he might be smoking dagga. He runs with an undesirable crowd and is extremely difficult to control. She, therefore, as very few other parents might, brought him before a probation officer. Initial attempts to counsel the boy were unavailing. He was accordingly placed at Kadoma Training Institute.

It is not clear in terms of what law the child was placed in the institution. A brief report given by

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the probation officer states that he was institutionalised ``on a place of safety basis in terms of section 15 of the Children's Protection and Adoption Act''. 1(54) That law, however, provides for the issue of a warrant



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for the removal of a child to a place of safety. It does not appear that any such warrant has been issued. Section 14 2(55) permits a police officer or a probation officer to remove any young person to a place of safety if he is of the opinion that the child is in need of care. It may be that the probation officer's act is justified under this provision, although there is not any separate record, nor any other indication, of anyone having determined young J- to be in need of care.

When a child has been removed to a place of safety, the law 3(56) requires that he be brought before a juvenile court as soon as possible. The juvenile court is then bound to hold an inquiry in respect of the child brought before it, in order to determine whether the child is in need of care. 4(57)

In this case, the child was placed before the juvenile court on 6 February 1998. An inquiry was commenced but was not completed. The probation officer requested the adjournment of the proceedings on the ground that investigations were continuing and moved in the meanwhile the removal of the child to a placed of safety. The magistrate presiding in the juvenile court made the following order:

> ``The said child shall be placed in a place of safety, namely Kadoma Training Institute in terms of s 22 of the Act on the following conditions - investigations have not been finalised - until indefinitely.''

This order now comes before me on review. 5(58)

Similarly, with little S-. All I know of her is that she is said to be:

> ``Still at Chinyaradzo Children's Home and is not presently feeling very well. She is reported to be persistently sick (vomiting) and is said to have been given a bed in hospital for persistent vomiting. Investigations are not complete.''

This is the full content of what is no doubt intended to be an enlightening and helpful report by a probation officer. The officer recommends that:

> ``the matter be adjourned until indefinitely and that S- be detained in a place of safety, namely Chinyaradzo Children's Home ... ''

The probation officer's wish is the magistrate's command and the juvenile court has made an order accordingly.

There is, in each case, precious little in the way of a record to review. The file consists of the case cover, the magistrate's order and the probation officer's written report. I would expect there to be in addition the magistrate's longhand note of evidence given by the officer. Those notes ought to show pertinent questions by the juvenile court revealing that it had given some

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consideration to the individual needs of the children and to the merits of the



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recommendations. There should also be a copy of any document or warrant by which the juveniles were placed in, or received into, the relevant institutions.

The reports by the probation officers are, in addition, inadequate. Thus one cannot know from the reports when each child was found to be in need of care; nor the grounds upon which such a determination was made; nor who made the decision to place each child in a place of safety; nor when such a placement occurred. There is no evidence of thought having been given as to why the children need to be in a place of safety.

That lack of thought persists in the juvenile court. J- obviously has a caring parent. It may well be better for him to stay with his mother, despite the difficulty she has in controlling him, rather than to endure the rigours of institutionalisation at a training school. It is a serious omission that there is no indication of the mother's attitude to her young son's being placed in borstal. On the evidence placed before the juvenile court, it is impossible to determine whether the child needs to be in a place of safety. Of S-'s circumstances nothing is known other than her unhappy gastric perturbations. This is no basis upon which to place a child in an institution.

The purpose of an inquiry by a juvenile court, where the child is brought before it in these circumstances, is to determine whether a child is in need of care 6(59) and, if so, the proper order to be made for its care. Even though the inquiry was preliminary and to be postponed, the juvenile court does have the power to order:

> ``that during any postponement or adjournment of the inquiry the child or young person shall remain or be placed in a place of safety or that he shall be returned to the custody of his parents or guardian on such conditions as the court may fix to ensure the proper care of the child or young person ... " 7(60)

If the court is to make a conscientious decision as to the interim disposal of the child, it was the duty of the probation officer to give as full a recitation as possible of the child's circumstances and the reasons for his recommendation.

It is true that the probation officer in each case needed more time to complete investigations. Nevertheless, even at this very early stage, a *prima facie* view should have been formed and should have been susceptible of explanation. It was the obligation of the juvenile court to give independent consideration to the acceptability of the probation officer's recommendations, preliminary though they may be, before endorsing them. All of the considerations which I have enumerated in the foregoing two paragraphs could and should have been attended to.



GILLESPIE J

In my judgment, the proceedings in the juvenile court show a failure on the part of the magistrate presiding to apply his mind properly to the issue requiring his deliberations.

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In addition, the court had no power to make the order which it did. It is specifically provided in the Act that:

> ``where the court orders that the child or young person shall remain or be placed in a place of safety, the court shall not order a postponement or adjournment for more than fourteen days at a time.'' 8(61)

Neither the probation officer nor the magistrate presiding adverted to this law. The indefinite postponement, coupled with the placement of the child in an institution, was in each case an unlawful order.

In the premises, I am bound to interfere. The least that I should do is alter the order of postponement from an indefinite postponement to one of a fortnight. Since there has been inadequate preliminary inquiry into the question of placement of the child in an institution, it seems to me, however, that I must do more. I must order the immediate resumption of the inquiries in order that proper consideration can be given to the best interests of the children concerned. As a precaution, and since I have at this stage nothing better to go on than the expressed (albeit unreasoned) view of the probation officers, I feel bound to permit the interim placement of the children in the institutions concerned.

In the case of J-, Juvenile Court number 106/98, I order as follows:

> ``1. The order of the juvenile court in case no. 106/98 is set aside.
>
> 2. The juvenile court shall reconvene forthwith in order to undertake preliminary inquiry into the placement of the child pending completion of the investigations of the probation officer.
>
> 3. In the event that after such inquiry it is deemed in the best interests of the child to postpone the inquiry and to hold the child in a place of safety, then the attention of the court is drawn to the proviso to s 21 of the Children's Protection and Adoption Act [*Chapter 5:06*].
>
> 4. Any order made in consequence of this direction shall be submitted for review by this court in terms of s 27 of the Act.''

In the case of S-, juvenile court 108/98, I order similarly:

> ``1. The order of the juvenile court in case no. 108/98 is set aside.
>
> 5. The juvenile court shall reconvene forthwith in order to undertake preliminary inquiry into the placement of the child pending completion of the investigations of the probation officer.
>
> 6. In the event that after such inquiry it is deemed in the best interests of the child to postpone the inquiry and to hold the child in a place of safety, then the attention of the court is drawn to the proviso to s 21 of the Children's Protection and Adoption Act [*Chapter 5:06*].
>
> 7. Any order made in consequence of this direction shall be submitted for review by this court in terms of s 27 of the Act.''

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**1998 (1) ZLR p213**

## S *v* CHAITA & ORS 1998 (1) ZLR 213 (HC)

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

Chinhengo J

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Criminal review

25 February 1998 Judgment No. HH-28-98

## Flynote

Criminal procedure (sentence) - common law offences - culpable homicide arising out of traffic accident - sentence - need to have regard to provisions of s 64(3) of Road Traffic Act [Chapter 13:11]

## Headnote

When deciding upon the appropriate sentence in cases of culpable homicide arising out of traffic accidents, judicial officers should always have regard to the provisions of s 64(3) of the Road Traffic Act [*Chapter 13:11*]. In every case of culpable homicide arising out of a traffic accident, the court is required by s 64(3) to make a finding on the degree of negligence involved. The failure to make such a finding amounts to a misdirection. A finding on the degree of negligence must always be made, because s 64(3) of the Road Traffic Act provides that if the offence that the accused would have committed had he been charged under the Road Traffic Act would have required the court to prohibit the accused from driving and/or to cancel his licence, then the court convicting the accused of culpable homicide must also prohibit him from driving and/or cancel his licence. The court must thus decide whether he would have been guilty of driving without care and attention or negligent driving or reckless driving.

The charge in a case of culpable homicide arising out of a traffic accident should be formulated in a way that takes account of the requirement to establish the degree of negligence.

Traffic accidents due to dangerous driving have brought untold suffering to the nation and stiffer sentences in cases of culpable homicide arising out of motor accidents are required to bring sanity onto the roads.

Cases cited:

*S* v *Combrink* HB-91-96

*S* v *Duri* 1989 (3) ZLR 111 (S)

*S* v *Dzvatu* 1984 (1) ZLR 136 (H)

*S* v *Mtizwa* 1984 (1) ZLR 230 (H)

## Judgment

**CHINHENGO J:** These three cases came before me on review. I have decided to deal with them together because there is a point of law which I will make in this judgment which is common to all the cases.

In *S* v *Chaita*, the accused was found guilty on two counts of culpable homicide arising out of a motor vehicle accident in which two persons were killed. He was sentenced to a fine of $1 600 or 4 months' imprisonment.

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The facts to which the accused pleaded guilty were that on 27 October 1996



CHINHENGO J

at about 7.00 am he was driving a bus on the Watsomba/Rusape Road. The bus was full to capacity with passengers. On approaching Dora Bridge, the accused saw two bovines which were yoked in the middle of the bridge. Due to excessive speed and lack of proper control of the bus, the bus left the road, plunged into the river and two passengers, Ottilia Mudiwa and Janet Gerede, were killed.

The accused admitted that he was negligent in that he was driving at an excessive speed; that he failed to keep a proper look-out; and that he failed to stop or to act reasonably when the accident seemed imminent.

In *S* v *Stephen*, the accused pleaded guilty to contravening s 6(1)(a) of the Road Traffic Act [*Chapter 13:11*] and to four counts of culpable homicide. The first offence, that of contravening s 6(1)(a) of the Road Traffic Act, is committed by any person who drives a motor vehicle when he is not a holder of a licence issued in respect of that vehicle. The accused was convicted of this offence and was sentenced to a fine of $400 or 40 days' imprisonment.

In respect of the four counts of culpable homicide, the accused, who was legally represented, initially pleaded not guilty. The trial proceeded on the basis of a not guilty plea and evidence was led. The evidence led by one witness Mathias Kufakunesu speaks of a harrowing experience for the passengers. He told the court that the passengers boarded the bus at Mutare bus terminus. They waited for three hours before the bus started on its journey. When the bus was started by the accused he said that all the passengers were shocked by the manner of the take off. There is a roundabout just after leaving the terminus and this witness said that the bus nearly overturned while negotiating the roundabout. The bus stopped at Mutare Teachers College and on taking off it reversed first before moving forward. Whenever the bus was negotiating a curve, and there were several such instances en route, the passengers would sway from side to side. The passengers sought assurance from the bus conductor, who said that the driver was a mechanic who was testing the bus for any faults. The manner of the accused's driving was a tale of failing to ascend steep slopes smoothly and of the bus constantly jerking. At one point, this witness said that the bus conductor asked the accused if they should carry on with the journey in view of the problems they were having and the accused assured him that he would ``do his best''. Near Birchenough Bridge the witness said that the passengers thought that they were going to perish as the accused caused the bus to swerve dangerously around the curves. The passengers shouted that the bus should be stopped and, as the shouting continued, the bus conductor went to stand by the steps at the entrance to avoid being ``bothered'' by the passengers. At Chikuku, the bus was filled beyond its legal capacity, with many passengers standing in the aisle ``from door to back-seat''. After Mapudzi, the bus was



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travelling very fast. When they approached Musaizi Bridge, the witness said that the bus was travelling at an excessive speed. There is a sharp curve 100 metres before the bridge and it is this curve that the accused failed to negotiate properly. When the bus approached the bridge, it was out of control - it smashed into the pillars of the bridge and landed on its side in the river-bed. Four passengers were killed and thirty-one were injured. Under cross-examination this witness was steadfast in his evidence, in particular in his evidence that the bus was travelling at an excessive speed and was not under proper control.

The magistrate ignored all this evidence which had been placed before him. Instead, he accepted that the brakes had failed and then found that the accused was negligent. He also proceeded to find that the accused was negligent in undertaking to drive the vehicle when he knew that he was not a holder of a class 1 driver's licence which would have entitled him to drive a bus. It was common cause that the accused was not a holder of a licence entitling him to drive a bus. He told the court that he had only been employed for a week as a mechanic before he was required, or forced on pain of losing his job, to undertake this trip. The magistrate found that the accused was forced to drive the bus but that he was negligent in succumbing to this requirement. The fact that a person drives a vehicle when he is not the holder of a requisite licence does not on its own constitute negligence.

The basis of the negligence of the accused as found by the trial magistrate was not, in my view, established. It is surprising that the court neglected the evidence of negligence which was put before it by the witness for the State. This evidence was supported by the accused himself, who admitted that he drove at an excessive speed in the circumstances. Clearly, the magistrate displayed a confusion which was not warranted in view of the evidence before him.

The trial was adjourned and resumed on 16 September 1997. At the resumed hearing, the accused was no longer legally represented. He told the court that his employer had hired the legal practitioner to assist him in his defence but when the accused had been dismissed from employment, the legal services had been withdrawn. He said that he was now pleading guilty to the four counts of culpable homicide. The magistrate questioned him at length on his change of plea and satisfied himself that the change of plea was genuine. The accused admitted the following facts. On 3 June 1995, he was driving a bus, owned by a Mr Zvinoira and known by that name, on the Mutare/Chikuku/Makore/Bikita Road. At Musaizi River Bridge, he lost control of the bus and it plunged into the river, killing 4 passengers. He admitted that he was driving the bus at an excessive speed in the circumstances and that he was negligent in so doing. He also said that the brakes failed and



he panicked and lost control. He was convicted and sentenced to a fine of $1 500 or 6 months' imprisonment. In addition, he was sentenced to 6 months' imprisonment, which was wholly suspended, and was prohibited from driving any class of motor vehicle for 6 months.

The magistrate totally ignored the evidence of Mathias Kufakunesu, who, as I have stated, was not discredited in cross-examination. The magistrate's conclusion was rather confused. He accepted that the brakes failed and the accused panicked and lost control. The magistrate

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found that the accused failed to act reasonably when this occurred and that he was negligent.

In sentencing the accused, the magistrate again exhibited further confusion. He said that the fact that the accused was forced to drive was in itself negligent but also constituted a mitigatory factor; that his degree of negligence was not so gross; and that the accident was caused by a failure of the brakes. He said that if there had been no compulsion to drive, a prison term would have been appropriate. I must say that the magistrate failed to grasp the important issues in this case. Had he taken into account the evidence of the State witness, which he was bound to do despite the change of plea, he would have quite properly convicted the accused on the evidence of the State witness as well as the accused's own admissions.

In *S* v *Marevo*, the accused pleaded guilty to culpable homicide, also arising out of a motor car accident. At 15.30 pm on 26 April 1997, he was driving a motor vehicle on the Chivhu/Buhera Road towards Chivhu. In the vehicle he was carrying two heifers, two calves and a goat. At the 52 km peg, the accused saw children playing on the left side of the road. They were about 200 metres away when he first saw them. He knocked down one child as the child tried to cross the road. The child died instantly from severe head injuries. It was common cause that the motor vehicle brakes were, to his knowledge, not in good working order. After knocking down and killing the child the accused only stopped some two kilometres away from the scene of the accident.

The Vehicle Inspection Department reported on the condition of the accused's motor vehicle. It found that the vehicle was not roadworthy and its braking mechanism was non-functional. The accused admitted that the brakes were non-functional, that he saw the children from a distance of 200 metres and that he did not take any precaution, such as blowing the horn or slowing down his vehicle. He admitted that, due to his failure to take any reasonable precautions to ensure the safety of the children, he killed one of them. The magistrate found that the accused knew that his vehicle's brakes were poor. He inquired as to the existence of special circumstances as required by the proviso to s 52(4) of the Road Traffic Act [*Chapter 13:11*] and found no such special circumstances. The accused was sentenced to a



fine of $1 500 or 4 months' imprisonment and was prohibited from driving for a period of 6 months.

The magistrate correctly inquired into the question of special circumstances and found none. He imposed an appropriate penalty in all the circumstances of the case. The proceedings should therefore be confirmed as being in accordance with real and substantial justice. I have however included this case in this judgment in order to illustrate the correct approach in proceedings of this kind and to draw the attention of other magistrates to that approach.

In all three cases, therefore, I am concerned with the approach to sentencing. In assessing an appropriate sentence in a case of culpable homicide arising out of a traffic accident, a judicial officer should always have regard to s 64(3) of the Road Traffic Act [*Chapter 13:11*]. It provides that:

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``If, on convicting a person for murder, attempted murder, culpable homicide, assault or any other similar offence by or in connection with the driving of a motor vehicle, the *court considers* -

(a) that the convicted person would have been convicted of an offence in terms of this Act involving the driving or attempted driving of a motor vehicle if he had been charged with such an offence instead of the offence at common law; and

(b) that if the convicted person had been convicted of the offence in terms of this Act referred to in paragraph (a) the court would have been required to prohibit him from driving and additionally, or alternatively, would have been required to cancel his licence;

the court shall, when sentencing him for the offence at common law -

(i) prohibit him from driving for a period that is no shorter than the period of prohibition that would have been ordered had he been convicted of the offence in terms of this Act referred to in paragraph (a); and

(ii) cancel his licence, if the court would have cancelled his licence on convicting him of the offence in terms of this Act referred to in paragraph (a)'' (emphasis added).

Section 64(3) (formerly s 55(3) of Act 48 of 1976) was introduced by the Road Traffic Act Amendment Act 4 of 1986. Prior to the coming into force of this amendment, a person who was convicted of culpable homicide arising out of the driving of a motor vehicle could not be prohibited from driving nor could his licence be cancelled. The result was that a person who drove negligently or recklessly or whilst he was so drunk as to be incapable of controlling the vehicle could be prohibited from driving or could have his licence cancelled or could be visited with both prohibition from driving and cancellation of his licence. Yet, a negligent driver or reckless driver who killed someone would escape without a prohibition from driving or cancellation of his licence. It is this anomaly which forms the evil which the amending Act of 1986 sought to remedy. This is the problem which MCNALLY J (as he then was) grappled with in *S* v *Dzvatu* 1984 (1) ZLR 136 (H) before the 1986 amendment. The headnote to that case reads:

``It is quite possible, in a road traffic case, for a lighter sentence to be received on conviction



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for culpable homicide than would be imposed on a conviction for reckless or drunken driving arising out of the same facts. This may arise because an accused person may be willing to plead guilty to culpable homicide, for which a prohibition from driving is not mandatory, but not so willing in respect of a charge under the Road Traffic Act for which a prohibition from driving is mandatory. The result is that the trial court may not, in a case of culpable homicide, make precise findings on the degree of negligence or intoxication involved resulting in the accused receiving a unwarrantably light sentence.''

See also *S* v *Mtizwa* 1984 (1) ZLR 230 (H).

Section 64(3) of the Act presupposes that the magistrate will make precise findings on the degree of negligence involved. A failure to do so negates the purpose of this amendment and may result in the anomaly which was pointed out in *Dzvatu*'s case. Viewed against the backdrop of this historical position, there can be no doubt that the phrase ``if ... the court considers'' in s 64(3) of the Act means ``if the court thinks'' or ``if the court forms the view'' that the death which led to the charge of culpable homicide was caused by negligence or recklessness or

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drunkenness of the driver, then the court must prohibit him from driving or cancel his licence depending on whether he was negligent or reckless or drunk.

The question which necessarily and crisply arises here is whether it is a requirement under s 64(3) of the Act that the court, on convicting a person of culpable homicide, should expressly apply its mind to the question of which of the statutory motoring offences the circumstances of the common law offence disclose. In *S* v *Duri* 1989 (3) ZLR 111 (S) the court did not have to deal with this question squarely as in that case the lower court had indeed considered that if the convicted person had not been guilty of culpable homicide he would have been guilty of negligent driving. But the following statement by MCNALLY JA at 115C-D is instructive:

> ``The whole basis of the case against the appellant was that he drove negligently. Particulars of negligence were alleged and were found proved. His guilt in relation to culpable homicide was based squarely on that finding of negligent driving. He could not have been found guilty of culpable homicide unless he was first found guilty of negligent driving. The court therefore must have found, and did find, that he was guilty of negligent driving. Therefore it must have considered, and did consider, that the convicted person would have been convicted of an offence in terms of the Act involving the driving or attempted driving of a motor vehicle if he had been charged with such an offence instead of the offence at common law (s 55(3)(a)) [now s 64(3)(a)] of Act 48 of 1976 [now *Chapter 13:11*]."

What, in my view, were not addressed in *Duri*'s case (because they did not arise for decision) are two questions: (a) whether the magistrate is required in every case of culpable homicide to have regard to s 64(3) of the Act; and (b) whether the magistrate must establish, in every such case, the degree of negligence involved. The answer to these questions can only be in the affirmative.

A magistrate who presides over a case of culpable homicide arising from



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a motor vehicle accident must satisfy himself that if the accused had been charged under the Act, he would have been convicted either of driving without due care and attention or reasonable consideration for others (s 51); or of negligent or dangerous driving (s 52); or of reckless driving (s 53); or of driving with a prohibited concentration of alcohol in his blood (s 54); or of driving while under the influence of alcohol or a drug or both (s 55). Such a determination will not only enable the magistrate to make a precise finding on the degree of negligence to found a verdict of guilty of culpable homicide but will also provide the magistrate with a proper basis for considering the appropriate sentence. This consideration is the foundation of the statement in *S* v *Combrink* HB-91-96 where CHATIKOBO J said that:

> ``... when a person is convicted of culpable homicide on the basis that he was negligent (or other similar conduct) the issue of prohibition from driving and cancellation falls to be dealt with in terms of these provisions" (s 64(3)(b)(ii) as read with s 52(4)(b)).

The degree of negligence, to use the word in its common signification, is of course established before conviction. It is before conviction that the nature of his driving must be investigated in plea proceedings. In a trial, evidence is put before the court to establish the degree of negligence. Thus at the conviction stage the magistrate will already be in a position to assess the accused's degree of negligence, recklessness or other driving conduct to enable him to

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arrive at his verdict. This is what MCNALLY JA was in effect saying when, in the statement which I have quoted earlier, he said:

> ``Particulars of negligence were alleged and were found proved. His guilt in relation to culpable homicide was based squarely on that finding of negligent driving.''

It will be apparent that while negligence is the basis of a conviction of the accused for culpable homicide, that does not necessarily mean that the accused's conduct amounted to one of the more serious examples of driving conduct such as reckless driving, or driving with a prohibited concentration of alcohol in his blood or driving while under the influence of alcohol or drug, nor does it mean that it was not a less serious form of driving conduct. Negligence, for the purposes of a conviction for culpable homicide, is the minimum level of conduct that is required to establish the offence. It has however various gradations which not only should be established at the plea stage or by evidence during a trial but should also be established for the purposes of sentence.

The wording of s 64(3) of the Act does not confer a discretion on the magistrate whether or not to deal with the matter under that section. My understanding of the provision is that he is *required* or *enjoined* to determine the degree of negligence and, depending on his findings, to sentence the accused on the basis of s 64(3)(i) or (ii). Any other interpretation cannot be



correct regard being had to what I have stated as having been the purpose for introducing this provision in 1986.

It is necessary for me to address a matter which I think is the basis of confusion for magistrates when dealing with charges of culpable homicide arising from motor vehicle accidents. The charges are usually, if not always, framed in such a way that an allegation of negligent driving without specificity is made. The words ``negligently drove'' are used. The use of the word ``negligently'' to describe the manner of driving is not intended to indicate that if the accused were charged in terms of the Act he would have been charged only with ordinary negligence. The word ``negligently'' is used only to denote the basis on which the crime of culpable homicide can legitimately be preferred against a person who kills another person in the circumstances of an ordinary traffic accident. It seems to me that the use of the word ``negligently'' in the body of a charge of culpable homicide in all such cases has resulted in some judicial officers thinking that they are not required to examine whether the facts reveal reckless driving or any other lesser or more serious form of driving.

I do not think it occurred to any of the magistrates that they could go beyond a finding of negligent driving for the purpose of proving the offence of culpable homicide and assessing an appropriate sentence. They were, I think, constrained in their thinking by the use of the word ``negligently'' in the body of the charges. They were, I am certain, using the word in the context of a ``reasonable'' man test to provide a basis for a conviction of culpable homicide and no more. I think it would be helpful to both prosecutors and magistrates that I should suggest a standard form of a charge in the manner of its formulation. The formulation should advert to the requirement to establish the degree of negligence. Such a formulation should ideally be as

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follows:

> ``Charged with the crime of culpable homicide in that on (date) day of (month) (year) at ... the (accused) drove a motor vehicle, namely a ... on a road without due care or attention/negligently/recklessly/with a prohibited degree of alcohol/whilst under the influence of alcohol or a drug and thus unlawfully caused the death of ..., more particularly he ... ''

The magistrates in the two cases, *Chaita* and *Stephen*, which involved buses, misdirected themselves by failing to make a specific finding on the degree of negligence in relation to the manner in which the accused drove the bus. If that had been done, the accused persons may very well have been sentenced as if they had been convicted of reckless driving under the Road Traffic Act. They also misdirected themselves by failing to have regard, as they are enjoined to do, to the provisions of s 64(3) of the Act.

To sum up, therefore, on a charge of culpable homicide arising out of a motor vehicle accident the court is required to make a finding of the precise



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degree of negligence of the accused and is enjoined to approach the matter in terms of s 64(3) of the Act. A failure to do so is clearly a misdirection.

In the three cases before me, the accused persons admitted that they were guilty of negligent driving. They were convicted on that basis. Thus, even though they were not charged with an offence under the Road Traffic Act, they could actually have been so charged and convicted accordingly. The degree of negligence in each case was not directly established by the magistrate. If that had been done, I have no doubt that the accused persons would have been found guilty of culpable homicide arising from reckless driving or at least gross negligence.

Although the exact details of what occurred in each case were not established during the proceedings, I am satisfied that one could draw a reasonable inference from the facts disclosed to establish the degree of negligence revealed in each case in order, in turn, to assess each accused's degree of moral blameworthiness. See *S* v *Mtizwa* 1984 (1) ZLR 230 at 232A-B.

REYNOLDS J in *Mtizwa*'s case *supra* explained the meanings of gross negligence and recklessness. He said at 233G-234A:

> ```Gross negligence' is simply a very serious or aggravated form of ordinary negligence - negligence of a high degree (see *S* v *Smith & Ors* 1973 (3) SA 21 (T)). In *Drake* v *Power* (1961) 46 MPR 91, a Canadian case cited by Saunders *Words and Phrases Legally Defined* vol 3 p 332, the expression `gross negligence' is usefully defined as implying `conduct in which there is a marked departure from the standards by which responsible and competent drivers habitually govern themselves'.
>
> `Recklessness', on the other hand, connotes not only a wilful disregard for the safety and rights of other road users but also `cases of indifference or rashness or inadvertence in which consciousness of consequences plays no part': *S* v *van Zyl supra* at 558. Recklessness may be shown by proof of gross negligence but proof of gross negligence does not necessarily show recklessness (*R* v *Greenland supra*).''

(See also the criteria for determining degrees of negligence laid down by the learned judge at

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235C-H).

On the facts of these cases, I think that a proper examination of the circumstances of the accidents would have led to a finding of recklessness. In two of the cases, those involving buses, the buses were full to capacity with passengers or were overloaded. The accused persons showed an indifference to the safety of the passengers which, to my mind, constitutes recklessness as defined above.

In *Chaita* and *Stephen*'s cases, the sentences imposed were grossly inadequate. The accused were lucky not be sent to prison. The manner in which they drove the buses was reckless. The buses were loaded to capacity, or beyond, with passengers. The accused drove at excessive speeds. They must be dealt with having regard to the provisions of s 53 of the Road Traffic Act. In terms of subs (4)(a) of that section, if a person is convicted of reckless



driving of an omnibus and has not been convicted of a similar offence (as defined in subs (1)) within a period of ten years immediately preceding the date of such conviction, the court shall prohibit such person from driving an omnibus during his lifetime and a motor vehicle other than an omnibus for a period of not less than six months and his licence in respect of the motor vehicles of the class to which such prohibition extends shall be cancelled. However the court may decline to prohibit the person from driving if special circumstances (as defined in subs (1)) are shown to exist.

An inquiry into special circumstances was not made. Going by the record it would appear that no such special circumstances exist in either case. However, I do not consider that such a finding can be made without first giving the accused an opportunity to be heard. As Chaita, who had been employed as a bus-driver, will lose his career as a bus-driver if he is prohibited from driving a bus, however justified such a step may be having regard to the manner in which he drove, he must be given an opportunity to have his say.

Section 65(6) of the Road Traffic Act sets out the procedure that must be followed when the court has convicted a person of an offence in respect of which prohibition from driving should have been imposed but was not. I consider that that procedure should now be followed.

In all three cases, the convictions are confirmed. In the *Chaita* and *Stephen* cases, I refuse to certify the proceedings as being in accordance with real and substantial justice as the sentences are far too lenient. These two cases are remitted to the trial magistrate so that the court can serve notice on the accused in terms of s 65(6) of the Road Traffic Act and proceed to act in accordance with the provisions of that section. I would draw to the attention of the magistrates the need to act expeditiously in view of the six-month period specified in subs (8) of s 65. The sentence imposed in the *Marevo* case is confirmed.

This nation has been subjected to untold suffering by the actions of motor vehicle drivers, in particular omnibus drivers, who drive dangerously, causing traffic accidents which take a heavy toll in human life, in turn causing untold suffering and hardship to the families of those who are killed. Stiffer penalties on conviction for culpable homicide will hopefully bring sanity to the

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jungle that our roads have become. It seems to me, however, that it is not only the conduct of the drivers that must be visited with the appropriate punishment. In *Stephen*'s case, the accused said that, although he did not have a licence to drive a bus and the bus-owner, Mr Zvinoira, well knew that to be the case, Mr Zvinoira ordered him to drive the bus. I consider that that fact should be reported to the Controller of Road Motor Transportation. The Controller must inquire into the circumstances of how Stephen was permitted



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or compelled to drive the bus. If he is satisfied that Mr Zvinoira did instruct or permit an unlicensed person to drive his bus then the appropriate action should be taken against him.

The views expressed above are shared by many of my brother judges with whom I have discussed the issues before issuing this judgment.

**CHATIKOBO J** agrees.



## S *v* MUPATSI 1998 (1) ZLR 224 (HC)

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

Gillespie J

Criminal review

25 February 1998 Judgment No. HH-40-98

### Flynote

Criminal procedure - trial - conduct of - in absentia - *when such trial permissible - accused refusing to take part in trial on grounds that he was not ready - magistrate continuing trial in accused's absence - a fatal irregularity - correct course of action*

### Headnote

There are very few provisions of the law which permit a trial, or any part of it, to be conducted in the accused's absence. One is the reception of evidence on commission in the absence of the accused in certain circumstances and with his consent. The second is the payment by a person admitting guilt of a deposit fine in lieu of an appearance in court. Again, this is predicated on the accused's consent and scarcely qualifies as a trial in his absence. The third is the adjudication of minor offences, for which a fine only is prescribed, in the absence of the accused; and with his consent.

The accused, on arraignment, said he was not ready for trial and requested a two week postponement. This was refused on the grounds that there had been previous postponements and the accused had been told that the next appearance would be for trial. The accused denied that he had been told that this was to be his trial date, and left the dock. The magistrate

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ordered the trial to continue, although for most of it the accused was outside the court room. The magistrate convicted the accused.

*Held*, that to conduct the trial in the absence of the accused was in these circumstances a fatal irregularity. By permitting the trial to proceed in the way it did, the magistrate allowed the proceedings to degenerate into low farce. The correct course would have been for the magistrate to have the accused arrested and brought before the court and then to have considered whether a sanction for contempt of court was appropriate. Only if the accused then conducted himself in a way practically disruptive of the proceedings would the magistrate have been justified, after due warning, in causing his removal from court and the continuation of the trial.

Matter remitted for trial *de novo*.

Cases cited:

*Matimba* v *Aylward NO & R* 1962 R & N 571 (SR)

*S* v *Kamanga* 1991 (2) ZLR 25 (H)

*S* v *Weinberg* 1993 (2) ZLR 448 (H)

Legislation considered:

Constitution of Zimbabwe 1980, s 18(3)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 194(2), 240, 356 and 357

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GILLESPIE J

## Judgment

**GILLESPIE J:** One hears in the news of persons in foreign parts having been tried, and even sentenced to death, *in absentia*. That is not our way. With us, a person charged with a criminal offence has the right that:

> ``except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.'' 1(62)

This declaration of a right finds expression in law in the provision that:

> ``Every criminal trial shall take place and the witnesses shall, except as is otherwise provided by this Act or any other enactment, give their evidence *viva voce* in open court in the presence of the accused, unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable, in which event the court may order him to be removed and direct that the trial proceed in his absence.'' 2(63)

Other than the foregoing, there are very few provisions of law which permit of a trial, or any part thereof, being conducted in the accused's absence. The relevant exceptions are: the reception of evidence on commission in the absence of the accused in certain circumstances and with his

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consent; 3(64) the payment by a person admitting guilt of a deposit fine in lieu of an appearance in court; 4(65) and the adjudication of certain minor cases in the absence of the accused. 5(66)

The first of these instances is an interim proceeding expressly permitted only where consent has been given. The second relates to a type of proceeding *sui generis* which is predicated upon the accused's consent and which scarcely qualifies as a trial in the accused's absence. The third is the only instance of a trial taking place *in absentia*. Here the law allows a person, summoned to appear in a court having summary jurisdiction in respect of an offence the prescribed penalty for which is a fine, to appear not personally but only through a lawyer. The provision extends to permitting the court, should both the accused and the lawyer fail to appear,

> ``if satisfied that the ends of justice will be met, [to] proceed to hear the case and adjudicate thereon as fully and effectively as if such person had appeared.'' 6(67)

This provision, as Reid-Rowland points out, 7(68) is of questionable constitutionality in the absence of express consent by the accused 8(69) to the trial continuing in his absence. 9(70)

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GILLESPIE J

The trial of the accused in this case proceeded without his participation, in most unusual circumstances. On arraignment, the accused stated:

> ``I am not prepared for trial. I did not know that I was coming for trial and so I prepared nothing.''

He requested a further two weeks, and the State papers, in order to prepare for trial. There followed argument during which the prosecutor submitted that at a previous appearance it had been made quite clear that the next appearance would be a trial date, whereas the accused insisted that he was not told that the trial would commence. He had apparently attended court on at least three previous occasions, only to be remanded further, and believed that that would be his fate on this particular day as well.

In the event, the magistrate, in the face of the accused's protestations, ordered the trial to commence and refused the postponement. On being directed to outline his defence the accused maintained once again:

> ``I am not ready. I wish I was told of this trial in the morning. I will stand out of this dock.''

And so he did. Witness after witness came and testified. The record contains in each instance, at the close of the evidence in chief, a notation:

> ``Xn by accd: could not be conducted as accd was outside the court room.''

When, on a subsequent day, the accused was called upon to present his defence, he said:

> ``I will not take the oath. I want to know the fact that all along I was outside court. Can I give my defence outline.
>
> Ct: Explains position to accd.
>
> I don't think there is any assistance on my side.''

The prosecutor nevertheless proceeded to question him. To the first question, the accused gave

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this answer:

> ``Matter was tried in my absence and it should proceed. I have no answer to that question.''

He answered no more questions from the prosecutor.

In giving judgment the magistrate wrote:

> ``It is very important to state that I will not labour myself writing down a lengthy judgment on the case. Because the accused person refused to participate in the trial. He refused to give a defence outline. And also he refused to even participate during the proceedings.
>
> In actual fact accused most of the times would walk out of the dock and maybe sit outside the court room there. And would be remanded to the next court hearing date 10(71) whilst he was seated outside the court room. The complainants and every other state witness they all gave their evidence. And there was no accused person to cross-examine them. Even in the defence case the Prosecutor just asked some questions. And there was no accused person to answer those questions.

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GILLESPIE J

> Thus basically, a reading of the court record will clearly indicate that the case proceeded in the accused's absence. The accused person was really taken aback when he actually witnessed that all the witnesses were present at court. And because he did not have any defence at all he also wanted to make it difficult for the prosecution to proceed. And thus he denied his presence in the trial.''

I consider this to disclose a fatal irregularity.

The magistrate obviously took the view that the accused's initial request for a postponement to prepare for trial was not genuine. She decided that his withdrawal from the proceedings was an indication not so much of protest at injustice, but rather of acknowledgement of guilt. Whether or not she was correct in this view, she was undoubtedly quite wrong in the manner in which she dealt with it. By permitting the trial to proceed in the manner indicated by the brief excerpt from the judgment, she allowed the proceedings to degenerate into low farce. They constituted a mockery of the judicial process. No doubt the accused's conduct may have been contumelious, but there are ways of dealing with that.

It is over thirty five years since last a magistrate thought that he could allow a trial to be conducted without the accused being present in court. On that occasion, the accused had moved the magistrate's recusal, and upon the denial of the motion challenged the jurisdiction of the court and refused to take further part in the proceedings. They continued in his absence and resulted in his conviction. After conviction, the accused took the proceedings on review. It was said:

> ``Apparently, the reason which prompted the magistrate to allow the applicant to leave the court was his belief that he had no authority to compel the applicant to remain, so that the trial could take place in his presence. If this was the magistrate's reason, he was mistaken as to his powers. He had the power to order the arrest of the applicant and to order the trial to take place while the applicant was in his presence and while in custody, and only if the accused then conducted himself in such an obstreperous manner as to make the further conduct of the proceedings impracticable would it have been permissible for him to eject the accused and try the case in his absence.'' 11(72)

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Similarly, here. There is no question of the accused so misconducting himself as to warrant his ejectment from court. In any event he was not ejected. It was undignified for the magistrate to permit a charade of a trial in the accused's self-imposed absence. She should have ordered him to be arrested and brought before the court, 12(73) and could have considered whether sanction for contempt of court were appropriate. Only if he then conducted himself in a way practically disruptive of proceedings would she have been justified, after due warning, 13(74) in causing his removal from court and the continuation of trial.



GILLESPIE J

I have given close consideration to the possible suggestion that should I interfere with the conviction, the accused will have benefited by behaviour which might have been contemptuous. The answer to this, however, is that any wrongful aspect of his behaviour could have been dealt with according to law. Interference on the grounds of the irregularity that has occurred is occasioned not so much by the accused's behaviour as by the magistrate's inept handling of it. In addition, the only benefit the accused gains is that of a re-trial at which he may, as his constitutional right permits, be present.

I accordingly order that the proceedings are set aside. The conviction and sentence are quashed and the matter is remitted for trial *de novo* before a different magistrate.

**SMITH J** agrees.



## LEVY *v* MODUS PUBLICATIONS (PVT) LTD 1998 (1) ZLR 229 (SC)

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

Korsah JA, Ebrahim JA & Muchechetere JA

Civil appeal

10 July 1997 & 26 February 1998 Judgment No. S-229-97

### Flynote

Delict - actio injuriarum - *defamation - defences - justification - whether defamatory allegations were true - public figures - whether press entitled to make allegations of misconduct on the part of public figures*

### Headnote

The appellant, a well-known businessman, sued the company that owned a newspaper for defamation. The statements complained of had criticised the manner in which the appellant had implemented his project to develop a shopping complex. In one of the statements, reference was made to the fact that the appellant had previously been summoned to appear before a commission of inquiry (the Sandura Commission) into a corruption scandal involving the obtaining of vehicles by the use of political influence and selling the vehicles above the control price in violation of the law. The trial court found that although the editorials were defamatory,

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the newspaper was not liable for defamation because the facts stated were generally true and the comment based on them were fair. On appeal:

*Held,* (*per* KORSAH JA and EBRAHIM JA) that in a case of defamation the court must determine the matter on the facts as they existed at the dates of the publication of the alleged defamatory articles, not as they were when judgment was given some months later by the court.

*Held*, further, that generally an appeal court will not interfere with the decision of a trial court based purely on a finding of fact, unless it is satisfied that the finding was based on an erroneous evaluation of the facts taken as a whole; or it is satisfied that the judge gave no weight or insufficient weight to those considerations which ought to have weighed with him; or that he was influenced by considerations which ought not to have been taken into account or should not have been given so much weight. In the present case there was a valid basis for interference with the trial court's finding, as on the evidence the defence of justification had not been established and the trial court had misdirected itself in finding that it had.

*Held*, further, that the editorials implied that the appellant was a crook, that he had corruptly used his wealth and his political connections to suborn Ministers and officials who ought to have prevented the development of the shopping complex from continuing and that he had bent the rules and violated the law in the process of pushing through the development of the shopping complex.

*Held*, further, that for the defence of justification to succeed the defendant must prove not only that the defamatory statement was true but that the publication was to the benefit of the public.

*Held*, further, that that the appellant had not committed a criminal offence by failing to comply



with certain regulatory procedures and there was no proof whatsoever that he used political influence and bribes to overcome obstacles to the carrying out of his development project.

*Held*, further, that the law jealously guards against the assassination of a person's character. To impute that a person has a bad general character by implying that a person is a crook is not in law justified by citing an isolated instance of a spurious business transaction or a single transgression of the law. Such an imputation can only be justified by proof of a series of unsavoury commercial transactions which unequivocally establish that the person who has been branded as a crook is a dangerous person with whom to enter into any business or commercial transaction. The respondent had thus failed to prove that it was justified in implying that the appellant was a crook.

*Held,* therefore, that on the evidence the defence of justification had not been established.

*Held,* (*per* MUCHECHETERE JA, dissenting) that the appellant was a wealthy man and a public figure.

*Held*, further, that it was true that following his appearance before the Sandura Commission he was later prosecuted for having committed a criminal offence by selling, which had been obtained for him by a senior minister, for an amount in excess of the control price. He was

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convicted of this crime. The evidence was to the effect that he had obtained the vehicle by asking a senior minister to acquire this vehicle for him. The Sandura Commission had found it incredible that he had not given a monetary reward to the Minister for acquiring this vehicle for him.

*Held*, further, that the statements complained of in relation to the development of the shopping complex were generally true and the comments based on them were fair. The statements did not label him a crook but simply pointed out and attacked his questionable and illegal actions during the development by him of a shopping complex. He had indeed bent the rules in order to get his way.

*Held*, further, that in a modern democratic and open society the press and the public should guard against the tendency of prominent, wealthy and well connected people in society to get away with breaking and bending the law and rules and trampling on the rights of other citizens.

*Held*, further, that there was no case more deserving than this case for the questions asked and the opinions expressed to be aired and the press ought not to be penalised for doing its legitimate duty.

Cases cited:

*Broadway Approvals Ltd & Anor* v *Odhams Press Ltd & Anor* [1965] 2 All ER 523 (CA)

*Clarke* v *Epsom Rural Council* [1929] 1 Ch 287

*Fitzpatrick & Anor* v *K Hensman Invstms (Pvt) Ltd & Ors* HH-249-90; S-176-91

*Johnson* v *Rand Daily Mails* 1928 AD 190

*London Passenger Tpt Bd* v *oscrop* [1942] 1 All ER 97 (HL)

*Madhimba* v *Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H)

*Mahomed* v *Kassim* 1972 (2) RLR 517 (A); 1973 (2) SA 1 (RA)

*Muhwati* v *Zimbabwe Newspapers (1980) Ltd* S-187-96

*Marais v Richard en `n Ander* 1981 (1) SA 1157 (A)

*Nationale Pers Bpk* v *Long* 1930 AD 87

*Scott* v *Sampson* [1881-5] All ER Rep 628; (1882) 8 QBD 491

*Suid-Afrikaanse Uitsaaikorporasie* v *O'Malley* 1977 (3) SA 394 (A)

*Sutherland* v *Stopes* [1925] AC 47

*Sutter* v *Brown* 1926 AD 155



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KORSAH JA

## Case Information

*J C Andersen SC*, for the appellant

*E W W Morris*, for the respondent

## Judgment

**KORSAH JA:** In the issues of the weekly newspaper, the *Financial Gazette*, (hereinafter referred to as ``*Financial Gazette*'') published on 8 June 1990, there appeared a letter headed ``Where is the rule of law?'' over a *nom de plume* ``Still Hanging'', and an editorial in the same newspaper published a week after on 15 June 1990, which are the subject matter of this defamation action that was tried before a judge of the High Court in Harare. Both articles refer to what is now known as Sam Levy's Village in Borrowdale, Harare.

The events leading to the publication of the alleged defamatory articles are as follows.

The appellant, through a company he owned, acquired Lot 49A of Borrowdale Estate (``Lot 49A'') and Lot 2A Dungarvan (``Lot 2A''). The two stands were separated by a road known as Virginia Lane, the property of the City of Harare.

Prior to a review of the Town Planning Scheme in or around 1975, Lot 2A was zoned for a mixture of commercial and residential purposes. After a review of the Scheme, Lot 2A was zoned for residential purposes. Thus while Lot 49A was zoned for commercial purposes, Lot 2A was zoned for residential purposes.

According to the appellant, he was approached by the City of Harare Council (``the Council'') concerning the acquisition of a portion of Stand 49A by the Council for purposes of widening the road and for a disposal of a portion of Virginia Lane as the Council intended closing off the road.

After lengthy discussions between representatives of the Council and the appellant it was agreed that, subject to the approval of the Council, the company would give to the Council the part of Lot 49A which the Council required for road widening purposes, in exchange for a portion of Virginia Lane, provided that the company could consolidate Lots 2A and 49A, which were separated by Virginia Lane.

On 2 July 1997, the Acting Town Clerk, in consonance with the above agreement, sent a minute to the Chairman and members of the Finance and Development Committee, informing them that he had ``received an application from Consolidated Mutual Investments (Private) Limited to purchase a portion of Virginia Lane in order to consolidate it with Lot 2A Dungarvan *so as to develop a shopping centre*'' (emphasis added). In the minute, the Acting Town Clerk expressed the Director of Works' interest in the Council making such an acquisition. The Acting Town Clerk himself extolled the land exchange proposal in these words:

> ``Considering the present use of the land, the land required by the Council is more valuable



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as it is zoned commercial than the portions of roadways to be transferred to the company. I therefore consider the proposed land exchange to be within the best interest of the Council.''

The point of considerable importance which emerges from all this is that right from the inception one of the issues cardinal to the whole agreement on the exchange of land was to enable the appellant to develop a shopping centre on the consolidated stand. Otherwise, there was no point in the appellant exchanging valuable commercial property considerably bigger and more expensive than the portion of road he was receiving in return, in order to consolidate the two properties owned by him. Any suggestion that an intended purpose was not agreed between the appellant and the Council is therefore false and the appellant was not being mendacious when he said such an agreement was reached.

A letter from the Town Clerk to the appellant dated 21 June 1988 is confirmatory of the assertion that there was an agreement to construct part of the shopping centre on Lot 2A. The letter reads:

``Dear Sir,

CONSOLIDATED MUTUAL INVESTMENTS: LOT 2A DUNGARVAN

I refer to your recent request for permission to start construction on a number of commercial stands at Borrowdale Shopping Centre and have to advise you that I have no objection to the construction work being commenced subject to the following terms and conditions:

(a) No construction work may be instituted on any portion of Borrowdale Road or Virginia Lane until the roadways have been closed in terms of the Roads Act.

(b) Council will not be liable for any damage if objection to the proposed road closures are received.

Yours faithfully,

TOWN CLERK''

Upon receiving the above letter, the appellant proceeded with clearing of the land for the building of the shopping centre on the two stands. The terms of the letter, far from suggesting the existence of some misunderstanding between the Council and the appellant, underscore the fact that the Council was at all times cognisant of the intentions of the appellant to construct a shopping centre on the consolidated plots and gave its blessing to it, prior to the approval of the plans.

The first signs of a misunderstanding arose in April 1989 and it is set out in a letter written on 15 May 1989 by Hensman and Wilkins, the appellant's agents, to the City Valuer and Estate Manager. It reads:

``Attention Mr Mukudu



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Dear Sir,

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Re: THE BORROWDALE SHOPPING CENTRE

When Mr Piha and I went to see you on Thursday the 27th of April, and you phoned Mr Barry Evans who told you that Shop Rights had not been extended to Lot 2A Dungarvan, we felt very let down.

Shop Rights on this Stand were an integral part of the `Package Deal' that we came to with the City, because of the devastation that the dual carriageway will have on the existing shops, and we had given you the land you required at no cost to the City, whilst the City had not kept to its side of the bargain.

Other important Shopping Centres have been ruined when major roads have been driven through the middle of them and we do not want that to happen to Borrowdale.

At your suggestion, we waited until the Permits for subdivision came through, and on the 12th of May, we applied for a Development Permit for Shops on Lot 2A. (Copy enclosed).

As the livelihoods of a great many people are involved, could you please do what you can to right this wrong.

Yours faithfully,

J K HENSMAN''

In compliance with the suggestion by Mr Mukudu, the agents of the appellant, on 12 May 1989, formally applied to the Director of Works, City of Harare, to have that part of the consolidated plots, that is, the portion of Virginia Lane to Piers Road (Lot 2A Dungarvan) rezoned for commercial use in consonance with the agreement reached with the Council.

Shortly after the bulldozers commenced clearing the site, the appellant received a letter from the Council signed, not by the Town Clerk, but by the Director of Works, who, reportedly, had earlier applauded the land exchange deal. The letter instructed the appellant's workers to stop uprooting the trees on the consolidated stand. The Council's Director of Works claimed in that letter that the appellant was destroying the vegetation around the site and that Lot 2A could be used for parking purposes only. The reason for this apparent volte-face is given thus in para 3 of the letter:

> ``In the original proposal as submitted to the City of Harare, the areas around the north of Virginia Lane were to be used for parking purposes only. In this respect, please note that Lot 2A of Dungarvan was granted a Special Council Permit for parking purposes.''

This was a further intimation that, contrary to the original purpose of the land swop, Lot 2A was to be designated for parking purposes only. I ask



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myself, having regard to the discussions and correspondence that had taken place between the Council and the appellant, could any honest and reasonable man genuinely believe that the appellant was exchanging valuable commercial property for land designated for use only as a car-park?

It appears from the above correspondence that while the Town Clerk was of opinion that the ``land-swop deal'' was to enable the appellant to build a shopping centre on the consolidated plots, Mr Barry Evans, the Assistant Director of Works, who admitted on oath that he was not a

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party to the negotiations leading to the ``land-swop deal'', was adamant that it was never agreed that Lot 2A should be converted to commercial use. Mr Evans' attitude was that no matter what the Council might have agreed, ``I am the authority to grant change of use and I shall grant change for use as a car-park''.

Perturbed by the tenor of the Director of Works' letter, the appellant complained first to the Council and then to the Minister of Local Government, Rural and Urban Development (``the Minister''). The complaint to the Minister evoked an emphatic response in a letter written by the Director of Regional Planning on 1 June 1989 to the Director of Works, City of Harare, whereof the relevant parts read:

> ``A representation has been made to this Ministry in respect of an abrogation by (the) Council which the developer claims to have experienced. The developer's submission is that he and the Council agreed on a `package deal' involving land exchange in terms of clause 49 of the operative Harare North East Town Planning Scheme, sections 1, 2, 3, and 4 Combined Resubmission.
>
> The rationale for such a land exchange is considered desirable by this Office and by the Minister. The permit issued (Permit No. S.D./464) with this object in mind is supported and must be implemented immediately.
>
> Regrettably, a problem seems to have arisen over the new zone/permitted use of the consolidated stand with the City apparently insisting on the former Lot 2A Dungarvan retaining its *Flats* zone (Zone 1c).
>
> It is noted that whereas the operative Scheme does not directly address the issue that has arisen, it does accord the local planning authority discretionary powers in determining the `predominant use of buildings'. In our view, Clause 17 does establish an important and relevant principle which can reasonably be extended in respect of consolidated stands. This office has in effect so acted in respect of similar instances throughout the country and would like the same principle applied in Borrowdale.
>
> You are expressly reminded that this is in effect what happens when a portion of a road is closed and consolidated with an adjoining property. The closed road automatically assumes the permitted use of the stand. In other words the `predominant use' prevails over the closed road. In this instance, the predominant use is *commercial* which is thus automatically permitted.
>
> It is also instructive to note that the overwhelming majority of operative Town Planning Schemes do contain the following standard clause:
>
> > `Where the site of a building or proposed building or a building plot is partly within the area of some planning scheme, the provisions of the other scheme corresponding to this Part of this Scheme shall apply to the part of the building or plot which is within the area



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> of this Scheme in place of the provisions of this Part of this Scheme in the following cases, namely -
>
> (i) if the greater part of the street frontage of the building or proposed building is or would be within the area of the other scheme;
>
> (ii) in the case of a building or proposed building which has or would have no street frontage, if the greater part of the building would be in the area of the other scheme; and
>
> (iii) in any other case if the greater part of the plot is in the other scheme.'
>
> The town planning principle of this standard clause is quite clear. If a plot or building is divided by a Scheme boundary, then the zoning which relates to `the greater part of the plot' is the predominant use which then applies

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> to the other/lesser part of the plot or building. We cannot see why this cannot be extended to a stand which straddles two land use zones. We believe this is a logical extension of the principle of `predominant use'.
>
> In this case, the predominant use of the consolidated stand (consolidated at (the) Council's instigation as is evident in Condition 1 of the Permit) is SUBURBAN COMMERCIAL. We would therefore urge that, in the light of the above, Council applies the principle of `Predominant use' in respect of Stand 585 Borrowdale Township. *The Minister of Local Government, Rural and Urban Development so directs*'' (emphasis supplied).

I have quoted extensively from the above letter because it is the directive therein given by the Minister that appears to have provoked the articles which the appellant complains are defamatory of him. Mr Evans admitted in evidence that he it was who suggested the land-swop. He also conceded that his views on the development of the consolidated stand were not shared by the Council.

In compliance with the Minister's directive, the Council, which had negotiated the land-swop deal with the appellant and was in favour of the development from the start, as exemplified in the memorandum of 2 July 1987 *supra* and did not share the views expressed by Mr Evans, who had not participated in the land-swop negotiations, issued the required permits.

The appellant had no reason to doubt the validity of the directive or the genuineness of the permits to be issued in consequence thereof at the time, and none was suggested to him. The plans were duly approved, development permits were issued, the fees relating to those permits were paid, and the development continued apace.

Thereafter, after considerable progress had been made at great cost, objection was made to the development by certain persons, and the Borrowdale Ratepayers and Residents Association intervened and petitioned the Administrative Court in terms of s 39 of the Regional, Town and Country Planning Act 1976 (No. 22 of 1976) (now s 38 of the Regional, Town and Country Planning Act [*Chapter 29:12*]) (``the Act'') on two grounds: firstly, that the Council acted *ultra vires* in issuing the permits in terms of s 27 of the Act in regard to Lot 2A Dungarvan; and, secondly, that the Minister erred in issuing a ``directive'' without following the procedures for rezoning, as



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outlined in the said Act. What was in effect sought by the applicants was that the development on Lot 2A Dungarvan be halted. The development sought to be stopped was being carried out by the appellant's company, yet that company against whom an injunction was sought was not even cited as a party in the proceedings. It was not served with notice of the application and not accorded a hearing. What valid order could have been granted against the company without it being heard is left to conjecture.

However, shortly before the hearing on 26 March 1990 in the Administrative Court, an agreement was reached between the applicants, the Council and the Government, and a document was handed in to the President of the Administrative Court, the precise terms of which are:

> ``IT IS ORDERED:

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1. That the permits granted to date hereof by first and second Respondents in respect of development that has taken place north of (the) closed portion of Virginia Lane Stand 585, Borrowdale Township, Lot 2A Dungarvan are set aside.

2. That the application for permits and permits already issued be referred forthwith to the Minister of Local Government in terms of s 30(1)(a) of the Regional, Town and Country Planning Act 1976, and the full provisions of s 30 be hereafter complied with by the Minister.

3. That the applicants *will not seek the demolition of the existing development, and will not seek to prevent present development proceeding in terms of the issued permits*'' (emphasis added).

The agreement was in effect that the proper procedures would be followed in the issuance of permits, pending which the development on Lot 2A Dungarvan was to continue.

The Administrative Court did not make an order in terms of the agreement reached by the parties before it. The court instead made the following order:

``1. That by consent the appeal be and is hereby allowed.

2. That the permits granted by the first respondent in respect of development that has taken place north of the closed portion of Virginia Lane, Stand 585, Borrowdale Township, Lot 2A Dungarvan, be and are hereby set aside.

3. (a) That the applications for development permits (if any were made) be referred forthwith to the first respondent as the local planning authority; and/or

(b) That this matter as a whole is referred to the first respondent as the local planning authority for it to be dealt with in terms of the relevant provisions of the Act.

4. That no order is made in regard to the demolition or non-demolition of the building already put up in terms of the permits now set aside.''

Thus, the Administrative Court did not order development to cease or even hint at it. It is a moot point whether, if the court had ordered development to cease, the applicants could legally have enforced the order against the appellant's company, which was not a party to the proceedings.

Understandably, having regard to the attitude of the ratepayers as expressed in the agreed order *supra,* the prejudice to the appellant's company if work



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were to stop, and in the absence of any order or direction to the contrary, the development continued pending compliance with the necessary formalities by the Council. Meanwhile, steps were duly taken to follow the proper procedures.

The work having proceeded as agreed by the parties to the Administrative Court proceedings and without any strictures to the contrary imposed by that court or any other on the appellant's said company, objection was publicly voiced in the *Financial Gazette* in the publications earlier mentioned. The first of the two publications complained of reads:

**"Where is the rule of law?**

Despite all the terrible things that may be happening in this country, the one thing I have always taken comfort in,

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is that there is the rule of law. Old Smithy finally got his judgment too.

But when we hear that people like Sam Levy, who have the advantage of having lots of money, are getting away with bending rules we get worried.

If it was not the same Sam Levy who appeared before the Sandura Commission, we would worry less. Just how was it possible for the development of a residential area into a commercial one allowed, and for that matter allowed after the fact.

Just what is going on in the Ministry of Local Government and the Harare City Council Department of Works? Do we need another Commission? I still believe in the rule of law. May it prevail."

The editorial of 19 June 1990 was couched in the following language:

**"Political Connections?**

The trenchant, if somewhat supercilious, manner in which business tycoon, Mr Sam Levy's ambitious Borrowdale Village Development project is proceeding has left many, even those with nothing more than a passing interest in goings-on in Borrowdale, quizzical.

Notwithstanding the fact that these developers have evidently ridden roughshod over objections raised by Borrowdale residents to the construction of an office and shopping complex in an area strictly zoned for residential purposes, there is excessive and highly suspicious inertia on the part of municipal and Ministry of Local Government officials at a time when they should be insisting on proper and legal procedures being followed in the building project.

The City Council director of works has completely ignored the objections of affected residents, objections which were later proved to be legitimately made in law. The previous Minister of Local Government arbitrarily issued a directive that certain permits should be issued to Mr Levy. Now the Harare Town Clerk is dragging his feet instead of informing the developers of the decision by the administrative court that Mr Levy's permits be set aside and that if he wishes to proceed with the project, fresh applications should be submitted to Council.

Meanwhile construction continues.

What is the importance of Mr Levy's project - or is it of Mr Levy himself - that it warranted the invocation of a ministerial directive for it to proceed?

That officials of a legal statutory body, one charged with the onerous responsibility of implementing certain legal procedures for the public benefit, should be found either unable or unwilling to discharge such duties is, if not scandalous, at least highly suspicious.



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While the City Council has attempted to minimise its involvement and obligations in the affair, by arguing in court that it was merely following a ministerial directive when it issued permits to Mr Levy, its subsequent reluctance to implement the court order cannot be that easily explained away.

Paradoxically, the same City Council officials recently displayed unrelenting and quite astonishing vigour, when they hauled before the courts a Waterfalls resident and a person of no substance, we are forced to conclude in the circumstances, for keeping six sheep on his premises, and with equal zeal enforced their removal from the property.

This is an obvious question of who you are and whom you know.

We believe a full investigation into the whole Borrowdale affair would not be entirely amiss, or should the whole affair just be dismissed as a simple case of an important businessman innocently reaping yet another benefit of

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connections cultivated in important political circles, as obviously appears to be the case."

Mr *Andersen* submitted, rightly in my view, that the matter before the court of first instance fell to be determined on the facts as they existed at the dates of publication of the alleged defamatory articles, and not as they were when judgment was given by the High Court in *Veronica Hillary Fitzpatrick & Anor* v *K Hensman Invstm (Pvt) Ltd & Ors,* four months later in October 1990, when the circumstances had changed to the extent that attitudes had hardened and the formalities had not been complied with - judgments HH-249-90 and S-176-91.

Before the pronouncement of those two judgments, the Borrowdale Ratepayers and Residents Association had acquiesced in an agreement that it would not seek to prevent present development proceeding in terms of the issued permits which were procedurally tainted. The Administrative Court did not order the cessation of building operations. I very much doubt that the Administrative Court has the jurisdiction to make declaratory orders - see s 4 of the Administrative Court Act [*Chapter 7:04*], and compare it with ss 13 and 14 of the High Court Act [*Chapter 7:06*]. In any case, except in special circumstances, the discretion to grant declaratory orders, even by the High Court, should not be exercised unless all parties interested are before the court - *London Passenger Transport Board* v *Moscrop* [1942] 1 All ER 97 at 103G-104D; and where the right which the plaintiff claims is not a private right, but as a member of the public, a declaration is not appropriate - *Clark* v *Epsom Rural Council* [1929] 1 Ch 287 at 297-299. As neither the appellant nor any of his agents were party to the Administrative Court proceedings, he could not be bound by any order which is in the nature of a declaration made without jurisdiction by that court. I do not for a moment doubt the correctness of the Administrative Court's order. I am merely saying that it cannot be valid as a declaratory order for the reasons above stated. Thus, prior to both the publications complained of and the judgment of the High Court in October 1990, there was no order of court extant prohibiting the appellant from carrying on building operations on Lot 2A Dungarvan,



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which the appellant disregarded. Which rule of law was the appellant transgressing?

The trial court set out the submission that the articles were defamatory of the appellant and alleged corruption thus:

> ``Levy complains that the allegation that he is getting away with bending the rules is defamatory and, when linked with the statement that he has lots of money, insinuates that there was some corruption involved and that the corruption is of so great a nature as to threaten the rule of law in Zimbabwe ...
>
> lThe editorial published on 15 June was headed `Political Connections' and expresses concern at the development of the shopping centre and concludes that full investigation into the whole affair would not be entirely amiss rather than that the whole affair should be dismissed `as a simple case of an important businessman innocently reaping yet another benefit of connections cultivated in important political circles, as obviously appears to be the case'. Levy complains that this is defamatory in that it insinuates yet another important benefit from political favouritism thus obtaining an advantage not available to the common man. Levy also complains that the editorial insinuates that the favouritism has been corruptly obtained in order to avoid the town planning laws. This complaint is based (on) statements in the editorial that he has `ridden roughshod over objections', that there was `excessive and highly suspicious inertia' on the part of officialdom, that `construction continues' and that official

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inactivity is `if not scandalous, at least highly suspicious'.''

At p 10 of the judgment the trial court noted the appellant's allegations that:

> ``A report of the (Administrative) Court order was published in the *Financial Gazette* on 24 May (1990). Then on 8 June (1990) the first of the defamatory articles was published in the *Financial Gazette*. There was a clear innuendo therein that he was corrupt and was using his money to bend the rules. He had appeared before the Sandura Commission and explained how he had acquired the Cressida. The use of the *nom de plume* `Still Hanging' implied that he was not needed in society and should be got rid of. The second defamatory article was published a week later on 15 June (1990). That too was distressing because it insinuated that he was a crook and that there was collusion between him and some officials. The implication that because he was a man of means he could break the rules with impunity was hurtful and the suggestion that a full investigation into the affair would not be amiss was most damning. His reputation was injured by the articles. His children told him that their friends jeered at them and his wife was embarrassed when she played cards with her friends.''

The High Court, without making any express finding as to the extent of the defamatory statements, remarked that their contents alluded to the appellant. Furthermore, without making an express finding and, therefore, omitting to direct itself as to the full extent of the defamation, the court found that the facts were generally true and the comment based on them fair.

Mr *Andersen* submitted that the publications inferred corruption on the part of the appellant, more particularly in that the first publication linked the appellant having a great deal of money with the implication that he was improperly using it to bribe officials by referring to the Sandura Commission, with the findings of corruption made therein, and suggesting that a similar





conduct was occurring. It insinuated that the development of a residential area into a commercial area must have been the result of irregular conduct of the nature of corruption.

The second article, contended Mr *Andersen*, alleged both improper and corrupt conduct by alleging that the appellant had ``ridden roughshod'' over objections and that there was ``excessive and highly suspicious inertia'' on the part of officials who should have insisted that proper procedures be followed. It alleged that the situation was ``if not scandalous at least highly suspicious''. The article stated it was a question of ``who you are and whom you know'', with the clear inference of improper influence. The last paragraph, said Mr *Andersen*, put it beyond doubt that corruption was to be inferred by stating unequivocally that the situation was one where ``yet another benefit'' (which alluded to illegally obtaining cars as investigated by the Sandura Commission) had been obtained as a result of ``connections cultivated in important political circles''.

There is much substance in the submission by Mr *Andersen* that, taking the articles together as a whole, ordinary reasonable readers would have been left in no doubt that, as with the Sandura Commission, the appellant had used his wealth and political connections to suborn Ministers and officials who ought to have prevented the development from continuing.

Mr *Andersen* pointed out that a plea to such defamation was conspicuously absent from the defence filed on behalf of the respondent.

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The respondent admitted only that it is defamatory of the appellant to say that he is getting away with bending the rules, but claimed that it was justified in publishing such statement, which was true and on a matter of public interest. It denied that annexure ``A'', entitled ``Where is the rule of law?'', was *intended*, and would reasonably be understood, to convey any of the secondary meanings, nor the sting alleged by the appellant. Paragraph 3.2.1. states:

> ``*Alternatively*, (the) defendant avers that insofar as the statements complained of contained allegations of fact, they were true and matters of common knowledge and insofar as they were opinions they were fair comment on matters of public interest.''

The writer of the article had not taken the trouble to find out details of the land-swop agreement between the Council and the appellant. Worse still, the article was published well after the decision of the Administrative Court, which did not restrain the appellant from continuing with building operations, had been reported in the *Financial Gazette* on 24 May 1990. That order was made with the consent of the Borrowdale Ratepayers and Residents Association, the City of Harare and the Minister of Local Government, Rural and Urban Development. The appellant was not a party to the proceedings.

If parties to a dispute decide to settle it in a certain manner, and the court



records the settlement, how can a third party, who has not been shown to have had anything to do with the settlement, be accused of bending the rules? There is not a scintilla of evidence that the appellant had influenced the parties to the dispute or the court, in a matter in which neither he nor his company had been cited, to reach a compromise that the offending erections would not be demolished pending the obtention of the requisite permits. It is absurd to assume, and there is nothing in the recorded evidence to persuade me, that the will of the irate Borrowdale Ratepayers and Residents Association was suborned by monetary recompense to agree to the compromise order that the Association acquiesced in and which was recorded by the Administrative Court.

The accusation that the appellant was bending the rules, insofar as it was not based on fact, was false. However, references to his being a wealthy man and the adverse findings of the Sandura Commission against him were employed by the writer to lend cogency to the untruth.

The respondent admitted that it was defamatory of the appellant to say that he was ``getting away with bending the rules''. As WESSELS JA observed in *Nasionale Pers Bpk* v *Long* 1930 AD 87 at 99-100, cited with approval by RUMPFF CJ in *Suid-Afrikaanse Uitsaaikorporasie* v *O'Malley* 1977 (3) SA 394 (A) at 406G-H:

> ``The use of defamatory language about a person is *prima facie* evidence of *animus injuriandi*. The onus is then upon the defendant to establish some lawful justification or excuse for the defamatory language used. But it is not enough for him to show that he did not intend to do wrong, for it is a principle of our law which applies as well to libel and slander as to other wrongs that if a man acts recklessly, not heeding whether he will or will not injure another, he cannot be heard to say he did not intend to hurt.''

In the instant case, the appellant was specifically named as the object of the defamatory

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statement and, regard being had to all the surrounding circumstances, I am left in no doubt about the existence of *animus injuriandi*.

Whereas falsity is not a matter to be alleged or proved by the plaintiff, because the defamatory nature of a statement is not dependent upon its falsity, it is settled law that:

> ``... the defendant must prove the truth of the very imputation complained of; he may not under a plea of justification prove the truth of other facts damaging to the plaintiff's reputation, even if they are in the same sector of the plaintiff's life, and would be no less damaging to the plaintiff's reputation than the imputation complained of.''

*Gatley on Libel and Slander* 8 ed para 354; *Scott* v *Sampson* (1882) 8 QBD 491; *Sutter* v *Brown* 1926 AD 155 at 172.

For the defence of justification to succeed, the defendant must not only allege that the defamatory statement was true, but that the publication thereof was to the benefit of the public: *Johnson* v *Rand Daily Mails* 1928 AD 190. If, therefore, the defamatory statement published is false, then that is an end



of the matter, because it cannot be in the interest of the public to know untruths. As BEADLE CJ pertinently observed in *Mahomed* v *Kassim* 1973 (2) SA 1 (RA) at 10B:

> ``The public interest lies in telling the public something of which they are ignorant, *but something which it is in their interest to know*.''

Since the defamatory statements complained of consisted both of facts and opinion, in the language of LORD FINDLAY in *Sutherland* v *Stopes* [1925] AC 47 at 62-63:

> ``A plea of justification means that the libel is true not only in its allegations of fact, but also in any comments made ... The defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct.''

And *per* LORD SHAW at p 75 of the same report:

> ``In a plea of justification, the defence that a matter of opinion or inference is true is not that the defendant truly made that inference, or truly held that opinion, but is that the opinion and inference are both of them true.''

In the instant case, the respondent offered no evidence in proof of the truth of both its opinion and inference. Bearing in mind that the offending articles were published after the Administrative Court judgment, and alleged that the appellant, by dint of his wealth and political connections, had suborned the will of officers of the Ministry of Local Government, Rural and Urban Development and the Council to permit the transformation of property designated for a residential area for use for commercial purposes and had by similar means suborned the will of the Borrowdale Ratepayers and Residents Association and other parties to the Administrative Court action to allow such development to continue on the said property after the fact, no attempt was made to substantiate these allegations.

Before I turn to the second article complained of, it seems to me that the learned trial judge, instead of asking himself the relevant questions, was carried away by opinions expressed of

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the appellant by other tribunals in regard to other transactions and fell into error in concluding that whatever was said of the appellant in his business transactions could not be defamatory of him. That should never be the court's approach to cases of defamation. The questions which the trial court should have asked itself in the instant case should have followed this approach:

(1) Is the article defamatory of the plaintiff? Yes.

(2) If yes, has the defendant proved that its sting, that is to say, its defamatory implication, is substantially true? No.

(3) If no, does the article consist partly of allegations of fact and partly of expressions of opinion? Yes.

(4) If yes, could a fair-minded man in good faith have held the opinion



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expressed having regard to such of the facts referred to in the article as are proved? Yes.

(5) If yes, has the plaintiff proved that in publishing the article the defendant acted with *animus injuriandi* or malice? Yes.

(6) If yes, what damages, if any?

See *Broadway Approvals Ltd & Anor* v *Odhams Press Ltd & Anor* [1965] 2 All ER 523 (CA) at 530B and 535G-H.

The editorial comment headed "Political Connections?", published in the *Financial Gazette* of 15 June 1990, contained allegations not dissimilar to the article published the week before. It alleged that business tycoon, Mr Sam Levy, had ridden roughshod over objections raised by Borrowdale residents to an office and shopping complex. This was after the same paper had published, in its edition of 24 May 1990, the consent judgment hereinbefore mentioned entered by the Administrative Court, wherein the Borrowdale residents had acquiesced. The editorial alleged excessive and highly suspicious inertia on the part of municipal and Ministry of Local Government, Rural and Urban Development officials.

It was contended on behalf of the appellant that the editorial contained in the final sentence the defamatory allegation, emphasised by the heading thereof, that the appellant was reaping yet another benefit of connections cultivated in important political circles, that is to say, was achieving as a result of influential political favouritism cultivated by himself an advantage not available to the common man. We need no reminder that the land-swop deal was not the brainchild of the appellant, and that Mr Evans was not a party to the discussions culminating in the land-swop and could not testify as to what inducement was offered to the appellant to make him agree to the deal.

It was also alleged that the said editorial contains a defamatory secondary meaning, that the favouritism mentioned was the undertaking of action or inaction in an official capacity by officials in the Ministry of Local Government, Rural and Urban Development and the Council, corruptly

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obtained by the appellant in order to avoid town planning laws inhibiting the development.

The appellant was not shown to have ridden roughshod over any valid objections. The land-swop agreement was alleged, but not proved, to be false. It was with the consent of the objectors that construction on Lot 2A Dungarvan should not be demolished pending the grant of the requisite permits. There was no order of court halting construction on the property and to say that a full investigation ``would not be entirely amiss'' raises the spectre of corruption.

Mr *Andersen* argued that, having regard to the surrounding facts outlined above, no blame could be laid at the appellant's door for commencing and continuing with the development up to mid-June 1990 when the articles were



published. I entirely agree with Mr *Andersen* that no fair-minded person could have inferred subornation of Ministers and officials when the Council itself, supported by the Government, believed the development to be beneficial to the community at large. There was no need for officials to be suborned or for them to stop the development in the light of the Administrative Court's judgment, which did not even hint that the appellant should stop building operations. Added to this was the published attitude displayed by the Borrowdale Ratepayers and Residents Association at the Administrative Court, the obvious disruption and blow to the morale of the contractors, loss of income by the workforce, and escalating building costs which would have resulted from cessation for what, on the face of it, was at the time seen by all parties, rightly or wrongly, to be a legal technicality by the State, the Council and the developers. Moreover, if for some highly unlikely reason the development (backed as it was by a sizeable group of ratepayers) did not receive eventual approval, the developers would have had to demolish it and make good the area.

The main adverse finding of the court of first instance was that the appellant's failure to have a clear recollection as to whether he saw the Minister and his officials raised ``the very questions alluded to in the articles''; that this, coupled with the fact that the Minister interceded quickly with no lawful authority to do so which was meekly accepted by the Council and the officials who did nothing, led to the finding that he was ``receiving an important benefit from political favouritism''.

Mr *Andersen* contended that there was no reason why the Minister, acting on the advice of his officials and in accordance with the wishes of the Council, which was cognisant of the conditions of the land-swop deal, should not have acted swiftly; that the finding of the trial court that the Minister did not have the capacity to do so was wholly unjustified, as was the extent to which inferences were drawn from the mere fact that he acted wrongly. Mr *Andersen* submitted, rightly in my view, that bad faith cannot be imputed from a failure to adopt the correct procedures.

The learned trial judge commented as follows on the letter from the Director of Works stopping the development and that from the Department of Physical Planning sanctioning the change of use:

> ``On 23 May (1989), the proposed development into which Levy had poured his heart, his substantial energy and

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> a not insubstantial part of his fortune, stood rejected and in tatters. The financial consequences for Levy of his Village, which was already at window height, being declared unlawful and in danger of demolition could only be serious. The emotional effect of seeing the Village which meant so much to him being consigned to oblivion could only be distressing. Within eight days (referring to the letter of 1 June 1989) he was able to turn catastrophic defeat into triumphant victory. A thunderbolt from on high obliterated the obstacle in his path. The Bible tells us that God created the earth in six days but local



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> authorities and Government Ministries do not *usually* work nearly as quickly. It must have been one of the most satisfying victories of Levy's long career. Yet he cannot remember with any semblance of accuracy what happened or how he won it (or) why the Minister's directive was issued."

The learned trial judge, in accepting the veracity of the statement contained in the letter of 23 May 1989, that the proposal attached to the letter by the appellant's contractors, was totally unacceptable, ``being totally different from the proposal on the basis of which the City of Harare agreed to the operative Town Planning Scheme for the area'', did not have regard to the fact that the Director of Works, who wrote that letter, was not present when the land-swop deal was concluded, nor the fact that the Council was made aware by the Acting Town Clerk as far back as 2 July 1987 that the purpose of the land exchange was to enable the appellant to consolidate Virginia Lane and Lot 2A Dungarvan so as to develop a shopping centre.

Had the trial court adverted to these facts, it could not have concluded that the appellant had won a victory, but rather that a wrong had been put right. Everything depended on the terms of the initial agreement between the Council and the appellant, to which Evans was neither party nor present. Evans' lack of knowledge or misconception of the agreement reached was the bedrock of all the misunderstanding surrounding the land use. It was because of it that the Council stood by the appellant. The Council was unwilling to renege on an agreement struck with the appellant before 2 July 1987, as evidenced by the memorandum of that date by the Acting Town Clerk.

It is worthy of note that the letter of 1 June 1989 by the Director of Physical Planning, regarding which the trial court set so much store, was copied to the ``Town Clerk - City of Harare''. In the letter, reference was made specifically to the ``package deal involving land exchange''. The Town Clerk did not refute the basis of the land-swop deal, nor could he have done so in the face of the memorandum of 2 July 1987. The only obstacle to its implementation in the path of the parties to the agreement was the refusal of the Director of Works to grant the requisite permits in terms of the then s 27 of the Regional, Town and Country Planning Act 1976 to achieve the purpose for which the parties had swopped land.

Under the Act, the Minister may, if an application is referred to him in terms of ss (1) of s 30, give directions to a local planning authority, if he is satisfied, having regard to the national or regional implications, regarding the granting of permits or preliminary planning permission in respect of any type of development specified in the direction subject to the proviso to ss (2).

I agree with Mr *Andersen* that it was understandable that the appellant would have no clear recollection of the precise steps taken to avoid the

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frustration caused by the Director of Works' letter of 23 May 1989 to a project which was seen as desirable and beneficial to all concerned. Everyone was in a state of flux or agitation. In such a condition, one seldom conducts one's actions along logical lines which can easily be recalled. The inability to recall vividly what transpired when one is stunned or confused is not necessarily a desire to be economical with the truth, but may be because of the absence of a planned course of action. The appellant made no secret of the fact that as a result of the Director of Works' letter dated 23 May 1989 he complained to both the Council and the Minister.

There was no rout of the officials in the Council's planning department. It is clear to me that what transpired was that whereas the Council had struck a deal with the appellant, its Department of Works, which was not a party to the deal, was displeased with the deal and refused to grant the necessary permits. The Council, far from abdicating its authority, also sought relief from the Minister, who had the statutory power to authorise a change in land use, but erred only in not following the correct procedures. The Minister's lapses in this regard cannot be visited upon the appellant. It was left to the Council to attend to the issue of building permits, and the proper procedures were being followed in compliance with the order of the Administrative Court.

Mr *Andersen* submitted, again rightly in my view, that, whatever may have been the validity of the strictures expressed by the High Court and Supreme Court thereafter in the light of additional events which occurred subsequent to the impugned publications, the trial court was not justified, and indeed fell into error, in finding that the appellant's explanation for continuing with building operations were unacceptable and that the rules were ``completely broken and trampled upon'' and that the appellant ``was receiving an important benefit from political favouritism''.

There was no direct evidence on which the last finding in particular was based, except that copious references were made by the trial court to the adverse findings of the Sandura Commission against the appellant and the decisions of the High Court and this Court, that the parties seeking to restrain the appellant from continuing with his building operations on Lot 2A Dungarvan were entitled to an order compelling him to comply with the law.

I have already indicated that neither the appellant nor his agents or contractors were party to the Administrative Court action. Such orders as were made by that court were not binding on them. In the High Court and the Supreme Court, however, the appellant's agents and/or contractors were party to the proceedings. Consequently, he was bound by those judgments. The decisions of the High Court and the Supreme Court were, however, grounded on facts occurring after 15 June 1989 and pronounced after



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publication of the alleged defamatory articles and should not have influenced the trial court, as

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they obviously did, in arriving at the conclusion it did - that the appellant was defying the law.

The law jealously guards against the assassination of a person's character. Therefore, the imputation of general bad conduct by implying that a person is a crook, is not, in law, justified by the citation of an isolated instance of a spurious business transaction or a single transgression of the law. It can only be justified by proof of a series of unsavoury commercial transactions which unequivocally establish that the person, who has been branded as a crook, is a dangerous person with whom to enter into any business or commercial transaction. It is no justification to call a person an habitual criminal by proving only one instance of a criminal conviction.

There is the further issue that the editorial complained of imputed general bad conduct on the part of the appellant by implying that he was a crook. A general charge of misconduct cannot be justified by an isolated instance of the conduct imputed - Gatley *op cit* paras 1117 and 1394. The trial court, by relying on the isolated adverse finding of the Sandura Commission against the appellant to justify the imputation of general bad conduct implied in the editorial of 15 June, which was published well before the High Court and the Supreme Court judgments which bound the appellant, misdirected itself as to the law. The opinions expressed by those courts in *Fitzpatrick & Anor* v *K Hensman Invstm (Pvt) Ltd & Ors* HH-249-90 and S-176-91, are of no relevance to this case. Giving reasons that are bad in law constitutes a failure to hear and determine according to law.

Generally speaking, an appellate court will not interfere with the decision of a trial court based purely on a finding of fact, unless it is satisfied that the finding had been based on an erroneous evaluation of the facts taken as a whole; or it is satisfied that the judge has given no weight or no sufficient weight to those considerations which ought to have weighed with him; or that he has been influenced by other considerations which ought not to have weighed with him or weighed so much with him. I am left in no doubt that the trial court fell into error in respect of all these aspects of the evidence and that the defence of justification was not established. A substantial wrong or miscarriage would be confirmed by allowing the decision of the trial court to stand.

The appeal is accordingly allowed. As regards the costs of the present appeal, I see no ground for departing from the usual course of visiting the costs on the unsuccessful party. The question of damages, unless agreed by the parties, is properly a matter for determination by the court of first instance.

I therefore make the following order:

---



EBRAHIM JA

1. The appeal is allowed with costs.

2. The judgment of the High Court is hereby set aside and substituted with the following -

``Judgment is entered in favour of the plaintiff''.

---

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3. This matter is remitted to the trial court for the assessment of damages and the award of costs.

**EBRAHIM JA:** I have had the benefit of considering the views of both my brother judges and make the following observations:

The issue for resolution is whether or not the branding of the appellant as a crook by the respondent was justified. Non-compliance with regulatory procedures *per se* does not render a person's actions criminal. We are here concerned with defamatory material in which the appellant had been stigmatised as a person of such bad character of whom honest persons must be wary. It is not a mere allegation of failure to comply with statutory regulations. That is not the essence of this case. The pith of the defamatory material, which the respondent sought to justify, was the labelling of the appellant as a crook. One must not take a parochial view of tabulating breaches of regulations which a person has failed to comply with in one transaction - continuing to build when permits had not yet been granted - as support for the remarks that the appellant is a person to be shunned by honest men.

In terms of s 24(1)(d) of the Act [*Chapter 29:12*]:

> ``(1) Unless permitted in terms of a development order and subject to this Act and any such development order, no person shall carry out any development, other than development which -
>
> ...
>
> (d) is carried out in ... terms of a permit."

At first blush, it would appear that any development carried out in contravention of s 24(1)(d) is proscribed by reason of illegality. However, s 27, entitled ``Regularisation of buildings, uses or operations'', by providing that:

> ``Where any development has been carried out in contravention of section *twenty-four* an application may be made in terms of section *twenty-six* in respect of that development and the local planning authority shall deal with that application in terms of that section but any permit granted thereunder shall take effect from the date on which the buildings were constructed, the operations were carried out or the use was instituted, as the case may be'',

does not forbid building operations carried on without a permit. It is, therefore, pertinent not to overlook the fact that a transgression of the provisions of s 24 of the Act invites, not a criminal sanction in terms of s 72 of the Act, but a demolition of the premises which has been constructed



without the grant of a permit after its construction. In other words, by continuing with building operations at the site before the grant of the requisite permits, the appellant was not carrying on any illegal activity; he was doing no more than risking having to demolish the structures erected without the grant of the requisite permits, but with no likelihood of incurring any criminal sanction. Where then is the justification in stigmatising him as a crook when to build without a permit is not an offence in terms of s 72 as read with s 27? The only effective legitimate means to stop development progressing in terms of s 27 is to obtain an interdict, such as was granted

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in the *Veronica Hillary Fitzpatrick & Anor* case *supra*. Before then there was no order extant restraining the appellant from building on the plots. No rule of law or order of court was ever trampled upon by the appellant, because there was none in force.

The all important question is: Did the respondent prove that it was justified in publishing that the appellant was a crook? Upon that, the law is clear, as has been pointed out by my brother KORSAH. If the respondent failed to prove justification, *cadit quaestio*, then the only remaining question is the *quantum* of damages.

It is for these reasons that I agree with the views expressed by my brother KORSAH. In the result the appeal succeeds.

**MUCHECHETERE JA:** I, with due respect, find myself in disagreement with some factual findings by my brother KORSAH JA and the conclusion he reached.

I should like to commence by stating that I am inclined to agree with my learned brother that an analysis of the facts in connection with the exchange of the land between the Council and the appellant leads to the conclusion that the exchange was intended to enable the appellant to develop a shopping centre on a consolidated stand. Indeed, as my learned brother observed, there would have been no point in the appellant exchanging valuable commercial property bigger and more expensive than the portion of road he was receiving in return. That said, however, it should be stated that the consolidation, even on these terms, did not automatically authorise the appellant to commence construction of shops on the stand. This is because before any development commences on land the developer is obliged to obtain a permit from the local planning authority. See s 24(1)(d) of the Act, which reads:

> ``Unless permitted in terms of a development order and subject to this Act and any such development order, no person shall carry out any development, other than development which -
>
> ...
>
> (d) is carried out in accordance with the terms of a permit.''



MUCHECHETERE JA

The application for a permit is, in terms of s 26 of the Act, made to the local planning authority, who in this case is the Director of Works, City of Harare. It is important to note that the Director of Works, although in the employ of the Council, is distinct and separate from the Council when exercising the functions of the local planning authority. The decisions of the Council on its land do not therefore bind him in the said capacity. It appears that this fact was not grasped in the submissions made on behalf of the appellant. In the circumstances, Mr Evans was correct in his attitude, which was to the effect that: ``No matter what the Council might have agreed, I am the authority to grant the change of use''. In view of that, all the agreements and decisions made between the Council and the appellant were not binding on the local planning authority (the Director of Works).

On receipt of an application for a development permit, the local planning authority is obliged to follow the provisions of s 26 of the Act which, amongst other requirements, provides for

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objections by interested parties. They have to be followed before a permit is issued. It is worthy of note that, whilst the appellant's agents, in their letter of 15 May 1989 to the City Valuer and Estate Agents, speak of a ``package deal'' with the Council and complain about the delay and the attitude of Mr Evans, they concede they had been advised to wait, and did wait, until permission for subdivision went through and that they had also been advised to apply for a development permit. They indicated that they had applied for the permit to the Director of Works on 12 May 1989 but it had not yet been granted. They were therefore aware of the need to obtain a permit because they had been advised to comply with it.

In view of the above, the appellant acted unlawfully when, upon receiving a letter of 21 June 1988 from the Town Clerk, representing the Council, he started clearing the land for the building of the shopping centre on the stands. The Town Clerk, to whom he addressed his wish to commence the development, had no authority to grant him the permit. And, as indicated above, he was aware of this. His agents indicated that they had already applied for the permit from the local planning authority. In the result, the Director of Works' letter to the appellant, instructing the appellant's workers to stop uprooting trees on the consolidated stand and claiming that the appellant was destroying the vegetation around the site, was proper. It was not an ``apparent volte-face'' because the Director of Works, in his capacity as the local planning authority, had never before that stage promised or undertaken to grant the development permits to him. The Director of Works had, as indicated in the letters on behalf of the appellant to the Council, as he was entitled to do, voiced some reservations about the development. The fact is that the development then being carried out by the appellant was unlawful



and the appellant ought to have complied with the order of the local planning authority.

The appellant defied the lawful order of the local planning authority. He instead took the irregular action of complaining to the Minister. I say ``irregular'', because the procedure under s 26 of the Act does not provide for an approach to the Minister when an application is under consideration. And, as is observed below, the appellant could not give a satisfactory explanation on how and in what circumstances he got to see the Minister on the matter. This resulted in the Minister issuing the irregular directive to the Director of Works and the *ultra vires* issuing of the permits. Having acted in the manner he did, it cannot be said that the appellant had no reason to doubt the validity and genuineness of the permits. He caused the unlawful issue of the permits because he did not want to await the outcome of his application to the local planning authority.

I should add that the fact that the directive of the Minister was irregular and that the permits were issued improperly was conceded by the respondents during the proceedings in the Administrative Court by the Borrowdale Ratepayers and Residents Association (``the Residents Association''). Even though in the draft order handed to the President of the court it was indicated that the Residents Association would not seek the demolition of the existing development and would not seek to prevent present development proceeding in terms of the issued permits, it was nevertheless clear that they wanted to stop the development pending the following of proper procedures in the application for the permits. To this end, they sought the

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cancellation of the issued permits. Their position was clarified and confirmed by the order of the court which allowed the appeal and set aside the issued permits. It also ordered that applications for development be submitted to the local planning authority (the Director of Works) and that the procedures relating to such applications be followed. No order was made in regard to the demolition or non-demolition of the buildings already put up in terms of the permits now set aside.

My understanding of the position after the conclusion of the court proceedings is that thereafter the appellant no longer had permission to continue to develop the stands. The permits had been set aside. If he continued he would be in breach of the above-quoted s 24(1)(d) of the Act. There was, in the circumstances, no need for the court to order the development to cease. The cancellation of the permits had the effect of stopping any development. The buildings he had put up unlawfully were spared pending the outcome of his fresh application for permits. Note should be taken of the fact that, although the appellant had the support of the Council and the Minister and maybe the understanding of the Residents Association in the





application, that was no guarantee that the local planning authority would grant the permits. The application was not a mere formality because the local planning authority was obliged to follow the procedures laid out in s 26 of the Act.

In the circumstances, the appellant was obliged to stop the development after the court order. The outcome of his application would thereafter determine whether he was to continue with the development or to demolish it. He instead continued with the development of the stands. In that he was again acting unlawfully. As will be seen below, it is this continuance of unlawful action which the High Court was asked to stop and did order to stop in the case of *Veronica Hillary Fitzpatrick & Anor* v *K Hensman Invstm (Pvt) Ltd & Anor* HH-249-90.

The above is, in my view, the position which pertained at the time the articles complained of were published. In summary, the appellant had commenced the development of the stands without permits even though he had been advised to obtain permits - his first act of illegality. Thereafter he defied the lawful order of the local planning authority to stop the unlawful development. Thirdly, he irregularly approached the Minister on the matter and must therefore have influenced him to issue an irregular directive. Fourthly, this irregular directive caused the improper issue of permits. Fifthly, he thereafter continued the development on the authority of what he must have appreciated were improperly issued permits. Lastly, even after the permits were set aside by the Administrative Court he continued with the development, clearly in breach of the peremptory provisions of s 24(1)(d) of the Act.

The appellant did not, at any time before the articles complained of were published, either cause or await the provisions of s 27 of the Act, which provisions are quoted in the above judgment of my brother EBRAHIM JA, to be complied with. It is worthy of note that any application under that section would still have triggered the provisions under s 26 of the Act and not legalised the development. In the circumstances, the development would have remained illegal until a permit was issued. In the event that the permit was refused, the development

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would have been demolished.

As to the criminal liability of the appellant's actions see s 72 of the Act which reads:

> ``Where -
>
> (a) any matter is, by or in terms of this Act or any order or notice made or given under the authority thereof, directed or forbidden to be done; or
>
> (b) any authority is given by or in terms of this Act to a local planning authority or any person to direct any matter or thing to be done, or to forbid any matter or thing to be done;



MUCHECHETERE JA

> and such act so directed to be done remains undone or such act so forbidden to be done is done, then in every such case every person so offending against such direction or prohibition shall be guilty of an offence.''

The appellant commenced the development without a permit. He was then ordered to stop the development by the local planning authority. He defied the order of the authority and continued with the development. Clearly, he must have been liable to prosecution. His actions were therefore *prima facie* criminal.

I should at this stage point out that, although I agree that this matter fell to be determined on the facts as they existed at the dates of publication of the articles complained of, I must also point out that the judgments in the said *Veronica Hillary Fitzpatrick & Anor* v *K Hensman Invstm (Pvt) Ltd & Anor*, HH-249-90 and S-176-91, have in them a lot that is relevant to this matter. In the High Court case, that is HH-249-90, the learned JUDGE PRESIDENT was asked, amongst other things, to decide whether the continuing development of the stands by the appellant without a permit, that is, after his permits had been revoked by the Administrative Court was proper and lawful. In this connection the learned *Judge President* said the following at pp 3 and 4 of the cyclostyled judgment:

> ``The second issue which I must determine is whether the building operations taking place on the stand in question (after the permits were revoked) are taking place in accordance with the provisions of the Regional, Town and Country Planning Act No. 22 of 1976 (now [*Chapter 29:12*]). I do not think so. Section 25 of the Act (now s 24 of [*Chapter 29:12*]) provides that no person shall carry out any development other than development which is carried out in terms of a permit. The section is peremptory. On the papers before me, it is clear that the first respondent (now the appellant) does not have a permit issued in terms of the Act authorising it to carry out the building operations which are taking place on the stand in question. Indeed, it was submitted by Mr *Colegrave*, counsel for the first respondent, that as the third respondent (the Council) had approved the change of use of the land from flats to shops and offices, the required permits would be issued as a matter of course. It is therefore conceded that the required permits have not yet been issued. It must follow that the first respondent also concedes that the building operations in question are taking place without the second respondent's authority. There can be no doubt about that. *Since the Administrative Court set aside the permits issued in terms of the third respondent's directive (the Minister), no permission or authority has been given to the first respondent to continue with the building operations. These operations are, therefore, being carried out unlawfully. I cannot see any basis upon which this court can condone such unlawful operations* ... '' (emphasis added).

The learned judge proceeded to interdict the appellant from undertaking any further development. The judgment is therefore relevant in that it also came to the conclusion that the

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development which the appellant carried out after the decision of the Administrative Court was unlawful and ought to have been stopped.



MUCHECHETERE JA

In the Supreme Court judgment (S-176-91), in which my brothers KORSAH JA and EBRAHIM JA concurred, MCNALY JA upheld the said decision of the learned JUDGE PRESIDENT. After quoting with approval from the judgment of the learned JUDGE PRESIDENT, he stated the following at pp 4-5:

> ``The fourth contention put forward by Mr *Paul* was that the original permits were intended to be as it were dormant, waiting to spring into life if and when the change of use was authorised. Again this submission is belied by the facts. The appellant began to build at once, without waiting for the authority for change of use.
>
> The fifth argument was that the appellant was entitled to build shops and offices in advance of authority so long as they were not actually used as shops and offices until authority was granted. If authority was denied they could be torn down. This argument would turn the concept of town planning on its head and is not worthy of serious consideration.
>
> Finally, there was the submission that an interdict should not have been granted in the circumstances because such enormous financial commitments were involved and because it must have been obvious that eventually there would be compliance with the law. Once the Minister's approval had been obtained, the rest was mere red tape and formality.
>
> This submission must be firmly rejected. It seems to me to stab at the very heart of the rule of law. The right of a private citizen with a genuine interest because of his residence or business qualifications to object to what he considers undesirable or inharmonious development is enshrined in our town planning legislation. That right must be protected. *Where a development proceeds in flagrant disregard of the law, an interested citizen has every right to object*. To criticise him or her for doing so, indeed to go so far as to suggest that improper motives are behind his or her objections, is in my respectful view dangerous. To adopt the attitude that once the Minister is in some way perceived to be `on your side' the law and the rights of individual citizens may be trampled on with impunity is to speak the language of totalitarianism ...
>
> The judgment of the learned JUDGE PRESIDENT upheld the law and the rights of the citizens. That judgment was right ..." (emphasis added).

That judgment also confirms the finding that the continued development of the stands after the order of the Administrative Court was unlawful - it was a ``flagrant disregard of the law''.

The learned trial judge in the present case found the appellant not to be a good witness. I agree with the finding. The evidence clearly indicates that he prevaricated on many issues and contradicted himself on a number of issues which were pointed out by the learned trial judge. In particular, he could not clarify the issue as to why and how he met and influenced the Minister to issue an irregular directive. This issue is properly analysed in the learned trial judge's judgment. He also could not explain how and why he carried on the development which he knew was unlawful even though the Administrative Court had set aside the permits. These and many other issues pointed out in the learned trial judge's judgment make his evidence totally unreliable.

Like the learned trial judge, I consider that the facts set out in the articles complained of are

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generally true and that the comments based on those facts



MUCHECHETERE JA

are fair. On the law relating to fair comment and justification see *Marais* v *Richard* 1981 (1) SA 1157 (A); *Madhimba* v *Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H) and *Muhwati* v *Zimbabwe Newspapers (1980) Ltd* S-187-96.

It is true that the appellant is a wealthy man and a public figure. Indeed he has appeared in articles which depict him as a rich businessman. This is also confirmed by the fact that he has built a village at vast expense which is called ``Sam Levy's Village'', that is, after his own name. He appeared before the Sandura Commission to answer allegations that he had a sold a vehicle at above the controlled price. He was later convicted of having contravened the Control of Goods (Price Control) Regulations and fined $95 000. During the hearing before the Sandura Commission, he stated that he had been in business for many years and knew that there were people in the know about getting through certain channels and that he had asked a senior Minister to assist him in acquiring a motor vehicle through Willowvale Motors which he had subsequently sold in breach of the law. He admitted giving a wedding gift to the senior Minister's relative, but the Sandura Commission had found it incredible that he had not given a remuneration to the senior Minister himself as a reward for his services in the acquiring of the motor vehicle. The Sandura Commission had found that it was difficult to believe the senior Minister when he said that he had received no remuneration from those, including the appellant, whom he had helped.

In the present case, it is a fact that the development for which the appellant was responsible was one that was prohibited by the relevant Town Planning Scheme. The appellant, as already indicated, started the development unlawfully and carried on the development even after he was lawfully ordered to stop. His action deprived interested parties of the right to object to the development, as they would have been entitled to do if the proper procedures for an application had been followed. The illegality later caused the Residents Association to approach the courts. He then irregularly approached the Minister, who issued an irregular directive. The directive had the effect of causing permits to be issued improperly. One cannot in the circumstances run away from the conclusion that the appellant was benefiting from bending the law and the rules. Even after the directive had been held to be *ultra vires* and the permits set aside by the Administrative Court, the appellant continued the development without anyone seeming to be able to stop him. He literally got away with breaking and bending the law and rules. He should have been charged with an offence under ss 72 and 73 of the Act but was not. In my view, lesser mortals would have been.

It is therefore, in my view, clear that the articles complained of are generally true and the comments based on them are fair. He was never



MUCHECHETERE JA

labelled a crook in the articles. It was his questionable and illegal actions which were pointed

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out and attacked. This is as it should be, more particularly when account is taken of the fact that our State is supposed to be a modern democratic and open society where the press and the public should guard against the tendency of prominent, wealthy and well connected people in society getting away with breaking and bending the law and rules and trampling upon the rights of other citizens. There was, in my view, no case more deserving than this case for the questions asked and the opinions expressed to be aired. The press ought not to be penalised for doing its legitimate duty.

In the result, I would dismiss the appeal with costs.

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

*Atherstone & Cook*, respondent's legal practitioners

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## FLETCHER *v* THREE EDMUNDS (PVT) LTD;
## VISHRAM *v* FOUR EDMUNDS (PVT) LTD 1998 (1) ZLR 257 (SC)

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

Gubbay CJ, Ebrahim JA & Sandura AJA

Civil appeal

19 February & 2 March 1998 Judgment No. S-25-98

### Flynote

Practice and procedure - default judgment - rescission - good cause - claim that default not wilful - failure to appear because of reasonable belief that courts not sitting - default not wilful

Landlord and tenant - tenant - ejectment - grounds for - Rent Regulations 1982 - s 30(2)(c) as read with s 30(4) - eviction on grounds that premises required for personal residential use by lessors - whether eviction could only take place if Rent Board had first determined that eviction of lessees was fair and reasonable in circumstances

### Headnote

Two companies owned certain premises. It had leased these premises to tenants. The companies sought to evict the tenants from the premises on the grounds that the premises were required for occupation by directors and shareholders of the companies. It commenced legal proceedings to obtain an eviction order against the tenants.

The tenants had intended to enter an appearance to defend within the seven day time period as required by the rules of court, but as there was a strike on in the public service they believed that they would not be able to file their papers with the clerk of court until the strike had ended. (In fact the office of the clerk of court had not been affected by the strike and the tenants could have filed process during the time that the strike was on.) When a few days later the tenants tried to enter the appearance at defend, they were informed that the owners of the premises had already obtained a default judgment against them. The tenants then applied for rescission of judgment. The magistrate dismissed this application, holding that the default had been wilful. He

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further held that, in any event, there was no merit in the defence raised that an order for ejectment could not be made by the court since the respondents had omitted to obtain a certificate from the rent board as required by s 30(4) of the Rent Regulations 1982 (SI 626 of 1982) (the Rent Regulations).

*Held*, that although in terms of Order 30 r 2(1) of the Magistrates Court (Civil) Rules a magistrate has no power to rescind a judgment where default to enter an appearance to defend is wilful, it is quite clear that the tenants had not wilfully defaulted. Wilful default requires that a party freely decides to refrain from appearing knowing of the service of the summons and the risks attendant upon default. The reason why the tenants had not entered an appearance within the required time was because of their belief that the magistrates courts were not operating because of the strike. This was an eminently plausible explanation for their default.

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GUBBAY CJ

*Held*, further, that on a correct construction of the Rent Regulations, even when the lessor requires the rented premises for personal residential occupation by the owner or employee, the rent board must first decide whether, upon a balance of all the circumstances, it is fair and reasonable that occupation of the dwelling be recovered from the lessee. The purpose of Part IV of the Rent Regulations is to protect the residential occupation of lessees. This protection could be eroded if the lessor could simply obtain an order for eviction from a court on the ground of that the lessor needed the premises for personal occupation. In order to avoid the erosion of this protection, the rent board is required to determine whether it is fair and reasonable for the lessor to evict the tenant on this ground. The lessor therefore has to obtain a certificate from the rent board that his re-occupation is fair and reasonable. Without this certificate he has no right to claim an order for eviction. The default judgment granted by the court was therefore void.

Cases cited:

*A-G, Tvl* v *Additional Magistrate for Johannesburg* 1924 AD 421

*CIR* v *Golden Dumps (Pty)* Ltd 1993 (4) SA 110 (A)

*CIR* v *Southern Life Assn Ltd* 1986 (4) SA 717 (A)

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

*Karimazando* v *Standard Chartered Bank of Zimbabwe* 1995 (2) ZLR 404 (S)

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

*Ngani* v *Mbanje & Anor* 1987 (2) ZLR 111 (S)

*R* v *Standard Tea & Coffee Co (Pty) Ltd & Anor* 1951 (4) SA 412 (A)

Legislation considered:

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Rent Regulations 1982 (SI 626 of 1982), s 30

## Case Information

*A A Brooks*, for the appellants

*A P de Bourbon SC*, for the respondent

## Judgment

**GUBBAY CJ:** These two appeals were heard together as, in each, the issues to be decided are identical.

The appellants are the lessees, respectively, of flats 3 and 4, Edmunds Court, in Harare. The owners and lessors of the building are the respondents.

In a letter of 17 April 1996, the appellants were notified that the flats they rented were required for occupation by the directors and shareholders of the respondents, Mr and Mrs Laxman Samji. They were given notice to vacate by 30 June 1996. Neither appellant paid heed to the requirement. Two years previously they had successfully resisted proceedings for their ejectment from the premises.

On 17 August 1996, each appellant found, pushed underneath the front door of her flat, a summons that had been issued by the respondent concerned out of the Harare magistrate's court on 8 August 1996. It sought an order of eviction. The claim was based on the ground that the respondent required the premises for its own use (presumably that of the Samjis) and that the two months notice given to vacate had expired.



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The appellants consulted a fellow lessee, a Mrs Hunt, who, though not versed in the law, had advised them in the past. Allowed seven days after service to enter appearance to defend, it was correctly appreciated that the last day to do so was 27 August 1996.

On the morning of 21 August 1996, members of the Public Service resorted to widespread industrial action for the redress of grievances. The strike ended on 4 September 1996.

On 5 September 1996, the respondents lodged with the clerk of court written requests for default judgments to be entered, with costs, against the appellants. They were granted the next day. Five days later Mrs Hunt, on behalf of the appellants, sought to enter appearances to defend the actions. She was advised that in each matter judgment had already been taken.

Consequently, on 17 September 1996, applications for rescission of the judgments were filed, supported by founding affidavits deposed to by the appellants on 13 September 1996. The relevant content of the affidavits (in all likelihood drafted by Mrs Hunt) is in similar terms. To be disregarded in each, however, was the hearsay averment that Mrs Hunt was informed by the clerk of court that, on account of the disruption caused by the strike, the period to enter

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appearance to defend proceedings had been extended to 10 September 1996.

The prevailing situation was alluded to in the judgment of the magistrate who heard the applications for rescission. It appears that the operation of the Harare magistrate's court was not paralysed; a litigant was not prevented from filing process. Those magistrates in attendance assisted in the function of the clerk of court's office and dealt with *ex parte* applications.

In dismissing the applications with costs, the magistrate held that since each appellant had been served properly with the summons and, thereafter, had failed to enter an appearance to defend, she was in wilful default; that the two week civil action could not be relied upon by them as an excuse for non-compliance with the Rules. He went on to express the view that, in any event, there was no merit in the defence raised that an order for ejectment could not be made by the court since the respondents had omitted to obtain a certificate from a rent board as required by s 30(4) of the Rent Regulations 1982, SI 626 of 1982 (``the Regulations'').

Before this court, the propriety of both aspects of the magistrate's judgment was attacked.

First, it was submitted that the rationale for the finding that the defaults were wilful was wholly misconceived. I have no hesitation in agreeing with counsel. The failure on the part of the appellants to enter an appearance to defend within the prescribed period did not, *per se*, signify wilfulness. What should have been considered, but was not, was whether the explanation



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advanced for such failure was of unacceptable cogency, in the sense that the inevitable inference it gave rise to was deliberate acquiescence not to defend the action. Put differently, but to the same effect, whether with full knowledge of the service of the summons and of the risks attendant upon default, a decision to refrain from appearing was freely made.

Order 30 Rule 2(1) of the Magistrates Court (Civil) Rules expressly provides that a magistrate has no power to rescind where the default was wilful. The enquiry terminates with that finding. Indulgence must be withheld. See *Neuman (Pvt) Ltd* v *Marks* 1960 R&N 166 (SR) at 168B-C; *Gundani* v *Kanyemba* 1988 (1) ZLR 226 (S) at 228F; *Karimazando* v *Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S) at 407E-F.

In these matters, the appellants plainly laboured under the belief that the Harare magistrate's court was not operating due to the collective job action taken by Public Service employees. Absent that mistaken perception, the probability was that appearances to defend would have been entered on or before 27 August 1996. An attempt to do so was made on 10 September 1996 and, when told that the judgments had been granted, applications for rescission thereof were lodged with expedition. All this, as well as the fact that the appellants were fairly longstanding statutory tenants who had previously resisted eviction from their occupancy of Edmunds Court, pointed strongly to a lack of acquiescence in the granting of judgment. I consider that the explanation proffered by them was eminently plausible.

The magistrate gave no reasons for his opinion that reliance by the appellants on s 30(2)(c) as read with s 30(4) of the Regulations did not constitute a valid defence. That point of law was

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critical to the grant or refusal of the applications. If good, the default judgments were to be set aside with the inevitable consequence that ultimately the actions brought would be dismissed; if bad, rescission had to be denied.

Subsection (2) of s 30, in material part, reads:

> ``Subject to the provisions of this section, no order for the recovery of possession of a dwelling 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 any court so long as the lessee continues to pay the rent due within seven days of due date and performs the other conditions of the lease, unless, in addition -
>
> (a) ...
>
> (b) ...
>
> (c) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is required -
>
> (i) by the owner; or
>
> (ii) where the lessee is a sublessee, by the person letting the dwelling to the sublessee;



GUBBAY CJ

> for his personal residential occupation or the personal occupation of his parent, child or employee; or
>
> (d) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is required for the purpose of a reconstruction or rebuilding scheme, and the nature of such reconstruction or rebuilding would preclude human habitation; or
>
> (e) the appropriate board has issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable on some other ground stated therein, and the date specified in the certificate for the vacation of the dwelling has passed.''

And subs (4) recites:

> ``No order for the ejectment of a lessee from a dwelling shall be made on the grounds referred to in para (c) or (d) of subs (2) unless the appropriate board has, on the application of the lessor, issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable, and the date specified in the certificate for the vacation of the dwelling has passed.''

It is also relevant to note the extended definitions given, in relation to a dwelling, to ``lessee'' and ``lessor''. The former includes any sub-lessee and the widow or widower of a lessee who was living in the dwelling with the lessee at the time of death. The latter includes the owner, the person to whom the rent is normally paid, a sub-lessor and any agent of the lessor.

At first impression it may appear that if a lessor wishes the lessee to vacate on the ground that the dwelling is required either by the owner (as defined in s 2) or the sub-lessor, for their personal residential occupation, or by a parent, child or employee, that should be the determining factor. The lessor should not be obliged, in addition, to obtain from the appropriate board a certificate that the requirement that the lessee vacate the dwelling is fair and reasonable; for the recovery of the dwelling for the residential occupation of the persons

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specified is a ground on its own.

This, as I understand it, formed the foundation of the respondents' argument that paras (c) and (d) to s 30(2) of the Regulations are irreconcilable with the provisions of subs (4); that para (e) to subs (2), especially in the use of the phrase ``or some other ground'' is meant to exclude all the grounds mentioned in the aforegoing paragraphs. Hence, subs (4), which contradicts the clear rights afforded under paras (c) and (d) to subs (2), was enacted by the draftsman in error. For if the intention had been to require the lessor to obtain the issue of a certificate, the apposite part of para (e) to subs (2) would have read:

> ``on the grounds referred to in para (c) or (d), or on some other ground stated therein.''

Attractive though the argument undoubtedly is, I think it is flawed.

In the first place, subs (4) prohibits in express wording an order for ejectment on the grounds referred to in paras (c) or (d) unless the appropriate board issues a certificate. It is a cardinal principle of interpretation that a court



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must give effect to every clause in a statute or regulation unless necessity or absolute intractability of language dictates otherwise. Recognising this, KOTÉ, JA in *Attorney-General, Transvaal* v *Additional Magistrate for Johannesburg* 1924 AD 421 said at 436:

> ``A statute ... should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. To hold certain words occurring in a section of an Act of Parliament as insensible and having been inserted through inadvertence or error is only permissible as a last resort.''

See also *R* v *Standard Tea & Coffee Co (Pty) Ltd & Anor* 1951 (4) SA 412 (A) at 416F; *Commissioner for Inland Revenue* v *Southern Life Association Ltd* 1986 (4) SA 717 (A) at 729J-730B; *Commissioner for Inland Revenue* v *Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) at 116F-117B.

Certainly, the manner in which paras (c) and (d) to subs (2) of s 30 are made subject to the qualification provided in subs (4), rather than by inclusion under para (e), reveals clumsy and inelegant draftsmanship. But no more than that in my opinion.

In the second place, regard is to be paid to s 32 of the Regulations. Subsection (1) thereof repeats that:

> ``If a lessor requires a dwelling to be vacated on any ground in respect of which a certificate is required in terms of subsection (2) or (4) of section 30 ...''

he must apply to the appropriate board for its issue. A hearing is then held. The obvious intention, so it seems to me, is that the board has to determine, in relation to para (c), whether ejectment from the dwelling, even when required for personal residential occupation by the owner or sub-lessor, or by their parent, child or employee, would be fair and reasonable. So also, it is incumbent upon the board to determine under para (d) whether it would be fair and reasonable to issue a certificate to the lessor who requires the dwelling for the purpose of a

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reconstruction or rebuilding scheme of a nature which precludes human habitation.

The applicability of such hearings to the grounds referred to in paras (c) and (d) is further underscored by the matters which the board may consider, as indicated in paras (a) and (b) to s 32(4), namely:

``(a) whether other suitable accommodation is available to the lessor or lessee;

(b) the period during which the lessee has been in continuous occupation of the dwelling."

The significance of applying the ``fair and reasonable'' criterion becomes readily apparent to a situation in which either the owner or sub-lessor requires the occupation of the dwelling from a lessee, who has been in continuous occupation for many years, for an employee as opposed to himself.

In sum, I am satisfied that the reference to ``fair and reasonable or some other ground'' in para (e) to s 30(2), when read in the context of ss 30(4), 32(1)



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and 32(4), does not exclude necessarily or *ipso facto* the issue of a certificate on the grounds specified in paras (c) and (d).

The purpose of Part IV of the Regulations is to protect the residential occupation of lessees. Doubtless it was feared by the Minister, who made the Regulations pursuant to the powers vested in him by s 23 of the Housing and Building Act 1979 (now s 24 of *Chapter 22:07*), that such protection could so easily be eroded if a lessor were able to obtain an order for eviction from a court simply on the ground of personal occupation, or for the purpose of a reconstruction or rebuilding scheme. Thus in order to ensure that the desired eviction was justified it was deemed necessary to provide for a hearing into whether, upon a balance of all the circumstances, it was fair and reasonable that occupation of the dwelling be recovered from the lessee.

For these reasons, I hold that the respondents had no cause of action against the appellants at the date summons was issued. Without the requisite certificate there was no right to claim an order for eviction. The judgments granted were accordingly void. See *Ngani* v *Mbanje & Anor* 1987 (2) ZLR 111 (S) at 115B-E. Nonetheless, a declaration to that effect was necessary, as judgment by default had been entered.

Counsel were agreeable to the suggestion that if this were the conclusion reached by the court, it would be appropriate to order that the two actions brought by the respondents be dismissed with costs; rather than to allow the appellants leave to defend proceedings which were destined to fail.

In the result, I would order as follows:

1. The appeals are allowed with costs.

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2. The separate orders made by the lower court are amended to read:

``1. The application for rescission of the default judgment granted on 6 September 1996 is allowed, with the costs on an unopposed basis to be paid by the applicant.

"2. The costs incurred in opposing the application are to be paid by the respondent.

"3. By consent, the action instituted by the respondent against the applicant on 8 August 1996 is dismissed with costs."

**EBRAHIM JA:** I agree.

**SANDURA AJA:** I agree.

*Honey & Blanckenberg*, appellant's legal practitioners

*Ahmed & Ziyambi*, respondent's legal practitioners

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## S v MUGUTI 1998 (1) ZLR 264 (HC)

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

Sibanda J

Criminal review

6 March 1998 Judgment No. HB-16-98

### Flynote

Criminal law - statutory offences - Concealment of Birth Act [Chapter 9:04] - *s 2* - *concealment of birth of child* - *meaning of word ``child''*

### Headnote

In terms of s 2 of the Concealment of Birth Act [*Chapter 9:04*] a woman commits an offence if, having given birth to a child, she endeavours to conceal that birth by a secret burial or disposal. The objectives of the Act are to ensure proper registration of births and to prevent the murder of infants by insisting on reporting of births and by punishment concealment of births.

There are conflicting judicial decisions in Zimbabwe on the meaning of the word ``child'' in this context. In some decisions the word ``child'' has been interpreted to mean a fetus of not less than twenty-eight weeks of intra-uterine existence at the time of its expulsion from its mother's body. In other decisions, the word ``child'' has been taken to mean any fetus, whatever its age, that is capable of being born alive and after separation from its mother breathes independently of the mother either naturally or with the aid of a ventilator. The correct interpretation is that for the purposes of this offence ``child'' means a fetus of not less than twenty eight weeks of age. There were pragmatic reasons for this. In the conditions that prevail in Zimbabwe it would in many cases be difficult to prove that the fetus in question was capable of a separate independent existence, but it would be relatively straightforward to determine the age of the fetus as this evidence was readily obtainable from the accused herself. Thus the chances of

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acquittal of guilty accused would be reduced by the adoption of the twenty-eight week definition. Additionally, as the objectives of the Act is the same as those of the Births and Deaths Registration Act [*Chapter 9:04*] , the word ``child'' should be interpreted in the same way in both Acts. In the latter Act, the word ``child'' has always been taken to mean a fetus of twenty-eight weeks of age.

In the present case, although the accused had pleaded guilty, the magistrate had failed to put all the essential elements of the offence to her and had not asked her about the duration of her pregnancy. The conviction had to be quashed as the State had failed to prove that the fetus was at least twenty-eight weeks old when it was expelled.

Cases cited:

*R* v *Matthews* 1943 CPD 8

*S* v *Jasi* 1993 (2) ZLR 451 (H)

*S* v *Chingodza* HH-54-96

*S* v *Madombwe* 1977 (1) RLR 325 (G)

*S* v *Makosi & Anor* 1997 (2) ZLR 308 (H)

*S* v *Maramba* 1994 (1) ZLR 326 (H)

*S* v *Mazengero* HH-68-85

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SIBANDA J

Legislation considered:

Concealment of Birth Act [*Chapter 9:04*], s 2

## Judgment

**SIBANDA J:** This matter came before me in chambers on automatic review. The accused was charged and convicted on her own plea of guilty of contravening section 2 of the Concealment of Birth Act [*Chapter 9.04*] and was sentenced to 24 months' imprisonment with labour with 10 months' imprisonment with labour suspended on good behaviour.

The allegations against the accused are set out in the State outline and are that on the evening of 4 February 1997, the accused informed her employer that she was suffering from a running stomach. She was given a salt and sugar solution which she drank. She later went to the clinic where she was given a prescription for paracetamol. She, however, continued to be restless and opted to sleep outside the house, as she did not want to irritate the other occupants of the house.

On 7 February 1997, the accused is said to have given ``birth to an infant unaided in the toilet and the male infant fell headlong on the concrete floor''. The accused, without informing any

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person, buried the fetus under a pile of bricks. The doctor could not ascertain the cause of death due to the advanced state of decomposition of the fetus.

On perusing the record, I entertained strong reservations as to the propriety of the conviction. I then sought the Attorney-General's views on the matter as to whether he supported the conviction. I drew his attention to the fact that, while the charge sheet alleged that the accused ``delivered a child' there was no medical evidence to establish the age of the fetus or at least the duration of the pregnancy. The Attorney-General in his response supported the conviction.

The unsatisfactory features of the allegations lie in the fact that the accused worked and lived with her employer, but she appears not to have noticed that the accused was pregnant let alone in an advanced state of pregnancy. The staff at the clinic who attended the accused also seem not to have noticed that she was pregnant.

Had the pregnancy been a full term, I have no doubt that both the accused's female employer and the clinic staff who must themselves have been females, would have noticed the accused's advanced state of pregnancy at the time she complained of stomach pains. The accused would have been most likely advised that her running stomach had everything to do with her pregnancy and was a sign of labour pains.

Further, the fact that at the critical moment the fetus was easily expelled from the womb does not support a normal delivery as submitted by the Attorney-General but an expulsion in the course of an inevitable abortion or miscarriage.

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SIBANDA J

The absence of any evidence or of medical evidence to establish the age of the foetus did not advance the State case. Further, as the accused pleaded guilty the matter was proceeded with in terms of s 271(2)(b)(i) and (ii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The trial magistrate dismally failed to put to the accused all the essential elements of the offence as required by subs (2)(b)(i) and (ii). She was asked:

``Q Did you conceal the birth of your child?

A Yes I secretly buried the child so that people do not know that I have given birth.

Q Any lawful right for your conduct?

A None.

Q Any defence to the charge?

A None.''

These questions fell far short of covering the essential elements of the offence. The accused ought to have been asked specific questions as to the duration or age of the pregnancy, details of what exactly transpired in the toilet when the fetus was expelled from the uterus and the physical condition or state of the fetus at the time and whether it was alive. The answers to these questions would have enabled the trial magistrate to determine the age of the fetus.

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Mrs Mwatse-Sumowah, for the Attorney-General, has submitted that ``It is very possible and indeed often happens that a young girl or woman falls pregnant and manages to conceal the pregnancy till full term''.

This submission was made in support of the allegation that the accused ``delivered a child''. This is a speculative and general submission as to what pregnant girls and women often did to conceal their pregnancy. In this case, no evidence of concealment of pregnancy by the accused was led. Therefore, the submission cannot advance the State case and must remain, being what it is, a mere speculative possibility.

Further, in an effort to explain and justify the apparent ease with which the fetus was expelled, in her submission, she gave a general exposition of how a fetus sits in the womb, with its head located at the exit point in order to facilitate easy delivery. This submission was intended to impress upon me her view that this was a normal delivery and not an expulsion in a miscarriage or inevitable abortion.

I certainly do not need to be impressed upon, but require evidence to satisfy me that this was not a case of miscarriage. Section 2 of the Act provides that:

> ``Any woman who is delivered of a child shall be guilty of the crime of concealment of the birth of her child if she, by secret burial or disposal of the body of the child, endeavours to conceal the birth thereof, and shall be liable to imprisonment for a period not exceeding five years.''

It is clear that the crime created by s 2 of the Act is one of concealment of the birth of a child and not of giving birth to a child.

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SIBANDA J

It is committed when the mother after giving birth, endeavours to conceal that birth by a secret burial or disposal of the child.

In *S* v *Chingodza* HH-54-96 GILLESPIE J (with whom BARTLETT J concurred) at p 6 of the cyclostyled judgment enunciated the policy underlying this provision when he said:

> ``The aim of the provision would appear to be two fold: one, a more technical approach to ensuring proper registration of the important matter of births and death. Underlying that, however, there must be an anxiety to prevent the murder of infants by insisting upon reporting of births by punishing any concealment.''

I am in full agreement with the view that these are the two objectives of the Act. In determining, whether either of these objectives has been defeated in any given case, it is essential to determine whether or not there has been a birth of a child.

The Act does not provide a definition of what constitute a child, for purposes of the section, although it refers to the birth of a child. In the instant case there is no evidence of the age of the fetus. The meaning of the word ``child'' for purposes of the Act has been considered by the courts both in South Africa and in this country. It is clear from those decisions, at least in this country, that there is a complete absence of unanimity, as to the meaning of the word ``child'' as used in the Act.

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One school of thought considers the word to mean ``a fetus of not less than 28 weeks'' of intra-uterine existence, while the other regards as a child any fetus, irrespective of age, ``capable of breathing independently of the mother either naturally or with the aid of a ventilator''. The meaning of the word ``child'' as used in similar legislation in South Africa was considered by DAVIES J in the case of *R* v *Matthews* 1943 CPD 8 at 9, who said:

> ``... No definition is given of `child' in s 113 of Act 46 of 1935 under which she is charged. But my attention has been drawn by the Attorney-General to the Births, Marriages and Deaths Registration Act 17 of 1923. Under s 19 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 6 months might be a child, but with this view Gardiner and Lansdown are not in agreement ... The better opinion, it is submitted, is that a fetus is not a child for the purpose of statutes unless it has reached a stage of development sufficient to have rendered its separate existence apart from its mother a reasonable probability.''

In Milton and Fuller *South African Criminal Law and Procedure* 2 ed Vol 3, in approving this approach, the learned authors state at p 271:

> ``... it is respectfully submitted that in as much as the offence is closely linked to the matter of registration of births the more satisfactory approach is to regard as a child for purposes of the offence a being whose birth is required to be registered in terms of the Births, Marriages and Deaths Registration Act 1963.''

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SIBANDA J

However, de Wet and Swanepoel *Die Suid Afrikaanse Strafreg* 2 ed express reservations as to the correctness of this approach.

I now turn to consider the two approaches that have been adopted by our courts.

In *S* v *Madombwe* 1977 (1) RLR 325 (G) at 326D-F, W*hitaker* J (with whom GOLDIN J concurred) adopting the approach enunciated by DAVIES J in *R* v *Matthews supra*, and approved by the learned authors Milton and Fuller *supra* and said:

> ``This approach commends itself to me and I consider it should be adopted. The Births and Deaths Registration Act [*Chapter 30*] makes provision for the registration, *inter alia*, of still births and in terms of s 2 the term `still birth' is to be 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 any time after being completely expelled from its mother breathe or show any signs of life'.''

He went on:

> ``It seems to me, therefore (and this accords with the view expressed by the Attorney-General, for whose assistance I an indebted) that a fetus of less than twenty-eight weeks should not be regarded as a child within the provisions of the concealment of Birth Act [*Chapter 57*].''

He proceeded to quash the conviction and in doing so held:

> ``As the accused's aborted fetus was only twenty-four weeks old she did not conceal the birth of a `child' and the conviction and sentence are set aside.''

This decision was followed by SCOTT J in *S* v *Mazengero* HH-68-85, where the accused, a

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temporary school teacher had discharged a three month old foetus into a shallow toilet and was convicted on her own plea of guilty to contravening s 2 of the Act. In quashing the conviction she said:

> ``It would appear that a still-born fetus of less than twenty-eight weeks old cannot be regarded as a child within the Births and Deaths Registration Act and consequently cannot be regarded as a child within the concealment of Birth Act. That being the case she cannot be said to have concealed the birth of her `child', that child having been a fetus of less than 28 weeks old.''

A different approach was adopted in *S* v *Jasi* 1993 (2) ZLR 451 (H) by ADAM J (with whom MTAMBANENGWE J concurred). After reviewing a plethora of authorities, the learned judge proceeded to reject the approach adopted by WHITAKER J in *S* v *Madombwe supra* at 459E-G and said:

> ``It is a truism that there have been rapid, extensive and most remarkable developments in the medical field, including obstetrics and gynaecology, since 1977. I cannot, therefore, accept that W*hitaker* 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.''

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SIBANDA J

In *S* v *Maramba* 1994 (1) ZLR 326 (H), the accused was charged with contravening s 2 of the concealment of Birth Act [*Chapter 57*]. The accused admitted giving birth to a dead foetus and throwing it into a pool of water.

There was no evidence as to the age of the foetus and the cause of death could not be established. GARWE J (MTAMBANENGWE J concurring) said at 327E:

> ``The first point to stress is that not every concealment of birth is a criminal offence. The word `child' in s 2 of the Act has been legally defined. Unless a court is satisfied that a fetus was a `child' for purposes of s 2 of the Act, then a conviction for concealment of birth would not be competent.''

I am entirely in agreement with the learned judge's remarks. However, after citing, with approval, the passage of ADAM J in *S* v *Jasi supra*, GARWE J went on:

> ``I agree entirely with the above remarks. Times have changed and in my view it is time to discard with the motion that only a fetus of more than 28 weeks is a child for the purposes of the Act.''

The latest decision, in a line of cases in which the meaning of the word ``child'' as used in s 2 of the Act has been considered, is to be found in *S* v *Makosi & Anor* 1997 (2) ZLR 308 (H). The two accused, a mother and daughter, were charged with contravening s 2 of the Concealment of Birth Act [*Chapter 9:04*]. The allegations were that the accused were working in their fields when the second accused's pregnancy was aborted. A five months fetus was expelled from her womb. The fetus was dead.

CHINENGO J (GILLESPIE J concurring), after acknowledging as ``pragmatic and supportable'' the approach adopted by ADAM J in *S* v *Jasi supra*, opted for the approach adopted by WHITAKER J in *S* v *Madombe supra*, and said at p 312E-G:

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> ``In adopting the views of WHITAKER J, I do not believe that 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 considered to be a child within the provisions of the Act if it was not less than 28 weeks old. It is in respect of the birth of a child 28 weeks old or older that the obligations to notify the Registrar is imposed on the persons referred to in s 11 of the Birth and Death Registration Act. I am satisfied that the conviction in the present case cannot be upheld, as the fetus was only 20 weeks old.''

He continued at p 312H-313A:

> ``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 concealment as any concealment in disregard of the twenty-eighth week age of the fetus would not make sense.''

What has emerged from these decisions is that there are two distinct, inconsistent and mutually destructive schools of thought as to the

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meaning of the word ``child'' under the Act. The approach that for a fetus to be regarded as a ``child'', it ought to have been conceived for a period of not less than 28 weeks, prior to birth or expulsion. Yet, with the other approach, to be considered as a ``child'' a fetus must be capable of a separate independent existence from its mother either naturally or with the aid of a ventilator.

In my opinion, there is a great deal to be said for both approaches. Indeed, I must say that both are highly commendable. However, the very fact that both are significantly meritorious, serves to underscore the very reason behind the lack of unanimity on proper construction of the word ``child'' as used in the Act.

The ``separate independent existence'' of the fetus approach must, in my view, more often than not, be faced with insurmountable logistic problems. It is true, as A*dam* J said in *S* v *Jasi supra*, that there has been ``rapid, extensive and most remarkable developments in the medical field ... ''

I am highly doubtful that it could be argued that this country has experienced that high level of medical development. Even if that level of development in medical technology has been attained, there can be no denying that, in the main, the provisions of the Act net and will continue to net for the unforeseeable future young women and girls from small towns and communal areas and young school girls in rural schools.

It must be apparent from the very nature of the crime that the expulsion of the fetus, in almost all cases, occurs in secrecy.

This, as it must, is followed by an immediate secret burial of the fetus. The commission of the crime is detected after the lapse of some number of days from the date of burial.

Further, precious time is lost while waiting for the authorities to be informed and ultimately come to the scene of the crime. By the time the body of the fetus is exhumed, it is found to have

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undergone an advanced state of decomposition, to the extent of rendering the conduct of a post mortem examination to determine whether the fetus was capable of a ``separate independent existence'' virtually impossible. The failure by the State to place before the court this crucial evidence can only mean that the acquittal of the accused must follow as a matter of course. In that event, there can be no recourse to the ``28 weeks age'' approach even if such evidence was readily available on record.

In my opinion, the nature of the crime, the secretive manner of its commission, the time lag that lapses before the crime is detected and the body exhumed for the post mortem to be conducted, the vast geographical area over which the limited logistics and human resources are to be deployed for



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the purpose, militate against the adoption of the separate existence approach. If adopted it may in the end undermine the administration of justice in regard to the enforcement of the provisions of the Act, as obviously guilty accused may escape conviction on technical grounds.

In my respectful submission, the ``28 weeks age'' of the fetus approach commends itself for that evidence is easy to obtain, as it should always be readily available and obtainable from the accused herself. She may, as the direct source of that fact, never be heard to say, ``I do not know when I conceived'' for she and she alone ought to know at least the month, if not the day and hour of her pregnancy. It is straight forward and does not require advanced technological knowledge and medical evidence to establish it. Indeed its adoption may not pose any limitation on the State in proving its case against the accused and that reduces the chances of an acquittal of a guilty accused to virtually nil.

Further, in my view, there is need for uniformity in defining the word ``child'' as used in both the Births and Deaths Registration Act [*Chapter 5.02*] and the Concealment of Birth Act [*Chapter 9.04*], as their objectives are identical. The ``28 weeks age'' fetus achieves the harmonisation of the two Acts. The current position is extremely unsatisfactory and must be very confusing to all those responsible and concerned with the administration of justice in respect of the provisions of s 2 of the Act. The desirability of a single construction of the word ``child'' in this regard cannot be over emphasised.

The ``28 weeks age'' of the fetus approach provides a single meaning of the word ``child'' as used in both Acts and at the same time removes the uncertainty in the state of the law currently prevailing.

For these reasons I, unhesitatingly find myself entirely in agreement with the views of WHITAKER J in *S* v *Madombwe supra*. The approach is unlikely to suffer from inhibitions due to limitations occasioned by the unavailability or limited technical and human resources.

In the present case, there is no evidence of the age of the fetus at the time of expulsion. The accused was not asked the obvious and simple questions by the trial magistrate as to the duration of her pregnancy and whether the fetus at the time of expulsion was alive or dead. In fact, the provincial magistrate elicited the scantiest of the essential elements from the accused.

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This, as ought to have been expected, left the State case hanging in the balance, ready to collapse.

There can be no contravention of the Act, unless it is proved by the State that the fetus was, at the time of expulsion, conceived for a period of not less than 28 weeks. Such evidence is notably missing in the instant case. I cannot agree with the Attorney-General that the accused was properly convicted of



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contravening s 2 of the Act. In fact, the Attorney-General completely ignored the decisions of the above authorities in his support of the conviction.

I am, therefore, satisfied that the accused should not have been convicted and would therefore quash the conviction and set aside the sentence and she is acquitted. Her immediate release has already been ordered.

**CHEDA J** agrees.



## S *v* DUBE & ORS 1998 (1) ZLR 273 (HC)

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

Smith J

Criminal review

11 March 1998 Judgment No. HH-50-98

### Flynote

Criminal procedure (sentence) - statutory offences - Criminal Law Amendment Act [Chapter 9:05] - unlawful carnal knowledge of girl under 16 (s 3(a)) - rationale for creating the offence - age difference between accused and complainant substantial - where girl under 14 years or where there has been a breach of trust strong mitigating factors will be required to avoid imprisonment

### Headnote

The rationale for creating the offence of having unlawful carnal knowledge of a girl under the age of 16 years is to protect immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility that psychic or physical injury may be suffered. That protection is achieved not by punishing the female, but rather the male partner, who in effect is assumed to have been responsible for inducing her to engage in sexual relations.

Where there is a disparity in age between the complainant and the accused, that has always been regarded as a factor, either of mitigation or of aggravation, depending on the age of the accused and how great the difference is. The younger the complainant, the more seriously will

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the offence be viewed; and when the complainant's age is within the knowledge of the accused, the accused himself deliberately sets the law at defiance and is not deserving of leniency. The fact that the accused is in love with the complainant and intends to marry her is mitigating but does not condone the offence. Where there is a substantial age difference, where the girl is less than 14 years or where there is a breach of trust - such as where a teacher has sexual relations with a pupil - there must be strong mitigating features before a fine would be appropriate.

Cases cited:

*A-G* v *Mutema* 1984 (1) ZLR 123 (S)

*S* v *Chiwara* HB-103-91

*S* v *Chuma* 1983 (2) ZLR 372 (H)

*S* v *Keyser* HB-98-93

*S* v *Mathe* HH-197-91

*S* v *Mlambo* HH-100-92

*S* v *Mudambi* S-156-95

*S* v *Mutowo* HH-178-96

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

*S* v *Rwodzi* S-12-96

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SMITH J

## Judgment

**SMITH J:** The accused in these three cases were all charged with contravening s 3(a) of the Criminal Law Amendment Act - having sexual intercourse with a girl under the age of 16 years. In each case the accused was convicted and sentenced to pay a fine. The regional magistrate who scrutinised the records felt unable to certify the proceedings and referred them for review.

Before dealing with the facts, I must mention the charges. In *Phiri*'s case, the charge correctly alleged a contravention of s 3(a) of the Criminal Law Amendment Act [*Chapter 9:05*]. In *Sianzara*'s case, the charge referred to the Criminal Law Amendment Act [*Chapter 58*] but the chapter number was altered to Chapter 9:05. However, in *Dube*'s case the charge referred to Chapter 58 and was not amended. It is surprising that some 18 months after the new Revised Edition of the Laws came into effect there are still some prosecutors and magistrates who continue to refer to chapter numbers in the 1974 Revised Edition of the Laws.

In *Dube*'s case, the complainant was 12 years and 8 months old when the offence was committed and the accused was 23 years old. He was sentenced to a fine of $600. When the

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regional magistrate queried the leniency of the sentence the trial magistrate replied that he had taken into account the fact that the accused had paid a ``bridal price'' of $600 and was going to pay the girl's school fees until she finished school and he believed that the accused was truly in love with the complainant and intended to marry her.

In *Phiri*'s case the complainant was 13 years old and was attending a school at which the accused, who was 32 years old, was a teacher. He was, in fact, her English teacher. The couple had sexual intercourse on a number of occasions and the girl fell pregnant. She said that during the first term of 1997 the accused started proposing love to her and persisted, despite her refusals. Eventually he forced himself on her and thereafter they had sexual intercourse on many occasions. The complainant gave birth four days after her 14th birthday. The trial magistrate said that the case warranted the imposition of a ``stiffer penalty'' and, having regard to the fact that the accused would lose his job, sentenced him to a fine of $1 000 and to a wholly suspended term of 6 months' imprisonment.

In *Sianzara*'s case the complainant was 13 years old when the offence was committed and the accused was 42 years old. He was sentenced to a fine of $500 and to a wholly suspended term of 3 months' imprisonment. When the regional magistrate who scrutinised the case queried the leniency of the sentence, the trial magistrate said that the accused came from ``a very rural place and as per their custom they cause the girl to elope and then marry when they are already residing together. In this case, this is what happened''. However, the girl's father objected because he felt that she was too young to marry. Accordingly, he reported the matter to the police. The trial magistrate



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said that he was of the view that incarceration would have been harsh since, for such offences, courts normally impose fines or a wholly suspended custodial sentence. I cannot agree with the trial magistrate that that is the normal sentence imposed.

In *S* v *Nare* 1983 (2) ZLR 135, GUBBAY J, as he then was, set out the reason why the legislature created the offence in question. He expressed it as follows at 137H:

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

The learned judge then set out factors which were mitigatory and those that aggravated the offence. In that case, the accused had been sentenced to 18 months' imprisonment and he appealed against the severity of the sentence. The court substituted a fine of $1 000, saying that, but for the length of the appellant's incarceration pending trial, a custodial sentence would be appropriate. Had the appellant been admitted to bail shortly after his arrest, the sentence would have been reduced to 12 months' imprisonment.

ROBINSON J, in *S* v *Mathe* HH-97-91, added further factors which he felt constituted aggravating features. At p 2 of the cyclostyled judgment, the learned judge said:

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``In *S* v *Nare* 1983 (2) ZLR 135 (H) at 138C, GUBBAY J (as he then was), in listing some of the factors relevant to sentence for the offence presently under consideration, stated that the offence is aggaravated where

`(i) the accused is a much older and more mature person that the complaintant;

(ii) the complainant is only just above the age of consent - see *S* v *Dziko* HB-47-82 (unreported);

(iii) the accused has relevant previous convictions.'

To this list, I would add the following as also constituting aggravating features:

(iv) where the complainant is a virgin;

(v) where the complainant has been made pregnant by the accused, in which regard - although I am not in favour of abortion - I would point out that where pregnancy results from a contravention of s 3(a) of the Criminal Law Amendment [*Chapter 58*], as opposed to where it results in rape under the common law, the pregnancy may not be lawfully terminated in terms of the Terminantion of Pregnancy Act 1977;

(vi) where the complainant is infected by the accused with the AIDS virus or with a sexual disease;

(vii) where sexual intercourse has taken place on a number of occasions;

(viii) where the accused has falsely promised marriage to the complainant to induce to have sexual intercouse with him;

(ix) where the accused has lived with the complainant for some time without the



knowledge of her parents and with full knowledge that the complainant is a schoolgirl. See *S* v *Dandiro* HH-183-87 (not reported);

(x) where there is a special relationship between the accused and the complainant, such as that between teacher and pupil whereby the accused stands *in loco parentis* to the complainant. See *S* v *Tshuma* S-86-84 (not reported) and *S* v *M* 1975 (1) SA 424 (A) at 425A; see also *S* v *Mupfudza* 1982 (1) ZLR 271 at 282G (*nganga*/patient relationship.''

He went on at the botton of p 3 to say:

``In *Dziko*'s case *supra* (HB-47-82), the accused, a fairly young first offender (his age is not given), was convicted of having sexual intercourse with a girl found to be just over 12 years of age. In sentencing the accused to 3 years' imprisonment with labour, the regional magistrate said:

> `Now, in assessing your moral blameworthiness, I find it to be of a high degree, though I find that the child consented, that cannot be given undue weight, because the law must protect wayward children like the complainant from themselves. To have sexual relations with a child of this age can have a marked adverse effect on her psychologically for life, and to have availed yourself of this child, in the asence of her parents, was indeed despicable on your part.'

In reviewing the sentence of 3 years' imprisonment with labour, G*ubbay* J (as he then was) found the regional magistrate's observations `entirely apposite' and had no quarrel with the term of the prison sentence imposed but, because the accused was a fairly young first offender, he suspended one year of the sentence.''

Finally, at p 4-5, the learned judge concluded by saying:

``Although, in mitigation, the accused said that he had paid the complainant's father the sum of $30 and that there

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was an arrangement that once he had paid the sum of $1 500 demanded by the complainant's father as lobola for the complainant, he would collect the complainant as his wife, there is obviously no certainty that his arrangement will materialise. Furthermore, there is nothing to indicate that the unfortunate complainant has had any say in her future fate, let alone that she has agreed to it and, therefore, little weight can be attached to this factor as one in mitigation of sentence. In any event, it is clear that, in the cirumstances of this case, this factor is not one which could be relied upon to keep the accused out of gaol for the brief moments of selfish pleasure which he enjoyed to satisfy his lustful desires by inducing a 13 year old girl to engage in sexual intercourse with him.

If I had been seized with this case, then, having regard to the aggravating features, namely, that the complainant was only 13 years of age and that the accused was well over double her age, that there was nothing to indicate that the complainant was other than an innocent virgin when she first had sexual intercourse with the accused, that the complainant was impregnated by the accused and that sexual intercourse between the parties took place on three occasions, I would have sentence the accused to 31/2 years' imprisonment with labour and suspended one year for five years on condition that the accused did not, within that period, commit any offence involving an assault of a sexual nature for which he was sentenced to imprisonment without the option of a fine.

In the premises, I am unable to confirm the sentence of a fine imposed by the magistrate and, therefore, I decline to certify the proceedings in this case as being in accordance with real and substantial justice.''

The disparity in age between the complainant and the accused has always



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been acknowledged as a factor, either of mitigation or aggravation, depending on the age of the accused and how great the difference is: see *S* v *Five* l988 (2) ZLR 168 (S).

The approach that should be adopted was very lucidly expressed by KORSAH J, as he then was, in *S* v *Chuma* l983 (2) ZLR 372 (H). At 374B-E the learned judge said:

``I think in dealing with cases of this nature it is well to remember that the intention of the legislature in creating this offence is to give statutory protection to young girls even against the consequences of their actual consent. The proclamations of love by the accused from the dock may or may not have been genuine, but they should have been weighed against his conduct when the complainant's father reported to the uncle of the accused that his nephew had put the complainant in the family way. And, in any case, having regard to the difference in their ages, the love professed by the accused for the complainant is unhealthy, and cannot be considered as a mitigatory factor. It is precisely because of such behaviour by older men towards young girls under the age of l6 that the legislature drew a ring of protection around that age group of girls. To accept love as a mitigatory factor, when the disparity in ages is so great and the complainant, to the knowledge of the accused, not yet 14, is to break that ring of protection imposed by the legislature.

I am unable to accept the proposition that the frequency with which sexual intercourse takes place between a girl and a boy is indicative of the genuineness of the affection of the boy for the girl. I think, when the difference in ages is so marked, such frequency can only be explained by the lasciviousness of the boy.''

The learned judge went on, at 375B-D, to say:

``Generally speaking, the younger the complainant is, the more seriously will the offence be viewed, and when the age of the complainant is within the knowledge of the accused then the accused has deliberately set the law at defiance and is not deserving of the leniency accorded him by the trial court.

I am in total agreement with the sentiments expressed by DUMBUTSJENA J (as he then was) in *S* v *Julius supra* quoted by the learned trial magistrate, but in view of the utter disregard for the age of the complainant and her educational prospects - the complainant was a pupil in Form 1 - a short custodial punishment would have met the justice of the case. In my judgment, if the courts are to give their blessing to paltry fines of $130 for this sort of

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offence, men with money in their pockets will not be sufficiently deterred from seducing young girls; and the protection accorded them by the law will become a sham.''

The fact that the accused is in love with the complainant and intends to marry her is a mitigating factor but does not condone the offence. In *A-G* v *Mutema* l984 (l) ZLR 123 (S), where a teacher had sexual intercourse with a 14 year old pupil at the school where he was teaching, the Supreme Court refused to interfere with a sentence of 9 months' imprisonment, of which 6 months' imprisonment was suspended. The Attorney-General appealed against the sentence imposed by the magistrate. The Supreme Court agreed with the submission by State counsel that Mutema had abused his position of trust and had exploited the inexperience, immaturity and dependence of a girl who was a pupil at the school. It held that where a teacher or other man abuses



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his superior age, experience or position of special responsibility, he deserved a more severe sentence than the 9 months' imprisonment that had been imposed. However, as Mutema had the genuine intention of marrying the girl with her agreement and with the consent of her parents, the sentence that had been imposed was appropriate.

In *S v Rwodzi* S-12-96, which also involved a contravention of s 3(a) of the Criminal Law Amendment Act, the Supreme Court, on appeal, set aside a sentence of 8 months' imprisonment (3 suspended) and substituted a fine of $500 and a wholly suspended sentence of 3 months' imprisonment. Although the complainant produced a birth certificate which indicated that she was almost 13 years old, the court was not satisfied that she was as young as that. E*brahim* JA said that the appellant was a young man, aged 23 years, who was attending college and therefore should not be treated in the same way as a fully mature adult. Also, he took into account that the complainant was a willing party and there was no question of her being coerced. The two were ``lovers''. He also noted that actual intercourse was not adequately proved but the court did not interfere with the conviction.

Finally, I would refer to *S* v *Mutowo* HH-178-96 where GILLESPIE J dealt, on review, with the case of a 27 year old widower who had had sexual intercourse with a 15 year old girl. He considered a number of cases, including *S* v *Chiwara* HB-103-91 and *S* v *Mudambi* S-156-95 where custodial sentences were considered appropriate and that of *S* v *Mlambo* HH-100-92 where a custodial sentence was set aside and a fine substituted. He finally concluded that the custodial sentence that had been imposed by the magistrate was excessive and substituted a fine of $300. The basis of his conclusion was that the magistrate had not fully investigated the circumstances in order to ascertain any aggravating or mitigating factors and therefore the accused had to be given the benefit of the doubt.

In these three cases, I concur with the views of the regional magistrate. In *Phiri*'s case, particularly, the moral blameworthiness of the accused is very great. The sentences imposed are far too lenient. As BLACKIE J said in *S* v *Keyser* HB-98-93:

``in more cases than not, imprisonment is imposed on those found guilty of contravening this section of the

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statute."

Where there is a substantial age difference, where the girl is less than 14 years old or where there is a breach of trust, there must be strong mitigating factors before it can be found that a fine is appropriate. I am unable to certify the proceedings in any of these three matters as being in accordance with real and substantial justice.

**BARTLETT J** agrees.

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## HOOPER & ANOR *v* BRISTOW 1998 (1) ZLR 279 (SC)

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

Gubbay CJ, McNally JA & Sandura AJA

Civil appeal

2 & 12 March 1998 Judgment No. S-27-98

### Flynote

Contract - termination - cancellation - subsequent attempt by party cancelling the contract to revive it - effect - new contract formed - liability of other party for damages arising from circumstances known to both at time of cancellation

### Headnote

The appellants sold an aeroplane to the respondent. At the time it was sold, it had just had a minor accident, resulting in damage which had been repaired. This repair resulted in the suspension of the aircraft's certificate of airworthiness until a flight test could be carried out. The sellers were, at the time of the sale, unaware that the suspension of the certificate would be anything other than a temporary problem. However, not only did it take a considerable time to arrange for the certificate to be reissued, but the flight test showed a degraded climb performance, which resulted in the aeroplane needing a new or at least a modified propeller. The sellers offered, in the light of all these problems, to cancel the sale and return the sale price plus interest. The respondent's lawyers wrote, stating that the respondent was cancelling the sale and required the repayment of the sale price plus interest.

When the respondent, who still needed an aircraft, failed to find one suitable for his needs, he attempted to reinstate the contract. He then claimed damages for various items, including the cost of a new propeller and the hire of other aircraft to meet his needs until the first one was serviceable.

*Held*, that the respondent had a right to cancel the original contract. Having done so, that was the end of the contract. By the time he decided to reinstate it, he was aware of all the problems relating to the propeller and the certificate of airworthiness. There was therefore no express or implied warranty that the aeroplane would be ready for the tasks he had in mind for it and he could not be said to have suffered any damages.

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Cases cited:

*Custom Credit Corp (Pty) Ltd* v *Shembe* 1972 (3) SA 462 (A)

*Flame Lily Invstm Co (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 (G)

*Hammond & Co* v *Bussey* (1887) 20 QBD 79

*Phame (Pty) Ltd* v *Paizes* 1973 (3) SA 397 (A)

## Case Information

*J C Andersen SC*, for the appellants

*A P de Bourbon SC*, for the respondent

## Judgment

**McNALLY JA:** Messrs Hooper and Barton (``the sellers'') owned an aircraft,



McNALLY JA

a Cessna 150, which they had purchased after it had had a fairly minor accident. They carried out repairs to it. Then they sold it to Mr Bristow (``Bristow'') (or was it his company?) in April 1991, for $110 000.

When an aircraft has an accident in Zimbabwe, it immediately becomes governed by the provisions of Part IX of the Aviation (Air Navigation) Regulations, 1988, contained in SI 79 of 1988. An accident such as this one, where the aircraft crash-landed immediately after take-off, has to be reported to the Director of Civil Aviation (``the DCA''). He may require an investigation, though in this case it seems he did not (at least initially). In terms of s 10(9) of the Regulations the aircraft's certificate of airworthiness:

> ``shall cease to be in force -
>
> "(a) if the aircraft or any part of it ... is overhauled, repaired, modified, removed or replaced otherwise than in a manner and with material of a type approved by the Director either generally or in relation to a class of aircraft or to the particular aircraft."

As I read that section, the certificate of airworthiness is not automatically suspended as soon as there is an accident. In the present case it appears that the repairs were carried out, presumably ``in a manner and with material of a type approved by the Director'', and therefore the certificate of airworthiness which was issued in May 1989, valid for three years, remained valid, and would, other things being equal, have expired in May 1992.

Thus up until the date of the sale, which was 9 April 1991, the position was that the aircraft had a valid certificate of airworthiness not due to expire for another thirteen months. However, on the morning of the date of the sale to Bristow, the sellers had learned from another person, who had been interested in buying the aircraft, that he was no longer interested because the aircraft had been ``grounded''. This word does not appear in the Regulations, but it means in effect that

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the certificate of airworthiness is suspended and thus that the aircraft may not be flown.

Again we have no evidence on the point, but the probability is that the DCA had ``grounded'' the aircraft in terms of s 10(9)(b) of the Regulations, which provides that the certificate of airworthiness shall cease to be in force:

> ``for the duration of any inspection of the aircraft or any such equipment as is mentioned in paragraph (a), being an inspection required by the Director to be made for the purpose of ascertaining whether the aircraft remains airworthy, and for the issue of a certificate in terms of subsection (8) of section 12.''

And s 12(2) of the Regulations makes it clear that:

> ``No aircraft shall fly unless any ... repair ... in terms of paragraph (b) of subsection (9) of section 10 of any part of the aircraft ... as is necessary for its airworthiness has been carried out in accordance with this section.''

Mr Bristow denied that he was told about this grounding although he admitted he knew about the accident. But the learned judge believed the



sellers when they said that they had told him. They themselves did not understand why it was grounded, and believed that it was a mere technical bureaucratic hitch, but because it was grounded they were unable to take Bristow up for a test flight. He bought the aircraft nonetheless.

The learned judge did not explain why he disbelieved Bristow on this point despite his final decision in favour of Bristow. Bristow's letter of 6 May 1991 shows he was aware of the grounding by that date, but is not conclusive as to his knowledge on 9 April 1991. Nor was cross-examination of Bristow adequately addressed to this point. In fact, one of the major difficulties in resolving this case has been the curious discrepancies between the pleadings, the correspondence and the evidence.

A reading of the evidence suggests that the learned judge had every reason to prefer the evidence of the sellers. Bristow says that he wanted to be taken up in the aircraft but Hooper was not qualified to take a passenger and Barton had left by then. Yet Hooper and Barton both say that Barton was present, not in the morning but in the afternoon. He could have flown Bristow but for the grounding. They explained this to him, and he contented himself with sitting in the cockpit while Barton started up the engine and revved it. Barton gives a clear and graphic description of all this. He explained that he had come out specifically to Charles Prince Airport to take Bristow up for a flight, but had been told when he got there by a Mr Churcher that he could not do so as long as the aircraft was grounded. Mr Churcher was not available to give evidence.

It seems clear, therefore, that until the very morning of the sale, the sellers had been satisfied that the repairs had been carried out to the satisfaction of the DCA, that the certificate of airworthiness remained in force, and that no further ``paperwork'' was or would be required. Barton, it should be said, had been a qualified pilot since 1973; was approved as a DCA examiner; and was approved to carry out certificate of airworthiness flight tests. He testified that

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the forced landing had been due to an electrical fault which had interfered with the flaps, thus preventing successful take-off. There had been minor damage to the mounting on top of the front wheel.

The sellers did not see the grounding as anything more than a temporary problem. But it turned out to be a great deal more than that. On 11 June 1991, the Acting DCA advised the sellers that the certificate of airworthiness was no longer valid. On 22 November 1991, the Acting DCA advised that the aircraft had failed the flight test for the third time and needed a new propeller. Only on 4 June 1992 was a certificate of airworthiness obtained. All these difficulties were due to the propeller, which had in no way been affected by the crash, but which had apparently deteriorated over the years so that it could no longer sustain the cruise rate and the rate of climb required for test purposes. In other words, had there not been a crash and a subsequent



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requirement for a test flight, this weakness in the propeller would probably have gone unnoticed until the expiry of the certificate of airworthiness in May 1992 and the subsequent flight test for a new certificate of airworthiness.

As a result of these difficulties litigation ensued. Bristow sued the sellers for damages, electing to proceed with the sale and take delivery of the aircraft.

The claim was based on the breach of three express terms of the contract, namely:

1. that the aircraft was serviceable;
2. that the aircraft was ready for immediate use; and
3. that the aircraft had a valid and current certificate of airworthiness.

Alternatively, it was alleged that the sellers falsely or negligently misrepresented these facts to the purchaser in order to induce him to enter into the contract.

The defence to these allegations was twofold: First, on the merits, it was:

1. conceded that it was a term of the agreement that the aircraft was serviceable;
2. denied that it was a term that it was ready for immediate use; and
3. admitted only that it was a term of the agreement that it qualified for a certificate of airworthiness.

It was averred that the purchaser knew at the time of purchase that it had been ``grounded'' and its certificate of airworthiness withdrawn (the word ``suspended'' rather than ``withdrawn'' is used later in the plea). It was further averred that despite this the aircraft was serviceable.

It seems to me, without further ado, that that defence was doomed to failure. ``Serviceable'', according to the Concise Oxford Dictionary, means ``useful or usable; able to render service''. By definition, if it was grounded, it was not able to render service. But even if one interprets the

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expression to mean ``able to render service once the pure formality of reinstating the certificate of airworthiness has been completed,'' the aircraft was not serviceable because the reinstatement of the certificate of airworthiness was, as matters turned out, not a mere formality. In fact, a new certificate of airworthiness had to be obtained.

It follows also that the third term of the agreement, even in the modified form in which it was admitted, was not complied with. The aircraft did not qualify for a certificate of airworthiness. The propeller required modification or replacement.

I agree, therefore, with the conclusion of the learned judge that there was a breach of a material term of the agreement. I agree further that it was an innocent breach. The sellers genuinely believed that the problem was no more than a bureaucratic delay. No-one knew about the propeller problem,



McNALLY JA

and indeed the DCA could not have required the flight test because of the propeller. Nonetheless, it was a material breach.

The sellers themselves very properly conceded, in a letter which was undated but probably sent on 20 May 1991, that they had innocently misled Bristow. They offered to cancel the sale and refund the money with interest at bank lending rates up to 31 May 1991. I will deal with this point in its context later, but I mention it now to indicate that the sellers were honestly acknowledging that they had purported to sell a serviceable aircraft and had not done so.

However, at the last minute, on the Tuesday before the trial on the Wednesday, the sellers lodged an application to amend their plea, which was granted after objection.

The effect of the amendment was that the sellers sought to rely on the fact that Bristow, through his legal advisers, had cancelled the original agreement on 12 June 1991 (the date was not given in the amendment, but it appears in the correspondence). The agreement, so it was alleged, was subsequently tacitly reinstated at a time when Bristow was fully aware, if he had not been earlier, that:

1. the aircraft was not serviceable;

2. the aircraft was not ready for immediate use;

3. the aircraft did not have a valid certificate of airworthiness.

The learned judge rejected this argument. He said:

> ``When all the actions of the parties and the circumstances they operated in are taken into account, the correct interpretation must be that the parties made threats and counter-threats to cancel the original contract, but in the end they decided to continue with it.''

I find it difficult to accept this reasoning. On 12 June 1991, after receiving the offer (mentioned earlier) from the sellers to cancel the contract and repay the price plus interest because of the

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problems that had arisen, Bristow's lawyers wrote:

> ``In these circumstances, far from you offering to cancel the sale, it is our client's prerogative to do so, and our instructions are to the effect that the sale is hereby cancelled and we write you (*sic*) to effect payment of the refund of the purchase price of $110 000 to ourselves together with interest thereon at the rate of $80 per day from 9 April 1991 to the date on which payment is received by us.''

That letter is an unequivocal cancellation. It was not a mere threat. It did not require acceptance. Mr Bristow admitted in evidence that the cancellation had been effected on his instructions.

But meanwhile, behind the scenes, Bristow was having second thoughts. He could not find another aircraft. He telephoned Mr Hooper and said he still wanted the aircraft.

By that stage, it was known that there was a problem with the propeller.

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McNALLY JA

There had been a successful test flight with a borrowed propeller. Nonetheless, on 8 July 1991, Bristow's lawyers wrote again:

> ``In the circumstances, the demand made of your client in our letter of 12 June 1991 is repeated and unless we he ar satisfactorily from you within the next seven days our instructions are to issue proceedings.''

The demand referred to was repayment of the purchase price plus interest, consequent upon cancellation.

It is an inescapable conclusion that the original contract was cancelled. The sellers did not dispute that Bristow was entitled to cancel. Whether, had matters rested there, he might have been entitled to damages, is a matter we need not consider. Without proof of fraud or negligence my *prima facie* view would be that ``money back plus interest'' would have been the limit of Bristow's remedy. Compare *Phame (Pty) Ltd* v *Paizes* 1973 (3) SA 397 (A).

But it seems that despite the cancellation, and in the light of all that he now knew about the problems with the aircraft and in particular the propeller, Bristow wished nonetheless to reinstate the contract. And so he did.

I do not think, with respect, that the legal consequences of that cancellation and subsequent reinstatement of the contract were properly appreciated by the learned judge *a quo*.

It is clear that a party to a contract has an election, in general, to cancel or to proceed and claim damages. Bristow elected to cancel, and did so. That was the end of the contract. See *Custom Credit Corp (Pty) Ltd* v *Shembe* 1972 (3) SA 462 (A) at 469F-G; and *Flame Lily Invstm Co (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 (G) at 384F.

However, some time after the cancellation on 12 June 1991, and presumably after the reaffirmation of the cancellation on 8 July 1991, Bristow decided, no doubt because, in spite of the problems, it remained his best alternative, to adhere to the contract. But then it was a new contract. By that time, he knew that the aircraft was not serviceable; that it could not be flown at

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once; and that it needed a new or modified propeller before it could obtain a certificate of airworthiness. He decided, with that knowledge, to buy it. He made various suggestions by way of compromise, but when difficulties arose he decided to go ahead and buy a new propeller himself which, after modification, enabled the aircraft to obtain a certificate of airworthiness.

I cannot see, in these circumstances, that he was entitled to any damages. He had been told, by the sellers, that a minor modification to the propeller would probably be enough to remedy the defect. For some reason, he did not try that remedy. He chose to buy a new propeller, which itself had to be modified. But once he decided to go ahead with the purchase in the knowledge of the defective propeller, and without offering any lower price, he took upon himself the risk of spending whatever was necessary to put the propeller right.



McNALLY JA

The same must be true of the cost of obtaining the certificate of airworthiness. He knew, when he decided to reinstate the contract, that he would have to obtain a certificate of airworthiness. He accepted that obligation. He took delivery knowing there was no certificate of airworthiness. He cannot be heard to say: ``I went ahead with the contract on condition that the sellers did this and that''. The fact is they never agreed to any conditions.

Finally, one looks at the so-called special or consequential damages. Bristow claimed considerable sums for the expense of hiring aircraft and helicopters to do the tasks that the aircraft was intended to perform during the dry season of 1991. But the answer to these claims is that when he decided to reinstate the contract he did so in the knowledge that the aircraft would not be operational until the propeller problem was solved and the certificate of airworthiness obtained. There was therefore at that stage no express or implied warranty that the aircraft would be able to perform those tasks in the 1991 dry season, or indeed in the 1992 dry season. Or, to ask the question posed by LORD JUSTICE FRY in *Hammond & Co* v *Bussey* (1887) 20 QBD 79 at 100, ``what, at the time of making the contract, was the common knowledge of both parties?''. The answer must be: ``they knew of all the difficulties''. There was no room for special damages.

In my view, Bristow suffered no damages, and should not have succeeded in his claim. This conclusion makes it unnecessary to decide the other issues, namely:

1. whether it was indeed Bristow or one of his companies who bought the aircraft;

2. whether the *quantum* of the damages was proved;

3. whether the damages were suffered by him or by another one of his companies, or several of them.

In the circumstances, the appeal succeeds with costs. The order of the court *a quo* is amended to read:

> ``The plaintiff's claim is dismissed with costs.''

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**GUBBAY CJ:** I agree.

**SANDURA AJA:** I agree.

*Kantor & Immerman*, appellants' legal practitioners

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

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## FEIGENBAUM & ANOR *v* GERMANIS NO & ORS 1998 (1) ZLR 286 (HC)

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

Malaba J

Civil application

2 February & 20 March 1998 Judgment No. HB-18-98

### Flynote

Company - judicial management - purpose of - judicial manager - whether term includes provisional judicial manager - provisional order of judicial management - part of order giving power to judicial managers to dispose of assets and sell company - whether provisional judicial managers thereby empowered to do so - court's discretion to authorise provisional judicial manager to sell assets - limits to discretion - no power to authorise sale of entire business

### Headnote

The first applicant was a director of the second applicant, a holding company which controlled nine other companies. Because of financial difficulties experienced, a provisional order for liquidation was made against the companies. The first applicant subsequently applied for the companies to be placed under judicial management and a rule *nisi* was issued. One paragraph of the rule directed the Master to appoint the respondents as judicial managers, while another empowered them to dispose of the non-core assets and to offer the whole business for sale as a going concern, if an offer acceptable to the majority of the creditors was made.

The return day came and went and the rule *nisi* was postponed several times. Without the rule being confirmed or discharged, one of the respondents decided to sell the assets of the companies. Purportedly acting on behalf of the others, he had notices put in the press. An offer to purchase the entire business and assets was received, which the respondents found attractive. The first applicant, however, applied for a rule *nisi* interdicting the respondents from selling the companies and their assets and for a variation of the original rule. It was argued that as provisional judicial managers, the respondents were not empowered to dispose of the assets; and in any event, even if the court could authorise the sale or other disposition of the assets, it could not authorise the sale of the entire business, as this would defeat the object of judicial management as opposed to liquidation.

*Held*, that judicial management is an extraordinary procedure made available to a company by the court in special circumstances and for statutorily prescribed purposes. It is only adopted

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when the court is satisfied that there is a reasonable possibility that, if placed under judicial management, a company which is unable to pay its debts will be able to do so in full, meet its obligations and become a successful concern.

*Held*, further, that the powers contained in the terms of a rule *nisi* which forms the first part of a provisional management order are *prima facie* intended to be given to a final judicial manager. It was clear that the powers contained in the rule *nisi* in this case were those to be conferred on a final judicial manager, not on a provisional judicial manager.



MALABA J

*Held*, further, that the object of placing a company under judicial management rather than placing it in liquidation is to enable the company's business to be carried on, not for the purpose of destroying the company. While it may be necessary, to achieve that object, for some of the assets to be disposed of, it would defeat the object to dispose of the entire business, even if the business may be more easily disposed of as a company under judicial management than one in liquidation. Consequently, while the court may authorise the sale or disposal of the company's assets, it may only do so if that enables the judicial manager to carry on the business for the achievement of the purposes of judicial management.

*Held*, further, that the rule *nisi* should not have been granted in the terms it was, empowering the judicial managers to dispose of the entire business.

*Held*, further, that as joint provisional judicial managers, the respondents were obliged to act jointly. The decision to sell or dispose of the company or its assets was a nullity because it was not a joint decision.

Cases referred to:

*S Cohen Ltd* v *Johnson & Johnson* 1970 (4) SA 332 (SWA)

*Cooper* v *The Master & Ors* 1996 (1) SA 962 (N)

In re *Delicatessen Ltd* 1939 OPD 220

*Irvin & Johnson Ltd* v *Oelofse Fisheries Ltd* 1954 (1) SA 231 (E)

Ex p *Joubert NO* 1970 (3) SA 511 (T)

Ex p *Judicial Mananger of Bloemfontein Milk Bars (Pty) Ltd* 1943 OPD 5

Ex p *Judicial Manager of Border & Allen (Prop) Ltd* 1942 OPD 182

*Marais* v *Leighwood Hospitals (Pty) Ltd* 1950 (3) SA 567 (C)

*Millman NO* v *Swartland Huis Meubeleerders (Edms) Bpk* 1971 (1) SA 741 (C)

*Mutare City Council* v *Mawoyo* 1995 (1) ZLR 258 (H)

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*Powell* v *Leach* [1997] 4 All SA 106 (W)

*Preston & Anor* v *Hivu Ests (Pvt) Ltd & Anor* HH-183-97

*Silverman* v *Doornhoek Mines Ltd* 1935 TPD 349

*Strydom* v *Roodewal Mgmt Cttee & Anor* 1958 (1) SA 272 (O)

Ex p *Vermaak* 1964 (3) SA 175 (O)

*Western Bank* v *Laurie Fassati Construction (Pty) Ltd* 1974 (4) SA 607 (E)

*Wire Industries Steel Products* v *Surtees & Heath NNO* 1953 (2) SA 531 (A)

Legislation considered:

Companies Act [*Chapter 24:03*], ss 301(1)(c), 306(m), 307(1)

## Case Information

*W Ncube*, for the applicants

*D P Carter*, for the respondents

## Judgment

**MALABA J:** On 2 February 1998, I delivered an *ex tempore* judgment in which I confirmed a provisional order granted on 16 January 1998, interdicting the respondents, jointly and severally from selling or disposing of the undertaking or the whole or part of the assets of Tirzah Investments (Pvt) Ltd and eight subsidiary companies (under judicial management) without the leave of the court. The final order also directed that para 8 of the provisional order made on 4 October 1996 be varied by its deletion and substitution of a direction to the respondents, jointly and severally, not to sell or dispose of





the business and assets of the applicant companies without the leave of the court. The costs of the application were ordered to be costs in the judicial management.

On 5 February, the respondents' legal practitioners wrote to the Assistant Registrar asking that I reduce the reasons for the judgment delivered on 2 February to writing. I proceed to do so.

The facts of the case as I could glean them from the papers are these. Tirzah Investments (Pvt) Ltd is a holding company in a group of nine companies comprising four trading companies, four property investment companies and one management company. The biggest trading company in the group is G & D Shoes (Pvt) Ltd, involved in the business of manufacturing and selling shoes.

Mr Feigenbaum and other members of his family are the shareholders in the group of companies. He was one of the directors of the companies until 17 January 1996 when they

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were divested of the powers of management of the companies by a provisional order placing the companies under liquidation. The provisional order of liquidation was granted on an application made by the shareholders on the ground that the companies were unable to pay their debts.

Whilst the companies were under provisional liquidation, Mr Feigenbaum, with the authority of other shareholders and supported by the major creditors, made an application to court for the companies to be placed under judicial management. A provisional order of judicial management was granted on the application on 4 October 1996. It contained a rule *nisi* calling upon interested parties to show cause, if any, on the return day, why a final order of judicial management should not be issued in the terms that were then set out.

At the centre of the dispute between the parties are the terms of para 8 of the rule *nisi* which provides:

> ``That the judicial managers be empowered to dispose of non-core assets at best and to offer the entire business for sale as an `going concern' basis if an offer acceptable to the majority of the creditors is made.''

In para 11 the provisional order directed the Master to appoint the respondents as joint provisional judicial managers of the companies. It is not necessary for the purposes of this judgment to reproduce the other terms of the provisional order of judicial management.

The return day was fixed as 15 November 1996. It was subsequently postponed and the rule *nisi* extended on numerous occasions at the request of the shareholders and one of the creditors. No complaints were raised by the other interested parties. Consequently, the companies remained under provisional judicial management for 26 months. Meanwhile, the respondents, probably fatigued by the delay in the confirmation or discharge of the rule





*nisi*, decided jointly or severally, to sell the ``entire business and assets'' of the companies. They relied on their own interpretation of the terms of para 8 of the provisional order of judicial management for the authority to sell or dispose of the entire business and assets of the companies.

On 8 January 1998, notices emanating from the office of the respondents appeared in the national newspapers advising the public that the business and assets of the companies were for sale and inviting interested parties to make offers to purchase them. The notices gave the deadline for the finalisation of the agreement of sale and purchase as 19 January 1998. Members of the public were advised that the purchaser was required on that day to pay the full purchase price. The purchase price could be paid in cash or by the production of a bank certified letter of credit for the movable assets and the production of a bank guarantee for the immovable assets. The offers to purchase were not acceptable later than 12pm on 14 January.

Each of the notices which further appeared in the national newspapers on 9, 10, 11 and 12 January said it was inserted by the ``Co-Judicial Managers''. On 12 January, Mr Feigenbaum saw the notice in one of the newspapers. On 16 January he made an urgent application for a rule *nisi* calling upon interested parties to show cause on the return day why the respondents

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should not be interdicted from selling or disposing of the entire business and assets of the companies. The rule *nisi* also called upon interested parties to show cause, if any, why the terms of the provisional order granted on 4 October 1996 should not be varied by the deletion of para 8 thereof and the substitution of the direction to the respondents not to sell or dispose of the business and assets of the companies without the leave of the court.

Mr Feigenbaum deposed to the founding affidavit in which he said he had the authority of the other shareholders to make the application. He averred that the respondents as provisional judicial managers had no power in the Companies Act [*Chapter 24:03*] to sell or dispose of the entire business and assets of the companies under their management. He said para 8 of the provisional order granted on 4 October 1996 did not confer upon the respondents such a power.

He averred that the shareholders had not been told that the respondents had decided to sell or dispose of all the business and assets of the companies. A meeting of creditors had not been convened by the respondents at which the offers made by members of the public would have been considered.

Mr Feigenbaum charged that the decision to invite the public to make offers to purchase the business and assets of the companies was not a joint decision by the three respondents. He said it was a decision made by the second respondent on his own. He said the first respondent had been incapacitated by poor health from performing the functions of a provisional



MALABA J

judicial manager for the later half of the period the companies were under judicial management. The first respondent had instead acted through a representative, Mr Kevin Gillet. He said the third respondent had not been involved in the management of the companies.

An interim order interdicting the respondents from selling or disposing of the business and assets of the companies pending the confirmation or discharge of the rule *nisi* was granted. On 22 January 1998, the respondents filed a notice of opposition. The second respondent deposed to the opposing affidavit in which he said he had the authority of the other respondents to oppose the application by Mr Feigenbaum.

He said the court gave them the power through para 8 of the provisional order granted on 4 October 1996 to sell or dispose of the entire business and assets of the companies. Shareholders, including Mr Feigenbaum, were aware that it had been the intention of the respondents to dispose of the companies as going concerns under judicial management. He said it was advantageous to sell or dispose of the companies as going concerns under judicial management than to do so whilst they were under liquidation. The respondents had been looking for buyers of the companies for a long time but without success.

In that regard, they had written letters to potential buyers inviting them to visit the factories and look at the assets. They had then inserted the notices in the national newspapers.

Of all the offers they received, one made by Native Investments Africa (Group) (Pvt) Ltd was

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found by them attractive. The company offered to purchase the entire business and assets of the companies excluding book debts for $30 million. The offer was due to expire on 26 January 1998.

Second respondent went on to say it was in the interests of creditors that the business and assets of the companies be sold to Native Investments Africa (Group) (Pvt) Ltd. He said in the event the court found that the respondents had no power under para 8 of the provisional order granted on 4 October 1996, he was now applying to court in terms of s 307(1) of the Companies Act [*Chapter 24:03*] (the Act) for leave to be granted to them to sell the business and assets of the companies to Native Investments Africa (Group) (Pvt) Ltd.

He did not deny that the first respondent had not performed his functions as a joint provisional judicial manager for a long time because of being incapacitated by poor health. He also did not deny the allegation that the third respondent was not involved in the management of the affairs of the companies. In para 20.2 of the opposing affidavit, the second respondent said:

> ``Although Mr Gregory Germanis has been incapacitated he has been represented at all



> times by Mr Kevin Gillet his duly authorised representative and the obligations and duties of the respondents have been carried out jointly by myself and Mr Gillet and I deny therefore that I have been in control of the companies".

I now turn to consider the issues.

The first question for determination is whether or not para 8 of the provisional order of judicial management granted on 4 October 1996 gave the respondents the power to sell or dispose of the entire business and assets of the companies. The observation made by *Mr Ncube* is that para 8 is contained in a rule *nisi* calling upon interested parties to show cause on the return day why the proposed powers should not be given to the ``judicial managers".

Paragraph 8 did not say that the power was being given to the joint provisional judicial managers. In other words, absent were terms which made para 8 of the rule *nisi* operate as a provisional order conferring the power to sell or dispose of the entire business and assets of the companies on the respondents.

A provisional judicial management order to be granted by a court in terms of s 301 of the Act must have two parts. The first part is a rule *nisi* which relates to powers intended to be conferred on a final judicial manager in terms of s 306 of the Act which deals with the duties of a final judicial manager. Section 305 of the Act prescribes what the court should do on the return day fixed in the provisional judicial management order. That section does not enjoin the court to confirm the provisional judicial management order.

Section 305 of the Act provides, instead, that the court may grant a final judicial management order if it appears that there is a reasonable probability that the company concerned, if placed under judicial management will be enabled to become a successful concern. That, in my view, means that the terms of the final judicial management order prescribed in s 306 must be contained in the rule *nisi*, otherwise there would be no final judicial management order to grant

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on the return day.

The powers contained in the terms set out in the rule *nisi* which forms the first part of the provisional judicial management order are *prima facie* intended to be given to a final judicial manager.

The second part of the provisional judicial management order to be granted by the court in terms of s 301 of the Act relates to the directions which the court addresses to the provisional judicial managers and other parties such as directors who have to be divested of their powers of management and to creditors who may be contemplating executing writs, summonses and other processes against the company.

A reading of s 301(1)(b) and (c) leave me in no doubt that the directions contemplated by the legislature must be contained in statements that clearly and positively confer the power on the provisional judicial manager. The



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language used must not permit of ambiguity as to whether or not the person being directed to perform the acts forming the subject matter of the direction is the provisional judicial manager.

*Mr Ncube*'s argument was that the wording of para 8, the nature of the power purportedly conferred, and its inclusion in the rule *nisi* formulation, all show that the power therein embodied was not given to the respondents. *Mr Carter* could advance hardly any convincing argument to the contrary because of the absence of terms in para 8 clearly and positively empowering the respondents to sell the business and assets of the companies. As an example, one would expect words to the following effect: ``the provisional judicial managers are hereby given the power to sell or dispose of redundant or unproductive assets to raise working capital''.

The use of the words ``judicial manager'' in the terms of a paragraph falling within the part containing the rule *nisi*, may in some circumstances, have the effect of making those terms operate as a direction to a provisional judicial manager. The reason is that the definition of judicial manager in s 2 of the Act ``includes a provisional judicial manager and a final judicial manager.'' The expression ``judicial managers'' was used in para 8 of the provisional judicial management order granted on 4 October 1996. Must it therefore not follow from the use of the expression, read with its enlarged meaning in s 2 of the Act, that the power contained in para 8 was conferred upon the respondents as provisional judicial managers? The syllogism is very attractive but misleading.

For ``judicial manager'' as used in a paragraph contained in a rule *nisi* to include provisional judicial managers, the subject matter of the paragraph must relate to or arise from a subject matter dealt with in a section of the statute in which the expression ``judicial manager'' is used. The principle is that by deliberately excluding the expression from some sections of the Act the intention of the legislature is that the definition should not apply. In construction of statutes a deliberate change of expression is *prima facie* taken to import a change of intention.

Now, the sections of the Act devoted to the judicial management machinery may, in so far as

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the use of the words ``judicial managers'' is concerned, be divided into three categories. The first category comprises sections dealing with powers and duties given to liquidators of companies. They are incorporated into the judicial management machinery by s 313 of the Act. By incorporation, the powers and duties given to liquidators also apply to ``judicial managers''. The expression is further used in ss 315, 316(b), 317(5), 317(7), 317(8), 318 and 319.

If the power intended to be given to ``judicial managers'' in para 8 of the provisional judicial management order was related to or derived from one of



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the above mentioned sections in which the expression ``judicial manager'' is used, the respondents would have that power by application of the definition of ``judicial manager'' in s 2 of the Act.

The Companies Act 47 of 1951 and the Companies Act [*Chapter 190 of 1974*] which succeeded it used the expression ``judicial manager'' in all the sections devoted to the judicial management machinery. It was the Companies Amendment Act 6 of 1993 which introduced the present definition of ``judicial manager''. As a result, various sections of the Companies Act [*Chapter 190 of 1974*] (the predecessor to the present Act) were amended and the three categories created.

The second category comprises sections of the Act in which the words ``provisional judicial manager'' instead of ``judicial manager'' are used. These sections set out for example, how and when a ``provisional judicial manager'' should be appointed, what the provisional judicial management order should contain and what the duties of a ``provisional judicial manager'' are. In other words, the legislature deliberately focused attention to the provisional aspects of the procedure of judicial management. The expression ``judicial manager'' is not used in any of the sections of the Act in the second category.

The third category comprises sections of the Act in which the words ``final judicial manager'' are used. These sections prescribe how and when a ``final judicial manager'' is to be appointed, what the final judicial management order should contain and what the duties of a final judicial manager are. There is again no use of the expression ``judicial manager'' in the sections.

The meaning to be given to the expression ``judicial managers'' in para 8 of the rule *nisi* depends therefore upon the context in which it is used. Firstly, it is used in respect to powers and duties derived from sections of the Act that do not contain that expression. Secondly, selling or disposing of the entire business and assets of a company is not an act with provisional consequences. It is an absolute act. Thirdly, assuming for a moment that it was statutorily permissible to do so, the power to sell or dispose of the entire business and assets of a company would more probably be conferred upon a final judicial manager rather than on a provisional judicial manager.

I therefore agree with Mr *Ncube* that the nature of the power, the presence of para 8 in a rule *nisi* and the absence of a provision making that paragraph operate as a provisional order show that para 8 was not intended to confer the power to sell or dispose of the entire business and

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assets of the companies on the respondents. They did not therefore have the power under para 8 of the provisional order of judicial management granted on 4 October 1996 to sell or dispose of the entire business and assets of the companies.

The second point taken by Mr *Ncube* is that even if the expression ``judicial manager'' in para 8 is construed to include the respondents, the court had no



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power in the express provisions of the Companies Act to authorise the sale or disposal of the entire business and assets of the companies under judicial management. Mr *Carter* argued that the court had wide discretionary powers under s 307(1) of the Act to authorise the respondents to sell the entire business and assets of the companies.

Section 307(1) of the Act provides:

> ``A provisional judicial manager or final judicial manager shall not, without the leave of the court, sell or otherwise dispose of any of the company's assets except in the ordinary course of the company's business.''

Section 307(1) of the Act gives the court the power to authorise a provisional judicial manager or final judicial manager to sell or otherwise dispose of assets of a company under judicial management. The judicial power is not absolute and does not extend to the authorization of a sale or disposal by a provisional judicial manager or final judicial manager of the ``entire business and assets'' of a company under judicial management. The discretionary power given to the court in s 307(1) of the Act is limited to those instances or circumstances covered by the express provisions of the sections of the Act devoted to the judicial management machinery.

The court is restricted in the exercise of its discretion to authorise the sale or disposal of the company's assets when it is satisfied that such a transaction is reasonably necessary in the management of the affairs of the company for the achievement of the purposes of judicial management.

The legislature gave the court the power so that it could use it in its supervisory role to facilitate and direct the achievement of the purposes of judicial management by the provisional judicial manager or final judicial manager.

It is important to remember that s 307(1) was enacted in the part of the Act with sections devoted to the judicial management machinery. Judicial management is an extraordinary procedure made available to a company by the court in special circumstances and for statutorily prescribed purposes: *Silverman* v *Doornhoek Mines Ltd* 1935 TPD 349. The procedure is only adopted when the court is satisfied, on the facts contained in the application, that there is a reasonable probability that if placed under judicial management, the company which is unable to pay its debts will be able to pay its debts in full, meet its obligations and become a successful concern: *Preston & Anor* v *Hivu Estates (Pvt) Ltd & Anor* HH- 183-97 at pp 29-30.

To be able to achieve the statutorily prescribed purposes of judicial management, the provisional judicial manager or final judicial manager must carry on the business of the

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company. It is in that regard that s 307(1) of the Act does not make reference to the sale or disposal of the company's ``business''. It talks of the court granting leave to the provisional judicial



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manager or final judicial manager to sell or dispose of ``assets'' of the company. It was not in the contemplation of the legislature that the court would want to authorise a provisional judicial manager or final judicial manager to sell or otherwise dispose of the ``entire business'' of a company under judicial management.

Such authorisation would be contrary to the object of judicial management, which is that the provisional judicial manager or final judicial manager must carry on the business of the company so that it is able to pay its debts in full, meet its obligations and become a successful concern.

If the entire business and assets of a company under judicial management were to be sold or otherwise disposed of, there would be no business left to carry on, no assets to manage. The court would in effect be authorising the provisional judicial manager or final judicial manager to do the very acts of disabling the company from becoming a successful concern, the removal of which the statute declares to be his duty.

The court can authorise the sale or disposal of the company's assets only if that enables the provisional judicial manager or final judicial manager to carry on the business of the company for the achievement of the purposes of judicial management. The assets in respect to which leave may be granted for their sale or disposal to raise working capital are redundant or unproductive assets.

Selling the entire business and assets of the companies under judicial management destroys the companies. Authorisation of such an act amounts to abuse of the procedure of judicial management to achieve the purposes of liquidation. In *S Cohen Ltd* v *Johnson & Johnson* 1970 (4) SA 332 (SWA) at 336F-G MULLER J said:

> ``The purposes of a liquidation order are entirely different from those sought to be achieved by an order for judicial management. In the one case, the very object is to wind up the affairs of a company and effect its dissolution; in the other the object is just the opposite, namely, to avoid liquidation where there is a chance of the company surmounting its difficulties by proper management, namely, management by a person appointed as judicial manager to conduct the affairs of the company subject to the supervision of the court.
>
> There is accordingly a fundamental difference between the function and powers of a liquidator and those of a judicial manager and also material differences between the rights of creditors of a company in liquidation and those of a company under judicial management.''

It is worth mentioning again that s 307(1) does not appear in the part of the Act with sections devoted to the winding-up of companies. It must follow that the court has no general power outside the express provisions of the Act devoted to judicial management to authorise a provisional judicial manager or final judicial manager to do acts such as the selling or disposal of the entire business and assets of the companies. The acts are promotive of the purposes of

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liquidation but destructive of those of judicial management.



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The power granted by the legislature to the court in s 307(1) of the Act is not different in content or substance from the power exercisable by the court in terms of s 301(1)(c). The difference is in the timing of the exercise of the power. Under s 301(1)(c) the court can give a direction to a provisional judicial manager to sell assets of a company at the same time it grants the provisional judicial management order.

Section 307(1) was however intended to cover a situation where a provisional judicial manager, in the course of the management of the company, finds that he needs to sell or dispose of certain redundant or unproductive assets of the company to raise working capital. In that event, he has to apply to the court for a variation of the provisional judicial management order to be granted authority to sell or dispose of those assets. The history of the Act shows that s 307(1) was enacted to end the practice that had grown whereby judicial managers proceeded to liquidate the assets of companies under their control. See *Henochsberg on the Companies Act* 2 ed pp 443, 453. The prohibited acts are not less of a mischief when unlawfully authorised by the court.

My research has failed to discover direct authority in our jurisdiction on the question of whether or not the court has power to authorise a provisional judicial manager or final judicial manager to sell or dispose of the ``entire business and assets'' of a company under his control.

There are, however, decisions emanating from the Orange Free State Provincial Division in South Africa (In re *Delicatessen Ltd* 1939 OPD 220; Ex p *Judicial Manager of Border & Allan (Prop) Ltd* 1942 OPD 182; Ex p *Judicial Manager of Bloemfontein Milk Bars (Pty) Ltd* 1943 OPD 5; Ex p *Vermaak* 1964 (3) SA 175 (O)) and from the Transvaal Provincial Division (Ex p *Joubert NO* 1970 (3) SA 511) which approve of the court granting final judicial managers leave to sell or dispose of companies under their control as going concerns.

With much deference to the individual judges who decided the cases, I have no doubt in my mind that the decisions represent bad law. They do not reflect the correct interpretation of s 197B(1) (corresponding to our s 307(1)) of the Companies Act 46 of 1926 of South Africa.

With the exception of *Joubert*'s case, the judgment in each of the cases is very brief - contained in one paragraph. The decision in *Joubert*'s case is based upon a recital of the single paragraphs constituting the judgments in the cases from the Orange Free State Provincial Division. The decisions were not based on careful analysis of recognisable legal principles.

It was suggested in each case that the decision was dictated by ``special circumstances''. For that reason, it may be said that the decisions are *obiter dicta*. That observation does not however change the fact that they are wrong decisions.



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It would not be competent for a court to authorise the sell or disposal of the entire business and assets of a company under judicial management. I express this view with greater confidence in finding that it coincides with the conclusion that has been reached in decisions emanating from the Cape Provincial Divisions and the Appellate Division of South Africa.

The decisions from the Orange Free State Provincial Division and the Transvaal Provincial Division seem to have been based on an erroneous view that in s 197B(1) (our s 307(1)) the court had wide discretionary powers to authorise a ``judicial manager'' to do acts that are not provided for by the legislature in the express provisions of the Companies Act. In *Wire Industries Steel Products* v *Surtees & Heath NNO* 1953 (2) SA 531 (A) at p 539E-F, SCHREINER JA said such a power was non-existent as it would not only be a drastic power, ``it would also be vague and undefined, being limited only by what the court might deem fit.''

In *Western Bank* v *Laurie Fassati Construction (Pty) Ltd* (*under judicial management*) 1974 (4) SA 607 (E) H*art* AJ considered the limits of the discretionary power embodied in s 196 of the Companies Act 1926 of South Africa which prohibited the execution of writs, summonses and other processes against a company under judicial management *without the leave of the court* (compare with s 307(1) of our Act). He said the courts should, in the exercise of the judicial discretion, be guided and assisted by the principles emphasised by Schwarts and Wade *Legal Control of Government* (1972) pp 254-5, being that:

> ``Every legal power must have legal limits otherwise there is dictatorship. In particular, the courts are stringent in requiring that discretion should be exercised in conformity with the general tenor and policy of the statute and for proper purposes and that it should not be exercised unreasonably. In other words, every discretion is capable of unlawful abuse and to prevent this is a fundamental function of the courts.''

After quoting *in extenso* from *Henochsberg* p 441 and from *Millman NO* v *Swartland Huis Meubeleerders (Edms) Bpk: Repfin Acceptances Ltd Intervening* 1972 (1) SA 741 (C) at 744B on the purposes of the judicial management procedure, his Lordship went on to say:

> ``The tenor and policy therefore, of that part of the Companies Act, those sections of the Companies Act relating to judicial management is [*sic*] purely, in my view, to preserve and not destroy a company which is capable of rehabilitation and there are undoubtedly instances of companies which are now successful and profitable concerns as a result of successful judicial management which otherwise would have disappeared into the morass of liquidation and insolvency.''

His Lordship concluded by saying that the same principles of the preservation and not destruction of a company under judicial management must guide the court in the exercise of its discretion.

It must follow from the *ratio decidendi* in *West Bank*'s case *supra* that the





lawful exercise of the judicial discretion in terms of s 307(1) of the Act is the one which takes into account and holds as the object of the authorisation of the sale or disposal of the company's assets the achievement of the purposes of judicial management. To use the words

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of SCHREINER JA in *Wire Industries*'s case *supra* at 539 F, ``I do not think that the most liberal approach to the interpretation'' of the phrase ``without the leave of the court'' in s 307(1) of the Act, can support the implication of a general power for the court to authorise a provisional judicial manager or final judicial manager to sell or dispose of the ``entire business and assets'' of a company under judicial management. These powers were given to enable the company's business to be carried on, not for the purpose of destroying the company.

In an explanatory note to s 433(l) (corresponding with our s 306(m)) of the Companies Act 1973 of South Africa *Henochsberg op cit* pp 772-773 states:

> ``Where the judicial management has failed, the court has in several instances authorised a judicial manager to sell the assets of the company and to pay creditors i.e independently of any winding up (see eg Ex p *Joubert* 1970 (3) SA 511 (T) and cases there cited). It is respectfully doubted whether the court had under the 1926 Act, or has under the present Act, any power to give such authorisation. It is submitted that the power under s 434 (1) [corresponding with our s 307 (1)] may only be exercised where the sale or disposal is for the purposes of the judicial management ie to contribute to the achievement of its objects. No power to authorise a sale or disposal of assets by the judicial manager is otherwise expressly assigned to the court by the Act and it can have no such power by implication (*Wire Industries Steel Products Ltd* v *Surtee* 1953 (2) SA 531 (A))."

The effect of the decision in the *Wire Industries* case *supra* is that individual judges should not knowingly make orders which fall outside the powers given to them by the sections of the Act devoted to judicial management. Courts should confine themselves to the limited powers which were unquestionably given to them in the legislation. They must not assume wider powers even if it might seem to them desirable that they should have such powers.

It is undesirable anyway for a court to grant, at the outset, a provisional order of judicial management containing a direction to the provisional judicial manager to sell or dispose of the company as a going concern. The impression given by such a direction is that the court is not satisfied at the outset that there is a reasonable probability on the facts revealed by the application that if placed under judicial management the company will be able to pay its debts, meet its obligations and become a successful concern. It would mean that factors foreign to the only criteria the statute requires to be considered in deciding to place the company under judicial management were taken into account.

The second respondent disclosed in the opposing affidavit that the attitude of the respondents was that it was more advantageous to sell or dispose of the



companies as going concerns under judicial management than it would be if they were sold or disposed of under liquidation. Paragraph 8 of the provisional judicial management order clearly had the effect of encouraging the respondents to pursue wrong goals.

In *Irvin & Johnson Ltd* v *Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) REYNOLDS J said at 238C-E:

> ``... the mere fact that a business may be more easily disposed of as a company under judicial management than as a company in liquidation is not a factor the court can take into consideration in this kind of application."

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The same sentiments were expressed by BAKER J in *Millman NO supra* at 745A-C:

> ``*Mulvihal*'s case is authority for the proposition that, even though it might be more advantageous to dispose of the business of the company as one under judicial management rather than as one in liquidation, this is not a factor that should influence the court to grant an order of judicial management in respect of a company which will in all probability never be able to discharge more than a percentage of its liability ... Since the sole reason given for seeking an order of judicial management is to facilitate the disposal of respondent company as a going concern and since this is not an acceptable reason for granting the order the order must be refused on this ground as well.''

The court ought to have refused to grant the rule *nisi* with para 8 in the terms now sought to be varied. It was not entitled to seek to confer upon the provisional judicial manager or final judicial manager authority for which no provision is made in the Act.

The second respondent has applied, in the event it is found that they did not have authority under para 8 of the provisional order of judicial management, that I grant them the authority to sell or dispose of the companies as going concerns to Native Investments Africa (Group) (Pty) Ltd. I refuse to grant the respondents the authority that is not provided for in the Act. I do not have the power to do so. If I granted the prayer I would be assisting in bringing about the destruction of the companies which are under judicial management. I would in fact be abusing my judicial discretion.

A similar application was made but refused in *Marais* v *Leighwood Hospitals (Pty) Ltd* 1950 (3) SA 567 (C). VAN WINSEN AJ said at 572H - 573D:

> ``Mr *de Villiers*, who appears for the judicial manager, asks that in spite of the fact that the purpose for which the judicial machinery was set in motion cannot now be achieved the judicial management should nevertheless be prolonged for a period of up to 6 months in order to allow the judicial manager to sell the business of the company as a going concern ... Now, I have grave doubts whether there is any statutory authority for the course proposed by Mr *de Villiers*. This envisages a continuation of the judicial management for the eventual purpose of liquidation - a purpose not contemplated by the legislature when it provided the judicial management machinery.
>
> The fact that a more favourable result would be achieved from the creditors' point of view by following the course proposed by Mr *de Villiers* affords no ground for the court assuming a power not granted it by the statute as presently framed.

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> If it is desirable that a judicial manager should be authorised in his capacity as such to sell the business of the company under his management as a going concern then it is for the legislature to confer such a power on him.''

The last point taken by Mr *Ncube* is that, assuming that para 8 of the provisional order of judicial management granted on 4 October 1996 gave the respondents lawful authority to sell or dispose of the business and assets of the companies, the decision to do so would be void because it was not made jointly by the respondents.

The respondents were appointed joint provisional judicial managers in terms of s 275 of the Act. They were appointed because they met the statutory requirements of the qualifications for appointment and were found possessed of the skills required for the proper performance of the functions of judicial management.

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Section 275 requires that joint provisional judicial managers shall act jointly in performing their functions as provisional judicial managers. They are obliged to act as one person every time they perform the functions of judicial management. In this case, the court was interested in the identity and capabilities of the persons performing the functions of judicial management. The court was interested in the personal exercise by the respondents of the special skills they professed to have. It was they who had to perform the functions of managing the affairs of the companies. They personally were privy to the appointment, not the firms of accountants for which they worked.

The respondents could not therefore delegate their authority to act jointly to one of their own number or to representatives. In *Strydom* v *Roodewal Mgmt Cttee & Anor* 1958 (1) SA 272 (O) DE VILLIERS J said at p 273:

> ``... where the act to be performed is of a personal nature in the sense that the identity and personal attributes of the performer of the act are of material importance to another who has an interest in its performance, delegation is not permitted. (Cf *Belonje* v *African Electric Co (Pty) Ltd* 1949 (1) SA 592 (E); *Hammond Harvey & Newton* v *Union Textile Mills Ltd* 1949 (3) SA 383 (E)). Similarly, where a person is required by statute to perform an action involving the exercise of his discretion in a matter in which another has an interest he may not delegate his power.''

Section 275(2) of the Act is incorporated into the sections dealing with the appointment and duties of the provisional judicial managers through s 313. The decisions that construe the provisions of s 275(2) of the Act on the legal consequences of the failure by co-liquidators appointed in terms of that section to act jointly in the performance of their functions, apply *mutatis mutandis* to joint provisional judicial managers.

In *Powell* v *Leech* [1997] 4 All SA 106 (W) SUTHERLAND AJ said at pp 117j-118c:

> ``It is trite that joint liquidators must act jointly (see *Murphy & Benjamin NNO* v *Semphill*



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> 1954 (3) SA 450 (W)). Joint liquidators may not delegate their functions to each other or to any one else because, in the words of INNERS CJ in *Goldseller* v *Hill* 1908 TS 822 at 827:
>
> > `They are in law only one person. They jointly represent the estate and together they are the channel through which the estate can sue or be sued and the proper persons to investigate all its affairs'.''

In *Cooper* v *The Master &Ors* 1996 (1) SA 962 (N) at 967F-968F it was held that the failure of trustees in insolvency to jointly approach the Master to increase a fee payable was a nullity.

The second respondent admitted that the obligations and duties of the joint provisional judicial managers were carried out by Mr Gillet and himself. Those acts were not performed by the respondents jointly. The decisions he made with Mr Gillet are a nullity. They have no binding effect on the company. The fact that it was inconvenient for example, for first and third respondents to travel from Harare where they ordinarily reside to Bulawayo from where the companies carried out their business, is no ground for failure to act jointly. I therefore agree with Mr *Ncube* that the decisions to sell or dispose of the entire business and assets of the companies would have been a nullity for the reason that it was not a joint decision of the three

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respondents.

The final question is whether the court has the power to vary the terms of the provisional order of judicial management in the manner requested by the applicants. Mr *Carter* said that what the court was being asked to do was not a variation but a substitution of one order for another. I do not agree.

Section 301(2) of the Act empowers the court or a judge at any time and in any manner, on the application of one of the persons prescribed therein, to vary the terms of a provisional order of judicial management.

In *Mutare City Council* v *Mawoyo* 1995 (1) ZLR 258 (H) at 263G I said:

> ``The general rule is that once a final judgment or order has been given, the judge who gave it or any other judge of parallel jurisdiction has no power to alter, rescind, vary or set it aside, except in the few instances recognised at common law or by the Rules of the High Court.''

The order whose terms are sought to be varied is not a final order. It is a provisional order, subject to alteration or discharge on the return day. The reason for the general rule is that the court, after making a final order, becomes *functus officio*. Its jurisdiction in the case would have been fully and finally exercised.

The general rule does not apply to provisional orders. It cannot be said that a court or a judge has exercised its or his full and final authority over the subject matter of a provisional order. The statute authorises the variation of the terms of the order and not the order itself. The word ``vary'' is therefore apt to describe the deletion of one term of a provisional order and the substitution of another in its place.

There would be no prejudice suffered by the interested parties or the



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respondents (a void direction confers no rights) if para 8 of the provisional order of judicial management granted on 4 October 1996 were varied by the deletion of its terms and the substitution of a direction to the effect that the provisional judicial managers should not, without the leave of the court, sell or dispose of the assets of the companies except in the ordinary course of business.

It was for these reasons that I made the orders mentioned at the beginning of the judgment.

*Kantor & Immerman,* applicants's legal practitioners

*Joel Pincus, Konson & Wolhuter*, respondents' legal practitioners



## CENTRAL AFRICAN BUILDING SOCIETY v KUFA 1998 (1) ZLR 303 (HC)

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

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Gillespie J

Chamber application

17 February & 25 March 1998 Judgment No. HH-54-98

## Flynote

Practice and procedure - service - address for - vacant piece of land given as domicilium citandi et executandi - summons left under rock at designated piece of land - whether process properly served

## Headnote

In terms of a loan agreement between the plaintiff and the defendant a vacant piece of land was designated as the *domicilium citandi et executandi.* The defendant fell behind in his loan payments and the plaintiff commenced legal action against him. The Deputy Sheriff purported to serve the process by leaving the summons under a stone at the vacant piece of land. The Registrar of the High Court queried the propriety of the method of service of summons.

*Held*, under the rules of court there is a greater obligation on the person seeking to effect service at the *domicilium citandi* than there is under the common law. No matter what the common law position may be, under the rules of court, as formulated, service cannot be properly effected by leaving the process at a *domicilium citandi* which is a vacant plot of land. Under the rules it is only if the process cannot be served on a responsible person that the process can be left in a conspicuous place. This seemed to imply that process could not be left as an empty plot of land. Neither expressly or impliedly did the rules provide for the leaving of process at a vacant plot of land.

*Held*, further, that even if such service was technically within the rules, this is a case in which the court should exercise its general discretion to depart from the rules and to hold the service to be insufficient. The *domicilium citandi* was not freely chosen by the defendant but was the result of a clause included in a standard form mortgage agreement prepared by the plaintiff and which nominated the mortgaged vacant stand as the *domicilium citandi.* The inclusion of such a clause was generally undesirable. The parties were not of equal bargaining strength. If the defendant had known the consequences of this clause, he may well have opted to give his place of residence or of employment *domicilium citandi.* Additionally, in all the circumstances, it was unfair to hold this service to be sufficient. The relevant circumstances were that a summons was thrust under a rock on the empty plot; the plot was a thoroughfare for people in a busy high-density suburb, it was the middle of the rain seasson; and no matter how often he went to the plot, it was unlikely that the defendant would find the summons under the rock.

Cases cited:

*Folders Bldg Soc v Willoughby* 1960 R & N 263 (SR)

*Gerber v Stolze & Ors* 1951 (2) SA 166 (T)

*L' Ons v Freeman & Frock* 1916 WLD 64

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*Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1994 (3) SA 834 (W)

*Prudential Bldg Soc v Botha* 1953 (3) SA 887 (W)

*Standard Bank of SA Limited v Mason* 1928 WLD 220

Legislation considered:

High Court Rules 1971 (RGN 1047/71), r 39(2)(b)

## Judgment

**GILLESPIE J:** This chamber application for default judgment on a summons to which no appearance to defend has been entered has fallen foul of the eagle eye of the registrar. He queries the propriety of the service of summons. His reservations are justified.

The summons shows that the defendant is indebted to the plaintiff in respect of monies advanced and secured by a mortgage bond over stand number 4146 Budirito township, Harare. This stand is the *domicilium citandi et executandi* designated in the agreement of loan. The Deputy Sheriff served the process at that address. He must have found it unimportant that the stand is vacant and undeveloped. He would not let this stand in the way of service of process. He purported to discharge his duty:

> "by placing under a stone at an undeveloped stand at the *domicilium citandi el executandi* chosen by the defendant."

So he says on his return of service.

At common law, a person who selects an address, at which process may be served in the event of litigation, is bound by that choice.

> "[S]ervice of any process may be effected by delivering or leaving a copy thereof at the *domicilium* chosen by the party concerned. Such service is then good, even if the process may not be received, for the very purpose of requiring the choice of a *domicilium* is *to* relieve the party causing service of the process from the burden of proving actual receipt. Hence the decisions in which service at a *domicilium* has been held to be good, even though the address chosen was vacant ground, or the party was known to be resident abroad, or had abandoned the property, or could not be found." 1 (75)

The *domicilium* so chosen is thus deemed to be the place of abode of the person to be served, even if he is known not to be living there. 2(76) So much so, that service by leaving process at a vacant piece of ground is, as the quotation shows, good in principle. Thus in a case where the person to be served had chosen as a *domicilium* leased premises, being a vacant stand used as a timber-yard, service by affixing process to a pole, there being no other erection of any sort on the premises, was held valid. 3(77) It was said:

> "The cases cited show that service at a last-known place of residence is good even though

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> the residence is destroyed and the summons is affixed to the soil. The same principle should apply to the case where *domicilium citandi* has been chosen.'" 4 (78)

In one case where the *domicilium* chosen was the party's "residence at the South African Railways Compound, Pretoria" it was held that service at the place where he used to reside in that compound, he having since moved on, was invalid. 5(79) That decision, however, has been distinguished on the basis that the spot chosen was not an exact address of a named house or premises but a piece described as the residence of the party. In the absence of his residence at the place, therefore, service could not be effected there. Where an exact address has been chosen as a *domicilium,* however, then the question of actual residence is immaterial. 6(80)

Many of the cases cited above relate to the South African rule of court. That provides simply that service of process may be effected:

> "if the person so to be served has chosen a *domicilium citandi,* by delivering or leaving a copy thereof at the *domicilium* so chosen." 7(81)

This rule is said to reflect the common law practice. 8(82)

Our rules of court make provision rather different to that made by the South African rules of court. The rule pertaining to service at a *domicilium* chosen for that purpose provides that process may be served:

> "by delivery to a responsible person at the residence or place of business or employment the person on whom service is to be effected or at his chosen address for service." 9(83)

This rule must be read with other provision which entities the deputy Sheriff to leave a copy of the process:

> "in a letter-box or affixed to or near the outer or principal door of, or in some other conspicious position at, the residence, place of business or employment, address for service or office, as the case may be." 10(84)

This alternative method of service is permitted where the person to be frustrates service by keeping the place of service locked, or where the Deputy Sheriff, after diligent search, is unable to find a responsible person at the place of service to whom the process may be delivered.

The rule, it will be observed, appears to make identical provisions for service both as to a chosen address for service and as to the place of residence,



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business or employment as to the person to be served. It might be the requirement to serve upon a responsible person exists only where service is effected at the place of residence, business or employment. Put another way, that the phrase "to a responsible person" applies only to the words which immediately follow it and not to the words "or at his chosen address for service." That, however, is not a correct interpretation. The same provision used previously to

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be formulated in two separate paragraphs permitting service:

> "(a) to the respondent personally or to his duly authorised agent;
>
> (b) at his residence or place of business or ernployment to some responsible person;
>
> (c) if the person to be served has chosen a domicilium *citandi,* at the domicile so chosen in the manner provided by subparagraphs (a) and (b) of this rule ..." 11(85)

Pertaining to this rule, as previously formulated, it has been said:

> "The requirement, however, in subparagraph (c) that service shall be 'in the manner provided by subparagraph (b)' is not surplusage and effect must be given to it. Where it is desired to serve at a *domicilium citandi,* service in the ordinary way must be to 'some responsible person'..." 12(86)

The condensation of the former subparas (b) and (c) into the one existing sub-rule has not altered the requirement under our rules that service, even at a *domicilium,* should be on a responsible person. Only where a responsible person cannot be found after diligent search, or where premises are to be kept locked so as to frustrate service, is it permissible to leave the process affixed to the premises in the manner expressly provided.

Our rules therefore clearly impose a more of an obligation on the person seeking to effect service at a *domicilium citandi* than does the common law (or the South African rule). The question is whether they nevertheless of service at a *domicilium* which is a vacant piece of land. The point is by no means clear on the wording of the rules. On the one hand, an indication arises from the wording that service by leaving process at an undeveloped vacant regarding this service as insufficient even if it were, stand is impermissible. This could follow from the fact that service must the first place be on a responsible person, and only failing that may process be left in a letter-box, affixed to the outer principal door, or in some other conspicuous position. That wording seems to exclude leaving process under a stone in an empty plot. On the other hand, it might be thought that the rules ought to be interpreted as detracting from the common law only to the extent to which such an alteration is expressed or necessarily implied. Service at a vacant stand is certainly not expressly included and the implication may well be thought to be by no means necessary.

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There is, however, an *obiter dictum* dealing with the issue. It has been said, pertaining to the rule as formerly formulated:

> "It will be appreciated, however, that the language used in [the rule] does not permit of service on a *domicilium citandi* which consists of vacant land.
>
> The CHIEF JISTICE has read this judgment and authozises me to say that he agrees with the views expressed." 13(87)

The statement is *obiter* since the point at issue was whether, in the absence of a responsible person at the *domicilium,* service could be effected by leaving the process affixed to the front door. It was held that such service was good and expressly provided for. 14(88) *Obiter* though it may be, however, it falls from one of our most distinguished judges and had the express

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approval of the then Chief Justice. 15(89) It was not a statement which could have been made *per incuriam* and was undoubtedly intended as guidance to the profession. I would be extremely reluctant to disagree with two such eminentjudges, even if the view expressed is not binding.

In the light of that *dictum,* therefore, I hold that no matter what die common law position, under the rules of court as presently formulated, service at a *domiciiiam citandi* which is vacant land cannot be effected.

If this conclusion were incorrect I would in any event hold as follows. At common law the court nevertheless retains a discretion to give further directions as to service, even if service is technically valid.

> "Even where the service is good, when considered in the light of the rules so read, the court must be regarded as having a discretion to require some further step to be taken if there are any special circumstances which appear to make such a step desirable." 16 (90)

The existence of a general discretion to depart from the rules is confirmed in the rules of court 17(91) and would in any event form part of the inherent jurisdiction of the court to regulate its own proceedings.

I consider that the circumstances of this case provide good reason for regarding this service as insufficient even if it were, technically, within the scope of the rules. My chief reason for so holding is that the rationale behind holding a person to the choice of his selected address for service is largely undercut in a case such as this. The choice of a *domicilium citandi et executandi* is contained in a standard form agreement of loan prepared by the plaintiff, the party seeking to effect service. This standard form contains a term selecting as the *domicilium* the property which in terms of the agreement



is to be mortgaged to secure the loan. The parties are not of equal bargaining strength. The selection by the defendant of the vacant stand as his stipulated address for service is therefore, on the face of it, not something to which the defendant has specifically adverted. Indeed, I would tend to think that had he known of the consequences of selection of a *domicilium*, the defendant would have given his residence or place of employment, rather than the land he had just committed himself to buy and had not yet started to develop, much less live on. I would go so far as to say that it is generally undesirable for a lender in such circumstances to include in a standard form contract a clause rendering mortgaged premises the *domicilium citandi* where those premises are, to the knowledge of the mortgagor, undeveloped and vacant. Add to this that a summons, thrust under a rock on an empty plot, forming a thorough fare in a busy high-density suburb, in the middle of the rainy season, is scarcely likely to come to the notice of the owner of the stand, no matter how frequently he visits it, and one can see it to be unfair to hold the service sufficient. I consider that where a vacant lot is in circumstances such as this chosen as a *domicilium* the court would usually tend to insist upon service at the residence of the debtor, even if service by leaving process on the at the stand would be valid in terms of the

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rules.

Accordingly, judgment is refused. I direct that service of the process is to be effected by service on the defendant or a responsible person at the defendant's residence or place of business or employment. In the event that such an address is unknown, 18(92) then application for directions for substituted service is to be made in terms of the rules of court.

*Surgey, Pittman & Kerswell,* plaintiff's legal practitioners



## BANANA v ATTORNEY GENERAL 1998 (1) ZLR 309 (SC)

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

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

Constitutional application

6 & 26 March 1998 Judgment No. S-35-98

### Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s18(2) as read with s18(3) - right to fair trial before impartial court - whether adverse pre-trial publicity about criminal case had made it impossible for the case to be tried fairly - how this right is to be balanced against the right to freedom of expression contained in s20(1) of Constitution - right of press to report criminal cases-limits to this right

Human rights - right to fair trial - vital importance of fairness and impartiality in criminal process - whether right to fair trial is to be given priority over freedom of press to report criminal cases

### Headnote

The applicant was a prominent public figure. He had been a past President of Zimbabwe and had taken part in a number of important international missions. He was a church minister and was an acclaimed academic. In 1997, he had been charged with several counts of sodomy, attempted sodomy and indecent assault. These charges were brought following police investigations which had been started after a police inspector had alleged that he had been the victim of repeated homosexual abuse when he was serving at State House at the time that the applicant was President. After these charges had been brought there was intense media coverage of the story.

The applicant applied for a permanent stay of the criminal proceedings against him on the basis that there was there was a real risk that he would not receive a fair trial because of the adverse pre-trial publicity. This application was based upon the provisions of s 18(2) of the Constitution which guarantees the right of a person to a fair hearing before an independent and impartial court of law.

*Held,* that although an accused person has a right to a fair and impartial trial the public also have a fight to know about pending criminal cases and the media have the right to inform the public about such matters. The right to a fair trial must thus be balanced against the right of freedom of expression, but on the hierarchy of constitutional rights the right to a fair trial must be

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given priority over freedom of expression.

*Held*, further, that freedom of expression is a core value of society and freedom of the press is encompassed in freedom of expression. The administration of justice is a public process which must be open to public scrutiny. The criminal process is a matter of legitimate public



interest and the press must be free to serve this public interest by reporting on criminal trials.

*Held,* further, that as the applicant was such a prominent and newsworthy person and the crimes with which he was being charged were so serious, it was inevitable that there would be considerable public interest in the case and substantial media coverage of the case.

*Held,* further, that there may be exceptional circumstances where the media may act so irresponsibly and prejudicially as to make the unfairness irreparably and the administration of justice impossible. The right of press to report criminal cases is not absolute and must be exercised reasonably, especially where the person targeted is awaiting trial. The media must not adversely influence the pending proceedings.

*Held,* further, that the cumulative effect of the media publicity by certain publications in this case was to induce a belief in the minds of members of the public that the applicant had a propensity to homosexuality and was guilty not only of the charges for which he was to be prosecuted but many other similar offences besides. The nature of this reporting was a marked departure from the standard of fair, temperate and unbiased reporting that a high profile figure accused of criminal charges is entitled to be accorded. This publicity had been to the prejudice to the applicant.

*Held,* further, that the real question was whether the prejudice to the applicant was of such magnitude as to make a fair trial impossible. Where the applicant is seeking an order prohibiting his prosecution because of adverse pre-trial publicity, he must establish on balance of probabilities that there is a real or substantial risk that by reason of the media coverage he could not obtain a fair trial.

*Held,* further, that despite the prejudicial pre-trial publicity, it could not be found that there was a real risk the applicant would not receive a fair trial. There were various adequate built-in safeguards in the Zimbabwean criminal justice system to ensure that the persons who adjudicated in a criminal trial would not be influenced by the adverse pre-trial media coverage. The manner of appointment of judges and the exacting qualifications and practical experience required for judicial appointment ensure that judges will judge cases solely on the basis of the evidence in court. As regards assessors, factors such as the qualifications required for appointment, the experience that assessors gain in judging cases, the active part they take in the proceedings and their relationship with the presiding judge ensure that they judge cases impartially and solely on the basis of the evidence in court.

*Held,* therefore, that the right of the applicant to receive a fair hearing had not been negated by the pre-trial media coverage.

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*R v Savundra* (1968) 52 Cr App R 367 (CA)

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*R v Taylor & Taylor* [1994) 98 Cr App R 361 (CA)

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*R v Hubbert* (1975) 11 OR (2d) 464

*Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S); 1995 (9) BCLR 1262 (ZS)

*Shabalala & Ors v A-G, Tvl & Anor* 1996 (1) SA 725; 1995 (12) BCLR 1593 (CC)

*Shamwana v The People* [1985] LRC (Crim) 120 (Supreme Court of Zarnbia)

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*United Parties v Minister of Justice, Legal and Parliaineniary Affairs & Ors* 1997 (2) ZLR 254 (S)

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Legislation considered:

Constitution of Zimbabwe 1980, ss 22 18 (2), 18(3) and 20(1)

## Case Information

*J C Andersen SC,* for the appellant

*A V M Chikumira,* for the respondent

## Judgment

**GUBBAY CJ:** This court is confronted for the first time with the contention



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that widespread pre-trial publicity adverse and hostile to an accused person may so indelibly prejudice the minds of the judge and assessors at the criminal trial as to negate the constitutional protection of a fair hearing before an independent and impartial court.

THE BACKGROUND FACTS

With the advent of independence on 18 April 1980 appointed the country's non-executive President. He remained in that office until the end of 1987. He is an acclaimed academic and minister of the Methodist Church, who was an honorary professor and lecturer in religious studies, classics and philosophy at the University of Zimbabwe. In 1989 the applicant served as a member of the United Nations Commission of eminent churchmen mandated to investigate multinational activities in South Africa. And in 1996 he was named as the Organisation of African Unity's special envoy to mediate an end to civil wars raging in Liberia and Sierra Leone. It is apparent that by virtue of his position in society and international standing, the applicant is a newsworthy personality both within and outside the borders of Zimbabwe.

On 24 February 1997, Jefta Dube, a former police inspector who had served as the applicant's aide-de-camp, was convicted by the High Court of having murdered a police constable. After a finding of extenuating circumstances was made, Dube was sentenced to undergo ten years' imprisonment with labour. The court accepted that when committing the crime Dube was suffering from diminished responsibility brought about by drink and stress. It held that it could not reject as false the uncontroverted claim that he had been traumatised as a result of being the victim of repeated homosexual abuse by the applicant, at State House, during the years 1983 to 1986. The presiding judge recommended that a full investigation be instituted through the Attorney-General's Office and the police to establish the veracity of Dube's claims of sexual abuse. The judgment, now reported as S *v Dube* 1997 (1) ZLR 229 (H), was given extensive prominence by the media.

The next day the Commissioner of Police announced that the allegations of sodomy against the applicant were to be investigated immediately.

On 7 July 1997, the applicant was indicted to the High Court for trial on two counts of sodomy,

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and six counts of indecent assault. The offences were stated to have been committed during the period extending from 1 January 1980 to 31 December 1996. The applicant was remanded on bail to appear before the High Court on 4 August 1997. The date of trial was later altered by consent to 22 September 1997.



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THE PROCEEDINGS BEFORE THE HIGH COURT

At the inception of the trial presided over by BLACKIE J and two assessors, counsel for the applicant moved an application for a permanent stay of proceedings. The grounds advanced were that there was a real risk that the applicant would not receive a fair trial in consequence of both the pre-trial publicity to which he had been subjected and statements as to inadmissible evidence set out in the outline of the State case. In the event of the refusal of that form of relief, an order was sought directing the Attorney-General to furnish the applicant with the investigation diary contained in the police docket. It was submitted that both applications were based on the provisions of 18(2) of the Constitution of Zimbabwe, which guarantees the right of any a person charged with a criminal offence to be afforded a fair hearing before an independent and impartial court established by law; the High Court having jurisdiction to entertain the applications in term s of s 24(4) of the Constitution. It was further submitted that under the common law the High Court had cent power to stop a prosecution which creates unfairness, injustice and abuse of its process. That this is so has been recognised by other courts whose decisions are persuasive. See *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL) at 1301, 1347 and 1365; *R v Bow Street Metropolitan Stipendiary Magistrate,* Ex p *Director of Public Prosecutions* [1992] 95 Cr App R 9 (QBD) at 16; *Bennett v Horseferry Road Magistrates Court & Anor* [1993] 3 All ER 138 (HL) at 156f-h; *Jago v The District Court of New South Wales & Ors* (1989-1990) 168 CLR 23 (High Court of Australia) at 26,29,53,56 and 75; *Moevao v Departinent of Labour* [1980] 1 NZLR 464 (Court of Appeal of New Zealand) at 482; *R v* Jewitt [1985] 2 SCR 128 (Supreme Court of Canada) at 136-137; *The Queen v William Hung* [1994] 1 HKCLR 50 (Court of Appeal of Hong Kong) at 56; *Klein v Attorney-General, Witwatersrand Local Division & Anor* 1995 (3) SA 848 (W) at 855I-J

The *Director of Public Prosecutions* opposed the applications on their merits. He did not suggest that the High Court should have recourse to s 24(2) of the Constitution and refer to the Supreme Court the questions arising as to the alleged contraventions of s 18(2). Nonetheless the learned trial judge, in the exercise of his discretion, resolved to refer the questions, which were neither frivolous nor vexatious. He reasoned that it was undesirable for a judge and assessors to determine whether the magnitude of the pre-trial publicity, and the impugned allegations in the outline of the State case, were so adverse to the applicant as to create a real risk of the members of the court being unable to try him with impartiality.

With duo deference, I consider that the trial court was better placed to



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decide the principal question than is the Supreme Court. Certainly, that was the view taken by the Privy Council in *Boodram* (also called *Dole Chadee) v Attorney General* [1996] 2 LRC 196, an appeal from the Court of Appeal of Trinidad and Tobago. LORD MUSTILL, on behalf of the Board, observed at 206h-i that the proper forum for a complaint about pre-trial publicity in pending criminal proceedings was the trial court, where the judge can assess the circumstances which exist and decide whether the available procedures are sufficient to enable the jury to reach its verdict with an unclouded mind; or whether, exceptionally, a temporary or even permanent stay of the prosecution was the only solution. See also the *dicta* of CORY J in *Phillips v Nova Scotia* (1995) 28 CRR 1 (Supreme Court of Canada) at 36.

THE MAIN ISSUE

(1) *The attitude of the Director Of Public Prosecutions*

Before this court, the *Director of Public Prosecutions* acknowledged that the outline of the State case, which had been served upon the applicant and lodged with the Registrar of die High Court in terms of s 110(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], contained matter either actually or debatably prejudicial to the applicant. He correctly pointed out, however, that as the applicant had not pleaded to the charges, the outline, though seen by the trial judge and his assessors, had not been formally produced and read out in open court. Thus the media had been denied access to it. He undertook to withdraw the offending outline and replace it with another which, he said, would be confined to the evidence the State intended to adduce in respect of each of the eleven charges, without any suggestion of the applicant's propensity.

Appreciating that if a stay of proceedings were refused it was likely that there would be a change of judge and assessors, Mr *Andersen*, who appeared for the applicant, was content to forego any reliance upon the outline of the State case. But he argued with much force that the impact of the improper allegations by the print media was so prejudicial to the applicant as to mate a real risk that any court trying him would be bound to be adversely affected.

(2) The *political tension between the right of the press to freedom of expression in the conveyance of information to the public and the right of an accused person to a fair hearing*

One of the crucial elements of a fair hearing is the right to be tried solely on the evidence before the court, and not on any information received outside



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that context. Section 18(2),as read with s 18(3), of the Constitution entrenches & right of any person charged with an offence to a fair hearing and to be presumed innocent until proved guilty. The fairness and impartiality of the criminal process is the cornerstone of the legal system. In protecting the fairness of the trial, both under the Constitution and at common law, it is to be accepted that the potential for prejudice relates not only to the accused but to society in general.

Freedom of expression, as this court has reiterated, is a right and enjoyment always to be

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jealously guarded. It is recognised as a core value of society, essential to truth, democracy and personal fulfilment. See *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S) at 211A-H; 1995 (9) BC1R 1262 (ZS) at 1271F-1272C; *United Parties v Minister of Justice, Legal and Parliamentary Affairs* & Ors 1997 (2) ZLR 254 (S) at 269.

Freedom of the press, which is encapsulated within the provisions of S 20(1) of the Constitution, is also crucial to the public nature of the administration of justice and the potential for scrutiny that comes with such openness. Prosecutions, and judgments and sentences of the courts, have always been matters of legitimate public interest. In many cases the press renders great service by the publication of reports of events surrounding the commission of a crime or an alleged crime, and it is no function of the courts to act as censors. The people have a right to know. Yet occasionally restrictions will be necessary and acceptable in a free and democratic society. Freedom of expression and of the press are not conferred in absolute terms. They carry with them the quality of restraint. In the context of legal proceedings such freedom must be exercised reasonably, especially where the person targeted is awaiting trial on a criminal charge. What always has to be balanced is the right of the public to information and of the media to report and express views freely, against the right of an accused person to a fair trial. To be avoided is a situation in which media coverage adversely influences or trespasses upon the proceedings, or the judicial officer trying them.

On a hierarchy of constitutional rights there can be no doubt that the right to receive a fair trial, which is the central precept of our criminal law, must be given priority over freedom of the press. See the decisions of the Ontario Courts in *Steiner v Toronto Star Ltd, et al* [1956] OR 14 at 17; *R v Begley, et al* (1982) 2 CRR 50 at 53; and also, *Dagenais v Canadian Broadcasting Corp* (1995) 25 CRR 1 (Supreme Court of Canada) at 13.

In *D v Director of Public Prosecutions* [1994] 2 IR 465 (Supreme Court of Ireland) FINLAY CJ sounded this caution at 468:

> "Even though it is clear that in the interests of justice much greater vigilance should be shown by newspapers in the type of publicity which they give to crimes in which trials are



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> still pending, it is not to be taken that every criminal trial in respect of an offence which has received significant publicity will by that fact become an unfair trial. If a contrary view were taken, the administration of the criminal law in notorious cases could be brought to a halt by adverse media publicity."

While accepting the good sense of these remarks, it cannot be gainsaid that media reporting of a judicial process, or in advance of it, may, in exceptional circumstances, be so irresponsible and prejudicial as to make the unfairness irreparable and the administration of justice impossible. If that were to occur then there is, quite literally, nowhere to go. The court will have no option but to grant a stay of proceedings; for it is more important to retain the integrity of the system of justice than to ensure the punishment of even the vilest offender. See, for instance, R *v McCann & Ors* (1991) 92 Cr App R 239 (CA) at 253; *R v Reade, Morris & Woodwiss,* unreported judgment of GARLAND J delivered at the Central Criminal Court, London, on 15 October 1993; *R v Taylor & Taylor* (1994) 98 Cr App R 361 (CA) at 369; *R v Knights,* unreported

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judgment of the Crown Court, at Harrow, dated 3 October 1995.

(3) *The publications and their overall effect*

The applicant placed before the trial court a series of articles about him which appeared in the press very shortly after the *Dube* judgment was published. These articles were written in the knowledge of the assurance given by the Commissioner of Police that investigations into sodomy allegations levelled against the applicant were to commence forthwith. I shall refer only to the leading articles.

On *28* February 1997, the front page of the weekly *Zimbabwe Independent* carried the sensationalised heading "Banana sex scandal balloons". This plainly inferred that the applicant's homosexual activities went far beyond those acts he was alleged to have committed upon Dube. The article was extremely long, continuing on page 2. It dealt in detail with the testimony of Dube. It quoted General Solomon Mujuru as saying that, during the period of the applicant's presidency, troops stationed at State House had to be withdrawn in order to prevent them from being abused; the implication being that the applicant posed a sexual threat to the troops. An editorial comment in the same issue of the paper was entitled "Chickens coming home to roost" It suggested that Dube's complaint "might just have opened a can of worms" and referred to reports of Banana's rampant sexual urges being received as early as 1981. Since Dube's assertions of sexual abuse by the applicant, as reported in the judgment, occurred between 1983 and 1986, it must have been obvious to readers that other incidents were being alluded to.

The April 1997 issue of the magazine *Parade* contained an article which bore the heading "Allegations against Canaan Banana shock churches", with



subheading "But insiders say reports had been rife for a long time". The first column offered this comment:

> "Political observers and the public at large were also horrified by the allegations although many said Banana's homosexual activities had become a public secret many years ago but no-one dared bring it out."

Perhaps the most offensive article was that which appeared in the *Financial Gazette* of 8 May 1997. It was entitled "Fresh allegations against Banana" and was followed by a subheading which read "Dozens flood police investigators with new charges". The first paragraph, in bold print, claimed that dozens of current and former students at the University, soccer players and members of the security forces had "trooped before a panel of police investigators to level new allegations of homosexuality" against the applicant. The article went on to mention "the sudden stampede to file fresh charges", and that the investigators had isolated eight cases so far - the sting being that there were many more. It related that the police had interviewed powerful personalities, such as Vice-President Muzenda, the Minister of Justice, the former Chief of the Army and Police Commissioner, which gave rise to a perception that the complaints of sexual harassment were true.

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In the *Financial Gazette* of the following week it was stated that more people were coming forward to give testimonials and present new sex charges against the applicant.

On 12 June 1997, it was again recounted by the press that the police were being flooded with complaints:

> "Dozens of former University of Zimbabwe students, footballers and security personnel are said to have come forward to report that Banana had at one time or another allegedly raped, sodomised or sexually abused them. All the complainants are said to be men."

A week later the Director of Public Prosecutions was reported as saying that he was constantly working with the police on the case in order to plug any loopholes that might frustrate any possible prosecution. "We want to put lock and key onto the case" (an unhappy turn of phrase). This quote followed the information that the Attorney-General's Office was assessing an assortment of sodomy and homosexual charges against the applicant. All this conveyed to the ordinary reader that the conviction of the applicant was assured.

Finally, the *Financial Gazette* of 26 June 1997 announced that nine concrete complaints had been identified by the police who said that, these apart, "dozens of other people have come forward alleging that Banana abused them, their friends or relatives".

Information that the University had "fired" the applicant and that he had been "stripped of his role as the OAU's special envoy to Liberia" was also published.

Amidst this extensive publicity, the applicant broke his silence on 19 June

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1997 in an interview with the *Zimbabwe Independent.* He described the allegations as -

> "a mortuary of pathological lies, a malicious vendetta of vilification and character assassination - the biggest joke in living memory, absolutely laughable."

To some extent, these protestations of innocence may have neutralised the antagonistic and prejudicial pre-trial press coverage to which the applicant was subjected. Nonetheless, I am persuaded to accept the argument that the cumulative effect of the publicity was to induce a belief that the applicant has a propensity to homosexuality and was guilty not only of the charges for which he was to be prosecuted but many other similar offences besides.

It is true that the applicant possesses a marked degree of notoriety. He is an extremely newsworthy person, a prominent leader in society against whom the commission of grave crimes is alleged. As such, the media had every right to report on matters of public interest and concern. This is a feature of modem times. Inevitably, therefore, the applicant had to succumb to greater coverage than those individuals who are less well known, or whose cases are not as serious. Yet even so, the impugned articles, to my mind, represent a marked departure from the standard of fair, temperate and unbiased reporting that a high profile figure accused of criminal charges is entitled to be accorded.

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(4) *The test to be applied*

Prejudice to the applicant emanating from the pre-trial publicity having been established, the real question is whether it was of such magnitude as every effectively to poison the fountain of justice before it begins to flow" (*per* WILLS J in R v *Parke* [1903] 2 KB 432 at 438).

It was not in contention, and rightly so, that an accused person who seeks an order prohibiting his prosecution on the ground that circumstances have occurred which would render it unfair (which include pre-trial publicity), must establish on a balance of probability that there is a real or substantial risk that by reason of such circumstances he could not obtain a fair trial. That principle was laid down by this court in S v *Hartmann & Anor* 1983 (2) ZLR 186 (S) at 195F; 1984 (1) SA 305 (ZS) at 312E-F, albeit in the context of whether a publication is a contempt of court. The courts of other countries have enunciated the same test. See R v *Savundra* (1968) 52 Cr App R 367 (CA) at 643; Ex p *Telegraphplc & other Appeals* [1993] 2 All ER 971 (CA) at 978c; *R v Taylor & Taylor supra* at 369; *Dagenais v Canadian Broadcasting Corp supra* at 47 and 69; *Phillips v Nova Scotia supra* at 41; *D v The Director of Public Prosecutions supra* at 507.



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The real or substantial risk of partiality of the judge and assessors has to be weighed against the backdrop of the developed system of safeguards that have evolved to prevent just such a contingency. Only when these built-in mechanisms are inadequate to guarantee impartiality will the test be satisfied and a fair trial rendered impossible of attainment.

(5) *The composition of the High Court in a criminal trial*

The High Court Act [*Chapter 7:06*] provides that for the purpose of hearing a criminal trial the High Court shall be duly constituted if it consists of one judge of the High Court and two assessors. At the trial, (i) any question of law, or (ii) any question as to whether an issue for decision is one of fact or law, or (iii) any question as to the admissibility of evidence, is to be decided by the judge alone. But any question of fact must be decided by a majority of the through members of the court.

The appointment of a judge to the High Court is by the President after consultation with the Judicial Service Commission. The incumbent must possess specified qualifications. In particular, he or she must have been for not less than seven years, whether continuously or not, qualified to practise as a legal practitioner in Zimbabwe. As a matter of reality, it would be rare indeed for a person to be appointed a judge of the High Court who had been qualified to practise for only seven years. Normally, judges are appointed from the ranks of senior legal practitioners in private practice, or from senior members of the Attorney-General's Office or from long-serving magistrates. The Judicial Service Commission, of which the Chief Justice and the Attorney-General are members, is tasked to ensure that it recommends for appointment persons of proven ability, conscientiousness and experience.

The qualifications to act as an assessor are prescribed in s 6(1) of the High Court Act and

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require that:

"(a) he has experience in the administration of justice; or

(b) he has experience or skill in any matter which may have to be considered at the trial; or

(c) in the case of a trial involving a juvenile, he has experience or skill in dealing with juveniles; or

(d) he has any other experience or qualification which, in the opinion of the Chief Justice and the Judge President, renders him suitable to act as an assessor in a criminal trial."

If it is considered by the Chief Justice and the Judge President that a particular criminal trial requires the special experience of a person whose name is not on the prepared list of assessors, the Minister of Justice, legal and Parliamentary Affairs may be requested to include him or her. Exceptionally, in complex trials involving serious offences, regional magistrates and senior



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legal practitioners in private practice have acted as assessors. But usually the persons chosen are in retirement, of standing in the community, with experience of life and people, such as former interpreters, police officers, district administrators, teachers, law lecturers and industrialists.

Before the commencement of a criminal trial, the judge is required to administer an oath to the assessors that they will give a true verdict according to the evidence upon the issues to be tried.

In practice, the Registrar of the High Court will not choose two assessors who have not acted before to preside with the judge. An assessor acting for the first time invariably will be joined by another who has performed such duty on many occasions.

(6) *The capacity of trail judges to disabuse their minds of extraneous and prejudicial matter*

Unlike the situation where jurors are the sole arbiters of factual issued in a criminal trial in the High Court the judge has a voice in the decision of any question of fact. It is necessary, therefore, to consider whether there is any realistic potential on his or her part for the existence of partiality following upon the pre-trial publicity to which the applicant was the victim.

Counsel for the applicant contended that the powerful impact of the media with the public perception of guilt and expectation of a conviction cannot ever be discounted on the part of our judges. Not only are they susceptible to it but also to the opinions of relatives, friends and colleagues who have been influenced. Reliance was placed on these words of LORD WIDGERY CJ in *A-G v Times Newspapers Ltd* [1972] 3 All ER 1136 (QBD) at 1142c-d:

"It is widely recognised that a professional judge is likely to be unaffected by temperate comment on the case before him, even though that comment is one-sided, but we should not, in our judgment, too readily accept the proposition that a judge sitting alone is not open to prejudice of this kind. Unfortunately, the comments made on pending proceedings am not always temperate, and, indeed, they may in some instances be so strong as to amount to a threat to the judge that if he does not follow the arguments there put forward, he may be severely

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criticised, if not pilloried subsequently."

These observations are pertinent and demand respect. I am inclined to think it a fallacy to assume that trial judges cannot be affected by persistent outside information of a prejudicial nature. Judges are mortals with human frailties. Yet it is my firm conviction that only a remote possibility exists of a judge, imbued with basic impartiality, legal training and power of objective thought, being consciously or subconsciously influenced by extraneous matter.

Even such a possibility has been refuted. In R v *Horsham Justices,* ex p *Farquharson & Anor* [1982] 2 All ER 269 (CA) LORD DENNING MR at 287f stated emphatically that:



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"at a trial judges are not influenced by what they may have read in the newspapers."

The Canadian Courts are equally definite that the training and experience of judges equip them to dismiss from their minds any media publicity adverse aid hostile to the accused they are trying. In *Regina v Hubbert* (1975) 11 OR (2d) 464 (Ontario Court of Appeal) at 477, the following *dictum* from an earlier decision was approved:

"I have not heard it suggested that a trial judge who had heard about a case is not competent to decide it, and I do not think that his capacity tor eject what he has heard before is unique."

More recently, in *Phillips v Nova Scotia supra* CORY J said at 45:

"The process of electing the mode of trial is a voluntary exercise freely undertaken by the accused. It follows that an accused must accept all of the consequences flowing from his choice of mode of trial. One of these is that if trial by judge alone is selected it must be assumed that a trial judge trained to be objective and well-versed in the legal burden resting upon the prosecution can readily disabuse him or herself of the prejudicial effects of pretrial publicity."

See also the remarks to similar effect of SILUNGWE CJ in *Shamwana v The People* [1985] LRC (Crim) 120 (Supreme Court of Zambia) at 151g-h.

To accept that there is a real or substantial risk of a judge's mind becoming so clogged with prejudice by what he has read or heard about an accused, would mean that it would be impossible to find an impartial judge for a high profile case; and that such an accused could never receive a fair trial. The result would be nothing less than judicial abdication. The proposition needs rely to be stated to convince of its unsoundness.

(7) *The capacity of assessors to disabuse themselves of information they not entitled to consider*

The risk of any particular publicity and notoriety of the accused person having the effect of destroying an assessor's indifference or impartiality between the State and the defence is, to my mind, of far lesser degree than in the case of a juror. This is because of significant differences between them.

In the first place, assessors are selected because they possess the type of experience that is prescribed in the High Court Act. They are intelligent people who are deemed to possess the

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ability to judge. The Chief Justice and the Judge President may give a directive to the Registrar of the High Court as to who to choose to act as assessors, and are likely to do so in a complex, serious and notorious case. Persons with legal training and practical experience in the operation of the criminal justice system are not excluded.

Second, unlike jurors, assessors acquire a familiarity with criminal trials. Theirs is not an isolated participation never to occur again. Almost invariably they have been members of a trial court on many occasions. They take a far



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more active part in the proceedings than do jurors, being permitted to ask questions of the witnesses and of counsel. Their relationship to the trial judge is closer than that of jurors. They sit on the Bench on either side of the judge. It is open to them to discuss the case with the judge during the course of the trial and they tend to do so. The guidance a judge may give them is private and ongoing.

Third, assessors share the responsibility of deciding issues of fact with trial judge. All have an equal say in such determination. The judge will consult with them up to the stage of verdict.

These differences apart, it is not to be assumed that jurors lack the capacity to put from their minds detrimental and extraneous information acquired elsewhere. Even holding a tentative opinion of the accused person does not make partial a juror, sworn to render a true verdict according to the evidence. In *R v Vermette* (1989) 34 CRR 218 (Supreme Court of Canada) LA FOREST J expressed the view at 225 that in extreme cases of pre-trial publicity:

> "I am far from thinking that it must necessarily be assumed that a (potential juror) will necessarily be biased."

The same sentiment is to be found in *Dagenais v Canadian Broadcasting Corp supra* where, at 34, LAMER CJ stated his belief that jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of criminal proceedings. The learned CHIEF JUSTICE referred to the words of LORD TAYLOR CJ in Ex p *Telegraph plc supra* at 978 that:

> "a court should credit the jury with the will and ability to abide by thej udge's direction to decide the case only on the evidence before them".

Similar pronouncements of confidence in the ability of jurors to maintain impartiality, and in their understanding of the responsibility placed upon them, have been expressed in many other judgments. See *R v Lane & Ross* [1970] 1 CCC 196 at 201; *R v Makow* (1974) 20 CCC (2d) 513 (British Columbia Court of Appeal) at 519; R v *Corbett* (1989) 34 CRR 5 (Supreme Court of Canada) at 71; *R v W (D)* (1991) 1 SCR 742 (Supreme Court of Canada) at 761; *R v Coughlan & Young* (1976) 63 Cr App R 33 (CA) at 37 *in fine; R v Horsham Justices supra* at 287f; *D v Director of Public Prosecutions supra* at 472; Z *v The Director of Public Prosecutions* [1994] 2 IR 476 (Supreme Court of Ireland) at 496 and 508; *Hinch v Attorney-General for the State of Victoria* (1987-1988) 164 CLR 15 at 74 (High Court of Australia); *Murphy v The Queen* (1988-1989) 167 CLR 94 (High Court of Australia) at 99; *The Queen v Glennon* (1991-1992)

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173 CLR 592 (High Court of Australia) at 603.

If these views reflect correctly, as I believe they do, the good sense and capacity of jurors to act with complete detachment and render a verdict in



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conformity with the evidence properly admitted, it must follow that there is much less of a likelihood of a judge and assessors being affected in their fact-finding role by the intense media coverage which branded the applicant a sexual abuser of male persons.

(8) *Judicial mechanisms and procedures*

The determination of the existence of a real or substantial risk of partiality at the trial of the applicant does not rest entirely on the deserved faith I have in this country's judges and assessors to accomplish their task. There is the ability of in-built mechanisms in the criminal law system designed to protect the fairness of the trial. Only when such measures are inadequate to guarantee impartiality and to rid the influence of prejudice will s 18(2) of the Constitution have been breached and the benefit of the fair trial process lost to the accused.

In the course of this judgment, many of these important safeguards have been mentioned, albeit in a different context. They are, with others:

(i) the solemnity of the oath administered to the prospective assessors; and the presumption that they will perform their bounden duty with integrity, and determine the guilt or innocence of the accused free from extraneous considerations, and free from either prejudice against, or favour for, the accused.

(ii) the instruction or reminders of the trial judge to the assessors that the case is to be decided solely on the evidence elicited at the trial.

(iii) the nature of a trial being to focus the minds of the assessors on the evidence put before them rather than on prior publicity detrimental to the accused.

(iv) the participation of the trial judge in the fact-finding process.

(v) the ready access the assessors have to the trial judge and the ongoing guidance he or she is able to provide to them at all stages of the trial.

(vi) the statutory requirement that reasons for any factual finding must be furnished (see s 10(4)(b) of the High Court Act), with the prospect of an appeal if such findings are not justified on the admissible evidence.

(vii) the experience required of persons in order to quality for appointment as assessors. And the authority given to the Chief Justice and Judge President to direct the Registrar of the High Court to choose those considered to be best placed to deal with a particular case, including persons with legal training.

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(viii) the right of the accused to challenge, without assigning any cause, two persons chosen to be assessors at the trial (see s 6(4) of the High Court Act) and, presumably on good cause, to seek the recusal of an assessor.



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And exceptionally,

(ix) the postponement of the trial for a period sufficient to allow the adverse pre-trial publicity to abate, the staying power and detail of which are limited.

(9) *The conclusion*

I have already referred to a series of recent judgments in which the English courts granted a stay of proceedings on the ground of a real or substantial risk of the jurors having been influenced in their decision by what they had read in the newspapers. A stronger line appears to have been taken by the highest courts of Canada and Australia.

In *R v Vermette supra* the accused, an inspector in the Royal Canadian Mounted Police, was being tried with the theft of computer tapes containing a list of members of the *Parti Québécois.* During the course of the defence case, the Premier of Quebec, in a colourful and abusive diatribe before the National Assembly, denounced not only the credibility of the accused's witnesses but also that of the defence lawyers. His remarks received exceptional publicity in the media on the following and succeeding days. The Supreme Court held that the order of the lower court staying the proceedings was not justified (see at 226).

In the Australian case of *The Queen v Glennon supra,* the respondent was a Roman Catholic priest. He had been convicted on a charge of indecently assaulting a girl under the age of sixteen. Several years later the respondent was a witness in a criminal trial before the magistrates court in which he was cross-examined about his conviction and about an alleged homosexual rape of one of the accused. Extensive publicity was given in the media to the allegation. A radio commentator mounted an attack on the respondent in three separate broadcasts in which he alleged grave criminal conduct and sexual impropriety, and specifically referred to his prior conviction. Subsequently, the respondent was charged with seventeen counts of sexual offences against young people. An application for a permanent stay of proceedings on the basis that the respondent would be unable to receive a fair trial because of the prejudicial effect of the pre-trial publicity was dismissed at first instance. The trial proceeded and the respondent was convicted. The Court of Criminal Appeal, by a majority, allowed an appeal by the respondent, holding that the pre-trial publicity had prohibited a fair trial. In a further appeal, the High Court restored the decision of the trial court. BRENNAN J (as he then was) said at 613-614:

> "(It) does not follow that, where a punishable contempt of court has been committed, the trial must be aborted If that were the consequence of punishable contempt, the penalties



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> imposed for contempt would be far harsher than those presently imposed, for the contempt would totally defeat the enforcement of the criminal law and penalties for contempt would have to reflect that fact. Administration of the criminal law cannot be made hostage to conduct amounting to contempt of court, even if the contempt be flagrant. If it were otherwise, the perpetrators of crimes which shock the public conscience, such as those charged in *Murphy v The Queen supra,* would oftentimes go untried and unpunished, for pre-trial publicity prejudicial to an accused is stimulated by the notoriety of the accused and the heinousness of the crime. Yet, it would undermine the criminal law's protection of society and its members to refuse to allow the law to take its ordinary course in these cases. The administration of criminal justice by the courts, which proceeds inexorably to its conclusion in each case, would be adventitious if trials could be halted by a punishable contempt. In cases where a punishable contempt is committed - at least where the contempt is flagrant - public obloquy would be substituted for jury verdict and trial by media would supersede trial according to law. No community governed by law could acknowledge that persons outside the control of the State could possess such a capacity for disrupting the administration of criminal justice."

It is this approach that commends itself as worthy of adoption by our courts. In the result, I am entirely satisfied that the applicant has failed to discharge the burden of establishing the existence of a real or substantial risk of not being afforded a fair hearing before the High Court on the charges for which he has been indicted by the Attorney-General.

THE ALTERNATIVE ISSUE

Prior to the inception of the trial the applicant was furnished by the Attorney-General with copies of statements of the witnesses who were to testify for the State, as well as others recorded from persons whom it was not intended to call, and all documents which were to be produced as exhibits. This disclosure was in compliance with the ruling of the High Court in S v *Sithole* 1996 (2) ZLR 575 (H) at 593H-594C. See also *Shabalala & Ors v Attorney-General of the Transvaal & Anor* 1995 (12) BCLR 1593 (CC) at para 37, 1996 (1) SA 725 (CC) at 743; S *v Scholtz* 1997 (1) BCLR 103 (NmS) at 105B-F; *Molapo v Director of Public Prosecutions* 1997 (8) BCLR 1154 (Les) at 1164H-1165F; S *v Angula & Ors; S v Lucas* 1997 (9) BCLR 1314 (NmH) at 1318I-1319F; *R v Stinchcombe* [1992] LRC (Crim) 68 (Supreme Court of Cananda) at 78h and 79h-80c.

The decisions cited establish further that the State is entitled to withhold any document in respect to which it is able to satisfy the court, on a balance of probabilities, that disclosure to the defence might reasonably impede the ends of justice, or otherwise be contrary to public interest. Examples of such claims are where the information sought -

(i) would disclose the identity of an informer whom it is necessary to protect;





(ii) would disclose police techniques of investigation which it is similarly necessary to protect;

(iii) might imperil the safety of the witness;

(iv) would otherwise not be in the interest of the public or the State.

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The applicant was not content with the disclosure made. He sought an order directing the Attorney-General to make available the investigation diary (or diary log) contained in the police docket. This was refused on the ground of confidentiality. The entries therein were those of the investigating officer, the supervisory police officer and members of the Attorney-General's Office who had issued instructions to the investigating officer. In short, blanket privilege was asserted in respect of the entire investigation diary.

Of course, the nature of an investigation diary does not in itself entitle protection from disclosure. If the order in *Phato v Attorney-General, Eastern Cape & Anor* 1994 (5) BCLR 99 (E) at 134H, 1995 (1) SA 799 (E) at 837E suggests the contrary, I would respectfully disagree with it. It is the information reflected in the entries, or some of it, that may be of relevant assistance to the accused.

In my opinion, there is an obligation on the Attorney-General to reveal to the defence, whether requested to do so or not, any information entered in the investigation diary which it may reasonably require, or deem to be of assistance, for the protection of the accused's rights. A substantial measure of good faith and fair play is essential, since the defence and the court will be unaware of whether any of the entries in the diary may tend to advance the accused's case.

Should the assertion that some entries in the investigation diary may be supportive of the accused's innocence be met with a disclaimer by the Attorney-General, then it would seem to me desirable that the trial court decide what should or should not be disclosed. See S *v Scholtz supra* at 117B-C; *R v Davis & other Appeals* [1993] 2 All ER 643 (CA) at 648c-d; R *v Keane* [1994] 2 All ER 478 (CA) at 484j-485c; *R v Mills* [1997] 3 All ER 780 (HL) at 798a-d. It is obviously unsatisfactory to permit the Attorney-General to be judge in his own cause.

I have endeavoured to provide some guidance for the future, even though the issue of what more the Attorney-General should disclose to the applicant was resolved during argument. The *Director of Public Prosecutions* gave *a* firm undertaking not to withhold the name and address of any person interviewed by the police from whom a statement was not recorded; as well as any other material of an evidential nature. He is to be commended for adopting that approach, which proved acceptable to the applicant's counsel.

In the circumstances the grant of an order was not persisted with.



GUBBAY CJ

THE COSTS

An important constitutional point was raised by the applicant. It was *res nova* in this and other neighbouring jurisdictions. Nor was the answer self-evident. Furthermore, the argument of Mr *Andersen* was of much assistance to the court.

Despite the failure of the application, I propose to apply the principle set out in *Bull v Minister of Home* Affairs 1986 (1) ZLR 202 (S) at 203G-H; 1986 (3) SA 870 (ZS) at 876B-C; *A-G v Blunwars & Anor* 1991 (1) ZLR 118 (S) at 126F-G; and *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S) at 16B; 1995 (9) BCLR 1221 (ZS) at 1233H-I. Accordingly, the applicant is not to be

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penalised in costs.

THE ORDER

The application for a stay of the criminal proceedings instituted against the applicant is dismissed. There is to be no order as to costs.

**MCNALLY JA:** I agree.

**EBRAHIM JA:** I agree.

**MUCHECHETERE JA:** I agree.

**SANDURA AJA:** I agree.

*Midzi Ziweni & Partners*, applicant's legal practitioners

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

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## IRVINE v HM THE QUEEN IN RIGHT OF CANADA 1998 (1) ZLR 328 (SC)

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

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

16 & 26 March 1998 Judgment No. S-37-98

### Flynote

Landlord and tenant - tenant - ejectment statutory tenant - good and sufficient cause for landlord to require ejectment order - foreign government having bought premises for use as diplomatic premises Ministerial authority to purchase premises for that purpose previous granted - such good and sufficient cause shown

Town and country planning - land - development of-purchase of for use as diplomatic premises - Ministerial approval granted for purchase for that purpose - development thereby approved

### Headnote

The respondent (the Canadian Government) owned 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 appellant 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 (Premises) Act [*Chapter 3.01*] to purchase the premises for the use by the Canadian Government's aid agency. Notice was later given to the appellant that the respondent required him to vacate the premises so that the aid agency could be placed there. The appellant argued that he had become a statutory tenant and that the respondent did not have good and sufficient ground to claim his ejectment because the Minister's letter of approval was for the purchase of the land only, not for the development that was proposed.

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*Held*, that in making the application to purchase, the respondent was required by the Act to specify the use to which it proposed to put the land. That was the approval sought of the Minister and that was the approval given. The approval was not restricted to the purchase. Consequently, good and sufficient cause had been shown for requiring the appellant to vacate the premises.

Legislation considered:

Foreign Missions and Agencies (Premises) Act [*Chapter 3.01*], ss 4(c), 5(1)(a) and 8

Regional, Town and Country Planning Act [*Chapter 29:12*], a 22(1)(b)

## Case Information

*R Y Phillips*, for the appellant

*S Moyo*, for the respondent

## Judgment

**GUBBAY CJ:** At all times relevant to this appeal, the respondent has owned

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GUBBAY CJ

Stand 1656, Salisbury Township, upon which the Canadian diplomatic mission is located. Since 1 June 1986, the appellant has been in occupation of an old dwelling house erected on the contiguous property, being Stand 1657, Salisbury Township, from where he has conducted the practice of a dental surgeon. The property was owned previously by Medview Investments (Pvt) Ltd ("Medview") and the appellant derived his right of occupation under an agreement of lease entered into with Medview. After the expiration of that lease on 31 May 1989, the appellant became a statutory tenant in terms of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983).

During the latter half of 1989, the respondent applied in terms of s 4 of the foreign Missions and Agencies (Premises) Act [*Chapter 3:01*] for the approval of the Minister of Local Government, Rural and Urban Development ("Minister") to purchase Stand 1657, it being a requirement of s 3(1) of the Act that no mission may purchase any premises (that is, immovable property) otherwise than in accordance with the approval of the Minister.

On 12 December 1989, the Minister approved the purchase of Stand 1657, by the respondent, "for the Decentralised Assistance Programme". Such approval, which was confirmed in writing by the Ministry of Foreign Affairs four days later, was made subject to the following conditions:

> "(i) no development, as defined in the Regional, Town and Country Planning Act, 1976 may take place on the said premises without prior consent of the Minister of Local Government, Rural and Urban Development;
>
> (ii) the said premises shall not be leased, sold or otherwise disposed of by the Canadian Government without prior consent of the Minister of Local Government, Rural and Urban Development;

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(iii) all development shall be in conformity with the relevant by-laws of the Harare City Council. "

The reference to the Decentralised Assistance Programme concerned a programme carried on under the auspices of the Canadian International Development Agency ("CIDA"). The Government of Canada was creating a Southern African centre for CIDA, which is that Government's development wing, to be based in Harare. The intention was to assemble the several local offices of the respondent at one place. The implementation of the programme thus necessitated the demolition of the existing dwelling house on Stand 1657 and the construction of a prestigious three storey building to accommodate the many employees of CIDA.

Having obtained the approval sought, the respondent concluded the purchase of Stand 1657 from Medview on 26 January 1989. Transfer of title to the property was registered in the respondent's name on 6 April 1990, and the appellant was advised of the resultant change in ownership.

On 24 October 1991, the respondent served upon the appellant a notice to vacate Stand 1657 by 31 December 1991 so as to enable her to take



occupation on the following day. The appellant had been informed in an earlier letter that it was the respondent's intention to demolish the existing building on the property in order to construct a three storey office block for CIDA.

The notice to vacate elicited the response that the appellant required a period of between six and nine months to relocate his dental practice in alternative premises. More significantly, it was contended that Stand 1657 was zoned for surgeries, dwelling houses and residential buildings by virtue of the City of Harare Phase I Second Re-submission Town Planning Scheme, and not for office accommodation. The gravamen of this contention, as clarified in subsequent correspondence, was that the approval given by the Minister constituted no more than permission to purchase Stand 1657. It was not a permit to alter the character or the use of that property for office or business purposes. And that until the respondent was able to produce a permit authorising her to put the land or the existing building to the use she proposed, she could not claim to have good and sufficient grounds for requiring the eviction of the appellant. Not unexpectedly, the submission failed to find favour with the respondent.

On 10 October 1996, the City of Harare, as the local planning authority, acting in terms of s 40 of the Regional, Town and Country Planning Act [*Chapter 29:12*], authorised the consolidation of Stands 1656 and 1657 into one property, henceforth to be referred to as Stand 18540 Harare Township.

Eventually, on 24 January 1997, the respondent issued another notice to the appellant to vacate by 30 March 1997. His persistent refusal to yield possession compelled the respondent to institute proceedings in the High Court for an order for his eviction. This was granted with costs on 10 September 1997.

Before this court, Mr *Phillips,* who appeared for the appellant, accepted that if the learned judge

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was correct in deciding that the Minister had approved the proposed development upon Stand 1657, it necessarily followed that good and sufficient cause had been shown in terms of s 22(2) of the Commercial Premises (Rent) Regulations. The argument he advanced was to this effect. The letter of 12 December 1989 was merely an expression of approval by the Minister for the purchase by the respondent of Stand 1657. It went no further than that. in fact, it specifically prohibited any "development" of the property without the Minister's prior consent. And as the altering of the character of the use of the land or building thereon from a surgery to a three storey office block would constitute development in terms of s 22(1)(b) of the Regional, Town and Country Planning Act, it was incumbent upon the respondent to submit an application to the Minister pursuant to s 8 of the Foreign Missions and Agencies (Premises) Act. This she had omitted to do.



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Any such development was therefore prohibited by s 24(1) of the Regional, Town and Country Planning Act. This argument, which was attractively advanced, warrants close scrutiny.

Section 8 of the Foreign Missions and Agencies (Premises) Act, under which the Minister assumes the function of the local authority, provides that:

> "Notwithstanding the provisions of the Regional, Town and Country Planning Act [*Chapter 29:12*], where, in terms of that Act, permission to carry out development on the premises of a mission or agency or any other permission or authority is required in relation to such premises, application for such permission or authority shall be submitted to the Minister, who may grant or refuse such permission or authority on such terms and conditions if any, as he may think fit to impose."

Obviously, this section must be read in conjunction with s 22(1)(b) of the Regional, Town and Country Planning Act, which, in turn, provides:

> "Any reference in this Part to development in relation to any land or building means any of the following -
>
> (b) the altering of the character of the use of any land or building, other than -
>
> (i) (inapplicable);
>
> (ii) (inapplicable)."

Permission to carry out development on the premises (the immovable property) of a mission or agency relates, in my opinion, to the alteration of the character ter of the use of the land or building "other than" as a mission or agency to another use. It is an alteration of the use of the land or building from a mission or agency to something different.

In making the application to purchase, the respondent was required by s 4(c) of the Foreign Missions and Agencies (Premises) Act to specify the use to which it was proposed to put Stand 1657. This was done by expressing an intention to use the land for the Decentralised Assistance Programme; to extend the mission established on Stand 1656 to the adjoining Stand 1657. That was the approval sought of the Minister; and that was precisely what was approved by him under s 5(1)(a) of the Act. It was not an approval restricted approved to the purchase of

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Stand 1657.

True, the approval was granted subject to the condition that no development, as defined, should be carried out before the consent of the Minister was obtained. But I agree with the learned judge that the condition, construed in the context of the letter of approval, refers to forms of development other than the alteration of the character of the use of the land from surgeries, dwelling houses and residential buildings, to a mission; for, in the preceding paragraph, approval to use Stand 1657 as a mission was granted simultaneously with approval to purchase it.

Consistent with this view is the later permission granted to the respondent by the local planning authority to consolidate Stands 1656 and 1657 into one





property, to be known as Stand 18540 Harare Township; and by the intimation that the previous use put to Stand 1656 as a mission "can still be enjoyed on Stand 18540".

In the result, I respectfully share the conclusion of the court *a quo* that an eviction order against the appellant was justified. The appeal is accordingly, dismissed with costs.

**McNALLY JA:** I agree.

**MUCHECHETERE JA:** I agree.

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

*Scanlen & Holderness,* respondent's legal practitioners



## WALENN HOLDINGS (PVT) LTD *v* INTEGRATED CONTRACTING ENGINEERS (PVT) LTD & ANOR 1998 (1) ZLR 333 (HC)

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

Sibanda J

Opposed application

5 December 1996 & 8 April 1998 Judgment No. HH-177-97

### Flynote

Company - director - authority - scope - entering into contract on behalf of company - whether had necessary authority to negotiate a valid and binding contract on behalf of company - if no actual authority, whether had ostensible authority - non-compliance with company's internal arrangements - effect - the rule in the Turquand *case* - *application of*

### Headnote

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One L Mugabe, a director of the first respondent company (``R1 company'') entered into negotiations with the applicant company (``WH'') for the purchase by R1 company from WH of shares in a subsidiary company of WH company. During these negotiations it was indicated that the likely source of the funds to pay for the purchase of these shares would be the second respondent company (``R2 company''). Mugabe was also a director in R2 company.

WH sought a declaratory order that R1 company had entered into a binding contract with WH for the purchase of the shares and that R2 Company had to make available the necessary funds to pay the purchase price for the shares.

*Held*, that a binding and enforceable agreement had been entered into between WH and R1 company for the purchase of the shares. It is clear that the board of R1 company was aware of and had authorised these negotiations and that Mugabe had actual authority to negotiate on behalf of R1 company and conclude a binding agreement. There was no evidence to support the assertion that the Board of Directors had rejected the agreement that had been reached. No resolution of the Board to this effect was placed before the court.

*Held*, further, that even if Mugabe did not have actual authority to enter into the contract on behalf of R1 company, he certainly had ostensible authority to act as he did.

*Held*, further, that if the internal arrangements of R1 company had not been complied with, the rule in the *Turquand* case applied. Mugabe had held himself out as having the authority to negotiate on behalf of R1 company. The negotiator for WH had negotiated in good faith and was entitled to assume that all the required internal formalities of R1 company had been complied with and that Mugabe was entitled to negotiate on behalf of the company. If Mugabe was not authorised by the constitution of R1 company to bind the company, the negotiator of WH was not aware of these internal arrangements. The negotiator for WH was not obliged to inquire into these matters of internal management.

*Held*, therefore, that a binding contract had been entered into between WH and R1 company.

*Held*, further, however, that no contract had been entered into whereunder R2 company undertook to finance the purchase of the shares. All that had happened was that, during the



negotiations between WH and R1 company, an indication had been made that the likely source of funds for the purchase of the shares was R2 company. The agreement between WH and R1 company had not been conditional upon R2 company providing the necessary finance. WH thus had no basis for asking the court to oblige R2 company to provide the finance for the purchase of the shares.

Cases cited:

*Anderson Shipping (Pty) Ltd* v *Guardian Insurance Co Ltd* 1987 (3) SA 506 (A)

*Barkett* v *SA Mutual Trust & Assurance Co Ltd* 1951 (2) SA 353 (A)

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*Biggerstaff* v *Rowatts Wharf* [1896] 2 Ch 93 (CA)

*CIR* v *Richmond Ests* 1956 (1) SA 602 (A)

*Cowan de Groot Properties Ltd* v *Eagle Trust plc* [1992] 4 All ER 700

*El Ajou* v *Dollar Land Hldgs plc* [1994] 2 All ER 685 (CA)

*Ferguson* v *Wilson* (1866) 2 Ch App 77

*Howard* v *Patent Ivory Mfg Co* (1888) 38 ChD 156

*County Life Assurance Co* In re (1870) 5 Ch App 288

*Legg & Co* v *Premier Tobacco Co* 1926 AD 132

*Lennard's Carrying Co* v *Asiatic Petroleum Co Ltd* [1915] AC 705; [1914-1915] All ER Rep 280 (HL)

*Levy* v *Central Mining & Invstm Corp Ltd* 1955 (1) SA 141 (A)

*Levy* v *Zalrut* 1986 (4) SA 476 (W)

*Mahomed* v *Ravat Bombay House (Pty) Ltd* 1958 (4) SA 704 (A)

*Mahony* v *East Holyford Mining Co* (1875) LR 7 HL 869; [1874-80] All ER Rep 4

*Meridian Global Funds Mgmt Asia Ltd* v *Securities Commission* [1995] 2 BCLC 116

*Mine Workers Union* v *JJ Prinsloo* 1948 (3) SA 831 (A)

*Morris* v *Kanssen* [1946] AC 459; [1946] 1 All ER 586 (HL)

*Paddon & Brock Ltd* v *Nathan* 1906 TS 158

*Registrar General* v *Northside Developments (Pty) Ltd* (1988) 14 ACLR 543 SC (SW)

*Royal British Bank* v *Turquand* (1856) 6 E&B 327; 119 ER 886

*Ruben* v *Great Fingal Consol* [1906] AC 439 (HL)

*Small* v *Smith* (1884) 10 App Cas 119

*Tom & Co* v *Northard, Lowe & Wills Ltd* [1927] 1 KB 246 246 (CA)

## Case Information

*A P de Bourbon SC*, for the applicant

*T Nyambirai*, for the respondents

## Judgment

**SIBANDA J:** This is an opposed application in which the applicant, Walenn Holdings (Pvt) Ltd,

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seeks a declaratory order against Integrated Contracting Engineers (Pvt) Ltd as follows:

1. that applicant and first respondent concluded an agreement on 2 February 1996 in terms of which:

   1.1 the first respondent purchased from the applicant 49% of the shares in Walenn Building Contractors (Pvt) Ltd on terms and conditions set out in the heads of agreement annexed to the application.

   1.2 the second respondent was to make available to the first respondent the funds necessary to pay the purchase price of the share holding.



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Further, having so declared, order that:

2. the first respondent is to pay applicant the sum of $3 000 000.

3. the second respondent is to make available to the first respondent the funds necessary to enable the first respondent to comply with para 2 hereof.

4. the respondent shall jointly and severally, the one paying the other to be absolved, pay the costs of the application.

The application is opposed by both respondents. The main grounds for resisting the application are that Mr Mugabe, for the first respondent, had no authority to negotiate a binding agreement and that in any event what was agreed to were proposals which were rejected by the first respondent's Board of Directors; for the second respondent, that it was not a party to the agreement.

I have been urged by both counsel for the parties that if the dispute between the parties could not be resolved on the papers I should refer the matter to trial. The only issue for determination is whether Mr Mugabe had the necessary authority to negotiate a valid and binding contract on behalf of the first respondent and whether second respondent gave an undertaking to provide the necessary funds. I am satisfied that there is no need to refer the matter to trial. There is, in my view, sufficient evidence on the papers to resolve the issue. I have therefore resolved to adopt a ``robust'' approach to decide the matter.

The applicant states that it is the owner of 49% of the issued shares in Walenn Building Contractor (Pvt) Ltd (herein after referred to as ``the company''). The remaining 51% of the said shares is owned by the first respondent Integrated Contracting Engineers (Pvt) Ltd.

According to the historical background of the matter, the applicant and the first respondent agreed to undertake a joint venture. The vehicle of the said joint venture was to be the company. On or about 1 October 1993, the parties entered into a conclusive and final agreement of sale of applicant's entire share holding in the company. It provided two stages for the acquisition of the said entire share holding spanning over a period of 3 years with 51% being acquired immediately and the remaining 49% to be acquired on 31 March 1997. What the

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parties agreed to leave unresolved and to be agreed upon in future was only the issue of the value of the 49% remaining shares.

I turn now to consider the relevant terms of that agreement:

Clause 5 of the agreement provides for ``The sale of shares in Newco Co''. ``Newco'' is defined as ``the company to be incorporated by the sellers in Zimbabwe for the purpose of acquiring the assets and liabilities''.

Clause 5.1 provided that:

> ``The Seller agrees to sell and transfer its shares in Newco to the Buyer which agrees to buy them as to:



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> 5.1.1 51% (fifty-one *per centum*) thereof at the effective date.
>
> 5.1.2 49% (forty-nine *per centum*) thereof on or about 31 March 1997.''

Clause 6.2 sets out the formula for the calculation of the purchase price of the 49% shares above referred, at the end of 3 years, that is, on or about 31 March 1997.

Clause 6.3 provides that ``The earnings (of the company) shall be calculated in accordance with the provisions of Annexure G'' in order to determine the value of the 49% shares for purposes of acquisition as at 31 March 1997.

These provisions were subject to a proviso which stated that:

> ``Provided always that the Buyer may by election in writing prior to 31 March 1997, elect to purchase the shares or may decline to do so, in which event the Buyer agrees to proceed in accordance with the provisions of Annexure 1.''

``Annexure 1'' sets out the formula for determining the purchase price of the shares in the event the Buyer declined to purchase the shares on or about 31 March 1997.

The parties, in anticipation that the terms of clause 5.1 as agreed may fail to materialise, through the fault of neither party, made provision for such unforeseen eventuality, under clause 5.3.

In case the shares were acquired in terms of clause 5.3, the parties put in place an appropriate machinery for the determination of the purchase price of the shares under clause 5.4.

The above referred agreement of 1 October 1993, was subject to certain suspensive conditions and did not come into operation until 1 July 1994. It is my view that, in terms of the above-referred agreement, the parties did not only conclude an agreement for purchase and sale of only 51% of applicant's shares, but also of the balance of 49% shares whose possession was to be taken by first respondent after 3 years of the agreement, leaving the mechanical computation and calculation of the purchase price of those shares to be resolved in future in terms of the agreement. Thus, in terms of the agreement, the entire share holding of the

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applicant was sold to first respondent on October 1993.

It was in terms of the agreement that in March 1995, Mr Mugabe approached Mr Thompson and proposed that first respondent acquire the remaining shares at an earlier date. It is not denied that the discussions were initiated and held at the instigation of Mr Mugabe for first respondent. The discussions, centred around the valuation of the purchase price of the 49% shareholding which had to be agreed. Since the method of acquisition adopted by first respondent was not one of those provided for in the agreement, it was necessary for the parties to agree as to the value of the 49% shareholdings of the applicant.



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The applicant's attitude was that it was happy to negotiate, but that such negotiations would have to be within certain parameters.

Mr Thompson confirmed these discussions in writing on 29 March 1995 in what he termed a ``memorandum'' addressed to Mr Mugabe. He indicated that they had no objection in entering into further negotiations on the topic as initiated by Mr Mugabe. He outlined matters that he thought had to be addressed and that the valuation of the 49% share holding was to be agreed. Further, he pointed out that unless first respondent had immediately available some $4 000 000 to $5 000 000, for the purposes of taking over the entire control of the company, there would be little point in starting serious negotiations.

On 18 January 1996, almost a year later, the parties held a meeting. In that meeting Mr Mugabe again raised the question of an early acquisition of the balance of 49% shareholding. He stated that he would like to see first respondent acquire applicant's shareholding immediately rather than at the end of the three year period. The parties then agreed to hold another meeting on 23 January 1996 to specifically, discuss the issue.

At the meeting of 23 January 1996, the parties examined the same issues raised in March 1995. The applicant, once again, informed the first respondent that it was not prepared to enter into further negotiations unless Mr Thompson, for the applicant, was satisfied that first respondent had funds available for the purchase of the shares. Mr Mugabe, for first respondent, confirmed that funds would be made available and stated that second respondent had been offered $4 000 000 for half of its 10% shareholding in the Zimbabwe Insurance Company. He went on to say, he was prepared to accept the offer on behalf of second respondent and utilise the proceeds of the sale to acquire further equity elsewhere. The meeting concluded with the parties agreeing to hold another meeting in the near future when the applicant would make definite proposals as to the price it required for its shareholding. The parties next met on 2 February 1996 at a Board meeting convened for the company by Mr Mugabe, the chairman of the company, at the offices of first and second respondents. At this meeting, the acquisition of applicant's shares in the company, by first respondent, was once again discussed as item No. 7 on the agenda.

According to the minutes of the said meetings, dated 5 February 1996, the minutes of the previous meeting held in 1995 could not be found in time for the meeting. The chairman, Mr

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Mugabe, then suggested an agenda for the meeting. He included, an item listed as No. 7 on the agenda which item was in respect of ``proposals for the purchase by K E of W H shares in WBC''.

Mr Mugabe, for the respondents, asserts that on 2 February 1996, he



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attended the board meeting, above referred and understood himself to have been attending in no capacity other than as director of the company.

However, he acknowledges and accepts that as director of first respondent and since the first respondent is a shareholder in the company he, Mr Mugabe, could discuss matters in which the first respondent had interests. He, however, qualifies this statement, to the extent that, while he could so discuss such matters, he could not conclude any agreement without first seeking the authority of the first respondent's board of directors to so conclude a contract.

Further, he acknowledges that he is a director of both first and second respondents. Also he accepts that on 2 February 1996, he attended a meeting and took part in the discussions of the possible changes in the share structure of the company. That when he made contributions to the issues under discussion he understood himself to have been doing so as a director of the company.

He and Mr Gutsa, the managing director of the first respondent, assert that they did not have authority of the first and second respondents to attend the meeting on their behalf, as they understood that the meeting was the meeting of the Board of Directors of the company. However, he concedes that as directors of first respondent they discussed matters pertaining to first respondent's affairs. He states:

> ``We discussed other issues concerning first respondent as directors thereof, but without seeking to bind first respondent by the views expressed in the discussion.''

It is submitted, for the first respondent, that the agreement of 1 October

1993 is relevant and should be considered in order to establish when and how applicant's shareholding in the company was to be sold to the first respondent.

I propose to examine and consider only the relevant clauses of the agreement of 2 February 1996, in order to place the issues forming the subject of these litigation in their proper perspective.

According to Mr Thompson, and indeed, the minutes of the meeting dated 5 February 1996, detailed negotiations were conducted leading to an agreement being concluded. However, Mr Mugabe, for the first respondent, says those negotiations concluded with a proposed agreement, which had to be taken to the first respondent's board of directors for its consideration and that Mr Thompson was aware of this. It is significant to note that, other than his mere say-so, Mr Mugabe has placed no evidence before me in the form of a resolution of the first respondent's board of directors, confirming that, the agreement was, indeed, placed

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before the Board and duly rejected.

It is to be noted that while Mr Thompson refers to a ``verbal agreement'' entered into by the parties on 2 February 1996, Mr Mugabe refers to a ``proposed agreement'', implying that the agreement was reduced into writing,



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which he then took and placed before first respondent's board of directors for approval. It is, in my opinion, immaterial what each party perceived the form of the agreement to be whether verbal or in writing.

What is of utmost importance is whether, in fact, the parties did conclude a valid agreement.

Further, it is contended for the first respondent that the parties had conducted business in the same way on previous occasions; that before any agreement was signed, it had always been a requirement that positive proof of the board's authority to sign the agreement, in the form of a resolution by the board of directors of either company, be produced. In an effort to prove his contention, Mr Mugabe then placed before me two resolutions, neither of which emanated from the first respondent's board of directors, but from the applicant's board of directors.

The two resolutions thus produced certainly could not advance Mr Mugabe's assertion that in previous dealing between the parties he always produced proof of authority by the first respondent's board of directors to negotiate and sign a contract. If anything, the resolutions produced tend to support applicant's contention that such was never, to Mr Thompson's knowledge, Mr Mugabe's practice.

Mr Mugabe concedes that he informed the meeting that he would approach the second respondent in order to secure the necessary funding on behalf of the first respondent for the purchase of the shares. But, he says, such approach was dependent upon the acceptance of the applicant's proposals, by the first respondent's board of directors. He says he did not approach the second respondent for the necessary funding because the first respondent's board of directors rejected the offer.

I have already commented elsewhere above on the absence of proof of such rejection.

He further says that, in any event, the first respondent is not a subsidiary of the second respondent and therefore, there can be no obligation upon the second respondent to finance the first respondent. On the papers before me, there is nothing to suggest that first respondent is a subsidiary of the second respondent and on the contrary there is express denial of such linkage.

It is my considered opinion that the issue of whether or not the first respondent is a subsidiary of second respondent is, for purposes of my judgment, quite irrelevant. The liability of the second respondent to finance the first respondent could only be a contractual one, that would be whether Mr Mugabe, when he stated that he would seek assistance from the second respondent to finance the first respondent for the purchase of the shares, imposed a contractual

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obligation between applicant and second respondent, to so finance the first respondent. I am unable to find any evidence in support



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of such an agreement between applicant and second respondent. In my view, if there was one, it could only have been a contract between first and second respondents and certainly not with applicant. Both first and second respondents deny the existence of such an agreement.

The minutes of the meeting of 2 February 1996 consist of eight parts, of which four contain the record of the negotiations.

A fact that tends to support Mr Thompson's contention that detailed discussions to determine the value of the 49% shares were conducted is that in the course of those negotiations, not only the valuation of the 49% shares was discussed, but also other issues that were to be directly or indirectly affected by the impending take over of the applicant's shares by the first respondent. Thus at the conclusion of their negotiations, the following terms of the agreement were recorded:

> ``The Chairman and Mr Thompson agreed to writing a letter on heads of agreement which would say:
>
> > $3 million would be payable within 30 days from 5 February 1998. $1.5 million would be payable within 120 days from 5 February 1996 with $1 million guaranteed paid within 120 days. Should that not happen, there would be an acknowledgment of debt on $1 million with commercial bank interest rates applicable to the $1 million. On the $500 000 not paid within 120 days, 24% preferential interest would apply within a year with commercial interest rates applicable to it should the period exceed a year. The limit on $1 million debt would be a year. The limit on $500 000 debt would be 18 months.
> >
> > The last $500 000 would be preferentially taken out of the project management company profits. The $500 000 would be interest free within a year and accrue interest at commercial bank rates thereafter.''

The above referred minutes were taken and recorded or prepared by Mr Gutsa, the managing director of first respondent. The record of the minutes establish, beyond any doubt, that comprehensive negotiations were conducted and that the paramount issue under discussion and consideration, in respect of item 7 on the agenda, was first and foremost the valuation of the purchase price and method of payment for the 49% shares. That it was a result of those extensive and intensive negotiations that culminated in an agreement as to the purchase price of the shares as set out above.

When the above minutes were presented to Mr Mugabe for signature, he declined to sign them, demanding that certain amendments be effected. The parties agreed and another copy of the same minutes was prepared by Mr Thompson, carrying those amendments requested by Mr Mugabe and were signed by the parties on 2 April 1996 including initialling the long hand effected amendments.

The amended and signed version of the minutes of the meeting of 2 February 1996, reflects that some insignificant and cosmetic changes were effected, eg by the insertion of the word ``proposed'' between ``by'' and

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agreement shown below. In the amended version of the minutes, the outcome of the negotiations is recorded in the following terms:

> ``Extensive discussion ensued which was concluded by (proposed insertion) agreement that a total of $5 000 000 of its loan accounts and the purchase of its shares, payable as shown below. $3 000 000 payable within 30 days of 5 February and $1 500 000 payable within 120 days of 5 February and $5 000 000 payable preferentially from profits made or to be made by a jointly owned project management company to be set up with HW owning 76% and ICE 24% of its equity.''

The ultimate sentence to those minutes reads: ``Messrs Mugabe and Thompson shook hands on the deal and the meeting was concluded.''

Prior to the preparation of the amended minutes, Mr Thompson had, in accordance with the terms of the agreement, drafted a ``memorandum of agreement''. It recapped and acknowledged the agreement of sale of the shares of 1 October 1993, that it came into effect on 1 July 1994 and that it was amended, with effect from 1 October 1994. The memorandum then sets out the terms of the agreed purchase price and how payment for the shares was to be effected exactly as they are set out in the minutes.

On 5 February 1996, Mr Thompson took the above referred document to Mr Mugabe at the offices of the first and second respondents for signing as agreed. But, on arrival, he found that Mr Mugabe had not arrived and he left the document with his secretary.

On 7 February 1996, Mr Thompson saw Mr Mugabe and the parties agreed to meet and met later that day. Mr Thompson says that it was during that meeting that they realised that Mr Mugabe had second thoughts about the agreement previously reached, that he was now unhappy with certain aspects of it and that he had some new proposals to make. They agreed to hear those proposals ``without prejudice'' to the agreement already reached.

The parties agreed to hold a further meeting and met on 13 February 1996 at a local hotel and had further discussions on the ``new proposals''.

Thereafter another meeting was arranged and held on 16 February 1996 at the same hotel when another draft ``memorandum'' incorporating the ``new proposals'' was presented to Mr Mugabe. He scanned through it and advised that he was taking it to his legal practitioners for advice.

Mr Gutsa contacted Mr Thompson on 22 February 1996. He then informed him that he had been instructed by Mr Mugabe to respond to the proposals set out in the agreement handed to Mr Mugabe on 16 February 1996, and that Mr Thompson should draft a ``shorter memorandum of agreement''. Mr Mugabe confirmed those instructions telephonically, but declined to discuss the terms of the intended new agreement as to how it differed from the previous agreement.

According to the agreement of 2 February 1996, the 6 March 1996 was to be the 30th day of the period by which payment of the first part of the purchase

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price of $3 million for the shares was to be made. But by that date, no such payment had been effected. The non-payment prompted Mr Thompson to visit the offices of the first and second respondents on 8 March 1996 and found Mr Zhuwao a managing director of the second respondent. In their discussion, Mr Zhuwao is said to have made it clear that the first respondent neither intended to be bound by the existing agreement nor to conclude the negotiations for the replacement agreement as has been previously suggested by Mr Mugabe.

Armed with non-payment of the first $3 million already due, and fortified by the results of the discussion with Mr Zhuwao, the applicant sought legal advice on the issue.

On 14 March 1996, the applicant's legal practitioners addressed a letter to the first respondent pointing out that the agreement of 2 February 1996 was still binding on the parties and that the applicant was holding the first respondent to it. Further, the first respondent was called upon to make payment of the $3 million purchase price by 20 March 1996. This correspondence was ignored by the first respondent.

It is, obvious, therefore, that when Mr Mugabe signed the ``amended'' minutes on 2 April 1997, he did so with the full knowledge that the first respondent was being held to the terms of the said agreement recorded in the very minutes he was signing. It is, in fact, a misnomer to refer to the signed copy of the ``minutes'' as ``minutes'' drawn by Mr Thompson, for they are in reality and in substance a summary of the original minutes drawn up by Mr Gutsa for the same meeting.

It has been submitted, for the applicant, that the manner in which he conducted the negotiations and the non-production of such a resolution rejecting the agreement from the first respondent's board of directors support the view that Mr Mugabe treated the two respondents as his ``*alter ego*''. According to the ``*alter ego*'' doctrine, the acts and omissions, intentions, purposes and knowledge of certain persons are the company's acts and omission, intentions, purposes and knowledge. That is to say, because the company as such - as a mere legal *persona* - has no physical existence and hence cannot act and has no mind or will of its own, the law attributes acts and states of mind of certain persons to the company. Their minds are its mind and the directing mind.

In *Lennard's Carrying Co* v *Asiatic Petroleum Co Ltd* [1915] AC 705; [1914-1915] All ER Rep 280 (HL), the appellant company was the owner of a ship and Lennard was the active director of the company. The ship carried the cargo belonging to the respondents and was in an unseaworthy state owing to the condition of the boilers. As a result, it became stranded in the gale and the cargo was destroyed by the fire. By s 502 of the Merchant



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Shipping Act of 1894, the owner of a British sea going ship was not liable to make good to any extent whatever any loss or damage happening ``without his actual fault of privity'' where any

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goods were lost or damaged by reason of fire on board the ship.

It was accepted that Lennard was at fault. The House of Lords held that Lennard was the ``directing and will of the company and that consequently his fault was that of the company itself''.

VISCOUNT HALDANE said at 283:

> ``The Corporation is an abstraction. It has no mind of its own any more than it has a body of its own. Its active and directing will must consequently be sought in the person or somebody who for some purposes may be called an agent, but who is really the *directing mind and will of the corporation, the very ego and centre of the personality of the corporation*'' (emphasis added).

See also *Barkett* v *S A Mutual Trust & Assurance Co Ltd* 1951 (2) SA 353 (A) at 362; *Levy* v *Central Mining & Invstm Corp Ltd* 1955 (1) SA 141 (A) at 149; *Anderson Shipping (Pty) Ltd* v *Guardian Insurance Co Ltd* 1987 (3) SA 506 (A) at 515-516; *El Ajou* v *Dollar Land Hldgs plc* [1994] 2 All ER 685 at 695 (CA).

The ``*alter ego*'' doctrine is, however, not limited to issues of delictual or criminal liability. It is a perfectly general one applying whenever it is necessary to attribute acts and state of mind of persons to a company.

In *Meridian Global Funds Management Asia Ltd* v *Securities Commission* [1995] 2 BCLC 116, LORD HOFFMAN said:

> ``It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called the rules of attribution.''

The doctrine of the ``directing mind'' is, then, a doctrine about rules of attribution.

Although there is persuasive evidence that Mr Mugabe may well have treated the respondents as his ``*alter ego*'', from the manner in which he conducted the entire negotiations, I, however, do not think that adequate submissions were advanced by counsel so as to enable me to rely on the ``*alter ego*'' doctrine for my decision.

Mr Mugabe has raised for the first respondent a number of defences of which only two are relevant:

(i) that he was not authorised to conclude and sign a binding agreement on behalf of the respondents;

(ii) that the negotiations between the parties resulted in a proposed agreement, which was not ratified by the board of directors of the first respondent.

Mr *de Bourbon*, counsel for the applicant, has submitted that these defences should properly be rejected. It will be seen that it is not denied that





the parties held negotiations leading to an agreement. What is in issue is the validity of that

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agreement. I shall turn to deal with the issue later.

The above stated defences, as I have already mentioned were, apparently, not the only ones submitted for the respondents.

Mr Mugabe adopted what may properly be termed a ``shot gun'' approach. He ``fired'' a bullet from the shot gun and then immediately knelt and bowed his head in earnest prayer that at least one of the many pellets from the cartridge just fired may find its target.

Here, then, are some of the ``pellets'' that are worth considering.

It was submitted that the first respondent had an option to buy the 49% shares and that it did not make a written option in terms of the proviso to clause 5.1.2. This submission is a result of a misconception of the meaning of clause 5 and the misinterpretation, in particular, of the proviso. The first respondent never had any option to buy or not to buy the 49% shares, but an obligation to buy the shares in terms of the agreement, as was submitted by Mr *de Bourbon*.

The proviso to clause 5.1.2 merely gave the first respondent an option to elect in writing to accelerate the acquisition of the 49% before 31 March l997 or, alternatively, to decline to acquire the said shares by the due date in which case the buyer was obliged to proceed to acquire the shares in accordance with Annexure 1.

Further, it was argued for the first respondent that the purchase price of $4-5 million was arbitrarily arrived at without taking into account the formula for calculation of the selling price set out in the agreement.

Mr Mugabe abandoned the agreed method as to the acquisition of the remaining 49% shares, therefore none of the formulae provided for the valuation of the purchase price of the shares could apply. It is clear that the parties then agreed to some method of the valuation of the purchase price of the shares consistent with the approach elected by Mr Mugabe outside the agreement. It was for this reason that Mr *de Bourbon* submitted that there was novation of the original agreement, which the parties in my view, were free to do.

Further, Mr *Nyambirai* for the respondents submitted that the parties did not conclude any agreement upon which applicant's claim was based. Of course, the argument overlooks the fact that the parties entered into a valid agreement on 1 October 1993, for the purchase and sale of the 49% share holding of the applicant.

He submitted that it was a direct result of that agreement that the parties embarked on the negotiations leading to the agreement forming the subject of these proceedings.

Mr *Nyambirai* further submitted that the parties submitted to arbitration



under the contract and therefore the court could not entertain the application. The fallacy with that submission is that it is based on a false conception that the adjudication by the court is on

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the breach of the terms of the agreement. Such is not the case.

It was argued that the approach adopted in the acquisition of the 49% share holding was in violation of the non-variation clause. This argument is certainly incorrect. The approach adopted by the parties was not hit by the non-variation clause, as none of the terms of the 1993 agreement were varied or breached in any way.

I now turn to consider two of what, to me, constitute the most important and critical defences raised on behalf of the first respondent:

(1) that when Mr Mugabe, embarked on negotiations, as he did with Mr Thompson, he had no authority to conclude and sign a binding agreement on behalf of the first respondent.

(2) that having so concluded and signed what he, Mr Mugabe, termed a ``proposed agreement'', the board of directors of the first respondent rejected that agreement now sought to be enforced.

It is not denied that when the parties negotiated the original agreement in 1993 Mr Mugabe had the actual authority to bind and indeed did bind the first respondent. It is equally not denied that in terms of that agreement first respondent acquired the entire share holding held by the applicant in the company. The first tranche of 51% shares was to be transferred immediately to first respondent, with the remaining 49% shares to be transferred on or before 31 March 1997 following an agreement between the parties as to the purchase price of those shares.

In view of the history of the matter, could it be said that Mr Mugabe required further authority merely to finalise one outstanding aspect of an agreement he concluded in 1993 at a time when he had full authority so to do?

In any event, does the role played by Mr Mugabe in the initiation and conduct of the negotiations for the purchase price of the shares support the argument that he had no authority to conclude a binding agreement? On the contrary, his role throughout is consistent with that of a director, let alone a chairman, with full authority to enter into a valid contract. This view finds support from the manner, the duration and persistency shown in the negotiations by Mr Mugabe. In the circumstances, and taking into account the composition or membership of the board of directors of the first respondent and those who were involved in the negotiations ie Mr Mugabe, not only a director but also chairman and Mr Gutsa the managing director, could it be argued that the board had not authorised the negotiations? It would be absurd to suggest that the board was not aware and did not authorise the negotiations, which were started when he concluded the original agreement in 1993.



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In my view, there was no need to clothe Mr Mugabe with fresh authority. What the parties were now involved in was the finalisation of the only item left outstanding for the future, the purchase price of the remaining shares. He, in my opinion, had actual authority to negotiate and conclude a binding agreement.

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If I am wrong, how else could he have concluded the original agreement in 1993, which in fact was the basis for his approach in seeking to acquire the remaining 49% shares? Even assuming that the assertion that Mr Mugabe had no authority to conclude a binding agreement is correct, and that the said agreement was subsequently rejected by first respondent's board of directors, there was no evidence, in the form of a resolution placed before me, in support of the alleged rejection by the board. If it were true that the board sat to consider the agreement and rejected it, a resolution to that effect would have been the only evidence of the intention of the first respondent.

Hahlo *South African Company Law through the Cases* 4 ed at p 445 sums up the role of the board of directors in these words:

> ``The fountainhead of a managerial power in the company is the board of directors, which acts on its behalf. A transaction entered into or approved by the board, acting within its constitutional powers, is binding on the company. So is a transaction entered into, within the scope of his actual authority, by the managing director, if there is one, by a single director, or by a manager or other officer of the company."

In *Ferguson* v *Wilson* (1866) 2 Ch App 77, CAIRNS LJ said:

> ``What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person.
>
> It can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable, where the liability would attach to the principal, and the principal only, the liability is the liability of the company ... "

See also *Small* v *Smith* (1884) 10 App Cas 119.

In *Commissioner for Inland Revenue* v *Richmond Estates* 1956 (1) SA 602 (A) at 606, CENTLIVRES CJ said:

> ``A company is an artificial person with no body to kick or soul to damn and the only way of ascertaining its intention is to find out what its directors acting as such intended. Their formal acts in the form of resolutions constitute evidence as to the intentions of the company of which they are director ... "

If I am wrong that Mr Mugabe had actual authority to negotiate and bind the first respondent, then he must have certainly had ostensible authority to act as he did for and on behalf of the first respondent.

What is effectively being contended for the first respondent is that matters of internal arrangements were not complied with, and therefore, the contract concluded by Mr Mugabe was not binding. For that contention to be



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sustained, there must be evidence to show that the applicant was aware of such an irregularity, or that Mr Mugabe, in terms of the first respondent's constitution, was not authorised to enter into such a transaction.

It was, in any event, not contented that the applicant was aware of the non-compliance with the

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internal arrangements at the time the contract was made and that Mr Mugabe was not authorised by the first respondent's constitution at all. Of course, it would have been, in view of the history of the dealings between the parties, absurd to the extreme to have dared to make such submission.

There is, in my opinion, merit in counsel's submission that those defences should properly be rejected. It seems to me that, this is a matter that should properly be dealt with on the basis that applicant was entitled to assume that all the required internal arrangements were complied with, thus enabling Mr Mugabe to conduct the negotiations as he did. Consequently, the first respondent should be bound in terms of the rule in *Royal British Bank* v *Turquand* (1856) 6 E&B 327; 119 ER 886. The facts in that case were that a bond in terms of which the Coalbrook company acknowledged itself to be bound to the plaintiff in the amount of £2 000 had been signed by two of its directors under the seal of the company.

Under the company's constitution the directors might borrow on bond such sums as should, from time to time, by a general resolution of the company, be authorised to be borrowed. The company pleaded that there had been no such resolution authorising the making of the bond. In the court of Queen's Bench it was held that the company was bound.

LORD CAMPBELL CJ stated:

> ``... we think the bond cannot be rendered illegal and void from any irregularity in the proceedings of the company, nor even by any excess of authority, the plaintiff having acted in good faith ... If the plaintiffs must be presumed to have had notice of the contents of the registered deed of settlement, there is nothing there to show that the directors might not have had authority to execute the bond as they asserted.''

The matter went on appeal to the Court of Exchequer Chamber, where the judgment of the Queen's Bench was upheld, JERVIS CJ stating the rule at p 888 thus:

> ``We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the state and the deed of settlement.
>
> But they are not bound to do more and the party here, on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done.''

Since its reception, the ``Turquand Rule'' has been applied in many



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decisions in England, South Africa, Australia, Scotland and other English speaking countries.

However, I have been unable to find any decision in which the ``Turquand Rule'' has been applied in this jurisdiction.

In *Morris* v *Kanssen* [1946] AC 459 at 474; [1946] 1 All ER 586 (HL) at 592 LORD SIMONS said:

> ``The rule in *Royal British Bank* v *Turquand* (The Turquand on Indoor Management Rule) provides that persons

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> contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and one is not bound to inquire whether acts of internal management have been regular. The rule renders proof by the company that the internal formalities have not been complied with insufficient to enable it to escape liability under the contract, hence the rule is not merely an application of the rebuttable presumption *omnia praesumuntur rite esse acta.*''

In *Registrar General* v *Northside Developments (Pty) Ltd* (1988) 14 ACLR 543 (SC, NSW) at 547, KIRBY P said:

> ``The whole point of the rule in *Turquand*'s case is that the presumption is irrefutable. Perhaps it is better not to speak of a `presumption' here at all; the rule is simply that the third party acting in good faith may assume that all internal formalities have been complied with.''

In my view, the presumption that the necessary acts of ``indoor management'' have been performed does not depend on the third party's knowledge of the constitution.

When it is said in this context that persons dealing with companies ``are bound to read'' the company memorandum and articles of association, all that is meant is that they are bound by those documents, that those documents define the limits of contracts into which companies can lawfully enter, and into which their directors or managing director can have authority to enter. The rule is that the necessary acts of internal management are presumed to have been performed, and not that a particular person is entitled to assume that they have.

See also *Mine Workers Union* v *J J Prinsloo* 1948 (3) SA 831 (A) at 847-849; *Mahomed* v *Ravat Bombay House (Pty) Ltd* 1958 (4) SA 704 (T) at 707B; *Levy* v *Zalrut* 1986 (4) SA 476 (W) at 487 and *Tom & Co* v *Northard, Lowe & Wills Ltd* [1927] 1 KB 246 (CA).

The third party can invoke the rule in *Turquand*'s case when, and only when, an organ or officer of the company has purported to contract on behalf of the company, such as in the instant case, then and only then, does the rule apply, entitling the third party to assume compliance with all the internal formalities necessary for the validity of the contract. In view of the fact that, neither counsel for the applicant nor for the respondents, made any submissions as to the applicability of the ``rule'' to the facts of this case.

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I must of necessity therefore proceed to consider the circumstances in which the rule would not apply. In the first instance, the ``rule'' does not entitle a person dealing with a company to assume that a person has been appointed to a position or office under the company's constitution, either as director or managing director simply because he could have been so appointed. The person must have been duly appointed to the position that he purports to hold, or hold that position *de facto*, or the company must be estopped from denying that he was duly appointed:

In Re *County Life Assurance Co* (1870) LR 5 Ch App 288 at 293, GIFFARD LJ said:

> ``The company is bound by what takes place in the usual course of business with a third party where that third party deals *bona fide* with persons who may be termed *de facto* directors, and who might, so far as he could tell, have been directors *de jure*.''

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See also *Mahony* v *East Holyford Mining Co* (1875) LR 7 HL 869; [1874-80] All ER Rep 427 and *Biggerstaff* v *Rowatt Wharf Ltd* [1896] 2 Ch 93 (CA).

The ``rule'' does not apply where a person purports to hold a position in the company that he does not hold *de jure* or *de facto*. It does not apply where the person dealing with the company knew that the formalities were not complied with or the circumstances were such as to put him on inquiry, which he failed to make. That such inquiry ought to be made of the secretary of the company.

LORD SIMONS in *Morris* v *Kanseen supra* at 592 expressed the qualification as follows:

> ``[The Turquand rule] is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, ie if he who would invoke it is put upon inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make might tell him that they were wrongly done.''

See also *Legg & Co* v *Premier Tobacco* 1926 AD 132 at 138; *Howard* v *Patent Ivory Manufacturing Co* (1888) 38 ChD 156; *Paddom & Brock Ltd* v *Nathan* 1906 TS 158 at 164; *Cowan de Groot Properties Ltd* v *Eagle Trust plc* [1992] 4 All ER 700 at 766.

The Turquand rule does not protect persons who by virtue of their position within the company ought to have known the irregularity. Further the rule cannot cure forgery.

In *Ruben* v *Great Fingal Consolidated* [1906] AC 439 (HL) LORD LOREBURN stated:

> ``I cannot see upon what principle your Lordships can hold that the respondent company is liable in this action. A forged certificate is a pure nullity.
>
> It is quite true that persons dealing with limited liability companies are not bound to



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> inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.''

None of these situations, obtain in the present case.

However, it is clear that the purpose of the Turquand rule is to avail the protection afforded to persons dealing with a natural person or the agent of a natural person, to persons dealing with companies.

Undoubtedly, the justification for the rule is business convenience. It must be obvious that to demand an inquiry into all the transactions which may have taken place ``indoors'' would be onerous, would put persons dealing with a company in an invidiously precarious position, and would in the main be extremely inconvenient for companies themselves.

In *Legg & Co* v *Premier Tobacco Co* 1926 AD 132, the Appellate Division accepted the ``rule'' as a correct statement of law. SOLOMON JA, who delivered the judgment of the court and after

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citing the portion of the passage in the judgment of *Jervis* CJ which I have quoted elsewhere above in expressing the justification for the rule, said at 143-4:

> ``... and indeed, unless some such principle was accepted, no one would be safe in dealing with joint stock companies.''

Tett and Chadwick *Zimbabwe Company Law* 2 ed p 68 state the reasons for rule thus:

> ``It would be shocking if [a company] could escape liability by hiding behind some lack of formality of which the unfortunate lender had no notice and could only discover by a search in the company's private record.''

A similar view as regards the justification for the ``Turquand Rule'' is to be found in Palmer's *Company Law* 23 ed p 33B where the learned author says:

> ``This rule, which is based on a general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agent of a company was compelled to call for evidence that all internal regulations had been duly observed.''

See also *Mine Workers Union* v *Prinsloo supra* at 845.

In this case, the first respondent's main contention is that it is not and cannot be held bound by the agreement entered into by the parties on 2 February 1996 for the valuation of the purchase price of the 49% remaining shares. This has to be, it is argued, because firstly, Mr Mugabe, had no authority to negotiate and sign a binding agreement on behalf of the first respondent. Secondly, that what was agreed on 2 February 1996 and recorded in the minutes of that meeting and signed on 2 April 1996 was a ``proposed agreement'' subsequently rejected by the first respondent's Board's directors.

On the other hand, it is contended for the applicant that the arguments advanced in defence of the first respondent have no substance and should



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properly be dismissed. Mr Thompson for the applicant denied that he was aware that Mr Mugabe had no authority to contract. He stated:

> ``... at no stage did he say that he was talking in his personal capacity only and that he was unable to commit either of the respondent's boards. If he had done so I would have been surprised as he never indicated in our previous dealings that he had anything less than full authority to act for the respondents. Furthermore, I would have called a halt to the negotiations then and there.''

The conflicting contentions of the parties necessarily demand that I take a close examination of the composition of the parties who attended, in particular, the board meeting of the company on 2 February 1996 and who took part in the negotiations.

Firstly, the board meeting of 2 February 1996, was that of the company and all those who attended were directors of the company, with Mr Mugabe as chairman.

Secondly, the first respondent is the majority shareholder with 51%, while the applicant is the minority shareholder with 49% in the company.

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Thirdly, Messrs Thompson and Potgieter are shareholders and directors of the applicant.

Fourthly, Mr Mugabe is a shareholder, director and chairman, while Mr Gutsa is a managing director of the first respondent and therefore both members of its board of directors.

It is clear from the evidence that not only at the meeting of 2 February 1996 were all key players in attendance, but also that in all previous and subsequent meetings the same key players took part in the negotiations. It is apparent from the evidence that most of those meetings were being held at the offices of the first and second respondents.

I have no doubt in my mind that the above evidence strongly supports Mr Thompson's assertion that Mr Mugabe had actual authority to negotiate and bind the first respondent. However, as I have already said, it is unnecessary for me to rely on actual authority for my judgment. There is adequate evidence in support of the view that Mr Mugabe must have had ostensible authority to validly contract.

Further, it is important to note that following these exchanges and the apparent attempt at a change of heart by Mr Mugabe on 14 March 1996, the applicant caused a letter to be addressed to the first respondent demanding compliance with the terms of the agreement of 2 February 1996.

The first respondent promptly ignored the letter, when simple logic demanded immediate and emphatic repudiation. Mr Mugabe stated:

> ``I did not take applicant's demand seriously. I thought applicant was trying to intimidate first respondent into resuming the negotiations for the purchase of applicant's shares by referring into an agreement which was never entered into.''

This cannot be true, because had it been true that no agreement was



reached, an astute businessman, as Mr Mugabe appears to be, would have promptly repudiated such an ``unfounded'' but serious assertion. However, in my view, the truth of the whole matter is to be found in the following statement by Mr Mugabe. Although he does not concede that he had actual authority he says:

> ``Though I was very keen to see the conclusion of the agreement ... ''

This statement, put in its proper perspective, in the light of the evidence, all it can mean is that he was ``very keen'' to conclude an agreement. How could he have been so ``very keen'' if, indeed, he had no authority to bind the first respondent?

To buttress the above assertion, he refers to a document produced by Mr Thompson in long hand marked at the top ``without prejudice''. This special phrase of apparent common usage in judicial circles was wrongly perceived by Mr Mugabe to mean that ``negotiation were still in progress''. It is obvious that first respondent misconstrued the import of this phrase in the context in which it was used. For in the context in which it is used in this case, it was intended to mean and it meant no more than, simply, that whatever further discussions the first respondent

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may have been desirous of conducting, such discussions were neither to affect nor to alter the terms of the agreement the parties had already reached. I am satisfied that when Mr Mugabe negotiated and agreed to the original contract of 1993, he had actual authority to negotiate and conclude a binding contract as he did.

I am, on the evidence, therefore, unable to accept that Mr Mugabe needed any further authority to finalise part of an agreement that he concluded when fully clothed with all the necessary authority in 1993, when the original purchase and sale of the 49% share holding was agreed.

The facts seem to support the view that Mr Mugabe, when he negotiated the valuation of the 49% share holding he had ``actual authority'' to do so, although he denies it. If I am wrong on this point and Mr Mugabe negotiated without actual authority and that, following the conclusion of the agreement, approval was required from the first respondent then, in those circumstances, Mr Mugabe, from the manner he conducted the negotiations throughout, must be held to have had ``ostensibly authority'' to negotiate a binding agreement. It is apparent that the applicant negotiated with first respondent in good faith for the valuation of the purchase price of the 49% shares. The applicant was, therefore, perfectly entitled to assume that all the internal arrangements or, as it is said, ``indoor management'' had been complied with at the time it reached an agreement with first respondent.

In the circumstances, the first respondent is bound in terms of the rule in *Royal British Bank* v *Turquand supra.* The ``Turquand Rule'' requires, as Hahlo *op cit* at 445 says:



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> ``Under that rule, also known as the `indoor management rule', persons dealing with the director or manager of a company who openly exercises an authority which he could have under the constitution of the company, provided that some act of internal management was performed, are entitled to assume that, that act was performed.''

Therefore, in terms of the ``rule'', the applicant must succeed in its claim against the first respondent.

As the applicant has been successful against the first respondent, it is entitled to its costs. I now turn to consider the claim against the second respondent. The nub of the case against second respondent is to be found in the following statement of Mr Thompson:

> ``In regard to the source of funds for the purchase price, it was clearly understood and agreed that there would be made available to the first respondent by the second respondent.''

He then went on:

> ``In undertaking to make the money available the second respondent became a party to the agreement between the applicant and the first respondent with specific obligation thereunder to provide the first respondent with sufficient funds to cover the purchase price.''

I certainly do not agree with Mr Thompson in this assertion. He is probably correct when he says: ``It was clearly understood'', in particular, as between the first respondent and the applicant but definitely not as between second respondent and applicant, because second respondent was at no stage a party in any negotiations with applicant. If at all there was an

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``agreement'' and ``undertaking'' as alleged, such an agreement and undertaking could only have been between the first and second respondents and not applicant. It was, however, submitted for the second respondent that the discussions of 2 February 1996 did not involve the second respondent. In any event, it was said that the agreement between the first respondent and the applicant was rejected by the first respondent's board of directors and that, on that basis, the second respondent could not be held liable to finance the first respondent.

In my view, the validity of the agreement entered into on 2 February 1996 between the applicant and the first respondent for the valuation of the purchase price of the 49% shares never depended on the availability of funds from the second respondent, as such funds could have been raised from any source where such were available.

I am inclined to agree with Mr Mugabe as being most likely correct, when he says that he expressed an intention to approach the second respondent on behalf of the first respondent for funding.

It is apparent on the papers that Mr Thompson demanded as precedent to any negotiations, *inter alia*, an indication from the first respondent that funds were available for the payment of the purchase price of the shares. It is also clear that it was in response to that demand that the first respondent mentioned the second respondent as the expected source of the funds. I am



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unable to appreciate how reference to the second respondent as the expected source of such funds could be construed as tantamount to an ``agreement'' with and ``undertaking'' made to the applicant to provide the first respondent with such funds.

Indeed, it is not uncommon, and certainly it is universally accepted business norm, that companies, in the ordinary course of business, finance their undertakings with loans sourced from financial institutions. It is highly unlikely that had a financial institution been named as the expected source of such funding, in the circumstance, the applicant would have sought to join that institution as a party in these proceeding. Of course, I am aware that a distinction has been sought to be made in respect of the second respondent in the instant case.

It has been argued for the applicant that, because Mr Mugabe is a shareholder, director and chairman of the second respondent, it follows that when he mentioned it as the likely source of funds, he did so in his representative capacity as director of the second respondent and therefore intended to bind it to the applicant.

This arguments ignores the evidence of Mr Zhuwao, the managing director of the second respondent, when he says:

> ``... the second respondent never authorised Mr Mugabe to conclude an agreement with applicant on its behalf, nor did it agree to provide any funding to the first respondent to enable the first respondent to purchase the applicants shares.''

This has to be so, because it has not been submitted that, in terms of the second respondent's

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constitution, it is part of its business to provide funds to the first respondent.

In my respectful opinion, the naming of the second respondent as the expected source of funds and considering that the second respondent had previously not been involved, it could not be said that its mere mention was intended to constitute an undertaking, given either to the first respondent or the applicant. To hold otherwise would amount to a betrayal of the ``corporate personality'' of the second respondent.

I am satisfied that the rule in *Royal British Bank* v *Turquand supra* does not apply in respect of the second respondent. In this case, actual authority in the form of a resolution of the board of directors of second respondent would have been required. Mr Zhuwao denies that such authority was ever granted.

Indeed, it is clear on the papers that the validity of the agreement between the part was never dependent on the second respondent advancing the first respondent with funds for the payment of applicant's shares. Indeed, the agreement was neither intended to be nor was it, in its final form, conditional on the second respondent providing such a funding to the first respondent. What was sought by the applicant as a prior condition to serious negotiations,



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and given by the first respondent, was no more than an assurance that funds would be available for payment of the shares and the second respondent was merely named as the expected source of the funds. It has been submitted for the second respondent, quite rightly, that:

> ``... as against the second respondent the applicant's papers do not disclose a valid cause of action.''

I am in total agreement with this submission and therefore I am satisfied that the second respondent was not a party to the agreement between the parties and should not have been cited as a party to these proceedings.

Accordingly, it is ordered as follows:

1. As against the first respondent:

   It is declared that:

   1.1 On 1 October 1993, the applicant and the first respondent entered into an agreement in terms of which the first respondent purchased from the applicant its entire share holding in Walenn Building Contractors (Pvt) Ltd:

      1.1.1 51% (fifty-one *per centum*) as at the effective date;

      1.1.2 49% (forty-nine *per centum*) on or before 31 March 1997, the purchase price to be determined in terms of the agreement.

   1.2 On 2 February 1998, the applicant and the first respondent entered into an agreement, in terms of which they agreed on the purchase price of the said 49% shares on the

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terms and conditions set out in the ``heads of agreement''.

2. The first respondent is to pay the sum of $3 000 000 to the applicant.

3. The first respondent shall pay the costs of this application.

4. As against the second respondent, the application is dismissed with costs.

*Honey & Blanckenberg*, applicant's legal practitioners

*Kantor & Immerman*, respondent's legal practitioners

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## GEORGIAS & ANOR *v* STANDARD CHARTERED FINANCE ZIMBABWE LTD 1998 (1) ZLR 356 (HC)

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

Blackie J

Application to set aside judgment by consent

8 April 1998 Judgment No. HH-59-98

### Flynote

Practice and procedure - judgment by consent -- - setting aside of - factors to be considered - lack of consent not only factor - onus - whether higher onus than normal placed on applicant

Interest - in duplum *rule* - *waiver of by debtor* - *whether permissible* - *compromise agreement for capital and up to double the interest* - *such agreement a novation and permissible*

### Headnote

The High Court has an inherent jurisdiction to set aside an order made by consent of the parties. The primary consideration is whether the person applying to have the order set aside actually consented or not; but even if he did not consent, it does not follow that the order will automatically be set aside. Other factors, such as the nature of the defence to the main action, any delay in bringing the application, and the importance of finality in litigation, must also be taken into account. There is no higher standard of proof required of the applicant than in any other civil action. He must establish, on the balance of probabilities, the facts necessary for relief; but strong grounds must be established. It is not correct to say that a heavy onus lies on the applicant.

Where a claim is based on a debt plus interest, the *in duplum* rule applies. The benefits of the rule may not be waived in advance by the debtor. However, there is nothing in law to prevent a subsequent agreement to a novation of the debt, in the form of a compromise in respect of the capital owed plus accrued interest up to the double. Further interest on the novated debt would not be a breach of the *in duplum* rule.

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Cases referred to:

*Commercial Bank of Zimbabwe Ltd* v *MM Builders & Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (Z)

*Washaya* v *Washaya* 1989 (2) ZLR 195 (H)

## Case Information

*B W Burman SC*, for the applicants

*A P de Bourbon SC*, for the respondents

## Judgment

**BLACKIE J:** This application is to set aside an order entered by this court as a consent order (the consent order).

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BLACKIE J

I will refer to the applicants separately as Georgias and Trinity and jointly as the applicants. I will refer to the respondent as ``the bank''.

The applicants submit that the law relating to the jurisdiction of this court to grant the relief which they seek, the grounds on which it may be granted and the onus of proof required, is set out in *Washaya* v *Washaya* 1989 (2) ZLR 195 (H). In that case, GREENLAND J held that this court has an inherent or common law jurisdiction to set aside an order made by consent and that, to succeed in such an application, an applicant need only show that he did not consent to the order. In particular, and at 201E of the report, he stated:

> ``It is clear, in terms of these precedents, common sense and justice, that once a court is not satisfied that a party consented to judgment, then the party is entitled to *restitutio in integrum*. Put differently, had the court granting the judgment been aware that the party had not consented it would not have acceded to the request that it enter judgment. The judgment must, therefore, be set aside. The court is not concerned with the other merits of the application."

The learned judge warned, however, that the onus on an applicant in such a case is a heavy one.

There is an important factual difference between *Washaya*'s case and this case. In *Washaya*'s case, the lawyer, representing the applicant when the consent judgment was entered, admitted that he did not have the applicant's authority to enter into the agreement, which resulted in the consent order. In this case, there is a dispute as to whether there was an agreement and the authority to enter into that agreement. The applicants say there was no agreement and no authority to enter into the agreement. The bank says an agreement was authorised and concluded. Whether or not there was an agreement is a factual issue, which must be determined. That factual difference does not, however, affect the principles to be applied in determining an application of this sort both as expressed in that case and on which this case

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must be decided

As far as those principles are concerned, while I agree with the learned judge's finding in *Washaya*'s case that this court has jurisdiction to grant the relief sought, I must respectfully suggest that the statements made by him concerning the grounds on which the relief sought will be granted and the question of onus require considerable qualification. I agree that the primary consideration in the application to set aside a consent order will be whether the applicant consented to the order or not. That, however, is not the exclusive consideration for the court in deciding to set the order aside. It does not follow that, because an applicant shows that he did not consent to the order, a consent order will automatically be set aside. There are other factors, which may also be need taken into account by the court (and this is not an exclusive list), such as the nature of the defence to the main action, delay in bringing the application and the importance of finality in litigation.

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BLACKIE J

Similarly, and with respect, I do not know what is meant by a heavy onus. The standard of proof required by an applicant in an application of this sort is the same as for any other civil action. Has the applicant established, on a balance of probabilities, the facts necessary for the relief, which he seeks? It seems to me that what should be said is that, if it is necessary for the court to exercise a discretion in the applicant's favour on any point which the court may take into account in determining the application, the applicant will have to establish strong grounds for the exercise of that discretion in his favour. The court will not ordinarily exercise its discretion in the applicant's favour unless there are such grounds.

I have therefore approached this application on the basis (a) that I have jurisdiction to grant the relief sort; (b) that the onus is on the applicants to prove, primarily, but not exclusively, that they did not consent to the consent order; (c) that I have a discretion to take into account factors other than the applicants' consent; and (d) that the applicants must establish strong grounds for me to exercise that discretion in their favour.

The background to the consent order is as follows. The bank sued Trinity for the payment of the capital and interest, which it said, was due to it by Trinity in terms of three hire purchase agreements and a lease agreement. Georgias was joined in the action as surety and co-principal debtor to the bank for Trinity.

The applicants defended the action. They filed claims in reconvention. The essence of the dispute between the parties was the quantum of the capital claimed by the bank and the amount of the interest, which was said to have accrued on the capital.

The action was set down for trial on 18 November 1996. At the start of the trial, discussions took place between the parties. The matter was stood down for the discussions to continue. On 20 November, the parties' legal practitioners (not the counsel in this application) appeared before the trial judge in chambers. The reason for that appearance is a matter of dispute between the parties. Nevertheless, it is common cause that, in the course of that appearance, the trial judge ordered that any agreement between the parties was to be recorded and submitted to him in

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writing. Thereafter, the legal practitioner for the bank drew, signed and presented to the trial judge a document, which purported to be such an agreement. The trial judge signed that document and entered it as the consent order on 17 December 1996.

The application is based on two grounds. Firstly, that there was no agreement of settlement between the parties which could be put into the consent order. Secondly, and in any event, the agreement alleged and the consent order may be contrary to law. They do not disclose whether the claim complies with the requirements of the *duplum* rule as set out in *Commercial*



BLACKIE J

Bank of Zimbabwe Ltd v *MM Builders & Suppliers (Pvt) Ltd* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (the *duplum* judgment) and the order was not obtained in compliance with standard of proof set out the practice directive by the court (the practice directive), at p 471B-3; 326B of that judgment.

The applicants' submission on the first point is that there was no final agreement with the bank on which the consent order could be based. They say that the agreement alleged was concluded between the parties' respective legal practitioners, when the applicants were not present. The applicants say that, prior to that agreement, they had instructed their practitioner, and made clear to the bank, that any settlement reached by the lawyers must comply with the *duplum* rule and must be submitted to them for approval. The applicants say further that the agreement, contrary to those express instructions to both legal practitioners, did not take into account the provisions of the *duplum* rule and was submitted to the trial judge without their prior knowledge and approval of the applicants.

The applicants' submission on the second point is that the requirements of the *duplum* rule are absolute and cannot be compromised and that the bank, in obtaining the consent order, did not comply with the practice directive and has not otherwise shown that the amount set out in the consent order does not offend the *duplum* rule.

The application is opposed. The bank submits that there was a final agreement between the parties and that the consent order was issued in accordance with that agreement. The bank further submits that its claim was for capital and interest and that such a claim may be novated, *ex post facto*, in a compromise agreement for the capital and up to double the interest due. The bank submits that the parties have so compromised the bank's claim against the applicants and it is now for the applicants to show that the *duplum* rule has been exceeded. In the alternative, and if the practice directive is applicable to this case, the bank submits that the amended statement of account, filed by it as further particulars to its claim in the main action, complies with that directive.

I will deal first with the issue concerning the agreement.

[The learned judge analysed the evidence on this point and concluded.]

In the result, I am not satisfied that, on the papers, the applicants have discharged the onus

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which rests on them to show that there was no final agreement reached on 20 November 1996.

The applicants submit, however, that, if the application cannot be determined in their favour on the papers, then the matter should be sent to trial to determine the conflict between the evidence of the two practitioners and



BLACKIE J

Georgias as to whether or not there was an agreement. Before deciding taking that course, I consider that the applicants must have established a strong *prima facie* case in favour of their claim that there was no agreement. I have already indicated that, in my view, such evidence as there is in the papers relating to events on 20 November and up the time when the consent order was entered as a judgment does not support the applicants' submissions. In these circumstances, and also in the interests of finality in litigation, I am not prepared to send the matter to trial to determine whether or not there was an agreement.

The applicants' second ground of attack on the consent order is that a debtor is not entitled to waive the benefits of the *duplum* rule. Any agreement that may have been entered into which permits the bank to claim interest which is in excess of that permitted by the *duplum* rule is, the applicants submit, contrary to public policy and, therefore, not enforceable. As authority for that proposition, the applicants point a passage in the *duplum* judgment at pp 465E-466F; 321E-322D, where GILLESPIE J, the author of the main judgment in that case, deals with the question of waiver. In so doing, GILLESPIE J distinquishes between an agreement in advance to waive the rule and an *ex post facto* agreement, after the debt has been called up, to agree to a novation of the debt. The former, GILLESPIE J held, would allow to go unchecked the abuses against which the *duplum* rule is the protection and is against public policy. In respect of the latter, GILLESPIE J said this:

> ``That is ... to contract a new loan in terms of which money is advanced by the creditor in an amount of the outstanding capital and interest and accrued interest up to the double in order to permit of the repayment of the outstanding indebtedness. This new debt would be a true capitalisation of the interest of the interest of the previous debt. It is the practice of merchant banks. It is in conformity with the old Roman agreement as to *anoticismus*. If concluded knowingly by freely contracting parties, when the existing debt is called up, I can see no objection to it. Whereas an agreement in advance to waive the rule leaves the debtor exposed to precisely those perceived evils which the rule is formulated to combat, a novation after the event permits the debtor the informed choice of increasing his possible indebtedness or of taking advantage of the cessation of accrual of interest.''

The applicants submit that, although these points concerning waiver are made *obiter* in the *duplum* judgment, the judgment is very persuasive as being of this court and in which three judges (one of whom was the trial judge in the main action and the other, myself) concurred. Further, and in any event, it is legally sound. I respectfully agreed and agree with what has been said in the passage from the *duplum* judgment just quoted.

The agreement alleged in this case is an *ex post facto* compromise. On the authority of the *duplum* judgment, it is permissible in respect of capital and ``accrued interest up to the double''. However, interest claimed by the bank, in excess of that double, is lawfully recoverable by the bank. The applicants

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BLACKIE J

submit that it is for the bank to prove that its claim, as reflected in the consent order, does not exceed the permitted interest. The applicants point to the practice directive in the *duplum* judgment to show what is required in terms of proof. They submit that neither the bank's claim, as disclosed in the particulars and amended statement of account in the main action, nor as set out in the consent order, complies with the practice directive or otherwise shows that the bank's claim is not in excess of the *duplum* rule. The applicants say that their papers in this application show that the claim may exceed the *duplum* rule. The consent order must, therefore, be set aside.

The argument advanced by the applicants on this point misconstrues the position that is now being considered. The applicants are seeking to have a judgment that was entered by consent set aside. We are dealing with an agreement, knowingly entered into by the parties, who were fully aware of the *duplum* rule, entered as a judgment of this court by consent by the trial judge in a contested action. He had before him the pleadings of the action and agreement of the parties. That judge was one of the two judges who concurred in the *duplum* judgment, and was the author of the practice directive in that judgment. He was clearly aware of the provisions of the *duplum* rule and cannot have overlooked them. We are not dealing here with a judgment by default, where the court must be satisfied that the bank is not claiming more than that to which it is entitled before granting the judgment. In a case such as this, the onus has clearly shifted to the applicants. The applicants cannot discharge that onus by submitting that the bank has not proved that the *duplum* rule has not been exceeded or by raising the possibility that the agreed claim may exceed the amount of interest payable in terms of that rule. It is for the applicants to show, on the balance of probabilities, that the consent judgment has been entered in an amount, which contravenes the provisions of the *duplum* rule. This, on the papers before me, the applicants have failed to do. Nowhere in the papers does it appear clearly how much the applicants say they owe or the amount by which they say the consent order exceeds the amount permitted in terms of the *duplum* rule.

Accordingly, the application must accordingly be dismissed with costs.

*V S Nyangulu & Associates,* applicant's legal practitioners

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



## *In re* Eight Juveniles 1998 (1) ZLR 1999 362 (HC)

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

Cheda J

Criminal review

9 April 1998 Judgment No. HB-20-98

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## Flynote

Family law - child - child in need of care - orders made by juvenile court - requirement to forward record of proceedings to High Court - what record should consist of

## Headnote

In terms of s 27(1) of the Children's Protection and Adoption Act [*Chapter 5:06*], when a magistrate presiding over a juvenile court makes certain specified orders under that Act, he is required to forward a record of the proceedings to the High Court within seven days of making such order. A judge can only review the proceedings where there is a proper record of the proceedings, that is, a record of the evidence and reports produced at the hearing. It is not proper for the magistrate simply to sign forms, put them in a file and send the file to the review judge. That is not a record of the proceedings.<B

## Judgment

**CHEDA J:** These cases came to me for review from the Provincial Magistrate, Bulawayo.

Section 27(1) of the Children's Protection and Adoption Act [*Chapter 5:06*] provides that:

> ``Wherever a juvenile court makes an order in terms of subsection (1), (2) or (3) of section *twenty* or subsection (3) of section *twenty five*, the officer who presided over such court shall cause to be forwarded to the Registrar of the High Court, not later than seven days after the making of such order, the *record of the proceedings* in the matter, together with such report, if any, as he may wish to append'' (emphasis is mine).

Subsection (2) provides that:

> ``The Registrar of the High Court shall, with all convenient speed, lay any record of proceedings and report received by him in terms of subsection (1) before a judge in chambers who may -
>
> (a) confirm, vary or set aside the order of the juvenile court; or
>
> (b) remit the matter to the juvenile court with instructions as to the further proceedings to be heard in such matter as the judge thinks fit.''

In short, the record is forwarded for review within seven days like in criminal cases.

Section 20 of the same Act provides that:

> ``(1) A juvenile court, after holding an inquiry in terms of section *nineteen* in respect of -





> (a) a child or young person brought before it in terms of this Act and who it has determined to be a child in need of care; or
>
> (b) a child or young person who had been ordered by a court which has convicted him of an offence to be dealt with in terms of this Act may ...''

The subsection then lists the various orders that the juvenile court can make which then become reviewable according to s 27.

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The above shows very clearly that there must be some proceedings that a judge has to review. In so reviewing, a judge has to peruse the proceedings held and the decision reached, as well as how it was reached. It is therefore important that the judge should have before him a record of the proceedings. A record of proceedings cannot be a set of forms placed in the file. It must be a record of proceedings in the proper sense. In other words, where evidence was led, that should be reflected on the record. Where a set of affidavits was filed, that should be recorded.

Where a witness gave evidence and produced certain reports, that should be properly recorded. It is this record which should then go to a judge for review.

Accordingly, it is not proper for a magistrate presiding over a juvenile court to simply sign forms, put them in a file and send the file to the judge for review.

I have found it necessary to state this because I have previously returned such forms to the magistrates pointing out that there is nothing to review if there is no record of proceedings as there is nothing to show how the decision was arrived at.

The record of proceedings should take the form of proceedings in any normal hearing in court. The Act refers to an inquiry. It cannot be said that the signing of forms by a magistrate amounts to holding an inquiry.

It is for these reasons that I am unable to review the attached juvenile court records and they are to be returned to their station of origin.

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## S *v* GAMBANGA 1998 (1) ZLR 364 (SC)

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

Ebrahim JA, Muchechetere JA & Sandura JA

Criminal appeal

24 February & 16 April 1998 Judgment No. S-32-98

### Flynote

Criminal law - common law offences - murder - -- finding of diminished responsibility - whether can reduce accused's legal responsibility so as to allow verdict of culpable homicide

### Headnote

There are *dicta* which have been taken to mean that, where on a charge of murder the court finds that the accused suffered from diminished responsibility, it may (though does not necessarily have to) return a verdict of culpable homicide. However, there appears to be no decided case where such a verdict was reached in such circumstances. It would appear to be contrary to accepted legal principles to accept homicide with intention and with guilty knowledge as anything other than murder. In numerous cases, though, it has been held that a state of diminished responsibility reduces the accused's moral, though not his legal,

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blameworthiness.

In appropriate circumstances, it would seem that where there is evidence that the accused's mental state - whether due to drink alone or to a combination of drink and other facts such as provocation and severe mental and emotional stress - leads to the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act, he should not be held criminally responsible.

Cases cited:

*S* v *Bailey* 1982 (3) SA 772 (A)

*S* v *Calitz* 1990 (1) SACR 119 (A)

*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 *Kalogoropoulos* 1993 (1) SACR 12 (A)

*S* v *Kensley* 1995 (1) SACR 646 (A)

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

*S* v *Phillips & Anor* 1985 (2) SA 727 (N)

*S* v *Sibiya* 1984 (1) SA 91 (A)

*S* v *Sulpisio* A-104-71

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

*S* v *van Vuuren* 1983 (1) SA 12 (A)

*S* v *Wild* 1990 (1) SA 561 (A)

## Case Information

*T Chitapi*, for the appellant

*M Zimba*, for the respondent



EBRAHIM JA

## Judgment

**EBRAHIM JA:** The appellant appeared before the High Court on 10 May -1997 facing a charge of murder. The State alleged that the appellant unlawfully and with intent to kill shot his wife with a pistol. The court found that when he shot his wife he was in a state of diminished

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responsibility. He was convicted of murder with constructive intent and sentenced to eleven years' imprisonment with labour.*(93) He appeals against both conviction and sentence.

The learned trial judge correctly summarised the pertinent facts as follows:

> `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, Woman AIDS Network, etc). His suspicion on his wife's infidelity grew into a 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 (he) accusing his wife of infidelity and she protesting her innocence. Whereupon 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 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 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 *n'angas* 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.



EBRAHIM JA

> "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."

The trial court considered the question of provocation and found - perhaps rather generously -

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that the appellant had been subjected to humiliation and ``gross'' provocation. It is arguable whether what occurred could really be described as ``gross'' provocation, certainly not to a more balanced individual, but to the appellant, who appears to have been somewhat emotionally unstable, what was said clearly enraged him.

The medical evidence about the appellant's condition is that he was suffering from emotional stress, amounting to diminished responsibility. Diminished responsibility is a condition falling short of a mental disorder such as would require a special verdict in terms of s 29(2) of the Mental Health Act 1996.

A successful plea of diminished responsibility has been said to reduce a charge of murder to culpable homicide: *S* v *Chitiyo* 1987 (1) ZLR 235 (S) at 239B. This statement requires considerable qualification. It has been held in some South African cases that non-pathological criminal incapacity could constitute a complete defence: *S* v *Kensley* 1995 (1) SACR 646 (A) at 658. It has been said that:

> ``... an accused person should not be held criminally responsible for an unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe mental or emotional stress ... Other factors which may contribute towards the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability. But in every case the critical question is - what evidence is there to support such a conclusion?'' *Per* DIERMONT AJA (as he then was) in *S* v *van Vuuren* 1983 (1) SA 12 (A) at 17G-H.

But even so, the courts in South African do not appear to have decided the point finally. See *S* v *Laubscher* 1988 (1) SA 163 (A), where the court held that it was unnecessary to decide whether a defence based on non-pathological criminal unaccountability by virtue of a total personality disintegration of a temporary nature was a valid defence.

The defence of sane criminal incapacity should in any event be viewed with extreme circumspection: *per* VAN DEN HEEVER JA in *S* v *Kensley supra* at 658j. Ultimately, always, it is for the court to decide the issue of the accused's criminal responsibility for his action, having regard to the expert evidence and to all the facts of the case, including the nature of the accused's actions during the relevant period: *per* BOTHA JA in *S* v *Kalogoropoulos* 1993 (1) SACR 12 (A).

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EBRAHIM JA

In one case, it seems that the defence has been successful: see *S* v *Wild* 1990 (1) SACR 561 (A), where the court said that if on the evidence there is a reasonable doubt whether the accused had criminal capacity, he should be given the benefit of the doubt.

As to whether diminished responsibility can ever reduce murder to culpable homicide, see *S* v *Bailey* 1982 (3) SA 772 (A), where the headnote reads:

> ``There appears to be little reason ... for considering, contrary to our presently accepted principles, homicide with intention and with guilty knowledge as anything other than murder and for the purposes of conviction distinguishing between degrees of blameworthiness in respect of such intention.''

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Zimbabwean authorities seem to indicate that a verdict of culpable homicide is permissible, though not actually inevitable. See, for example, the remarks of BEADLE CJ in *S* v *Sulpisio* A-104-71, cited by the judge *a quo* in this case, which indicate, though without citing authority for doing so, that diminished responsibility ``may not be relevant in considering verdict''. Whether this means that in some cases it may be relevant, or whether the learned CHIEF JUSTICE was effectively saying that it is *not* relevant is unclear. However, I have been unable to find a case where murder was reduced to culpable homicide on the basis of sane criminal incapacity. That it should be able to do so seems to me to be inconsistent with principle.

There are numerous cases, though, where a conviction for murder was returned, the accused's state of diminished responsibility being held to reduce the accused's moral, but not his legal responsibility. See, for example, *S* v *Sulpisio supra*; *S* v *Sibiya* 1984 (1) SA 91 (A); *S* v *Phillips & Anor* 1985 (2) SA 727 (N); *S* v *Taanorwa* 1987 (1) ZLR 62 (S); *S* v *Chiwambutsa* 1987 (2) ZLR 59 (S); *S* v *Laubscher supra*; *S* v *Chin'ono* 1990 (1) ZLR 244 (H); *S* v *Calitz* 1990 (1) SACR 119 (A). There is nothing in the facts of the present case to take it out of the ordinary run of cases. I can find no reason to depart from the trial court's findings in respect of conviction.

In respect of sentence, it is my view that the sentence does not induce a sense of shock. Had it not been for the finding of diminished responsibility made in his favour the death sentence may well have been appropriate on the facts of this case.

Accordingly, the appeal is dismissed in its entirety.

**MUCHECHETERE JA:** I agree.

**SANDURA AJA:** I agree.

*Gollop & Blank*, appellant's legal practitioners

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## DEWERAS FARM (PVT) LTD & ORS *v* ZIMBABWE BANKING CORP LTD 1998 (1) ZLR 368 (SC)

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

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

23 March & 16 April 1998 Judgment No. S-49-98

### Flynote

Practice and procedure - default judgment - rescission - factors to be taken into account - wilful default - when may constitute good and sufficient cause

### Headnote

A farming company had an overdraft with a bank. The bank took judgment against the company in a sum which the parties at that time regarded as the amount outstanding on the overdraft.

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This action was not opposed and default judgment was obtained. Following a judgment of the High Court relating to the *in duplum* rule, the company and its two directors applied for rescission of judgment. When the matter came before the court the applicants put the whole amount of the debt in issue and did not admit to liability for any portion of the debt. The application for rescission was dismissed and the appellants appealed against this decision.

*Held*, that the High Court Rules require only ``good and sufficient cause'' as the basis of rescission of judgment. This gives the court a wide discretion and it is not possible to provide an exhaustive definition of what constitutes sufficient cause to justify the grant of indulgence. Even where there has been wilful default there may still sometimes be good and sufficient cause for granting rescission. The good and sufficient cause, for instance, might arise from the motive behind the default.

*Held*, further, that had the applicants put forward an authoritative affidavit detailing how the bank had erred in its calculations together with their calculations as to what was actually due, and had they consented to judgment in the admitted amount and asked simply that the issue of the disputed amount go to trial, it would have been difficult to have refused the application. However, as they put their application on a far vaguer basis, that was not enough to establish good and sufficient cause for rescission.

Cases cited:

*Cairns' Exors* v *Gaarn* 1912 AD 181

*Commercial Bank of Zimbabwe* v *MM Builders & Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (ZH)

*Maujean t/a Audio Video Agencies* v *Standard Bank of SA* 1994 (3) SA 801 (C)

*Morkel* v *ABSA Bank Ltd & Anor* 1996 (1) SA 899 (C)

## Case Information

*T Nyambirai*, for the appellants

*A P de Bourbon SC*, for the respondents



McNALLY JA

## Judgment

**McNALLY JA:** The detailed facts of this matter are set out in a comprehensive judgment in the High Court - HH-112-97. *(94) I will therefore merely sketch them in to provide a framework for what follows.

The appellants are a farming company and its two directors. I will refer to them collectively, where appropriate, as ``the farmers''. They had an overdraft with the respondent (Zimbank). Zimbank took judgment against them in a sum which all parties regarded as the total amount

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outstanding on the overdraft. The farmers, accepting their liability, did not oppose the judgment, which went by default.

Subsequently, and particularly in the light of the judgment in *Commercial Bank of Zimbabwe Ltd* v *MM Builders & Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (ZH) relating to the *in duplum* rule, the farmers applied for the rescission of the judgment.

At first, their attitude was that they owed only $1 872 251.95. That was in their application for stay of execution. But by the time of the present application, they had backed away from that admission. They put the whole amount in issue. Nothing was admitted. No payment on account was proffered. No consent to partial judgment was forthcoming.

The learned judge considered the three factors which are normally taken into account when considering an application for rescission of judgment - the explanation for the default, the *bona fides* of the applicant and the *prima facie* strength of the case. He noted that r 63 of the High Court Rules requires only ``good and sufficient cause'' as a basis for rescission of a judgment. He contrasted this with the specific reference to ``wilful default'' in the Magistrate's Court Rules. He considered that the superior courts should be slow to fetter the wide discretion inherent in the phrase ``good and sufficient cause''. I agree. While it may generally be true to say that when there is wilful default there will usually not be good and sufficient cause, I believe we fetter our discretion improperly if we lay down a fixed rule that when there is wilful default there is no room for good and sufficient cause. I favour the definition of wilful default offered by KING J in *Maujean t/a Audio Video Agencies* v *Standard Bank of South Africa Ltd* 1994 (3) SA 801 (C) at 803H-I:

> ``More specifically, in the context of a default judgment, `wilful' connotes deliberateness in the sense of knowledge of the action and of its consequences, ie its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be.''

See also *Morkel* v *ABSA Bank Ltd & Anor* 1996 (1) SA 899 (C).

But it is precisely in the ``motivation'' mentioned in that passage that one might find ``good and sufficient cause''. I respectfully agree with the *dicta* of



McNALLY JA

INNES J in the oft-cited case of *Cairns Executors* v *Gaarn* 1912 AD 181 at 186 *passim*. In particular, His Lordship said:

> ``It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive and which it is highly desirable not to abridge.''

Thus, in the present case, had the applicants put forward an authoritative affidavit explaining detailed errors in calculation by the bank, accompanied by a fresh calculation showing the ``correct'' amount due; and had they then consented to judgment in the admitted amount and asked simply that the issue of the disputed amount go to trial, I, like the learned trial judge, would have been hard put to refuse their request, despite what might well be described as their

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wilful default.

But that is not what happened. The farmers did not recalculate their debt; they did not file an accountant's affidavit setting out the ``correct'' amount due; they did not pay that amount or even consent to judgment in that amount.

In effect, all they did was to say ``We think, if given a chance, that we may be able to show that we owe something less''.

I am entirely satisfied that that is nowhere near good enough to establish ``good and sufficient cause''.

I would dismiss the appeal with costs. But because I do not share counsel for the bank's view of the *mala fides* of the application, costs will be on the ordinary scale.

**GUBBAY CJ:** I agree.

**EBRAHIM JA:** I agree.

*Kantor & Immerman*, appellant's legal practitioners

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



## CHIZIKANI & ANOR v CENTRAL AFRICAN BUILDING SOCIETY 1998 (1) ZLR 371 (SC)

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

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

24 March & 16 April 1998 Judgment No. S-50-98

### Flynote

Practice and procedure - execution - sale - need for sale to be properly advertised - purpose of advertisement - whether requirement that the sale be properly advertised was a peremptory requirement and whether sale was null and void as a result of failure properly to advertise the sale

### Headnote

It is in the interests of the judgment debtor, and probably in the interests of the creditors, that when a judgment debtor's property is to be sold in execution the property should be sold for the highest possible price.

In terms of r 352 of the High Court Rules any sale in execution must be properly advertised by the Sheriff. The purpose of such advertisement is not merely to identify the property to be sold. It is also to inform the public of what is being sold, with the aim of attracting the interest of potential purchasers to the auction and realising as high a price possible for the property on the date appointed for the sale. The main characteristics of the property should be described in the

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advertisement, but the extent of the description will depend on the particular nature and locality of the property in question. Generally, the details that should be given in the advertisement are as follows: the address, the size of the stand, the type of improvements or buildings, if any, and any special privilege or exemption granted in respect of the property in accordance with the governing town planning scheme.

*Held*, that in the present case it was decided that the advertisement of the sale was inadequate as it did not give sufficient details of the nature and characteristics of the property so as to afford potential purchasers a clear appreciation of what was being offered for sale and it did not even advise them of where to view the property.

*Held*, further that the requirement contained in r 352 to advertise the sale properly was peremptory and thus the purported sale in execution was null and void and the appellants were entitled to an order setting aside that sale.

Cases cited:

*Chasfre Invstms (Pty) Ltd* v *Majavie & Ors* 1971 (1) SA 219 (C)

*Cummins* v *Bartlett NO & Anor* 1991 (4) SA 135 (E)

*Lalla* v *Bhura* 1973 (2) ZLR 280 (G)

*Messenger, Magistrate's Court, Durban* v *Pillay* 1952 (3) SA 678 (A)

*Rossiter & Anor* v *Rand Natal Trust Co Ltd & Ors* 1984 (1) SA 385 (N)

*Smith & Anor* v *Acting Sheriff & Anor* HH-133-94

*Woods* v *Spence & Anor* 1978 RLR 254 (G)

*Zvirawa* v *Makoni & Anor* 1988 (2) ZLR 15 (S)



GUBBAY CJ

Legislation considered:

High Court Rules 1971 (RGN 1047/1971), r 352

## Case Information

Appellants in person

*A J Dyke*, for the respondent

## Judgment

**GUBBAY CJ:** The issue for decision in this matter is whether the High Court was correct in finding that there had been a valid sale in execution of the property owned by the appellants,

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known as Stand 983 Parktown Township (``the property'').

The respondent obtained a judgment sounding in money against the appellants jointly and severally, the one paying the other to be absolved. As the judgment was not satisfied, it instructed the Sheriff of Zimbabwe to attach the property and arrange for it to be sold by public auction. This the sheriff did. The sale in execution was held on 8 April 1994. The respondent was the highest bidder at $260 000, an amount less than the indebtedness of the appellants. The auctioneer reported to the sheriff that in his opinion the respondent's bid was reasonable in relation to present market conditions. He assessed the open market value of the property at about $300 000.

The appellants were dissatisfied. On 11 April 1994, they complained in writing to the sheriff that the notices advertising the property for sale by auction inadequately described it to the public; consequently the highest price offered was not reasonable. The sheriff was urged not to declare the respondent to be the purchaser.

On 22 April 1994, and without expressing a view as to the sufficiency of the notices advertising the property, the sheriff advised the appellants that he was satisfied that the highest price offered at the auction was reasonable. Acting pursuant to r 356 of the Rules of the High Court of Zimbabwe, he duly declared the respondent to be the purchaser of the property, subject to confirmation.

The appellants were anxious to prevent the sheriff confirming the sale in accordance with the provisions of r 360. So they applied to the High Court, as they were entitled to do under r 359, for an order setting aside the sale in execution of their property.

The learned judge dismissed the application with costs. He was of the opinion that the property had been properly advertised in compliance with r 352 and was not open to attack on that ground. In the second place, he held that on the information placed before him the appellants had not shown that the price at which the property was sold for was an unreasonably low sum, being one substantially less than the market price. See *Lalla* v *Bhura* 1973 (2) RLR 280 (G) at 282H-283B; *Woods* v *Spence & Anor* 1978



GUBBAY CJ

RLR 254 (G) at 255E-G; *Zvirawa* v *Makoni & Anor* 1988 (2) ZLR 15 (S) at 17 A-B.

Rule 352 provides, *inter alia*, that the sheriff:

> ``shall cause the sale to be advertised at least once in the *Gazette* and in a newspaper circulating in the district in which the property is situated ... ''

What is obviously implied (as was appreciated by the learned judge) is that the sale must be properly advertised. An advertisement which inadequately describes the property is no advertisement at all. It will fail to comply with the sheriff's mandated obligation.

The purpose of properly describing the property is not merely to identify it. It is also to inform the public of what is being sold, with the aim of attracting the interest of potential purchasers to the

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auction. See *Chasfre Investments (Pty) Ltd* v *Majavie & Ors* 1971 (1) SA 219 (C) at 222F-G; *Cummins* v *Bartlett NO & Anor* 1991 (4) SA 135 (ECD) at 141B; *Smith & Anor* v *The Acting Sheriff of the High Court & Anor* HH-133-94 (unreported) at pp 8-9. For it is in the interests of the judgment debtor, and probably in the interests of creditors, that the property to be sold should obtain as high a price as possible. It is not necessary for the sheriff to employ the eulogistic style of enhancing attributes so often to be read in notices of open market property sales. Rather what must be inserted in the advertisements are the main characteristics of the property. Clearly, in each case, the extent of the description will depend on the particular nature and locality of the property in question. See *Rossiter & Anor* v *Rand Natal Trust Co Ltd & Ors* 1984 (1) SA 385 (N) at 389D.

While it is neither possible nor desirable to lay down specific criteria, in general it seems to me to be a crucial part of the description of the property to state the address (the street number and locality), the size of the stand, the type of improvements or buildings, if any, and any special privilege or exemption granted in respect of the property in accordance with the governing town planning scheme.

The sheriff caused to be published in the *The Herald* newspaper three successive notices advertising the appointed day and place for the sale of the property. The initial two notices were in the same form. They merely listed as ``Sale 13'', Stand 983 Parktown Township, being one of forty-nine properties to be sold by public auction on 8 April 1994.

On 24 March 1994, the first appellant wrote to the auctioneer, and sent a copy of the letter to the sheriff. The material portion was to this effect:

> ``I have seen the second advertisement on 23 March 1994 and felt compelled to draw your attention as I hereby do to the fact that on Stand 983 Parktown was constructed a modern four bedroomed house in 1992. The main bedroom is en suite, there are two spacious semi-



> detached cottages, three phase electricity and a hand dug well which only needs the final rock blasting.
>
> I feel these details together with the address which is 983 3rd Avenue Parktown ought to be advertised. You will appreciate I have an interest in having people know what you will be auctioning to enable them to view it in advance and make well informed bids.''

The advertisement which appeared on 31 March 1994 was more detailed than its predecessors. It was worded thus:

> ``Sale 13: Stand 983 Parktown Township, *CABS* v *Chizikani & Anor* - comprising verandah, kitchen, bathroom, toilet, lounge, dining-room, four bedrooms (m.e.s.), five roomed cottage, fenced.''

It was the appellants' submission before this court that the notice of 31 March 1994 breached the requirements of r 352. It did not properly advertise the property for sale. What ought to have been brought to the attention of prospective purchasers, but was not, was the following information:

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(1) the street number and locality of the property;

(2) the recent construction and modernity of the house;

(3) the one acre extent of the stand;

(4) the availability of three-phase electricity capable of sustaining a workshop on the property;

(5) the existence of two semi-detached cottages - a three roomed unit and a two roomed unit - and *not* one five roomed cottage as mis-described.

(6) the partial completion of a well; and

(7) the close proximity of the property to schools, churches and a shopping centre.

I am persuaded that in respect of this property the form of the advertisement of 31 March 1994 was inadequate. It did not sufficiently detail the nature and characteristics of the property so as to afford potential purchasers a clear appreciation of what it was that was being offered for sale; and, of course, it did not even advise them of where to view the property. All in all, the advertisement fell short of achieving the objective of attracting as high a price as possible on the date appointed for the sale.

What then was the consequence of the sheriff's non-compliance with r 352? Did it render the sale of the property to the respondent null and void? The answer is dependent on whether the sheriff's obligation to cause the property to be properly advertised was peremptory or simply directory.

In my view, the various requirements of r 352 are peremptory. The rule imposes duties upon a public officer. It uses the word ``shall'', which is to be construed as peremptory, rather than directory, unless there are other circumstances which negative such a construction.

The issue is by no means devoid of authority. The decision of the South African Appellate Division in *Messenger of the Magistrate's Court, Durban*

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GUBBAY CJ

v *Pillay* 1952 (3) SA 678 (A) is much in point. There the respondent, the judgment debtor, claimed against the appellant an order setting aside before transfer a sale in execution of immovable property. He did so on the ground that the advertisement for its sale did not satisfy r 40(6) of the Magistrates Court Rules, which required a short description of such property and its situation. VAN DEN HEEVER JA (with whom CENTLIVRES CJ and GREENBERG JA concurred) stated at 683C-F:

> ``I proceed to inquire what remedy is in the contemplation of the authors of r 40(6) available to a judgment debtor in the circumstances of this case, the advertisement being admittedly `insufficient and invalid'.
>
> In the first place, the sub-rule with which we are concerned is couched in peremptory terms: the messenger `shall cause the sale to be advertised ...' The Afrikaans version has the categorical imperative `*moet*'. If a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing

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to another conclusion, that the issuer of the command intended disobedience to be visited with nullity.

Proceedings in execution are inroads upon the rights and property of the individual in which the messenger carries out his duties *sub hasta*, `*met den sterken arm*'. As is pointed out in Maxwell *Interpretation of Statutes* 7 ed, p 316:

> `Where powers are ... granted with a direction that certain regulations, formalities or conditions shall be complied with it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the ... authority conferred, and it is therefore probable that such was the intention of the legislature'."

He continued at 684E-G:

> ``Another consideration which persuades me that the provisions of the rule are peremptory is that such a construction leaves them in harmony rather than in conflict with the common law. Matthaeus *De Auctionibus* 1.2.7 mentions advertisement as the primary formality in sales in execution. The advertisement should contain an enumeration and description of the property to be sold. In the same Book, Chapter 15, n. 8 *et seq*., he explains that non-compliance with any prescribed formality, especially advertisement of the attached property, will in general render the sale in execution null and void. In France, he points out, a sale in execution was void if a curator had not been appointed to take charge of the property attached. This was owing to the imperative provisions of a statute governing the subject."

Finally, the eminent and learned JUDGE OF APPEAL dealt with the argument that the first part of r 40(6) may be peremptory and the latter part, relating to advertisement, merely directory. He said at 685A-B:

> ``According to the first part of the sub-rule the messenger cannot appoint a day for sale earlier than a month after service of the notice of attachment except by special leave of the court; the second part makes no provision for relaxing its commands. This, as Mr *Fannin* conceded, cannot assist us. It seems to me, however, that the two provisions are so closely interconnected that they cannot be treated on different bases. It would be futile if the messenger appointed a day and a place for the sale and failed to advertise it. Similarly, to publish an ineffectual advertisement would be to frustrate the objects of the rule."

In *Rossiter & Anor* v *Rand Natal Trust Co Ltd & Ors supra* MILNE JP (as



he then was) observed that there was no basis for distinguishing in principle r 46(7) of the Uniform Rules of the Supreme Court, with which he was concerned, from r 40(6) of the Magistrates Court Rules; and that by parity of reasoning the provisions of the former rule were, indeed, peremptory (see at 387 *in fine*- 388A).

I am similarly convinced that there is no room for distinguishing in principle r 352 from its South African counterparts. The reasoning of VAN DEN HEEVER JA accordingly furnishes impressive support for the proposition that an omission by the sheriff to cause to be properly advertised a sale of property to be sold in execution, will *per se* invalidate the sale. It will disable the sheriff from acting in terms of r 56 and declaring the highest bidder to be the purchaser.

It follows that on this ground alone the appellants were entitled, as a matter of right, to an order setting aside the sale of their property.

Before concluding, I should mention that at the hearing the appellants produced, without objection, documentary evidence that subsequent to the date of the purported sale, the City of

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Harare notified that it would entertain applications for permission to subdivide stands in Parktown Township; and, upon application by the appellants, granted a permit to subdivide the property into two half-acre plots. This new development, and added attraction to the property, would have been of no assistance to the appellants if the sale of 8 April 1994 had been properly advertised and the price obtained for the property not an unreasonably low one. But if the property is to be auctioned again, this special feature must then be included in the notice advertising it for sale.

For the reasons stated, the appeal is allowed with costs. The order of the High Court is set aside and the following substituted:

``The application is allowed with costs.''

**McNALLY JA:** I agree.

**EBRAHIM JA:** I agree.

*Scanlen & Holderness*, respondent's legal practitioners

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## NDEBELE *v* NCUBE 1998 (1) ZLR 377 (SC)

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

McNally JA & Muchechetere JA

Civil appeal

30 March & 16 April 1998 Judgment No. S-53-98

### Flynote

Delict - actio injuriarum - defamation - defamatory nature - insulting names - injuria only, not defamation - undesirability of awarding damages for minor insults arising out of altercations - only small solatium justified

### Headnote

To call someone a ``dog'' and ``a mad person'' might give rise to an action for injury to dignity, either under common law or under customary law. But people frequently exchange insults, arising out of grievances real or imagined, large or small. It would be intolerable if every insult were to be followed by a law suit, so a court should be very careful about awarding damages for abuse such as occurred in this case. A small *solatium* only could be justified.

Cases referred to:

*Gwebu* v *Sibanda* S-219-97

*Magigwana* v *Sibanda* S-220-97

*Manyenga* v *Muza* S-145-95

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## Case Information

Appellant in person

Respondent in person

## Judgment

**McNALLY JA:** This was one of two appeals in Bulawayo which came from what was described as Plumtree Magistrate's Court (Customary Law). Initially I thought the appeal should have been heard by the provincial magistrate in terms of s 74(3)(a) of the Magistrate's Court Act [*Chapter 7:10*]. But it appears the case was heard by a senior magistrate, not an assistant magistrate, so the section does not apply.

This is a defamation, alternatively insult, case in which damages were sought under customary law in the sum of $3 000. The magistrate awarded $600 plus costs. I will call the respondent the plaintiff and the appellant the defendant.

I have said on a previous occasion that magistrates must be careful about defamation cases. See *Magigwana* v *Sibanda* S-220-97 (not reported).

I have also expressed concern about the *quantum* of awards - *Manyenga* v *Muza* S-145-95 and *Gwebu* v *Sibanda* S-219-97.

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McNALLY JA

I am under the impression that defamation actions in the magistrate's courts are on the increase. It is therefore correspondingly necessary for magistrates to familiarise themselves with the law as to defamation, both under the Roman-Dutch and the customary law systems.

The vast majority of these cases are dealt with by parties appearing in person on one or both sides. So the commonest problem is, particularly when the pleadings are rudimentary or non-existent, that the defendant will not realise the defences open to him or her. Often the defendant will simply admit or deny that the words were used. I dealt with this aspect in *Magigwana supra*.

In the present case, the plaintiff is a Plumtree District Council employer, working as a project executive officer. He says this involves him in the issuing of liquor licences. The defendant operated a liquor business and held an ordinary liquor licence, but seemingly did not have a licence to sell opaque beer. He had been required to pay a deposit fine by the police for selling opaque beer without a licence. He appears to have thought that the plaintiff had directed the police to his premises. He also asserted that the plaintiff had done this because he, the defendant, had refused to pay the plaintiff a bribe to expedite the obtaining of the licence from the Ministry of Justice.

The plaintiff did not make the matter very clear, but I understand him to mean that he is the officer in Plumtree District Council who organises the issue of these various liquor licences even though he does not actually issue them himself - that being the function of the Ministry of

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Justice. He denied the allegations against him.

The allegation of defamation/insult as expressed in the summons is as follows:

> ``Plaintiff is claiming $3 000 being defamation and insult damages rising from a liquor licence issue in which defendant accused plaintiff of inciting the police to arrest defendant for operating a shebeen.''

It is very doubtful whether this reveals any cause of action at all. If a conscientious public servant who is involved in the organising of liquor licences becomes aware that someone in his district is selling opaque beer without a licence, I would think it is his duty to report that fact to the police licence inspectorate. To accuse someone of doing his duty is not defamation. Nor is it an insult.

In fact, that was no more than part of the background to the actual allegations of defamation/insult. In his evidence the plaintiff said:

> ``He insulted me saying I was a dog and a mad person who did not know what he was doing in the office.''

Now, the first part of that allegation - that he was called a dog and a mad person - would not be treated as defamatory in Roman-Dutch law on the



McNALLY JA

grounds that it is ``mere vulgar abuse'' or ``meaningless abuse''. See Burchell *The Law of Defamation in South Africa* p 126. An action for injury to dignity may be available, and certainly in customary law there is such an action. See Goldin & Gelfand *African Law and Custom in Rhodesia* Chapter 27 p 200.

But one must be very careful about awarding damages for this kind of abuse. People engage in the exchange of insults very frequently, arising out of grievances real or imagined, large or small. If every insult is to be followed by a law suit, life will become intolerable. If every altercation in a bar at the weekend is to lead to the civil courts we will have a new breed of lawyers to rival the well-known ``ambulance-chasers'' of American practice. The relationship between the public and the public service is a difficult and sensitive one. Neither side should be encouraged to resort to litigation when that relationship occasionally boils over.

The evidence from witnesses on both sides in this case is that the parties were exchanging harsh or violent words. On the other hand, it is apparent that the defendant started the quarrel, and he has not justified his conduct.

The second part of the allegation is more serious. To say of someone that he is ``a person who does not know what he is doing in the office'' is *prima facie* defamatory. But what the magistrate overlooked is that there is no corroboration of the allegation. The plaintiff's witness recalled only the use of the word ``dog'' by the defendant of the plaintiff. So there is no corroboration of the defamatory words being used. And therefore, in a defamation context, there was no publication of the defamation, and thus no defamation. ``There is no doubt'' says Burchell *op cit* p 67 ``that in contemporary law an element of the delict of defamation is publication''.

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Insult without publication may be a ground for damages in Roman-Dutch law, and is sufficient for the purposes of customary law as already stated. But since the magistrate did not address his mind to the specific question whether these particular words were proved to have been used, this court must come to its own conclusion. In my view, lacking corroboration by the one person called who might have been expected to hear and remember these words, we must find that their utterance was not proved.

Finally, it must be noted that the magistrate has wholly ignored the defence of justification or ``truth for the public benefit''. The defendant, perhaps unwisely, made a very serious allegation against the plaintiff - that he had demanded a bribe for processing the application for a licence to sell opaque beer, and that his action in reporting the defendant to the police was intended as a punishment of the defendant for refusing to pay the bribe - and presumably as an incentive to force him to pay it.

Now, I must make it clear that there was no proper attempt made to establish this defence. The allegation was simply made and denied. But the



magistrate was, with respect, a little naive to say, as he did in his reply to the grounds of appeal:

> ``Plaintiff is a mere employee of the District Council and has no financial interest in the District Council's beer outlets so he has no reason to victimise defendant over his bottle store.''

District council officials, in common with all officials who deal with the public, are in a position to abuse their power and authority. They can and, as we know from our legal and judicial practice, they do from time to time demand bribes. ``Unless you pay me, I will not process your application.'' They must not be allowed to protect themselves by using the action for defamation or abuse against frustrated members of the public.

I do not in any way wish to suggest that the allegation to this effect in this case is true. The onus was on the defendant to prove it and he did not do so. I raise the point simply because, in the lower courts when the pleadings are often grossly inadequate, and the evidence often misdirected because the defences are not understood, great care must be taken by the presiding officer to ensure that justice is done.

In the present case, I conclude that all that was proved was that an angry member of the public in a heated exchange with a District Council official, called the latter ``a dog'', which insult was heard by another official and probably by some members of the public. No justification or excuse, partial or otherwise, was proved. A small *solatium* for the insult is all that was justified. The claim for defamation was not established.

In the circumstances, I would reduce the award of damages to $50, with costs. In this court each party is to pay his own costs.

**MUCHECHETERE JA:** I agree

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## WATSON *v* GILSON ENTERPRISES (PVT) LTD 1998 (1) ZLR 381 (SC)

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

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

19 March & 21 April 1998 Judgment No. S-54-98

### Flynote

Contract - pre-incorporation contract on behalf of company to be formed - methods of entering into such contract - distinction between contracting as agent for company and contracting as principal, with subsequent adoption of contract by company - determination of whether individual acted as agent or as principal

Practice and procedure - rules of court - departure from rules in interests of justice - admission of affidavit of third party with significant interest in matter

### Headnote

The appellant had entered into a contract to buy a farm. He did so in the name of a company yet to be incorporated (and which was never incorporated). In the documents signed at the time, the company was said to be ``represented by'' the appellant; and he signed ``for'' the company. The original owner of the farm cancelled the sale, no money having changed hands, and sold it to two other persons, acting on behalf of another company yet to be formed. That company (the respondent) was duly formed and ownership of the farm was transferred to it. The respondent then subdivided the farm and sold part of it to a third company.

The appellant applied for an interdict, restraining the respondent from disposing of the farm, but his application was dismissed by the High Court on the grounds that (1) the appellant had no *locus standi* and (2) the requirements for the grant of an interdict were lacking. During the proceedings, the judge admitted an affidavit filed on behalf of the third company, which had spent a considerable amount of money on improvements.

On appeal, it was argued for the appellant that he had *locus standi*, as he was a principal under the contract and incurred rights and obligations. It was also argued that the judge should not have admitted the affidavit from the third company, as it was not tendered in support of the respondent, nor had it been accompanied by an application for the third company to be joined as a party.

*Held*, that a pre-incorporation contract may be made in terms of s 47 of the Companies Act or under the common law rules relating to contracts for the benefit of third parties. A requirement of the Act allowing a company to ratify or adopt a written contract is that the person who made the contract must have professed to act as agent or trustee. Under the common law, on the other hand, a non-existing principal (a company yet to be formed) may after incorporation adopt a contract made for its benefit by a person acting as a *principal*, but pending adoption by the

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company the principal may, in the absence of any contrary



GUBBAY CJ

intention emerging, exercise all such rights as are necessary to hold the other party to the contract. Until acceptance by the company takes, places, the contract remains one between the actual parties and may be modified or even cancelled.

*Held*, further, that it is a question of fact in each case whether a person who acted for a company before incorporation did so as agent or trustee under s 47 or as principal under the common law. In this case, the appellant signed as ``representative'' of and ``for'' of the company. There was no provision in the contract which suggested that if the company were not formed, he would personally obtain rights and incur liabilities. It was clear that he had contracted as agent for a company to be incorporated.

*Held*, further, that the purchaser of the subdivision would have been prejudiced had the judge ignored the reality that it had purchased a portion of the disputed property without being aware of a competing claim and had then expended a large amount of money on its development. The Rules of the High Court permit a departure from the Rules if the judge is satisfied that such a departure is necessary. He had correctly exercised his discretion to depart from the Rules and admit the purchaser's affidavit.

Cases cited:

*AFC* v *Pocock* 1986 (2) ZLR 229 (S)

*Bagradi* v *Cavendish Tpt Co (Pty) Ltd* 1957 (1) SA 663 (N)

*Blower* v *van Noorden* 1909 TS 890

*Buttar & Anor* v *Ault NO & Ors* 1950 (4) SA 229 (T)

*CIR* v *Friedman & Ors NNO* 1993 (1) SA 353 (A)

*de Visser* v *Fitzpatrick* 1907 TS 355

*Gardner* v *Richardt* 1974 (3) SA 768 (W)

*Gool* v *Min of Justice & Anor* 1955 (2) SA 682 (C)

*Lind* v *Spicer Bros (Africa) Ltd* 1917 AD 147

*McCullogh* v *Fernwood Est Ltd* 1920 AD 205

*Makaruse* v *Hide & Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S)

*Martian Entertainments (Pty) Ltd* v *Berger* 1949 (4) SA 583 (E)

*Nine Hundred Umgeni Rd (Pvt) Ltd* v *Bali* 1986 (1) SA 1 (A)

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*Nordis Construction Co (Pty) Ltd* v *Theron, Burke & Isaac* 1972 (2) SA 535 (D)

*Peak Lode GM Co Ltd* v *Union Govt* 1932 TPD 48

*Semer* v *Retief & Berman* 1948 (1) SA 182 (C)

*Sumbereru* v *Chirunda* 1992 (1) ZLR 240 (H)

*Webster* v *Mitchell* 1948 (1) SA 1186 (W)

*Wilmot* v *Zimbabwe Owner Driver Assn (Pvt) Ltd* 1996 (2) ZLR 415 (S)

Legislation considered to:

Companies Act [*Chapter 24:03*], s 47

High Court Rules 1971 (RGN 1047/71), r 4(1)(a)

## Case Information

*P Nherere*, for the appellant

*E W W Morris*, for the respondent

## Judgment

**GUBBAY CJ:** This is an appeal brought by Watson against the refusal of the High Court to grant him an interim interdict restraining the respondent, Gilson Enterprises (Pvt) Ltd, from disposing of the immovable property known as Echo Farm, of Borrowdale Estate, in the district of Harare.

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GUBBAY CJ

The judgment of GILLESPIE J, reported under the same name in 1997 (2) ZLR 318 (H) at 319G- 321F sets out comprehensively, and in graphic language, the history of the litigation between the parties. It is only necessary therefore to highlight the more salient facts, which are these:

(1) On 8 December 1993, Watson, representing Echo Farm Investments (Pvt) Ltd, a company yet to be incorporated, entered into a written agreement of sale with Stanley Norman Folwell, in terms whereof Echo Farm was sold to Watson acting on behalf of the company to be formed;

(2) On 5 January 1994, Folwell sold the farm to Deborah Jane Davies and Darrell Alwyn Botha, acting on behalf of a company to be formed and named Gilson Enterprises (Pvt) Ltd (``Gilson Enterprises'');

(3) Davies and Botha caused the ownership of Echo Farm to be transferred to the recently incorporated Gilson Enterprises on 1 February 1994;

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(4) At the date of transfer to Gilson Enterprises, Davies and Botha were aware of the prior sale of Echo Farm and of Folwell's contention that he had validly cancelled that sale on 31 December 1993; and

(5) The company to be named Echo Farm Investments (Pvt) Ltd was never incorporated.

The learned judge dismissed the application on two grounds. First, he held that Watson had not established *locus standi in judicio* to bring the proceedings. He had failed to assert a *prima facie* case, even one open to some doubt, that he had acted as principal and not as agent, in entering into the agreement of sale with Folwell. Secondly, he expressed the view that the requirements for the grant of an interdict were lacking. Watson possessed an adequate alternative remedy in damages and, moreover, the balance of convenience rested, not with him, but with those presently in occupation of Echo Farm. They, unlike him, had invested monies in that property.

There were two aspects of the *prima facie* case that Watson had to establish. These were that:

(a) in his personal capacity he had *locus standi* to institute proceedings to enforce the agreement of sale of Echo Farm against Folwell;

(b) Folwell's cancellation of the sale on 31 December 1993 was of no force and effect.

The learned judge did not decide the efficacy or otherwise of the cancellation of the sale by Folwell. He left that aspect of the matter open, since in the context of his findings it did not arise. To be considered is whether his determination of the first part of the issue was correct.

A pre-incorporation contract may be made in terms of s 47 of the Companies Act [*Chapter 24:03*], or under the common law rules relating to contracts for the benefit of third parties (*stipulatio alteri* or *ius quaesitum tertio*). See *McCullogh* v *Fernwood Estate Ltd* 1920 AD 205 at 207-208.



GUBBAY CJ

One of the requirements of s 47 permitting a company to ratify or adopt a written contract entered into prior to its incorporation, is that the person who made the contract - whether described as agent or trustee (a word implying that the person so described is the *dominus* of the relative subject matter) - must, in the light of all the surrounding circumstances, have professed to act as agent or trustee. See *Martian Entertainments (Pty) Ltd* v *Berger* 1949 (4) SA 583 (E) at 590.

At common law, a company cannot ratify or adopt a contract entered into prior to its incorporation by a person who professed to act as its agent; for an agent cannot act on behalf of a non-existing principal. See *Commissioner for Inland Revenue* v *Friedman & Ors NNO* 1993 (1) SA 353 (A) at 377C-D. Where there is no existing principal, such a contract renders liable in damages, for warranty of authority, the person professing to act as agent. See *Nordis Construction Co (Pty) Ltd* v *Theron, Burke & Isaac* 1972 (2) SA 535 (D) at 540H. However, a non-existing principal (a company to be incorporated) may adopt a contract made for its benefit by a person acting as *principal*, and such a contract need not comply with the requirements of s

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47 of the Companies Act. For instance, it does not have to be in writing. The nature of the principal's rights and obligations, prior to the adoption of the contract by the company, depends exclusively on the terms of the contract. In the absence of any contrary intention emerging, the principal may exercise all such rights as are necessary to hold the other party to the contract pending adoption by the company. See *McCullogh* v *Fernwood Estate Ltd supra* at 207 and 217; *Bagradi* v *Cavendish Transport Co (Pty) Ltd* 1957 (1) SA 663 (N) at 668A; *Gardner* v *Richardt* 1974 (3) SA 768 (W) at 770A-B; it being implied that a reasonable time for such adoption must have passed. See *Semer* v *Retief & Berman* 1948 (1) SA 182 (C) at 194 *in fine*. Until acceptance takes place, the contract continues to be solely between the actual parties and is capable of modification by subsequent agreement. It may even be cancelled, should the parties so wish. See *Buttar & Anor* v *Ault NO & Ors* 1950 (4) SA 229 (T) at 238B-E.

It is a question of fact in each case whether a person who acted for a company prior to its formation did so as an agent or trustee under s 47 (upon compliance, it matters not in which capacity), or as a principal at common law. If the company is not incorporated, or once incorporated fails or refuses to ratify or adopt the contract, then whether the principal is personally entitled and bound as against the other party is dependant upon the construction of the contract; for the principal is not so entitled and bound as a matter of law. See *McCullogh* v *Fernwood Estate Ltd supra* at 217.

If, as correctly appreciated by GILLESPIE J, Watson entered into the agreement as agent for Echo Farm Investments (Pvt) Ltd, yet to be formed,



he incurred no obligation thereunder and, more particularly, acquired no contractual rights. He, therefore, had no claim to enforce against Folwell.

What then had to be determined was whether, taking the facts relied upon by Watson together with those set out by Gilson Enterprises and Folwell (who was the second respondent) which he could not dispute, and having regard to the inherent probabilities, Watson *should* on such facts obtain final relief. See *Webster* v *Mitchell* 1948 (1) SA 1186 (W) at 1189; *Gool* v *Minister of Justice & Anor* 1955 (2) SA 682 (C) at 688E; *AFC* v *Pocock* 1986 (2) ZLR 229 (S) at 232F.

As the learned judge aptly observed, a grave obstacle in the way of Watson's ability to establish *locus standi* and hence a *prima facie* right open to some doubt, was his failure expressly to assert such a right. The several affidavits deposed to by him contained no unequivocal statement that in entering into the agreement of sale he had acted as principal. He remained silent on the point even though, in her opposing affidavit, Davies, on behalf of Gilson Enterprises, specifically averred that he had not made out a case for the enforcement by him, in his personal capacity, of the written agreement entered into with Folwell. Watson's response was simply an opinion as to the law; and then was totally wrong. He said:

> ``I confirm I have *locus standi* to bring this application. The company which I was due to form has not been formed *and, therefore, the agreement between myself and Folwell is clearly a binding agreement between myself and Folwell*'' (emphasis added).

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And later:

> ``I confirm Echo Farm Investments (Pvt) Ltd has not been duly incorporated in terms of the Companies Act. There is no such company in being. I confirm in the circumstances the agreement of sale signed on 8 December 1993 is between Folwell 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 Folwell and myself.''

Much the same averment appears in the declaration filed in the action instituted by Watson against Folwell and Gilson Enterprises for transfer of Echo Farm. It makes the contradictory allegation that Watson entered into the agreement ``acting as agent and trustee for a company to be formed''; and advances the conclusion that as the company was not formed, Watson ``is accordingly entitled to exercise the agreement in his personal capacity''.

Again, the failure to appreciate the distinction between agent and principal is reflected in the further particulars furnished to the declaration. There it is baldly stated that Watson's entitlement to exercise the agreement in his personal capacity arises ``as a matter of law''.

This treatment satisfies me that Watson went no further than to ``confirm'' that he had *locus standi*, and that because Echo Farm Investments (Pvt) Ltd was never formed, he automatically acquired personal rights.

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GUBBAY CJ

It is significant that the agreement of sale described the purchaser as ``Echo Farm Investments (Pvt) Ltd ( a company to be formed and herein *represented* by Adam Watson)'' (emphasis added); and that in signing, Watson wrote in manuscript ``*for* Echo Investments (Pvt) Ltd, a company to be formed'' (emphasis added). The words ``represented by'' and ``for'', in the absence of qualification, are popularly understood to mean that the person so described is acting as an agent. See *de Visser* v *Fitzpatrick* 1907 TS 355 at 363; *Lind* v *Spicer Bros (Africa) Ltd* 1917 AD 147 at 151; *Martian Entertainments (Pty) Ltd* v *Berger supra* at 590.

Other documents signed by Watson employ the same terminology, ``represented by'' and ``for''. Indeed, a draft agreement prepared by Watson's legal practitioners, and submitted by himself, without amendment, to Davies and Botha, describes him as ``agent for a company to be formed of which Watson and Gould were to be shareholders.''

Apart from the language used by Watson to describe his capacity, it should be ascertained whether other objective *indiciae* show that he was acting not as an agent but as a principal under the agreement of sale.

There is no provision in the agreement of sale which suggests that if Echo Investments (Pvt) Ltd were not incorporated, Watson personally would obtain rights and incur liabilities. See *Nine Hundred Umgeni Road (Pty) Ltd* v *Bali* 1986 (1) SA 1 (A) at 6E-F.

What was relied on in an argument was that Folwell regarded Watson as personally liable and looked to him for performance. True, the letters written by Folwell on 30 and 31 December 1993 were headed ``Mr Adam Watson Echo Farm Investments'', but that obvious ambiguity

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takes the contention no further. Certainly, there was no clear affirmation by Folwell that Watson contracted with him as a principal with the intention that he should obtain rights and duties if the company never came into existence. Quite understandably, Folwell, as a layman, would not have given any thought to Watson's precise capacity.

To my mind, the conclusion is irresistible that Watson intended to ensure that his name appeared on documents only as an agent. He was not about to put up his own money for Echo Farm and did not wish to incur any personal liability under the agreement of sale with Folwell. Furthermore, as the learned judge so pertinently remarked:

> ``... 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."

For these reasons, I am in complete and respectful agreement with



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GILLESPIE J that, far from Watson establishing a *prima facie* right in his own name to Echo Farm, what plainly emerged from the affidavits was that he had contracted with Folwell as an *agent* for a company to be incorporated. Absent an express or implied provision in the agreement of sale that in such capacity Watson acquired rights or incurred obligations, any liability on his part would have been cast in damages arising, not under the contract, but in consequence of a lack of authority from the non-existence of the principal. See *Blower* v *van Noorden* 1909 TS 890 at 897; *Peak Lode Gold Mining Co Ltd* v *Union Government* 1932 TPD 48 at 51.

The fate of the appeal is thus sealed. Nonetheless, as the learned judge proceeded to hold that in any event he would have declined the relief of an interim interdict, it is as well for this court to consider whether there is room to interfere with the discretion so exercised.

The argument addressed on behalf of Watson was that in exercising his discretion the learned judge ought to have disregarded the averments in the affidavit of Prima Flora (Pvt) Ltd (Prima Flora). For the admission of that affidavit into evidence was a misdirection. However, counsel accepted that if the affidavit had been properly admitted, the balance of convenience would not favour the grant of the relief sought.

The objection to the reception of the affidavit, deposed to by the director of Prima Flora, was that it had not been tendered in support of Gilson Enterprises; nor had it been accompanied by an application to be joined as a party to the proceedings. And being filed a mere two days before the hearing, Watson had been denied the opportunity to respond to it.

There is no validity in the last complaint. If Watson believed that he was prejudiced by the late production of the affidavit he ought to have applied for a postponement to enable him to deal with its averments. Such a request could not have been refused. But it was not made. It is too

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late now to cry foul.

The other criticisms carry a little more weight; yet they overlook that r 4(1)(a) of the Rules of the High Court permits a departure from any provision of the Rules where the court or judge is satisfied that the departure is required in the interests of justice.

The provisions of the Rules are not strictly peremptory. But as they are there to regulate the practice and procedure of the High Court, in general, strong grounds have to be advanced to persuade the court or judge to act outside them. See *Sumbereru* v *Chirunda* 1992 (1) ZLR 240 (H) at 243B, *Makaruse* v *Hide & Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S) at 65D-E; *Wilmot* v *Zimbabwe Owner Driver Organisation (Pvt) Ltd* 1996 (2) ZLR 415 (S) at 419C-D.

The learned judge was firmly of the opinion that the interests of justice obliged him to take account of what Prima Flora had to say. The affidavit

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disclosed that it had purchased a sub-divided portion of Echo Farm from the registered owner Gilson Enterprises and had paid the purchase price of $2 200 000; that though informed by its legal practitioners that transfer had been effected on 16 April 1996, it only learned on 31 May 1996 of Watson's claim to Echo Farm and that title was still to be passed to it; and that in the intervening period it had undertaken, in good faith, a substantial amount of improvements to the farm, costing in the region of $2.5 to $3 million.

These facts persuade me that Prima Flora had a significant interest and concern in any order that would be made in respect of Echo Farm. It had a right to be heard. It would have been prejudiced if the learned judge were to have ignored the reality that it had purchased a portion of the disputed property without notice of a competing claim and had then expended a large amount of money on its development in the genuine but mistaken belief that it was the registered owner.

On this aspect as well, I respectfully agree with the approach and reasoning of the learned judge.

Accordingly, the appeal must be dismissed with costs.

**McNALLY JA:** I agree.

**MUCHETERERE JA:** I agree.

*Ali Ebrahim,* appellant's legal practitioner

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

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**ZIKITI *v* UNITED BOTTLERS 1998 (1) ZLR 389 (HC)**

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

Gillespie J

Civil application

28 January & 22 April 1998 Judgment No. HH-60-98

## Flynote

Employment - appeals under Labour Relations Act and regulations - appeal noted to Labour Relations Tribunal - whether appellant precluded from bringing proceedings of disciplinary body on review

Employment - employee - misconduct by - punishment in terms of code of conduct - maximum penalty provided by code - disciplinary tribunal not obliged to impose maximum

Review - domestic remedies - exhaustion of before review is brought - no requirement on party to exhaust domestic remedies - when court may nevertheless decline to exercise jurisdiction

## Headnote

An employee was dismissed from employment after a disciplinary committee found him guilty of dismissal offence under a code of conduct that governed his employment. He brought an application in the High Court for the review of these proceedings. Prior to making this application, he had appealed to the Labour Relations Tribunal against his dismissal. This appeal was still pending when his application was brought in the High Court. In the appeal before the Labour Relations Tribunal, there would have been a full rehearing of the case.

The employer argued that the applicant, having commenced appeal procedures under the Labour Relations Act, was obliged to exhaust this statutory remedy before approaching the High Court for a review of the original disciplinary proceedings.

*Held*, that even where a person chooses to pursue domestic or statutory procedures, he is not obliged to exhaust these remedies before approaching the High Court. Far from excluding the right of recourse to the courts, s 124(1) of the Labour Relations Act seems to recognise the right of recourse to the courts, even where proceedings in terms of the Act are under way, subject to the requirement that the applicant must notify the court that such proceedings are under way.

*Held*, however, that the court has the discretion to withhold jurisdiction to review such a case where domestic or statutory proceedings are already under way and the courts will discourage a duplication of proceedings unless good cause is shown. The court may decide to withhold jurisdiction where bringing of parallel proceedings in the High Court would result in prejudice by producing a duplication of effort and expense and a prolongation of what is already an agonisingly protracted labour dispute process under the Labour Relations Act.



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*Held*, further, that the courts have recognised that a domestically provided procedure that allows for a full rehearing of the case is usually the most efficacious remedy for the aggrieved party. In the present case it was certainly the most appropriate remedy, because the applicant

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was seeking to raise not only issues relating to procedural regularity but also matters relating to the merits of the decision.

*Held*, further, that where in an employment code of conduct a penalty is specified for an offence, the prescribed penalty is generally the maximum penalty that can be imposed and the disciplinary tribunal dealing with the matter in terms of the employment code may decide to impose the maximum penalty or a lesser penalty.

Cases cited:

*Art Printers Ltd* v *Regional Hearing Officer & Anor* HH-169-87

*Caltex Oil Zimbabwe (Pvt) Ltd* v *Mutsvangwa* S-55-93

*Cargo Carriers (Pvt) Ltd* v *Zambezi & Ors* 1996 (1) ZLR 613 (S)

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

*Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H)

*Ntini* v *Jongwe P & P Co (Pvt) Ltd* HH-623-87

*Nyoni* v *Sec for Public Svc & Anor* HH-193-97

*Tutani* v *Min of Labour & Ors* 1987 (2) ZLR 88 (H)

*Western Assurance Co* v *Caldwell's Trustee* 1918 AD 262

## Case Information

Applicant in person

*P Nherere*, for the respondent

## Judgment

**GILLESPIE J:** Mr Zikiti was employed by Bulawayo Bottlers (Pvt) Ltd. He had been employed there for many years. He worked there when it was an independent company. He remained there when it was acquired by United Bottlers (Pvt) Ltd. He worked on after the workers of Bulawayo Bottlers became bound by the United Bottlers code of conduct. He was still working there when he absented himself without leave in January of 1997.

This act ran foul of the code of conduct. It provides, in a detailed classification of disciplinary offences, a specific act of misconduct under the general heading of ``Sub-standard performance''. It is item 8.8 in the schedule and it provides that an offence is committed:

> ``Where an employee absents himself from work without permission or valid reason for a period exceeding 5 days.''

For each offence there is a punishment provided according to whether the infraction be the first or a repeat transgression. The punishment provided for the first commission of this offence is

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dismissal.

Mr Zikiti was accordingly subjected to disciplinary proceedings. He was found guilty of a disciplinary offence in terms of item 8.8 of the schedule of offences. He was dismissed. He appealed to the appropriate internal authority. His appeal was dismissed. Matters had progressed expeditiously, it was by then approaching the end of February. On 11 April, he appealed to



the Labour Relations Tribunal. This appeal is still pending. The present proceedings were instituted on 9 May. The relief claimed by way of review is the setting aside of the misconduct proceedings and the reinstatement of the applicant, alternatively the referral to a labour relations officer of the dispute.

Mr *Nherere* for the employer has raised three preliminary points. They are: the improper citation of the respondent; the duplication of proceedings in this court and in the labour tribunal; and the late filing of the application for review. The first of these is readily dealt with. The respondent was actually cited as United Bottlers. This citation fails to disclose the corporate status of United Bottlers and wrongly identifies the employer as the holding company rather than the company which actually employs the applicant - Bulawayo Bottlers. Although United Bottlers filed an affidavit averring misjoinder, it did not persist in a claim for dismissal of the application on that ground. Rather, Bulawayo Bottlers simultaneously filed affidavits opposing the application on the merits and appeared on the date of set down to argue the matter. It did not claim to be joined as a party but simply proceeded as if it were. This was, no doubt, as technically irregular as the original misjoinder was potentially fatal. Since matters proceeded on that basis to the stage of argument, however, and since Bulawayo Bottlers appeared to contest the application on its merits, I would be inclined, if all else were equal, to permit an amendment of the citation of the respondent so as to identify the respondent as Bulawayo Bottlers (Pvt) Ltd. Before disposing of the first point in so summary a manner I ought to examine the validity of the other two preliminary points advanced.

The second point raised by Mr *Nherere* concerns the pending unresolved appeal to the Labour Relations Tribunal. Advancing the principles of the defence, *lis alibi pendens*, counsel moves me to exercise a discretion not to entertain this application.

The particular point concerning the bringing of review proceedings in the High Court, in connection with an employment dispute not yet resolved in a lower authority, is generally raised as an instance of a suggested obligation to exhaust domestic remedies before approaching this court. The Labour Relations Act does not expressly require that the domestic or statutory procedures and remedies be exhausted before an approach is made to this court. The question whether an intention to this effect is to be necessarily implied from the legislation has therefore exercised the court on occasion. It would appear from the authorities that in employment disputes the court does not hold its common law jurisdiction in principle to be ousted or suspended pending the exhaustion

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GILLESPIE J

of domestic remedies. 1(95) The proposition that jurisdiction is not suspended pending exhaustion of domestic remedies was recently expressed by M*alaba* J in these terms:

> ``A court will not insist on an applicant first exhausting domestic remedies where the appeal system created by the code of conduct does not confer on the aggrieved party better and cheaper benefits than its remedies or where the decision to be appealed against undermined those domestic remedies themselves, for example, where the tribunal had no power to make the decision in question.'' 2(96)

Despite this clear conclusion on principle, the court has nevertheless discouraged access to it whilst the often lengthy and complicated initial hearing and appeal process is still in train. Thus, S*mith* J has written:

> ``In my view, this court should not be prepared to review the decision of a domestic tribunal merely because the aggrieved person has decided to apply to court rather than to proceed by way of the domestic remedies provided ... A litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for approaching the court earlier.'' 3(97)

This decision follows frequent statements in which is emphasised the fact that these domestic remedies are characterised as involving a full and efficacious hearing, and the appeal procedure as requiring a complete rehearing of the matter. 4(98)

This reluctance to permit access *ad libitum* where proceedings and recourse are still available in lower tribunals appears inconsistent with the accepted interpretation that the relevant statute does not expressly or by necessarily implication require the exhaustion of domestic remedies. In like manner, the divergence in factual conclusion, as to whether or not the domestic remedies were sufficiently efficacious as to require the parties to exhaust them, which the cases exhibit, is curious. It appears to me, however, that there is a proper rationalisation for this apparent contradiction.

One must commence with the finding that the court's common law jurisdiction is not in principle ousted or stayed pending exhaustion of domestic procedures. This proposition is one which is binding and which is, with respect, obviously correct. Whilst the domestic remedies and procedures



GILLESPIE J

are exhaustive 5(99) they patently do not replace the common law remedies for wrongful dismissal. In addition, none of them involve a power of review of an earlier irregular decision. The election of an aggrieved person to pursue his common law remedy rather than the very cumbersome and time-consuming statutory procedures is therefore preserved. Similarly, the privilege of a person to seek a review of an improper early decision, so that subsequent decisions are not prejudiced thereby, must be upheld.

Far from excluding recourse to the courts, the legislature has, if anything, recognised the

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continued right to approach the courts. The Act makes specific provision to the following effect:

> ``Where any proceedings in respect of any matter have been instituted, completed or determined in terms of this Act, no person who is aware thereof shall institute or cause to be instituted, or shall continue any other proceedings, in respect of the same or any related matter, without first advising the authority, court or tribunal which is responsible for or concerned with the second-mentioned proceedings of the fact of the earlier proceedings." 6(100)

Although failure to comply with this provision is an offence potentially punishable by imprisonment, 7(101) nevertheless all that is required to regularise a duplication of proceedings, is that the second court be informed of the proceedings already underway in another place.

That having been said, however, there are undoubtedly many cases where a person, having chosen to pursue the domestic remedies, would cause considerable prejudice by bringing parallel proceedings in the High Court. Such a course is calculated to cause a duplication of effort and expense and a considerable prolongation of the entire process of litigation, already agonisingly tedious and protracted. 8(102) The *dicta* which I have cited, discouraging access to the courts while the domestic process is in train, are to be seen as an attempt to deal with this possible abuse or occasion of injustice. The pronouncement of S*mith* J in particular obviously involves the exercise of a discretion to withhold jurisdiction unless good reason is shown for the duplication of proceedings.

It might seem most anomalous that the High Court should, by an exercise of discretion, withhold jurisdiction from a party who, on established authority, is entitled to claim relief. Although not expressed, the jurisprudential basis for such a discretion is not hard to find. It is an instance of the inherent jurisdiction of this court to regulate and control its own proceedings so as to prevent injustice or abuse of process. This equitable discretion underlies





many of the recognised instances where the court will stay or dismiss proceedings. The defence of *lis pendens* is itself such an instance. Other examples include staying proceedings pending an arbitration or pending payment of accrued costs, and the dismissal of frivolous or vexatious proceedings. The power is, of course, sparingly exercised since the courts of law are open to all, and it should only be in exceptional circumstances that these doors will be closed upon a litigant. 9(103) The existence of such a discretion in the present specific instance is recognised by the Supreme Court. 10(104)

One is therefore able to state the following clear principles. An aggrieved employee has an unfettered election whether to pursue a cause of action arising from employment according to the common law, or through the domestic and statutory procedures appointed. Even when he has chosen, or been compelled, to submit to the domestic procedures, he is not obliged to exhaust those remedies before praying relief from the High Court. Since, however, the courts have recognised that the appeal procedure domestically provided is generally most efficacious, frequently permitting a full rehearing, the courts discourage a duplication of proceedings unless good cause is shown. 11(105)

In this case, the review is brought at the stage after the internal code of conduct proceedings

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have been completed and an appeal in the nature of a full rehearing in the labour relations tribunal is pending, having been instituted by the applicant. Many of the grounds of review advanced are such that are more properly dealt with as an appeal. Such grounds are the averments termed by the applicant ``unreasonableness and error or law'' and ``irrelevant considerations'' which, on examination, are no more than an invitation to reconsider the merits. Some, however, are appropriate for review and could not perhaps be adequately addressed by the tribunal. These are allegations of absence of jurisdiction and bias. Quite apart from all other relevant considerations, a decision whether to entertain a review on these grounds will involve determination of the third preliminary point advanced by Mr *Nherere*: namely, the failure to bring this application for review within the stipulated time limit.

I turn therefore to address this issue. The principles concerning the



question of condoning a failure to institute proceedings timeously ought to be well-known, so frequently are they rehearsed in cases instituted outside the time limit. Where a good reason for the delay is given and a sound case on the merits is disclosed, then even a lengthy delay might be condoned. A relatively short delay, however, might be fatal where insufficient prospect of success or inadequate excuse is given. In this case, the delay in instituting the application is by no means extended - perhaps a matter of a fortnight. There is no application for condonation. There is therefore nothing in the way of excuse advanced explaining the delay. From the bar the applicant submits that he brought the review in order to avoid delays in the tribunal. He may have been concerned at the prospect of future delay, but at the time of institution of the application none had yet occurred. In any event, this does not explain the failure to abide by the rules. Since the delay is short, and the applicant a self- actor, one might normally be prepared to condone the delay and the absence of good explanation if there were some hint of prospects of success. I therefore examine whether the applicant does show *prima facie* good grounds for review.

After giving the grounds for review, and the record of the disciplinary proceedings full consideration, I conclude that there is no prospect of success on those grounds which raise alleged irregularities and improprieties. The allegation of bias is utterly unfounded. A full transcript of the deliberations of the relevant disciplinary committee shows that conscientious and careful attention was given to the facts and submissions placed before it. In addition, many of the alleged grounds of bias, constitute no more than argument on the merits of the decision reached.

The allegation of an absence of jurisdiction is also without merit. The first point taken is that the code of conduct requires that a decision be pronounced within fourteen days of the commencement of disciplinary proceedings. It is averred that the decision was delayed beyond that date and that the committee accordingly had no jurisdiction to reach a decision. Even if the conclusion in law were correct, the facts are misstated. The applicant was notified of proceedings on 28 January and the decision was reached on 11 February. Even if there were a delay that in itself does not deprive the committee of its disciplinary power and is not even

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necessarily a reviewable irregularity. 12(106)

The second ground advanced for an absence of jurisdiction is that the entire proceedings were not completed within 30 days. That is true. That fact, however, does not deprive the internal body of its power. The law provides that:

> ``If a matter is not determined within thirty days of the date of the notification referred to



GILLESPIE J

> in paragraph (e) of subsection (3), the employee or employer concerned may refer such matter to a labour relations officer, who may then determine or otherwise dispose of the matter in accordance with section *ninety-three*."

This, in its clear terms, is not in any way peremptory. It serves solely to give a party the option of using an alternative procedure. While on this point, I might mention that the relief prayed by the applicant in the alternative is misconceived. In the alternative to reinstatement, he claimed the referral of the dispute to a labour relations officer in terms of this provision. The provision is quite clearly of no applicability at all.

The final ground of review, that the decision is grossly unreasonable, is one that directly attacks the merits of the decision. It is not a determination fit for review, and on the papers there does not appear to me any substance to such a challenge - save in one respect. The only point which does appear possibly to be in the applicant's favour is one which he has not taken. It is a point which occurred to me but which neither party argued, although I questioned each of them on the subject. The record of proceedings shows that the disciplinary committee, in considering the punishment to be imposed, formed the view that:

> ``once the offence was found to have been committed the party hearing the case cannot have a discretion to allow a lesser punishment unless such punishment is built into the code [of conduct]." 13(107)

Since the schedule of offences provided for dismissal for this offence, the committee therefore considered itself bound to dismiss the applicant. In this, I am quite satisfied that it misdirected itself.

In holding this view, the committee was influenced by certain decisions of the Supreme Court. 14(108) These hold that a labour relations officer, determining whether grounds for dismissal exist in respect of a person summarily suspended without pay, 15(109) has no discretion to do anything other than terminate the employment of the suspended worker if he finds the grounds for suspension to have been established. Those decisions, correct and binding as they are, do not apply to the situation faced by the disciplinary committee where a code of conduct prescribes a particular punishment for a particular offence. The meaning of such a schedule of offences and punishment is generally, and is certainly in this case, that the punishment prescribed is the maximum permissible. The employer, through the properly constituted disciplinary organs, then has to decide whether to impose that maximum or something less. The situation is different for a Labour Relations Officer



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considering an application for determination of employment, because in such a case the employer has already decided that dismissal is required. The officer's sole function is then to determine whether the grounds relied on are established.

This error on the part of the disciplinary body is a *prima facie* ground for interference in the punishment. Had the point been advanced and argued, and had the appropriate relief been sought, one might have given serious consideration to setting aside the dismissal and remitting the matter to the domestic tribunal to reconsider the sentence on the basis that dismissal was not mandatory. My task must now be to determine precisely how to exercise the discretion that attaches both to the question of condonation and to the question of duplication of proceedings, in the light of the view on the merits of the review as I have found them to be.

The factors that influence me most greatly are these. The pending appeal in the Labour Relations Tribunal is a proceeding far more suited to the challenge on the merits of the decision than is a review. The relief that could be granted by the tribunal would itself be better calculated to bring finality to the matter than would a decision of this court, remitting the matter for determination. Undoubtedly, it is an order of remittal that would be made by this court, and not a substantive and final order on the merits. It might be that the best the applicant could hope for is reconsideration of the punishment imposed, but it does not seem to me that this court should be hasty to order a remittal, which is relief not sought, on a ground neither advanced by the applicant nor properly argued by either side. This is particularly so when the applicant still entertains the hope of a full appeal, in fact a full rehearing, on the merits in the Labour Relations Tribunal. For these reasons, after giving the matter the best consideration of which I am capable, I have decided to withhold condonation of the late institution of the proceedings; to decline to hear the matter whilst the domestic remedies remain incomplete; and not to amend the defective citation of the respondent. The applicant must, and indeed would be better advised to, pursue the appeal so long delayed by the unnecessary bringing of this application. The tribunal, in considering that appeal, will no doubt take cognisance of the error committed by the disciplinary body in respect of punishment which this judgment has revealed.

In the premises the application is dismissed with costs.

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

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## MISIHAIRAMBWI *v* HARARE CITY COUNCIL & ORS 1998 (1) ZLR 398 (HC)

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

Chinhengo J

Civil application

24 February & 22 April 1998 Judgment No. HH-66-98

**Flynote**

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Elections - setting aside of - when election may be set aside - candidate wrongly disqualified on grounds of age when actually eligible - election set aside

## Headnote

The applicant wished to contest a municipal election as an independent candidate. Her only opponent was a candidate of the ruling party, ZANU PF. In terms of the Urban Councils Act, she was required to be at least 30 years of age to qualify for election. Her birth certificate then incorrectly showed her to be 29, but she applied to the second respondent, the Registrar-General, for a corrected certificate. This was issued and she was allowed to stand as a candidate. However, at the prompting of ZANU PF, the Registrar-General intervened and withdrew the amended birth certificate. As a result, the third respondent, the Town Clerk of Harare, disqualified her and declared the ZANU PF candidate to be duly elected.

The applicant took the matter to court and in due course the Supreme Court held that the Town Clerk had erred in disqualifying her, because her date of birth, which was a question of fact, was established and showed that she was actually 30 years of age at the time of her candidature. As a consequence of the Supreme Court's finding, the applicant sought an order setting aside the declaration of the ZANU PF candidate as being duly elected and the convening of fresh elections. The application was opposed on the grounds that (1) the applicant should have applied for an interdict earlier and her failure to do so should be held to be a waiver of her rights; and (2) as the application was one for review of the Town Clerk's declaration, it was out of time.

*Held*, that the present application was brought in order that the applicant's rights flowing from the Supreme Court's judgment be confirmed. There was nothing to be reviewed; but even if the matter were one for review it would be one where condonation should be granted. The applicant had pursued her rights actively and timeously. In any event, the only decision that could be reviewed was the decision to disqualify the applicant. Having made that decision, the Town Clerk had no option but to declare the other candidate elected.

*Held*, further, that the applicant was actually eligible to stand as a candidate, and the Town Clerk had no basis in law for rejecting her nomination.

*Held*, further, that an election did not take place because of the Town Clerk's erroneous determination that the applicant was disqualified. The election was not conducted substantially in accordance with the principles laid down in the Urban Councils Act, and the court was entitled to set the election aside to give democracy its lifeline. To do otherwise would not only be a denial of the rights of the individual aspirant and the electors concerned but would also undermine the very basis on which democratic institutions are founded. In





addition, there seemed to have been an improper involvement of the ruling party and the court should be seen to discourage any such impropriety.

Cases cited:

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*Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H)

*Misihairambwi* v *Min of Home Affairs & Ors* HH-52-97

*Misihairambwi* v *Min of Home Affairs & Ors* S-120-97

*Pio* v *Smith* 1986 (2) ZLR 120 (H)

*Pullen* v *Johnson NO* 1940 TPD 124

Legislation considered to:

Urban Councils Act [*Chapter 19:15*], ss 40, 41, 44, 45 and 77

## Case Information

*B Kagoro*, for the applicant

*M Foroma*, for the first and third rrespondents

*K Matsikiti*, for the second respondent

## Judgment

**CHINHENGO J:** The applicant wished to contest the local government election for Ward 6 in Harare municipal area on 20 March l997. She thought, correctly, that she qualified to be elected as a councillor. She was disqualified by the Town Clerk of the City of Harare, who was the returning officer. The only other contestant, the second respondent, was as a consequence declared the duly elected councillor for the ward. This is an application wherein the applicant disputes the process of election and the outcome and seeks the following order that:

(a) the first respondent's decision appointing the second respondent as the duly elected councillor for ward 6 and such elections be set aside;

(b) the first respondent be directed to convene fresh elections for ward 6 within 30 days from the date of this order;

(c) the third respondent is directed to register the applicant as a duly nominated candidate for such elections;

(d) the applicant be declared eligible to contest the elections should she so wish;

(e) the costs of this application shall be paid by those of the respondents who oppose the relief sought by the applicant.

The facts which form the background to this application appear in the judgment of this court in *Misihairambwi* v *Minister of Home Affairs & 2 Ors* HH-52-97 and in *Misihairambwi* v *Minister of Home Affairs & 2 Ors* S-120-97, the latter case being an appeal from the decision of this court in the former case. At p 1 of the Supreme Court judgment the issue on appeal was identified as follows:

``The appellant made an application in the High Court, Harare, for amongst others, an order that the third

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respondent (Harare City Council) reinstate her `as a declared candidate for ward 6 - Harare for the Municipal elections to be held on 22 and 23 March l997',



CHINHENGO J

alternatively a *declaratur* that she was born on 31 December l966. The court dismissed her application on l9 March l997. This appeal is now against that decision.''

Outlining the facts of this case on appeal, MUCHECHETERE JA said at pp 1-2:

``These are to the effect that the appellant wished to contest a municipal election as an independent candidate. Her only opponent was to be a ZANU PF candidate. In terms of s 40 of the Urban Councils Act [*Chapter 19:15*] she was required to be thirty years of age in order to qualify for election. She had in her possession at that time a birth certificate showing her date of birth as 31 December l967. Fearing, in the result correctly, that she would be disqualified from standing for election because of the date of birth shown on her birth certificate, she caused an application to be made to the second respondent in terms of s 8(2) of the Births and Deaths Registration Act [*Chapter 5:02*] (``the Act'') to have her certificate corrected in a number of respects, namely the spelling of her name and the place and date of her birth.

The application was successful and a new birth certificate showing, *inter alia*, her correct date of birth as 31 December l966 was issued. As a result, the refusal by the Town Clerk of the third respondent to allow her to stand as a candidate was withdrawn.

However, at the prompting of ZANU PF the second respondent *(110) intervened in the matter. He held a meeting with the parents of the applicant. At that meeting he determined that false information had been given as to the appellant's place of birth and thereafter directed the withdrawal of the amended certificate. This decision was communicated to the third respondent. As a result, the third respondent again disqualified the appellant from standing as a candidate in the election.

Because time was pressing with election day looming the appellant sought relief from the High Court to enable her to contest the elections. As indicated the High Court refused her relief. In the result she was unable to contest the elections''.

The Supreme Court set aside the judgment of this court and ruled that the Town Clerk had erred in disqualifying the applicant from standing as a candidate in the elections as her date of birth, which is a question of fact, was established as being 31 December l966 and that in reality there had never been a dispute about her correct date of birth. It declared that the applicant was born on 31 December l966. Dealing with the questions of costs, the learned JUDGE OF APPEAL said at p 5, that:

``... my view is that all respondents should bear the costs in this matter. As I have indicated above, there was never any dispute as to the date of the applicant's birth. In the circumstances, there was no reason for any of the respondents to disqualify her from standing in the elections or for any of the respondents to oppose a *declaratur* to that effect''.

The present application is consequent upon the decision of the Supreme Court. The second respondent, who was declared duly elected after the unlawful disqualification of the applicant, was cited as a respondent because she has an interest in the outcome of this application.

In her founding affidavit, the applicant contends that her disqualification



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should be set aside as it was unlawful. By disqualifying her, the third respondent failed to comply with the provisions of the Urban Councils Act which directs him to register all qualified aspiring candidates for an election. The applicant avers that as a result of her disqualification she has suffered prejudice in that she has been denied her democratic right to contest the election and in that she has expended money and money's worth in the campaign which would be lost to no avail. Further she avers that the electors in ward 6 were denied their right to choose a councillor of their choice. She also avers that if the election had taken place, the result may well have been different as she has a sizeable number of supporters in the ward. For these reasons therefore she sought the order in the terms indicated above.

The first and third respondents opposed the application on the grounds that the applicant knew or should have known that if she did not interdict the first and third respondents from proceeding with the exercise, the second respondent would be declared the duly elected councillor for ward 6. They contend that the applicant's failure to apply for an interdict and take advantage of the options available to her must be held to have been a waiver of her rights. They admit that the Supreme Court ruled that the applicant's disqualification was erroneous but contend that due to the applicant's failure to obtain a interdict the second respondent's uncontested election as the councillor for ward 6 should not be set aside.

The second respondent also filed an opposing affidavit which is based on the same grounds as those of the first and third respondents. In amplification of those grounds, the second respondent avers that the applicant's failure to interdict the first and third respondent left the third respondents with no option but to declare her the duly elected councillor for ward 6. She argues that the applicant is estopped from complaining as her own inaction is the cause of her present predicament. As a parting shot, the second respondent says that the whole election process should not be started all over again as it is a costly exercise and as ``the applicant has no chance whatsoever of winning the by-election''. With respect to the applicant's chances, I must observe that this court is unable to make any comment as no election was held.

The second respondent raised a point *in limine* which I must deal with before deciding on the merits of this application. She argued that this application is really one for the review of the third respondent's decision declaring her the duly elected councillor and being such an application it must be thrown out as it has been brought some seven months after the applicant became aware of her disqualification. Rule 259 of the High Court of Zimbabwe Rules l971 provides that all proceedings by way of review shall be instituted within eight weeks of the proceedings in which the irregularity or illegality complained of is alleged to have occurred. And, further, that the





application being one for review and is out of time the application did not seek condonation for instituting the proceedings out of time. The second respondent contended that on both these grounds the application should be dismissed without hearing argument on the merits.

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This objection is swiftly shot down by applicant in her answering affidavit and by her legal practitioner in his arguments, both written and oral. The argument is that the present application was brought in order that the applicant's rights which naturally flow from the judgment of the Supreme Court may be confirmed. The Supreme Court in effect ruled that the applicant's disqualification was erroneous and unlawful. This means that there is really nothing for this court to review in so far as the legality or otherwise of the disqualification is concerned. What this application seeks to do is, in substance, to restate the decision of the Supreme Court and order that the consequences of that decision should be given effect to. I am in total agreement with the applicant. There is nothing for me to review in respect of the applicant's disqualification by the third respondent. The ruling of the Supreme Court leaves no room for doubt that the disqualification was as unwarranted as it was unlawful. A correct analysis of the relief sought by the applicant shows that she seeks that the declaration of the second respondent as councillor and the process leading up to this declaration be set aside and the elections be conducted afresh. In my view, therefore, there is no substance at all in the argument that this is an application to review the third respondent's decision disqualifying the applicant. Even if I thought that the matter is one for review, I would have had no problem condoning the non-timeous institution of the proceedings. The applicant approached this court for relief on an urgent basis and the decision of the court was handed down on l9 March l997. If the court had not dismissed her application this application would never have been embarked upon. I am satisfied that the applicant pursued her rights actively and timeously such that if it was necessary to condone anything in this application I would have readily done so.

It seems to me that in respect of the question whether this is an application for review or not, the applicant and the second respondent have chosen to look at the facts, and perhaps the substance, from different angles that suit their purpose. As much as the applicant says that if the matter were one for review, the decision by the third respondent which would have to be reviewed is his decision to disqualify the applicant. The second respondent says that the decision which has to be reviewed is the third respondent's decision to declare her the duly elected councillor for ward 6. The decision to disqualify the applicant was the operative decision while the decision, if it can be called a decision at all, to declare the second respondent duly elected was a consequence of the decision to disqualify the applicant and the applicant's



disqualification. To ``decide'' is to come to a resolution about something, to resolve or to settle a question or dispute or to give a judgment concerning a matter. And a decision is a conclusion or resolution reached, especially as to future action. To ``declare'' on the other hand is to announce openly or formally or to announce a thing to be something. To ``declare'' presupposes the existence of a thing or state of affairs. In this case, therefore, if any decision were to be reviewed it would only have been the decision to disqualify the applicant. Into that decision naturally and logically some process, some thinking, should have been part of the third respondent's mental activity. Whereas in respect of the declaration that the second respondent was now the councillor, no process or thinking was involved. Whichever way I look at this matter, the conclusion is that if it were a matter for review the decision that would have to be reviewed is the decision to disqualify the applicant. As I have indicated above, there is nothing

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to review here and the second respondent's objection *in limine* must fall away.

The Urban Councils Act [*Chapter 29:15*] (``the Act'') provides in s 40 that a person who meets the criteria stipulated therein (including the criterion that she should be 30 years or older) shall be qualified to be elected as a councillor. Section 41 stipulates that a person shall be disqualified from being nominated as a candidate for or from election as a councillor if any of the disqualifications specified in that section apply to him. The qualification and disqualifications specified in these sections take effect by operation of law: if a person meets the specifications in s 40 he shall be qualified to be elected as a councillor and a person shall be disqualified from being nominated as a candidate for or from election as a councillor if the disqualifications in s 41 apply to him.

The returning officer's duties in respect of the election and nomination day are provided in s 44. In respect of the nomination of candidates, the returning officer is required by s 45(7) to reject the nomination of any person who is not qualified in terms of s 40 to be elected as a councillor. The returning officer in the present matter (the third respondent) purported to act in terms of s 45(7), believing erroneously that the applicant was disqualified by virtue of her age being lower than 30 years, when in fact she was qualified. The returning officer was, as a result of his determination that the applicant was disqualified under s 40(b), unable to post the list of contestants as required by s 45(8) or to post the notice showing the names of the persons in respect of whom a poll will be taken as required by s 45(a)(b). The result of applicant's disqualification was that in terms of s 45(1)(a) the second respondent was deemed to have been duly elected as the councillor for ward 6.

It is evident, that in terms of s 45(7)(a), the returning officer is enjoined to satisfy himself that a person is not disqualified in terms of s 40 to be elected as a councillor. The applicant was not ineligible and therefore the third



respondent had no basis in law or otherwise to advise the applicant that her nomination had been rejected, thereby rendering her not nominated for the purposes of the election.

There is no doubt in my mind that the election of the second respondent was attended by an irregularity and illegality. As stated by the Supreme Court, there was no basis at all for the disqualification of the applicant. The question is whether the attendant illegality or irregularity was such as may move this court to set aside the election or to declare invalid the second respondent's election.

Section 77 of the Act provides that an election shall not be declared invalid or set aside by any court solely on account of any defect in the appointment of the returning officer or other election official or on account of any mistake or non-compliance with the provisions of the Act if it appears to the court that the election was conducted substantially in accordance with the principles laid down in the Act and that the mistake or non-compliance is not likely to have affected the result of the election. The word ``election'' is not defined in terms of its substance or to give it a meaning of its own. The definition reads ``an election as a mayor or councillor in

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terms of this Act''. In my opinion, ``election'' in s 77 must mean an election which involves a poll and not one where a contestant is deemed under s 45(10)(a) to have been duly elected as a councillor. Such an interpretation would mean that s 77 is not applicable in this case and my decision must rest on other considerations.

Assuming however that I am wrong in regard to the meaning of the word ``election'' and I have to adopt the meaning that ```election' impliedly refers to every process of election among those processes being the necessity for nomination'' (as in *Pullen* v *Johnson NO* 1940 TPD 124 at 128), I would still reach the same conclusion.

In *Pio* v *Smith* l986 (2) ZLR 120 (H) the court dealt with an application to set aside an election conducted under the Electoral Act l979. The court stated that a court should not be astute to adopt a construction of a section which would have the effect of invalidating a vote where the intention of the voter has been indicated with certainty and that an election conducted substantially in accordance with the principles of the Electoral Act ought not to be invalidated on the ground that a narrow majority in favour of the successful candidate would not have been achieved if only a few eligible voters had not been discouraged from voting by encountering some modest inconvenience that would have been avoided had better foresight been exercised by those responsible for arrangement at the polling station. It went further to state that an election should only be set aside where there is a failure to comply in substance with the principles underlying the Electoral Act or where a mistake or non-compliance with the Act affected the result (see the headnote).



CHINHENGO J

The provision of the Electoral Act which was the subject of interpretation in this case is *in pari materia* with s 77 of the Urban Councils Act. The wording is almost identical.

In the present case, an election involving a poll did not take place because of the third respondent's erroneous determination that the applicant was below the age of 30 years and was disqualified. This was such a fundamental misdirection that, even though the outcome of the election is a matter for conjecture or speculation, the error or non-compliance with the provisions of the Act lead me to the conclusion that the election was not conducted substantially in accordance with the principles laid down in the Act. Read as a whole, Part V of the Act is facilitative of a democratic process of election. So fundamental is this underlying principle that where a duly nominated candidate has died, s 45(12) directs that the election proceedings shall be terminated and commenced afresh. In such a situation, the remaining candidate is not declared duly elected in terms of s 10(a) or any other provision of the Act. This is intended to ensure that those elected to public office are not elected by default, as well as to ensure that the electors are given the full opportunity to exercise their right to choose between competing candidates. Where, therefore, an aspiring candidate is erroneously disqualified from nomination and from participation in the election two principles are infringed: the right of the person concerned to participate in the election process and the right of the electors to choose a candidate to carry out a public function for their benefit. In such circumstances the court will be entitled to set aside the election to give democracy its lifeline. To do otherwise would not only be a denial of the rights of the individual aspirant and the electors concerned but it would also

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be to undermine the very basis upon which democratic institutions are founded. In this case, there appears to have been an improper involvement of the ruling party ZANU PF in the disqualification of the applicant (see the Supreme Court judgment S-120-97 at pp 2 and 3). The court should be seen to discourage any such improper involvement. This is not to say that a political party which sponsors a candidate should not inquire into or investigate the qualification of another candidate. Far from it. Such political party is entitled to exert itself in this way, provided that it stays clear of directly or indirectly influencing the election officials as to the decision which they may take in respect of any complaint lodged by it. In this context, it behoves me to quote the statement by CHATIKOBO J in *Kuvarega* v *Registrar-General & Anor* HH-48-98 where at p 7 of the cyclostyled judgment he said: *(111)

> ``The ascendancy of a nation to the sublime ideals of democracy demands of each



CHINHENGO J

> contestant in a national election a valiant demonstration of a high degree of tolerance and fair play. The role of the courts remains that of a disinterested umpire to provide redress and protection to those who are denied a level field of play."

This is a statement worthy of commendation to all election officials who conduct elections at whatever level of government in this land.

The contention that the applicant should have sought to interdict the first respondent from proceeding with the election does not, on the particular facts of this case, carry favour with me and the same applies to the contention that the applicant waived her rights. In respect of waiver, it is trite that waiver must be expressed or implied by conduct and communicated to the other party. The applicant's conduct in this case is not anywhere near an expression, express or implied, of an intention to wavier her rights. She sought relief from the High Court on an urgent basis and prosecuted her application all the way to the Supreme Court with the keenness of one intent on preserving her rights.

An application to interdict the first respondent from proceeding with the election would have been based on the same grounds as the application which she instituted in the previous case in this court. I doubt very much if such an application would have been successful. I do not think that it is necessary at all for me to decide whether or not such application should have been made. The erroneous disqualification of the applicant and the resultant declaration of the second respondent as the duly elected councillor were so flawed that the election should not be allowed to stand.

The costs will follow the result. There is no basis for ruling otherwise. All the respondents have actually opposed the relief sought by the applicant and, in that, they have not been successful.

The draft order filed by the respondent raises a problem which I have to highlight. In para 4, the applicant prays that she be ``declared eligible to contest the elections should she so wish''. The court, in my view, should not be engaged in an academic exercise in the sense that if a person applies to set aside an election and asks for a re-run, the court must be assured that that person is committed to contesting the election. There would be no purpose for the court to set

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aside an election only to find that there are no persons interested in contesting it. It appears from the body of her founding affidavit in particular from the whole of para 6 thereof that the applicant still wishes to contest the election. My order will be suitably worded to reflect this concern.

In the result, it is ordered as follows that:

1. the declaration of the second respondent as the duly elected councillor for ward 6, Harare, be and is hereby set aside;

2. the election which resulted in the declaration referred to in para 1 be and is hereby set aside;



CHINHENGO J

3. the first respondent is directed to hold a fresh election for ward 6, Harare, only if the applicant notifies the first respondent in writing within 10 days of this order that she will contest the fresh election for ward 6 as a candidate;

4. if the applicant does not notify the first respondent as specified in para 3, the second respondent shall be deemed to have been duly elected as the councillor for ward 6 and she shall continue in office as such;

The costs of this application shall be paid by the respondents, jointly and severally, the one paying the other to be absolved.

*Kantor & Immerman*, applicant's legal practitioners

*Sawyer & Mkushi*, first and third respondents' legal practitioners

*Chihambakwe, Mutizwa and Partners*, second respondent's legal practitioners



## PARKVIEW PROPERTIES (PVT) LTD *v* CHIMBWANDA 1998 (1) ZLR 408 (HC)

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

Bartlett J

Action for eviction

26 February & 22 April 1998 Judgment No. HH-68-98

### Flynote

Landlord and tenant - lease - termination - grounds for - failure to observe conditions of lease - persistently paying less than full amount of rent - acceptance by landlord's agent of lower amount for long period - arrears paid in full when error observed - non-waiver and non-variation clauses in contract - effect - landlord must elect within reasonable time whether to cancel contract

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## Headnote

The plaintiff was the lessor and the defendant the lessee of a shop. A three-year lease agreement had been signed in 1989. The agreement contained an escalation clause in respect of the rent payable. The tenant paid the agreed rent timeously for the first two years, but in the third year paid the rent applicable to the second year, instead of the higher rent that should have been paid. The landlord's agent accepted this rent without demur for a further year. The lease then, without renegotiation, continued on ``the same terms and conditions'' as before, and the lower rent continued to be paid for several more months. After the tenant had paid the lower rent for nearly 30 months the plaintiff discovered the error and sought payment of the arrears as well as the eviction of the tenant. The tenant paid the arrears and thereafter paid the correct rental.

There was a clause in the contract that any failure by the landlord to exercise any right would not be a waiver of the right, and that acceptance of overdue rental would not be held to be a waiver. There was also a non-variation clause. The question was whether in the light of these clauses the landlord was entitled to claim ejectment of the tenant.

*Held*, that despite the existence of the non-waiver and the non-variation clauses, the lessor must, if there is a late or partial payment, make his election within a reasonable time, and at the latest when the next payment is tendered. Failing such an election, the acceptance without reservation of a subsequent payment must be taken as an election not to cancel on the grounds of the past breach and a condonation of the breach (though the landlord would retain the right to recover the unpaid rent due). To allow the landlord to accept the late or partial payments for a long time and rely on a breach which had occurred months previously as grounds for cancellation would be most unfair.

Cases cited:

*AFC* v *Pocock* 1986 (2) ZLR 229 (S)

*Commercial Bank of Zimbabwe* v *MM Builders & Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (ZH)

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BARTLETT J

*Masukusa* v *Tafa* 1978 RLR 167 (A)

*Sotiriadis* v *Patel* 1960 R & N 280 (SR)

*Stracon Development (Pvt) Ltd* v *Gruer* 1990 (1) ZLR 354 (H)

## Case Information

*E W W Morris*, for the plaintiff

*C Warara*, for the defendant

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## Judgment

**BARTLETT J:**

INTRODUCTION

Parkview Properties (Pvt) Ltd (the plaintiff) is seeking to evict Denford Handison Chimbwanda t/a Sergio Photo Studios (the defendant) from shop 3 of Parklane Building in Julius Nyerere Way, Harare.

The plaintiff is the lessor and the defendant the lessee. But the lease has some curious terms and an even more curious history. It was signed on 22 February 1989 and was supposed to run until 29 February 1992. The rent was precisely specified for each of the three years of the lease's proposed duration. There was no renewal clause and accordingly no formula for establishing a rental beyond the three year period. The manner in which certain clauses of the Knight Frank and Rutley standard form lease were deleted meant that at the end of the three year period the lease would continue on the same terms and conditions subject to 3 months' calendar notice of termination by either party.

The defendant paid the required rental with acceptable regularity until the end of the second year (28 February 1991). Then from 1 March 1991, instead of paying the agreed rental for the third year of the lease ($1 587 per month), he continued to pay the rental appropriate to the previous year ($1 380 per month). The plaintiff, through its agent, Knight Frank and Rutley, received this lower rental without query or question right through the third year of the lease. It then continued to receive the lower rental when the lease - without any apparent discussion or correspondence between the parties - continued ``on the same terms and conditions'', subject to three months' notice either way. Then over 18 months later and towards the end of 1993 - though exactly when is not clear from the evidence - the plaintiff, through its agent, discovered its error. So after accepting the lower than agreed rental for some 30 months without any query, the plaintiff sought payment of the amount outstanding and by the issue of summons on 18 March 1994 the eviction of the defendant from the premises.

The defendant had commenced paying the correct rental of $1 587 from 1 February 1994 and offered to pay the arrears - which have since been paid. The defendant is still in occupation and is now paying a monthly rental in





excess of $5 000 - though I accept Mr *Morris*'s assurance that no tacit relocation has taken place. The defendant, however, resists ejectment, referring to the plaintiff's delaying to enforce its right as waiving its contractual right and being estopped from claiming cancellation.

The arrears having been paid, the only issue between the parties is whether the defendant is liable to eviction.

THE WITNESSES AND THEIR CREDIBILITY

The evidence led was marked by its brevity. The plaintiff called only its agent's representative -

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a Mr Johnson of Knight Frank and Rutley. The defendant called only himself. The handling of the lease in this matter by the plaintiff's agent is marked by considerable carelessness. How any agent - carrying out its duties properly - could not notice that rent had been underpaid each month for over 30 months is difficult to comprehend. When that agent is Knight Frank and Rutley, a professional real estate agent, the carelessness becomes even more incomprehensible. No sensible explanation for this failure by Knight Frank and Rutley was provided by its representative, Mr Johnson. Indeed, his evidence only enhanced the impression of careless inefficiency. He brought to court only his file of papers commencing in December 1994 although all relevant correspondence in this matter took place well before December 1994. He did not ask to be allowed to go and fetch the correct file and familiarise himself with its contents - but continued with his evidence. Mr Johnson obviously had done no preparation for the trial - if he had, he would have brought the correct file, or at least been aware of its contents. He patently had no recollection of any of the relevant events. He, for example, adhered to his affidavits sworn in regard to the application for summary judgment previously made. But he was unaware that the arrears had now been paid - which meant that he had not bothered to read the supplementary affidavit he had sworn in the summary judgment application. In a continuing catalogue of carelessness deriving from his complete lack of preparation, he was unaware of when Knight Frank and Rutley had become aware of the arrears, what they had done on reaching awareness and whether they had in fact cancelled the lease.

I said earlier that I found it difficult to comprehend how an agent could not realise that rent had not been properly paid for over 30 months. Having heard the evidence of Knight Frank and Rutley's representative I am surprised they found out so soon.

On a serious note, however, one expects litigants to regard litigation in the High Court with appropriate seriousness. One expects them to arrive for trial properly prepared - if not from the respect one hopes that they would have



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for the High Court, then at least from the realization that hard work and proper preparation are the necessary concomitants for success. Regrettably, this case is not an isolated example of a litigant's failure to prepare for High Court litigation with the necessary and expected thoroughness.

The defendant maintained, as per his opposing affidavit in the summary judgment proceedings, that the incorrect payments had been made by oversight and pointed out that the arrears had been made good. He stated that the plaintiff's real concern had been to get him to agree to a very substantial increase in rent and in the absence of such an agreement to have him removed. This position is to some extent borne out by correspondence from the plaintiff annexed to the opposing affidavit in the summary judgment proceedings. This correspondence shows that in January 1994 the plaintiff was asking for payment of the arrears and the signing of a new lease and that as late as June 1994 (summons was issued in March 1994) it was putting forward a new lease for signature at a very much increased rental.

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The plaintiff and its agent were undoubtedly enormously careless in the manner they administered the receipt of rental payments. The defendant was likewise considerably careless - if he wished to maintain his rights under the lease - not to ensure he was paying the appropriate rent. But the probabilities overwhelmingly indicate that both parties were unaware of the error and what evidence there is (in view of the lack of evidence led by the plaintiff) indicates on the probabilities that the plaintiff, on discovering the under payment, asked the defendant to make good the arrears and to agree to a new lease at an escalated rental.

But little turns on the evidence led. Mr *Morris*, the plaintiff's counsel, who introduced a pleasing air of preparedness and efficiency to the plaintiff's case, which had hitherto been completely lacking, submitted written heads of argument prior to the commencement of trial. The basis of this written argument was that the defendant had clearly been in arrears and, on the law relating to the effect of non-waiver and non-variation clauses and the appropriation of payments, the plaintiff was clearly entitled to evict the defendant. I should point out that there had been some reference in the defendant's plea to the defence of *res judicata* but no meaningful evidence was led on this aspect and the point was not pursued.

THE NON-WAIVER AND NON-VARIATION CLAUSES OF THE LEASE

Mr *Morris*'s compelling argument centered on the non-variation and non-waiver clauses in the lease. Clause 33(a) of the lease states as follows:

> ``The failure by the landlord to exercise any right shall not be deemed a waiver of any of



> the landlord's rights in terms of this lease and the acceptance of overdue rental hereunder shall not constitute a waiver of any such right which the landlord has to cancel this lease rising out of such late payment.''

Clause 33(b) reads:

> ``This lease constitutes the whole of the agreement between the parties; any variations or collateral agreements, unless in writing and signed by both parties, shall be of no force or effect.''

In view of the persistent acceptance of the incorrect rental, it is the operation of these clauses on which the plaintiff's case must stand or fall. Mr *Morris* referred to *Agricultural Finance Corp* v *Pocock* 1986 (2) ZLR 229 in regard to the effect of such clauses. The non-waiver and non-variation clause in that matter was as follows:

> ``15. The borrower acknowledges that this agreement constitutes the entire agreement between the Corporation and himself and that any relaxation or indulgency which may be granted by the Corporation following any breach by the borrower of any of the terms and conditions of this agreement shall not be deemed a condonation by the Corporation; nor shall the Corporation be deemed to have waived any of its rights under this agreement. Nor shall any such relaxation or indulgency be deemed to constitute a novation of the terms and conditions of this agreement.''

The clause is accordingly similar in all material respects to the equivalent clause in the present matter. GUBBAY JA (as he then was) said this of this non-variation and non-waiver clause at p 236C-D:

> ``I am satisfied therefore, that the respondent cannot rely successfully on either waiver or estoppel, for the effect of the clause 15 is to negate both defences. Under it, the respondent agreed that condonation of a breach will not

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constitute a waiver of the appellant's rights arising from the breach, and at the same time accepted notice that any conduct of the appellant which might otherwise give rise to estoppel may not be taken by him to be such conduct."

See also GUBBAY JA's quotation with approval at 235E-H of the words of HATHORN J in *Sotiriadis* v *Patel* 1960 R&N 280 at 288B-E:

``Where an estoppel has arisen in a case such as the present, its effects may always be removed by a notice given by the lessor: *Roman Catholic Bishop in Natal* v *Sewduth* 1938 NPD 110 at p 114. I see no reason why such a notice should not be given in advance, namely, at the time the contract is made. That is what the effect of clause 13 is. It is a notice by the lessor and an acknowledgement by the lessee that conduct on the part of the lessor which might otherwise give rise to an estoppel may not be taken by the lessee to be such conduct. If a prudent lessee has been given such a notice in advance and wishes to ensure the continued operation of the lease, he knows that he must comply strictly with his obligations and that if he does not do so he is running the risk of having the lease cancelled without further notice. He is not, or should not be, taken by surprise if strict compliance with the lease is insisted upon. Nor is there bad faith on the part of the lessor if, having so given notice, he relies upon a breach and cancels the contract."

Accordingly, if clauses 33(a) and (b) are applicable the plaintiff must succeed.

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BARTLETT J

THE DECISION IN *MASUKUSA V TAFA 1978 RLR 167*

The only basis on which clauses 33(a) and (b) could be held to be not applicable is on the basis of the approach laid down by the Appellate Division in *Masukusa* v *Tafa supra* - a case which appears to me to be relevant but which was not referred to.

In that case, there was a lease with a non-variation and non-waiver clause not dissimilar from that in the present matter. The plaintiff had previously accepted late payments of rent. Summons was, however, issued on 14 July 1977 without any indication of prior notice of cancellation having been given. Rent had been timeously paid for the month of July 1977 (or it needed to be accepted that it had). It was stated at p 172A-B by LEWIS JP:

``If, in fact, the rental payment for July was also a late payment then there would have been no doubt, on the authority of such cases as *McGhie* v *Green* 1948 SR 125 and *Sotiriadis* v *Patel* 1960 R&N 280, that acceptance of the previous late payments would not have raised an estoppel against the plaintiff, nor could they be relied upon as a waiver of his rights to cancel having regard to the terms of clause 9 [the non-variation and non-waiver clause]".

LEWIS JP continued at p 172C-G, referring to *McGhie* v *Green supra* and *Sotiriadis* v *Patel supra*, the latter of which of course had a non-variation and non-waiver clause similar to that in *Agricultural Finance Corp* v *Pocock supra*, and stated as follows:

``There is no authority for the proposition that having accepted a timeous payment, and without any subsequent default on the tenant's part, the landlord can then go back in time and rely upon previous late payments in order to cancel the lease. The answer may well be that on the occurrence of the breach entitling him to rescind, the landlord must exercise his election whether to abide by the contract or cancel it within a reasonable time (See Cooper *South African Law of Landlord and Tenant* p 288, citing *North Vaal Mineral Co Ltd* v *Lovasz* 1961 (3) SA 604 (T)) and where the rental is payable monthly in advance he should reasonably exercise it before the deadline date for the next month's payment. In other words, by accepting the next month's payment on due date, he loses his right to cancel and must be deemed to have elected to abide by the contract. Another way of looking at it is that an attempt to go back in time to previous months' defaults, after acceptance of subsequent timeous

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payments, enables the lessee to resist a claim for ejectment by raising the *exceptio doli* against the landlord, notwithstanding the provisions of a clause such as clause 9 in the lease."

*Masukusa* v *Tafa* was followed in *Stracon Development (Pvt) Ltd* v *Gruer* l990 (1) ZLR 354.

Accordingly, applying the approach in *Masukusa* v *Tafa*, despite the existence of a non-waiver and non-variation clause, the lessor must, if there is late payment, make his election within a reasonable time and at the latest when the next payment is tendered, failing which acceptance without reservation of a subsequent payment must be taken as an election not to



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cancel on the grounds of the past breach. This does not detract from the operation of the non-variation and non-waiver clauses. If the lessee again makes late payment the following month and the lessor cancels within that month, the lessee cannot, because of these clauses, be heard to suggest that previous late payments have been accepted in circumstances amounting to waiver or estopping any denial of waiver. But if the lessee does not commit a further breach and pays on time then the lessor, having made his election to abide by the contract when the previous breach occurred, cannot then rely on the non-variation and non-waiver clauses. To do so could have iniquitous results. For example, suppose there were a five-year lease containing non-variation and non-waiver clauses and in the third month the lessee pays the rent three days late - but no cancellation is made at the time and the lessee faithfully complies with all terms thereafter. Then if two years later, the lessor relying on the late payment made over 18 months previously, were to seek to cancel the lease, referring to the non-variation and non-waiver clauses, it would be, to say the least, most unfair. The principle in *Masukusa* v *Tafa* prevents such unfairness while still giving appropriate effect to the non-variation and non-waiver clauses.

THE APPLICABILITY OF *MASUKUSA* v *TAFA*

In the instant matter (as in *Masukusa* v *Tafa*), there is nothing on record to show that the defendant had been given notice of cancellation prior to the issue of the summons. Indeed, in argument Mr *Morris* asked the court to regard the issue of summons as cancellation in view of the poor and vague evidence of Mr Johnson as regards any prior cancellation. As in *Masukusa* v *Tafa* the rent had been properly paid for the month during which summons was issued. Summons was issued on 18 March 1994 and the correct rent had been paid on 3 March 1994 - indeed the correct rent had also been paid for the previous month on 7 February (those rentals may have been paid late in terms of the lease but late payment for the months of February and March 1994 is not the basis of the plaintiffs claim for eviction).

Accordingly, if *Masukusa* v *Tafa* is applicable, the plaintiff had not elected to cancel the contract when the various late payments were being made and having made that election could not thereafter cancel as long as timeous payments were being made.

Mr *Morris* argued that *Masukusa* v *Tafa* did not apply as it related to late payment of the full amount of rent whereas the present case concerned payment of less than the required rent -

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$1 380 each month instead of $1 587.

While this point of difference does exist, I do not consider that it affects the principle



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laid down in *Masukusa* v *Tafa*. Whether there is late payment, or partial payment, an election, in my view, needs to be made by the time of the next tender of payment of rent. If there is partial payment and the lessor does not elect to cancel this does not affect his right to claim the underpaid amount. Using the example I have previously given: if there is a five year lease and a partial payment of rent is made in the third month and then proper payment thereafter, it would be most unfair for the lessor to be allowed, say two years later, to point to the partial payment almost two years earlier and cancel the lease. It would, however, be entirely appropriate for the lessor to demand payment of the underpaid amount and, if necessary, to sue for its recovery.

Applying the principle laid down in *Masukusa* v *Tafa*, when the first incorrect amount was received the plaintiff was put to its election whether to cancel the lease because of the part-payment or abide by the contract (though obviously retaining the right to sue for the portion of rent due). Once the second incorrect payment was made the plaintiff, by its acceptance, condoned the past breach but was once again put to its election whether to cancel the contract because of the further part-payment or to abide by the contract (though retaining the right to recover the unpaid rent due). The election needed to be made each month and each month the plaintiff could easily have cancelled the lease on the basis of the partial payment. The plaintiff could in fact have cancelled the lease during any month from March 1991 to January 1994 and evicted the defendant (and even earlier than March 1991, if it had based its cancellation on late payment as opposed to incorrect payment).

Mr *Morris* also argued that ``enough was enough'' and because it had not waived its rights the plaintiff was entitled to ``wake up'' and give notice that it was enforcing them. Mr *Morris* argued that that is what the plaintiff did and that that is why the defendant started paying $1 587. There may have been substance in that argument if the plaintiff had properly prepared its case and led evidence as to precisely what actions it did take when it awoke. As it is, its emergence from its long-term slumber was not accompanied by any apparent wakefulness. If, when the plaintiff realised the underpayments (which realisation was probably reached around October 1993), it had produced correspondence showing it had written to the defendant requiring compliance with the lease and payment of the arrears by a specific date, then the plaintiff would have improved its position. Or if it had simply waited for a further partial payment and then properly elected to cancel before the next tender of payment and stood by the non-variation and non-waiver clauses to discount its previous acceptances, it would have assumed an unassailable position. But it did not do this - or certainly led no evidence that it did.



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I am aware that no actual election to abide by or cancel the contract was made by the plaintiff. I do not consider, however, that there is any need to delve into the often murky waters of whether

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there was an election by conduct or whether the plaintiff is estopped from saying there was not an election by conduct. The simple fact from basic principle is that if the plaintiff wished to cancel the contract during any month when partial payment was made, the election needed to be made within a reasonable time, which in the circumstances of a monthly rental, must mean no later than the date of payment of the forthcoming month's rent. And no such election was made. It matters not, in my view, what the reason for the failure to make the election may have been. The simple fact is that if the plaintiff wished to cancel that contract, it needed, in just one of those many months when partial payment was made, to cancel the contract. It did not. It cancelled the contract when proper payments were being made and on the basis of *Masukusa* v *Tafa* (supra), which I regard as applicable, it cannot do that.

APPROPRIATION

In view of my finding as to the need for the plaintiff to make an appropriate election and its failure to do so, I do not consider that it is necessary to deal with the ingenious argument as to appropriation put forward by Mr *Morris*. The basis of the argument was that, in accordance with the approach laid down by my learned brother GILLESPIE in *Commercial Bank of Zimbabwe* v *M M Builders & Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H) at 465; 1997 (2) SA 285 (ZH) at 321, payment would always have been allocated to arrears, always leaving a current arrears, to prevent any suggestion of acceptance of payment in approbation of the contract. In view of my findings in regard to the need to make an election, the most Mr *Morris*'s appropriation argument would achieve for the plaintiff is to avoid prescription defeating any claim in regard to the under payments made. Since all outstanding payments have been made the point is of no practical relevance.

I would emphasise that the quality of the pleading by both the plaintiff (whose pleadings were not perpetrated by Mr *Morris*) and defendant in this matter is decidedly poor. I am, however, of the view that the plea, though poorly drafted, does sufficiently aver the failure in enforcing the contractual right as preventing eviction.

ORDER

The plaintiffs claim for eviction is dismissed with costs. I would add that



BARTLETT J

if Knight Frank and Rutley have integrity they will ensure that the legal costs of this matter are met by themselves and not passed on to their principal.

*Gill, Godlonton & Gerrans*, plaintiff's legal practitioners

*V S Nyangulu & Associates*, defendant's legal practitioners



**VAN NIEKERK *v* MASTER OF THE HIGH COURT & ORS 1998 (1) ZLR 418 (HC)**

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

Ziyambi J

Civil application

22 April 1998 Judgment No. HH-57-98

## Flynote

Administration of estates - Master of the High Court - review of decision by - correct procedure - locus standi of applicant - whether a ``person aggrieved'' in terms of legislation - prescription of action - objection to transfer of property - prescription only to run from when objector became aware of transfer

## Headnote

The Master had upheld various objection to the account of a deceased account. The applicant, the widow of the deceased, applied for a review of the Master's decision in terms of s 52(9) of the Administration of Estates Act [*Chapter 6:01*]. One ground was that a company in which she and the deceased had been the only shareholders had been defrauded by the deceased when certain property was transferred to him without her knowledge. The application was opposed on various grounds. The first was that the applicant had adopted the wrong procedure in bringing the matter on review when there were manifest disputes of fact that had to be settled. Secondly, the applicant had no *locus standi* as the aggrieved party was not the applicant, but the company. Thirdly, that the claim had prescribed, because the applicant knew of the property transfer some 5 years before the present proceedings were instituted. Fourthly, there were disputes of fact which were not capable of resolution on the papers.

*Held*, that the applicant, as a person aggrieved, had no alternative but to proceed by way of review. In such a review, the court may make such order as it may think fit. This procedure envisages a situation where a dispute of fact, incapable of resolution on the papers, is referred to trial. In motion proceedings, the court will not hesitate to decide an issue on an affidavit merely because it may be difficult to do so. The court should endeavour to resolve the dispute without the hearing of evidence if it is satisfied that this can be done without doing an injustice to either party. In this case, the disputes raised in the papers were not such as to be incapable of resolution on the papers.

*Held*, further, that the applicant did have *locus standi* as she was an aggrieved party in terms of s 52(9), of the Act. She was a shareholder in the company and the decision of the Master to uphold the objection had prejudicially affected not only the interests of the company but her interests as well.

*Held*, further, that the claim had not prescribed. In the circumstances of this case, prescription had only started to run at the date of the deceased's death, as it was at this time that the applicant had become aware of the fact that the property would not and could not be transferred by the deceased to the company.



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Cases cited:

*Attorney General, The Gambia* v *N'jie* [1961] 2 All ER 504

*Concorde Leasing Corp (Rhodesia) Ltd* v *Pringle-Wood NO & Anor* 1975 (2) RLR 4 (G)

*Joosab & Ors* v *Shah* 1972 (1) RLR 137 (G)

*CP Smaller (Pty) Ltd* v *The Master & Ors* 1977 (3) SA 159 (T)

*Sidebotham* Ex p (1880) 14 ChD 458

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

Legislation considered:

Administration of Estates Act [*Chapter 6:01*], s 52(9)

## Case Information

*A J Dyke*, for the applicant

*J B Colegrave*, for the third respondent

## Judgment

**ZIYAMBI J:** This is an application for a review, in terms of s 52(9) of the Administration of Estates Act [*Chapter 6:01*], of the Master's decision to sustain an objection to an estate account and other relief. The facts forming the basis of the application are as follows.

During the course of 1996, the estate account in the estate of the late I J M van Niekerk who died at Harare on the 18 February 1995 lay open for inspection. An objection was filed by third respondent (the stepson of the applicant and son of the deceased) to debit items 19, 20 and 21 of the said account and the value to be attributed to the deceased's shareholding in Lone Oak Stud (Pvt) Ltd. Written submissions in response to the objection were submitted to the then Master (Mr Moyo) in December 1996, by the applicant, who is the widow of the late Mr van Niekerk. The Master at that meeting indicated that he intended to disallow the objection. In April 1997, the applicant received a copy of a letter written to the second respondent by the Master. The letter, Annexure D to the application, reads as follows:

> ``I acknowledge receipt of your letter dated 7 April 1997 and attach herewith copy of the Master's letter dated 10 January 1997. As will be seen the letter was directed to yourselves but I am not sure whether the letter was delivered. However, if it was not, I further attach copy of the objection for your perusal.
>
> There is no indication on file that meetings were held before the Master or anyone. I am keen to lay my hand on the minutes should they exist. Are you able to shade (*sic*) any light on what is suppose (*sic*) to have happened or agreed upon."

The applicant's legal practitioners then wrote to the Master, indicating their knowledge of the matter.

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The next communication received by the applicant in connection with this matter was a letter from Gill, Godlonton & Gerrans, enclosing a letter from the Master's Office, drawn by C Nyatanga, the Acting Master of the High Court, and referring to a letter dated 10 January 1997 drawn by a Mr Mushangwe, the then Acting Master. The letter dated 10 January 1997, at p 74 of the papers, reads in part:



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> ``Mr R van Niekerk, the son of the deceased and a beneficiary has lodged an objection to the account lodged by you. After considering his submissions I have come to the conclusion that his objection be sustained. I feel there is need to redraw the accounts."

The applicant alleged that Mushangwe was not present at the Master's meeting held in November 1996 and was therefore unable to make reference to the meeting with Mr Moyo. Secondly, the Acting Master (Mr Nyatanga) was uncertain as to whether the letter of 10 January 1997 had been sent out at all. It will be noted that the letter dated 10 January 1997 is not signed by Mr Mushangwe. Thirdly, the file on the matter at the Master's office did not contain the previous Master's minutes of the November 1996 meeting, his decision in the matter as communicated to the applicant and her legal representatives present at that meeting, or counsel's submissions in reply to the objections raised.

With regard to the objections raised the applicant took issue with the decision of the Master upholding the objection in respect of subdivision H of Homefield (Debit Item 20). She averred that Franklin Trading (Pvt) Ltd (hereinafter referred to as Franklin Trading), a company of which deceased and the applicant were the only shareholders, on the 11 March 1995, took cession of a lease agreement for the lease of subdivision H of Homefield. It was the intention of the deceased and the applicant to take advantage of the option to purchase contained in the said lease since the applicant's personal property (No. 1 Homefield Rd, Mt Hampden), on which the deceased and the applicant, trading in partnership under the name of Loan Oak Stud were carrying on the business of running a horse and stud farm, was no longer big enough to accommodate their proposed expansion project. Thus, before the expiry of the lease, the applicant and the deceased agreed that they would exercise the option to purchase contained in clause 4 thereof, the deceased having assured her that he would convey to the legal practitioners concerned their intention in this regard.

So it was that on the 10 September 1985, the deceased wrote to Stumbles and Rowe, expressing the lessee's wish to exercise the option to purchase on or about 25 September 1985. He also, however, instructed that the property be transferred into his name, a move which had not been agreed to by the applicant and which was taken without her knowledge, she reposing in the confidence that Franklin Trading, the lessee, ``was the purchaser of the property duly financed by the deceased and [herself] in partnership". It was only on 10 February 1992 that she became aware that the deceased, in March 1986, and without her knowledge, authority or any prior discussion, caused the said property to be transferred into his name. The transfer costs were paid by cheque drawn by Lone Oak partnership. Prior to that date, the applicant had believed that the property was held by Franklin Trading, of which the

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only two members were herself and the deceased. She confronted the deceased over this issue, thus sparking an argument. On 20 February 1992, she wrote to deceased expressing her dismay at what she termed his ``deceitful actions''. She also wrote to the deceased's legal practitioners the letter Annexure ``O'' on 17 February 1992.

She was satisfied that the deceased had committed a fraud on Franklin Trading in which, by virtue of her shareholding, she has a beneficial interest.

As to the remaining objections, the applicant conceded that they were properly taken and did not query the Master's decision upholding them. An amended draft order reflecting these concessions was accordingly filed by the applicant.

It was submitted by Mr *Colegrave* on behalf of the third respondent that:

(a) the applicant had adopted the wrong procedure in that the objection procedure set out in s 52 is wholly inappropriate in the present case, where by reason of the manifest and obvious disputes of fact, the applicant should not have proceeded by way of an application for review, but by way of action. Alternatively, the applicant's remedy was to have waited for the amended account, to lie for inspection and then to object to the amended accounts;

(b) the applicant has no *locus standi* to bring this application, the aggrieved party being not the applicant but Franklin Trading;

(c) any claim which the applicant may have had is prescribed, in that the applicant claimed to have knowledge of the transfer by the deceased of the property in his name on 10 February 1992, some 5 years before the present proceedings were commenced;

(d) in any event, there were disputes of fact which were incapable of resolution on the papers and it was impossible, on those facts which are not in dispute, to grant relief to the applicant.

Each of these submissions is considered hereunder.

(a) *The wrong procedure*

Section 52(9) provides that:

> ``The Master shall consider such account, together with any objections that may have been duly lodged, and shall give such directions thereon as he may deem fit:
>
> Provided that -
>
> (i) Any person aggrieved by any such direction of the Master may, within 30 days after the date of the Master's decision, and after giving notice to the Executor and to any person affected by the direction, apply *by motion* to the court for an order to set aside the direction and the court may make such order as it may think fit'' (my emphasis).

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It seems to me that in terms of s 52(9)(i) the applicant had no alternative but to proceed by way of review if she was ``a person aggrieved'' by the Master's decision. Upon review, it is for the court thereafter to make such



ZIYAMBI J

order as it may think fit. This procedure, in my view, envisages a situation where a dispute of fact incapable of resolution on the papers is referred to trial. Granted, the Master may not be in a position to resolve factual disputes but he may give a direction such as was made by the Master in *C P Smaller (Pty) Ltd* v *The Master & Ors* 1977 (3) SA 159 (T) which concerned a similar position under the Insolvency Act.

(b) *The* locus standi *of the applicant*

It was submitted by *Mr Colegrave* that the applicant, not having suffered a legal grievance, was not a person aggrieved in terms of s 52(9). The term ``person aggrieved'' has been given the following meaning:

> ``... the words `person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A `person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something'':

*per* JAMES LJ in Ex p *Sidebotham* (1880) 14 ChD 458 at 465, approved in *C P Smaller (Pty) Ltd* v *The Master & Ors supra*.

In the *C P Smaller* case, the Master had, in response to an objection, in terms of s 110(1) and (2)(a) of the Insolvency Act directed the trustee to delay the finalisation of the estate for 30 days to enable the applicant (the objector) to institute an action to establish its rights. It was held that the Master's direction did not in any way result in the true ownership of the caravan in question being affected and that accordingly the applicant, not having suffered any legal grievance and not having been wrongfully deprived of any legal right, was not an aggrieved person in terms of the Act.

The *dictum* of JAMES LJ in the *Sidebotham* case *supra* was not explained in *Attorney General of The Gambia* v *N'Jie* [1961] 2 All ER 504 at p 511 where LORD DENNING remarked:

> ``The words `person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.''

This definition was followed in *Concorde Leasing Corp (Rhodesia) Ltd* v *Pringle-Wood NO & Anor* 1975 (2) RLR 4 (G) by BEADLE ACJ.

The applicant is a shareholder in the company Franklin Trading. The decision by the Master to uphold the objection would effectively mean that the property, Subdivision H, being registered in the deceased's name, would be regarded as part of the deceased's estate. Such a decision would prejudicially affect the interests of the company and the applicant. This, in my view,

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places the applicant within the above definition of ``person aggrieved'', thus in my



ZIYAMBI J

view the applicant is an ``aggrieved person'' in terms of s 52(9) of the Administration of Estates Act.

The issue of prescription is closely related to the disputes of fact and the two are dealt with together.

Mr *Colegrave* contended that there were extensive disputes of fact such that it was impossible to grant relief to the applicant on the admitted facts.

The approach of the courts regarding disputes of fact has always been that ``in motion proceedings the court must not hesitate to decide an issue of fact on an affidavit merely because it may be difficult to do so. The court should endeavour to resolve the dispute without the hearing of evidence if it is satisfied that this can be done without doing an injustice to either party''. See *Joosab & Ors* v *Shah* 1972 (l) RLR 137 (G); *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S). I proceed to examine disputes of fact which were identified by Mr *Colegrave*.

[The learned judge then considered the issues of fact and concluded.]

Taking all the misgivings experienced by the third respondent into consideration I am satisfied that the disputes raised in the papers are not such as to be incapable of resolution on the papers and that the applicant has made out a case for the remedy which she seeks in the amended draft order.

It was agreed by counsel that in the event of the court ruling in favour of the applicant the costs ought to be borne by the estate.

In the result, the application is upheld and an order is granted in terms of the draft order marked ``A'' as amended.

*Gollop & Blank*, applicant's legal practitioners

*Gill, Godlonton & Gerrans*, second respondent's legal practitioners

*Stumbles & Rowe*, third respondent's legal practitioners



## S *v* JAMES 1998 (1) ZLR 424 (SC)

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

Ebrahim JA, Muchechetere JA & Sandura AJA

Criminal appeal

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24 February & 23 April 1998  Judgment No. S-63-98

## Flynote

Criminal procedure (sentence) - statutory offences - Criminal Law Amendment Act [Chapter 9:05] - s 3 - sexual relations with girl under age of 16 years - factors to be taken into account - girl of mature appearance encouraging young man into sexual relations - fine appropriate

## Headnote

The appellant, a young man of 20 at the time of the offence, had sexual relations on a number of occasions with a girl under sixteen years. She was a girl of mature appearance; she and the appellant were genuinely in love with each other; and she encouraged and provoked him into having intercourse with her. She made no complaint, the affair being discovered by her grandmother.

*Held*, that this was a case where imprisonment was not called for, even if the whole of the sentence were to be suspended. A fine should have been imposed.

Cases cited:

*S* v *A* 1990 (1) ZLR 216 (S)

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

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

*R* v *Sava* 1967 RLR 367 (G)

## Case Information

*A Muchadehama*, for the appellant

Mrs *M Zimba*, for the respondent

## Judgment

**SANDURA AJA:** The appellant was charged in the regional magistrate's court with four counts of rape. He pleaded not guilty to all the counts but was convicted on all of them. All the counts were treated as one for the purpose of sentence and he was sentenced to nine years' imprisonment with labour, of which eighteen months' imprisonment with labour was conditionally suspended for five years. He now appeals against conviction and sentence in respect of all the counts.

The allegation against the appellant was that on 26 April, 4 May, 14 June and 25 June 1995 he unlawfully and intentionally had sexual intercourse with Sekai, a girl aged eleven years who was, in law, incapable of consenting to



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sexual intercourse. It was, however, common cause that at all material times the appellant and Sekai were genuinely in love with each other and that on all the four occasions Sekai was a consenting party. Nevertheless, it is well established that a girl under the age of twelve years cannot legally consent to sexual intercourse and that if she does consent then such sexual intercourse amounts to rape. Referring to this principle, GUBBAY JA (as he then was) said the following in *S* v *A* 1990 (1) ZLR 216 (S) at 218D:

> ``It is a rule of the common law, and one hallowed by long practice, that there is an irrebuttable presumption that a girl under the age of twelve years is incapable of consenting to sexual intercourse. See *R* v *M & Anor* 1950 (4) SA 101 (T) at 102C-D; *R* v *Z* 1960 (1) SA 739 (A) at 742E and 743 *in fine* - 744A.''

Commenting on this rule, Professor Milton says the following at p 454 of the third edition of *South African Criminal Law and Procedure* vol 2:

> ``This is a fiction, for a girl under that age may well in fact understand the nature of the act and have both *intellectus* and *judicium*, but the rule is justified on grounds of public policy.''

In his defence, the appellant, who was aged twenty years at the relevant time, alleged that before he had sexual intercourse with Sekai she told him that she was sixteen years old. He said that he believed her because she appeared to be of that age. I do not wish to refer to Sekai as the complainant because she was happily in love with the appellant and did not complain to the police. In fact, it was she who encouraged and provoked the appellant into having sexual intercourse with her. This clearly emerges from her own evidence, which I shall summarise in due course. It was her grandmother who reported the matter to the police after discovering on 25 June 1995 that Sekai had had sexual intercourse with the appellant on that day.

In order to prove its case against the appellant the State called two witnesses and produced Sekai's birth certificate as well as a medical affidavit compiled by the doctor who examined Sekai after the allegation that she had been raped had been made to the police.

Sekai's evidence was as follows. She was born on 15 August 1983. On 29 April 1991, she left for South Africa in the company of her mother, her grandparents, her aunt and her brother. She lived in South Africa for about four years. Whilst living there, she fell in love with a certain boy but did not have sexual intercourse with him. She returned to Zimbabwe with her grandmother on 4 April 1995. Thereafter, she fell in love with another boy called Sibangi but did not have sexual intercourse with him. She later fell in love with the appellant, who lived on the same street with her in the high density suburb of Glen View in Harare. She started attending school on 9 May 1995 and was placed in Grade Six, being the equivalent of the grade in which she was before leaving South Africa. She had sexual intercourse with the





appellant in his bedroom on the four occasions already referred to. She remembered the details of what happened on the first, third and fourth occasions but not what happened on the second occasion, other than that on that occasion she had sexual intercourse with the appellant in his bedroom.

On the first occasion, ie 26 April 1995, Sekai went to the appellant's house but the appellant

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was not there. She returned to her grandmother's house, waited for about ten minutes and then returned to the appellant's house. She found him in the house. Shortly thereafter, she went to his bedroom and he followed her. There was nobody else in the house. She closed the bedroom door and the appellant locked it. She then started kissing him and later removed all her clothes and went onto the appellant's bed. She was lying on the bed when the appellant joined her and had sexual intercourse with her. She did not bleed. She then dressed and returned to her grandmother's house. She had not been invited to the appellant's house.

On the second occasion, ie 4 May 1995, she again had sexual intercourse with the appellant in his bedroom but could not recall any other details of what happened on that occasion. As on the first occasion, she had not been invited to the appellant's house.

On the third occasion, ie 14 June 1995, she again went to the appellant's house and found him outside the house. As on previous occasions, she had not been invited. After speaking to the appellant she entered the house and immediately went to his bedroom. He followed her, kissed her and removed all her clothes. She went onto his bed and was lying on the bed when he joined her and had sexual intercourse with her. She then dressed and returned to her grandmother's house.

Finally, on the fourth occasion, ie 25 June 1995, she went to the appellant's house and found him in the house listening to some music. After talking to him for a while, she went to his bedroom and sat on a chair. He followed her and sat on his bed. She got up and started kissing him. He took off his clothes and she took off hers and went onto his bed. She was lying on the bed as on previous occasions, when he joined her and had sexual intercourse with her. After that, she heard her grandmother calling her. She quickly put on her clothes and left the house. However, later on, when questioned by her grandmother, she admitted that she had had sexual intercourse with the appellant in his bedroom earlier that day. She also confessed that on three other occasions she had had sexual intercourse with him in his bedroom.

The second witness called by the State was Sekai's grandmother, Sheila. Her evidence was not of great significance. However, she did say that the appellant could not have believed that Sekai was sixteen years old because Sekai used to play with the appellant's younger sister, who used to bath her



(ie Sekai). Unfortunately, she did not say how old the appellant's younger sister was when she used to bath Sekai and why she used to do that.

The medical report compiled by the doctor who examined Sekai states that her apparent age was twelve years. Her vagina admitted two fingers and the examination was easy.

The birth certificate, which was produced as an exhibit, indicates that Sekai was born on 15 August 1983 at Mbuya Nehanda Maternity Hospital in Harare. The birth was registered on 5 September 1989 and the certificate was issued on 6 September 1989. It is endorsed as follows:

``In terms of the citizenship laws in force in Zimbabwe, the child named in this certificate is not a citizen of

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Zimbabwe by birth."

As Sekai was born in Zimbabwe, the senior regional magistrate wanted to know why she was not a citizen of Zimbabwe by birth. He therefore called her mother to give evidence. Her explanation was as follows. She herself was born in Zambia. When she gave birth to Sekai on 15 August 1983 in Harare, she had not yet become a citizen of Zimbabwe. She acquired that citizenship on 3 May 1990. However, when she was cross-examined by the appellant, she indicated that another birth certificate, which was not produced at the appellant's trial, had been issued in respect of Sekai immediately after her birth. The cross-examination proceeded as follows:

``Q. You said that she started school when she was five years old, what year was that?

A. She got her birth certificate immediately after she was born. Only when we were looking for a place for her school, that is when it was discovered that I was not a citizen of Zimbabwe and that is when they were changed in 1989 to be the external ones (*sic*).

Q. Where is the birth certificate which you obtained soon after her birth?

A. If you really want it, you can go to the Registrar's Office and you will find the birth certificate there.

Q. I am requesting that you produce that birth certificate.

A. These things are filed at the offices. If you want them, you can go there. It is not my duty to go there and look for it ... "

Unfortunately, neither the regional magistrate nor the prosecutor took any steps to ensure that the birth certificate issued immediately after Sekai's birth was produced. They were content with the one which was issued in September 1989 and which showed that Sekai was born on 15 August 1983.

As already indicated, the appellant's defence was that he believed that Sekai was sixteen years old because that is what she told him. He produced two photographs of Sekai which were taken in 1994 in South Africa, and maintained that they supported his contention that in 1995 Sekai must have been sixteen years old.

The main issue in this case is whether the State proved beyond all reasonable doubt that at the relevant time Sekai was below the age of twelve



years. Although Sekai denied telling the appellant that she was sixteen years old, the senior regional magistrate found her to be an untruthful witness. He commented as follows in his judgment:

``Firstly, it was quite apparent that the complainant was not being truthful in what she was deposing to, especially her relationship with the accused. Secondly, she was very reluctant to admit that she regarded the accused as her boyfriend. When this was suggested to her, she freely admitted that she was at the time in love with the accused. She, however, denied that she had been assaulted by her grandmother although it is a fact that she was assaulted.

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> The complainant, when she appeared in court, appeared to be a mature girl. This was two years after the incident almost. At the time of this incident, she was eleven years and ten months. The accused produced a photograph of hers taken in 1994. This photograph confirmed that the complainant is a naturally big-bodied girl and by 1997, some three years later, she gave the impression that she was much older than her age."

Later on in the judgment he continued:

> ``As I have said, I did not find the complainant's evidence extremely impressing. I say her evidence was not impressive because she admitted that she was not being truthful in certain respects of her evidence. She explained that the reasons for that was (*sic*) because she was afraid of her grandparents ..."

Notwithstanding the adverse finding on Sekai's credibility, the regional magistrate concluded that at the relevant time she was below the age of twelve years. In arriving at that conclusion, he placed great reliance on the birth certificate. In doing so he erred. In the first place, the birth certificate was issued in very suspicious circumstances. It was issued just before Sekai started going to school, and her mother's explanation of the circumstances in which it was issued remains unclear. However, what is clear from her mother's evidence is that Sekai has another birth certificate which was issued immediately after her birth and which was not produced at the appellant's trial. Secondly, the senior regional magistrate found that Sekai was ``a naturally big-bodied girl and by 1997 ... she gave the impression that she was much older than her age''. Her photograph, which was taken in 1994, certainly gives the impression that in 1994, a year before the offences were allegedly committed, she was more than twelve years old. In addition, her behaviour in provoking and encouraging the appellant to have sexual intercourse with her gives the impression of a much more mature girl.

In the circumstances, and in the absence of a reliable birth certificate, I am satisfied that the State did not prove beyond all reasonable doubt that at the relevant time Sekai was below the age of twelve years. The appellant's conviction on each count should, therefore, be set aside.

It now remains for me to determine whether the appellant ought to have been found guilty of contravening s 3(a) of the Criminal Law Amendment Act [*Chapter 9:05*], ie having sexual intercourse with a girl under the age of sixteen years. In terms of the proviso to that section, it is a good defence for





a person charged with contravening the section to show that he had reasonable cause to believe that the girl was of or above the age of sixteen years. In the present case, even if it were accepted that Sekai told the appellant that she was sixteen years old, the onus would still rest upon the appellant to satisfy the court, on a balance of probabilities, that he had reasonable cause to believe that she was sixteen years old. In my view, the fact that Sekai was in Grade Six should have put the appellant on his guard. It would have been unlikely for a sixteen year old girl to be in Grade Six in 1995. In the circumstances, I do not think that the appellant had reasonable cause to believe that Sekai was sixteen years of age. He should, therefore, have been convicted of contravening s 3(a) of the Criminal Law Amendment Act [*Chapter 9:05*], which is a competent verdict on a charge of rape.

As far as sentence is concerned, s 3 of the Criminal Law Amendment Act [*Chapter 9:05*]

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provides that a person convicted of contravening s 3(a) of the Act shall be liable to a fine not exceeding $1 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment. In the past, fines have been imposed in appropriate cases.

In *R* v *Sava* 1967 RLR 367 (G), BEADLE CJ set out some of the factors to be taken into account in assessing the appropriate sentence for this offence. At 368H-369A, the learned CHIEF JUSTICE said:

> ``The most important features to be taken into account in offences of this description are (i) the age, appearance and character of the complainant, (ii) the age of the accused and (iii) the circumstances under which the offence was committed. The complainant, though only fourteen years and nine months of age, had the appearance of a girl of about seventeen years. So far as her character is concerned, she was, as I have said, a shameless, brazen little hussy. So far as the circumstances in which the offence was committed are concerned, it is clear the accused and the complainant were genuinely in love with each other, and it was she who encouraged and provoked the accused into having intercourse with her. The accused is a youth of nineteen. All the features which I have outlined are features which mitigate the seriousness of this offence.''

In that case, the accused had been convicted of contravening s 3(a) of the Criminal Law Amendment Act (then *Chapter 30*) and had been sentenced to a fine of £20 or, in default of payment, twenty days' imprisonment with hard labour. The Attorney-General, dissatisfied with the sentence imposed by the magistrate on the ground that it was inadequate, took the matter to the High Court on review and asked that court to increase the sentence. In view of the mitigating features set out by the learned CHIEF JUSTICE in his judgment, he was not prepared to hold that the sentence was manifestly inadequate. He therefore dismissed the Attorney-General's application.

In my view, nearly all the mitigating features enumerated by the learned CHIEF JUSTICE in *R* v *Sava supra* are present in this case.

Another relevant case is *S* v *Nare* 1983 (2) ZLR 135 (H), in which the



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appellant was aged twenty-two years and was a captain in the Zimbabwe National Army. Whilst on duty in the district of Nkayi in Matabeleland he met a fifteen year old girl who was a stranger to him. They had a conversation and sexual intercourse subsequently took place with her consent. She was not a virgin at the time. The appellant was later charged with and convicted of contravening s 3(a) of the Criminal Law Amendment Act (then *Chapter 58*). He was sentenced by the regional magistrate to eighteen months' imprisonment with labour, of which six months' imprisonment with labour was conditionally suspended. On appeal to the High Court, GUBBAY J (as he then was), with the concurrence of KORSAH J (as he then was), set aside the sentence and substituted a fine of $750 or, in default of payment, five months' imprisonment with labour. At 138A-C the learned judge, dealing with the factors relevant to sentence, said the following:

> ``Without intending to formulate an exhaustive list of the factors relevant to sentence, the offence is mitigated where for instance:

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(i) the complainant, though not a prostitute, was a girl of loose morals when the accused met up with her ...;

(ii) the complainant enticed the accused to have intercourse with him ...;

(iii) the complainant and the accused were genuinely in love with one another ...;

(iv) the complainant was nearly sixteen years old ...;

(v) the accused is a simple unsophisticated person from a community in which this law is not well known;

(vi) the accused is a youth;

(vii) the accused *bona fide* believed that the complainant was of age though unable to establish reasonable cause for such a belief.

On the other hand it is aggravated where:

(i) the accused is a much older and more mature person than the complainant;

(ii) the complainant is only just above the age of consent ...;

(iii) the accused has relevant previous convictions."

Subsequently, in *S* v *Five* 1988 (2) ZLR 168 (S), K*orsah* JA commented as follows at 171E-F:

``Thus, in an appropriate case, a fine may be imposed instead of imprisonment. And I cannot imagine a more apt case in which a fine is to be preferred to a custodial sentence than one in which the offender is youthful, is hitherto of an unblemished record, and is currently in gainful employment."

In that case, the appellant was nineteen years of age. He fell in love with a girl aged fourteen years. They were genuinely in love with each other and indulged in sexual intercourse. He was convicted of contravening s 3(a) of the Criminal Law Amendment Act (then *Chapter 58*) and was sentenced to eight months' imprisonment with labour, of which five months' imprisonment with labour was conditionally suspended. On appeal, KORSAH JA set aside that sentence with the concurrence of DUMBUTSHENA CJ. In its place, he substituted a fine of $150 or, in default of payment, six weeks' imprisonment



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with labour. In addition, he imposed six weeks' imprisonment with labour, all of which was conditionally suspended for three years.

In the present case, there are so many mitigating features that imprisonment is not called for, even if the whole of the prison term were to be suspended. Although Sekai's age could not be ascertained, she was certainly much older than twelve years. She had the appearance of a mature girl. She and the appellant were genuinely in love with each other. It was she who encouraged and provoked the appellant into having sexual intercourse with her. Indeed, one would be justified in describing her as a shameless little hussy. She had sexual experience and must have had sexual intercourse with a previous boyfriend or boyfriends before she met the appellant. When she first had sexual intercourse with the appellant she did not bleed, and the doctor who examined her noted that her vagina admitted two fingers and that the examination was easy. In addition to all these mitigatory features, the appellant was a first offender aged

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twenty years. After he had been sentenced, he spent three months in prison before he was released on bail pending the determination of this appeal. In my view, he has already been sufficiently punished. In any event, the facts of this case did not justify a custodial sentence.

In the circumstances, the conviction on each count is quashed and the sentence is set aside. Instead, on each count the appellant is convicted of contravening s 3(a) of the Criminal Law Amendment Act [*Chapter 9:05*] and, all the four counts being treated as one for the purpose of sentence, he is sentenced to a fine of $600 or, in default of payment, one month's imprisonment with labour. As he has already served more than the alternative sentence of one month's imprisonment with labour, he shall not be required to pay the fine.

**EBRAHIM JA:** I agree.

**MUCHECHETERE JA:** I agree.

*Chihambakwe, Mutizwa & Partners*, appellant's legal practitioners

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## S *v* JULIETA & ANOR 1998 (1) ZLR 432 (HC)

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

Adam J

Criminal review

13 May 1998 Judgment No. HH-74-98

### Flynote

Criminal procedure (sentence) - general principles - magistrate - sentence in excess of jurisdiction required - correct procedure

### Headnote

If, after convicting an accused person, a magistrate considers that a sentence in excess of that within his jurisdiction to impose is justified, he has, in terms of s 54(2) of the Magistrates Court Act, the discretion to adjourn the proceedings and remand the convicted person and submit a written report to the Attorney-General, together with a copy of the record of the proceedings. The discretion must be exercised judicially and account must be taken of all relevant factors. Where the magistrate decides to follow this course he must inform the accused why he has decided that a sentence in excess of his jurisdiction is justified. These reasons must form part of the record. By informing the accused of the reasons for declining jurisdiction to sentence him, the accused will then have the opportunity to make proper submissions on sentence should the Attorney-General decide to direct the magistrate to transfer the case to the High Court for sentence. As the reasons will be in the record the High Court will also be able to determine whether this discretion has been properly exercised. The magistrate is only *functus officio* in the case when the Attorney-General has given a direction to the magistrate that the case is to be transferred to the High Court for sentence.

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When the Attorney-General receives the magistrate's report and the record of the proceedings, in terms of s 225(b) of the Criminal Procedure and Evidence Act, he must consider the matter quasi-judicially and decide on a reasonable basis whether the magistrate should pass sentence or the matter should be transferred to the High Court for sentence.

If the Attorney-General directs the magistrate to transfer the case to the High Court for sentence, the convicted person must once again appear before the trial magistrate so that the accused can be informed of the Attorney-General's direction.

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 255(b)

Magistrates Court Act [*Chapter 7:10*], s 54(2)

## Judgment

**ADAM J:** The above accused were convicted of contravening s 37 of the Law and Order (Maintenance) Act [*Chapter 11:07*]. The record of proceedings disclosed that prior to judgment addresses in written form were submitted on behalf of the State and on behalf of the second accused by his legal practitioner with the first accused being unrepresented. It also disclosed pleas in mitigation (after the reasons for judgment of the





conviction) by both accused. Thereafter the following was said by the regional magistrate:

> ``Gentlemen, I thank you very much. I will prepare the report and refer this record to where it must be referred to. I do not pass sentence in this matter myself. I will refer it to the superior courts for sentence. Now you will be remanded waiting for the superior courts."

It would appear from the foregoing that, as far as the accused persons were concerned, their trial before the regional magistrate had abruptly come to an end and they would be appearing before the superior courts, since the regional magistrate had remanded them there for the purpose of sentence. They would not have known the reason for this.

The reference to the report by the regional magistrate must be to s 54(2) of the Magistrates Court Act [*Chapter 7:10*], which provides:

> ``If, upon the conviction of an accused upon summary trial or trial on remittal by the Attorney-General before sentence is passed, the magistrate is of the opinion that a sentence in excess of his jurisdiction is justified, he may adjourn the case and remand the persons convicted and submit a report to the Attorney-General, together with a copy of the record of the proceedings in the case."

The regional magistrate clearly had not adjourned the case as required, since he should have done so by explicitly informing the accused persons that he was doing so.

The record of proceedings (both in his own handwriting and in typewritten transcribed form) does not contain the regional magistrate's report (which must be in written form) in it. Instead, what is contained is a written direction from the Attorney-General in terms of s 225 (b)(i) of the

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Criminal Procedure and Evidence Act [*Chapter 9:07*], which draws the attention of the regional magistrate to s 226 of the same Act.

The Criminal Procedure and Evidence Act provides as follows:

``PART XIII

PROCEDURE IN RESPECT OF CASES ADJOURNED UNDER SECTION 54 OF MAGISTRATES COURT ACT [*CHAPTER 7:10*]

**225 Powers of Attorney General**

Where a magistrate has adjourned a case and submitted a report to the Attorney-General in terms of section 54 of the Magistrates Court Act [*Chapter 7:10*], the Attorney-General may -

...

(b) if the magistrate acted in terms of subsection (2) of that section, in writing direct that the case -

(i) be transferred to the High Court for sentence; or

(ii) be continued by such magistrate.

**226 Duties of magistrate**

Upon the receipt of the Attorney-General's direction in terms of section *two hundred and*



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twenty-five the magistrate shall cause the accused or the person convicted, as the case may be, to be informed of the Attorney-General's decision and shall -

...

(c) where the Attorney-General has given direction in terms of subparagraph (i) of paragraph (b) of that section -

(i) grant a warrant committing the person convicted to prison, there to be detained till brought before a judge for sentence or till admitted to bail or liberated in due course of the law; and

(ii) forthwith transmit the record of proceedings, together with his reasons for convicting the person concerned, to the Registrar of the High Court."

The regional magistrate usurped the powers of the Attorney-General. He acted contrary to the above express provisions of the Criminal Procedure and Evidence Act.

There is no doubt that a trial magistrate is required, after convicting an accused person, to be of the opinion that a sentence in excess of his jurisdiction is justified and he has a discretion to adjourn the case and remand the convicted person and submit a written report to the Attorney-General together with a copy of the record of proceedings. It must follow from this that a convicted person is entitled to be informed on what basis the trial magistrate has declined jurisdiction to sentence him and to proceed by way of the provisions of s 54(2) of the Magistrates Court Act. The convicted person, who now faces the prospect of a higher sentence

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than one the magistrate can impose must be put in a position, by being given fully the reasons, to know why a sentence in excess of the trial magistrate's jurisdiction is justified. This would allow him the opportunity of being able to make proper submissions on sentence should the Attorney-General give written direction to the trial magistrate to transfer the convicted person to the High Court for sentence. The trial magistrate's reasons for so doing must form part of the record of the proceedings (since the trial magistrate is given a discretion to adjourn the proceedings and submit a report, which discretion has to be exercised judicially) in order to allow the High Court to ascertain whether or not he had exercised his discretion properly. It is only when the Attorney-General has given his written direction in terms of s 225(b) and the provisions of s 54(2) of the Magistrates Court Act and s 226(c) have been complied with by him that the trial magistrate is *functus officio*.

Upon receipt of the written report along with a copy of the record of proceedings, the Attorney-General is obliged to act in terms of s 225(b) of the Criminal Procedure and Evidence Act, which provision also gives him a discretion. This has to be exercised reasonably by requiring him to consider the report and the record of proceedings and to determine quasi-judicially whether the trial magistrate should pass sentence or whether the matter should be transferred to the High Court for sentence since the legal practitioner



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appearing before the High Court on behalf of the State must perforce submit that, in his view, a higher sentence is called for in excess of the trial magistrate's jurisdiction and why this should be the approach the High Court should adopt to sentencing the convicted person.

In the past, attention had been drawn of presiding officers to the fact that they discharge a judicial function. On the conviction of the accused, the frequent incantation or perfunctory observation often made to the effect that these proceedings are being halted and the matter is being referred to the Attorney-General does not, in my view, adequately show that the trial magistrate has acted judicially. It is once again reiterated for the benefit of the trial magistrates that they should take all factors into account pertaining to the question of sentence by giving the convicted persons their reasons fully for proceeding by way of s 54(2) of the Magistrates Court Act. The reasons need not be very elaborate but they should be adequate to satisfy any court looking at the record of proceedings what activated the trial magistrate in applying the provisions of s 54(2). Thereafter the accused must be informed that the proceedings are being adjourned awaiting the Attorney-General's direction. On receipt of the Attorney-General's direction, the convicted person must once again appear before the trial magistrate so that he may be informed of the Attorney-General's direction. All of this must form part of the record.

The High Court Act [*Chapter 7:06*] under s 29(2)(b)(v) provides that if this court considers that any criminal proceedings are not in accordance with real and substantial justice, in the exercise of its powers of review this court may remit the case to the inferior court with such instructions relative to the further proceedings to be had in the case. It was under the above provisions that the matter was remitted by this court to the regional magistrate so that he may proceed further in terms of s 54(2) of the Magistrates Court Act and (if the Attorney-General were to once again give direction under s 225(1) of the Criminal Procedure and Evidence Act) in terms of s 226 of

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the Criminal Procedure and Evidence Act.



## MASHAVE *v* STANDARD BANK OF SOUTH AFRICA LTD 1998 (1) ZLR 436 (SC)

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

McNally JA, Ebrahim JA & Muchechetere JA

Civil appeal

12 January & 18 May 1998 Judgment No. S-6-98

### Flynote

Real rights - ownership - movables - vindication - vehicle acquired under hire-purchase agreement in South Africa subsequently sold to innocent purchaser in Zimbabwe - limits of right of owner of vehicle to vindicate it - whether equitable estoppel exists

### Headnote

The respondent bank was the owner, under a hire-purchase agreement, of a motor vehicle which was being bought by one R. Some 3 weeks after entering into the agreement, R sold the vehicle to L, who in turn sold it to the appellant, a resident of Zimbabwe. At the time he acquired the vehicle, the appellant was shown certificates to the effect that at the time of sale the vehicle had not been reported to the South African police as stolen, and the vehicle was in turn cleared by the police in Zimbabwe. When R fell into arrears, the bank made enquiries, nearly 2 years after the hire-purchase agreement had been entered into, and discovered that the vehicle was in Zimbabwe, registered in the appellant's name. It sought to vindicate the vehicle. The appellant vigorously opposed the action. It was argued on his behalf that the bank was not entitled to vindicate the vehicle, having been negligent in the manner in which it had acted.

*Held*, that there is a basic injustice in a system under which a foreign finance house can act in a manner so prejudicial to an innocent *incola* of Zimbabwe who has been reassured by the police forces of both countries before purchasing the vehicle. Where a foreign owner falls into the category of an expert dealer or merchant seller, one would expect it to take steps to protect persons in neighbouring countries who are likely to be exposed to the very danger now faced by the appellant.

*Quare:* whether a hire-purchase company in South Africa should be aware of the danger that some of their vehicles might be exported to neighbouring countries and that the hirer-purchaser might manipulate the system so as to induce the police to clear a vehicle in such a way that an innocent purchaser might be misled, as the appellant was.

*Quare*: whether in these circumstances the hire-purchase company had a duty of care to such purchasers, so as to give rise to a kind of equitable estoppel.

*Held*, that the matter should be referred to trial so that the owner could establish positively that it operated a system which reasonably discharged its duty of care to foreign purchasers.

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Cases cited:

*African Distillers Ltd* v *Matabeleland Tractor Svcs (Pvt) Ltd* 1997 (2) ZLR 503 (S)

Akojee v *Sibanyoni* 1976 (3) SA 440 (W)

*Aris Entprs (Finance) (Pty) Ltd* v *Protea Assurance Co Ltd* 1981 (3) SA 274 (A)



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*Barker* v *Bell & Anor* [1971] 2 All ER 867 (CA)

*Basson t/a Repcomm Community Repeater Svcs* v *Postmaster-General* 1994 (3) SA 224 (SE)

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

*G & P* v *CoT* 1960 R & N 596 (SR)

*Grosvenor Motors (Potchefstroom) Ltd* v *Douglas* 1956 (3) SA 420 (A)

*Johaadien* v *Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A)

*Jones & Ors* v *Trust Bank of Africa Ltd & Ors* 1993 (4) SA 415 (C)

*Kroonstad Westelike Boere-Kooperatiewe Vereeniging Bpk* v *Botha & Anor* 1964 (3) SA 561 (A)

*Oakland Nominees (Pty) Ltd* v *Gelria Mining & Invstm Co Ltd* 1976 (1) SA 441 (A)

*R* v *Maponga* 1993 (2) SA 784 (N)

*R* v *Streak* 1958 R & N 601; 1958 (3) SA 539 (SR)

*Union Govt* v *National Bank of SA Ltd* 1921 AD 121

## Case Information

*J C Andersen SC*, for the appellant

*F Girach*, for the respondent

## Judgment

**McNALLY JA:** In the High Court, the South African owner of a motor vehicle was successful in an application for the vindication of the vehicle from an apparently innocent purchaser. The Standard Bank of South Africa Ltd (``the Bank''), through one of its divisions, the Standard Credit Corp, owned the vehicle in dispute. On 22 November 1993, it leased the vehicle to one Routledge in South Africa. In terms of the lease the lessee was not permitted to sell or export the vehicle. If he fell into arrears the owner was entitled to cancel the agreement and repossess the vehicle.

Routledge did fall into arrears. Exactly when he did so is not clear. Upon making enquiries in

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September 1995, the Bank discovered that the vehicle was in Zimbabwe, registered in the name of Mr Mashave.

Mr Mashave indignantly opposed the application to vindicate the vehicle. He had bought it after seeing it openly displayed for sale near the Tobacco Auction Floors where he worked. He had been concerned that it might be a stolen vehicle, but was satisfied by the documents he was shown. These included -

1. A South African Police Clearance Certificate obtained (for purposes of export) by Routledge at Beitbridge on 9 April 1994, which certified (correctly) that on that date it had not been reported as stolen to the South African police.

2. A document reading:

   ``This document is a receipt for vehicle reg no. SCS 766 T sold to Mr S D Levendale for the sum of R70 000'',

   signed by Routledge on 12 December 1993 (a bare three weeks after he leased the vehicle) and signed again by him before the postmistress at Birchleigh in South Africa on 8 April 1994.



McNALLY JA

3. A Zimbabwe registration certificate for the vehicle, in the name of Levendale, dated 20 May 1994.

   He later obtained from the Central Vehicle Registry -

4. A copy of the application for registration showing that the vehicle had been duly cleared by the Car Theft Section of the Zimbabwe Republic Police at Southerton, and was lawfully registered in Levendale's name in Zimbabwe.

While it might appear odd, with hindsight, that Routledge, having sold the car in South Africa in December 1993, should have cleared it at Beitbridge in April 1994 and was selling it in Harare in mid 1995, the fact is that when the point was raised by Mr Mashave, Routledge promised to produce, and did produce, the man Levendale, who in turn produced his identity document and passport.

The Roman-Dutch law protects the right of an owner to vindicate his property, and as a matter of policy favours him as against an innocent purchaser. See for instance *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20A-C. The innocent purchaser's only defence is estoppel.

Estoppel depends upon an allegation that a representation was made by the owner/claimant. In *Aris Enterprises (Finance) (Pty) Ltd* v *Protea Assurance Co Ltd* 1981 (3) SA 274 (A), CORBETT JA (as he then was) said at 291:

> ``The essence of the doctrine of estoppel by representation is that a person is precluded, ie estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice (see Joubert *The Law of South Africa* vol 9 para 367 and the authorities there cited). The representation may be made in words, ie expressly, or it may be made by conduct,

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including silence or inaction, ie tacitly (*Ibid* para 371); and in general it must relate to an existing fact (*Ibid* para 372)."

See also *Grosvenor Motors (Potchefstroom) Ltd* v *Douglas* 1956 (3) SA 420 (A) at 427G; *Johaadien* v *Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A); *Oakland Nominees (Pty) Ltd* v *Gelria Mining & Invstm Co Ltd* 1976 (1) SA 441 (A); *Jones & Ors* v *Trust Bank of Africa Ltd & Ors* 1993 (4) SA 415 (C) at 424-5; *Basson t/a Repcomm Community Repeater Svcs* v *Postmaster General* 1994 (3) SA 224 (SE) at 235A-C; Rabie *The Law of Estoppel in South Africa* p 1; Miller *The Acquisition and Protection of Ownership* p 306 *et seq*; Visser and Potgieter *Estoppel: Cases and Materials* p 240; Silberberg & Schoeman's *The Law of Property* 3 ed 284-299; Gibson's *SA Mercantile & Company Law* 6 ed 186-7.

In the *Jones* case *supra* FRIEDMAN JP set out the requirements for a successful reliance on estoppel as defined in the *Oaklands Nominees* case *supra* as follows:

``(i) There must be a representation by the owner, by conduct or otherwise, that the



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person who disposed of his property was the owner of it or was entitled to dispose of it ...

(ii) The representation must have been made negligently in the circumstances.

(iii) The representation must have been relied upon by the person raising the estoppel.

(iv) Such person's reliance upon the representation must be the cause of his acting to his detriment."

In the *Jones* case, as here, the representation relied on was a failure to act - a representation by silence. It is therefore worth noting the further words of the learned JUDGE PRESIDENT at 425B-D:

``For a representation by silence to be capable of founding an estoppel, the silence must have occurred in circumstances which gave rise to a duty to speak."

Against this legal background the learned judge in the present case held that no blame could be attached to the Bank's conduct:

``The nature of the agreement was such that (the) respondent (I think this must mean ``Routledge") had to be placed in possession of the vehicle and the appropriate documentation. It cannot be stated with justification that the (Bank) by its conduct at any stage represented that Routledge was the owner of the vehicle and was entitled to dispose of it. In regard to the period after it became apparent that Routledge had defaulted, I am not persuaded that there are any practical steps that the (Bank) could have taken to avoid the risk of the vehicle being disposed of to innocent third parties."

Mr *Andersen* submitted that there were practical steps which the Bank could and should have taken, and the failure to take them constituted a negligent representation by silence or inaction, which was relied upon to his prejudice by Mr Mashave. (Mr *Andersen* did not dispute that negligence had to be established).

The grounds of appeal set out the practical steps which should have been taken, as follows:

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``1. By failing to make periodic checks that the vehicle was in the possession of Routledge and in South Africa.

2. By failing to take any steps to trace the vehicle prior to 19 September 1995.

3. By failing to take any further steps prior to the institution of proceedings in August 1996.

4. By failing to seek the assistance of the police at any material time.''

I will deal with these submissions in turn:

1. I must say that I cannot think that there is a duty on a leasing or hire purchase company to monitor continuously the whereabouts of the leased property, so long at least as the instalments are being paid. I know of no legal requirement to that effect.

2. The allegation that the Bank should have taken steps to trace the vehicle prior to 19 September 1995 must depend upon when the monthly instalments fell into arrears and what steps were taken then to demand



payment? It is also necessary to know on what date, as a result of non-payment, the Bank cancelled the agreement with Routledge. This information is peculiarly within the knowledge of the Bank. Yet, when the question of negligence was raised in para 23 of the opposing affidavit, the Bank responded with bluster that such matters were irrelevant. Certainly there was common law theft committed by Routledge when he purported to sell to Levendale in December 1993. See, eg, *R* v *Maponga* 1993 (2) SA 784 (N); *R* v *Streak* 1958 R&N 601; 1958 (3) SA 539 (SR). Yet, the Bank's representative says ``it was not a theft *per se*''.

We cannot, on the papers, determine when the payment of instalments fell into arrears, or ceased. According to the lease agreement, the amount payable, after the initial rental was paid, and including interest and charges, was R126 394.57. It was payable in instalments of R1 814.29, beginning on 28 December 1993. The amount outstanding at the end was R81 825.59, according to the Bank.

This would suggest, without allowing for interest, that R44 568.98 had been paid. That is the equivalent of twenty-four-and-a-half monthly instalments. So the lessee had *prima facie* paid up to the end of 1995. If that is the case, it is difficult to see in what way the Bank was negligent in not checking on the vehicle until September 1995. Indeed one wonders why they checked then. One possible explanation is that payments lapsed before then, and were resumed to delay further investigation. But one simply does not know. I think the Bank should have told us.

*Prima facie,* however, the facts do not suggest that the Bank delayed negligently in trying to trace the lessee and the vehicle.

3. It follows that the Bank cannot be accused of negligence vis-à-vis Mr Mashave by not taking steps to protect its interest between September 1995 (when it discovered the vehicle's whereabouts) and August 1996 (when it instituted proceedings). The Bank's

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conduct ceased to have any relevance once Mr Mashave committed himself to the purchase in mid-1995.

4. The final allegation is that the Bank should have notified the police earlier, by which I suppose is meant, should have reported the vehicle stolen at some stage. Yet it is difficult to imagine when they could have done so. Certainly, the sale to Levendale amounted to theft by conversion, but how would the Bank become aware of that transaction, if indeed there was such a genuine transaction? The document of 12 December 1993 was probably false, and there is no evidence that the vehicle was ever registered in South Africa in Levendale's name. So how could they have known that it had been stolen? And if the instalments of rental were



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being paid, why should they have become suspicious? On the face of it, they became aware that it had been stolen only in September 1995, by which date any report to the South African Police Services would have been irrelevant as far as Mr Mashave's interests were concerned.

The weakness in the system seems to lie in the legislation which permits the registration of a vehicle in the name of a lessee or hire-purchaser without any caveat on the registration book to show that the vehicle is the subject of an agreement of lease or hire-purchase. The exploitation of this weakness by Routledge led to the unhappy situation of Mr Mashave.

It seems to me however that there is a wider basis upon which the possible negligence of the Bank should be investigated. There is a basic injustice in a system under which a foreign finance house can act in a manner so prejudicial to an innocent *incola* or citizen of Zimbabwe who has been reassured by the police forces of both countries before committing himself to the purchase of a motor vehicle.

I have said earlier that the Roman Dutch law, as a matter of policy, favours the owner as against the innocent purchaser. However, we may need to consider more thoroughly the defence of estoppel. Where a foreign owner falls into the category of an ``expert dealer'' or ``merchant seller'' in the sense in which that term was used in *Kroonstad Westelike Boere-Koöperatiewe Vereeniging Bpk* v *Botha & Anor* 1964 (3) SA 561 (A), then by analogy one is entitled to expect from it that it will take steps to protect persons in neighbouring countries who are likely to be exposed to the very danger which Mr Mashave now faces.

This court is not an expert on South African legislation, though it is able to consider South African statutes when they are referred to - see *G & P* v *CoT* 1960 R&N 596 (SR) at 603 *in fine*. But the respondent Bank has not made any attempt to set out for the benefit of the Zimbabwean courts the relevant provisions of the South African legislation.

I will assume for the moment that there is no legislation in South Africa which protects the bona fide purchaser, as there is, apparently, in England - see *Barker* v *Bell & Anor* [1971] 2 All ER 867 (CA).

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But even so, the question must arise - would not a leasing/hire purchase finance company in South Africa be aware of the danger that some of their vehicles are unlawfully exported to neighbouring countries? Would they not be aware that in such cases the lessee/hirer purchaser, as in this case, is able to manipulate the system so as to induce the police forces of both countries to clear the vehicle in such a way that an innocent purchaser can be misled as Mr Mashave was?

Given those facts, does not such a company have some kind of duty of care to purchasers like Mr Mashave, so as to give rise to the kind of equitable



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estoppel discussed by INNES CJ in *Union Government* v *National Bank of SA Ltd* 1921 AD 121 at 126 *in fine et seq*?

It is all very well to say (although it has not been said) that South African legislation does not require the owner to take any such steps. But if the law of South Africa permits car dealers to sell vehicles on long term arrangements under which ownership remains vested in the seller; and if the law of South Africa does not adequately prevent the unlawful export of such vehicles and thus provides no protection for persons in the position of Mr Mashave; then what attitude should the courts of this country take when the South African company comes to us to protect its rights of ownership? On whom should the risk fall?

It seems to me that, at the very least, we can require the owner to establish affirmatively that he operates a system which reasonably discharges his duty of care to Zimbabwean potential purchasers. Simply to say ``I am the owner, I want my vehicle'' is not enough. One wants to know the answers to questions like the following:

1. Why do you allow the lessee/hire purchaser to possess the vehicle registration book?

2. Alternatively, why do you not make it a condition of the agreement that the vehicle registration book be endorsed with a bold stamp ``This vehicle is on lease'' or some such wording - or even that such vehicles should have registration books of a distinctive appearance? (This would of course have to be done by arrangement with the authorities).

3. What arrangements do you have in place *in Zimbabwe* whereby an enquirer can check whether a particular vehicle is the subject of a South African lease or hire-purchase agreement?

4. What arrangements do you have in place at the border posts whereby by reference to an appropriately programmed computer it can be ascertained by customs or the police whether the vehicle is still on lease/hire purchase?

5. If none of these arrangements are in place, why should the risk of loss, resulting from your failure to put them in place, fall on an innocent Zimbabwean purchaser? Or, to put the question into the language of estoppel, have you not represented to the world at large, and to Mr Mashave in particular, by your negligence in failing to take any of these steps, that the

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possessor of the vehicle and the registration book is the owner of the vehicle?

I am aware of the fact that inside South Africa it has been said that the mere possession of the registration book and licence is not proof of ownership, and delivery of them to the possessor does not constitute an implied representation of a power to dispose of the vehicle. See *Akojee* v *Sibenyoni* 1976 (3) SA 440



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(W) at 442D *per* NICHOLAS J (as he then was). But here we have the additional factors of clearance of the vehicle by the South African and Zimbabwean police. It seems to me there is *prima facie* negligence on the part of the owner in permitting to exist a system under which such clearance is possible. Is there not a hire-purchase information organisation in South Africa which could readily be linked with border posts?

I am conscious of the fact that this wider aspect of negligence in the context of cross-border claims is a new consideration, and that it does not fall specifically within the particulars of negligence argued by Mr *Andersen*. However the appellant's alternative prayer on appeal was that the matter should be referred to trial, specifically for an investigation of the procedures adopted by the Bank for the avoidance of such thefts. I consider that justice will best be served by requiring that the matter go to trial.

If all else fails the unfortunate Mr Mashave is not necessarily without a remedy. He has conducted a *virilis defensio* against the true owner, and may now be able to proceed against the person from whom he purchased the vehicle, Mr Levendale. See *African Distillers Ltd* v *Matabeleland Tractor Services (Pvt) Ltd* 1997 (2) ZLR 503 (S).

The appeal succeeds with costs. The order of the court *a quo* is set aside and the matter is remitted for trial, the costs of the previous hearing to be costs in the cause. The affidavits already filed are to stand as pleadings, and both parties are at liberty to lead evidence to deal with matters raised in this judgment.

**EBRAHIM JA:** I agree.

**MUCHECHETERE JA:** I agree.

*Byron Venturas & Partners, appellant*'s legal practitioners

*Stumbles & Rowe, respondent*'s legal practitioners



## PTC MANAGERIAL EMPLOYEES WORKERS COMMITTEE *v* PTC & ANOR 1998 (1) ZLR 444 (HC)

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

Chinhengo J

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Civil application

24 March & 20 May 1998 Judgment No. HH-71-98

## Flynote

Administrative law - review - grounds for - audi alteram partem rule - legitimate expectation principle - limits to application of

Constitutional law - Constitution of Zimbabwe 1980 - s 18(9) - right to be heard when determination made - legislative provision allowing Minister to prevent salary increases in parastatal - whether violates s 18(9) - whether rights or legitimate expectations affected

Employment - employee - rights of - employer and employee agreeing to job evaluation and accepting findings thereof as valid - whether recommendations must be implemented

## Headnote

A job evaluation exercise had been carried out in the PTC. The Minister responsible for the PTC had accepted the recommendations made in the evaluation report as valid and had consented to their implementation in respect of junior employees. However, the recommendations were not implemented in respect of certain senior managers as the Minister had ``designated'' the posts of these senior managers in terms of s 39 of the Audit and Exchequer Act [*Chapter 22:03*]. This designation meant that increases that had been recommended in the job evaluation could not be brought into operation without the Minister first approving them. The Minister had withheld his approval for these increases. The end result was that there were now serious anomalies in the salary structures at the PTC. For instance, certain categories of junior employees were earning more than the Chief Executive.

A body set up to represent managerial employees brought an application for an order declaring that the designation of the applicant's members as unconstitutional and null and void. It attacked the validity of the designation by the Minister on three main grounds, namely:

- that s 39 of the Audit and Exchequer Act violates s 18(9) of the Constitution;
- that the designations by the Minister were invalid, as the Minister had designated posts, whereas s 39 of the Audit and Exchequer Act only permits him to designate employees;
- that the decision to designate the posts was invalid on the grounds of irrationality.

*Held*, that there is a presumption of constitutionality of statutory provisions and if a statutory provision can be construed in such as way at to be in conformity with the Constitution, then it will not be found to be unconstitutional. Section 39 of the Audit and Exchequer Act can



be applied in such a way as to conform to s 18(9) of the Constitution, as s 39 does not exclude the giving of a hearing to the affected party. As regards the argument that the Minister's discretion in terms of s 39 is untrammelled because he is not obliged to give reasons for his decision, this on its own is not a sufficient basis to challenge the validity of the provision. In any

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event, the Minister's discretion in terms of s 39 is not untrammelled as he bases his decision on information made available to him arising from the submission to him of the Corporation's income and expenditure. Additionally, the provision does not provide that the Minister may or shall not give reasons for his decision. The fact that in a particular case the Minister has not given reasons for his decision does not render s 39 unconstitutional. The affected party may ask for the Minister's reasons and indeed compel him to furnish them.

*Held*, further, that s 39 of the Audit and Exchequer Act exists for the purpose of ensuring that the Minister can effectively control the expenditure budgets of parastatal corporations. Its rationale derives from the economic relationship between the State and its statutory bodies. In terms of that relationship, the State is invariably required to meet the shortfall if a statutory corporation incurs a budgetary deficit. Section 39 is thus grounded in broad policy considerations and, as the Government is better placed than the judiciary to decide what the public interest requires, a court reviewing the Minister's decision to designate the PTC posts should allow a wide margin of appreciation and will not interfere with the decision unless it is convinced that the decision is manifestly without reasonable foundation. The designations had been made in accordance with Executive policy applied to the entire parastatal sector and the designations had taken into account, among other things, the need to control and regularise levels of remuneration as well as the PTC's financial performance.

*Held*, further, that in any event, that s 18(9) of the Constitution only applies where the rights of a person have been affected. The applicant's members had not acquired any rights as a result of the job evaluation exercise. They would only have acquired rights to the recommended salary increases after the Minister had approved these increases. As the Minister's action in designating their posts had not affected their rights, they were not entitled to a hearing in terms of s 18(9) of the Constitution. The designation of the posts by the Minister did not involve the determination of the existence or extent of civil rights or obligations.

*Held*, further, that although it has now been recognised that the right to a hearing also applies where the persons concerned can reasonably be expected to acquire a benefit, advantage or privilege, and that the applicants' members could be said to have reasonably expected to acquire a benefit as a result of the job evaluation exercise, the legitimate expectation doctrine has to be used with caution so as not to extend too far the *audi alteram partem* rule. In the present case such caution needed to be exercised as the expectation of the applicant's members was too far removed from the proper circumstances in which legitimate expectation applies. In any event, the applicant's members had in fact been afforded the right to be heard and had been given a fair hearing.

*Held*, further, that although it was correct that the Minister's power in terms of s 39 is to designate employees, this designation can be done be with reference to the posts held and not only with reference to the particular incumbents. To hold otherwise would lead to absurdity and this would be contrary to the rule of statutory interpretation that a provision must be interpreted in such a way as to avoid absurdity, provided that this can be done without doing violence to the clear and unambiguous ordinary meaning of the words used. To hold that the Minister cannot designate by reference to posts would lead to administrative nightmares as every time incumbents in the posts changed there would have to be re-designation. Section 39 is designed to enable the Minister to rationalise the payments of salaries in the

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parastatal sector on a uniform basis, with regard being had to the nature of the work and the qualifications and experience required for that work. It is not concerned with the actual persons appointed to carry out that work but with the scale and amount of remuneration to be paid for the work. The designation of employees must be based on objective factors relating to the post and not on personal characteristics of the incumbent.

*Held*, that the court has the power to set aside the exercise of a statutory power by a Minister on the grounds that the decision is irrational, in the sense that it is so outrageous in its defiance of logic or of accepted moral standards, that no sensible person who has applied his mind to the question to be decided could have arrived at that decision. However, this only applies in respect of a decision that affects a person's rights, interests or legitimate expectations. In the present case the decision had not deprived the applicant's members of any of their rights.

*Held*, further, that the root cause of the problem in the current case was not the Minister's designation of the senior employees; it was rather the refusal by the Minister to adjust the salaries of designated employees to take account of the changes in the salary structure brought about by the job evaluation exercise. This had resulted in salary structures which is anomalous as between senior and more junior employees and had led to a situation at the PTC that was untenable. The Minister should therefore reconsider the case for the upward adjustment of salaries and allowances of designated employees. This is line with the principle that if parties agree to a job evaluation exercise and accept its findings as valid, then they are bound to implement it subject to an assessment of the individual capabilities of the employees affected thereby. In the present case the Minister accepted the validity of the job evaluation report and directed that it be implemented in respect of non-designated employees. It was reasonable for the applicant's members to expect that their remuneration would be adjusted in accordance with the job evaluation report. They did not expect the Minister to refuse to do so. It was in this regard that the allegation of irrationality levelled against the Minister's action lay. The Minister had admitted that he was in the process of dealing with this matter when the application was brought.

*Held*, therefore, that the Minister should be ordered to review the salaries, allowances and other remuneration payable to the applicant's members on the basis of the job evaluation report with a view to removing the anomalies between the remuneration for designated and non-designated employees.

Cases cited:

*Admin, Tvl & Ors* v *Traub & Ors* 1989 (4) SA 731 (A)

*CCSU* v *Min for the Civil Svc* [1984] 3 All ER 935 (HL)

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

*Holland & Ors* v *Min of the Public Svc* 1997 (1) ZLR 186 (S)

*Kanonhuwa* v *Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H)

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*Machiya* v *BP Shell Marketing Svcs (Pvt) Ltd* 1997 (2) ZLR 473 (H)

*Moodley & Ors* v *Minister of Education & Anor* 1989 (3) SA 221 (A)

*Munhumeso & Ors* In re 1994 (1) ZLR 49 (S)

*Naran* v *Head of Local Govt & Housing & Anor* 1993 (1) SA 405 (T)

*Nyambirai* v *NSSA* 1995 (2) ZLR 1 (S)

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

*PTC* v *Modus Publications (Pvt) Ltd* 1996 (2) ZLR 707 (H)

*Taylor* v *Min of Higher Education & Anor* 1996 (2) ZLR 772 (S)

*Zimbabwe Township Developers (Pvt) Ltd* v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S)

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CHINENGO J

Legislation considered:

Audit and Exchequer Act [*Chapter 22:03*], s 39

Constitution of Zimbabwe 1980, s 18(9)

## Case Information

*A P de Bourbon SC*, for the applicant

*B Patel*, for the respondents

## Judgment

**CHINHENGO J:** The Posts and Telecommunications Corporation (``the Corporation'') is a statutory body established in terms of the Posts and Telecommunications Corporation Act [*Chapter 12:03*]. The Minister of Information, Posts and Telecommunications (``the Minister'') has been assigned the administration of the Posts and Telecommunications Act and is therefore the Minister responsible for the Corporation. In this unusual case, the Corporation and the Minister are respectively the first and second respondents. They are being sued by the Managerial Employees Workers Committee (``the applicant'') represented herein by its Chairman. The applicant is a legal *persona* set up in terms of its own constitution to represent the trade union interests of its members who are managerial employees of the Corporation. Assistant Directors, Directors, the Deputy Postmaster General, the Senior Deputy Postmaster General and the Postmaster-General are all members of the applicant. Rarely does one come across an organisation, and a statutory corporation at that, where the top brass has constituted itself into a workers' pressure group. That this is the case in the Corporation indicates that the top brass have been faced by a rare situation which, in their conception, calls for an unusual approach.

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The applicant's members' posts have been designated by the Minister in terms of s 39 of the Audit and Exchequer Act [*Chapter 22:03*]. This section provides in subs (1) that:

> ``(1) Notwithstanding any other Act, no statutory corporation which, in terms of any such Act, is empowered to employ persons shall, on or after the 26 October 1973, fix or increase the salary, allowance or other remuneration of any employee designated by the responsible Minister, unless that Minister approves the fixing or increasing of such salary, allowances or other remuneration.''

The applicant averred that as a result of the designation, its members have suffered prejudice in respect of their salaries, allowances or other remuneration. It now seeks the following order:

(a) that the designation of applicant's members (whose names are listed in Annexure ``O'' to the founding affidavit) by the Minister be and is hereby declared null and void or unconstitutional;

(b) *alternatively* that s 39 of the Audit and Exchequer Act and its use thereof by the Minister be held not applicable in respect of the benefits accruing as a result of the Corporation's 1992 Job Evaluation Report;

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(c) that it is declared that the Corporation is obliged to apply, implement and enforce the 1992 Job Evaluation Exercise to cover the applicant's members listed in Annexure ``O'';

(d) that the Corporation pays each of applicant's members their arrear incomes as fully detailed in Annexure ``O'' with interest to accrue on such amounts individually at the legal rate with effect from the date of this order; and

(e) that the costs of this application be paid by any of the respondents who opposes this application.

The Corporation has not opposed this application. It has always supported the applicant's position in this dispute. This is yet another unusual feature in that the Corporation, through its Board of Directors, has been rendered ineffective and has, as it were, abandoned its management team to battle it out with the Minister whilst it stands by and watches.

The applicant relates the background to the present dispute in its founding affidavit. It tells the story that in 1992 a report in ``*Parade Magazine*'' disclosed that the Postmaster-General earned $16 000 per month. This was not true, however, but it was understood by the magazine's readership that if he earned such a salary it far exceeded the salary of a Government Minister. The applicant averred that the Government reacted to this report through the Minister by designating applicant's members under s 39 of the Act.

The Corporation had, prior to the ``*Parade Magazine*'' article, hired the accounting firm of Price Waterhouse to carry out a job evaluation exercise in order to rectify and clear certain salary anomalies that existed within the Corporation and make recommendations to bring the salaries of the Corporation employees into line with those in the private business sector and in

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parastatals of comparable status. The exercise was soon completed and it recommended significant salary raises for many employees of the Corporation, including members of the applicant.

The Minister, who was Mrs Victoria Chitepo at the time, approved the job evaluation exercise. She directed the Corporation to implement the recommendations in the job evaluation report except in respect of employees who had been designated until such time as she had received submissions from the Corporation on the cost of increasing the salaries of designated posts. At this time, only the Postmaster-General and his deputies were designated employees. Until her retirement the Minister did not, despite several undertakings, redress the issue of designation and the implementation of the job evaluation exercise to cover the managerial employees.

Mr David Karimanzira became the Minister. The Corporation and the applicant pushed him to redress the issue. It was highlighted to him that the Deputy Postmaster-General and the Postmaster-General had not benefited



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from the job evaluation exercise and that their salaries were now lower than those of the departmental Directors who are their subordinates. The applicant avers that the Minister first sought to reduce the salaries of the directors, but, upon advice from the Attorney-General that that could not be done, he then designated the directors by letter dated 17 May 1993.

Faced with the situation that, from 1991 in respect of the Postmaster General and Deputy Postmaster General and 1993 in respect of the Directors, no salary increase had been granted whilst the salaries of junior employees continued to increase in terms of the recommendations of the job evaluation report which had been given effect to, the Corporation wrote to the Minister suggesting ``stop-gap measures'' to arrest the ``unsavoury situation''. The stop-gap measures were contained in a letter by the Chairman of the Corporation dated 21 December 1994. The letter reads in part:

> ``Honourable Minister, the decision which is a stop gap measure was arrived at to ameliorate our Top Management from the effects of the ever increasing cost of living. This is even more so considering that it is two years since their remuneration was last reviewed. We are confident that you will appreciate that the Senior Executives of the Corporation should not be demotivated by prolonged salary reviews.
>
> The attached schedule shows the current salaries and allowances earned by Assistant Directors (D4), Directors (D5), Deputy Postmaster General, Senior Deputy Postmaster General and Postmaster General. It is worthy of note that the total remuneration package is $186 909, $164 716, $153 500, $168 050 and $195 800 respectively. The Assistant Director is the most junior and earns considerably more than his peers who have not benefited from the Collective Bargaining Exercise of 1993/94 and 1994/95.
>
> The decision which will be implemented on 23/12/94 unless we hear otherwise from you is to pay the salary of Directors, Deputy Postmaster General, Senior Deputy Postmaster General and Postmaster General at the highest notch for Assistant Directors as an interim solution. In this way, the remuneration will rise to $184 869, $228 156, $237 206 and $259 456 for Directors, Deputy Postmaster General, Senior Deputy Postmaster General and Postmaster General. You may have noticed that the remuneration for Directors is still below that of Assistant Directors.''

It is evident that as at the time of this letter the Assistant Directors were earning $3 409 *per*

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*annum* more than the Deputy Postmaster-General and $8 891 less than the Postmaster-General. They were also earning $22 193 more than their immediate superiors, the Directors, and $18 859 more than the Senior Deputy Postmaster-General. The Minister responded to this letter, through the Secretary to the Ministry, on the same day noting the contents of the letter by the Chairman of the Corporation but stating that -

> ``The matter of salaries and allowances of PTC designated posts is under consideration between the Ministry and Cabinet Committee on State Enterprises. It is hoped that the processes will be completed soon.
>
> In the meantime, only payment of salaries already *approved* by Cabinet is allowed. In other words, PTC must not pay the proposed stop gap increases before Cabinet so authorises.''



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I have already stated that the Minister is responsible for the Corporation and s 39 of the Audit and Exchequer Act reposes in him the power to designate posts and approve the fixing or increase of the remuneration of designated employees. The Minister's letter above is couched in such terms as amount to mere scapegoating. His reference to the Cabinet Committee on State Enterprises and the Cabinet is a familiar but worn out tactic by a Minister who wishes to escape blame from one side for a decision which he himself must make in terms of the law. In terms of s 39 it is irrelevant whom he consults in the background or how, in this sense, he comes to his decision. so long as he makes the decision himself. The invocation of Cabinet is a tactic ordinarily adopted by a Minister who has failed to convince his colleagues in Cabinet as to the correctness or desirability of a step he wishes to take in a matter that falls within his portfolio. The letter must be read, for the purposes of s 39, as having no reference at all to the Cabinet Committee on State Enterprises or the Cabinet. It must be read to mean that he, as the responsible Minister, was not yet in a position to approve any increase in the remuneration of the employees concerned.

In paragraph 2.2.6 of its affidavit the applicant seems to accept that certain salary increases for its members were approved during the period in question but complains that they were approved after a period of five to eighteen months after the beginning of the financial years and that these increases ``were always below the Job Evaluation Salary scales, which of course was being ignored''.

The applicant states that over the years several representations were made to the Minister and meetings were held in which the Minister, the Permanent Secretary to the Ministry, and the Corporation Board were involved. No progress was made and on 9 January 1995, thirteen members of the Applicant wrote and signed a letter and submitted it to the Minister. The letter reads:

> ``As you are aware, Directors in the PTC have not had adjustments in salaries and allowances since their designation by yourself in May 1993. Efforts by the P & T Board to have the matter resolved have so far not yielded positive results. Considering the negative impact this is already having on our personal lives and the implications on the well-being of the PTC as an organisation that has a key function in providing essential services that will assist in the implementation of ESAP, we humbly request for an urgent resolution of this long standing issue.

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**Background**

The PTC conducted a job evaluation exercise, which was approved by the former Minister of Information, Posts and Telecommunications in 1992. This exercise also entailed a new salary structure for the PTC following the grading of all the posts. The salary structure that was implemented by the PTC is the lower quartile of the market as was recommended by the consultants who were assisting the PTC in this exercise. It was felt that by implementing



the new salary structure that was close to the market rate, the need for the critical areas allowance or retention allowance was removed.

Accordingly, the retention allowance that was previously payable to critical areas has been removed. We also wish to bring to your attention that we are in touch with colleagues at our levels who are working in similar parastatals, such as ZESA. Their packages are similar to those recommended by our Board to yourself. These parastatals also operate under parent Ministries and senior staff remuneration and conditions of service are reviewed regularly.

**Implications of Designation**

As we have not received any adjustments in our salaries and allowances since designation in May 1993, we can only surmise that this designation was intended to be punitive. Unfortunately, we are not aware of the crime that we may have committed, whether individually or collectively, that would justify this kind of treatment. Designation of PTC Directors has now caused a serious distortion of salaries and allowances throughout the entire organisation and this is likely to adversely affect performance both in the medium and long-term. You now have a situation where a cleaner in the PTC is paid higher telephone and housing allowances than a Director. Any salary structure that does not take into account the level of responsibility shouldered by an individual as we now have in PTC as a result of designation, will definitely spell disaster for the organisation. It seems to us that designation has actually created more problems than it was intended to solve. Assistant Directors in PTC now earn in excess of $30 000 *per annum* more than Directors in basic salaries alone. Should they be designated, if we are to use the same argument that led to the designation of Directors? If they were to be designated, Managers would then earn more than they do and likewise would have to be designated and so on and so on.

The concept of designation not only goes against the grain of basic management principles, but does not also promote Government's own enunciated policy on Public Enterprises as stated in a Zimbabwe Government publication `Zimbabwe - A Framework for Economic Reform (1991-95)' of 18 January 1991. The main thrust of this reform entails commercialisation of Public Enterprises such as the PTC and this cannot be realised when such controls as designation continue to be applied. These Public Enterprises will not be able to survive the ESAP created competitive environment, if these controls continue to be tightened, instead of being loosened.

The irony of the whole designation saga is that it comes at a time when the PTC was now in a far much better position to grow in leaps and bounds. A very good relationship now exists between management and the employees resulting in goal congruence. Unfortunately, this momentum is going to be lost as we not only have dissatisfied management in PTC as a result of the negative effects of designation, but we also have a management which continues to be denied the basic management tools.

It is our conviction that our Ministry and Board should only concern themselves at setting broad policy guidelines for the PTC, but that operational issues should be left to PTC management. This would facilitate quick decision-making, which will be crucial to the PTC for it to survive in the now emerging competitive environment. This competitive environment will not be limited to the services that PTC provides but will also be in the resources that PTC needs in order to provide these services. Management would therefore need the leverage to enable it to make appropriate decisions in organising and controlling its resources. In this regard, the existing tight controls are major constraints for the PTC management. It would therefore be grossly unfair for the PTC management to

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totally responsible for the shortcomings in the provision of services for which it is mandated, when Management is denied the authority that should go along with the responsibility.

**Conclusions and recommendations**

Whilst it is within your power to designate any level in the PTC, it is also important to realise that designation leaves no room for the Board to reward and punish its management. The only punitive weapon that will be left for the Board is one that is drastic ie discharge from the PTC of a member of management who fails to perform but will not be able to reward those managers who will have achieved exceptional performance. The principle of designation should be done away with completely and salaries and allowances should be determined by the Board, who in turn will be answerable to yourself. The designation of posts for the purposes of determining salaries is likely to harm industrial relations.

Having waited patiently for 19 months for a decision from you on our salaries and allowances with no decision being made, and none apparent in sight, we have now collectively taken this unenviable decision of writing to you. Given the long period that we have been waiting and the prevailing high inflation rate in the country, we would please request you to authorise the P&T Board to accordingly effect the adjustment of our salaries and allowances within a period of 14 days.''

The applicant says that Minister's reaction to this letter was punitive. He directed that the Directors were not to be paid a retention allowance and a 20% performance bonus to which they had hitherto been entitled.

The applicant's members sought the assistance of a labour relations expert, Mr Patrick Lloyd, who wrote to the Minister on 16 March 1995 putting forward to the Minister the applicant's case. The Minister replied through the Acting Secretary and advised that if the applicant was unhappy about salary levels for designated posts, it should raise the matter with the Minister of the Public Service, Labour and Social Welfare because the salaries for designated posts are determined by the Government. The applicant describes this response as ``defensive, incorrigible and self-evidently cold''. I would describe it as another instance of scapegoating.

The applicant states that as of 1995, the Assistant Directors were now earning more than the Postmaster General because they had not been designated. The applicant further states that instead of resolving this anomaly by increasing the salaries of designated employees, the Minister designated Assistant Directors. This was by letter dated 23 February 1995.

On 21 November 1995, the Minister increased with effect from 1 July 1995 the salaries of designated employees but the applicant states that the increased salaries ``woefully'' fell below those that the Corporation Board had agreed upon as well as those recommended in the job evaluation report. This, however, is another of those instances when the Minister approved the salaries, allowances and other remuneration payable to designated employees.

When Mr David Karimanzira was replaced by Mrs Mujuru as Minister, there appeared to be some sympathetic consideration of the applicant's case.



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The applicant says that she undertook to rectify the position and asked the applicant to compile its members' salaries from 1992 in order to establish the financial prejudice they had suffered. The applicant understood this request and exercise to be aimed at increasing the applicant's members' salaries and the payment to them of the arrears arising from the failure to implement the job evaluation recommendations in respect of them. The information was forwarded to the Minister on 20 May 1997. Before the Minister advised of her position, non-managerial employees threatened a collective job action and they were awarded a 32% across the board salary increase and a 53% across the board increase in allowances for the year 1997-1998. The remuneration of designated employees was not reviewed. Further correspondence was sent to the Minister by the applicant's legal practitioners. There was no progress.

The applicant argues that the designation should be set aside and that the applicant's members should be paid the amount of the financial prejudice that arose from the non-implementation of the recommendation of the job evaluation exercise. It beseeches this court to declare that the designation of its members by the Minister was illegal and unfair and therefore null and void. It argues that the Minister did not hear its members before designating them and as a result the *audi alteram partem* rule was infringed. It says that its members had a legitimate expectation to be heard both in terms of the rules of natural justice and s18(1) and 18(9) of the Constitution of Zimbabwe. It contends that its members, as employees of the Corporation, have been discriminated against as they have not been allowed to enjoy the benefits of the job evaluation exercise. Such discrimination, it says, is outlawed by s 18(1) and s 22 of the Constitution of Zimbabwe as well as by the Labour Relations Act [*Chapter 28:01*].

The applicant contends further that any salary increases arising from the job evaluation exercise were not salary increases *strictu sensu* for the purposes of the applicability of s 39 of the Audit and Exchequer Act. In its opinion, such salary increases must be viewed as arising out of a ``re-examination and re-evaluation of the status of the Corporation's employees and, *a fortiori*, the designation clause does not apply''. In any event, it argues that its members acquired contractual rights pursuant to the job evaluation exercise and, such rights having been so acquired, a resort by the Minister to s 39 amounted to a compulsory acquisition of rights in breach of s 16 of the Constitution. It complains that the designation was vindictive and punitive and should be struck down on the basis of irrationality. The applicant also argues that designation, especially as regards the Directors and Assistant Directors whose designation came much later after the job evaluation recommendations were given effects to, amounts to a retrospective taking



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away of vested rights and s 39 was not intended to take away such vested rights. Last, the applicant argues that the designation was aimed at frustrating all agreements between the applicant's members and the Corporation, thus interfering with the contractual freedom of the parties which is protected by ss 18, 20 and 21 of the Constitution of Zimbabwe. The Audit and Exchequer Act does not permit this and, if it does, it must be struck down as being in

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contravention of ss 18 (1), 20 and 21 of the Constitution of Zimbabwe.

The second respondent's response is brief. He denies that the report in ``*Parade Magazine*'' stated the applicant's members' salaries as actual. He says that the reference to those ``speculative salaries'' as being greater than Ministers salaries is irrelevant, because the salaries of the Corporation's employees (and I assume he is referring to the salaries of designated employees only) are determined by the State Enterprise Committee. The Minister denies that the Government reacted to the article in ``*Parade Magazine*'' at all and states that the posts of Postmaster-General, Senior Postmaster-General and Deputy Postmaster-General were designated in September 1991, well before the article was published, and the other employees were designated ``progressively thereafter'' to avoid the overlapping of salaries within the Corporation.

The Minister avers that since 1992 the applicant's salary proposals were religiously and regularly placed before the Cabinet for approval and salary increases were awarded for designated employees. The salaries of the Postmaster-General, the Senior Postmaster-General and the Deputy Postmaster-General were increased with effect from 1 July 1992. These increases are admitted by the applicant in its answering affidavit but it says that they do not reflect the salary levels recommended in the job evaluation report which the Corporation's Board had agreed to. The Minister says that the designated employees did get salary increases but not in the percentages bargained for. He further states that all the Ministers involved in this dispute negotiated with applicant's members and the Corporation in good faith, hence all salary increment proposals were placed before the Cabinet. He says, ``It was the Cabinet which decided on the percentages of increments to be awarded which in all cases were not the percentages that the applicants had requested.'' He admits that the retention allowance was removed but says that this was to facilitate a performance-related bonus payment arrangement.

The Minister says that it is the applicant's members who contributed to the salary anomaly because they failed to submit their proposals on salary increments timeously. He also makes the accusation that they engaged in a deliberate move or tactic to award salary increments that were way above percentages being recommended by the State Enterprise Committee. He says that the designation of Assistant Directors was made in an effort to redress





the anomalies created by earlier designations. The Minister comments on the 32% and 53% salary and allowance increases awarded to non-managerial employees following the threat to embark on a collective job action and says that a different procedure is applicable to designated posts. The Minister also says that the causes of this application were being addressed as at the time these proceedings were instituted but that the process had been put on hold pending the outcome of this application.

The Minister's position in this matter is quite clear. The designation of applicant's members was properly done in terms of s 39 of the Audit and Exchequer Act and that designation should not be set aside. He urges the court to reject the argument by the applicant that a job evaluation does not involve salary increases which are subject to the application of s 39. The designation

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was done after due consideration of all factors, ``inclusive of the fact that the general performance of the Corporation was below expectation''. The designation cannot be viewed as irrational, he argues. He also denies that the applicant's members were prejudiced in any way.

I now turn to examine the parties' respective submissions on the issues raised on the affidavits. I must, at the outset, make the observation that the applicant's founding affidavit contained every conceivable argument, whether valid or not, against s 39 of the Audit and Exchequer Act. This approach is hardly commendable. A legal practitioner is expected, and should, I think, sift through all the possible legal arguments that on their face value appear to support his contentions. The sifting or winnowing process should enable him to put before the court only those arguments that are sound and present the judge with a reasonable basis for making a determination in favour of the party who the legal practitioner represents. It is quite another thing simply to put before the judge every conceivable argument and leave it to the judge to relate those arguments to the facts and hope that any one or number of them will find favour with him. It is also to be discouraged that a legal practitioner should invoke the Constitution in a vain attempt to give weight to an otherwise untenable argument. I accept that constitutional law is a live area for innovative approaches or realignment of thought to accord with current and on going perceptions in the development of democratic legal principles, but I must hasten to say, and emphasise, that constitutional arguments must be raised with due regard to their relevance and cogency. This is what Mr *de Bourbon* inevitably recognised as arising from the applicant's affidavits. Hence he did not adopt or pursue all the arguments contained therein. I shall accordingly restrict myself to the arguments that he adopted and pursued, not only because it makes good advocacy on his part, but also because it is sensible to do so.

The first argument is based on s 39 of the Audit and Exchequer Act. The





applicant submitted that s 39 offends against the Constitution in that it does not provide for the employee to have a right to be heard before the Minister designates him or his post. The section allows for a unilateral act by the Minister that can have far ranging impact on both employer and employee. It grants the Minister an untrammelled discretion which, taken together with the fact that the Minister is not required to give reasons for his decision, makes the provision unlawful and in contravention of s 18(9) of the Constitution. Mr *de Bourbon* urged the court to adopt the approach in *Holland & Ors* v *Minister of the Public Service, Labour and Social Welfare* 1997 (1) ZLR 186 (S) and strike down the provision.

Mr *Patel*'s counter argument was that the designation of employees in terms of s 39 could well be carried out after affording to the party concerned a fair hearing. In keeping with the presumption of constitutionality therefore, s 39 must be construed as being susceptible to application in conformity with the Constitution. This, to my mind is an attractive argument.

Section 39 is not explicit as to whether or not the party concerned should be afforded a hearing. It contains nothing to indicate that it was the intention of the legislature to deny the party concerned a right to be heard. One must therefore have regard to certain indicative factors as outlined in *Holland*'s case *supra*, to determine whether such a provision contravenes the

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Constitution. In *Holland*'s case the CHIEF JUSTICE identified five *indiciae* which, if satisfied, would lead to the conclusion that the provision impugned is in contravention of s 18(9) of the Constitution. The first is whether, if a Minister is entitled to act on the basis of any information supplied to him regardless of its source, he is required at the same time to exercise his discretion upon any particular finding of fact. If he is not, then the provision concerned contains an element that may establish its unconstitutionality. The second is whether the Minister's power is untrammelled, as may be evidenced by the absence of any requirement to give reasons for his decision. The third is whether the Minister is entitled to take urgent action which would ``point strongly in the direction of excluding the grant of a hearing'' to an affected person. The fourth is whether the Minister is empowered to revoke his action within a specified time frame. If he is so empowered, that may give rise to an inference that the legislature did not intend to give the affected party the right to be heard but that the Minister may take time to assess the veracity of the information placed before him. The fifth is whether the Minister is empowered to cause an investigation to be carried out into the matter and take action upon receipt of the investigation report. If he is so empowered, that may suggest that the legislature did not intend that the affected party should be heard before action is taken. These *indiciae*, except the first two, are not relevant to a consideration of the present challenge to s 39. I do not think they were



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intended to be exhaustive however. To the contrary, they were indications applicable to the provision under consideration in that case and could be extended or narrowed in other cases, depending on the wording of the provisions to be interpreted. They provide valuable guidance.

True, as I have already stated, s 39 does not expressly require that the Minister should act on any information and make a finding of fact, nor does it require him to give reasons for his decision. It is silent. In *Zimbabwe Township Developers (Pvt) Ltd* v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382B-D, GEORGES CJ said:

> ``Clearly, a litigant who asserts that an Act of Parliament or a regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the lawmakers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit `into the framework of the Constitution'.''

This passage was referred to with approval in In re *Munhumeso & Ors* 1994 (l) ZLR 49 (S) at 59 where GUBBAY CJ also added a second principle of interpretation in the following words:

> ``The second principle relates to the adoption of a broad approach. All provisions bearing upon a particular subject are to be considered together and construed as a whole, in order to effect the true objective. Derogations from rights and freedoms that have been conferred should be given a strict and narrow, rather than a wide, construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language

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dictates otherwise'' (at 59 G).

It is clear therefore that a statutory provision, which is susceptible to application in conformity with the Constitution, must be upheld and not struck down. I am satisfied that s 39 is not in contravention of s 18(9) of the Constitution as it does not exclude the giving of a hearing to the affected party. As for the argument that the Minister's discretion is untrammelled because he is not obliged to give reasons for his decision, I do not think that that on its own is a sufficient basis on which to challenge the provision.

Taking ``a broad approach'', one sees that s 39 applies to all parastatals. Its purpose is to control expenditure on salaries, allowances and other remuneration paid to parastatal employees. Its rationale derives from the economic relationship between the State and its statutory bodies. In terms of this relationship, if the Corporation incurs a budgetary deficit, the State is invariably required to meet that shortfall. In the particular case of the



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Corporation, s 30(2) of the Posts and Telecommunications Corporation Act provides that the State may meet any such deficiency, though in terms of subs (3) thereof any payment by the State shall be regarded as a loan to the Corporation which it is obliged to repay.

The relationship of the State and the Corporation is spelt out in *PTC* v *Modus Publications (Pvt) Ltd* 1996 (2) ZLR 707 (H) where at 716B-C DEVITTIE J said:

> ``It seems to me that the plaintiff (ie the PTC) is closely linked and associated with Government. It provides an essential public service in respect of which it enjoys a monopoly. It is guaranteed a Government subsidy in situations where this is required to ensure its viability. Its operations are closely controlled by the Minister and its Chief Executive may take directions from the President on any matter relating to the operations of the Corporation. It may be required to take actions in the national interest or in the interests of national security - indeed to comply with the Government's obligations to other states outside Zimbabwe.''

The learned judge made this statement in his examination of the degree of control that the Government exercises over the Corporation. He could as well have mentioned an additional feature of the Government's control of the Corporation - the control exercised by the Minister over salaries, allowances and other remuneration payable to the employees of the Corporation in terms of s 39. This control is another factor evidencing the close link or association of the Corporation to the State. Section 39 must therefore be read in the context, not only of the close relationship of the Corporation and the State, but more importantly in the context of the employer/employee relationship that it creates. In terms thereof, the Minister is empowered to approve salaries, allowances or other remuneration as determined by the Corporation. It must be noted that the power to fix or alter the remuneration remains that of the Corporation and the Minister is restricted to approving or disapproving them. Section 39 appears in Part VI of the Act which subjects parastatal expenditure, generally, to the approval of the Minister. The power reposed in the Minister by s 39 is designed to secure that his control of parastatal expenditure is not distorted or scuttled by increases which the parastatal may effect to the remuneration of its employees outside the scope of his control. This is the point of departure between *Holland*'s case and the present. In *Holland*'s case it was held that the Minister's discretion ``does not hinge upon an inquiry into or a consideration of facts or circumstances in respect to which there

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may be a conflict; or upon a particular finding of fact'' (*per* HOEXTER JA in *Moodley & Ors* v *Minister of Education & Culture & Anor* 1989 (3) SA 221 (A) at 235D, as quoted by GUBBAY CJ in *Holland*'s case). The situation is not the same in the present case. The Minister's discretion under s 39 is not, in my opinion, untrammelled. He bases his decision on information made available to him arising from the submission to him of the Corporation's



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capital revenue and expenditure budgets in terms of s 34 of the same Act. If s 39 is impugnable, which I do not think it is, it cannot be so impugned in isolation from the other provisions of Part VI. If s 39 contravenes s 18(9) of the Constitution, then the whole of Part VI, and by extension, the Act, does so too. This cannot be so as it would cut across the very essence of the relationship between the State and the statutory bodies. The Minister's decision to designate any employee of the Corporation is consequent upon his power to control the expenditure of the Corporation. In any event where the Corporation has fixed or increased the salaries of its employees who are designated and approaches the Minister for his approval, s 39 does not provide that the Minister may or shall not give reasons for his decision. It is silent and the implication is that, if required to do so, the Minister should give his reasons. Thus again the section is in conformity with the Constitution on this score.

That in a given case the Minister may not have given any reasons for his decision does not render s 39 unconstitutional. The affected party may ask for the Minister's reasons and indeed compel him to furnish them. But this is not, to my understanding, the real problem here. The applicant is not seeking an order that the Minister should provide his reasons for not approving the salaries and other emoluments recommended by the Corporation for designated employees. The applicant's contention is that the Minister should be ordered to approve the recommendations of the Corporation by implementing the job evaluation report in respect of designated employees as his decision in all the circumstances is irrational. That, I think, the applicant cannot oblige him to do by an approach to the court. The most that the court could do, if that were the applicant's prayer, would be to order that the Minister should furnish his reasons. In this regard, I concur with the submission of Mr *Patel* when he urged this court to follow the decision in *Nyambirai* v *NSSA* 1995 (2) ZLR 1 (S) where at 9H-10B GUBBAY CJ said:

> ``I do not doubt that because of their superior knowledge and experience of society and its needs, and a familiarity with local conditions, national authorities are, in principle, better placed than the judiciary to appreciate what is to the public benefit. In implementing social and economic policies, a government's assessment as to whether a particular service or programme it intends to establish will promote the interest of the public is to be respected by the courts. They will not intrude but will allow a wide margin of appreciation, unless convinced that the assessment is manifestly without reasonable foundation.''

The application of the gravamen of this statement to the present case is self-evident. The provision which is sought to be impugned here exists for the purpose of ensuring that the Minister can control effectively the expenditure budget of the Corporation. It is, in the words of Mr *Patel*, grounded in ``broad policy considerations'' and, in reviewing the designation of posts by the Minister, the court ``should recognise and allow a wide margin of appreciation''.

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Section 39 is also intended to ensure that emoluments in the parastatal sector are relatively uniform and generally commensurate with the overall financial performance of statutory bodies.

For the above reasons I am satisfied that s 39 of the Audit and Exchequer Act is not in contravention of s 18(9) of the Constitution. It is susceptible to application in conformity therewith and it is based on broad policy considerations which the court should not interfere with.

There is an even stronger and separate argument against holding that s 39 offends against the Constitution on the ground that it excludes the right to be heard. The traditional view taken of the right to be heard (the *audi alteram partem*) rule is set out in *Administrator, Transvaal & Ors* v *Traub & Ors* 1989 (4) SA 731 (A) where CORBETT CJ stated:

> ``The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter - see *Chikane*'s case *supra* at 379G), unless the statute expressly or by implication indicates the contrary.''

This formulation has been accepted by our courts. In *Holland*'s case *supra* GUBBAY CJ said at 192F:

> ``It is settled law that where a statute empowers a public official or body to give a decision which will affect the individual in his liberty, property or existing rights, the right to a fair hearing is to be given effect to unless the statute expressly or by implication indicates the contrary.''

He makes reference to *Traub*'s case *supra* and, as is evident, uses more or less the words used by CORBETT CJ in his formulation of the *audi alteram partem* rule. Section 18(9) of the Constitution guarantees the right to be heard. It reads:

> ``Every person is entitled to be afforded a fair hearing, within a reasonable time, by an independent and impartial authority established by law, in the determination of the existence or extent of his civil rights and obligations.''

In the present case, the contention is that s 39 does not provide for a right to be heard or, if it does, the Minister did not afford the affected employees of the Corporation that right. Mr *Patel* argued, correctly I think, that even if the Minister did not afford the affected employees the right to be heard, the designation of posts does not involve any determination of the existence or extent of civil rights or obligations. He argued that the applicant's members are claiming a better remuneration package for themselves. That claim is subject to the ordinary processes of negotiations, agreement and statutory approval. As such the claim does not constitute a right or obligation within the meaning of s 18(9) of the Constitution. The claim does not crystallise as a right until the necessary ministerial approval has been granted. *Holland*'s



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case *supra*, is distinguishable on this basis also. In that case, the court determined that the

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appellant's civil rights and obligations existed and they had been violated by the Minister. GUBBAY CJ said at 191A-C:

> ``In this matter, the act of suspension was based on a determination made by the Minister that the applicants were unfit to remain in office as members of the executive committees; that they were prohibited from exercising all functions that is their rights and obligations, until he either revoked their suspension within thirty days under s 21(2) of the Act; or thereafter, by notice in the *Gazette*, removed their disqualifications.
>
> Now, membership of the executive committee was, of course, dependent upon the applicants being elected by the National Council. Until 2 November 1995, the applicants were lawfully entitled and obliged to act in that capacity. They held a status that the law was there to protect. By removing their entitlement to function as members of the executive committee, the Minister effectively determined the extent of their civil rights and obligations: he curtailed such rights and obligations.''

In the present case, the affected persons are employees of the Corporation. Their salaries, remuneration or other allowances are fixed by the Corporation and approved by the Minister before they become entitled to them, that is to say, before they acquire any right to them. The Minister has not approved the salary increases recommended in the job evaluation report in respect of applicant's members. Therefore the applicant's members have not acquired any right to the salaries and thus there is no right which the Minister may curtail or violate. The Minister is simply not in a position to violate or curtail any right for none exists. Section 18(9) of the Constitution presupposes the existence of a right or obligation and, if no such right or obligation exists, a resort to it is completely out of place. I am satisfied that the applicant has failed to show that its members had acquired any right to the salaries or other emoluments recommended in the job evaluation report and approved by the Corporation's Board. As such, even if s 39 afforded them the right to be heard, there was simply no basis for such right to be claimed.

The inquiry does not end here however. In *Naran* v *Head of Local Government Housing and Agriculture & Anor* 1993 (1) SA 405 (T) McCREATH J said at 406J to 407:

> ``The applicability of the *audi alteram partem* principle has, however, been expanded by the Appellate Division in *Administrator, Transvaal & Ors* v *Traub & Ors*. In that case, the court held that the principle was not only applicable in cases where the freedom, property or existing rights of a person were affected by the exercise of statutory power, but was also applicable in cases where a person was prejudicially affected by the exercise of statutory powers and where such person had a legitimate expectation to be heard. It was pointed out in that case that the concept `legitimate expectation' is not clearly defined and caution was expressed in regard to the unlimited extension of the *audi alteram partem* principle.''

So defined, the doctrine has been accepted in our law (see *Holland*'s case, *supra*); *Kanonhuwa* v *Cotton Company of Zimbabwe* HH-10-98 *(112); *Machiya*



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v *BP Shell Mktg Svcs* (Pvt) Ltd HH-170-97 and *Taylor* v *Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S)). It is clear from its definition in *Traub*'s case *supra* at 785D-E that this doctrine may be ``expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain which it would be unfair to deny such person without prior consultation or a prior hearing''.

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*In casu* the designated employees can be said to have reasonably expected to acquire a benefit or advantage or privilege from the implementation of the recommendations of the job evaluation report and it would have been unfair to deny them such benefit, advantage or privilege without hearing or consulting them. I am quite alive to the caution expressed above that ``legitimate expectation'' is still not clearly defined. A thoughtless resort to it may result in an undesirable extension of the *audi alteram partem* rule. This case, in my view, represents the typical example for the need to exercise caution. The applicant's members' expectation is, in my opinion, too far removed from the proper circumstances in which ``legitimate expectation'' may find application. For the reason that I want to be cautious and also for the reason that on the facts of this case I do not think that the applicant's members were not given a fair hearing, I shall not have regard to the doctrine of legitimate expectation.

The applicant's members, and indeed the Corporation, were afforded the right to be heard. They knew beforehand that the Minister was empowered by s 39 to designate any employee of the Corporation. They knew that the Minister had considered the job evaluation report and in particular its recommendations on salary increases. They had negotiated with the Minister on the implementation of that report in respect, not only of the generality of the Corporation's employees, but also of themselves and they became aware that the Minister was concerned about the cost implications of increasing the salaries of the designated posts. They appreciated that the job evaluation exercise did not constitute an award of salary or a contract between them and their employer. They made numerous representations to the Minister and even hired a labour relations expert to intercede with the Minister on their behalf. All the factors which needed to be placed before the Minister, including the Corporation's budgets, were placed before him in abundance. There is no suggestion that the Minister did not consider their representations.

In *Health Professions Council* v *McGown* 1994 (2) ZLR 329 (S) at 333B it was stated that:

> ``The maxim *audi alteram partem* is founded upon the flexible criteria of fundamental fairness. It is not a rule of fixed content, but varies with the circumstances. In its fullest extent it may include all the facilities allowed a litigant in a judicial trial. Yet in appropriate cases the `right to be heard' may be confined to the submission of written representations.''

This statement adequately covers the situation in the present case. That the





dispute was not resolved despite numerous memoranda and representations, meetings and intercessions, is proof enough that the matter was fully ventilated between the parties. The annexures to the papers are particular proof that the applicant and the Corporation made representations to the Minister. I am therefore satisfied that the applicant's members were in fact heard or that a fair hearing was granted to them.

Mr *de Bourbon*'s second argument is that the designations by the Minister are improper in that, whereas s 39 only permits the Minister to designate employees, the Minister has in fact designated posts. He submitted that what the Minister has sought to do is to designate whoever the person might be holding a particular post with reference to office and not with reference to

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the employee concerned. This, he said, is not appropriate because if the law makers' intention was to allow a post to be designated, then such an appropriate word would have been used rather than ``employee'', which pertains to a particular person and not to a particular post.

Mr *Patel* made a counter-argument on this point with which I agree. The clear intention of s 39 is to designate an employee, as submitted by Mr *de Bourbon*. In my view, however, designation may be by reference to post held and not only by reference to the particular incumbents. Mr *Patel* contended that if designation were to relate to particular individuals as employees that would lead to an absurdity. At every change of the incumbent a re-designation would have to be done. This would lead to administrative nightmares. Section 39, he said, is designed to enable the Minister to rationalise the payment of emoluments in the parastatal sector on a uniform basis with regard being had to the nature of work, qualifications and experience required for that work. It is not concerned with the actual persons appointed to carry out the work but with the scale and amount of remuneration to be paid in respect thereof. The designation of employees must be based on objective factors relating to the post and not on personal characteristics of the incumbent. One of the cardinal rules of statutory interpretation is to interpret a provision without giving it an absurdity if that can be done without doing violence to the clear and unambiguous ordinary meaning of the words used.

Mr *Patel*'s argument is not acceptable in its entirety. Indeed, s 39(1) requires that the Minister should designate an employee. How, it may be asked, is an employee identified? Quite evidently, an employee is identified by means either of his name or by the office he holds. There is always an individual who holds a particular office. In reference to such individual it is quite normal to identify him by name or by the post he holds. The Minister's letters designated the individuals by reference to the offices they held. He could well have referred to them individually by name. I do not see that it makes a difference. No evidence was put before me that the reference by post





held was liable to be misunderstood. There is nothing on record to indicate that any doubt was created as to which employee was being designated. There is no evidence that the affected persons were in any way prejudiced by the designation by reference to post held and not by their names.

I must note that the argument as to whether the designation was proper was not raised in the papers, as correctly pointed out by Mr *de Bourbon*. It was an argument canvassed by him in his heads of argument and to which Mr *Patel* responded such that I was obliged to address it. It has no substance. I hold that the Minister designated individual employees although he did so by reference to their offices and not by their names. He did not, in my view, violate the intendment of the provision.

The strongest argument, and perhaps the only valid one, is the contention that the continued application of s 39(l) is irrational. I will in this regard quote from Mr *de Bourbon*'s written submission. He says:

> ``It is not really disputed that salaries of persons more junior to those represented by the applicant are earning

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more than persons represented by the applicant (*sic* `appellants'), and indeed it is stated that a Grade 3 manager earns $30 000 annually more than the Postmaster General. See para 3.1.2 at p 68. Accordingly it is respectfully submitted that the continued application of s 39(l) is irrational.

The whole background to the application of designation, certainly in respect of those holding the position of director or assistant director had their post designated as a counter-measure to a salary increase see para 2.2.5 on p 6 and para 3.1.1 on p 7. The response of the second respondent is firstly to admit that the designation in respect of the directors was to redress the anomaly created, see para 10 p 53, and that the designation in respect of assistant directors was likewise to address anomalies see para 14, p 54. It is clear from these facts that the designation exercise was done as a deliberate attempt to frustrate the first respondent paying proper salaries to these persons as determined by the job evaluation exercise conducted by Price Waterhouse.

It is submitted that the approach is irrational, and cannot stand, see *PF ZAPU* v *Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (S) at 326. Indeed the second respondent puts forward no basis for the decision other than that already mentioned, namely to prevent anomalies. On the other hand, by so designating, the second respondent has created the very anomalies that he sought to avoid."

There is no doubt at all that the salary structure and the remuneration system at the Corporation is a mess. Junior employees of certain categories are earning more than the Chief Executive, not because they hold particular technical skills which would entitle them to such higher remuneration but principally because of the administrative misunderstanding that has been the hallmark of the conduct of the Minister. They are earning more because of the implementation of the job evaluation exercise in respect of them and not in respect of the designated employees.

Is it the designation under s 39 which is the root cause of the problem at issue? The Minister argued that it is not the fact of designation which has



created the problem. Designation does not *per se* imply the freezing of salaries payable to designated posts. In fact designation is premised on the need to contain the salaries within acceptable levels. Thus adjustments to salary levels may be made, and should be made, to accommodate any necessary changes effected to the whole salary structure. Section 39 makes for such flexibility.

The Minister however took the point that the salaries and allowances of non-designated employees should ordinarily be pegged at levels lower than those applicable to designated posts. He says that the salaries of non-designated employees are determined by the Corporation which determination is in fact made by the governing Board on the recommendation of Senior Managers. The Minister contended that the failure to contain non-designated posts at appropriate levels has resulted in the need to progressively designate successive levels of management. That failure has also inexorably resulted in the current anomalous situation where non-designated junior managers earn disproportionaly high rates of remuneration. In the Minister's view, therefore, the anomalies in the remuneration packages in the Corporation have arisen due to the acts and omissions of the Corporation that is to say, the Board acting together with applicant's members. He denies completely that these anomalies can be attributed to the Minister.

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The applicant's case on this point seems to be based squarely on the direction by the Minister, then Mrs Chitepo, that the Corporation could implement the job evaluation report. It is necessary for me to refer to her letter of 12 June 1992 in which she said:

> ``I agree that PTC starts implementing the programme of rectifying the wages anomalies as recommended by the team of consultants. As I pointed out, this exercise should deal with workers in the lower levels of PTC Management.
>
> Designated posts will be dealt with as soon as we have assessed the impact of their cost to PTC.''

The applicant argued that once the Corporation implemented the recommendations in the job evaluation report which, as stated in the founding affidavit, ``meant significant salary gains for many employees'', including the members of applicant, the ball was set in motion for the need to proportionately increase the salaries and allowances of the designated posts. That is what the Minister has not done. He has had to resort to designation to avoid the evident need to adjust the salaries of designated posts as was logically necessary after giving effect to the job evaluation report.

As I see it, there is nothing wrong with designation *per se* or with the continued application of s 39(1). The wrong, if it is one at all, lies in the Minister's alleged failure to apply s 39 in such a manner that the Minister takes advantage of the inbuilt flexibility in that section and determines that



the salaries and allowances of the designated posts should be adjusted upwards as recommended in the job evaluation report. This is where the rationality of the Minister's conduct would be examinable. It would be examinable not in the sense that he should be compelled to adjust the salaries upwards to a specific level, but in the sense that he needs to undertake such an adjustment to remove the present anomalies.

It must, however, be recognised that it is not within the province of the courts to determine salaries payable to parastatal employees. Apart from it not being the province of the court to do so, there is, in the present case, no basis at all on which the court could embark on such an exercise. The question of what amount of salary and allowances, if any, should be payable to the holders of the designated posts remains the province of the Minister. However, on a proper appreciation of the import of s 39 which, as I have stated, is intended to allow for the adjustment of salaries and allowances taking into account all the relevant considerations, there is scope for questioning the rationality of the Minister's refusal to adjust the salaries in terms of the job evaluation report. The Minister said that he was, as at the time this application was filed, engaged in a review of the salaries payable to applicant's members. He should do so and do so speedily.

The applicant's challenge is to the exercise by the Minister of the statutory power vested in him by s 39. This is a challenge that can properly be brought before this court for determination - see *PF ZAPU* v *Minister of Justice*, *supra*. In that case, DUMBUTSHENA CJ quoted with approval the speech of LORD DIPLOCK in *CCSU* v *Minister for the Civil Service* [1984] 3 All ER

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935 (HL) at 950j-951d where he deals with the three grounds upon which administrative action is subject to judicial review - illegality, irrationality and procedural impropriety. In respect of ``irrationality'' he is quoted as saying:

> ``By `irrationality' I mean what can now be succinctly referred to as `*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1947] 1 All ER 680, [1948] 1 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 wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to VISCOUNT RADCLIDDE''s ingenious explanation in *Edwards (Inspector of Taxes)* v *Banstow* [1955] 3 All ER 489; [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. `Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.''

Mr *Patel* submitted that the facts in this case do not meet the test, namely



that the decision of the Minister not to increase the salaries and allowances for designated posts 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''. He submitted further that case authority (*CCSU* and *PF-ZAPU* cases, *supra*) requires the following criteria to have been met:

(a) that the decision operates to deprive a person of his rights, interest or legitimate expectation;

(b) that the subject-matter of the exercise of power by the public authority is justiciable; and

(c) that where public policy is at stake, the case against justiciability is stronger enabling the appreciation of the executive to take precedence over individual rights.

He argued the point, which I have already accepted, that the designation of posts in the present case does not deprive the applicant's members of any of their rights. It simply renders any adjustment of their emoluments subject to ministerial approval. Further, the designations were made in accordance with the Executive policy applied across the entire parastatal sector and the decision to designate took account of, among other things, the need to control and regularise levels of remuneration as well as the Corporation's financial performance, which the Minister described as ``below expectations''.

I have already stated that, in my view, the mere fact of designation is not of itself the root-cause of the problem here. It is rather the Minister's refusal to adjust the salaries of designated employees to take account of the changes in the salary structure brought about by the job evaluation exercise. I think that the situation obtaining at the Corporation is untenable. The applicant's members should not be in receipt of salaries and allowances that are exceeded in some instances by those received by their junior managers. Equally, the junior managers should not be in receipt of salaries which are disproportionately close to those received by the

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designated employees without a suitable adjustment of the latter's salaries and allowances. That cannot be said to be in the interests of the Corporation. The applicant adverted to the dangers and detrimental effects of such a salary and allowances structure. It is disastrous for the Corporation. The Minister should therefore reconsider the case for the upward adjustment of the salaries and allowances of designated employees.

*Bowers on Employment Law* 2 ed at p 74-75 says:

> ``A job evaluation scheme is thus an alternative route to equal pay and attempts to be as scientific and objective as possible. Its criteria are commonly agreed between management and unions and are of particular application to white collar staff. Yet its limitations must be appreciated, since it classifies jobs not the people who fill them. They must be followed



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> by a subjective merit assessment of the individual's qualities. A job evaluation study merely provides a building block to indicate the underlying structure of wages on which individual variations may then be built.''

He goes on to say that where there is a valid and proper study, it is impermissible for an employer to override it or implement only part of it. Concerning a failure to effect the job evaluation exercise, *Bowers* at p 76 says that although the exercise does not bring about or effect a contractual condition, once the parties have agreed to carry it out and the exercise has been completed and its validity accepted, the job evaluation exercise cannot be implemented at the whim of management.

I note that *Bowers* was dealing with certain legislation concerning equal pay, but I am satisfied that I can draw from him the principle that if the parties agree to a job evaluation exercise and accept its findings as valid, then they are bound to implement it subject to an assessment of the individual capabilities of the employees affected thereby.

The situation *in casu* is that a job evaluation exercise was carried out and the Minister accepted its recommendations as valid and consented to its implementation albeit in respect of non-designated employees. The recommendations were effected in a manner seen fit by the management and board of the Corporation. The affidavits by the applicant do not reveal how the job evaluation report was implemented in detail and this raises the question (which is the point made by the Minister) whether there was any scope to give effect to the report in such manner as would have ensured that the current anomalies were not created. I cannot answer this question as there is no information to assist me. But I must recognise that the Minister accepted the validity of the report and directed that it be implemented in respect of non-designated employees. The Corporation did that. It was reasonable for the applicant's members to expect that their remuneration would be adjusted accordingly in terms of the recommendations of the report. They did not anticipate that the Minister would refuse to do so. Here, in my view, lies the irrationality levelled against the Minister's decision. By his own authorisation the Corporation went ahead to implement the job evaluation exercise in the manner best suited to its purpose and without dissent from the Minister. The Corporation and the senior management were entitled to expect an adjustment of their remuneration packages on the basis of the job evaluation exercise. Any adjustment which was not based upon it, and particularly if it left the

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salary structure in an anomalous position, could not have been in the spirit of the job evaluation exercise. The Minister's reason for successive designations of the Directors and Assistant Directors was to deal with the anomaly. He admits that he was in the process of doing so but for this application. I find that he should be ordered to rectify the



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anomaly on the basis of the job evaluation exercise whose validity he has accepted.

I must conclude by making reference to the applicant's prayer for the payment of arrear salaries. Mr *Patel* filed supplementary heads of argument to deal with this issue which arose from the applicant's draft order. Mr *de Bourbon* did not object to the filing of these heads. Mr *Patel* submitted that the prayer that the designated employees should be paid ``arrear incomes'' is without foundation. I agree. In my view, there is no legal basis for that order because the job evaluation exercise did not create any rights which could be enforced against the Corporation.

I am satisfied that the following order should be made.

It is ordered that -

(1) The matter be and is remitted to the second respondent;

(2) The second respondent shall review the salaries, allowances and other remuneration payable to the applicant's members on the basis of the job evaluation exercise conducted in 1992 with a view to removing the anomalies between the remuneration to be paid the designated employees and the remuneration payable to non-designated employees.

(3) The second respondent shall pay the costs of this application.

*Honey & Blanckenberg*, applicant's legal practitioners

*Civil Division of the Attorney General's Office*, for the second respondent



## S *v* CHINZENZE & ORS 1998 (1) ZLR 470 (HC)

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

Garwe J

Criminal review

20 May 1998 Judgment No. HH-73-98

### Flynote

Criminal procedure (sentence) - community service - imposition of - in addition to being a condition of suspension of sentence, may be imposed as alternative to payment of fine or as direct penalty - choices open

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to court - need for court to apply its mind to which way to impose community service

## Headnote

By Act 8 of 1997, the Criminal Procedure and Evidence Act [*Chapter 9:07*] was amended, and the scope of community service orders has been widened to bring our system more in line with trends elsewhere. A sentencing court now has three options as to how to impose a community service order:

(1) as a condition of suspension of a sentence;

(2) as an alternative to a fine; or

(3) as a substantive penalty in its own right.

These three options exist alongside each other and none overrides the other. In deciding which, if any, to invoke, the court should be able to explain why one course is preferable to the others. An arbitrary choice should not be made.

Where a fine is the appropriate penalty, the accused should pay the fine if possible, even if this means giving him time to pay. However, where he is genuinely unable to pay the fine, community service should be imposed as an alternative, rather than imprisonment. The court should carry out a full enquiry, not only as to the accused's means, but also his general suitability for community service. It would be undesirable to sentence him to community service and then have to revoke the order because he has raised the money. As regards the number of hours, the court should consider what would be the appropriate alternative period of imprisonment, then, using the guidelines issued by the National Committee on Community Service, determine the number of hours of community service.

Community service as a direct punishment would be appropriate where the court does not wish the offender to go to prison or pay a fine: for example, a young offender. In such cases, the court should again consider what would be the appropriate period of imprisonment, then, using the guidelines, determine the number of hours of community service.

In all cases, the guidelines will apply and the court should continue to make a full enquiry before imposing community service.

*Quaere*: whether community service orders should be subject to review.

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 347, 350A and 358

**1998 (1) ZLR p471**

GARWE J

## Judgment

**GARWE J:** The above matters were heard by different magistrates at Gweru. There is a common thread running through each of them and the same basic issues arise in each of the

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matters. Following the promulgation of the Criminal Procedure and Evidence Amendment Act 8 of 1997, the community service scheme in this country was expanded to include community service orders both as a direct penalty and as an alternative to payment of a fine. The Act however does not indicate the circumstances under which these new changes to our legal system may be invoked. The fundamental issue that arises in all these matters is: when can a community service order as defined in the Act and community service as an alternative to payment of a fine be imposed? Put another way, how do these new changes fit into the community service scheme introduced in 1992?

The brief facts of the above cases are as follows:

1. *S* v *Gladys Chinzenze* - CRB 2009/97

The accused in this case, aged 30, pleaded guilty to two counts of receiving stolen property well knowing it to have been stolen. The property in question consisted of two shovels and a satchel valued at $400. The property was recovered.

In mitigation, the accused told the court that she is a mother of two and had $370 in savings. A report by a community service officer recommended her for community service. The trial magistrate then sentenced her to pay a fine of $600 *suspended on condition* she performed 140 hours of community service at an institution in Gweru. The record does not explain why the trial magistrate imposed this sentence or how he arrived at 140 hours of community service. Two weeks after sentence, the accused appeared before the same magistrate to apply for revocation of the order since she had now raised the fine and wanted to pay it in full.

Only in answer to a query did the trial magistrate indicate that he had had recourse to the draft guidelines issued by the National Committee on Community Service in December last year. In particular, he says he took the fine of $600 imposed to be equivalent to 4 months' imprisonment with labour, which, in terms of the present grid of hours, equates to 140 hours of community service. This detail, however, was not included in the record.

2. *S* v *(1) Robson Gabi &(2) Marshall Gabi* - CRB 9-10/98

The two accused, aged 19 and 31, were convicted on their pleas of guilty of malicious injury to property. They admitted that, after an argument with a bus conductor over fares, they took stones and damaged the front windscreen and five side windows of a bus, causing damage estimated at $1 400.

In mitigation, accused 1 told the court he was a student at Dombotombo



Secondary School. He asked for the option of a fine. Accused 2 told the court he was unemployed but married with one child.

In assessing an appropriate penalty, the trial magistrate remarked in respect of accused 1:

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``I do not see how you can possibly pay a fine if this is imposed".

In respect of accused 2 the magistrate remarked:

``I have considered that you are a likely candidate for community service owing to the fact that you cannot raise funds for a fine".

In the result, accused 1 was sentenced to l05 hours of community service and accused 2 to 280 hours of community service to be performed at institutions named in the order.

The record however does not indicate how the magistrate arrived at 105 and 280 hours of community service respectively or why a direct community service order was found to be more appropriate. Only in answer to a query does the trial magistrate now advise that he had recourse to the provisions of s 350A of the Criminal Procedure and Evidence Act, as introduced in 1997. In order to arrive at the above sentences he says he made use of the draft guidelines distributed by the National Committee on Community Service. He considered a sentence of $450 or in default three months' imprisonment appropriate for accused 1 and a fine of $1 200 or 8 months' imprisonment for accused 2. In order to impose direct community service orders, he then used the present grid of hours and came up with l05 and 280 hours respectively. He says the difference in the sentence ``was designed to reflect the personal circumstances of each offender".

3. *State* v *Kholisani Ndhlovu* - CRB 60/98

The accused, aged 22, pleaded not guilty to theft. He was nevertheless convicted. The facts were that accused, who was employed as a security guard at a farm, stole six 50-kilogram bags of maize and two buckets of maize from his place of employment. The value of the maize was $800. Fifty dollars worth was recovered.

In mitigation, the accused told the court he had lost employment as a result of this case. He had been earning $600 per month. A report by a community service officer at Gweru established that he had no fixed place of abode in Gweru but that his rural home was in Nkayi. ``Due to a problem of transport'' it was not established whether accused did have a fixed abode at Nkayi.

The trial magistrate imposed a sentence of 210 hours of community service to be performed at a school in Nkayi. The record does not explain why a substantive community service order was found more suitable or how the trial magistrate had arrived at 210 hours of community service. When asked to explain the trial magistrate advised that he had invoked the draft guidelines





issued by the National Committee on Community Service pursuant to the promulgation of the Criminal Procedure and Evidence Amendment Act 8 of 1997.

4. *S* v *Sheckleton Mavezere* - CRB 45/98

The accused in this case, aged 29, was convicted on his plea of guilty of theft of crates of empty beer bottles and soft minerals. He admitted inserting his hand into a bottle store at Chirundura

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Business Centre, Gweru through a broken window and stealing the property in question. The total value stolen is $1 223.08. Seventy two dollars worth was recovered.

In mitigation, he told the court he had secured employment with BHP Minerals and was due to commence work on 14 January 1998. He also told the court he was prepared to make restitution. A report by a community service officer recommended him for community service. He was then sentenced to 210 hours of community service to be performed at a named institution from 19 January 1998. No indication was given as to why a substantive community service order was found to be more appropriate. Nor did the magistrate explain how he had arrived at 210 hours of community service. Further it appears no consideration was given to either a fine or restitution. When asked to explain, the trial magistrate advised he had had recourse to the draft guidelines on the approach to direct community service orders.

5. *S* v *Samuel Ndimande* - CRB 45/98

The accused in this case, aged 22, was convicted on his plea of guilty of housebreaking with intent to steal and theft. He admitted that, acting in concert with an accomplice, he opened a locked door using a duplicate key. From the house they stole a television set and a bunch of keys valued at $900. The property was recovered.

A report by a community service officer found him suitable for community service. He was consequently sentenced to 210 hours of community service to be undertaken at a named institution. The record however does not reflect how the trial magistrate came to the conclusion that community service be carried out at the particular institution or why a substantive community service order was found more appropriate. How the trial magistrate arrived at 210 hours was also not explained although the trial magistrate now says he applied the draft guidelines prepared by the National Committee on Community Service.

6. *S* v *Malvin Mangove* - CRB 57-58/98

The accused in this case, aged 14, was convicted on his plea of guilty of housebreaking with intent to steal and theft. This was on 12 January 1998. He



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admitted stealing keys to a grinding mill where his brother was employed. Using the keys he and an accomplice gained access into the grinding mill from where they stole three bags of maize valued at $450. The maize was recovered.

In mitigation, he told the court he was a student at Senga Secondary School. He asked the court to consider imposing a fine since his parents were prepared to assist him raise the money. An inquiry undertaken by the trial magistrate found that he was suitable for community service. In consequence he was sentenced as follows:

> ``$500 or in default 105 hours of community service.''

The place at which community service was to be rendered and the times during which such service was to be performed were not indicated. The trial magistrate says this was done ``in

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order to accommodate possible changes on accused's and institutions circumstances'' (*sic*). The record does not indicate why community service in default of payment of a fine had been found more appropriate. It does not reflect how the Magistrate had arrived at 105 hours of community service. Nor does the trial magistrate explain the propriety of the fine of $500 or community service on a 14-year-old.

7. *S* v *Tavedzerwa Maphosa* - CRB 387/98

In this case the accused, aged 17, was convicted of theft. He pleaded guilty. He admitted stealing a double deck radio and CD player valued at $2 000 from another person staying at the same place of residence.

Accused was sentenced to 140 hours of community service to be performed at a given institution.

The magistrate says in passing this type of sentence he had recourse to the new s 350A of the Criminal Procedure and Evidence Act and to the draft guidelines compiled by the National Committee.

THE EFFECT OF THE CRIMINAL PROCEDURE AND EVIDENCE AMENDMENT ACT 1997

This Act has considerably widened the scope for community service and community service orders. In the new s 347, provision is made for the court to impose, *as an alternative to a fine*, either a sentence of imprisonment within the jurisdiction of the court or such community service as may be specified. The court is also empowered to do both. The new s 350A now authorises a court, instead of sentencing an accused to imprisonment or a fine, to make a community service order and to make such orders run concurrently where there are more than two. The Act also makes provision



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for breach of community service orders and for the amendment and revocation of such orders.

It is important to note that the new changes do not affect the other sentencing options. A court is still obliged, in appropriate circumstances, to either impose a fine (and where necessary grant time to pay) or a wholly suspended prison sentence. There can be no doubt that such sentences may be most appropriate in certain circumstances.

The effect of the new changes to the law is to expand the scope of community service and community service orders in order to bring our system more in line with trends elsewhere. In other words, it is no longer necessary for a community service order to be made conditional to a suspended sentence of imprisonment. The difficulty, as the seven cases forming the subject of this judgment show, is that the circumstances under which these new changes can be invoked have not been defined. This has led to inconsistency in approach and arbitrariness in the choice of option.

The Criminal Procedure and Evidence Act [*Chapter 9:07*] now provides for community service in

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three situations. These may be summarised as follows:

(a) by the suspension of a sentence, whether a fine or imprisonment, on condition that the accused person renders service for the benefit of the community or a section thereof - s 358;

(b) as an alternative to a fine - s 347; and

(c) as a substantive penalty in its own right ie a community service order - s 350A.

These three options exist alongside each other. None overrides the others. It would appear from the cases forming the subject of this review judgment that some magistrates may be under the mistaken impression that the new changes take precedence over the old scheme. Nothing, of course, could be further from the truth. The position is that the court now has three choices of community service orders. In deciding when to invoke any of three options a court must be able to explain why the one is more appropriate than the others. In my view, it is not proper for a court to arbitrarily apply any of the three options.

The first option does not cause any problems as the National Committee on Community Service has previously issued guidelines on the approach to be taken in imposing community service as a condition of suspension of a sentence. These guidelines remain as valid today as they were yesterday. In terms of s 358 of the Criminal Procedure and Evidence Act, community service may be imposed as a condition of suspension of a sentence of imprisonment or a fine. The starting point remains the ``12 months'' guideline.



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These guidelines have been carefully considered and will no doubt continue to be used in the majority of cases.

The difficulty has been to define the circumstances under which a court may impose community service in terms of the new changes. In this regard, the National Committee on Community Service has endeavoured to draft guidelines to assist magistrates. These guidelines are still in draft form as comments are still awaited from a number of quarters. Coming up with a meaningful set of draft guidelines to these new changes has not been an easy task, because the underlying principle in community service orders is that community service is an alternative to a prison sentence. The new changes deliberately avoid all reference to imprisonment. At the end of the day, however, there is need for all these options to co-exist and complement each other.

When then can the new provisions be invoked? The National Committee on Community Service has found that there are few instances where the new options can be utilised. Since a fine is still a competent penalty, it follows that the accused should pay the fine in those cases where he is able to do so, although this might mean giving him time to pay such fine. Community service should not be imposed in these circumstances. In such a case an accused can still receive a sentence such as

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``$500 or in default of payment 2 months' imprisonment.''

However, it is a fact that there are many persons in prison serving alternative jail sentences after failing to pay fines ordered by the court. In such circumstances, ie where the accused is *genuinely* unable to pay a fine, then community service can be imposed in the alternative. It is important in such cases for the court to carry out a full enquiry, not only as to the accused's means, but also his general suitability for community service. A situation where accused is sentenced to do community service, but thereafter raises the fine, thereby necessitating a revocation of the order, is clearly undesirable. This is what happened in one of the cases forming the subject of this judgment ie *S* v *Chinzenze* CRB 2009/97. In short, therefore, where the offender is genuinely unable to pay a fine, then community service would be an appropriate alternative to payment of such a fine. In this regard, I need to stress that community service in terms of the new changes is an alternative to payment of a fine. There is no provision for suspending payment of a fine on condition accused performs community service as happened in *S* v *Chinzenze supra*. The draft guidelines suggest that in such circumstances the court should have regard to what would have been an appropriate alternative period of imprisonment to payment of the fine and using the current grid of hours, then determine the number of community service hours to be served in the particular case. In other words, the current method of computing the



GARWE J

number of hours will continue to apply whether community service is imposed as an alternative to imprisonment or to a fine.

Coming to direct or substantive community service orders, the guidelines suggest that these can be imposed where the court does not wish the offender to either go to prison or pay a fine e.g. a young offender whose father would simply pay the fine and it is necessary that the accused realises that crime does not pay or where a fine would have no real deterrent effect but it is not necessary to send the accused to prison. In such cases, the court would take into account the term of imprisonment that would have been appropriate in the circumstances and, using the recommended grid, determine the appropriate number of hours of community service.

I need to emphasise that these new changes to community service orders are not intended to replace but rather complement the scheme that has been in existence since 1992. In other words, the community service scheme remains a single scheme - although different orders may now be imposed.

It is important that magistrates are clear as to when these new changes can be used. Quite clearly, a sentencer cannot, as it were ``toss a coin into the air'' and, without any rational basis, choose any of the three options. The record must indicate clearly why a particular approach is favoured. Where the new changes are invoked, the record must show how the court has arrived at a particular number of hours. The guidelines currently in use will continue to apply. There will still be need for a proper inquiry. In other words, the court must still ascertain whether accused is married, employed, a first offender, has a fixed place of abode, distance to nearest institution, etc. There will still be need for the accused to be properly matched to the institution

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where he is to carry out his community service, ie professionals will need to be made to perform community service where their expertise can be utilised. In cases, where the accused is employed, it will still be necessary that any community service be performed outside normal working hours. It may also be necessary, in such a situation, that the number of community service hours be reduced to take into account the fact of the accused's employment.

The new changes will need to be applied rationally and a full record maintained showing how the court would have arrived at a particular sentence.

I now come back to the individual matters forming the subject matter of this judgment.

[The learned judge then considered the sentences imposed in the several cases, and continued:]



GARWE J

GENERAL

It is clear, from the problems encountered in the present matters that the new changes to the law are bound to create difficulties for some magistrates. It is apparent that the approach to these new changes is haphazard in nature and that the concepts are not clearly understood. The result is that inappropriate and different sentences are being imposed, even though the facts might be similar. It is to be hoped that these difficulties will be overcome in due course.

A further difficulty lies in the fact that substantive community service orders are not subject to automatic review, unless they are imposed as alternatives to fines of a reviewable level.

The approach to these new changes by magistrates at Gweru is lacking in consistency. The possibility of abuse of the new options cannot be discounted. Clearly, there is need for the usual checks and balances provided by the automatic review system. In the circumstances, the Ministry of Justice, Legal and Parliamentary Affairs is urged to look into the possibility of amending the Magistrates Court Act in order to provide for the automatic review of all substantive (or direct) community service orders or orders where community service is imposed as an alternative to payment of a fine, even where such fine is not otherwise subject to scrutiny or review. Only in this way can these new changes be properly developed into a rational body of principles with properly considered guidelines. The need for this amendment to be affected as soon as possible goes without saying.

**CHINHENGO J** agrees.



## RADAR HOLDINGS LTD & ANOR *v* EAGLE INSURANCE LTD 1998 (1) ZLR 479 (HC)

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

Adam J

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Civil action

4 March & 27 May 1998 Judgment No. HH-85-98

## Flynote

Contract - enforceability - penalty - requirement that insured must notify insurer ``as soon as possible'' of event giving rise to claim - whether an unfair provision under Consumer Contract Act

Insurance - insured - duties - requirement to notify insurers ``as soon as possible'' of event giving rise to claim - meaning of

## Headnote

It was a condition of an insurance policy that, in the event of a claim, the insured must notify the insurance company as soon as possible of the event giving rise to the claim. The insured, who had suffered loss in a fire, had notified the insurance company about the fire some eight days after the fire. The insurance company refused to indemnify the insured because it had breached the condition requiring him to notify the insurance company as soon as possible. The insured argued that this condition had been complied with, alternatively that this condition in the contract was unenforceable under the Consumer Contracts Act [*Chapter 8:03*].

As regards the condition requiring that the insurance company be notified as soon as possible:

*Held*, that the purpose of having the clause requiring quick notification of the insurer is to protect the interests of the insurer against fraud by allowing it to make enquiries into the cause of the loss, as soon after the event giving rise to the loss as possible. Speed in reporting was of essence in the policy and it is a condition that must be strictly complied with by the insured. The insured must comply with this condition by notifying the insurer as soon as reasonably practicable in all the circumstances of the case. In the present case the insured had failed to comply with this condition.

As regards the argument that this condition was unenforceable under the Consumer Contracts Act:

*Held*, that although insurance contracts fall within the ambit of the Consumer Contracts Act, the insured had failed to show that the notification condition was not reasonably necessary for the protection of the insurer's interests. In terms of the Act, a condition is not unfair simply because it imposes an onerous obligation on one of the parties. In deciding whether a condition is unfair, the court must have regard to the interests of both parties. Thus even if it could be said that the condition imposed an onerous obligation upon the insured, having regard to the interests of both parties, the condition was not unfair.

Cases cited:

*Anglo-American Oil Co Ltd* v *Port of London Authority* [1914] 1 KB 14



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*Collen* v *AA Mutual Ltd* 1954 (3) SA 625 (E)

*CIR* v *Tvl Bookmakers Assn (Co-op) Ltd* (1953) 19 SATC 14

*Damon* v *Greatermans Stores Ltd & Anor* 1983 (4) SA 131 (W)

*H* v *Commissioner of Taxes* 1957 R & N 688 (SR)

*Hick* v *Raymond & Reid* [1893] AC 22 (HL)

*JJ Rousseau NO* v *Federated Employers' Ins Co Ltd* 1978 (1) PH A17 (C)

*Ochberg* v *CIR* 1931 AD 215

*Scottish Union & National Ins Co Ltd* v *Native Recruting Corp* 1934 AD 458

*Sydmore Eng Works (Pty) Ltd* v *Fidelity Guards (Pty) Ltd* 1972 (1) SA 478 (W)

*Thompson* v *T Lohan (Plant Hire) Ltd & Anor* [1987] 2 All ER 631 (CA)

*Yorkshire Ins Co Ltd* v *Garde* 1965 RLR 681 (A)

## Case Information

*E W W Morris*, for the plaintiff

*A P de Bourbon SC*, for the defendant

## Judgment

**ADAM J:** A fire occurred on 25 April 1995 in the second plaintiff's premises in Gweru for which there was a claim made by the plaintiffs for loss suffered of $587 248.33. It was averred in their declaration that the second plaintiff, alternatively the first plaintiff, was entitled to be indemnified in respect of the loss by the defendant. The defendant in its plea denied the loss claimed in that neither of them was entitled to be indemnified by virtue of the breach of numbered clause 3 of the general conditions of the Assets All Risk Policy of Insurance (Exhibit 1) since the incident happened on 25 April 1995 and the defendant was only notified of this on 3 May 1995 which was not ``as soon as possible'' as stipulated in that clause which was worded as follows:

> ``3. Note of Claims and Prescription Period
>
> The Insured shall notify the Insurers as soon as possible of any event which could give rise to a claim. If the claim arises out of any criminal act the Insured shall also advise the police as soon as such act comes to his notice. The Insured shall with due diligence do and concur in doing and permit to be done all things which may be reasonably practicable to minimise or check any interruption of or interference with the business or to avoid or diminish the loss.
>
> No claim (other than a claim under Section B or Section C) shall be payable after the expiry of twelve months or such further time as the Insurers may allow from the happening of an occurrence unless the claim is the subject of pending legal action or is a claim in respect of the Insured's legal liability to a third party.''

To this, the plaintiffs replicated that, properly interpreted, their obligation under that clause 3 was to notify the defendant of the event ``as soon as was reasonably possible in the

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circumstances'' which obligation was complied with by the plaintiffs. The defendant rejoined to this by admitting that the obligation was as interpreted by the plaintiffs but denied that the plaintiffs had complied with such obligation.

The plaintiffs at the hearing, without objection by the defendant, amended their declaration by the insertion of two further paragraphs to the effect that clause 3 of the general conditions was unenforceable in accordance with



ADAM J

s 4(1) or s 4(1)(c) as read with clause 3 of the Schedule of the Consumer Contracts Act [*Chapter 8:03*].

It was agreed by the parties that the only issue for trial was the question of liability it was also agreed that on the morning of 3 May 1995 the plaintiffs' brokers were advised who then that afternoon contacted the defendant.

The only witness at the trial called by the plaintiffs was Mr Richard Stevens. He testified that he worked for a division of the second plaintiff and that he was informed about the fire at 9.30 a.m. on 25 April 1995 which was eventually extinguished that day. He called Mr P Merrit (from Inductotherm (Pvt) Ltd) who came to the foundry on 26 April 1995 and assisted in dismantling the furnace and was the only person who could determine the electrical aspects of the furnace as it was sophisticated machinery from USA. This was done to ascertain the damage. He conceded that he could have telephoned (the brokers) earlier but did not do so as ``carbon boil is something all owners dread'' and because he would not be able to tell them about the damage if he was asked about it. Under cross-examination he agreed that the first plaintiff was located in Bulawayo that he advised the first plaintiff of the fire the next day and this was because the policy laid down that they must do so. He indicated that if he had been asked by the office in Bulawayo about the damage he would have informed them about what had happened. He agreed that Mr Merrit spoke on behalf of them to the USA concerning the furnace between 26 April 1995 and 3 May 1995. He agreed that the insurance claim form was signed on 9 May 1995. He also stated that the insurance was dealt with by the Bulawayo office and that the second plaintiffs' telephones and faxes were in working order at that time.

It was submitted by Mr *Morris* on behalf of the plaintiffs that ``as soon as possible'' must be interpreted ``as soon as reasonably possible''. He referred to *Hean* v *General Accident, Fire & Life Assurance Corporation Ltd* 1931 NPD 215 where on Saturday late at night the plaintiff's car was involved in a collision and so early Monday morning he left the car, before business hours, in a damaged condition outside the garage premises of the defendant's agent who was the garage owner. On the Wednesday, the garage owner wrote to the plaintiff and referred to the damaged car and asked him to indicate what they were to do with it. There was no reply by him. The following Monday (nearly nine days after the collision) at the request of the garage owner he filled in a claim form and gave it to him. Besides this there was no other written notice given by the plaintiff to the defendant. A condition of the insurance policy was that where there is a claim as a result of a collision against the insurance company, the insured must give immediate written notice to the insurance company and must furnish full details of the occurrence. The

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policy also stated that in respect of this condition time was of the essence



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of the contract. HATHORN J held that ``immediate'' in the condition meant ``reasonably immediate having regard to the circumstances'' and so had written notice (in this case) been given on say the Monday morning after the collision on Saturday night this would clearly have been in compliance because the owner of the vehicle would have had no opportunity of giving notice any sooner. Mr *Morris* asserted that since ``immediate'' had been accepted as meaning ``as soon as reasonably possible'' it followed that as far as the present plaintiffs were concerned ``as soon as reasonably possible'' meant that 8 days here (including the week-end) of which one day was a public holiday was, according to him, notification given ``as soon as reasonably possible''. He also submitted that, for purposes of the Consumer Contracts Act, even though ``services'' were not defined in that Act, a ``consumer contract'' covered a contract of insurance under which the ``service rendered'' was to provide an indemnity. He relied on *Sydmore Engineering Works (Pty) Ltd* v *Fidelity Guards (Pty) Ltd* 1972 (1) SA 478 (W) at 480-1 for the definition of a ``contract of insurance'' and that in *Commissioner for Inland Revenue* v *Transvaal Bookmakers Association (Co-operative) Ltd* (1953) 19 SATC at l4 it was held that ``services''were defined as ``acts or instances of helping or benefitting; conduct contributing to another's advantage or welfare or benefit'' and that in *Ochberg* v *CIR* 1931 AD 215 at 230 an agreement to assist a company financially was regarded as an agreement to render services. He argued that s 4 provided relief for unfair consumer contracts. Under s 5(1)(c) and (d), a consumer contract may be found to be unfair if the consumer contract imposes obligations or liabilities which is not reasonably necessary to protect the interests of any other party or if the consumer contract excludes or limits the obligations or liabilities of a party to an extent that is not reasonably necessary to protect his interests. Under s 6(1), the exercise of a right or discretion under a consumer contract may be found to be unfair if such exercise is not, or would not be, reasonably necessary to protect the interests of any party. Mr *Morris* further submitted that it was not reasonably necessary in order to protect the interests of the defendant for them to enforce clause 3 of the general conditions. He also referred to para 3 of the scheduled provisions.

Mr *de Bourbon* on behalf of the defendant submitted that under the contract of insurance the general conditions in clause 3 required the plaintiffs (a) to notify the defendant as soon as possible of the event and (b) have the claim made to the defendant within 12 months or such further time as the defendant may allow from the happening of the occurrence unless the claim is the subject of pending litigation or is a claim in respect of the plaintiff's legal liability to a third party. The necessity to notify the defendant, according to him, was explained in *Scottish Union & National Insurance Co*



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Ltd v *Native Recruiting Corp Ltd* 1934 AD 458 at 467 where WESSELS CJ said:

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``It is often essential for an insurer, in order to prevent his being subjected to fraud, to enquire immediately into the circumstances of an accident or of a burglary, or even in case of embezzlement.''

Mr *de Bourbon* also referred to *J J Rousseau NO* v *Federated Employers' Insurance Co Ltd* 1978 (1) PH A17 (C) where BAKER J said:

``The words `as soon as possible after the occurrence' have been held to mean `as soon as is reasonably practicable in all the circumstances' (*Naicker & Ors* v *Godfrey & Ors* 1945 NPD 458, *Collen* v *AA Mutual Ins Assn Ltd* 1954 (3) SA 625 (E) at 629, *Kali* v *Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 185-186, *Union Guarantee and Insurance Co Ltd* v *Potgieter* 1959 (3) SA 881 (E) at 882; MacGillivray *Insurance Law* 5 ed vol 2, para 1719; Gordon & Suzman *SA Law of Insurance* 2 ed pp 271-3).

...

Mr *van der Riet* correctly submitted that an insurer is entitled to be placed in a position from where it can investigate the occurrence in circumstances which are as advantageous to the insurer as can be achieved. This being so, speed in reporting the occurrence is clearly of the essence. It is also clear that a condition providing for speedy reporting of an occurrence that might give rise to a claim for indemnity is a material condition, and that the important question to be decided in any case similar to the present is whether that condition has been breached. If it has, then the questions of prejudice to the insurer by reason of late notification are irrelevant, the insurer does not have to prove prejudice, merely the breach.''

Mr *de Bourbon* also submitted that the Consumer Contracts Act was not intended to apply to a contract of insurance since no services are being provided under such a contract. He also referred to the British Unfair Contract Terms Act 1997 and *Thompson* v *T Lohan (Plant Hire) Ltd & Anor* [1987] 2 All ER 631 (CA). In that case, the first defendant hired an excavator together with a driver to the second defendant (the third party) under the terms and conditions of the Contractors' Plant Association (CPA) conditions. Condition 8 made the driver a servant or agent of the hirer (the second defendant) and condition 10 provided that the hirer was to indemnify the owner (the first defendant) in respect of all claims by any person for injury to person caused by or in connection with the use of the excavator while being driven by the driver supplied by the owner. The plaintiff's husband was killed so she brought an action. The third party contended that if condition 8 had validly and effectively excluded or restricted liability for negligence it was nevertheless contrary to the Unfair Contract Terms Act 1997 which indicated that a person could not by reference to any contract term exclude or restrict his liability for personal injury or death resulting from negligence. HODGSON J held that the third party knew that the hiring was subject to CPA terms and found that the plaintiff's husband's death was caused by the driver's negligence. He awarded damages against the first defendant who sought to





be indemnified by the third party so he held that the first defendant was entitled to be indemnified. The third party appealed and the Court of Appeal held that the provisions of the Unfair Contract Terms 1977 were intended to prevent the restriction or exclusion of liability in relation to the victim of the negligence and was not concerned with arrangements made by a wrongdoer with others for sharing or transferring the burden of compensating the victim. Mr *de Bourbon*'s contention was that likewise the Consumer Contracts Act did not extend to insurance

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contracts where indemnification was involved.

Mr *de Bourbon* further submitted that s 4(1) of the Consumer Contracts Act which refers to the relief against unfair consumer contracts is made subject to s 4(3) and to ss 5, 6 and a scheduled provision. In s 5(1) (under when consumer contract is unfair) the only paragraphs cited on behalf of the plaintiffs were paras (c) and (d). Further, s 5(3) requires that a court must have regard to the interest of both parties. In s 6(1) (when exercise of power is unfair) again it is only para (b) that has been relied upon by the plaintiff. But this must be read with s 6(2) and (3). Mr *de Bourbon* argued that insurance contracts are contracts *uberrimae fidei* (of the utmost good faith) which applied to the plaintiffs and required that they carry out the terms and conditions of their policy.

The policy of insurance (Exhibit 1) expressly provides that the insurers will indemnify the insured against loss or damage provided always that the due observance of the general and specific exceptions and conditions shall be a condition precedent to the liability of the insurers. It is clear that clause 3 of the general conditions concerns notification of claims as well as a prescription period. In the present case, the defendant has raised only a breach relating to the notification of claims. The prescriptive period is not an issue before me. It is also clear that the pleadings reveal the plaintiffs maintain that they have complied with their obligation to notify the defendant whereas the defendant denied that the plaintiffs had complied with that obligation.

In *Yorkshire Insurance Co Ltd* v *Garde* 1965 RLR 681 (A) BEADLE CJ said that there are ``no special rules governing the interpretation of insurance polices which place them in a different class from other agreements: see the case of *Scottish Union & National Insurance Co Ltd* v *Native Recruiting Corp Ltd* 1934 AD 458 (A)''. In the *Scottish Union* case, the insurance policy had a condition that on the occurrence of any loss the insured should immediately notify the police, forthwith give notice thereof in writing to the insurance company and within seven days thereafter deliver to the insurance company in writing an account of and the amount of the loss sustained and the policy did not cover loss of which the insurance company has not had notice within three days of the occurrence. WESSLES CJ said at 464-467:

> ``There is no doubt that contracts of insurance must be fairly interpreted so as to give effect



> to the policy. This does not mean that the court must strain the language of the policy in favour of the insured. The ordinary rules of construction must be applied in construing a policy of insurance ... Naturally, we must look to the object of the contract of insurance we are dealing with in order to ascertain what both parties to the contract intended by the language used ... Where, however, the language is clear and explicit, the court must give effect to the words of the policy and they must be taken to mean what they say ...
>
> Now in construing a contract we must not only consider the intention of one party...but we must see what both parties intended, and we must guard ourselves against making a contract for the parties. We have no right, because we may think that the contract is a hard bargain, to lean towards a construction more reasonable to the insured than the contract constituted by the words of the document ... We must gather the intention of the parties from the language of the contract itself ... and we must presume that they knew the meaning of the words they used. It has been repeatedly decided in our courts that in construing every kind of written contract the court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties their plain, ordinary and popular meaning, unless it appears clearly

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from the context that both the parties intended them to bear a different meaning. If, therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the court may modify the words just so much as to avoid that absurdity or inconsistency but no more ...

If we apply the above principles of construction to the contract before us, we must hold that the plain and ordinary meaning of the policy is that the insurance covers a risk in cases of theft ... loss by embezzlement ... on the part of any employee; but that the policy does not cover cases where the loss is caused ... where the company does not receive notice within three days of the occurrence of the loss for which the claim is made, for these risks are specially excluded. There is no doubt as to the meaning of the words `This policy does not cover loss of which the company has not had notice within three days of the occurrence thereon'. They can only mean that whether the loss is caused by theft [or] ... embezzlement ... if the insurer cannot give notice within three days of the occurrence of the loss he cannot claim on the policy: the policy does not cover such a risk.

It has been argued that this is an unreasonable meaning to give to the words because the insured cannot report a loss of which he had no knowledge. It must, however, have been quite plain to the insured from the words used that this is so, and yet he agreed that the policy should not cover loss of which he cannot give notice within three days, for this is plainly stated in clause l(b). That the respondent company may not have been aware of the true import of clause l(b) when it accepted the contract is possible, but that is not the fault of the appellant. There is nothing in the language: it is not ambiguous nor is it illusory, for it covers a very large number of cases where notice of the loss can be given within three days. It is no doubt true that the few cases of embezzlement, fraud or pilferage can arise where notice of the loss can be given within three days of the occurrence, but we cannot say that such cases can never arise. We cannot say that both parties must have intended that the notice of loss should be given after knowledge of the loss. The insurer may well have intended only to insure such cases as he could investigate at once, and that is why, in clause 3, he required immediate notice to the police. The contract so explicitly excludes loss of which the insurer does not get notice within three days of the occurrence thereof that the insured cannot be heard to say that he understood these words to mean that the insurer only



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excluded a loss of which the insured did not give notice within three days after it came to his knowledge ...

An insurer is free to confine his risk to such cases of loss where notice can be given within three days after the loss actually occurred at a certain premium, or at a higher premium, cases where notice of the loss is given only after it comes to the knowledge of the insured. Each is a class of insurance in itself. There is nothing unreasonable in such a provision. It is often essential for an insurer, in order to prevent his being subjected to fraud, to enquire immediately into the circumstances of an accident or of a burglary, or even in a case of embezzlement ...

I have come to the conclusion, therefore, that inasmuch as no notice of the loss by embezzlement had been given within the specified three days, the risk was not covered by the policy. The question of loss submitted to B*arry* J and should therefore have been answered in favour of the appellants, the Scottish Union & National Insurance Co."

In *Collen* v *A A Mutual Ltd* 1954 (3) SA 625 (E) VAN DER RIET J said at 629-630:

``In *Naicker & Ors* v *Godfrey & Ors* 1945 NPD 458, `so soon as possible' was accepted by the court and by counsel to mean `so soon as is reasonably practicable in all the circumstances', and this surely is the true interpretation of the expression ...

It is obvious that the intention of the condition is to give the insurer sufficient notice of the accident in order that it may taken adequate steps to protect its interests."

In *Damon* v *Greatermans Stores Ltd & Anor* 1983 (4) SA 131 (W) a person arrested without a

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warrant in terms of the Criminal Procedure Act 1977 must ``as soon as possible'' be brought to a police station. BOSHOFF JP said at 148-149:

> ``The question which presents itself in this case is whether the words `as soon as possible' in the section entitles a person in the position of the second defendant, making the arrest, to take this person suspected of theft and arrested, back into the store to be questioned about the suspected theft. In the case of suspected shoplifting it is not practicable to arrest the suspected person until he has left the premises without paying for goods which he has taken. It is not practicable for the person in charge of the security to decide whether a charge should be made unless subordinate or other employees are entitled to take an arrested person back to the premises before he is handed over to the police. What is of considerable importance is that it is in the interest of an arrested person himself that he should not be charged without being given an opportunity of offering an explanation or making any representation to the responsible officer. It is to his own advantage that this opportunity should be given in the privacy of an office with the minimum possible number present. If all these steps are therefore taken with reasonable expedition and an arrested person is only thereafter brought to a police station, it cannot be contended that he was not brought to a police station as soon as possible within the meaning of the phrase in the section, cf *John Lewis & Co Ltd* v *Tims* [1952] 1 All ER 1203 (H).''

In *Union Guarantee & Insurance Co Ltd* v *Potgieter* 1959 (3) SA 881 (E) at 882 *de* VILLIERS JP said:

> ``It has been held in many decided cases here and abroad that under the Insurance Act and in relation to other statutory and contractual provisions of a similar import where something has to be done `as soon as may be', `as soon as possible' or under similar



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> terms, that performance of the stated duty must take place within a time which is soon after the occurrence as is reasonably practicable in all the circumstances of each particular case.''

In *Hick* v *Raymond & Reid* [1893] AC 22 (HL) cargo was to be delivered to the Port of London, where it was to be applied for within 24 hours of the ship's arrival but no time was specified within which the discharge of the cargo was to be completed. The ship arrived on 14 August 1889 when the respondents duly applied for the cargo and unloading began on 16 August and continued until 20 August at which time some labourers went on strike and shortly afterwards the strike became general which lasted till 16 September 1889. After that date unloading proceeded and was completed on 18 September 1889. MATHEW J held that the respondents had undertaken to discharge the ship within a reasonable time and had failed to perform their undertaking. The Court of Appeal reversed the decision of M*athew* J. On appeal to the House of Lords, LORD HERSCHEL LC said at 29:

> ``I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances ... It appears to me ... that the only sound principle is that the `reasonable time' should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under these circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee. I think the balance of authority, both as regards the cases which relate to contracts by a consignee to take discharge, and those in which the question what is a reasonable time has had to be answered when analogous obligations were under consideration, is distinctly in favour of the view taken buy the court below.
>
> In *Postlethwaite* v *Freeland* 5 App Cas 599, 608 the law was stated by LORD SELBOURNE thus: `If, on the other hand, there is no fixed time, the law implies an agreement to discharge the cargo within a reasonable time; that is

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(as was said by BLACKBURN J in *Ford* v *Cotesworth* LR 4 QB 127) a reasonable time under the circumstances'."

In *Anglo-American Oil Co Ltd* v *Port of London Authority* [1914] 1 KB 14, the plaintiffs received an ocean tanker of oil on 27 March 1913 that was to be discharged into their tanks at Purfleet and some of the oil was mixed with old oil. Under a provisional order made by the Board of Trade (which prescribed the maximum port rates to be paid on goods) it was provided that no port rates shall be charged by the Port of London Authority on goods imported ``for transhipment'' which expression was defined in the provisional order. On 29 March 1913, one oil load was to be transhipped to Sunderland and on 31 March 1913 another oil load was to be transhipped to Lowestoft. Further oil was to be transhipped to Plymouth, Dublin and Grangemouth on 13, 21 and 29 April 1913. The defendant refused to exempt the oil conveyed to the five places from port rates. The definition of goods imported for transhipment required the goods ``to have been shipped again as soon as



practicable within the limits of the Port of London for conveyance by sea to such other port''. PICKFORD J said at 24-26:

> ``It seems to me, however, that the expression `as soon as practicable' must mean in the ordinary course of navigation, and that it does not mean as soon as practicable for the convenience of the merchant's business. If the merchant has a steamer available to carry a cargo of oil and does not use her for that oil, but uses her to carry other oil to some other place, and so delays the transhipment of the particular cargo, it seems to me that he is not shipping it as soon as practicable; he is not bringing and keeping the oil for transhipment only ... but is keeping it for distribution not in London but for other places for his own convenience.''

In *Sydmore Engineering Works (Pty) Ltd* v *Fidelity Guards (Pty) Ltd* 1972 (1) SA 478 (W) at 480-1, F S STEYN J observed:

> ``Accepting the definition of an insurance contract as applied by G*algut* J in *Lake & Ors NNO* v *Reinsurance Corp Ltd & Ors* 1967 (3) SA 124 (W) at p 127A:
>
> > `A contract between an insurer and insured whereby the insurer undertakes in return for the payment of a price or premium, to render to the insured a sum of money or its equivalent, on the happening of a specified uncertain event in which the insured has some interests',
>
> it would appear that it is an essential element of any insurance agreement that a determinable payment of a premium in consideration for the risk undertaken by the insurer, must be provided for.
>
> ...
>
> The frequently used definition that the insurance contract is `a contract of utmost good faith', derives from the circumstances that the insurer undertakes to indemnify the insured against a risk which is wholly outside the control of the insurer but to some extent within the control of the insured. This facet of the insurance contract becomes highly important when the motivation of the stringent application and effect of breach, of insurance warranties are considered.
>
> ...
>
> WESSELS J in *Sachs* v *Western Assurance Co* 1907 TH 257 at p 259 discusses the meaning of the term warranty in the law of insurance:

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> `The term warranty is not always used in the same sense ... Hence to say in a contract that a condition is a warranty is not sufficient to determine whether its breach will render the contract void. It seems so far to say that there are certain conditions in policies of assurance which must be strictly adhered to, and if there is a failure on the part of the insured to adhere to these conditions the insurer can at his option refuse to carry out his part of the contract. If we restrict the meaning of the word warranty to such conditions as will render a contract void, if not adhered to, then there is some convenience in the use of the term when, therefore, I speak of a warranty in this judgment, I mean a condition, the breach of which on the part of the insured will enable the insurer to treat the policy as void. It is therefore the duty of the court to inquire whether any particular condition inserted in a policy was intended by the parties to be such a material condition that the insurer is entitled to insist on its performance before he can be called upon to pay the amount of the policy.'

Insurance warranties are defined by INNES CJ in *Lewis Ltd* v *Norwich Union Fire Insurance Co Ltd* 1916 AD 509 at 515 as follows:



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> `A warranty, in the sense in which that term is used in insurance transaction, is a statement or stipulation upon the exact truth of which, as the case may be, the validity of the contract depends. Courts of law will construe such stipulations as they would any other conditions of the policy; but when the meaning has been ascertained, a warranty must be exactly complied with whether it is material to the risk or not.'

In this case, the nature of the contract and the fact that the guarantor remains mainly in control of the risk belies a probable intention of the parties to make their agreement subject to a series of promissory warranties. The language of the agreement does not convey the clear intention of the parties to lay down certain promissory warranties.''

In *H* v *Commissioner of Taxes* 1957 R & N 688 where the appellant as a result of a transaction acquired a number of shares in the company by paying a nominal shilling for them, firstly, because he and two others guaranteed the company's payment of debt owed to W, whose interest in the company, the company wanted to buy out, secondly, he had agreed to provide the company with credit facilities from time to time and thirdly, he had served as chairman of the board of directors and managing director of the company. The Commissioner of Taxes had treated the face value of the shares as part of his gross income on the basis that it was an amount received for ``services rendered''. HATHORN J said at 692:

> ``While I agree that the transaction must be looked at as whole, it is unnecessary to decide whether it was a capital transaction ... But the substance of the matter is that, as a result of the whole transaction, the Appellant acquired the shares without paying anything but the nominal shilling and he acquired them because he and two others guaranteed the company's payment to W.
>
> ...
>
> The question is, then, whether the receipt falls within the provisions of s 8(b).
>
> It is clear that the services contemplated are not limited to those provided pursuant to a contract of employment. This appears from the express wording of the paragraph. One must therefore give the words `services rendered' their ordinary meaning. It is conceded, and rightly so, that the provision of a guarantee may be a service rendered.''

But in *Trans-Africa Credit & Savings Bank Ltd* v *Union Guarantee & Insurance Co Ltd* 1963 (2) SA 92 (C), where the South African Insurance Act 1943 prohibited an insurer entering into a guarantee without the consent of the Registrar of Insurance and failure by parties to such an

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insurance guarantee policy without the consent of the Registrar of Insurance rendered it null and void, THERON AJ accepted that ``guarantee'' and ``insurance contract'' were not defined. However, the Act intended that they bear their ordinary common law meanings. He said at 98:

> ``When it enacted s 20(2)(b) of the Act the Legislature must, therefore, have been satisfied that it would be possible to distinguish from each other contracts of guarantee (or suretyship), on the one hand, and of insurance, on the other, as these contracts are known in the common law. And indeed it seems to be generally recognised that although the two classes of contract have very much in common, so that it is often difficult to determine into which class a particular contract falls, a line can and must be drawn between them ...



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> The main difficulty is to find any satisfactory formulation of a test or tests which will enable one to distinguish infallibly between contracts of guarantee and insurance ... I have been unable to uncover any tests which are more comprehensive and reliable, in my view, than those indicated by Troplong in his *Commentaire du Cautionnement*, Chapter 1 art 2011 paras 35 and 36. Troplong wrote at a time when the law of suretyship applicable in his native France was almost identical with that practised in the Courts of Holland and his work is recognised as casting valuable light on the Roman-Dutch law of suretyship ... I shall, however, number and restate (with notes) the three differences between the two kinds of contract which are enumerated in para.35. These are -
>
> (1) Suretyship is a unilateral contract (by which Troplong meant a contract in which one or more persons are bound towards one and more others without any engagement on the part of the latter); insurance a synallagmatic contract (ie one whereby the contracting parties bind themselves reciprocally towards each other).
>
> (2) Suretyship is an accessory contract: insurance a principal contract.
>
> (3) Suretyship is a contract of benevolence: insurance a contract in which both parties have an interest, approaching to the nature of a sale. (As I understand it, what Troplong meant by this third point ... is merely that, unlike suretyship, insurance results from bargaining or negotiating carried on by and between the two parties to the eventual contract in the usual manner of contracting business-men, the subject-matter of such negotiations being, of course, the purchase and sale of the chance (risk) involved, when he stated that suretyship was a contract of `benevolence'. Troplong certainly did not mean to convey that a surety never received any *quid pro quo* for the risk run by him, but merely that the question of such *quid pro quo* could not properly arise as a matter of negotiation between the surety and the creditor as principals - a surety being some-one produced and, if necessary, paid by the debtor.
>
> I should add that Troplong saw in the element in which I have just referred - *viz* by whom (if anyone) payment is made to the person running the risk of the debtor defaulting - the origin of the difference between the contracts of suretyship and insurance which he enumerated in para 35. In para 36, he indicated that while in suretyship the creditor did not pay for the security received by him, this security was the basis of his granting credit to his debtor, and then continued as follows:
>
> > `But introduce into the suretyship an element which is not of its essence, that is a price payable by the creditor, and you have at that moment a contract of insurance properly so called ... I say price payable by the creditor because it is only on that condition that suretyship is transferred into insurance. As we have seen above, it remains suretyship if it is the debtor who pays for the risk run by the surety'.
>
> Despite the seemingly categorical nature of the words employed in the last sentence, it is not clear to me that they were intended to convey that a contract could not possibly be one of insurance if the person running the risk was required to be paid by the debtor - for instance, as a result of some special arrangement between such person and the creditor, as the two principal contracting parties ... It is

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noteworthy that the element as to who, if any-one, paid for the risk was not mentioned by Troplong in para 35 where he set out what he conceived to be the essential differences between contracts of suretyship and insurance)."

As I read the above authorities I must fairly interpret clause 3 of the general conditions in order to give effect to the policy. The expression where something has to be done ``as soon as possible'' had to be construed so that it



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must be carried out within a period which is as soon after the event as is reasonably practicable in all the circumstances of each particular case and it does not mean that it can be done at the convenience of the Insured. Speed in reporting is clearly of essence in the policy. Also, that as far as certain conditions inserted in a policy are concerned, they ``must be strictly adhered to'' by the Insured.

The first question that arises is whether the plaintiffs have complied with clause 3 of the general conditions. It is common cause that there was notification of the occurrence of 25 April 1995 on behalf of the plaintiffs on the afternoon of 3 May 1995. But can this be said that the defendant was notified ``as soon after the occurrence as is reasonably practicable in all the circumstances of this particular case''. Mr Stevens for the plaintiffs testified that the fire in question was extinguished that day; that the first plaintiff, located in Bulawayo, was notified the next day on 26 April 1995 because their policy required him to do so; that Mr Merrit of Inductotherm (Pvt) Ltd was called to the second plaintiff's place on 26 April 1995 who was in communication with the USA on behalf of the plaintiffs in the period 26 April to 3 May 1995; that he could have telephoned the plaintiffs' brokers earlier but did not do so because he would not be able to inform them if asked about the damage suffered; and that the second plaintiff's telephones and telefaxes were in working order at that time.

There is little doubt that in a contract of insurance like the Assets All Risks Policy of Insurance (Exhibit 1) the intention of the parties in having clause 3 of the general conditions is to give the defendant as ``insurer sufficient notice of the accident in order that it may take adequate steps to protect its interests'' - *Collen* v *AA Mutual Insurance Ltd supra*; that it is often essential for an insurer in order to prevent it ``being subjected to fraud, to enquire immediately into the circumstances of the accident'' - *Scottish Union of National Insurance Co Ltd* v *Native Recruiting Corp Ltd supra*; and that ``an insurer is entitled to be placed in a position from where it can investigate the occurrence in circumstances which are as advantageous to the insurer as can be achieved. That being so, speed in reporting ... is clearly of the essence'' - *J J Rousseau NO* v *Federated Employers' Insurance Co Ltd supra*.

Mr *de Bourbon* submitted correctly that if Mr Stevens could find time on 26 April 1995 not only to inform the first plaintiff in Bulawayo but also have Mr Merrit attend at the second plaintiff's place in Gweru on the same day and for this person to be able to communicate to the USA on their behalf prior to the defendant's being notified, it could not be maintained by the plaintiffs that the defendant was notified as soon as reasonably practicable. It would appear from Mr *Morris*' submission that he concentrated strictly on the number of

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ADAM J

days that elapsed from 25 April 1995 and not on the important matter whether the plaintiffs had discharged their obligation to notify the defendant as soon as reasonably practicable in all the circumstances of this particular case. An examination of all the circumstances surely reveals that the plaintiffs were in a position to notify the defendant but chose not to communicate with them and instead concentrated on establishing the damage caused which could only be regarded for their own purposes as what transpired subsequently revealed (see Exhibit 4). The plaintiffs could not assert that the defendant did not have an interest in establishing the damage suffered at the foundry as early as possible. I am of the view that the plaintiffs failed to discharge their obligation as required by clause 3 of the general conditions.

The second question is whether clause 3 is unenforceable under the Consumer Contracts Act. A definition of ``consumer contract'' is given in the Act. This does not include a contract for the sale, letting or hiring of immovable property or a contract of employment. The meaning given is ``a contract for the sale or supply of goods or services or both, in which the seller or supplier is dealing in the course of business and the purchaser or user is not''. Mr *de Bourbon* referred to the Unfair Contract Terms Act 1977 which provided a general control over contract terms which excluded or restricted liability for breach of contract, etc. But in Raoul Colinvaux's *The Law of Insurance* 5 ed, 1984 at para 6-27 it was stated that the Act ``irrationally excludes from its scope, by Schedule l (1)(a) to it'' any contract of insurance. It would therefore appear that according to Colinvaux the provisions of the Unfair Contracts Terms Act would have applied to contracts of insurance but for Schedule l (1)(a). For purposes of this case, in light of the fact that ``services'' under contract for sale or supply of services as used in the Consumer Contracts Act has a wide connotation, I am prepared to accept that a contract of insurance falls under the Consumer Contracts Act. Section 5(1) of that Act gives a court a discretion to find a consumer contract to be unfair under para (c) if it imposes obligations or liabilities on a party which are not reasonably necessary to protect the interest of any other party, and under para (d) if it excludes or limits the obligations or liabilities of a party to an extent that it is not reasonably necessary to protect his interests. But s 5(2) provides that a court must not find a consumer contract to be unfair solely because (a) it imposes onerous obligations on a party or (b) it does not result in substantial or real benefit to a party, while s 5(3) provides that in determining whether or not a consumer contract is unfair a court must have regard to the interest of both parties. Section 6(1) gives a court discretion to find the actual or anticipated exercise or non-exercise of a power, right or discretion under a consumer contract to be unfair if, under para (b), such exercise or non-exercise is or would not be reasonably necessary to protect the interests of any



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party. But s 6(2) provides that a court must not make such a finding solely because a party affected thereby suffers or may suffer a penalty or forfeiture or a loss or diminution of any right or benefit under the contract. Section 6(3) provides that in determining whether or not the actual or anticipated exercise or non-exercise of a power, right or discretion under a consumer

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contract is unfair a court must have regard to the interests of both parties.

The plaintiffs have not shown why clause 3 of the general conditions were not necessary for the protection of the defendant's interest. Mr *Morris*'s contention runs counter to what was held in the cases referred to above by WESSELS CJ, BAKER J and VAN DER RIET J. In any case, in order to grant the relief under s 4 of that Act, this court must apply the above provisions of ss 5(2) and (3) and 6(2) and (3) before it can find a consumer contract to be unfair. Even if one were to make the assumption that clause 3 could be regarded as having imposed an onerous obligation on the plaintiffs (which it would be most difficult to maintain in this case) it would still have to be shown by the plaintiffs that it was not solely for that reason that the consumer contract was unfair. Further ss 5(3) and 6(3) requires this court to have regard to the interests of both parties. Were this court to accept Mr *Morris*'s contention and to determine that clause 3 of the general conditions is an unfair consumer contract, it would have had regard to the interests of the defendant if a determination were made that clause 3 of the General Conditions to be an unfair consumer contract. This would have meant that this court would have taken the plaintiffs' interests only into account.

In *Norwich Union Fire Insurance Society Ltd* v *South African Toilet Requisite Co Ltd* 1924 AD 212 SOLOMON J said at 216:

> ``It is trite law that a strict compliance with the terms of a warranty is a condition precedent to the incidence of liability. When once, therefore, its meaning has been ascertained, a warranty must be exactly complied with.''

In the circumstances, it has been established by the defendant that there has not been strict compliance with the terms of clause 3 of the general conditions by the plaintiffs. The plaintiffs were in breach of the Assets All Risks Policy of Insurance.

By reason of the foregoing the plaintiffs have not proved their claim. In the result the order which I make is that the plaintiffs' claim be dismissed and judgment be entered for the defendant with costs of suit.

*Atherstone & Cook*, plaintiff's legal practitioners

*Granger & Harvey*, defendant's legal practitioners

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## TAONA INVESTMENTS (PVT) LTD *v* FIRE 'N LIGHT VIDEOGRAPHERS (PVT) LTD & ANOR & TWO OTHER CASES 1998 (1) ZLR 494 (HC)

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

Gillespie J

Chamber applications

27 May 1998 Judgment No. HH-80-98

### Flynote

Practice and procedure - summons - service on company - requirements - service on ``responsible

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person'' - what is - service on domestic employee or spouse of director or on lodger at premises owned by defendant - not service on responsible person - service on individual - failure to find person after diligent search - what is required before summons may be left in letter box - return of service - presumption of validity - when arises

## Headnote

Where process is served on a body corporate, it may be served on a responsible person at the body corporate's place of business, or by delivery to a director or the secretary or public officer. A responsible person is not a person whom the deputy sheriff judges to be mature or reliable, but such a person who also has a degree of answerability towards the party to be served. Service on a domestic servant or spouse of a director of a defendant company would not be service on a responsible person, there being doubt as to whether the servant or spouse was answerable to the company. Similarly, service on a lodger at premises owned by a defendant company would not be effective. However, where it was clear that the relevant papers had come to the attention of the relevant people, the deficiency in the service could be condoned.

Service on an individual may be effected by leaving process in a letter box where the person, or a responsible person, cannot be found after diligent search at the person's residence. Sitting in a car at a closed gate and hooting does not constitute a diligent search, and leaving the process in the letter box would not constitute service.

Case cited:

*Fox & Carney (Pvt) Ltd* v *Sibindi* 1989 (2) ZLR 173 (S)

Legislation referred to:

High Court Rules 1971 (RGN 1047/71), rr 39(2)(d) and 40

## Judgment

**GILLESPIE J:** These three matters all came before me as uncontested chamber applications for default judgment. In each of them, the registrar has noted defects in the manner of service of summons on the corporate bodies



GILLESPIE J

cited as co-defendants. The defect in each is similar. In the first, service has purportedly been effected upon both defendants in the following manner, as stated on the deputy sheriff's return of service:

> ``Served on Mrs Majana, domestic worker for second defendant who accepted service on behalf of first defendant at the registered office.''

In the second case, summons was:

> ``Served on Mrs Muza, wife for first defendant's director at place of business.''

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Summons in the third matter was served by:

> ``Handing a copy thereof to Kazembe Gunda, a responsible person, a lodger, at No. 2641, ZMDC personally, who advised that the house is owned by the defendant and that he no longer does business at Stand 1183, Pfupajena, Chegutu.''

The registrar complains that in each case, compliance with the High Court Rules is either doubtful or absent.

The service of process is dealt with in orders of the High Court Rules 1971. The manner of service generally is provided for in r 39, the relevant paragraph of which reads as follows:

> ``(d) in the case of process to be served on a body corporate -
>
> (i) by delivery to a responsible person at the body corporate's place of business or registered office; or if it is not possible to serve the process in terms of subparagraph (i), by delivery to a director or to the secretary or public officer of the body corporate.'' 1(113)

The structure of this rule is perfectly clear. Provision is made both as to the place where service may be effected and as to the person upon whom service is to be carried out. Where service occurs at the body corporate's place of business or registered office, then that service must be on a responsible person but need not be on a director. Where service is effected elsewhere than at those places, then that service must take the form of delivery of process to a director or to the secretary or public officer.

Two questions do nevertheless arise from this rule. The first relates to the meaning of the expression ``responsible person''. This expression could, on the face of it, be taken as meaning any person of an age and condition to discharge a responsibility. Or it could mean more. It could mean a person bearing a responsibility towards the party upon whom service is intended. In the context of the rule, it must mean the latter. Service could not properly be effected upon any of those notional *dramatis personae*: the reasonable person; the officious bystander; the good Samaritan or any other, unless that person had some legal duty towards the prospective party to pass on the process. Otherwise anyone would have authority to accept service on behalf of another, provided that he or she happened to be passing by the relevant





address for service. Put in other words, what determines whether a person is responsible in terms of the rule is not solely the deputy sheriff's assessment of that person's maturity or reliability, but also a degree of answerability, on the part of the person to whom the process is delivered, towards the party to be served.

The second question is whether service, when effected away from the company's registered office or place of business, must be on the director, secretary or public officer personally or may be made to some responsible person at the director's home, for instance. The answer to that is obvious. It is that the rules make no provision for service on the director or other official in any manner other than upon the director himself. The rule requires ``delivery to the director'' and only delivery to the director, secretary or public officer will do.

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Having stated clearly the rule pertaining to service of process upon a body corporate, one further principle must be expressed in order to give balance to the question. It is that the deputy sheriff is an officer whose return is presumptive proof of the regularity of the service that it reports. 2(114) In order for this presumption to arise, of course, the return must be valid on the face of it. Thus it must, for instance, state that service has been effected to an identified person, whose responsibility to the company to be served is stated, at premises which are named and identified as the registered office or place of business. That being done, the return will be accepted at face value and the burden will fall on a defaulting party to challenge the validity of service in due course. Where the return of service of a summons is not sufficient on the face of it, however, it will be queried even, perhaps one should say especially, where no appearance to defend is entered.

There is, of course, a discretion inherent in the court to condone a departure from the Rules and to accept a service that is technically deficient. This is a discretion that can only be exercised where one can be satisfied that the process must have come to the attention of the relevant person. To assist the court in exercising this discretion, where a return of service is questionable, or omits relevant and indisputable matter, there is nothing to prevent the plaintiff's attorneys from supplementing the application for default judgment. This may be done by way of an affidavit supplying any omission from the return of service or amplifying any questionable feature of service.

Applying these principles to the three queries raised by the registrar, one concludes as follows. In the first case, service on the body corporate, the first defendant, is technically inadequate. Service was purportedly effected upon the first defendant, the company, by delivery of the summons to a domestic



GILLESPIE J

worker employed by the defendant of the second defendant, a director of the company, at his own residence, which residence, the summons shows, also happens to be the registered office, although not the place of business, of the first defendant. At the same time, process in respect of the second defendant was also delivered to the domestic worker, thus purportedly effecting service on the second defendant as well.

On the test which I have enunciated two queries arise. Both relate to whether the domestic worker is a ``responsible person''. There may first be some theoretical doubt as to her reliability. This doubt affects service in respect of both defendants. It is a point upon which the deputy sheriff's return would normally be regarded as persuasive. Should that officer state that the person to whom he handed the returns was a ``responsible person'' then it would be presumed that he were correct. In this case, he has not described the person as responsible. He should have if he were being dutiful. Nevertheless, it would be unduly technical to reject the service on that ground alone. For this reason the court normally accepts such service, assuming that the deputy sheriff would properly have discharged his obligation to serve upon a person apparently reliable.

Secondly, there is doubt as to whether the domestic worker is responsible, in the sense of

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answerable, to the company. She is obviously answerable to the individual director who employs her, but one cannot hold her answerable to the company without blurring the separate legal status of the company. This consideration is sufficient to outweigh the presumption of regularity arising from the deputy sheriff's return. On the face of the return, the person to whom process for the first defendant was delivered does not seem to be responsible in terms of the rule.

The conclusion to be reached is that the return of service, although lacking in particularity, appears to disclose good service in respect of the individual director. In the absence of anything further, however, it is technically defective in respect of the company. I think it would, however, be unduly punctilious in the circumstances of this case to withhold judgment. I am prepared to condone the technical deficiency in service because it seems tolerably clear that the relevant papers have come to the attention of the relevant people. I will therefore order judgment in terms of the summons. Attorneys must, however, expect that defects of this sort might well result in judgment being refused pending proper service of summons.

In the second matter, the service is similarly defective. The process for the first defendant, the company, was delivered to the wife of the second defendant, a director, at the company's place of business. There is nothing in the return of service to show in what capacity the wife was present at the company's premises nor whether she is responsible to the company at all.

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GILLESPIE J

While it may be that she has some status in the company that is not necessarily so. If the only factor stated by the deputy sheriff as qualifying her to accept service (ie the fact that she is married to a director) does not in fact qualify her, then no presumption of regularity can arise. On the face of the return, she has no capacity to accept summons for the company.

Curiously enough, the deputy sheriff purported to effect service on the director himself, on the same day, as his return says:

> ``by affixing in a letter box since there was no reply from hooting.''

This occurred at the director's residence. It is difficult to see why, if the officer was at the place of business, he could not simply have left both sets of process with a responsible person at the company premises. One wonders whether the duplication was a calculated attempt to increase the day's income. Such an attempt would be reprehensible; if the deputy sheriff can curtail costs he ought to do so.

In passing, I must say that this manner of service on the individual is most questionable. The rules permits of service by leaving process in a letter box only where -

> ``(a) the person upon whom it is to be served keeps his residence ... closed and thus prevents the process from being served; or
>
> (b) the person seeking to effect service of any process is unable, after diligent search at the residence, ... to find that person or a responsible person ...'' 3(115)

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There is nothing in the return of service that justifies the assumption that the director was preventing service by keeping his residence closed nor that the deputy sheriff made diligent search. Sitting in a car at a closed gate, hooting impatiently, does not constitute diligent search. Certainly, the combined questionable features in these two returns cause one to wonder whether the duty of service of process is always being conscientiously discharged.

In any event, in this case I can see no good reason to condone the irregularity that I have identified and I would therefore refuse judgment. The plaintiff's attorneys will have to ensure proper service of summons and make a fresh application for default judgment. The costs entailed in this wasted application and in the defective service are not to be borne by the defendant. The plaintiff must bear these unnecessary wasted costs.

In the third case, the company is the only defendant. Service was purportedly effected by delivering process to a person identified as a lodger at premises reportedly owned by the defendant. These premises are neither the place of business nor the registered office of the company. The lodger is not a responsible person in terms of the rules. Not only was the assistant deputy

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GILLESPIE J

sheriff in error in attempting to effect service as he did, but also the plaintiff's attorneys were at fault in applying for default judgment on the basis of this return and certifying process to have been duly served. The error in this matter is significantly greater in degree than the error in the second case; in the latter the attorneys at least would have had some excuse for failing to note the deficiencies. The attorneys in this instance cannot claim such an excuse; there appears to have been a failure to read the return of service. It seems sufficiently blameworthy to justify an order that the attorneys should recover no fees for the defective application. That order might remind attorneys of the need to take care in considering returns of service and certifying proceedings to be in order when they are not.

In the result, in Case No. HC-9741-97, I order judgment for the plaintiff against the first and second defendants jointly and severally, the one paying the other to be absolved, in the sum of $23 117.24 together with interest thereon at the prescribed rate from 4 March 1997 to the date of payment in full and costs of suit.

In Case No. HC-462-98, judgment is refused and the plaintiff is to bear the wasted costs of the application for default judgment dated 17 February 1998 and of the attempts at service of process against both defendants on 3 February 1998.

In Case No. 488/98, judgment is refused and the plaintiff is to bear the wasted costs of the application for default judgment dated 17 February 1998 and of the attempts at service of process dated 29 January 1998, provided that Messrs Winterton Holmes and Hill shall recover no fees from the plaintiff in respect of the application for default judgment.

*Gill, Godlonton & Gerrans, plaintiff*'s legal practitioners (case 1)

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*Gollop & Blank, plaintiff*'s legal practitioners (case 2)

*Winterton Holmes & Hill*, plaintiff's legal practitioners (case 3)

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## ZIMBABWE ELECTRICITY SUPPLY AUTHORITY *v* DERA 1998 (1) ZLR 500 (SC)

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

McNally JA, Ebrahim JA & Korsah AJA

Civil appeal

19 & 28 May 1998 Judgment No. S-79-98

### Flynote

Employment - contract - termination - dismissal - onus - allegation that employee guilty of theft - not necessary to prove guilt beyond reasonable doubt

Evidence - onus - difference between civil and criminal cases - rationale for - reason why higher standard of proof required where legal practitioner being disciplined

### Headnote

The respondent was an employee of the appellant. He was charged with dishonesty, in contravention of the appellant's code of conduct, before a disciplinary committee. The committee found him guilty as charged and ordered his dismissal. An appeals committee dismissed the respondent's appeal, but the Labour Relations Tribunal upheld it, on the grounds that the appellant had to prove the respondent's guilt beyond reasonable doubt, not merely on the balance of probability. The Tribunal also found, on the facts, that the respondent's version was not only possible but probable. On appeal to the Supreme Court:

*Held*, that in a civil case the standard of proof is never anything other than proof on the balance of probabilities. The reason for the difference in onus between civil and criminal cases is that in the former the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. In a criminal matter, on the other hand, the trial is an attack by the State, representing society, on the integrity of an individual. The main concern is to do justice to the accused. If the prosecution fails, the State does not lose.

*Held*, further, that the analogy of cases involving the disciplining of lawyers, where a higher standard of proof is required before a lawyer may be struck off, is incorrect. In such cases, the Law Society is acting as a guardian of the public interest, acting more like the State in a criminal trial than like an employer in a dispute with an employee. There is no need to balance competing interests.

*Held*, further, on the facts, that the case against the respondent was proved not only on the balance of probabilities but beyond reasonable doubt.

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Cases cited:

*B* v *P* 1991 (4) SA 113 (T)

*Bater* v *Bater* [1951] P 35

*Blyth* v *Blyth* [1966] 1 All ER 524 (HL)



McNALLY JA

*Copper Trading Co (Pvt) Ltd* v *City of Bulawayo* 1997 (1) ZLR 134 (S)

*Hornal* v *Neuberger Products Ltd* [1957] 1 QB 247 (CA)

*Industrial Steel & Pipe Ltd* v *Sengeredo* S-128-97

*Khala* v *Min of Safety & Security* 1994 (4) SA 218 (W)

*Khaweja* v *Sec of State* [1983] 1 All ER 765 (HL)

*Mugabe & Anor* v *Law Society of Zimbabwe* 1994 (2) ZLR 356 (S)

*Paddock Motors (Pty) Ltd* v *Igesund* 1976 (3) SA 16 (A)

*Pitluk* v *Law Society of Rhodesia* 1974 (2) RLR 245 (A)

## Case Information

*P Nherere*, for the appellant

*J C Andersen SC*, for the respondent

## Judgment

**McNALLY JA:** I will speak of the parties as ZESA and Dera. Dera worked as a driver for ZESA. He was found early on the morning of 10 November 1995 driving a motor vehicle carrying four tyres worth $10 340 stolen from ZESA's central garage at Ardbennie.

As a result he was charged before ZESA's disciplinary committee with dishonesty in contravention of s 7(1)(j)(i) of the ZESA Code of Conduct, that is to say:

> ``taking and converting, or attempting to take and convert, to one's own private use, property or moneys belonging to the Authority, or in its lawful possession.''

The proceedings which took place on 15 May 1996 seem to have been conducted with admirable fairness. Dera and his lawyer were present. His defence was that he was innocently performing a service for one of the security guards, Christopher Nyamowa, who had asked him to carry his four tyres to Matlock Service Station for delivery to one Philip.

The evidence of the first witness, a ZESA employee, was that Dera had required four new tyres for a horse and trailer on 8 November 1995. A check was made and it was confirmed they were

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needed. The tyres were ordered, and they arrived late on 9 November 1995. They were stored temporarily in the tyre bay. The following morning the security guards were found at about 7 am driving Mr Dera's truck loaded with those four tyres. The guards were enquiring whether these tyres were missing from stock. At the same time, a report was received that the tyres were missing from the tyre bays.

The second witness was the already mentioned Christopher Nyamowa, a security guard. He said Dera had approached him on 6 November 1995 with a proposal to ``make money'' for Christmas. The idea was that he would let Dera into the ZESA premises and allow him to remove certain goods.

Christopher spoke to his fellow guard, Richard Jim, and they decided to consult their head office. They were advised to play along with the proposal. On the 9 November 1995, they were again approached by Dera and they agreed to co-operate the following morning at 6 am. They cleared this with Head Office and their immediate supervisor Mr Chibaya. It was arranged that



two other guards would park their car just outside the premises (presumably in readiness to give chase). He let Dera in as arranged and shortly thereafter Dera came out with the four tyres loaded on to his vehicle. He managed to avoid the other two guards' car and a chase began. He did not see the end of the chase.

In cross-examination, he denied assisting Dera in loading the vehicle. He was cross-examined about whether he had not known Dera previously, and in this context he was apparently unsatisfactory in his knowledge of the Makoni district where he claimed to have grown up.

The next witness, Richard Jim, told virtually the same story. He too was cross-examined as to whether they were not involved in the scheme for their own profit. He denied it.

The fourth witness, Mr Togowa, was a corporal employed by Chitken Security. He confirmed that Christopher and Richard had reported Dera's plan to the security company management, and he and another guard had, on instructions, parked outside the premises. Dera had emerged with the tyres, avoided their blocking car, and driven off at high speed. They gave chase, caught him and took him to Marlborough Police Station. He had tried to bribe them. He explained that they had handcuffed Christopher and Richard to cover-up their part and to ``fool'' Dera. That was their *modus operandi*.

Dera in his evidence simply re-affirmed what he had said in his defence outline.

The Disciplinary Committee found, by a majority vote, that Dera was ``guilty as charged''. After hearing evidence in mitigation it decided that the offence be classified ``Category D'' warranting dismissal, and ordered his dismissal with effect from the date of his suspension.

There was an appeal to the Appeals Committee which was dismissed on 12 July 1996. The record of those proceedings reveal that the point was raised by Mr Mutezo that the standard of proof should have been that in criminal cases and not that in civil cases. He relied on *Mugabe*

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*& Mutezo* v *Law Society of Zimbabwe* 1994 (2) ZLR 356 (S). That submission was rejected. The Appeals Committee found it was ``highly probable'' that Christopher had been involved in the scheme, in a minor role, but that Dera was guilty on a balance of probabilities and the punishment of dismissal was justified.

This matter came before the Labour Relations Tribunal. The Deputy Chairman found that there was no evidence of the existence of a trap, since neither the ZESA authorities nor the police had any foreknowledge of it. He found the security guards to be totally unreliable. He found as a matter of law, apparently with the consent of both lawyers, that ZESA had to prove an allegation of a criminal offence beyond any reasonable doubt. He found the





appellant's innocent version not only possible but probable. He allowed the appeal.

Mr *Nherere*'s first task on appeal to this court was to apply to amend the notice of appeal. He sought to introduce an entirely new notice. The application was opposed by Mr *Andersen*. We reserved judgment on the application and proceeded to hear argument on the merits.

We propose to allow the amendment for the following reasons:

1. The first amendment sought to raise squarely the point about the appropriate standard of proof. That is a matter of law of considerable importance. It is one which had been disputed, not before the Tribunal, but earlier. Matters of law may always be raised on appeal with the leave of the court, even if not disputed below. The test is prejudice and there is no prejudice in the present case. Compare *Copper Trading Co (Pvt) Ltd* v *City of Bulawayo* 1997 (1) ZLR 134 (S) and *Paddock Motors (Pty) Ltd* v *Igesund* 1976 (3) SA 16 (A) at 23D-24G.

2. The second amendment effectively puts into proper form the points already made in the original notice. By alleging simply that the Tribunal erred, the original notice did not comply with the requirement that appeals from the Tribunal may only be on matters of law. By relying on the same alleged errors, but alleging now that the decision was ``grossly unreasonable'' the appellant brought itself within the requirements of the statute without altering the factual basis of its appeal.

THE STANDARD OF PROOF

It is a startling, and in my view, an entirely novel proposition, that in a civil case the standard of proof should be anything other than proof on a balance of probabilities. The reason, I have always understood, why in a criminal case proof beyond reasonable doubt is required, is that the loss of a criminal case can result in death by hanging, incarceration, or at the least, the branding of a person as a criminal or convict. A criminal trial is an attack by the State, representing the whole of society, upon the integrity of an individual. Thus a person convicted of a crime is marked as one whose conduct stands condemned by society.

A civil case, on the other hand, is merely a dispute between individuals. The loss of such a

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case, however ruinous in terms of money or property, loss of employment or loss of face, is not a judgment by society as a whole, but simply a resolution of the dispute between the parties.

Moreover, the parties in a civil dispute are equally interested parties, in the sense that each one seeks relief. A claims money from B, B claims an order that he owes nothing; A wishes to dismiss B, B wishes to remain employed.



McNALLY JA

In a criminal matter the State does not stand to gain or lose by the outcome of the trial. So, if B is acquitted of theft, the State does not suffer. But if A is forced to continue to employ B whom it has accused of theft, A does indeed suffer if B, who is in fact a thief, is found not guilty of theft.

So in a criminal case one is primarily concerned with doing justice to the accused. In a civil case one is concerned to do justice to each party. Each party has a right to justice, and so the test for that justice has to balance their competing claims. Hence the ``balance of probability'' test. ZESA, in the present case, has a right not to be forced to employ a thief; Dera has a right not to be dismissed unjustly. The law must balance those rights.

This understanding is reinforced by authority. Hoffmann & Zeffertt *SA Law of Evidence* 4 ed at p 528 say categorically:

> ``There are no exceptions to the rule that all issues in a civil action are decided upon a preponderance of probabilities.''

Joubert *The Law of South Africa* vol 9 para 573 p 340 says equally unequivocally:

> ``In civil proceedings, proof is furnished upon a preponderance of probability and this is the case even when allegations of criminal or immoral conduct are to be proved.''

These statements are fully supported by the cases cited by the learned authors, and more recently by *dicta* in such cases as *B* v *P* 1991 (4) SA 113 (T) at 115F-G (a Full Bench decision), and *Industrial Steel & Pipe Ltd* v *Sengeredo* S-128-97.

I am satisfied that the concession as to the law in this regard before the Tribunal was entirely wrong. Reliance was placed upon cases involving the disciplining of lawyers before disciplinary tribunals such as *Mugabe & Mutezo* v *Law Society of Zimbabwe supra* at 365B-C; and *Pitluk* v *Law Society of Rhodesia* 1974 (2) RLR 245 (A). The fact that, in such proceedings, a higher standard of proof is required, does not lead to the conclusion that a higher standard of proof is required in all disciplinary proceedings.

There is a fundamental distinction. When the Law Society is disciplining one of its members, it is acting as a guardian of the public interest. It is not itself a directly interested party in the sense that an employer is. It is acting more like the State in a criminal trial, than like an employer in a civil dispute with its employee. Its interests do not need to be protected in the same way as those of an employer. There is no need to balance competing interests, as there is in a dispute between employee and employer.

I do not think it necessary, in this judgment, to enter into the debate over what has been called

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``variable standards of proof''. In *Bater* v *Bater* [1951] P 35 at 36-7 LORD DENNING said:

> ``It is of course true that by our law a higher standard of proof is required in criminal cases



McNALLY JA

> than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard ... So also in civil cases the case must be proved on a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion.''

See also *Hornal* v *Neuberger Products Ltd* [1957] 1 QB 247 (CA) at 262-3; *Blyth* v *Blyth* [1966] 1 All ER 524 (HL); and *Khaweja* v *Secretary of State* [1983] 1 All ER 765 (HL) at 982j *et seq*. And compare *Khala* v *Minister of Safety & Security* 1994 (4) SA 218 (W) at 228D-H.

*Hoffmann & Zeffertt op cit* say rather stiffly at 529:

> ``To speak of variable standards of proof is again to confuse probabilities with the quantity of evidence needed to create them.''

I am inclined to go back to LORD DENNING, who said, also in *Bater supra*:

> ``The difference of opinion ... may well turn out to be more a matter of words than anything else.''

The Tribunal therefore erred as to the law, and misdirected itself, in requiring ZESA to prove its allegations against Dera beyond a reasonable doubt. The first ground of appeal succeeds.

WAS THE FINDING GROSSLY UNREASONABLE?

However, in coming to its conclusion, the Tribunal found that the appellant's evidence was not just reasonably possible, but probable. The second ground of appeal is that that finding was grossly unreasonable.

I have to say, with the greatest of respect, that I am entirely in agreement with Mr *Nherere* on this point. In my view, the evidence against Dera was such that I would not hesitate to say that his guilt was proved, not only on a balance of probabilities but even beyond a reasonable doubt were that standard of proof required (which it is not).

[The learned judge considered the evidence against the respondent and concluded:]

I am satisfied, on any test, that the charge of misconduct against Dera was proved. I am equally satisfied that it warranted categorisation in the worst category, namely category D, and therefore warranted dismissal.



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McNALLY JA

In the result, the appeal succeeds, and is allowed with costs. The decision of the Labour Relations Tribunal is set aside. In its place the following order is substituted:

> ``The appeal is dismissed with costs and the decision of the Appeals Committee to dismiss the appellant is confirmed.''

**EBRAHIM JA:** I agree.

**KORSAH AJA:** I agree.

*Ziumbe & Mutambanengwe*, appellant's legal practitioners

*Mutezo & Partners*, respondent's legal practitioners

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## MATIDA *v* CHAIRMAN, PSC & ANOR 1998 (1) ZLR 507 (HC)

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

Adam J

Civil application

4 June 1998 Judgment No. HH-90-98

### Flynote

Legal practitioner - conduct and ethics - duty to opposing practitioner - failure to point out non- compliance with High Court Rules by opposing practitioner - delays caused thereby may be met by order that no fees be charged

Practice and procedure - citation - citing of respondent where respondent is a legal persona - *Public Service Commission - Commission itself should be cited, not Chairman - record - review of proceedings of administrative tribunal - tribunal required to lodge original record of proceedings, not a certified copy thereof*

### Headnote

In a case where the applicant is seeking to have the decision of the Public Service Commission reviewed, the Public Service Commission must be cited as the respondent and not the Chairman of the Public Service Commission.

In terms of the High Court Rules, the respondent is obliged to lodge with the Registrar the original record of the proceedings in question. This rule is not complied with by the lodging of a certified true copy of the original record. In the past, the Public Service Commission had frequently failed to comply with this requirement and in the future the court might have to resort to awarding costs against those involved in the proceedings of the Public Service Commission (be they the Chairman or members of the Public Service Commission itself) when a hearing is not held in the High Court due to the failure to abide by the Rules.

The legal practitioner for the applicant should have realised that without the proper record of the

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proceedings, review proceedings would not be possible. Legal practitioners owe a duty to their clients to see to it that proceedings in court are conducted expeditiously and in accordance with the rules of court. Where the respondent has failed to comply with the rules, the applicant's legal practitioner should write to the other side about this and, if necessary, thereafter seek the intervention of the court to compel compliance. Failure by the legal practitioner to do this may result in the court making an order, where appropriate, that the legal practitioner should not charge the client for the appearance in court where no hearing as a result takes place.

Cases cited:

*Christian Care* v *Mapedzanhamo Co-op* 1996 (2) ZLR 323 (H)

*Maxwebo* v *Chrmn, PSC* HH-125-97

*Muzuregi* v *Muchekwa* 1992 (1) ZLR 58 (H)

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ADAM J

Legislation considered:

High Court Rules 1971 (RGN 1047/71), rr 256 and 260

## Case Information

*S Nduna*, for the applicant

Mrs *J Zindi*, for the respondent

## Judgment

**ADAM J:** The procedure for review proceedings is laid down in Order 33 of the High Court Rules. This provides in r 259 that such proceedings must be instituted within 8 weeks of the termination of the suit, action or proceeding in which the irregularity or illegality is alleged to have occurred. Rule 256 states as follows:

> ``Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected.''

Rule 257 requires that such a court application state shortly and clearly the grounds upon which the proceedings are to be set aside or corrected and the exact relief that is sought. Further, the provisions of Order 32 that relate to court applications apply to review proceedings. Rule 260 indicates that where the proceedings concern those of an inferior court, the clerk of that court, and for other proceedings, the tribunal, board or officer, must *within 12 days* of the date of the service of the court application lodge with the Registrar of this Court the *original* record together with two typed copies, which copies must be certified to be true and correct copies.

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Order 32 in r 227(l)(c) requires that every written application, notice of opposition and supporting and answering affidavits, including every annexure, must have each page number consecutively. Rule 228(1) provides that, where a party is represented by a legal practitioner at the hearing, before the matter is set down for hearing the legal practitioner must first file, with the Registrar, heads of argument and immediately afterwards deliver a copy of those heads of argument to every other party and file with the Registrar proof of such delivery. Rule 238(1a) explicitly provides that any matter to which r 238(1) applies shall not be set down unless the legal practitioner has filed heads of argument, and also proof of service of those heads of argument, on the other party and has paginated the application in accordance with r 227(1)(c). It needs to be reiterated, moreso as r 238(2b) provides that where heads of argument are not filed within the time specified the party concerned shall be barred, that legal practitioners must comply strictly with r 238 - *Muzeregi* v *Muchekwa* 1992 (1) ZLR 58 (H); *Christian Care* v *Mupedzanhamo Co-operative* 1966 (1) ZLR 323 (H).

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ADAM J

Mr *Nduna* for the applicant has conceded that in this matter the pages have not been numbered consecutively.

Here, the court application was filed on 11 November 1997. It is indicated in the certificate of service (by a person in the employ of a legal practitioner) filed in this court (which incidentally is not in accordance with Form 7 since it is not certified by a legal practitioner) that the application was delivered on a responsible person at the Public Service Commission on 11 November 1997.

Now that court application, firstly, cites the Chairman of the Public Service Commission as the first respondent. Yet, the annexure to the founding affidavit gives the Public Service Commission as the decision-maker. The wrong party has been cited. Rule 256 surely is concerned with the decision or proceedings of the legal *persona*, be that an inferior court, tribunal, board or officer. This means it is that legal *persona* whose decision or proceeding has to be reviewed that must be cited and the application must be directed and delivered, in the case of the tribunal or board, to the chairman of that body. See in this regard *Maxwebo* v *Chairman, Public Service Commission* HH-125-97 at p 6-7 where SMITH J said:

> ``Before concluding, I wish to make an observation on the party cited as respondent. The Chairman of the Public Service Commission was so cited. Although exception was not taken thereto, I consider that it was improper to cite him as respondent. Section 74 of the Constitution establishes the Public Service Commission which consists of the Chairman and not less than two and not more than seven other members. Any findings, rulings or decisions of the Public Service Commission are those of that body and not of the Chairman. Accordingly, the Chairman of the Public Service Commission cannot do anything in the name of the Commission if the majority of members do not agree with him. The distinction is illustrated by the order sought by the applicant. The draft order states that the respondent's decision to find the applicant guilty of misconduct should be set aside. However, the finding of guilty was not a decision of the respondent. It was a decision of the Public Service Commission. I therefore consider that it was improper to cite the Chairman as respondent. The Public Service Commission should have been cited as respondent.''

Secondly, on 17 March 1998 was filed what is described as ``certified true copy of the original'' of the record. This is clearly not in accordance with r 260. This court has on many occasions

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castigated the Public Service Commission for its disdain of the Rules of Court. It has been the experience of this court that r 260 is generally not complied with and only in very exceptional cases has an effort been made to comply with the High Court Rules. In future, this court may have to resort to awarding costs personally against those who are (be they the Chairman or members of the Public Service Commission) involved in the proceedings or decision-making when a hearing in this court is not held due to a failure to abide by the High Court Rules.



ADAM J

Thirdly, the first page of the so-called record contains a ``Minute Sheet'' which has on it in type-written form ``The Chairman'' and in handwriting what appears to be the words ``Discuss 2/9/97'', then ``Commissioner Sadza'' and in handwriting ``away,'' then ``Commissioner Mugamba'' and in handwriting ``Agree 4/9/97'' then, ``Commissioner Mumbengegwi'' and in handwriting ``Agree 28/8'', then ``Commissioner Chigwedere'' and in handwriting ``Agree 1/9/97'', then ``The Secretary'' in handwriting ``supported 26/08/97'', then ``Legal Adviser'' in handwriting ``Away'', then ``Mr Chidzanga'' and in handwriting ``supported 25/8/97'' and then ``Mrs Zembe'' and in handwriting ``supported''. On the third page, in type-written form, is given the name ``Mrs N P Kaiyo, Discipline and Staff Relations Section, 21 August 1997''. These three type-written pages appear to be authored by Mrs N P Kaiyo. On the third page, in handwriting, is recorded ``Commission decision on 9/9/97''. Attached to the foregoing ``Minute Sheet'' are photocopies of the whole Court Application, various letters with dates ranging from 11 November 1996 to 13 October 1997, Exhibits A-G and other documents. If the foregoing is being put forward as the ``record'', there is certainly a need for the Public Service Commission to provide pertinent information such as where the decision on 9 September 1997, was made and at what time, who was present and who, if any one, kept a note or record of this. It must not be forgotten that decisions or proceedings that include persons who are not members of the Public Service Commission in the process under which the proceedings are conducted or in the decision making, run the risk of having the proceedings being set aside or the decision being nullified.

Finally, although the applicant's heads of argument were filed on 27 February 1997 and served on the other party on the same date, the legal practitioner responsible should have realised that without a ``record'' of the proceedings or any explanation filed in this court about it, review proceedings would not have been possible. In the past, this court has observed that legal practitioners owe a duty to their clients to see to it that proceedings in court should be conducted expeditiously and in accordance with the Rules of Court, and to that end, where a party has failed to comply with the Rules of Court, they should write initially to the other party and, if necessary, thereafter to seek the intervention of this court to compel compliance. Failure on the part of legal practitioners for the applicant to do this may result in this court making an order, where appropriate, to the effect that the legal practitioner concerned not to charge his client for the appearance in court where no hearing of the matter is held.

In the light of the foregoing, it is once again most regrettable but this court has no other option but to order that the applicant (if so minded) amend his court application by citing the proper respondent in this matter; that the

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ADAM J

Public Service Commission, within the time provided under r 260, thereafter file with the Registrar the original record, together with typed copies, certified as true and correct copies and that there will be no order as to costs. The Registrar is requested to ensure that a copy of this judgment is sent to every member of the Public Service Commission.

*Nduna & Partners*, applicant's legal practitioners

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



## CITY OF MUTARE *v* MATAMISA 1998 (1) ZLR 512 (SC)

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

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

14 May & 8 June 1998 Judgment No. S-80-98

### Flynote

Employment - contract - termination - dismissal - town clerk - approval of Local Government Board required for dismissal of town clerk, but not that of Minister of Labour

Local authority - officer - town clerk - termination of employment - dismissal by council - lawful provided approval of Local Government Board obtained - payment of salary and other benefits - whether may be withheld beyond six months from date officer is suspended

### Headnote

The respondent, who was town clerk of Mutare, was suspended from duty on 14 February 1996 without pay, pending investigation of allegations of misconduct. After the investigations were complete, the council resolved, on 10 June 1996, to dismiss the respondent and sought the approval of the Local Government Board to do so. That approval was granted on 4 October and notified to the council on 28 October. The respondent challenged the legality of his dismissal, arguing that, because the council had failed to obtain the approval of the Minister of Labour to dismiss him, the dismissal was null and void. He also sought an order for the payment to him of all salary and benefits as from the date of suspension. The respondent's contentions were upheld in the High Court. On appeal:

*Held*, that s 138 of the Urban Councils Act [*Chapter 28:01*], which requires the approval of the Minister of Labour for a council to fix or alter the conditions of service for its employees, was not applicable to the situation of termination of a contract of service. Discharge was dealt with by s 139.

*Held*, further, that a history of s 139 showed clearly that it was no longer obligatory to obtain the

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prior approval of the Minister of Labour for an urban council to dismiss a senior employee. Instead, the approval of the Local Government Board is required. This Board was constituted as a prestigious and influential body with wide powers and is a body of far superior standing to a labour relations officer. To require the approval of a labour relations officer would mean that the decision of a prestigious body would be taken on appeal before an individual of fairly minor status, which cannot have been the intention of the legislature.

*Held*, further, that the council discharged the respondent within six months of the date of suspension and the suspension remained valid until the date of discharge. A delay by the Local Government Board in approving the dismissal only after the end of the six month period did not mean that the suspension fell away and that the council thereby became liable to pay the respondent's salary and benefits.

Decision of CHINHRNGO J in *Matamisa* v *City of Mutare* 1997 (2) ZLR 122 (H) reversed.

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GUBBAY CJ

Cases cited:

*Gumbo* v *Norton-Selous Rural Council* 1992 (2) ZLR 403 (S)

*Min of Labour & Ors* v *Port Elizabeth Municipality* 1952 (2) SA 522 (A)

Legislation considered:

Urban Councils Act [*Chapter 28:01*], ss 138 and 139

## Case Information

*L T Biti*, for the appellant

*S V Hwacha*, for the respondent

## Judgment

**GUBBAY CJ:** The two substantive issues debated in this appeal, as they were before the High Court, involve pure statutory interpretation. They are whether it is lawful for an urban council to discharge its town clerk from employment without complying with the provisions of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985) (``the Regulations''). And if so, whether an urban council may legitimately withhold payment of salary and other benefits beyond six months from the date of the suspension.

The respondent was employed by the appellant, which I shall refer to as ``the Council'', as its town clerk. On 14 February 1996, the mayor, acting pursuant to s 139(3)(a) of the Urban Councils Act [*Chapter 29:15*] (``the Act''), in writing suspended the respondent from office without pay. The Council then appointed a committee to enquire into the allegations of misconduct contained in the letter of suspension. On 10 June 1996, and consequent upon the

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findings of the committee of enquiry, the Council resolved to discharge the respondent. It sought the approval of the Local Government Board for the discharge in terms of s 139(2) as read with s 123(1)(e) of the Act.

On 4 October 1996, the Local Government Board granted approval for the respondent's discharge and forwarded its written reasons to the Council on 28 October 1996. On the same day, the mayor communicated the decision to the respondent.

In reaching the conclusion that the prior written approval of the Minister responsible for the administration of the Labour Relations Act (shortly, the ``Minister of Labour'') was essential in order to terminate the contract of employment of the respondent, the learned judge relied heavily on the *ratio decidendi* in *Gumbo* v *Norton-Selous Rural Council* 1992 (2) ZLR 403 (S). He considered himself bound by it.

With respect to the learned judge, *Gumbo*'s case was concerned with the question of whether s 63(2) of the then Rural Councils Act (prior to its repeal by the Rural District Councils Act 1988) overrode the provisions of ss 2 and 3 of the Regulations. This court held that whereas special legislation had been



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passed both allowing urban councils (under the erstwhile s 90(9) of the Urban Councils Act [*Chapter 214*] as amended by Act 15 of 1986) to obtain permission for dismissal from the Minister in charge of local government instead of from the Minister of Labour, and making the Labour Relations Act inapplicable to parastatals (by s 18 of the Parastatals Commission Act 1987 - now repealed), no such provisions existed in relation to rural councils (see at 411C-G). In short, the learned judge was mistaken in his belief that he was bound by the judgment. He ought to have paid closer regard to the caution expressed in the opening paragraph, at 405E, to the effect that differently worded statutes may lead to different conclusions.

However, the learned judge did not found his decision solely upon his understanding of *Gumbo*'s case *supra*. He was of the opinion that the intention of the lawmaker in enacting s 139 of the Act was to ensure an absence of conflict between that Act and the Labour Relations Act; and that s 139 provides merely for the different treatment of specific employees by stipulating that senior employees are to be dealt with by the Local Government Board and others by the urban council concerned; its purpose being not to remove all such employees beyond the reach of the Labour Relations Act and Regulations.

In support of the conclusion of the court *a quo* that it was impermissible to discharge an employee of an urban council without recourse to labour legislation, Mr *Hwacha*, for the respondent, referred to s 138 of the Act. He submitted that by providing for a council's inability to fix or alter the conditions of service of its employees without the approval of the Minister of Labour, the legislature was clearly minded not to vest in a council the power to discharge an employee without such approval. Of course, this submission, if sound, will seal the fate of the appeal.

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Section 138 provides as follows:

> ``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*]'' (emphasis added).

The point to be decided therefore is whether the discharge of a council employee constitutes within the meaning of the section a fixing or alteration of the conditions of service of that employee.

The word ``fix'', in the context of ``conditions of service'' and in contradistinction to ``alter'', comprehends finality, certainty, definiteness; to settle, to establish, to make permanent. See *Black's Law Dictionary* 5 ed; *Chambers 20th Century Dictionary* New edition (1983). It signifies the initial setting or establishing of such conditions as, the nature or type of service, the remuneration, the hours of employment, the duration of the



contract, the period of notice required to terminate. The emphasis is upon the creation of the relationship of employer and employee. That this is so, I think, is underscored by the words ``or alter'' which complete the remainder of the phrase.

``Alter'' conveys a change or variation; a modification; but not a change in the whole, or a total replacement. See *Words and Phrases (Legally Defined)* 1984 Supplement. Accordingly, a person whose employment has been terminated on grounds that in law would justify discharge without notice, cannot be said to suffer an alteration in the conditions of his or her service. Alteration also implies a continuation of the bond of employment though under conditions different from those originally settled.

The meaning of the term ``alter the conditions of employment'', as it appeared in s 64(1) of the South African Industrial Conciliation Act 36 of 1937, was considered by the Appellate Division in *Minister of Labour & Ors* v *Port Elizabeth Municipality* 1952 (2) SA 522 (A). In a passage of his judgment, supportive of the meaning I have ascribed to ``alter'', CENTLIVRES CJ said at 533B-G:

> ``The first question that arises is whether the discharge of an employee constitutes within the meaning of subs (1) of s 64, when that subsection is read by itself and without reference to subs (6), an alteration of the conditions of employment of that employee. Mr *Findlay*, who appeared on behalf of the Association, boldly contended that to give notice terminating an employee's contract altogether is simply a more drastic alteration of his conditions of employment than a notice terminating an employee's contract coupled with an offer of re-engagement on new terms. There is no substance in this contention. I agree with Mr *Kinkead-Weekes,* who appeared on behalf of the respondent, that the phrase `alteration of conditions of employment' postulates in regard to the employee or employees concerned a continuation of employment under changed conditions. I also agree with the following remarks of RAMSBOTTOM J in *Muehlendorf & Anor* v *Rand Steam Laundries Ltd* 1945 TPD 317 at p 329:
>
> > `The dismissal of an employee would not ordinarily be described as an alteration of the conditions of his employment; it is the termination of his employment, not a change in the conditions under which he is employed. Technically every alteration of conditions of employment involves the termination of one contract of service and the substitution of another, and so might be said to constitute a discharge and a re-employment of the employee, but I do not think that to dismiss an employee without an offer of

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re-employment ordinarily falls within the meaning of the words to alter conditions of employment.'

It seems to me, therefore, that subs (1) does not apply when an employee is dismissed, whether that dismissal is or is not in breach of his conditions of employment.''

If the legislature had intended to make the discharge of a council employee subject to the restriction provided for in s 138, it could so easily have employed the wording ``fix, alter or terminate the conditions of service of its employees''. This it did not do. Instead it dealt specifically with discharge in ss 139, 140 and 141 of the Act. It made such discharge subject, in the case of



a town clerk or senior employee, to the approval of the Local Government Board, and in respect of other employees, to the approval of the employer council.

It follows that, in my opinion, s 138 of the Act bears no relevance to the question of whether the discharge of the respondent is subject to the approval of the Minister of Labour. What falls for determination is whether such approval is a requirement mandated by s 139 of the Act.

Section 139 was formerly s 90 of the Urban Councils Act [*Chapter 214*], as amended by the Urban Councils Amendment Act 15 of 1986, which came into operation on 4 July 1986. The amendment introduced an important modification in s 90(9), which read:

``Notwithstanding any other law to the contrary, if the consent of the Minister (i.e. the Minister of Local Government, Rural and Urban Development) has been obtained for the discharge of any employee of a council, the council need not obtain the consent of any other Minister or authority.''

As pointed out in *Gumbo*'s case *supra* at 409G-H, the reference to ``any other law to the contrary'' was to the Labour Relations Act which came into effect the previous year, on 15 December 1985; it being clearly understood by the legislature that, in the absence of the provision, the consent of the Minister of Labour would have been required for the discharge of a council employee. Positively stated, the position brought about by s 90(9) was that it became no longer obligatory to obtain the prior written approval of the Minister of Labour. As an alternative option, the approval of the Minister of Local Government, Rural and Urban Development (``the Minister of Local Government'') was made acceptable.

The current Act became law on 22 December 1995. It introduced new provisions in the form of Part IX. The discharge of a town clerk falls within s 139, of which subss (1) and (2) provide:

``(1) Subject to subsection (2) and to the conditions of service of a town clerk, a council may at any time discharge a town clerk -

(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.''

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The discharge of a senior official also requires the approval of the Local Government Board (see s 140(2)).

The Local Government Board - the establishment of which was an innovation - is a body of seven members appointed by the Minister of Local Government in terms of s 116(2) of the Act, of whom:

``(a) one shall be chosen from a list of not less than three names submitted by the Urban Councils Association;



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(b) one shall be chosen from a list of not less than three names submitted by the town clerks;

(c) one shall be chosen from a list of not less than three names submitted by the Municipal Workers' Union;

(d) one shall be a member of the Public Service Commission chosen from a list of not less than three names submitted by the Minister responsible for the Public Service; and

(e) two shall be appointed for their ability and experience in public administration and who are or have been employed by a local authority or the Public Service for a period of not less than five years in a senior post.''

The functions of the Local Government Board are defined in s 123(1) of the Act. They include guidance for the general organisation and control of employees in the service of councils; the need to ensure the wellbeing and good administration of councils' staff; the making of model conditions of service and model regulations stipulating the qualifications and appointment procedures for senior officials of councils; and the approval of the appointment and discharge of senior officials. Section 123(3) provides that the powers of the Local Government Board in the carrying out of an inquiry are to be the same as those conferred upon commissioners in terms of the Commissions of Inquiry Act [*Chapter 10:07*] other than the power to order a person to be detained in custody. Other powers inherited from the Minister of Local Government, albeit in consultation with him and the Minister responsible for finance, are:

(i) the fixing of pensions and other benefits upon termination of service of employees of council (see s 146 compared with s 94(1) of *Chapter 214*);

(ii) the fixing of the contribution by council to any medical aid society, sick fund and funeral expenses (see s 147 compared with s 95(1) of *Chapter 214*);

(iii) the determination of the terms and conditions on which a council may guarantee the repayment of a housing loan made to an employee (see s 148 compared with s 96(1) of *Chapter 214*).

This summation of the status of the Local Government Board underlines, in my view, the intention of the lawmaker to constitute it as a prestigious and influential body with wide powers; one which effectively was to perform the functions previously assigned to the Minister of Local Government. Thus, whereas under the repealed Act it was sufficient to obtain the approval of the Minister of Local Government for the discharge of any employee of a council, that function in relation to a town clerk or senior official has been taken over by the Local Government Board without any indication in the Act that the additional approval of any other Minister or authority is

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required.

Had the intent been other than to give the final say with respect to the discharge of a town clerk to the Local Government Board, the legislature



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would have added a proviso to that effect to s 139(2). The provisos to ss 140(2) and 141(3) deal specifically with the discharge of a medical officer of health and a health inspector. In each, the discharge is subject not only to the approval of the Local Government Board but in addition to the approval of the Minister responsible for health in terms of s 11 of the Public Health Act [*Chapter 15:09*]. It is significant that with a medical officer of health, who is a senior official, and a health inspector, who is an ordinary employee, the provisos do not include the necessity to obtain the approval of the Minister of Labour.

Furthermore, I consider there is merit in Mr *Biti*'s submission that the Local Government Board is a body of far superior standing to that of a labour relations officer. If the validity of the approved discharge of a town clerk or senior official were to go before a labour relations officer for adjudication in terms of the Regulations, it would mean that the decision of a prestigious body of members, reached after the holding of an inquiry, effectively, would be taken on appeal before an individual of fairly minor status. I cannot comprehend such a situation to have been within the intention of the legislature.

These reasons persuade me that the learned judge was wrong in concluding that the discharge of the respondent was unlawful and null and void for the failure to seek the prior written approval of the Minister of Labour.

I turn to the issue of whether the respondent was discharged within six months of 14 February 1996, being the date of his suspension. The answer is dependent upon the meaning to be assigned to s 139(5)(a) of the Act.

It was the Council's contention that the respondent was discharged by it on 10 June 1996 within the six month period. Not so, argued the respondent. The effective date was when the Local Government Board approved the discharge, which was as late as 4 October 1996 - after the six months had elapsed. Accordingly he was entitled to be paid the full amount of his salary or wages and any allowances over the intervening period commencing from the date of suspension.

Although in the light of the finding that the discharge of the respondent was invalid, it was unnecessary for the learned judge to deal with the issue, he nonetheless did so. He upheld the respondent's argument.

Section 139(5)(a) of the Act states as follows:

> ``Where a 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

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after six months has elapsed, whichever occurs sooner."

This provision implies, to my mind, that if the council has decided to discharge a town clerk before the lapse of six months, the suspension remains valid. A contrary construction would lead to the absurdity that tardiness on



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the part of the Local Government Board - a body totally independent of a council and over which a council has no authority - in approving the decision to discharge a town clerk or senior official, made well within the six month period, would make a council liable, without any fault on its part, to meet the salary or wages and allowances during the period of suspension.

It is the council which decides to discharge. If the discharge is not approved the decision of the council falls. The discharge by the council is subject to the resolutive power of the Local Government Board. Accordingly, it is the council which must comply with the six month period and not the Local Government Board. This was clearly the intention of the legislature. When regard is has to the fact that the Local Government Board comprises seven persons with the power of the chairman under s 122(1) of the Act to convene a meeting ``whenever he considers it to be necessary'', it is inevitable that the lawmaker would have been appreciative of the occurrence of some delay between the date of discharge by the council and the date of approval by the Local Government Board.

In the result, I am satisfied that in discharging the respondent from employment the Council complied fully with the requirements of the Act.

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

``The application is dismissed with costs.''

**McNALLY JA:** I agree.

**MUCHECHETERE JA:** I agree.

*Bere Brothers (Mutare)* and *Honey & Blanckenberg,* appellant's legal practitioners

*Kantor & Immerman*, respondent's legal practitioners



## ATTORNEY-GENERAL *v* LAFLEUR & ANOR 1998 (1) ZLR 520 (HC)

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

Blackie J

Application for leave to appeal against acquittal

10 June 1998 Judgment No. HH-94-98

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## Flynote

Appeal - criminal matter - acquittal - appeal by Attorney-General against - acquittal on point of law - what ``point of law'' is - acquittal on facts - what must be shown for appeal to succeed - time limits - appeal must be brought without undue delay

## Headnote

In terms of s 61 of the Magistrates Court Act [*Chapter 7:10*], the Attorney-General may, with the leave of a judge of the High Court, appeal against the acquittal of the accused in the magistrates court if he is dissatisfied with the judgment on a point of law or if the acquittal resulted from a view of the facts that could not reasonably be entertained. The onus is on the Attorney-General to establish that the application falls within the ambit of s 61 of the Act.

Where the ground of the application is dissatisfaction with the judgment on a point of law, the point of law must relate to a decision made by the trial court on a legal issue relevant to the acquittal which the Attorney-General believes to be wrong and on which the trial court based its acquittal. It cannot simply be a complaint that the magistrate failed to apply his mind to the law or, if he did apply his mind to the law, he failed to apply that law to the facts.

Where the ground of the application is that the acquittal resulted from a view of the facts that could not reasonably be entertained, the Attorney-General must establish that the inference drawn from the primary facts is so inconsistent with logic and commonsense that the judgment is perverse. It is not enough to establish that the trial court made mistakes or was negligent in evaluating the evidence.

Although no time period is laid down for bringing an application in terms of s 61 of the Act it is clear that this drastic power to appeal against an acquittal must be exercised reasonably and in the interests of justice and that the application must be brought without undue delay.

In the present case the High Court found that the applicant had failed to establish that the case fell within the ambit of s 61 of the Act. Additionally, in the particular circumstances of this case, given the lengthy delay in bringing the application and the considerable prejudice caused to the respondent as a result of this undue delay, it was not in the interests of justice to allow the Attorney-General to proceed with the appeal.

Cases cited:

*A-G v Paweni Trade Corp (Pvt) Ltd* 1990 (1) ZLR 24 (S)

Legislation considered

Magistrates Court Act [*Chapter 7:10*], s 61

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**1998 (1) ZLR p521**

BLACKIE J

## Case Information

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*R Goba*, for the Attorney-General

*D Matyszak*, for the first respondent

*A A Musunga*, for the second respondent

## Judgment

**BLACKIE J:** The respondents were brought to trial before the Chief Magistrate, sitting in the Regional Magistrates Court, on two counts of contravening the Dangerous Drugs Act [*Chapter 15: 02*]. The counts were contravening s 8 as read with s 19(1) of that Act - the unlawful importation of dagga - and contravening s 9(b) as read with s 19(1) of the same Act - the unlawful possession of dagga. After a lengthy trial, the respondents were convicted on the first count and acquitted on the second. The applicant brings this application, in terms of s 61 of the Magistrates Court Act [*Chapter* 7:10], (the Act) for leave to appeal against the acquittal of the respondents on the second count. Section 61 provides for an appeal by the Attorney-General to the High Court, with the leave of a judge of the High Court, if he -

> ``is dissatisfied with the judgment of a court in a criminal matter -
>
> (a) upon a point of law; or
>
> (b) because it has acquitted or quashed the conviction of any person who was the accused in the case on a view of the facts which could not reasonably be entertained;''

The applicant states that he is dissatisfied both on points of law in the acquittal of the respondents and because that acquittal is based upon a view of the facts ``which could not reasonably be entertained''. The application is opposed on two main grounds. These are that the applicant has not discharged the onus on him of showing that his appeal falls within the provisions of s 61 and that, in any event, it is not in the interests of justice that the application should be granted because of the delay in bringing this application and the prejudice caused to the respondents by that delay.

The onus is on the applicant to bring his application within the terms of s 61 of the Act.

The points of law about which the applicant says he is dissatisfied are that the trial magistrate failed to take into account ``striking similarities (between the evidence) involved in both counts and to appreciate the value of similar fact evidence'' and that he failed ``in his appreciation of the evidential rules concerning circumstantial evidence in that he failed to analyse the evidence of State witnesses and make findings of fact from which inferences could be drawn''. Neither of these ``points of law'' claimed by the applicant seems to me to be a point of law as required by s 61. A point of law must relate to a decision made by the trial court on a legal issue relevant to the acquittal (which the applicant believes to be wrong) and on which the trial court based its acquittal. That is not what the applicant is complaining about in relation



to this trial. Essentially, he is complaining that the trial magistrate failed to apply his mind to the law or, if he did he did apply his mind to the law, he failed to apply that law to the facts. Both are

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completely different matters.

The applicant also claims that the trial court acquitted the respondents ``on a view of the facts that could not reasonably be entertained''. In support of this submission the applicant has asserted variously that the trial magistrate ``failed to take [an] important piece of evidence in to account'', ``erred in his appreciation of evidential rules'', ``misdirected himself in rejecting the evidence of 10 witnesses unreasonably and without cogent reasons'', failed to analyse and compare the evidence of certain witnesses and dealt with the fingerprint evidence in a ``grossly unreasonable'' manner. He says that the acquittals were unreasonably grounded because the magistrate failed to ``carefully and methodically analyse the evidence''.

The phrase ``a view of the facts which could not reasonably be entertained'' means something more than mistakes or negligence on the part of the trial court. In the case of *Attorney-General* v *Paweni Trade Corp (Pvt) Ltd* 1990 (1) ZLR 24 (S), KORSAH JA (with the concurrence of the remainder of the court) held that -

> ``..., it is only when the inference drawn from the primary facts is so inconsistent with logic and commonsense that the Attorney-General can succeed ... if there are reasonable grounds for taking certain facts into consideration, and all the facts, when taken together, point inexorably to the guilt of an accused beyond peradventure, but the trial court nonetheless acquits the accused, then the trial court has taken a view of the facts which could not reasonably be entertained. Put another way, if, on a view of the facts, the court could not reasonably have inferred the innocence of the accused, then the verdict of acquittal is perverse, and the Attorney-General is entitled to attack it.''

The respondents dispute the applicant's criticisms of the acquittal judgment but, even if that criticism is disregarded, I am not satisfied that the allegations made by the applicant about the acquittal of the respondents, viewed singly or cumulatively, show more than that the trial magistrate may have made a number of errors in his approach to the evidence before him and in his judgment on the acquittal. What has been put before me does not discharge the onus on the applicant to establish that the inference to be drawn ``from the primary facts is so inconsistent with logic and commonsense'' that that judgment is ``perverse''.

Accordingly, I hold that the applicant has not discharged the onus, which is on him, to bring his application within the terms of s 61 of the Act.

Even if I am wrong in the findings which I have made in the preceding paragraphs, it seems to me that the second point made by the respondents (that the application should not be granted in the interests of justice because of the delay in bringing it) is correct and is conclusive of this application.

No time limit is set out in s 61 of the Act or in any of the rules of court within





which the Attorney-General must file his appeal in terms of that section. It is not clear from the history of the section whether the absence of a time limit by which the applicant must act is by accident or design. It is unusual not to have such a time limit and this section is in stark contrast to the requirements for all other appeals. The omission is particularly striking because the

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concept that a man, once acquitted of an offence, may not be retried for that offence is a fundamental principle of the criminal law. That principle would apply but for this specific provision having been made in the Act as read with s 18(6)(b) of the Constitution. The overriding reason for this principle is the need for finality in litigation. Nevertheless, the parties to this application are agreed that this court, notwithstanding the absence of a time limit to the making of the application for leave to appeal, may, in considering the application, take into account the question of delay by the applicant in filing his application in terms of s 61 and decide the application on that point. That agreement seems to me to be correct. Even though s 61 has modified the common law to a limited extent, the exercise of the applicant's power in terms of that section is subject to the leave of the court and must be exercised reasonably and in the interests of justice. What is reasonable and in the interests of justice is a matter of fact in each particular case.

Nearly fourteen months have passed since the date of the respondents' acquittal. They were acquitted on 17 March 1997. The applicant filed this application in the High Court on 29 April 1998. In the intervening period, the following events, which are relevant to the arguments of both sides in this application, took place. On 2 April 1997, the Chief Magistrate referred the question of sentence, in relation to the count on which the respondents had been convicted, to the applicant in terms of s 54 of the Act. On 19 April, the applicant directed that the matter be transferred to the High Court for sentence on that count. The respondents were brought before the High Court on 9 May and again on 6 June for argument on sentence. They were sentenced in November 1997. Both respondents started serving their sentences immediately. On 19 December 1997, the applicant applied to the Supreme Court for leave to appeal against the respondents' acquittal. Unfortunately, the applicant had overlooked the fact that s 61 had been amended with effect from 10 October 1997 by s 6 of Act 9 of 1997. In terms of that section, an appeal in terms of s 61 now lay to the High Court, as the first court of appeal, and not to the Supreme Court. The registrar of the Supreme Court told the applicant of his mistake on 11 March 1998. The applicant then filed this application on 27 April 1998.

The respondents complain about both the overall period of delay and the mistakes and delays on the part of the applicant, which took place between their date of sentence and the filing of this application. They submit that both



periods of delay are unreasonable in themselves. They also point out that, beyond admitting the mistake in filing the application for leave to appeal in the wrong court, the applicant has given no explanation for the delays which have occurred since their date of sentence. They say that they are now well into the sentences imposed on them in November 1997 and are greatly distressed and prejudiced by this application.

*Prima facie* fourteen months seems to me to be an undue delay in dealing with a matter of this sort, even if s 61 does not compel the applicant to act within any particular period. It is interesting to compare the period taken for the applicant to appeal against acquittal in this case with that taken by him to file such an appeal in the only other reported similar case that I have been able to find and in which the time taken for the applicant to note his appeal is referred to -

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7 days (See *Paweni*'s case *supra* at 26). It is important therefore to look at the explanation given by the applicant for this delay.

In the papers filed with the application, the applicant says that it was always his intention to appeal against the respondents' acquittal. He says that he could not ``for practical reasons'' apply for leave to appeal and note his appeal against the acquittal ``without a determination of the sentencing proceedings pending in the High Court because, the two counts of which the (respondents) had been charged had been linked from an evidentiary point of view''. Mr *Goba*, who appears for the applicant, has explained this statement further by stating that it would have been wrong in principle to deal with the appeal against acquittal while this court was considering sentence on the count on which the respondents were convicted. He further submits that the applicant, anticipating the possibility of an appeal against the sentence to be imposed on the respondents and because the record of the trial is long and the two charges are intimately linked with each other, considered it to be both sensible and convenient for the two appeals, that against sentence and that against the acquittal, to be heard at the same time. This view, Mr *Goba* submits, has been confirmed by events in that the applicant has appealed to the Supreme Court against the sentence imposed on the respondents. In his submission there has, therefore, been no undue delay by the applicant and the applicant has served the interests of justice in the manner in which this application has been handled.

I am unable to accept the submissions, both in regard to principle and in regard to practice, made by the applicant. I do not agree that it would have been wrong in principle to start the proceedings against the respondents' acquittal before this court had completed its sentencing of the respondents. There would have been no disrespect to, or problem for, the court or prejudice to either of the parties in doing so. By contrast, there seems to me to be every reason in principle and practice why the appeal against the acquittal should



have proceeded. There was the need to bring this matter to finality. The prospect that the respondents' acquittal would be appealed, and might be reversed, is something that should have been known to the court that sentenced the respondents on the other count. A conviction on two counts, particularly if the counts are closely connected, would have affected the sentence to be imposed on the respondents. The sentencing court may well have decided to stand down the question of sentence until the appeal against acquittal had been completed. As it turns out, the amendment to s 61, that was made by s 6 of Act 9 of 1997, would have meant that both sentence and the appeal against acquittal would have been dealt with by this court. Further, the applicant's explanation for the delay goes only so far as the events up to November 1997. It does not deal with the situation between November 1997 and April 1998. Notwithstanding that the applicant made a mistake about the court in which to note the appeal, no reason is given for the delays in proceeding between the date of sentence and 19 December 1997 and then between 11 March and 27 April 1998. If the applicant had truly intended, from March 1997, to note this appeal, he must have known his grounds for doing so from that date. It is difficult to see why these delays occurred.

In contrast to the lack of prejudice to the applicant in proceeding with this application as I have

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suggest he should have done, considerable prejudice has been caused to the respondents because he has not done so. They are now well into the sentences imposed on them in respect of the first count. Until this application was filed, they had every reason to believe that when those sentences had been served they would be released and would be able to restart their lives. They are understandably surprised and distressed that this may not now be the case.

In the result, I am not satisfied that the applicant has discharged the onus which was on him to establish that this is a case which falls within the provisions of s 61. Further, I do not consider it to be in the interests of justice that the applicant should be allowed to proceed with this appeal. The application for leave to appeal is accordingly refused.

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

*Byron Venturas & Partners*, first respondent's legal practitioners

*Musunga & Associates*, second respondent's legal practitioners

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## FOUNDERS BUILDING SOCIETY *v* DALIB (PVT) LTD & ORS 1998 (1) ZLR 526 (HC)

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

Gillespie J

Chamber application for default judgment

10 June 1998 Judgment No. HH-89-98

### Flynote

Legal practitioner - conduct and ethics - opposing practitioner - duty of courtesy towards - duty to give fair warning of intention to take technical point, rather than snatching at judgment

Practice and procedure - default judgment - application for - plaintiff's practitioner aware of proceeding taken by defendant which does not constitute a proper entry of appearance to defend - correct procedure for plaintiff to follow

### Headnote

In any action where the plaintiff's legal practitioner contemplates applying for default judgment, but is aware of some proceedings being taken by the defendant which is an attempt at opposition but does not constitute due and regular entry of appearance to defend, he ought to address to the defendant or his legal practitioner due warning of the irregularity of the procedural step. Having done so, he may then choose between -

(a) an application for default judgment; or

(b) an application, on notice to the defendant, to strike out the irregular proceeding.

The latter application may be joined with an application for default judgment.

If he opts to apply for default judgment, he must inform the court of the relevant irregularity and

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give reasons why the court should exercise its discretion in the plaintiff's favour. The fuller, and preferable, course is an application to strike out, coupled with a prayer for default judgment.

A party who proceeds to default judgment in circumstances where he may be accused of ``snatching at a judgment'' may well be held accountable for unnecessary proceedings generated by his deviousness or pigheadedness. On the other hand, a defendant who knowingly makes an irregular entry or files an irregular proceeding with a view to avoiding the consequences of failure to enter appearance can expect to be mulcted in costs.

The registrar who is faced with an irregular proceeding should advise the affected legal practitioner and invite him to apply to strike out the irregularity or to show good cause for the judge to disregard the irregular proceeding.

Cases cited:

*Creux & Sons (Pty) Ltd* v *Groenewald* 1953 (3) SA 726 (T)

*Gibson & Jones (Pty) Ltd* v *Smith* 1952 (4) SA 87 (T)

*Independence Mining (Pvt) Ltd* v *Soko* S-188-93



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*KDL Motorcycles (Pty) Ltd* v *Pretorius Motors* 1972 (1) SA 505 (O)

*Min of Home Affairs & Ors* v *Vuta* 1990 (2) ZLR 338 (S)

*Motaung* v *Mukubela & Anor NNO* 1975 (1) SA 618 (O)

*Petzel* v *Leinveber* 1953 (3) SA 62 (SWA)

*Ruzvidzo* v *Kanhanga* S-70-91

*Zapf* v *Provident Inc & Trust Co* (1884) 4 EDC 17

*Zimdef (Pvt) Ltd* v *Min of Defence & Anor* 1985 (1) ZLR 146 (H)

Legislation considered:

High Court Rules 1971 (RGN 1047/71), rr 5(2), 48

## Judgment

**GILLESPIE J:** The applicant instituted proceedings by way of summons against a company, as principal debtor, and three sureties (each co-principal debtors). It is seeking to foreclose on a mortgage bond. Summons was served on 13 January 1998. No appearance to defend was entered in the form prescribed by the rules of court. Nevertheless, on 16 January attorneys purported to file a notice of assumption of agency for the defendants. It used to be the case that an attorney was obliged to file his power of attorney with an appearance to defend. That is now unnecessary. The filing of an assumption of agency is not required of an attorney entering

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appearance to defend and is only required where a party has changed his legal practitioner. 1(116) The filing of the notice of assumption of agency seems to have been intended as an attempt to enter an appearance but was obviously inadequate for that purpose. On the same day, the attorneys also filed a request for further particulars, thereby confirming the intention to defend, but still without entering appearance. The plaintiff's attorneys have simply ignored these two proceedings and have applied for judgment in default of entry of appearance to defend.

The matter thus came before me as an unopposed application for default judgment. I was not satisfied that the papers were in order and caused there to be addressed to the plaintiff's attorneys a query formulated in the observation: ``There exists some species of opposition from the defendants.'' 2(117) The attorneys responded to this in the following terms.

> ``According to our record, the Summons was issued out of the High Court on 23 December 1997 and served by the Deputy Sheriff on 13 January 1998. So far an Appearance does not appear to have been entered nor have we received a Notice of Appearance to Defend. We subsequently received a document called ``Notice of Assumption of Agency'' from Messrs C K Mkinya & Partners and also a Request for Further Particulars. The particulars which have been requested appear to relate to matters of evidence and are not necessary to enable the Defendants to plead but in any event, since an Appearance has not been entered, the



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> Defendants appear to have been barred. We would accordingly be obliged if arrangements can be made for judgment to be entered.'' 3(118)

I will disoblige the attorneys.

It is true that strictly, according to the rules of court, the defendants are barred. The mode of entering appearance to defend is prescribed in the Rules, 4(119) as is the form of notice to the plaintiff of appearance to defend and the time limit for giving such notice. 5(120)

> ``A defendant who has failed to enter appearance shall be deemed to be barred.'' 6(121)

The bar in this case is automatic. There is no need to give prior notice of intention to bar. The effect of a bar is that application for default judgment may be made without further notice to the defendants. Applied according to the letter, this rule has the effect that the entry of appearance in an irregular manner; an entry without notice in prescribed form to the plaintiff; late entry; or entry that is in any other way technically deficient, results in the automatic bar.

If the approach of the attorneys in this case is correct, then it results in the situation where a person with a genuine intention to defend, and possibly even an arguable defence, will suffer default judgment being taken against him despite the existence on file of a clear signal of an intention to defend. The court, if the attorney's approach is correct, must essay an impersonation of Horatio, Lord Nelson, at the battle of Copenhagen, and turn a blind eye to this intimation. Pretend it does not exist. ``Signal? I see no signal.'' 7(122)

This approach is certainly not the only approach that could be taken. Many attorneys, seeing an oversight or irregularity of this nature from a colleague whom they regard as a peer, would take the trouble and courtesy to address to the errant opposite number a memorandum,

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drawing attention to the cause for complaint and calling upon him, or her, to regularise the matter. Such an attitude is to be expected, not from just a few, but from all, legal practitioners, towards all other legal practitioners. It is part of the duty that a legal practitioner has to other lawyers. This duty is put in a nutshell:

> ``Every legal practitioner has a duty to behave fairly and honestly towards other legal practitioners. The legal practitioner on the other side is only trying to do his best for his client and it is desirable that legal practitioners co-operate as much as possible.'' 8(123)

The same principle is put rather more fully thus:

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> ``Repetitively, as all aspects of practice unfold, the practitioner finds an insistence on fair dealing and good faith whether in his relationship with his client, his adversary, or any other. Integrity has been emphasised as a required `fundamental quality' of all who would practise law ... attorneys are often under pressure from clients to engage or assist in some impermissible act or omission, assertion or concealment, which clients hope will extricate them from some difficulty or gain them some advantage. That being so, especial effort must be made by every practitioner to ensure that all his dealings are strictly honourable.'' 9(124)

The courtesy of giving fair warning to other lawyers of an intention to take a technical point is one rather jealously guarded by the profession. One knows of a standard question, put to all those who are obliged to take the professional oral examination in ethics. It is designed to elicit the response that the failure to give fair warning, before steps are taken, for instance, to bar an opponent or to take a technical point, is a discourtesy. It may result in an adverse order of costs against an attorney should costs be incurred in undoing what was done without warning.

How does one apply that principle to this case? Should judgment be given in default, the court deeming it proper to ignore the defective proceeding, notwithstanding its existence on file, then application will be made for the rescission of the default judgment. If that application is unopposed, then that would demonstrate the lack of advantage or good sense in ever having taken the judgment at all. Unnecessary costs in preparing the application for rescission 10(125) will have been incurred by the defendant, and the substantial cause of them will have been the lack of consideration, or even the obduracy, of the plaintiff's attorney. Should the application be opposed then the costs incurred will have been all the greater. In the event that the opposed application is granted, then where will those costs fall? In my estimation, the plaintiff, and his attorney, would be very fortunate indeed, should the court not conclude that they have ``snatched at a judgment''. 11(126) In addition to the question of costs, there is also the disadvantage of the consequential delay in obtaining judgment. In the event that the application for rescission were to fail, then that would demonstrate a defence so lacking that the giving of warning by the plaintiff's attorneys would not have prejudiced the plaintiff at all. In this case, I consider that fair dealing requires at least that courteous

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warning be given of an intention to make the appropriate application, should the technically

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barred opponent not take steps to cure the irregularity.

That observation begs the question, `What is the appropriate application?' It would appear that the answer involves a choice between two extremes. Either to regard the proceeding as a nullity and to be ignored, or to insist that the party seeking to proceed have it struck out. I say appear, not because I am given to the same tormented legalese that shrieks from the attorney's letter, but because the reality of the matter is that one need not choose between these inconsistent approaches. The correct approach merely involves a proper understanding of the nature of the court's discretion.

The point has been one of no little debate in the various divisions in South Africa some years ago. Those jurisdictions have, of course, for some time had rules, amended over the years, providing for the bringing of an application to strike out an irregular proceeding. An irregular or late appearance to defend would be susceptible of such a measure. Our rules of court have never defined such an application but one is undoubtedly available as part of the inherent jurisdiction of the court to regulate its own proceedings. 12(127) Quite apart from that inherent jurisdiction, the discretion to withhold default judgment is written into the rules of court. 13(128) The purpose of rules of court is:

> ``to expedite the administration of justice and to avoid incurring unnecessary costs.'' 14(129)

The exercise by the court of a discretion to depart from the rules, 15(130) or the resort to its inherent jurisdiction where the rules are silent, must be directed towards that same end. The existence of a discretion as to how to deal with late or irregular appearance to defend has been expressly recognised in the many decisions throughout South Africa that touch upon the point. It is in fact the consistent thread that underlies what might otherwise be seen as inconsistent approaches to the issue.

One of the earliest decisions on the point, 16(131) a case where appearance to defend was entered after time for entry had expired, resulted in an order of default judgment which, however,

> ``for all practical purposes amounted to a refusal of the default judgment because the final passage in the judgment is as follows:
>
> > `While giving judgment for plaintiff, I think we should, however, protect defendants by tacking on an order that defendants shall have reserved to them their right to apply on





> > showing cause to have the judgment reopened ... and that the judgment is given in favour of plaintiff subject to his finding security for costs'.'' 17(132)

A slightly different attitude was evinced by CLAYDEN J 18(133) in a similar matter where appearance to defend had been entered after expiry of the *dies induciae*. The learned judge was unwilling simply to ignore the irregular entry 19(134) and remarked:

> ``But I think the answer to this application is that as the Registrar has in fact allowed 20(135) the defendant to enter appearance, there is in fact here an entry of appearance. As the facts are before me, it appears that that

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> entry of appearance was an irregular one in that it was made when the defendant was barred from the right to enter appearance, but the fact is that there is an appearance entered ... It is a wrong entry of appearance, but there it is, and the court can either defer the plaintiff's rights until he makes application to set aside that entry of appearance, or can adopt the procedure adopted in [*Zapf*] of entering judgment for the plaintiff subject to the right of the defendant to set it aside." 21(136)

In the event the learned judge did not order judgment but postponed the court application for default judgment, thereby giving the plaintiff the opportunity to apply for the striking out of the irregular proceeding and the defendant the opportunity of a counter-application for leave to enter appearance late. He remarked, in doing so, that he was taking the course he considered:

> ``to be less complicated and to be likely to lead to less costs." 22(137)

It is apparent from the foregoing that CLAYDEN J considered that he was exercising a discretion. In a later case, the existence of that discretion in similar circumstances was expressly recognised.

> ``[The rule] says that where the defendant, having been duly served with the summons, fails to enter appearance [timeously], the plaintiff may set the case down for judgment against the defendant. From this it seems that where the defendant does not enter appearance timeously the plaintiff may as a right set down the case, and the court has the power to give judgment against the defendant. The court has a discretion to give judgment or not, and it would refuse judgment if the circumstances showed that to give judgment would be unjust." 23(138)

The learned acting judge went on in that matter to grant default judgment.

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GILLESPIE J

In a similar matter, 24(139) DOWLING J exhibited a preference for the approach of granting judgment on the basis:

> ``Had the matter been *res nova* I might well have taken the view that the terms of [the rules] entitled the plaintiff *ex debito justitiae* to default judgment, leaving the defendant to his remedy of applying to set it aside." 25(140)

The learned judge nevertheless followed the decision of CLAYDEN J. He referred to *Petzel*'s case and the existence of the discretion 26(141) and went on to give reasons showing the correctness of the approach by CLAYDEN J in the circumstances of the Transvaal Provincial Division at the time. He said:

> ``In view of the prevailing practice in the Registrar's office, I think that [it] might well lead to unfortunate results if judgment by default were indiscriminately granted where a late appearance to defend has been entered. The present practice is that the Registrar allows the appearance book to be signed by or on behalf of the defendant, without any enquiry as to whether the *dies induciae* have elapsed. A litigant or his attorney may leave the Registrar's office with a sense of security that entrance of appearance has been allowed by an official of the court, and that he will be secure against any default judgment followed by a visit of the deputy-sheriff armed with a warrant of execution." 27(142)

The learned judge accordingly refused judgment,

> ``thus affording the plaintiff an opportunity to proceed after proper notice to set aside the entry of appearance, and to the defendant to apply for countervailing relief." 28(143)

It is, I think, unnecessary to examine the many decisions since these, in the various provincial

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divisions, where either a similar order has been made or default judgment has been granted. Any differences in result that have been arrived at are all explicable on the basis of an exercise of discretion. 29(144)

This is, of course, a judicial discretion to be exercised on consideration of all relevant circumstances. These factors include, on the one hand, the notion that it is:

> ``an extraordinary position that a defendant who intends to defend an action but has failed to enter appearance to defend should be privileged to place an obstacle in the plaintiff's way and burden him with a new and additional application [to strike out].'' 30(145)

Reinforcing this consideration in favour of granting default judgment and ignoring an irregular proceeding is the fact that the defendant will have available the opportunity to move rescission of judgment on good cause



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shown. The above *dictum*, however, was made in the context of, and in rejecting, a submission that the plaintiff was not entitled to obtain default judgment without first making an application to strike out. It may well lose force in the context of an enquiry as to whether, as a matter of discretion, such an application ought not to be insisted on by the court.

In favour of requiring that an irregular proceeding be removed is the fundamental principal *audi alterem partem*. Where the effect of an irregular appearance to defend is such as to show nevertheless that a genuine intent to defend exists, then a court might well be inclined to caution before giving judgment without permitting that defence to be advanced. Further, where it is apparent that the default judgment, and an attempt at execution, will prompt an application for rescission, which will probably be allowed, then there would seem to be little point in giving a judgment which would be nullified soon afterwards. I would add that the present situation in the registrar's office seems very similar to that which pertained in the Transvaal in the time of CLAYDEN J.

The seeming unfair burden of requiring the plaintiff to take a step to correct the irregular procedure of his opponent is more apparent than real. In the absence of opposition to the application to strike out, it will inevitably be granted, and if a prayer for default judgment is conjoined with the application, then judgment will follow forthwith. The only opposition that can possibly be made to an application to strike out, where the challenged proceeding is truly irregular, is an application for the uplifting of the automatic bar and an extension of time within which to enter appearance to defend. Such an application will be dealt with on its merits, including the explanation for the default, and will generally result in an order of costs adverse to the defaulting party. Depending upon the view taken by the court of the explanation for the default, that order of costs might even be directed against the legal practitioner responsible.

The costs of a prior application to strike out, especially where it is conjoined with an application for default judgment, will generally be substantially less than those incurred where a judgment must be set aside. The application itself will involve minimal expense: a form of application, a brief supporting affidavit, a draft order and service thereof. In the alternative situation, one would

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expect to be incurred not only the costs of obtaining judgment; but also the costs of a writ of execution; of an attempt at execution; of correspondence pertaining to a stay of execution and a rescission of judgment; and costs of a substantive application at least for rescission if not for both a stay and rescission.

Add to these factors the consideration of the duty, if only of courtesy, of a warning to the opponent where the irregularity is known to the plaintiff, then



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there would seem to be in general a very clear balance in favour of requiring prior striking out of an irregular proceeding. Where the plaintiff is not aware of any potential obstacle to an application for default judgment, then this consideration naturally falls away. Nevertheless, if some questionable proceeding exists on record as a potential hindrance to judgment then the court, or the judge, might nevertheless, if it is considered appropriate, direct that steps be taken to remove the proceeding from the record before allowing judgment to be taken.

I therefore hold as follows. In any action, where the plaintiff's legal practitioner contemplates an application for default judgment, but is aware of some proceeding taken by the defendant, being an attempt at opposition, which does not constitute due and regular entry of appearance to defend, he ought to address to the defendant or his legal practitioner due warning of the irregularity of the offending procedural step. Having done so, he may then choose between an application for default judgment or an application, on notice to the defendant, to strike out the irregular proceeding - which latter application may be conjoined with an application for default judgment.

If he opts for the former course, then he must, in his application, and in fulfillment of the well-recognised duty of full disclosure in *ex parte* proceedings, 31 inform the court (or the judge) of the relevant irregularity and give reasons as to why the court's discretion should be exercised in favour of the plaintiff. The fuller, and more preferable, course is an application on notice to strike out conjoined with a prayer for default judgment. This will never be regarded as an unnecessary proceeding, particularly where there has been a prior warning given of an intention so to proceed.

Conversely, the party who proceeds to claim default judgment in circumstances where he may be accused of snatching at a judgment may well be held accountable for unnecessary proceedings generated by his deviousness or pigheadedness. Where the plaintiff is unaware of an irregular opposition which exists on file when he claims default judgment, then this may well be drawn to his attention, either by the registrar or by the judge before whom the matter is placed, and he may expect a direction to cause any such irregular proceeding to be struck out.

The defendant who knowingly makes an irregular entry of appearance to defend, or files an irregular proceeding, with a view to avoiding the consequences of a failure to enter appearance to defend timeously, ought not to suppose that his stratagem will be looked on with any favour at all. He can expect to be mulcted in any costs incurred by procedures taken to remove or regularise the cause for complaint. An attorney who is responsible for such an abuse need not

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be surprised if the order of costs hits at his own pocket.

The function of the registrar faced with an irregular proceeding would be



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as follows. He ought to advise the legal practitioner affected by it. In doing so, he should invite him either to apply, on notice to the offending party, to strike out the irregularity or to show good cause to the judge to disregard the irregular proceeding. The response, whatever it may be, should then be placed before the judge for his decision.

Since this judgment involves considerations of practice not addressed by the rules of court, I have taken the precaution of showing it to the Judge President, who authorises me to say that he is in agreement with it.

In this case, I consider the intimation of an intention to defend to be unequivocal. Irregular it may be, but ignoring it would not be justified. I consider that the most expedient course would be to require the plaintiff to remove the obstacle to judgment. The failure of the plaintiff to give warning to the defendant of the intention to ignore the irregular proceeding I regard as undesirable. It warrants an adverse order of costs. However I will not punish the attorneys with those costs, but prefer to regard this judgment as due notice to the profession of the standard of conduct expected.

It is accordingly ordered as follows:

1. Default judgment is refused.

2. The plaintiff is directed to make application, on notice to the defendant, for an order striking out the irregular proceedings and claiming judgment in default of appearance.

3. All costs incurred between the date of the application for default judgment, namely 5 February 1998 and the date hereof, are to be borne by the plaintiff.

*Honey & Blanckenberg*, plaintiff's legal practitioners

*C M Mkinya & Partners*, defendant's legal practitioners



## S *v* DZAWO 1998 (1) ZLR 536 (SC)

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

Gubbay CJ, Ebrahim JA & Korsah JA

Application for leave to appeal

10 & 11 June 1998 Judgment No. S-97-98

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## Flynote

Criminal procedure - bail - refusal of - magistrate refusing bail - appeal to High Court judge unsuccessful - application to judge for leave to appeal refused - application to Supreme Court for leave to appeal against judge's refusal - whether judge's decision appealable

## Headnote

The applicant was convicted of a criminal offence in the magistrates court. The magistrate turned down the applicant's request to be admitted to bail pending his appeal against conviction and sentence. He then appealed to the High Court against the refusal to admit him to bail, but the judge refused the appeal. He sought leave from the judge to appeal to the Supreme Court against the judge's refusal. The judge declined to grant such leave because he decided that in terms of s 121(8) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] no appeal lay against his decision to the Supreme Court.

*Held*, that where a person applies for bail in the magistrates court and the application is refused he is only entitled to a single appeal against this decision to the High Court. Section 121(8) of the Criminal Procedure and Evidence Act had removed the right of the person concerned who had appealed to a judge of the High Court against the bail decision of a magistrate to take the judge's decision, subject to leave, on appeal to a judge of the Supreme Court. On the other hand, where a person convicted in the magistrates court makes his initial application for bail, not to the magistrate but to a judge of the High Court, an appeal still lies with leave to a judge of the Supreme Court.

*Held*, therefore, that the application had to be rejected, although there seemed to be no reason why bail should not have been granted in the circumstances. There was no risk of the applicant absconding and, contrary to the judge's opinion, from the record there seemed to be a reasonable prospect of the appeal against conviction and sentence succeeding.

Cases cited:

*Aitken & Anor* v *A-G* 1992 (1) ZLR 249 (S)

*S* v *Aitken* 1992 (2) ZLR 84 (S)

*S* v *McGown* 1995 (2) ZLR 81 (S)

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

*S* v *Williams* 1980 ZLR 466 (A)

*S* v *Woods* S-60-93

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 121(8)



GUBBAY CJ

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*E T Matinenga*, for the applicant

*J Musakwa*, for the respondent

## Judgment

**GUBBAY CJ:** This is an application purportedly brought before this court pursuant to s 44(5) of the High Court Act [*Chapter 7:06]*. It is for leave to appeal against the refusal by a judge of the High Court to grant leave to appeal against his decision declining to admit the applicant to bail pending the determination of an appeal against both conviction and sentence.

On 30 April 1998, the applicant was convicted in a regional magistrate's court of one count of fraud involving an amount of $50 000. A month later, on 29 May 1998, during which preceding period the applicant had remained out of custody, he was sentenced to fifty-four months' imprisonment with labour, of which twelve months were suspended for five years on conditions of good behaviour and a further eighteen months on the making of restitution.

Immediately upon the pronouncement of sentence the trial magistrate was informed of the applicant's intention to appeal against both conviction and sentence. She was verbally requested, in terms of s 117(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (``the Act'') to admit the applicant to bail. The prosecutor opposed the application and the grant of bail was refused.

Thereupon an appeal to a judge was submitted in terms of r 5 of the High Court of Zimbabwe (Bail) Rules 1991. The appeal, which was opposed, was heard by CHINHENGO J in chambers on 2 June 1998. It was refused on the ground that, in the opinion of the learned judge, there were no reasonable prospects of an appeal succeeding against either conviction or sentence.

Aggrieved at the dismissal of his appeal against the magistrate's refusal of bail, the applicant sought the leave of CHINHENGO J to appeal to this court. That application was likewise dismissed on 8 June 1998, the learned judge expressing himself thus:

> ``I am satisfied that in terms of s 121(8) of the Criminal Procedure and Evidence Act no appeal lies against my decision to the Supreme Court. Were it not for this provision I would have granted the leave applied for as in the matter of sentence, in particular, a different court may well reach a different conclusion.''

The primary issue before this court is whether the learned judge was correct in holding that in this matter no appeal lies against his decision. If he was, then the court has no jurisdiction to entertain the application. But if wrong in his view, then the application for leave to appeal, and the substantive appeal against the refusal of bail, both fall to be determined on their merits. And if





it be considered that leave ought to have been granted either against conviction, or sentence, or both, then the appeal will have to be allowed and the applicant admitted to bail upon suitable conditions.

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In construing s 121(8) in context, guidance may be derived as to the intention of the legislature from the background to the passing of the Criminal Procedure and Evidence Amendment Act 1997. The position which obtained before 1 October 1997, when this Act came into operation and repealed and replaced s 121, was this. Under s 44(5) of the High Court Act, an appeal lay to the Supreme Court with leave of either a judge of the High Court or, if he refused the grant, a judge of the Supreme Court, against an interlocutory order or judgment in relation to criminal proceedings before the High Court. See *S* v *Aitken* 1992 (2) ZLR 84 (S) at 87A-E.

In enacting the new s 121, the lawmaker must be taken to have been aware of the decision in *Aitken*'s case. The clear inference is that an alteration to the existing procedure was aimed at.

Subsection (1) of s 121 of the Act provides that where a judge or magistrate has admitted, or refused to admit, a person to bail, the Attorney-General, or the person concerned, may appeal. That right is made subject to: (i) s 44(5) of the High Court Act, which specifies that leave must be obtained where the decision is that of a judge of the High Court; and (ii) any restrictions contained in the other subsections.

Subsection (2) provides that an appeal in terms of subs (1) against a decision of a judge of the High Court shall be made to a judge of the Supreme Court and against the decision of a magistrate to a judge of the High Court. Thus, where the initial application for bail was to a judge of the High Court, an appeal with leave lies to a judge of the Supreme Court; but where the initial application was before a magistrate, there is an absolute right of appeal to a judge of the High Court.

Subsection (5) reads:

> ``A judge who hears an appeal in terms of this section may make such order relating to bail or any condition in connection therewith as he considers should have been made by the judge or magistrate whose decision is the subject of the appeal.''

The term ``judge'' refers to both a judge of the High Court and a judge of the Supreme Court.

Subsection (8), which provides that:

> ``There shall be no appeal from a decision or order of a judge in terms of this section'',

can only mean, in the context of the subsections referred to, that the aggrieved person is entitled to a single appeal. If the initial application was made to a magistrate, the appeal must be to a judge of the High Court; but if made to a judge, then an appeal lies, with the grant of leave, to a judge of the Supreme Court.



GUBBAY CJ

In sum, the change brought about by the amendment to s 121 has removed the right of the person concerned who had appealed to a judge of the High Court against the decision of a magistrate in relation to bail, to take the judge's decision, subject to leave, on appeal to a judge of the Supreme Court.

Finally, it is perhaps necessary to point out that under s 123(1)(b) of the Act a person who has

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been convicted and sentenced by a magistrate's court may either apply for bail to a magistrate within whose area of jurisdiction he is in custody or to a judge of the High Court, pending the determination by the High Court of his appeal. If made to a judge, then an appeal with leave will lie to a judge of the Supreme Court. In other words, the person convicted and sentenced by a magistrate is not denied access to a judge of the Supreme Court, provided he chooses to bring the initial application for bail before a judge of the High Court.

For these reasons, I am satisfied that the learned judge was right in ruling that a judge of the Supreme Court has no jurisdiction to entertain this particular application. It follows that the order must be that the application is struck off the roll.

Before concluding, I am constrained to indicate that if the appeal against the magistrate's decision had come before me I would have had no hesitation in admitting the applicant to bail.

The main factors to consider in an appeal against a refusal of bail brought by a person convicted of an offence are twofold: First, the likelihood of abscondment. See *Aitken & Anor* v *Attorney-General* 1992 (1) ZLR 249 (S) at 254F. Second, the prospects of success of an appeal in respect of both conviction and sentence. See *S* v *Williams* 1980 ZLR 466 (A) at 468G-H; S v *Mutasa* 1988 (2) ZLR 4 (S) at 8D; *S* v *Woods* S-60-93 (not reported at pp 3-4); *S* v *McGowan* 1995 (2) ZLR 81 (S) at 83E-H and 85C-E. Other factors to bear in mind are the right of the individual to liberty and the potential length of the delay before the appeal can be heard.

I do not believe that there was any risk whatsoever of the applicant absconding. Indeed, the learned judge did not suggest that there was. The application was opposed and rejected solely on the ground that there was no reasonable prospect of the pending appeal succeeding. With respect I must disagree.

Suffice it to say that having read the magistrate's judgment with some care - and recognising that I am at a disadvantage (as was the learned judge) in not having available a transcript of the evidence led at the trial - I confess to finding the reasoning inadequate. And not to be overlooked is the principle that the noting of an appeal against sentence offers a wide scope for a different opinion. That was certainly so in this matter.



GUBBAY CJ

Be this as it may, the unfortunate reality is that, although satisfied that the applicant has been unfairly treated, this court is powerless to grant him the relief he deserves.

**EBRAHIM JA:** I agree.

**KORSAH AJA:** I agree.

*Kantor & Immerman*, applicant's legal practitioners





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

Gubbay CJ, Ebrahim JA & Korsah AJA

Civil appeal

11 June 1998 Judgment No. S-111-98

## Flynote

Contract - interpretation - vagueness - approach adopted by courts - court will help parties towards what they intended rather than find defects - sale - price not stated - method provided in contract whereby price could be fixed - validity of contract upheld

## Headnote

The approach that the courts will adopt to the issue of whether a contract is void for vagueness will be to help the parties towards what they both intended rather than obstruct them by legal subtleties and allow one of the parties to escape the consequences of all he has done and all he has intended. The courts will interpret contracts fairly and broadly, without being to quick to find defects, following the principle *ut res magis valeat quam pereat*.

There can be no valid contract of sale unless the parties have agreed on a purchase price. If it is not stated expressly, it must be stated implicitly: there must be an agreed method by which the price can be ascertained. Provided the price is ascertainable with the requisite degree of certainty, the contract is valid.

Cases cited:

*Bellville-Inry (Edms) Bpk* v *Continental China (Pty) Ltd* 1976 (3) SA 583 (C)

*Burroughs Machines Ltd* v *Chenille Corp of SA (Pty) Ltd* 1964 (1) SA 669 (W)

*Gandhi* v *SMP Properties (Pty) Ltd* 1983 (1) SA 1154 (D)

*Hillas & Co* v *Arcos Ltd* [1932] All ER Rep 494; (1932) 147 LT 503 (HL)

*Hoffmann & Carvalho* v *Min of Agriculture* 1947 (2) SA 855 (T)

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

*Shell SA (Pty) Ltd* v *Corbitt & Anor* 1986 (4) SA 523 (C)

*Taggart* v *Green* 1991 (4) SA 121 (W)

## Case Information

*P Nherere*, for the appellant

*J Dondo*, for the respondent

## Judgment

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**GUBBAY CJ:** The sole point that arises for determination in this appeal is whether the High Court was correct in finding that a valid and enforceable agreement of sale had been entered into by the parties with respect to the immovable property known as Stand 1/183 Smuts Road, Prospect, Waterfalls, (``the property''); and in rejecting the appellant's contention that the so-called agreement was void for vagueness on account of an omission to stipulate a purchase price for the property.



GUBBAY CJ

The document in question was written in longhand on a single sheet of paper. It was signed by the appellant and the respondent, and witnessed by four other persons. It took the following form:

``SALE OF STAND NO. 1/183 SMUTS ROAD, PROSPECT, WATERFALLS

I, Richard Bonjour Chikomba, hereby agree to surrender my property, Stand No. 1/183 Smuts Road, Prospect, Waterfalls, by deed of sale to:

Samuel Mukwezva on this the 17th December, 1983 (at 11.35 am at no. 861 Old Canaan, H/D).

METHOD OF PAYMENT

| | | |
|---|---|---|
| 1. | Initial deposit | $2 000 |
| 2. | Part of the interest paid so far | $1 000 |
| 3. | Monthly instalment | $ 142 |

WHEN THE PAYMENTS WILL BE MADE

| | | |
|---|---|---|
| 1. | Initial deposit on 04.01.84 | $2 000 |
| 2. | Part of the interest - fixed amount per month w/e f 31.1.84 | $2 000 |
| 3. | Monthly instalments w/e f 31.1.84 | $ 142 |

We have entered into this agreement freely, without any coercion:

...

House Acc. No. 81028897.''

The account number provided at the foot of the page referred to the appellant's account with Central Africa Building Society (``CABS'') to which he was paying a monthly instalment of $142 in settlement of the balance owing under a loan secured by a mortgage bond registered over the property.

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In his plea to the claim that he be ordered to register title to the property into the name of the respondent - the allegation being that the purchase price had been paid in full - the appellant did not advance the defence that the agreement was void for vagueness. He accepted that an agreement of sale had been entered into, but averred that after the respondent had paid off the loan to CABS, he was still to purchase for him an undeveloped stand in Bluff Hill in order to satisfy the price of the property sold. This the respondent had failed to do. An alternative defence was pleaded. It was to the effect that the respondent had not fully paid off the mortgage bond on his own. The appellant had also made certain payments to CABS subsequent to the date of the agreement.

At the close of the respondent's case after he and his wife had testified, the appellant applied to the learned trial judge for absolution from the instance.

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GUBBAY CJ

Raised for the first time was the submission that the document relied upon as evidencing a sale of the property, was void for vagueness. Upon refusal of the application, the appellant closed his case, thereby effectively abandoning the defences pleaded. Judgment was given against him with costs.

It admits of no doubt that the appellant intended that the document he signed on 17 December 1983 was to constitute a valid agreement of sale of the property. He acted in conformity with its provisions by accepting payment from the respondent of the deposit of $2 000 together with the further sum of $1 000, and in permitting the latter, over a period of six years, to assume liability for the existing mortgage bond repayments. He raised no objection to the respondent's continued occupation of the property without the payment of rental. When, in February 1995, the respondent eventually requested that the property be registered in his name, the appellant declined on the spurious grounds alleged in his plea. The inescapable inference is that in the realisation that over the intervening years the value of the property had appreciated substantially, the appellant became dissatisfied with the agreed purchase price and resolved, by any means possible, to resile from the sale.

Against this scenario, the approach to be adopted to the issue of vagueness must be that expressed by P*rice* J in *Hoffmann & Carvalho* v *Minister of Agriculture* 1947 (2) SA 855 (T) at 860, namely:

> ``Where parties intend to conclude a contract, think they have concluded a contract, and proceed to act as if the contract were binding and complete, I think the court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all that he has intended ... "

See also *Belville-Inry (Edms) Bpk* v *Continental China (Pty) Ltd* 1976 (3) SA 583 (C) at 592A; *Gandhi* v *SMP Properties (Pty) Ltd* 1983 (1) SA 1154 (D) at 1156E; *Shell SA (Pty) Ltd* v *Corbitt & Anor* 1986 (4) SA 523 (C) at 528I-529E; *Taggart* v *Green* 1991 (4) SA 121 (W) at 122H-124B.

Not to be overlooked, as well, are the wise words of L*ord* W*right* in *Hillas & Co Ltd* v *Arcos Ltd* [1932] All ER Rep 494 (HL) at 503I; (1932) 147 LT 503 (HL) at 514:

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``Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*."

See also *Burroughs Machines Ltd* v *Chenille Corp of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670G-H.

---



GUBBAY CJ

It is obvious to my mind that the parties intended the document they signed to have commercial operation. It made mention that the transaction was by way of ``deed of sale''; it referred to the salient terms of payment; and ended with the pronouncement that it had been entered into freely and without coercion. No fewer than four witnesses to the signing of the document were obtained.

In accordance with these principles, the argument that the parties neither fixed the selling price of the property nor a method by which it was to be fixed, must now be considered.

I accept that for an agreement of sale to have binding force the requirement relied upon by counsel for the appellant must be met. This was emphasised by C*olman* J in *Burroughs Machines Ltd* v *Chenille Corp of SA (Pty) Ltd supra* at 670C-D and F-H:

``It is, I think, clear that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They must either fix the amount of that price in their contract or agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them. Authority for that proposition is to be found in Mackeurtan *Law of Sale* 3 ed p 18, and in *Margate Estates Ltd* v *Moore* 1943 TPD 54.

...

It is my task therefore to examine exhibit `A' in order to see whether or not it fixes a price, or provides for the fixing of a price with the requisite degree of certainty. In so doing I must, I think, have regard to the fact that exhibit `A' is a commercial document executed by the parties with a clear intention that it should have commercial operation. I must therefore not lightly hold the document to be ineffective. I need not require of it such precision of language as one might expect in a more formal instrument, such as a pleading drafted by counsel. Inelegance, clumsy draftsmanship or the loose use of language in a commercial document purporting to be a contract, will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract."

See also *Lewis* v *Oneanate (Pty) Ltd & Anor* 1992 (4) SA 811 (A) at 819E-G.

While clearly the signed document did not set out the purchase price of the property in a definite sum, it is my view that it contained an agreed method by which such price was to be fixed - a method which made such price ascertainable with the requisite degree of certainty. The purpose of referring to the appellant's house loan account with CABS and of specifying the monthly instalment payable by the respondent of $142, was to indicate that the total purchase price of the property was the sum of $3 000 and, in addition, whatever amount was outstanding at any one time to CABS in order to settle in full the appellant's indebtedness under the mortgage bond. This information was obtainable by simple enquiry from CABS. In other words,

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the purchase price of the property was $3 000 plus the repayment of the



GUBBAY CJ

mortgage bond registered in the name of the appellant to the satisfaction of the mortgage bond holder.

It was for these reasons that the court was not persuaded that the decision of the learned judge was wrong. Accordingly at the hearing the appeal was dismissed with costs.

**EBRAHIM JA:** I agree.

**KORSAH AJA:** I agree.

*Gill, Godlonton & Gerrans*, appellant's legal practitioners

*Chinamasa, Mudimu & Chinogwenya*, respondent's legal practitioners



## MHOWA *v* BEVERLEY BUILDING SOCIETY 1998 (1) ZLR 546 (SC)

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

Gubbay CJ, Ebrahim JA & Korsah AJA

Civil appeal

8 & 15 June 1998 Judgment No. S-91-98

### Flynote

Employment - employee - misconduct - absence from work without reasonable excuse - whether lawful excuse required - absence on incorrect legal advice - reasonable excuse shown

### Headnote

After an investigation by the works council, the appellant was found guilty of negligence which had caused the respondent, his employer, serious financial loss. The penalty imposed was demotion. The appellant notified the respondent of his intention to appeal against the determination, but was told nonetheless to report for duty. Acting on legal advice that the noting of an appeal suspended the determination of the works council, the appellant stayed away from work. For this, he was charged with, and found guilty of, absenting himself from duty without reasonable cause and dismissed from his employment. On appeal, the Labour Relations Tribunal held that the noting of the appeal against the determination of the works council did not suspend the determination; and that the appellant did not have a reasonable excuse for absenting himself.

*Held*, that assuming that the noting of an appeal did not suspend the determination of the works council and that the appellant therefore did not have a *lawful* excuse for absenting

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himself, it did not mean that he did not have a *reasonable* excuse. He had received legal advice to the contrary and his belief, based on that advice, was not so bizarre that no reasonable person would have entertained it. Consequently, the charge of absenting himself without a reasonable excuse was not proved.

*Held*, further, therefore, that it was not necessary to decide whether the noting of an appeal suspends the operation of a determination made under a code of conduct.

*Held*, further, that since the dismissal of the appellant was unlawful, the respondent must be given the option of either reinstating the appellant or submitting to an award of damages.

Cases cited:

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

*Hama* v *NRZ* 1996 (1) ZLR 664 (S)

*Muzuva* v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S)

*Phiri & Ors* v *Industrial Steel & Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S)

*R* v *Allan NO* 1956 (4) SA 208 (SR)

*S* v *Janyure* 1988 (2) ZLR 470 (S)

*R* v *Mackay* 1964 R & N 51; 1964 (3) SA 176 (FS)

*R* v *Parker* 1966 RLR 15 (A); 1966 (2) SA 56 (RA)

*ZESA* v *Bopoto* 1997 (1) ZLR 126 (S)



GUBBAY CJ

## Case Information

*E T Matinenga*, for the appellant

*A P de Bourbon SC*, for the respondent

## Judgment

**GUBBAY CJ:** The appellant was employed by the respondent building society (``the Society'') as the manager of one of its branches in Harare. At the date of his dismissal on 29 September 1993, he had served the Society, apparently faithfully and without any complaint of misconduct, for a period of sixteen years. What led to his ultimate downfall was the sequence of events which follows.

On 20 August 1993, the appellant was advised in writing that he was suspected of involvement in a fraud, perpetrated at his branch, which had resulted in a loss to the Society of $325 000. Pending the completion of investigations, and acting pursuant to clause 6:2(b) of its registered

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code of conduct, the Society suspended the appellant from duty with immediate effect and without benefits. However, it permitted him the continued use of the Mazda 323 motor vehicle assigned to him as manager.

A disciplinary hearing, to consider the appellant's alleged misconduct, was convened by the Society's works council on 1 September 1993. The finding made was that the appellant was guilty of negligence which had caused the Society serious financial loss. The penalty imposed was demotion from officer grade seven to officer grade eight, with his salary and entertainment allowance reduced to $4 427.80 and $55 per month respectively. The use of the motor vehicle was withdrawn. The appellant was instructed to report to the Society's head office on 6 September 1993 to be advised of his new duties.

Aggrieved at the outcome of the disciplinary proceedings, the appellant expeditiously notified the Society of his intention to appeal against the determination. Nonetheless, he was informed in writing that he was to report for duty on 7 September 1993 and surrender the motor vehicle not later than noon that day. The next day, the legal practitioner engaged by the appellant wrote to the Society stating:

> ``Our instructions are to note an appeal with the Labour Tribunal of which we are advised that client has already indicated to you of his intention to note an appeal.
>
> Meanwhile we are deeply concerned by the fact that in spite of his intention to note an appeal against the decision of the works council you have sought to enforce the terms of the determination. The legal position is quite clear that the order of the works council would not take effect until the determination of the appeal.
>
> Bearing in mind the legal position, ... we would insist that you are required to reinstate client at his former position at work until such time that the appeal is determined.''

The threatened appeal was duly noted to the Labour Relations Tribunal (``the Tribunal'') on 9 September 1993. On 14 September 1993, the Society's legal practitioners, by letter, disputed the contention that the noting of the





appeal had the effect of suspending the determination of the works council. They warned that a refusal by the appellant to take up his new duties and surrender the motor vehicle, would amount to a dismissable offence; and that unless the appellant complied with its demands by 17 September 1993, a further disciplinary charge would be brought against him.

Unable to persuade the appellant and his legal practitioner as to its view of the law, the legal practitioners acting for the Society then advised that the appellant was to appear at a disciplinary hearing to be held on 27 September 1993. He was to be charged with having absented himself from work for a period of five or more working days without reasonable cause, in contravention of clause 5:4:4 of the code of conduct.

The proceedings were attended by the appellant and his legal practitioner. The latter protested to the members of the works council that the effect of the appeal pending before the Tribunal was to suspend both its finding that the appellant was guilty of negligence and the consequent penalty of demotion; that the appellant, accordingly, had been justified in not resuming

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employment in a lower grade upon reduced remuneration and benefits. The submission, however, failed to convince the works council and, on 29 September 1993, the appellant was informed officially of the termination of his contract of employment with the Society.

Against this determination an appeal was noted to the Tribunal. Although considerably out of time, condonation was granted and the appeal heard.

Three issues were raised before the Tribunal. In respect of them, it held that:

(1) the noting of an appeal pursuant to s 101(7) of the Labour Relations Act [Chapter *28:07*] by a person aggrieved by a determination made under a registered code of conduct does not suspend the operation of the determination.

(2) the works council had correctly found the appellant guilty of contravening clause 5:4:4 of the code of conduct, in that he was absent from work for a period in excess of five working days without reasonable excuse.

(3) the works council had correctly found the appellant guilty of contravening clause 5:3:6 of the code of conduct, in that he negligently facilitated the commission of a fraud by a customer which caused the Society a loss of $325 000; and demotion under clause 6:1(e)2 was a competent penalty to impose upon him.

The Tribunal accordingly dismissed both appeals. It made no order as to costs.

Because the Tribunal ruled against the appellant on the first issue, it was obliged to determine whether he had absented himself from work without *reasonable cause*. Since it found against the appellant on that issue as well,





thereby confirming the decision to dismiss him from employment, it was, strictly speaking, unnecessary for it to consider the issue relating to his demotion (the first appeal).

I propose to deal at the outset with the charge that the appellant had absented himself from work for a period of five or more working days without reasonable excuse.

It was common cause that the appellant deliberately absented himself for a period of working days in excess of those permitted after having been ordered by the Society to report for duty and hold his services available. And I am prepared to assume in favour of the respondent that the Tribunal was correct in its understanding of the law that the noting of an appeal to it did not suspend the operation of the works council's determination that the appellant was to be demoted. From this, it follows that the appellant had no lawful excuse to absent himself from work for a period of five days or more. The fact that he genuinely believed that the determination of the works council was wrong and that he had been unjustly demoted did not afford him a ground in law to disobey the order. As a matter of law, he had to comply with it until the Tribunal allowed the appeal and set aside the determination.

But the lack of a lawful excuse did not necessarily mean, as the Tribunal appears to have

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supposed, that the appellant had no reasonable excuse to absent himself. The two concepts are different. Reasonable excuse may be something less than lawful excuse. That this is so emerges clearly from the judgment of CLAYDEN FCJ in *R* v *Mackay* 1964 R & N 51 (FS) at 57E-F, 1964 (3) SA 176 (FS) at 183F, where it was said:

> ``In this case, the appellant had two reasons for keeping publications known to him to be prohibited, two excuses for contravening the Act. One was that he wanted the publications for accounting purposes. That would perhaps be a `reasonable excuse', if those had been the words used, but there was nothing lawful, in accordance with law, about it. The other was that he thought that the law required a publisher to keep a copy of all publications for seven years. There is no such law. Again I think that the excuse was reasonable, having regard to his view of the law, but the excuse cannot be shown to be in any way in accordance with law.''

In *R* v *Parker* 1966 RLR 15 (A); 1966 (2) SA 56 (RA) MACDONALD JA (as he then was), after pointing out that it was not easy to draw a line between such words as ``sufficient'', ``reasonable'' and ``just'', went on to remark at 18 *in fine* (RLR) and 59C-D (SA) that:

> ``... it is possible that even in a trial an excuse amounting to a `just' (reasonable) excuse but falling short of a `lawful' excuse might be offered.''

See also *S* v *Janyure* 1988 (2) ZLR 470 (S) at 475B-476B.

It is also not open to doubt that the question whether or not ``reasonable excuse'' exists on the facts of a given case is one of law. See *R* v *Allan NO* 1956 (4) SA 208 (SR) at 211F.

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GUBBAY CJ

The material facts were not in dispute. The appellant acted on the advice of his legal practitioner in refusing to attend for work. It matters not if that advice was wrong in law. The appellant honestly believed it to be sound. Was his belief so bizarre that no reasonable person would have entertained it? I do not think so. On the contrary, I deem it somewhat unusual for a layman engaging legal advice to query its validity. After all, he places himself in the hands of the legal practitioner he is paying to represent him in the dispute.

Demotion for a longstanding employee is a crisis situation. It is both humiliating and degrading. The appellant did not intend by his action to repudiate his contract of employment. Far from it. He was simply accepting the legal advice proffered to him that he was entitled to insist on the status quo being maintained until such time as the Tribunal dismissed his appeal. He was willing and available to return to work immediately the Society indicated its preparedness to hold the determination to demote him in abeyance.

Being in a position no less favourable than the Tribunal to exercise a value judgment on those facts, I am satisfied that the appellant had a reasonable excuse for absenting himself from his workplace. The charge was not proved against him.

This conclusion effectively relieves the court of the need to decide whether the noting of the appeal on 9 September 1993 suspended the disciplinary action taken to demote the appellant. The Tribunal held, and properly so, that it was bound by the judgment of SMITH J in *Chatizembwa* v *Circle Cement Ltd* HH-121-94 (not reported) that suspension did not operate where an appeal had been noted in terms of s 101(7) of the Labour Relations Act. It considered

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that the later judgment of KORSAH JA in *Phiri & Ors* v *Industrial Steel & Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S) left that of the High Court undisturbed. I agree.

In the case of *Phiri & Ors*, the part of the Minister's order setting the terms and conditions of retrenchment was severable from the determination approving the retrenchment of the appellants, which was unchallenged by them on appeal. Consequently, that part of the order stood and was not suspended by any rule of the common law, and the appellants were not entitled to the relief claimed, namely, the payment of their salaries. For that reason, the invitation to rely on the ratio in *Chatizembwa* v *Circle Cement Ltd supra* was declined (see at 49F-H).

The present case, of course, is on all fours with *Chatizembwa supra*. But in the light of the conclusion that the charge of absenteeism was not proved against the appellant, any remarks made as to the correctness or otherwise of the judgment of S*mith* J would be obiter. I prefer therefore to leave open for decision whether the noting of an appeal in terms of s 101(7) of the Labour



GUBBAY CJ

Relations Act suspends the operation of a determination made under a registered code of conduct.

Insofar as the first appeal is concerned, the Tribunal held that the evidence fully supported the determination of the works council that by his negligence the appellant had facilitated the fraud perpetrated upon the Society. No appeal against that factual finding lies to this court. See s 92(2) of the Labour Relations Act; *Muzuva* v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S).

The only point taken was that the penalty imposed was one not permitted by the code of conduct. This is not so. Clause 6:1(e)2 provides that demotion, down to an appropriate grade below the current grade held, is the penalty to be administered for ``incompetence or inability to fulfil contractual obligations or for misdemeanours inconsistent with the job position''. In the negligent performance of his duties as branch manager, the appellant was plainly guilty of incompetence.

Since I have found that the dismissal of the appellant must be set aside, the Society must be given the option of either reinstating him in employment, albeit in officer grade eight, or submitting to an award of damages to be specified by the Tribunal. See *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 678C; *ZESA* v *Bopoto* 1997 (1) ZLR 126 (S) at 132G-H.

Finally, with regard to the question of costs, it seems to me that as the two appeals dealt with separate issues, it is appropriate that, in each, costs should follow the event.

In the result:

1. The second appeal is allowed with costs. The order of the Tribunal dismissing the appeal is set aside. The matter is remitted to the Tribunal to specify the amount of damages to be

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awarded after the requisite evidence has been adduced before it.

2. The first appeal is dismissed with costs.

**EBRAHIM JA:** I agree.

**KORSAH AJA:** I agree.

*Madzivanzira & Partners,* appellant's legal practitioners

*Winterton, Holmes & Hill*, respondent's legal practitionerS

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## INDEPENDENT AFRICAN CHURCH *v* MAHEYA 1998 (1) ZLR 552 (HC)

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

Devittie J

Application for eviction

24 June 1998 Judgment No. HH-98-98

### Flynote

Church - legal proceedings - independent church - dispute between church and members - what law should regulate such disputes

### Headnote

In resolving church disputes, the courts of this country have consistently applied the law of voluntary associations, but it is questionable whether this is appropriate. To begin with, democratic principles govern voluntary associations, whereas churches are hierarchical. The State has a legitimate interest in the resolution of church disputes, but the reason why church disputes in Zimbabwe never resolve the underlying doctrinal disputes is that the constitutions of the independent churches make no provision for the establishment of an adjudicative body with the power to decide on matters of doctrine. The courts resolve the disputes according to the court's interpretation of the church's constitution, but this may result in no decision being made on the substantive dispute.

The applicant was a Christian church, independent of any of the established mainstream churches. It was established in 1949. An application was brought to evict the respondent, the widow of the former Bishop of the church, from church residential property. The facts were not agreed between the parties. There were clearly two factions in the church, one loyal to the former Bishop and other not. The size of the factions was in dispute, but each had effectively constituted itself into a separate church, and each claimed the right to the property of the applicant.

*Held*, that to apply the law of voluntary associations would not resolve the substantive dispute; and to apply the ``majority'' principle would not be possible because it was not possible to say

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who constituted the majority. The deference approach, whereby the courts defer to determinations of the church's highest body in ecclesiastical matters, would also be impossible, the applicant being a congregational church with no recognisable supreme adjudicatory body.

*Held*, therefore, that the court should exercise an equitable discretion, to avoid the courts being embroiled in matters of church practice. Further evidence would, however, be necessary and the matter would be postponed for such evidence to be obtained and adduced.

Cases cited:

*Gonzalez* v *Roman Catholic Archbishop* 280 US 1 (1929)

*Jones* v *Woolf* 443 US 595 (1979)

*Kedroff* v *St Nicholas Cathedral* 344 US 94 (1952)

*Maryland & Virginia Eldership, Churches of God* v *Church of God at Sharpsburg NC* 396 US 367 (1970)

*Presbyterian Church in the US* v *Mary Elizabeth Hulle Memorial Presbyterian Church* 393 US 440 (1969)

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*Serbian Eastern Orthodox Diocese for the US & Canada* v *Milivojevich* 426 US 696 (1976)

*Watson* v *Jones* 80 US (13 Wal) 679 (1871)

*Zimbabwe Apostolic Faith Mission* v *Bishop Tsueta* HH-368-88

*Zimbabwe Assns of God Africa* v *Sande & Ors* HH-79-90

## Case Information

*J B Colegrave*, for the applicant

*T Masendeke*, for the respondent

## Judgment

**DEVITTIE J:** This case concerns an intra-church controversy which has raged for several years. There appears to be no realistic prospect of an amicable settlement. Each faction has during the past five years taken its crusade to the civil courts. This dispute has the potential to spill over into civil commotion.

I express no disappointment that the element of charity which features so prominently in the Christian faith has not, in this instance, made possible a peaceful resolution of this dispute. History teaches us that the passion generated by church disputes has been a major source of civil conflict from ancient times.

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Even at birth, the Christian Church experienced a great schism. After the death of Christ, the burden of the message which the early disciples preached was the belief that, although crucified by the Romans, Christ would return as the Messiah, and establish a messianic kingdom. They spread word beyond the confines of Palestine, that Jesus was the promised Messiah. Even in this ancient church, a schism occurred. It came about when a convert of the early church, Paul, adapted Christianity to meet the needs of all mankind and freed it of the local and national parameters. He interpreted the messianic kingdom as unrelated to the Jewish state and instead as a Kingdom of peace and righteousness for all mankind. His preaching caused a serious conflict in the early church, which is recorded in the Epistle to the Galatians and the Acts of the Apostles (Chapters 15-22).

Another great schism which took place in early times was the Reformation. The growth of national consciousness in medieval times in part motivated the great conflict between the Catholic Church and Protestantism. The spirit of nationalism could not accommodate the claims of the papacy, a non-national authority, to moral dictatorship. This schism has raged for centuries and continues to this day. It was not long ago that Catholics in England were denied the right to vote and suffered other forms of discrimination.

In like vein, the spirit of freedom radiated by the advent of democratic government in Zimbabwe in 1980 precipitated a rapid growth of independent churches in Zimbabwe. I use the word ``independent'' to denote churches with no association or affiliation to the established churches.

This case raises questions whose significance goes beyond the immediate



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context of the present dispute. The question that lies at the heart of it all is whether there ought to be a separate corpus of principles to govern the resolution of church property disputes in Zimbabwe. Invariably these disputes concern independent churches. The present dispute concerns a church body with no affiliation to an established church. The applicant is an autonomous congregation and was established in 1949. The applicant claims that it is the lawful church authority. It claims an order evicting the respondent from church residential property. The respondent is the widow of the former Bishop of the Church and the claims of the applicant are disputed in every respect in her opposing papers.

The papers before me do not ventilate the cause of the dispute to the extent that I would have desired. It seems, though, that the present feud has its genesis in matters of church administration and practice. Certain members appear to have been dissatisfied with the late Bishop's conduct of church affairs. According to the applicant, the Bishop was voted out of office on 29 May 1993 at a duly constituted Annual Conference. The minutes of the meeting of 29 May 1993 indicate that a vote of no confidence was passed but no reasons were given as to why the motion was proposed. At that same meeting applicant claims that it adopted a new constitution.

The respondent disputes that her late husband was deposed by a vote of no confidence. She claims that the church is split into two factions, one supporting the deponent to the applicant's

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affidavit, and the other, which is still loyal to the late Bishop. The respondent has attached to her founding affidavit minutes of an Annual Conference held on 29 March 1997. These minutes indicate that a new Head of the Church was appointed and that a resolution was passed to institute proceedings to bar persons who are now opposed to the late Bishop from interfering with church property. The respondent further contends that the applicant did not give the requisite notice of amendment to the Constitution. The applicant's response is that the amendment was initiated and approved by the Bishop. The respondent maintains that her faction is the lawful authority and approves of her continuing in occupation of the church residential property.

Without defining the issues, counsel for the applicant and the respondent were not averse to the matter being referred to trial on the grounds that there were unresolvable disputes of fact on the papers. It is well that I comment on aspects of the dispute which the court has been asked to resolve. Firstly, it is clear to me that there are two factions in existence. The applicant's Chairman, Mr Mapisaunga, although denying that there are two factions in existence, nonetheless concedes that the respondent's group had their own Annual Conference. He states that on the day and time that the applicant had its Annual Conference, the respondent -



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> ``was holding her opposing Conference on the veranda of the Church house and to the best of my knowledge it could not have been attended by more than about 25 people. The official Conference held at the same time was attended by over 300 members and 58 official delegates.''

Mr Mapisaunga further states that:

> ``I deny that applicant is now divided into two main camps. The vast majority of Church members remain united under the Constitution attached to my founding affidavit.
>
> There is a group of people who appear to be loyal to the respondent as the widow of the one time Bishop but this group is small of not more than 100 people at the most which is composed of members of the Maheya family.''

The respondent maintains the existence of two factions and asserts that her faction is the main stream faction, whereas that of Mr Mapisaunga is a splinter group. In support, a church elder who has been in the Church since its inception in 1949, states that in his Province, which is Manicaland, there is no support for the Mapisaunga faction and that his main stream faction supports the respondent's tenure in the Church property. Mr Mapisaunga responds to the assertion by the church elder in the following words:

> ``He was presumably elected at the little meeting held on the veranda at the same time as the main meeting was held in the Church premises.''

It admits of no reasonable doubt that the congregation has split into two factions. Each faction has a different constitution. Each faction has held its own separate annual meeting and elected different office bearers. The dispute as to which faction constitutes the majority is one which I am unable to resolve on the papers.

Although the main cause of the dispute is difficult to unravel, it clearly revolves around the status enjoyed by the late Bishop before and after his death. More importantly, to the extent the

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dispute involves matters of church doctrine and practice, it is this: what status is to be accorded to a bishop of a church after his death? What rights and privileges attach to his widow and his family? Do those who remain loyal to a bishop after his death represent the true defenders of the faith? The late Bishop's children and family are central figures in the dispute. The respondent complains that her two sons had, at the time she deposed to the affidavit, been imprisoned for having been in contempt of a court order which restrained them from interfering with the Church services. It seems to me that the dispute extends beyond the narrow confines of the relief sought, namely the ejectment of the respondent from the residential property. The respondent and the church elder deposed to the fact that they have given instructions to their legal practitioners to institute proceedings barring the applicant's members from having access to any of the churches property in Zimbabwe. The extent of the movable and immovable property is not indicated. Each faction has thus effectively constituted itself into a church, with a separate organisational structure, and each claims the



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right to the Church property. A resolution of the ejectment dispute will not resolve the conflict. It may continue to simmer years hence, as it has done over the past l0 years.

There is a dispute too as to which constitution is the lawful Constitution. Both constitutions share the principle that the Head of the Church is appointed by delegates of the Church Congregation. The applicants seem not to dispute the procedural requirements for the amendment to the Constitution. The respondent claims that these requirements were not followed. The applicant explains that the amendment was authorised and approved by the late Bishop. The amended Constitution does make provision for the removal of the Head of the Church. But I need not concern myself with the dispute concerning the legality with the removal of the late Bishop. The reality now seems to be that his adherents have constituted themselves into a full-bodied and separate structure. I am not able to determine which is the breakaway faction. This issue cannot properly be determined by reference to which faction was formed at a later stage in time.

The question presented by this case is which faction is entitled to possess and enjoy the Church residence, and as I pointed out, the litigation which encompasses all the church property in this country looms in the background.

In resolving church disputes, our courts have consistently applied the law of voluntary associations. The majority of disputes involving private associations that culminate in litigation involve churches. As there is no homogeneous law of voluntary associations it seems to me that church property disputes demand a special focus. In resolving disputes involving voluntary associations which are churches, the law applicable thereto ought to be fashioned to meet the needs of Zimbabwean churches. Religious associations have features which distinguish them from other associations. One needs only mention the tension which exists between the democratic principles that normally govern the operation of a voluntary association and which all its office bearers are subject to, and the exalted position which the head of an independent church in Zimbabwe or indeed any church, occupies. He is a revered figure, in whom is reposed the wisdom to determine and interpret the principles of the faith. He has no equal. He stands in

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sharp contrast to the chairman of, say a jockey club, who is an ordinary mortal amongst the members.

In Zimbabwe, no separate body of law has developed pertaining to the resolution of church property disputes. Our case law index makes no reference to the church disputes as a separate corpus of law. The influence of independent churches in Zimbabwe is steadily growing. There is a need to articulate a separate body of church principles. These emerging churches require, for their spiritual and administrative growth, the articulation of



separate legal principles. They have immense potential to contribute to a national culture and identity that is truly Zimbabwean.

But the need to develop separate church principles arises not only from the fact that this would benefit the Zimbabwean Christian community as a whole. The State has a legitimate interest in the peaceful resolution of church disputes. These considerations seemed to me to justify the extensive discussion which I have undertaken of the principles which should govern the resolution of church disputes in this country.

The United States of America, like Zimbabwe, witnessed a proliferation of independent churches after the American War of Independence. An examination of the development of American law is instructive on the need to arrive at a coherent body of rules for settling church disputes. To understand the present status of American church law, it is necessary to travel through the Supreme Court cases which have shaped American law on church property disputes.

The first case is *Watson* v *Jones* 80 US (13 Wall) 679 (1871). It concerned a dispute after the Civil War. The Kentucky Church split into pro-slavery and anti-slavery factions. The church was a member of the Presbyterian Church of the United States. The pro-slavery group, which was the minority faction, claimed title to church property based on the fact that its views were more consistent with the teaching of the Presbyterian Church at the time of the Church's founding. The Presbytery of Louisville, which was the next highest governing Church body after the Church itself, declared the pro-slavery minority the true Church body and, therefore, the rightful titleholder.

The General Assembly, which was the highest body, decided in favour of the majority abolitionist faction. The Supreme Court set down the following principles:

``(a) The Federal Courts are competent to enforce express terms contained in trust instruments governing the use of ownership of property. However, courts may not resolve or enquire into matters of religious doctrine in order to determine entitlement to property.

(b) Where a dispute arises between factions of an independent congregation, `the right of such bodies to the use of the property must be determined by the ordinary principles which govern the association'. If the church had always governed itself by majority rule, for example, the majority faction would prevail.

(c) Where the dispute is between a subordinate and superior bodies of a single hierarchical church organisation, and whenever the questions of discipline are of faith or ecclesiastical rule, custom or law

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> which have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them in their application to the case before them."

The *Watson* approach is popularly termed the ``deference approach'' and



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requires judicial recognition of the decisions of the ``church's highest body'' on matters of discipline, faith or ecclesiastical rule, custom or law.

The principles in *Watson*'s case were modified to an extent in *Gonzalez* v *Roman Catholic Archbishop* 280 US 1 (1929). The plaintiff claimed a right to be appointed to a chaplaincy. The Archbishop refused to do so on the grounds that the plaintiff did not qualify. The court deferred to the Archbishop's decision in these terms:

> ``Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualities of a chaplain are and whether the candidate possessed them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals upon matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive because the parties' interest made them so by consent or otherwise.''

Whereas, therefore, the court in *Watson*'s case urged wholesale judicial deference to determinations of a church's highest body in ecclesiastical matters, the *dictum* in *Gonzalez* case suggested that there could be some judicial review on church decisions in exceptional cases in which fraud, collusion or arbitrariness was alleged. In terms of the *Gonzalez* decision, a civil court would examine the fairness of the church proceedings to determine the absence of fraud or collusion and whether the church has disregarded its own rules and acted arbitrarily.

In *Kedroff* v *Saint Nicholas Cathedral* 344 US 94 (1952) the court elevated the principles in the *Watson* and *Gonzalez* to constitutional status. The dispute concerned the use and occupancy of the Russian Cathedral in New York. The local churches appointed their Archbishop and the authorities in Moscow, purporting to be the highest authority, appointed their Bishop. The decision turned on which of the two had been validly selected as the ruling hierarch for the American churches. The court ruled in favour of the Bishop selected by the church in Moscow and stated that there was no schism between the Russian and American churches and that the evidence showed administrative control of the American church by the supreme authority in Russia .

The court further stated that even in those cases where a property right follows as an incident from decisions of the church custom or law on ecclesiastical issues the church rules and contracts must be given constitutional protection as a proof of the free exercise of religion against State interference.

The case of *Presbyterian Church in the United States* v *Mary Elizabeth Hulle Memorial Presbysterian Church* 393 US 440 (1969) concerned the ordination of women in the Presbyterian Church. The Presbyterian local congregation decided to withdraw from the National Church as it was opposed to the ordination of women. It sought to control the local

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church properties. The State Court held that the property was for the benefit of the



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general church as long as it adhered to the same tenets of faith and practice existing at the time of the affiliation of the local churches.

The Supreme Court overturned this decision and explained that:

> ``It is obvious that not every civil court decision as to property claimed by a religious organisation jeopardises values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property and there are neutral principles of law, developed for use in all property disputes, which can be applied without `establishing' churches to which property is awarded. But First Amendment values are plainly jeopardised when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.''

In contrast to the approach in the *Watson* and *Gonzalvez* cases, where the courts reviewed a church decision in narrow terms to determine whether there was fraud, collusion or arbitrariness, the *Presbyterian* case suggests the application of ``neutral principles'' of secular law to resolve intra-church disputes.

In *Maryland and Virginia Eldership of the Churches of God* v *Church of God at Sharpsburg, NC* 396 US 367 (1970) the Supreme Court upheld the ``neutral principles'' approach. BRENNAN J, in a concurring opinion at 368, set out the acceptable approaches to intra-church disputes:

> ``A State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.''

In *Serbian Eastern Orthodox Diocese for the United States and Canada* v *Milivojevich* 426 US 696 (1976) a dispute arose over the control of the American Diocese of the Serbian Eastern Orthodox Church property. The State Court invalidated the Bishop's removal as arbitrary, because removal proceedings were not conducted according to the court's interpretation of the church's Constitution and the Penal Code. The Supreme Court overturned this decision stating at 708 that:

> ``The fallacy fatal to the judgment is that it rests upon an impermissible rejection of the decision of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and it impermissibly substitutes it own inquiry into church policy and its resolutions based thereon of these disputes.''

The court noted that the constitutional requisite that courts refrain from resolving church controversies over religious doctrine ``applied with equal force to church disputes over church practice and administration''. The court further held that notwithstanding the arbitrariness exception in *Gonzalvez*, the evaluation of testimony concerning church procedures and rejection of the interpretations of the highest church body was inappropriate.

In *Jones* v *Woolf* 443 US 595 (1979) a dispute arose between two factions of a Presbyterian Church congregation over the use and possession of Church



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property. A commission appointed by the church hierarchy to investigate the matter ruled in favour of the minority faction being the true Congregation. The minority faction sued for exclusive possession and use of the church property. The State Court relied on the neutral principle approach, which it applied.

The Supreme Court at 603 stated:

> ``This method relies exclusively on objective, well established concepts of trust and property law and formulae familiar to lawyers and judges. It thereby promises to free civil courts completely from the entanglement of religious doctrine, policy and practice.''

The court stated that there was no requirement that the Georgia court should adopt a rule of compulsory deference. As the determination that the majority faction was the true congregation was unclear and made without adequate analysis, the court remanded for determination whether the Georgia courts had adopted a presumptive rule that a voluntary religious organisation is represented by a majority of its members. If so, the Georgia court's judgment would stand on a neutral principles approach.

The foregoing examination of American church law demonstrates an attempt by the courts to evolve a coherent set of principles to be applied in church property disputes. The American experience adds impetus to the call for our courts to begin to develop a set of principles to be applied in Zimbabwean church property disputes.

As happened in Zimbabwe, the emergence of nationalism after the American revolution resulted in the growth of independent churches and the establishment of congregational self-government. Congregational sects abound in America, as they do in Zimbabwe. But there the similarities end. I make no suggestion for the wholesale application of American church law to Zimbabwean church disputes. There are features which are peculiar to Zimbabwean church disputes which have to be borne in mind when seeking to apply some of the principles that American courts have evolved in dealing with church property disputes.

The constitutions of independent Zimbabwean churches are invariably drafted along rudimentary lines of a voluntary association. Little attention is given to dispute resolution procedures. The genesis of the disputes that arise is often difficult to unravel. Where the origin of the disputes is ventilated and, as is often the case, it is doctrinal, no adjudicative decision is reached. Property disputes, with doctrinal origins, are made to turn upon the application of the procedural law of voluntary associations - and yet, a significant majority of the members of independent churches have low levels of literacy, such that at times it makes little sense to apply strictly procedural niceties to their disputes. The reason why church property disputes in Zimbabwe never resolve the underlying doctrinal dispute is that the constitutions of the





churches make no provision for the establishment of an adjudicative body with the power to decide upon matters of church doctrine or practice. Consequently, when disputes arise that

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culminate in civil litigation, the issues are defined within the strict parameters of procedural law of voluntary associations and the interpretation of the relevant constitutional provisions. The doctrinal origins of the dispute are relegated to the background and in consequence property disputes that have emerged from bitter and fundamental doctrinal disputes are made to turn on the court's interpretation of rules of the constitution. It is for these reasons that I consider that church law jurisprudence developed in America has some relevance to the resolution of church property disputes in Zimbabwe.

Seldom would any occasion arise where the *Watson* deference approach could be applied because normally no adjudicatory body would have made any decision. The difficulties are further compounded by the fact that the administrative capacity of the independent churches is usually inadequate. Matters of detail and record-keeping, which deserve attention if any organisation is to function efficiently, are not high on the list of priorities. What this means is that the faction which may have been successful on a resolution of church doctrine and practice, loses the right to church property by the application of the law of voluntary associations.

The above features I believe are demonstrated in the unreported judgment of GIBSON J in *Zimbabwe Associations of God Africa* v *Sande & Ors* HH-79-90. The applicant sought an order that certain property, which the opposing faction had seized, be restored to its possession. The factual dispute arose because of grievances held by some church members over the church leadership and its practice. The Bishop was accused of nepotism in that he had, *inter alia*, appointed his wife as vice-chairman of an important branch of the church. There were complaints too about other forms of corruption. The bulk of the complaints stemmed from the alleged dictatorial tendencies of the Bishop. GIBSON J found that the grievances held by those who had seized the church property in protest, and in an apparent attempt to break-away, were justified. In other words, if the dispute over church practice was to be adjudicated upon, that faction would have been vindicated. But that was not the issue before the court. Civil courts are not competent to decide upon matters of church practice. The learned judge thus turned to the law of voluntary associations. She ordered the respondents, whom she stated had ``laudable motives'', to restore the church property. The real cause of the dispute thus remained unresolved. It is evident from an examination of this case that the constitution of the church was wholly ill-equipped to deal with the dispute that rocked the church. The disaffected members took the law into their own hands and achieved no success in the ensuing litigation. The faction





that was defending a position of good administration was able to advance its case no further in a civil court and the dispute was made to turn on a procedural point.

In *Zimbabwe Apostolic Faith Mission* v *Bishop Tsueta* HH-368-88 G*ibson* J faced a congregational dispute in which the majority of the church members sought an order effectively defrocking the Bishop and for the restoration of certain movable property. The origin of the dispute was steeped in matters of church doctrine and practice. It seems that a substantial number of church members felt that the Bishop's conduct in taking, as his wife, the wife of his late brother, had breached a fundamental tenet of the church. In seeking his defrockment, they relied upon a resolution passed by a majority of the church members. The court held that the

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executive committee, which had taken the decision to oust the Bishop, derived its power from a constitution which had not been validly amended. Consequently, the court held that any acts done under that constitution were invalid. The amendment was invalid because the requisite notice had not been given as required by the constitution for the amendment to be effected. The court reached this decision despite the fact that it would seem, from reading the judgment, that the meeting which amended the constitution, was fully attended. In other words no prejudice was caused by the failure to give the required notice. The strict application of procedural law of voluntary associations it seems to me, was inappropriate to a congregation which, the judgment clearly shows, was barely literate - and whose capacity to attend to matters like minute and record keeping was evidently minimal. The court held that those who had ousted the Bishop had no authority to act other than in strict compliance with the constitution. Further, that the members who were in office prior to the amendment had to attend to the amendments of the constitution in accordance with its rules. The order for the Bishop to restore church property was declined on the ground that the Bishop had an equal right to its possession. In regard to the order interdicting the Bishop from acting as Bishop, the court held thata clear right had not been shown to exist.

I now have to decide how to resolve the present dispute. What principles ought to govern the resolution of this church property dispute? The applicant's cause of action, as it appears from the founding affidavit, is simply that it is entitled to an order for eviction on the grounds that the applicant's husband is no longer Bishop. As a consequence of his vacation of office it is claimed that his wife is no longer entitled to occupy the church property. That is the simple proposition put before me. I was inclined to hold that the dispute was non-cognisable as its resolution involved a decision by this court on matters of church practice regarding the status of the widow of a bishop, and therefore



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the court had no jurisdiction to entertain the dispute. However, the courts have a legitimate interest in the peaceful resolution of church disputes and I am accordingly duty bound to resolve the dispute. I am mindful of the fact that there is a further dispute looming - it concerns the right to possession of all the church property, wherever situate.

I shall first consider each of the possible approaches to this dispute. I could apply the law of voluntary associations. An avenue I could follow in this regard is the failure by the applicant to give due notice in terms of the old constitution of the meeting where of the amendment was adopted. If due notice was not given then it could be argued that the present executive was not validly elected and consequently has no authority to evict the respondent. I decline to adopt this approach. It would not resolve the substantive dispute. A zealous adherence to procedural technicalities is to be discouraged in matters of this nature. I accept, though, as was stated in the *Gonzalvez* case *supra*, that procedural rules of fairness must be enforced where their violation leads to fraud.

I am unable to apply ``neutral'' or ordinary principles of the common law in this dispute. As presently framed, the cause of action requires me to make a finding on church practice. I cannot order the eviction of the respondent on the ground that as her husband has ceased to occupy

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the office of Bishop her right to occupy the property has ceased.

A third possible approach is to apply the majority principle and to hold that the majority is entitled to act in the manner it sees fit in regard to this dispute and in regard to that which is about to enfold in regard to all the church property. The first difficulty in this regard is that I am unable to determine which is the majority faction. I would accordingly leave open the question as to whether I ought to uphold the decision of the majority. Considerations that may weigh against this approach are that the minority may, over several decades, have made valuable contributions to the church property. Am I now to cast them into the wilderness?

Finally, I may consider the ``deference'' approach as in *Watson*'s case. But that course is not open to me. This is a congregational church with no recognisable supreme adjudicatory body. Furthermore, it seems that the church is split into two factions. Finally, I may consider ordering that elections be held. But this approach is fraught with the same difficulties as bedevil the majority principle.

The conclusion to which I have come is that I must exercise an equitable discretion. I find some support for this approach in an article in the *Harvard Law Review* (75) 1142:

> ``Courts would appear to retain discretion to decline enforcement of an ecclesiastical tribunal's decision not only where the award of the property conformally with the decision



> would be offensive to be settled public policy, but also where it would be harsh, unfair, or otherwise insensitive with traditional equity notions. Thus the decision not to award the use of the Church property to a majority which, because of the blandishments of a `roving evangelist', adopted doctrines antithetical to the beliefs of those who only a few years before had devoted the property to the church might well be justified as an exercise of equitable discretion quite apart from any doctrine of implied truth.
>
> The resolution of the dispute by the use of a discretionary power does not entail, and ought not to involve, the court in deciding which faction is right in regard to Church doctrine or practice. To do so would implicate constitutional values.''

The court's discretion ought to be exercised with caution so that the courts do not become embroiled in matters of church practice. In the present case, it will be necessary that more information be placed at my disposal, including the leading of oral evidence before I can be placed in a position to exercise a meaningful discretion. Should the evidence justify such a course, I consider that I may, in the exercise of my discretion, make an order in terms of which the use of the Church property is shared. But, as I have indicated above, I do not have sufficient information at present and I prefer to leave the matter open.

I propose to make an order which allows the parties to adduce such further evidence as they may deem necessary and to afford them an opportunity to dissuade me from the course which I am inclined to adopt in the light of further evidence.

Finally, I wish to make some observations for the attention of the Law Development Commission and the relevant church authorities. This case has thrown light on the real problems that face the development of the independent churches in the country. I disavow any suggestion that the State should interfere in church administration. But it seems to me that State assistance is needed to impose a semblance of order in church affairs and to protect the

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interests of the church communities in Zimbabwe who invariably suffer real prejudice from the interminable church disputes that rage on even as I write. A situation has to be created where the appropriate adjudicatory church body resolves matters of church doctrine and practice. The courts ought not to be placed in a situation where fundamental matters of church practice remain unresolved - and the property disputes are made to turn on procedural law of voluntary associations. If the underlying causes are not resolved a large section of our Christian communities will be disadvantaged.

The Law Development Commission should give consideration to the establishment of a Church Commissioner, appointed by the State. He ought to be legally qualified and his function should be to advise church bodies on a model constitution and other administrative matters. This is along the lines of the Charity Commission in the United Kingdom. Consideration should be



given to including, as a function of the Church Commissioner, the administrative task to organise, from a representative panel, an ecclesiastical tribunal to give rulings on matters of church practice within the independent churches. African custom and belief seems to play a central role in church disputes. This would lead to a coherent body of church law. The decisions of the tribunal in matters of church practice would not be appealable and the powers of the tribunal would be limited to matters of church practice. The civil courts would retain jurisdiction in all other areas.

In this way, Zimbabwean culture would be enriched and the spiritual movement would flourish unimpeded by factional wrangles, but instead supported by a rock solid foundation of immutable principles.

The order I make in regard to the present dispute is as follows:

1. The matter is postponed in terms of r 159 of the High Court Rules for the adduction of further evidence, including oral, as is more fully provided below.

2. The applicant be and is hereby given leave to file further affidavits and serve them on the respondent within ten days of the day of this order showing -

   (a) the assets of the Independent African Church and the extent to which its members have contributed thereto;

   (b) why a finding should not be made that the members have constituted themselves into two separate church organisations or congregations;

   (c) why this court should not, in the exercise of an equitable discretion, make an order in terms of which the assets and the right of occupation of church property should not be divided between the separate congregations;

   (d) the number of members in each congregation.

3. The respondent and/or the organisation of which she purports to be a member shall file and

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serve on the applicant an opposing affidavit touching on the issues as formulated above within ten days of receipt of applicant's further affidavits.

4. The applicant may, by no later than 10 days after the receipt of the opposing affidavit, file and serve on the respondent a replying affidavit.

5. The parties shall, within 15 days after the opposing affidavit is filed, prepare and file heads of argument and thereafter the applicant shall request the respondent to appoint a date, in agreement with the Honourable Mr Justice DEVITTIE for the further hearing in this matter.



DEVITTIE J

6. At the hearing of this matter:

   (a) The parties may adduce such further oral evidence as may be adduced in respect of the issues set out above; and

   (b) the parties may adduce such further oral argument as they wish.

*Atherstone & Cook*, applicant's legal practitioners

*Honey & Blanckenberg*, respondent's legal practitioners



## MASHAVE *v* ZIMBABWE UNITED PASSENGER CO LTD & ANOR 1998 (1) ZLR 567 (HC)

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

Blackie J

Opposed application

24 June 1998 Judgment No. HH-101-98

### Flynote

Practice and procedure - representative proceedings - numerous persons having interest in same proceedings - form of authority required for representative to bring proceedings

### Headnote

The applicants, workers employed by the respondent company, had been retrenched. One applicant applied on behalf of the other applicants for the court to review the Minister's decision to authorise their retrenchment from employment. He brought the application as a representative of the others, in terms of r 89 of the High Court Rules. This rule permits one person to represent others in proceedings before the court, but he can only do so if he produces evidence to establish that he is duly authorised to represent the persons he is purporting to represent.

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For the applicant to prove such authorisation it is not necessary in every case for him to produce an individual affidavit from each applicant to be represented, stating in express terms that he has authorised the applicant to act on his behalf. Proof of authorisation to start proceedings on behalf of another in the High Court is not normally required to be in affidavit form and there is no reason in principle why some document, other than an affidavit, if properly presented, could not be used to prove the authority to represent others. Especially where there are a large number of applicants, there is no objection in principle to the filing of a joint document of authorisation and there are practical reasons of convenience why this should be allowed. In the present case, however, the joint document contained a number of defects and did not prove the authority of the applicant to represent the other applicants.

As regards the application for condonation of the late filing of the review application, the application had to be rejected. There had been considerable delay and non-compliance with the rules, the applicant had failed to give an explanation for the delay, the prospects of success on the merits were not good and delay in proceedings had caused prejudice to the first respondent.

Cases cited:

*Gudza* v *University of Zimbabwe* HH-85-95

*Prosser & Ors* v *Zimbabwe Iron and Steel Co Ltd* HH-201-93

Legislation considered:

High Court Rules 1971 (RGN 1074/71), r 89

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BLACKIE J

## Case Information

*A J Dyke*, with him Miss *W Miles*, for the applicants

*P Nherere*, for the first respondent

Mrs *L Goredema*, for the second respondent

## Judgment

**BLACKIE J:** The applicants were employed by the first respondent (United). They were retrenched by United with effect from 31 December 1996 following a notice of authorisation to retrench from the second respondent (the Minister). In this application, the applicants seek a review of the Minister's decision to authorise their retrenchment. They ask, primarily, for that decision to be set aside and for a direction from this court that their proposed retrenchment and its package be referred back for negotiation between them and United. In the alternative, the applicants seek confirmation of their retrenchment but ask for a declaration that that they are entitled to the retrenchment package, which they have set out in their draft order.

The respondents have raised two objections *in limine* to the application. These are that, with the

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exception of the first applicant (Mashave), none of the applicants is properly before the court and that, in any event, the application is out of time.

Mashave brings this application on behalf of the other applicants in terms of r 89 of the Rules of this court. That rule permits one person to represent others in proceedings before this court. The basic requirements for proof of such authority to represent others in terms of the rule have been set out by S*mith* J in *Gudza* v *University of Zimbabwe* HH-85-95:

> ``Where an applicant purports to institute proceedings in terms of r 89 of the High Court Rules 1971 on behalf of a body of persons, it is essential that he...produces some evidence to establish his...claim that he is duly authorised to represent the body concerned.''

A more detailed statement on the same point is made by BARTLETT J in *Prosser & Ors* v *Zimbabwe Iron & Steel Co Ltd* HH-201-93. In that case, Prosser, the first applicant, signed the application and stated, in his affidavit, that he represented the other 35 persons. As proof of his authority he referred to an annexure to the affidavit in which the full names of the 35 persons were set out. He then stated that he had been duly authorised to act on behalf of all the applicants. BARTLETT J held that this was not sufficient proof of authorisation. He said:

> ``I am of the view that it would have been necessary to have gone further than that in order to properly make the other 35 persons applicants in this matter. I am satisfied that an affidavit from each of the other 35, which could have been done in simple terms stating that they had authorised Barry Thomas Prosser to act on their behalf and confirming that they had read the papers would have been necessary.''

In this case, Mashave says in his founding affidavit that at ``a meeting of the ZUPCO Retrenched Workers Committee, held on Friday, 30 May 1997, (he) was duly elected by members of that Committee, whose names appear





Annexure A, to act as their representative for the purpose of making this application ...'' Behind that affidavit is a page stating that -

> ``We, the undersigned, do hereby make oath and say:
>
> 1. We have read the application in this matter, and are in agreement with the contents thereof.
>
> 2. We confirm that Gibson Mashave is the duly appointed representative of the Retrenched Workers Committee, and is authorise(d) to represent us in the abovementioned Application before this Honourable Court.''

At the bottom of that page and under the words ``Sworn to at Harare this 13th day of June 1997'' are two signatures. One is that of the commissioner of oaths, with his stamp. The other, because it looks similar to that of Mashave at the end of the founding affidavit, appears to that of Mashave but there is no other means of identifying it as such. Behind that page, and placed after it in this application, is a series of pages comprising lists of names with signatures against most of those names. None of those pages is signed or initialed by the commissioner of oaths and it is clear that none of the signatories on those pages took the oath before the commissioner. Some of the typed names have no signature to them. Some persons have signed with a name different to typed name. Others have signed with the letters ``pp'' after their

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signature. There follows another document marked Annexure A which is said to be a list of the applicants represented by Mashave.

The respondents' submit that the papers filed do not provide proper evidence that Mashave is authorised in terms of r 89 to act on behalf of the persons who have signed the list of names. The affidavit, they submit, covers nobody except, perhaps, Mashave himself. The remainder of the document filed is not in affidavit form. The other applicants have not, therefore, complied with the basic requirement for proof of authorisation set out in *Prosser*'s case. Further, there are signatures missing from the list of names and, in many instances where there are signatures, the signatures on the document are clearly not those of the persons whose names are typed on the lists. In any event, there is no authentication of the identities of signatories or their signatures. Such a document, the respondents submit, cannot be acceptable evidence that Mashave is authorised to represent the signatories to it. The applicants' submission is that, in this case, the persons named in the document filed have clearly shown that they wish Mashave to represent them. That is all that is necessary in terms of *Gudza*'s case where S*mith* J spoke merely of ``some evidence'' to establish the authorisation. *Prosser*'s case is distinguishable on the facts in that, in *Prosser*'s case, Prosser claimed to represent the other applicants but produced no proof of that authority beyond his own statement that he was so authorised. In any event, *Prosser*'s case did not claim to be, and cannot be regarded as, authority for a universal



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and inflexible method of proof of authorisation in all cases, where r 89 is to be used. If it was to be so regarded, it would be in conflict with *Gudza*'s case and would also be in conflict with practicalities and common sense. The applicants point to the practical difficulties in obtaining individual affidavits where large numbers of persons are to be represented and submit that the record would be unacceptably burdened and clumsy to work with if the court was to insist that individual affidavits must be obtained from each prospective representee in every case.

I do not believe there is any conflict between the two decisions of *Gudza* and *Prosser*. SMITH J was speaking very generally in *Gudza*'s case. BARTLETT J was dealing with the facts of *Prosser*'s case, which is distinguishable from this one. Further, as I understand *Prosser*'s case, BARTLETT J was setting out a general and valuable guideline not an inflexible rule. I respectfully accept the general wisdom of and agree with the use of an individual affidavit and the wording for that affidavit, which BARTLETT J has set out in Prosser's case, as providing adequate proof of authorisation for representative appearance. However, I do not understand *Prosser*'s case to be authority that, in every case where r 89 is invoked, authorisation can only be proved by an individual affidavit from each applicant to be represented expressed in the words set out in that case. If it was the intention of BARTLETT J to set a rule of practice and there is, therefore, a conflict between the *Gudza* and *Prosser* cases, then, with respect, I prefer the more general approach set out in *Gudza*'s case. Proof of authorisation to start proceedings on behalf of another in this court is not normally required to be in affidavit form. I can see no objection in principle to the filing of a joint document of authorisation and every reason in practice why, where there are a large number of applicants, such a document, if it can be obtained, should be filed. Such a document of authorisation would be far more convenient. I can

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also see no reason in principle why some document, other than an affidavit, if properly presented, could not be used to prove the authority to represent in terms of r 89.

The issue here is whether the document filed is adequate proof of Mashave's authority to represent those persons on the lists behind Mashave's affidavit. The onus of proof in this respect is on the applicants. The respondents have drawn attention to obvious and specific defects in the document - lack of signatures against some names, a signature in a name apparently different to the typed name and signatures endorsed pp. Clearly, all these must be excluded. There is another difficulty not all the names set out in Annexure A are covered by any signature. For example, the first name on pp 1 and 2 of Annexure A, Alfanet S and Kachiri M (Nos. 1 and 82) do not appear on the list of signatories. There is also a general difficulty covering all the signatures. There is no list of the members of the ZUPCO Retrenched Workers'



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Committee. There nothing to show that all the names on the list are members of that committee and there is nothing against which the names on the list of signatories can be checked. Further, there is nothing to authenticate the signatures of those persons who appear to have signed on their own behalf.

In the result, I am not satisfied that Mashave has proved the authority which he claims in represent the other applicants in this case and any relief which may be granted in this case will be in respect of Mashave only. The next point of objection *in limine* to this application is to the late filing of the application. Order 33 requires that:

> ``any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred:
>
> Provided that the court may for good cause shown extend the time.''

It is common cause that these proceedings are out of time in terms of that order. The Minister's decision authorising the retrenchment is dated 18 January 1996. The applicants apparently knew of the decision by 31 January 1996. These proceeding were started on 19 July 1997.

Mashave applies for condonation for the late filing of this application. He says he has good cause for that late filing. The respondents say he has not.

The factors to be taken into account in determining whether good cause has been shown are well established. The most important (but not the exhaustive list) for the purposes of this application can be simply expressed - the period of delay and degree of non-compliance with the rules, the explanation given for that delay and non-compliance, the prospects of success on the merits and the prejudice to the respondent.

There has been considerable delay and non-compliance with the rules this case. Fifteen months passed between Mashave becoming aware of the Minister's decision and the institution of this review.

Mashave himself does not give any explanation for the delay in the founding affidavit. Instead,

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he refers to the affidavit of a legal practitioner attached to his affidavit, which he says, gives the reasons. The practitioner's affidavit, however, deals directly only with the delay and the reasons for that delay in the period between April 1997 and the date of the institution of these proceedings in July 1997. Nevertheless, it appears indirectly from the practitioners' affidavit that, between February 1996 and April 1997, Mashave was pursuing an appeal against his retrenchment package first to the Labour Relations Tribunal and, when unsuccessful there, to the Supreme Court.

In respect of the period February 1996 to April 1997, Mashave's counsel submits in argument, that the applicants were following the advice of the lawyers who were then representing them. The argument concedes that the advice may have been wrong. The lawyers then representing Mashave may



have overlooked the possibility of proceeding by review to this court. However, so counsel submits, any errors or negligence on the part of Mashave at that time should not be held against him now, when his conduct has always demonstrated a determination to attack his retrenchment.

For the period April to July 1997, the practitioner's affidavit says that she was first briefed to attend in this case in April 1997. At that time, the applicants' appeal to the Labour Relations Tribunal had been dismissed and she was briefed for the appeal to the Supreme Court against the Tribunal's decision. The practitioner says that she then realised that the applicants were pursuing the wrong remedy and should have challenged the Minister's authorization for their retrenchment by review in this court rather than appealed the retrenchment package to the Labour Relations Tribunal. It was, she says, still necessary to obtain an order by consent from the Supreme Court in relation to the appeal before pursuing this application for review. After that relief had been obtained, there were logistical difficulties and delays in obtaining the authorisation of as many retenchees as possible to pursue the review on their behalf in terms of r 89.

I understand and accept the explanation given by the legal practitioner for the delay involved in the period April to July 1997. Had the position been confined to that period, I would probably have accepted it as a reasonable explanation for the delay for that period. However, it is not possible to isolate this period from the period of February 1996 to April 1997 and from the overall period of delay. There are obvious difficulties in relation to the overall period. The applicant himself has not advanced any explanation for the delay. It has been left to his new counsel to raise the point in argument. That argument presupposes that this court should deduce the facts for the explanation from the inferences to be drawn from the papers and then test the reasonableness of the explanation from those facts. That is unacceptable. The onus is on the applicant. He must set out the facts on which he asks the court to exercise its discretion in his favour. If he does not do so, it is not for the court to search out or infer possible explanations from other facts in the papers. In any event, even if the applicant was following the advice of a practitioner, the remedy that he was pursuing in the Tribunal and then, initially, before the Supreme Court, only related to the retrenchment package. The Minister's decision to

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authorise the retrenchment was not in issue. There is no explanation from the applicant as to why he did not object to the Minister's decision to authorise his retrenchment until fifteen months after he had been retrenched. The result is that the applicant has failed to give an explanation for his delay in pursuing the remedy which he now seeks.

It is necessary to deal with the merits of Mashave's case for both the main and alternative relief, which he seeks. In regard to the main relief, Mashave



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asks for the decision of the Minister to be set aside and the matter of the retrenchment and its package to be referred back for negotiation between the parties. In the alternative relief, he seeks to have the court impose a retrenchment package of his choosing on United. I am not satisfied from the papers, or the argument advanced for Mashave, that the Minister has acted *ultra vires* the regulations as alleged or that the relief, which Mashave seeks, is possible or appropriate on the papers. Even if there is merit in the submissions made on these points, that merit is insufficient to overcome the difficulties which stand in his way in regard to is delay, failure of explanation and prejudice.

Finally, there is question of prejudice. The delay in proceeding with this application has clearly caused prejudice to United. For fifteen months it has worked on the basis that Mashave has been lawfully retrenched. Its affairs have been so organised. Mashave has now come forward, at a late stage and without proper explanation for the delay, seeking the aid of the court to set all that aside. The disadvantage and prejudice to United is obvious and is not outweighed by any of the arguments raised by Mashave. In the result, the application is dismissed with costs.

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

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



## NHARI *v* PUBLIC SERVICE COMMISSION & ANOR 1998 (1) ZLR 574 (HC)

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

Devittie J

Application for review

24 June 1998 Judgment No. HH-99-98

### Flynote

Public service - Public Service Commission - investigation of misconduct - suspicion of corruption - duty of Commission to conduct immediate investigation - fair hearing - right to legal representation - inquiry under disciplinary regulations - postponement requested to allow accused time to obtain legal representation - refused on grounds that adequate time had already been given - whether presiding officer exercised his discretion judicially

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## Headnote

The applicant, the then Deputy Chief Immigration Officer, was charged under the public service regulations with misconduct. As part of his reply, he alleged corruption on the part of the Chief Immigration Officer.

An inquiry was ordered, and the allegations against the applicant were presented to him. He responded in writing to these allegations. Several months later, the hearing of the inquiry began. The applicant was given some 17 days' notice of the hearing. Shortly before this notice was given, the applicant's then legal practitioner renounced his agency, but only on the date of the hearing did the applicant appoint another legal practitioner to act for him. The applicant sought a postponement on the grounds that his legal practitioner had not had enough time to prepare his case. The presiding officer refused the postponement on the grounds that the application for a postponement was not bo*na fide*, because the applicant had already prepared his defence, and in any event the applicant had had ample time to seek legal representation. On the second day of the hearing, the applicant, on the advice of his new practitioner, withdrew from the proceedings, which were completed in his absence.

The applicant sought a review of the proceedings on the grounds that the denial of a postponement effectively denied him the right to legal representation, and sought an order setting aside the decision of the inquiry.

*Held*, that whenever it comes to the notice of the Public Service Commission that there is a possibility of corruption in any department or ministry, the Commission has a duty to cause an investigation to be held. Failure to act decisively undermines the Commission's own integrity and that of other State institutions whose function it is to enforce law and order.

*Held*, further, that the relevant regulations provide for the right to legal representation, which was not questioned by the presiding officer. The question was whether the application for a postponement should have been granted. Where a postponement for the purposes of securing legal representation is refused, the question is always whether the judicial officer exercised his discretion judicially. If it did, there would be no breach of the right to legal representation.

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**1998 (1) ZLR p575**

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*Held*, further, that it may not be necessary to buttress a decision not to postpone by assessing the merits of the case and considering whether any actual prejudice occurred. In every case where the accused is unrepresented, there is potential prejudice.

*Held*, further, however, that in an application for postponement to secure legal representation, the court has to balance competing interests: one is that recognition must be given to the accused's right to representation; the other os that the proceedings must not be allowed to continue interminably. Even where the failure to secure legal representation has caused prejudice, this does not justify in itself setting aside the proceedings. The presiding officer took account of all relevant factors and did not act on any wrong principle of law. The applicant had no convincing reason for why he had not secured representation earlier.

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Cases cited:

*Fripp* v *Gibbon & Co* 1913 AD 354

*Isaacs & Ors* v *University of the Western Cape* 1974 (2) SA 409 (C)

*Madnitsky* v *Rosenberg* 1949 (2) SA 392 (A)

*Maynard* v *Osmond* [1977] 1 All ER 64 (CA)

*Ndanozonke* v *Nel* 1971 (3) SA 217 (E)

*R* v *Joannou* 1957 R & N 623; 1957 (4) SA 387 (FS)

*S* v *Ngara* S-44-87

*S* v *Nqula* 1974 (1) SA 801 (E)

*S* v *Paweni & Anor* 1985 (2) ZLR 133 (S)

*R* v *Second* 1969 (2) RLR 285 (A)

*S* v *Shabangu* 1976 (3) SA 555 (A)

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

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

*R* v *Zackey* 1945 AD 505

## Case Information

*P Maredza*, for the applicant

*J Dube*, for the respondent

## Judgment

**DEVITTIE J:** The main function of the Department of Immigration is to decide whether foreign persons wishing to reside or work in this country may be permitted to do so and the conditions subject to which such permission is given. The Department's officials thus wield tremendous discretionary power over the lives of those wishing to reside or work in this country.

The evidence in this case is pregnant with suggestions that corrupt practices have taken root in the Department of Immigration. The Chief Immigration Officer caused the allegations of misconduct to be levelled against the applicant. The charges against the applicant make no express mention of corruption, but the inference can readily be drawn that the substance of the allegations is that the applicant conducted his duties in furtherance of corrupt motives. The applicant in turn alleges that the Chief Immigration Officer is corrupt. One of the charges laid against the applicant is that he falsely accused the Chief Immigration Officer of corruption. In respect of this allegation the presiding officer ruled that he was unable to

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reach a conclusion. I believe the presiding officer ought to have broadened his inquiry so as to investigate the applicant's allegations.

I am not required in this case to make any finding on the allegations of corruption that have surfaced. It seems to me, however, that whenever it comes to the notice of the Public Service Commission (the ``PSC'') that there is a possibility of corruption in any department or Ministry of the Public Service then it is the duty of the PSC to cause an investigation to be held. Section 8 of the Public Service Act [*Chapter 16:04*] sets out the functions of the PSC which are to appoint persons to the Public Service, to promote them, to inquire into and deal with complaints and to exercise disciplinary powers. Subsection (2) of that section then provides:

> ``The Commission shall so exercise its functions under this Act as to ensure the well-being and good administration of the Public Service and its maintenance in a high standard of efficiency.''

Corruption is guaranteed to undermine good administration and efficiency in the Public Service. In *S* v *Paweni & Anor* l985 (2) ZLR 133 (S) at 140-1 BECK JA said:

> ``Bribery of public officials is a most serious evil in any society, and is particularly to be guarded against in a developing country - see *Attorney-General* v *Mantwana & Anor* S-2-82 at p 3. In *S* v *Narker & Anor* 1975 (1) SA 583 (A) at 566A, H*olmes* JA said of bribery that it is a corrupt and ugly offence striking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration. In general, courts, view it with abhorrence.''

The learned JUDGE OF APPEAL referred to the case of *S* v *van der Westhuizen* 1974 (4) SA 61 (C) at 65G where BAKER J said:

> ``Society does not tolerate dishonest officials in its public administration; it cannot afford to do so for, as soon as public administration falls into the hands of dishonest and dishonourable men, the complete corruption of the community starts to develop.''

In *S* v *Ngara* S-44-87 at p 12 of the cyclostyled judgment GUBBAY JA (as he then was) said:

> ``This brings me to the matter of sentence. Any form of corruption resorted to by government servants, especially police officers whose duty it is to uphold the law and by their conduct set an example of impeccable honesty and integrity, is rightly viewed by the courts with abhorrence. It is dangerous and insidious evil in any community and in particular requires to be guarded against in a developing country.
>
> Corruption is a crime difficult to detect and more difficult to eradicate. If unchecked or inadequately punished it will disadvantage society by depriving it of a good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of the penalty.''

When any allegation of the possibility or suspicion of corruption comes to the notice of the PSC, whether through a disciplinary inquiry or otherwise, then, in my opinion, the PSC has a statutory duty to conduct an immediate



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investigation. The PSC has the necessary inquisitorial powers and authority to make the necessary inquiry. If the Disciplinary Regulations need amendment in this regard then this ought to be done. Failure by the PSC to act decisively in such cases undermines its own integrity and that of other state institutions whose function it is to enforce law and order. As the PSC is responsible for the appointments and promotions in the Public Service it has a responsibility to ensure that the persons so appointed or promoted are suitable and worthy of the positions they hold. It must ensure that they are honest and efficient. In this case, the allegations of corruption have been made by a person who held a senior post in the Department of Immigration. He was presumably appointed to that post by the PSC, which must have been satisfied that he was, at the time, suitable for promotion. It may well be that the allegations made by the applicant against the Chief Immigration Officer were made in an attempt to avoid discharge and are false. On the other hand, it may be that there is some truth in the allegations against the head of the country's immigration service. One does not know until an inquiry is held. When allegations of corruption are made by a senior public officer such as the applicant, it becomes imperative that in compliance with a statutory duty the PSC holds a full inquiry into the Department of Immigration be made.

If, as I suspect, and based on the limited light that has been thrown on the workings of the Department of Immigration, the administrative structure does not contain adequate safeguards against the abuse of discretionary power, the real problem will continue long after the applicant's case has been resolved.

I would accordingly recommend that the PSC institutes a full inquiry even at this late stage. Such an inquiry, in my view should include a consideration of whether the present decision making structures need to be changed so as to control the abuse of wide discretionary powers. An Immigration Appeal Board staffed by legal personnel comes to mind as an effective check against corrupt motives entering the discretionary escape of decisions.

The applicant was, until his suspension, the Deputy Chief Immigration Officer. In 1995, he was suspended from employment. Subsequently fifteen counts of misconduct were preferred against him. The bulk of the charges related to allegations that he had failed to obey lawful instructions issued by the Chief Immigration Officer. The particulars in this regard were that:

(a) he had taken unilateral decisions on applications for residence permits in defiance of the instruction that such applications should be decided by the Immigration Control Committee;

(b) he had not attended monthly meetings for a year;

(c) he had issued instructions to subordinates to issue visas to certain





persons contrary to the instruction and decision of the Chief Immigration Officer;

(d) he had not obtained the consent of the Public Service Commission to be a company director. In relation to the same company he was charged with operating a consultancy

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in circumstances where a conflict of interest was likely to exist; He also faced a charge of conduct inconsistent with discharge of his official duties in that he leased his cottage to a person who had made inquiries regarding the right of a non-resident to purchase investment property;

(e) finally, he was charged with having made a false allegation of corruption against the Chief Immigration Officer.

On 1 July 1996, the respondent ordered that an inquiry be held in terms of s 7(c) of the Public Service (Disciplinary) Regulations. The applicant was furnished with a summary of the factual allegations against him. He responded in writing to the allegations.

On 3 March 1997, before the hearing commenced, the applicant applied for a postponement on the ground that his legal practitioner, whom he had engaged that morning, was unable to attend and needed time to study documents which had been made available only four days ago. The presiding officer rejected the application for postponement, firstly, on the grounds that the reason advanced by the applicant, namely, that time was needed for his lawyer to study further documents, was not *bona fide,* because the applicant had already prepared his defence. The presiding officer further found that the applicant had had ample time to seek legal representation and prepare his defence.

On the second day of the hearing, the applicant advised the presiding officer that he was withdrawing from the case on the advice of his legal practitioner. The matter then proceeded in his absence. At the conclusion of the hearing the presiding officer found the applicant guilty on some of the charges and the respondent in turn took the decision to dismiss the applicant from the public service.

The applicant now seeks a review of the proceedings of the inquiry on the grounds, *inter alia*, that the refusal of a postponement effectively denied him the right to legal representation. On these grounds, he seeks an order setting aside the decision of the enquiry and for his reinstatement.

The right to legal representation before a tribunal other than a court of law is beyond question. As LORD DENNING stated in *Maynard* v *Osmond* [1977] 1 All ER 64 (CA) at 79:

> ``In principle if a man is charged with a serious offence, which may have grave consequences for him, he should be entitled to have a qualified lawyer to represent him ... By analogy, it should be the same when charged with a disciplinary offence before a





> disciplinary tribunal, at any rate when the offence is one which may result in his dismissal from the force or other body to which he belongs; or the loss of his livelihood; or, worse still, may ruin his character forever. But even if it is not allowed, as of right, as a general rule a tribunal should have a discretion in the matter. The tribunal should have a discretion to permit him to have a lawyer if they think it would assist him. They are the masters of their own procedure and unless clearly forbidden, they should have a discretion to permit it.''

My attention was drawn to several cases, which concern the constitutional right to legal representation. No constitutional question involving the non-recognition of the right to legal

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representation arises in this case. The regulations provide for the right to legal representation and the presiding officer did not question the existence of the right. He made a ruling upon an application for postponement and it is his decision in that regard that is brought on review. The question is not whether the applicant has a right to legal representation but whether the application for a postponement ought to have been granted.

A review of the case law involving the denial of an application for postponement where it is sought for the purposes of legal representation demonstrates that in an appeal or review against a refusal to postpone, the question is always whether the trial judge exercised his discretion judicially. In *Madnitsky* v *Rosenberg* 1949 (2) SA 392 (A) at 398 it was stated that:

> ``The question is whether the trial judge exercised his discretion judicially, that is not capriciously or upon any wrong principle but for substantial reasons.''

In *S* v *Nqula* 1974 (1) SA 801 (E) at 806 the court stated that:

> ``the granting of a postponement is a matter within the discretion of the magistrate and the court will not lightly interfere with the exercise by the magistrate of that discretion as long as that discretion was judicially exercised. The question therefore is whether the magistrate's refusal to grant a postponement was a judicial exercise of his discretion or not. In the present case, however, it cannot be said that the requisites were satisfied and in all the circumstances I am not prepared to hold that the trial judge did not exercise his discretion judicially.''

In *Isaacs & Ors* v *University of the Western Cape* 1974 (2) SA 409 (C) it was stated that:

> ``Although a court will be slow to refuse a postponement because of the consequences which ensue, it is clear that an applicant who seeks a postponement must satisfy the court that it should grant such an indulgence. He should fully explain the true reason for his non- preparedness.''

I now have to consider whether it is proper to have regard to the merits of a determination or to whether actual prejudice has resulted, where it is claimed that a procedural or constitutional right has been breached in consequence of the denial of a postponement sought for the purposes of legal representation.

I deal firstly with the situation where it is found on appeal or review that



a lower court properly exercised its discretion in refusing a postponement. The refusal to postpone would lead to no breach of the right to legal representation and no occasion would arise to inquire into whether there is prejudice related to the fact that no representation was afforded.

In *R* v *Second* 1969 (2) RLR 285 (A) at 288, QUÉNET JP, in holding that the refusal of a postponement was justified, even though it meant that the accused was unrepresented in the trial, made mention of the fact that there had been no prejudice as the evidence was overwhelming. The learned judge said:

> ``In my view, there were substantial grounds for refusing the application for postponement and the affidavit was not prejudiced by reason of the refusal. Although it was indicated in *Joannou*'s case this was not a relevant factor,

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I would say the case against the appellant was overwhelming."

In *R* v *Joannou* 1957 R&N 623 (FS) at 625D; 1997 (4) SA 387 at 388 CLAYDEN FJ stated:

``Part of any inquiry as to whether relief should not be granted must necessarily be whether a miscarriage of justice may have come about. That is necessary in this court because the ground upon which the court could interfere is by reason of a miscarriage of justice, and because relief may be refused if no substantial miscarriage of justice has actually occurred. If that inquiry showed likelihood that lack of representation has been prejudicial to an accused person, it emphasises the serious consequences of a refusal to interfere with the discretionary order, which have to be kept in mind in every criminal case, and the court would no doubt in such a case more readily interfere with a discretionary order.''

I am aware that the above *dicta* concern criminal proceedings and not administrative proceedings as in the present matter. The approach in the above *dicta,* that where a postponement sought for the purposes of legal representation has been wrongly refused, relief may be declined if ``no substantial miscarriage of justice has actually occurred'' is no doubt dictated by the equivalent of s 29(3) of the High Court Act [*Chapter 7:06*] which provides that:

``no conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record or proceedings unless the High Court or a judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred.''

Hence, in *S* v *Tau* 1997 (1) ZLR 93 (H) GILLESPIE J, with the concurrence of BARTLETT J, having found that the delay in the proceedings constituted a breach of the accused's constitutional right, seemed to consider it necessary to first find that a substantial miscarriage of justice had occurred before he could grant relief. At p 101, the learned judge stated:

``I consider all this to disclose a fatal irregularity on the proceedings. I cannot possibly say that there has been no miscarriage of justice. I therefore quash the conviction and set aside the sentence.''



DEVITTIE J

I express the view, without making a firm finding, that in criminal proceedings, where rights enshrined in the Constitution are found to have been breached, appropriate relief must be granted regardless of whether there has been prejudice or an actual miscarriage of justice resulting from the breach. I have reservations as to whether s 29(3) applies where constitutional rights are affected.

In my opinion, where there are substantial grounds for the refusal for postponement, it may not be necessary to buttress that decision by assessing the merits and having regard to whether actual prejudice has occurred. In every case where a party is unrepresented the potential for prejudice always exists. It has to be accepted that the overwhelming majority of persons who come before the courts in this country are unrepresented and suffer some

prejudice. As was stated by GREENBERG JA in *R* v *Zackey* 1945 AD 505 at 512:

``I have already set out the facts which were before the magistrate, and I shall assume that the refusal of an adjournment deprived the appellant of an opportunity of engaging another attorney and that the services of an attorney may have secured his acquittal. But there is no doubt that at a certain stage this consideration, weighty as it is, must be put aside ... I conclude therefore, that the contention advance in argument, that the paramount consideration of a trial is that no injustice shall occur, does not mean that an order can never be made which may

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result in the conviction of an accused who, but for such order might have been acquitted."

Where the refusal to postpone is challenged on appeal or review and the court finds that the postponement ought to have been allowed, a situation does arise where the consequence of the wrong denial of a postponement is that the party's right to legal representation will have been breached. A fatal irregularity will have occurred. In these circumstances, it may not be necessary in my view to have regard to the merits of the case or to whether actual prejudice has resulted. The right to legal representation is one enshrined in the Constitution and its enforcement ought not to depend upon whether there has been actual prejudice. It seems to me that where constitutional rights are found to have been breached, an appropriate remedy must be granted, whether or not prejudice is shown to have resulted. In any event, how is it to be determined whether prejudice has resulted? As was stated in *Ndanozonke* v *Nel* 1971 (3) SA 217 (E) at 221:

``Once they were deprived of the opportunity of having legal representation, it is impossible for this court to say that, had they been granted such representation, the outcome of the case might not have been different, and therefore it cannot be said that they did not suffer substantial prejudice by the magistrate's refusal to grant the application for the attorney to complete the case."

In *S* v *Shabangu* 1976 (3) SA 555 (A), the court again expressly refrained from considering the merits. At 558 JANSEN JA said:



DEVITTIE J

``The case against the appellant on the merits appears formidable and to have fully justified the conviction. But, on the other hand, it is impossible to say what effect a properly conducted defence could have had on the ultimate result."

I turn now to the facts of this case. The applicant was advised on 1 July 1996 that misconduct charges were to be preferred against him. On 14 February 1997, he was advised that the hearing would commence on 3 March and a copy of the charges were furnished. On 19 February 1997, the applicant wrote to the Department of Immigration requiring copies of certain documents. He was given sight of these documents on 27 February 1997. According to the applicant, this was four days before the inquiry and it gave his legal practitioner insufficient time to prepare his case. He stated that on 12 February his legal practitioner withdrew from acting for him and that on the morning that the hearing was due to commence he had engaged another legal practitioner. The presiding officer ruled that although the applicant may have received some documents pertaining to the case some four days before the hearing, he had ample time to prepare for the hearing as was evidenced by the fact that he had, at an early stage, provided a detailed response to the charges in which detailed reference was made to relevant documents.

The question is whether, in declining the application for a postponement, the presiding officer acted within the proper exercise of his judicial discretion. The assertion of the right legal representation does not involve a discretionary decision, but where a postponement is claimed to secure legal representation, the discretion comes into play.

Where an application is made for a postponement on the specific ground that legal

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representation is sought, the court has to balance competing interests - on the one hand it must give recognition to a person's right to legal representation, but on the other hand the court, as master of its own procedure, cannot allow proceedings to go on interminably, without finality, on the sole ground that legal representation is sought. It must follow, therefore, that even in cases where the failure to secure legal representation has caused prejudice in the conduct of a person's defence, this in itself does not justify a setting aside of the proceedings. There will always be some prejudice where a party is not represented.

As these are not criminal proceedings no questions arises as to the application of ss 2 and 3 of the High Court Act. In considering the present application, therefore, I shall disregard the merits of the determination. I shall not have regard to whether prejudice has resulted from the denial of a postponement. This does not, of course, mean that the applicant was precluded from seeking a review of the determination upon other recognised grounds of review. The applicant has not done so. No allegation is made that the decision of the inquiry is grossly unreasonable. I confine myself therefore

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DEVITTIE J

to a finding on whether the presiding officer exercised a judicial discretion. ``Judicial discretion'' has been referred to in a large number of cases and I propose to quote one. In *Fripp* v *Gibbon & Co* 1913 AD 354 DE VILLIERS JP said at p 363:

> ``Questions of costs are always important and sometimes difficult and complex to determine, and in leaving the magistrate a dissertion, the law contemplates that he should take into consideration the circumstances of each case, the conduct of the parties and any other circumstances ... and if he does this and brings his judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion.''

I am satisfied that the presiding officer took into account all relevant factors and did not act upon any wrong principle of law. The applicant gave no satisfactory explanation as to why he had done nothing to secure legal representation, after 12 February 1998 when he had parted ways with his lawyer. The reason he gave for doing so is hardly convincing, namely, that it was because of problems in securing a trial date. His assertion that he had received the documents at a late stage and needed time for his practitioner to peruse these was rejected because he had prepared his defence in some detail. In these circumstances I am unable to say that the presiding officer acted upon any wrong principle. Clearly, there were substantial reasons for refusing the application.

I would accordingly dismiss the application with costs.

*Honey & Blanckenberg*, applicant's legal practitioners

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

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**CHARUMBIRA *v* COMMISSIONER OF TAXES & ORS 1998 (1) ZLR 584 (SC)**

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

McNally JA, Muchechetere JA & Sandura JA

Civil appeal

4 & 29 June 1998 Judgment No. S-88-98

## Flynote

Review - irregularity - gross irregularity in decision - allegation that tribunal came to wrong decision on evidence - not a ground for review

## Headnote

The appellant, having been found guilty in two separate inquiries of misconduct under the Public Service (Disciplinary) Regulations, was discharged from the Public Service. He brought the matter on review before the High Court and, having failed there, appealed to the Supreme Court.

*Held*, that as this was a review, the only ground for review the High Court could rely on was gross irregularity in the decision, there being no allegation of irregularity in the proceedings. A gross irregularity might be found if the decision is outrageous, irrational or absurd; but where, as here, the only allegation was that the magistrates who held the inquiries came to wrong conclusions on the evidence, no ground for review was shown.

Cases cited:

*Dube* v *Mandioma NO & Anor* S-173-93

*Hira & Anor* v *Booysen & Anor* 1992 (4) SA 69 (A)

*Muringi* v *Air Zimbabwe Corporation* 1997 (2) ZLR 488 (S)

*ZESA* v *Dera* 1998 (1) ZLR 500 (S)

## Case Information

Appellant in person

*J Musimbe*, for the respondents

## Judgment

**McNALLY JA:** The appellant was employed as a public servant in the Department of Taxes. He was charged with various acts of misconduct in terms of the Public Service (Disciplinary) Regulations, SI 65 of 1992 (``the Regulations''), arising out of his conduct as a tax examiner or tax officer.

The first set of five counts of misconduct arose in 1993. An inquiry (in terms of s 7 of the Regulations) was held before the third respondent, who was then a provincial magistrate. In

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December 1996, the third respondent found him guilty on four of the five counts.

The second charge of misconduct concerned the appellant's stay at the Manica Hotel in Mutare consequent upon his transfer to that city. He arrived on or about 30 January 1995 and stayed at the hotel, with brief absences, until 4 April 1995. It was alleged he had made a false claim for travelling and



subsistence allowances in respect of that period, and had committed other ancillary offences. In February 1997, the fourth respondent, in a similar inquiry, found him guilty as charged, of contravening paras 16, 17 and 23 of the Disciplinary Regulations. Such acts, he found, constituted acts of misconduct in terms of the Second Schedule of the Regulations.

In consequence of these findings, the appellant was found guilty of misconduct by the second respondent and was discharged from the Public Service.

The appellant then took the matter on review before the High Court. It is important to recognise that this was a review, not an appeal. The difference is fundamental and well-established. The High Court's powers of review are set out in ss 26 and 27 of the High Court Act [*Chapter 7:06*]. The only ground upon which reliance was placed was that set out in subs 1(c), ``gross irregularity in the proceedings or the decision''. One can narrow that even further because there was no complaint about the form of the proceedings. So in effect what was relied upon was gross irregularity in the decision.

I bear in mind, of course, that the High Court has also a common law power of review. But in this present situation I can see no distinction between the statutory and the common law power. ``Judicial Review'' as GUBBAY CJ said in *Muringi* v *Air Zimbabwe Corp & Anor* 1997 (2) ZLR 488 (S) at 490F, ``is concerned not with the correctness of the decision, but with the decision making process''. Or again, in *Dube* v *Mandioma NO & Anor* S-173-93:

> ``In order for the review to succeed, it was incumbent upon the appellant to show, not that the determination was wrong, but that it was irrational, in the sense of being `so outrageous in its defiance of logic or of any accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it' as *per* LORD DIPLOCK in *CCSU* v *Minister for the Public Service* [1984] 3 All ER 935 (HL) at 951a-b.''

See also Feltoe *A Short Guide to Zimbabwean Administrative Law* p 20.

The appellant pointed to certain acts which, he claimed, showed that the judgments of the two experienced magistrates who conducted the inquiries were wrong. I am not convinced that those facts did show what he claimed they did. But even if they did indicate that there might have been some defence, the fact is that the magistrates considered them, and regarded them as insufficient to remove the balance of probabilities in favour of the first two respondents.

The appellant's other point was that all this was a plot to get rid of him, because he had uncovered corruption in the Department of Taxes. But again, whether or not he had done so does not affect the evidence that he had committed these acts of misconduct. Indeed on several of the counts, the damning evidence was given by persons outside the Department - the

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taxpayers in two cases, the Manica Hotel staff in another.



McNALLY JA

The two magistrates gave carefully reasoned judgments. They could not have been involved in any ``plot'' against him, even assuming there was one. As pointed out by the learned judge, one of them found him not guilty on one count. Their conclusions cannot possibly be described as ``irrational'', ``outrageous'' or ``absurd'' - to use the words often used by judges in indicating the kind of decisions that may be upset on review. It is not alleged that they made errors of law, as to which see the judgment of CORBETT CJ in *Hira & Anor* v *Booysen & Anor* 1992 (4) SA 69 (A).

Essentially all that was alleged was that the magistrates came to wrong conclusions on the evidence. I find very little to support these allegations, but the real point is that that is not by itself a ground for review.

I say ``very little'' because, without having the actual evidence of the hotel staff in the second inquiry before us, I am not totally clear about the finding on that count, though I do not say it was wrong. But the evidence on the other four counts is quite clear, and justifies the decision to dismiss.

I should perhaps add that the appellant also pointed to the fact that the State declined to prosecute him. That is not material to the review. We do not know the grounds on which the State declined; we might or might not agree with those grounds; and in any event the State has a heavier onus to discharge in seeking to establish criminal guilt - see *ZESA* v *Dera*. *(146)

In my view, the learned judge came to the correct conclusion. The appeal is dismissed with costs.

**MUCHECHETERE JA:** I agree.

**SANDURA JA:** I agree.

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

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## Endnotes

**1 (Popup - Popup)**

This judgment was received too late to be included in the 1997 Reports. - *Editor.*

**2 (Popup - Popup)**

This judgment was received too late to be included in the 1997 Reports. - *Editor.*

**3 (Popup - Popup)**

This judgment was received too late to be included in the 1997 Reports. - *Editor.*

**4 (Popup - Popup)**

Wm. Shakespeare, *Romeo and Juliet*, Act II scene ii.

**5 (Popup - Popup)**

The case of *F W Woolworth & Co Ltd v Woolworths (Australasia) Ltd* (1930) 47RPC337, concerns an attempt by the British company to prevent the use of the name Woolworths by an Australian concern.

**6 (Popup - Popup)**

*Per* CORBETT J in *Dun & Bradstreet (Pty) Ltd v S A Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 218E.

**7 (Popup - Popup)**

Per VAN DIJKHORST J in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Ors* 1981 (2) SA 173 (T) at 188-9.

**8 (Popup - Popup)**

*Per* RABIE JA in *Capital Estate & General Agencies (Pty) Ltd & Ors v Holiday Innes Inc & Anor* 1977 (2) SA 916 (A) at 929.

**9 (Popup - Popup)**

*Per* CORBETT CJ in *Royal Beech-Nut (Pty) Ltd v United Tobbacco Co Ltd* 1992 (4) SA 118 (A) at 122D.

**10 (Popup - Popup)**

*Per* KANNEMEYER J in *Polakow Bros (Pty) Ltd v Gershlowitz* 1976 (1) SA 863 (E) at 865D.

**11 (Popup - Popup)**

*Per* CORBETT JA *Brian Boswell Circus (Pty) Ltd & Anor v Boswell Circus (Pty) Ltd* 1985 (4) SA

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466 (A) at 479C-D.

**12 (Popup - Popup)**

See *Truck & car Co Ltd v Kar-N-Truck Auctions* 1954 (4) SA 552 (A) at 557G; *Stellenbosch Wine Trust Ltd & Anor v Oude Meester Group Ltd; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd & Anor* 1972 (3) SA 152 (C) 159-160; *Burnkloof Caterers Ltd v Horseshoe Caterers Ltd* 1974 (2) SA 125 (C) at 132H.

**13 (Popup - Popup)**

*Horseshoe Caterers Ltd v Burnkloof Caterers Ltd* 1975 (2) SA 189 (C) on appeal from the decision cited in n 8 *supra*.

**14 (Popup - Popup)**

*Ibid* at 202B-C.

**15 (Popup - Popup)**

*Lorimar Productions Inc & Ors v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc & Ors v OK Hyperama Ltd & Ors;Lorimar Productions Inc & Ors v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1139-1140A.

**16 (Popup - Popup)**

In the *Brian Boswell Circus* case *supra* n 7 at 479E.

**17 (Popup - Popup)**

*Per* CORBETT CJ in *Royal Beech-Nut* case *supra* n 6 at 122E-F

**18 (Popup - Popup)**

For example, in *Slenderella Systems Inc of America v Hawkins & Anor* 1959 (1) SA 519 (W) at 521C; *Pick-n-Pay Stores Ltd v Pick-n-Pay Superette (Pvt) Ltd* 1973 (3) SA 597 (R), 1973 (1) RLR 244 (G) 254F; *Tie Rack plc v Tie Rack Stores (Pty) Ltd & Anor* 1989 (4) SA 427 (T) at 442F-I

**19 (Popup - Popup)**

In *Bon Marché (Pvt) Ltd v Brazier* 1984 (2) ZLR 50 (S) 55C-E and 60F-G and *Saybrook (1978) (Pvt) Ltd & Anor v Girdlestone* 1986 (2) ZLR 185 (S) at 189A-D; also in the *Pick-N-Pay* case, n 15 *supra*, upheld on appeal - see 1974 (1) SA 597 (RA).

**20 (Popup - Popup)**

In *kellogg Co v Cairns Foods Ltd* 1997 (2) ZLR 230 (S) MCNALLY JA, referring to the *dictum* of CORBETT JA at n 13 *supra*, intimated a preference to "leave open" the point whether some reuptation must be proven in a passing-off action.

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**21 (Popup - Popup)**

Per LORD MACNAUGHTON in *Commissioner for Inland Revenue v Muller & Co's Margarine Ltd* [1901] AC 217 (HL) at 223; see also the *Bon Marché* case *supra* n17 at 60B.

**22 (Popup - Popup)**

*Cf* CORBETT JA in *Brian Boswell Circus supra*, nn 7 & 13 at 482H.

**23 (Popup - Popup)**

*Ibid* at 480A; also *Policansky Bros Ltd v L & H Policansky* 1935 AD 89 at101.

**24 (Popup - Popup)**

*Per* WESSELS CJ in *Policansky supra* at 103-4.

**25 (Popup - Popup)**

See *Woolworths (Pty) Ltd v Coetzer* 1934 CPD 198 at 202; the *Bon Marché* case *supra*, n 17 at 58-59 and cases there cited; *Car Guard (Pvt) Ltd v Mallard Auto (Pvt) Ltd trading as Autogard* HH-123-97.

**26 (Popup - Popup)**

*Reckitt & Colman SA (Pty) Ltd v SC Johnson SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315F-G.

**27 (Popup - Popup)**

The correct feferences are *Robertson v Securicar Transport Ltd* [1972] IRLR 70 and *Pascoe v Hallen & Midway* [1975] IRLR 116. - *Editor*.

**28 (Popup - Popup)**

Reported in 1996 (2) ZLR 754. - *Editor*.

**29 (Popup - Popup)**

[*Chapter 14:09*].

**30 (Popup - Popup)**

*Ibid s* 3 *sub voc* "cash price".

**31 (Popup - Popup)**

*Ibid s* 3 *sub voc* "purchase price".

**32 (Popup - Popup)**

*Ibid s* 28 subss (1) and (2).

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**33 (Popup - Popup)**

*Cf* n 3; para (d) of the definition.

**34 (Popup - Popup)**

In reaching this decsion, I am aware of the judgment in *Western Bank Ltd v Woodroffe & Ors* 1976 (1) SA 482 (N). In this case, it was held that *mora*, in respect of an accelerated payment, ran from the date upon which the accelerated payment was lawfully demanded. That conclusion, however, was arrived at for the purposes of a provision in terms of the South African Limitation and Disclosure of Finance Charges Act 1968, which permitted the charging of finance charges on the principal debt alone claculated to the date a payment became due, and further finance charges on the principal debt plus finance charges thereafter. In addition, although it was held that the further finance charges had to be reduced by being recalculated to the accelerated date. This, therefore, provides an example of avoiding a duplication of charges. In any event, under our Hire-Purchase Act there is no comparable provision.

**35 (Popup - Popup)**

In terms of the Contractual Penalties Act [*Chapter 8:04*] s 2 *sub voc* "penalty stipulation".

**36 (Popup - Popup)**

*Per* SCHREINER JA in *Auby & Pastellides (Pty) Ltd v Glen Anil Invstms (Pty) Ltd* 1960 (4) SA 865 (A) at 873B-D

**37 (Popup - Popup)**

*Parekh v Shah Jehan Cinemas & Ors* 1982 (3) SA 618 (D) at 628F.

**38 (Popup - Popup)**

*Cf* Rule 39 (1) High Court Rules 1971.

**39 (Popup - Popup)**

*Haddow v Haddow* 1974 (1) RLR 5 (G) at 6A; *Lindsay v Lindsay* 1995 (1) ZLR 296 (S) at 299B.

**40 (Popup - Popup)**

*Per* REYNOLDS J in *Harare West Rural Council v Sabawu* 1985 (1) ZLR 179 (H) at 183D; *Lindsay v Lindsay (2)* 1995 (1) ZLR 296 (S) at 299F.

**41 (Popup - Popup)**

*Per* MILNE J in *Cape Times v Union Trades Directories & Ors* 1956 (1) SA 105 (N) at 120D.

**42 (Popup - Popup)**

Order 43 r 391.

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**43 (Popup - Popup)**

*Cf* r 94 High Court Rules 1971, at it originally existed prior to amendment.

**44 (Popup - Popup)**

*Ibid* r 393(3).

**45 (Popup - Popup)**

*Cf* r 394 (1).

**46 (Popup - Popup)**

*Per* CHIDYAUSIKU J in *Chichoni v Food Industrial (Pvt) Ltd* HH-63-91 (not reported).

**47 (Popup - Popup)**

*Hendricks v van Biljon* 1940 SR 118 at 120-1.

**48 (Popup - Popup)**

*Cf Hippo Valley Estates Ltd v Chisi* 1992 (1) ZLR 346 (s) at 349C.

**49 (Popup - Popup)**

Rule 396 of the High Court Rules.

**50 (Popup - Popup)**

*Hippo Valley Estates supra* at 349D; *Bonne v Bonne* 1964 (1) SA 291 (SR).

**51 (Popup - Popup)**

See eg *Attwell v Guisman* 1949 (3) SA 991 (E).

**52 (Popup - Popup)**

As was recognised in *Bonne supra* at 294.

**53 (Popup - Popup)**

Cf Herbstein & van Winsen's *Civil Practice of the Supreme Court of South Africa* 4 ed by van Winsen *et al*.

**54 (Popup - Popup)**

[*Chapter 5:06*].

**55 (Popup - Popup)**

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Of the same Act.

**56 (Popup - Popup)**

*Ibid s* 17.

**57 (Popup - Popup)**

*Ibid s* 19.

**58 (Popup - Popup)**

*Ibid s* 27.

**59 (Popup - Popup)**

*Ibid s* 19(1)(a).

**60 (Popup - Popup)**

*Ibid s* 21(b).

**61 (Popup - Popup)**

Section 21, proviso.

**62 (Popup - Popup)**

Constitution of Zimbabwe, s18(3).

**63 (Popup - Popup)**

Criminal Procedure and Evidence Act [*Chapter 9:07*], s194(1).

**64 (Popup - Popup)**

*Ibid s* 240 proviso (ii).

**65 (Popup - Popup)**

*Ibid s* 356.

**66 (Popup - Popup)**

*Ibid s* 357.

**67 (Popup - Popup)**

Section 357(2).

**68 (Popup - Popup)**

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*Criminal Procedure in Zimbabwe* p 16-26.

**69 (Popup - Popup)**

And not just that of his legal practitioner: see *S v Weinberg* 1993 (2) ZLR 448 (H).

**70 (Popup - Popup)**

But see *S v Kamanga* 1991 (2) ZLR 25 (H) in which the conditions of applicability of this section were enumerated without mention (perhaps inadvertently) of any need for the accused to give consent.

**71 (Popup - Popup)**

This is not a reference to interim remand dates, but to postponements for the continuation of the trial which occupied three days over a period of one month.

**72 (Popup - Popup)**

*Per* BEADLE CJ in *Matimba v Aylward NO & R* 1962 R&N 571 (SR)

**73 (Popup - Popup)**

(2) [*Chapter 9:07*].

**74 (Popup - Popup)**

*Cf* Reid-Rowland *op cit* p 16-25.

**75 (Popup - Popup)**

*Per* MARGO J in *Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 847D-F.

**76 (Popup - Popup)**

*Prudential Building Society* v Botha 1953 (3) SA 887 (W).

**77 (Popup - Popup)**

*L' Ons v Freeman & Frock* 1916 WLD 64.

**78 (Popup - Popup)**

*Ibid, per* WARD J.

**79 (Popup - Popup)**

*Standard Bank of South Africa Ltd* v *Mason* 1928 WLD 220.

**80 (Popup - Popup)**

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See *Gerber v Stolze & Ors* 1951 (2) SA 166 (T) at 170D-H.

**81 (Popup - Popup)**

Uniform Rules of Court of the Supreme Court of South Africa, r 4(iv); *cf* Erasmus, *Superior Court Practice,* B1-15; B1-23.

**82 (Popup - Popup)**

*Loryan (supra)* n 1, 847A; Herbstein & van Winsen's *Civil Practice of the Supreme Court of South Africa* 4 ed by van Winsen, Cilliers & Loots (ed Dendy) p 287.

**83 (Popup - Popup)**

High Court of Zimbabwe Rules 1971, r 39(2)(b).

**84 (Popup - Popup)**

*Ibid* r 40.

**85 (Popup - Popup)**

Order 5, r 3(2)(c) High Court Rules, schedule to Chapter 9 of 1939.

**86 (Popup - Popup)**

*Per* MACDONALD J in *Founders Building Societyv Willoughby* 1960 R&N 263 (SR) at 256F.

**87 (Popup - Popup)**

*Ibid,* at 265 *in fine.*

**88 (Popup - Popup)**

By the then equivalent of r 40 - see n 10 *supra*.

**89 (Popup - Popup)**

SIR JOHIN MURRAY, a judge distinguished not only in this jurisdiction but also for his time on the Bench of the Transvaal Provincial Division.

**90 (Popup - Popup)**

*Per* FEETHAM JP *in Lindup v Lowe* 1935 NPD 189 at 193.

**91 (Popup - Popup)**

Rule 4C.

**92 (Popup - Popup)**

Astonishingly, the particulars of claim declare that the particulars of the defendant further than

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his selected *domicilium* are unknown to the plaintiff. I cannot believe this to be true. It seems more likely that there has been an inadequate pleading than a gross abnegation of responsibility by the plaintiff.

**93 (Popup - Popup)**

See *S v Gambanga* 1997 (2) ZLR 1 (H). - *Editor.*

**94 (Popup - Popup)**

See 1997 (2) ZLR 47 (H). - *Editor.*

**95 (Popup - Popup)**

Amongst many unreported decisons are those in *Art Printers Ltd v Regional Hearing Officer & Anor* HH-168-87 (unreported), in which REYNOLDS J held that judicial review of a decision at first instance was not excluded by delay or failure in exhausting domestic appeals; and *Ntini v Jongwe Printing & Publishing Co (Pvt) Ltd* HH-623-87 (unreported) in which GREENLAND J held that access at first instance to the common law remedies provided in the courts was not ousted by the provision of the statutory remedies and grievance procedures.

**96 (Popup - Popup)**

*Moyo v Forestry Commission* 1996 (1) ZLR 173 (H) at 192C.

**97 (Popup - Popup)**

*Musandu v Chairperson of Cresta Lodge Disciplinary & Grievance Committee* HH-115-94 (unreported).

**98 (Popup - Popup)**

For example, MTAMBANENGWE J in *Tutani v Minister of Labour & Ors* 1987 (2) ZLR 88 (H) at 95D.

**99 (Popup - Popup)**

Indeed, the frequent and justified criticism is that they are excessive.

**100 (Popup - Popup)**

Labour Relations Act [*Chapter 28:01*], s 124(1)

**101 (Popup - Popup)**

*Ibid s* 124 (2).

**102 (Popup - Popup)**

In my experience, I have known of delays of four and five or more years in finalising a dispute

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through the hierachy of labour hearing officers and tribunals

**103 (Popup - Popup)**

See SOLOMON JA in *Western Assurance Co v Caldwell's Trustee* 1918 AD 262, 274.

**104 (Popup - Popup)**

In *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S) 617H-618C, GUBBAY CJ, dealing with an appeal on the subject whether or not the High Court should have entertained the review application by an aggrieved party whose domestic employment remedies had not been exhausted, noted that the significant factor in the matter was that the decision involved an exercise of discretion by the learned Judge at first instance.

**105 (Popup - Popup)**

In *Moyo v Forestry Commission supra* n 2, MALABA J did hold that the domestic employment remedies were inadequate. He was, however, dealing solely with the appeal procedure in a code of conduct and was not considering (the point was apparently not raised) the possibility of the more extensive appeal and rehearing in the labour relations tribunal.

**106 (Popup - Popup)**

See my decision in *Nyoni v Secretary for Public Service & Anor* 1997 (2) ZLR 516 at 522.

**107 (Popup - Popup)**

This appears at p 78 of the record.

**108 (Popup - Popup)**

*Caltex Oil Zimbabwe (Pvt) Ltd v Mutsvangwa* SC-55-93; *Masiyiwa v TM Supermarkets* 1990 (1) ZLR 166 (S) at170-1.

**109 (Popup - Popup)**

In terms of s 3 Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations SI 371/1985.

**110 (Popup - Popup)**

The Registrar-General. - *Editor*.

**111 (Popup - Popup)**

See ante at p 188. - *Editor.*

**112 (Popup - Popup)**

See p 68 of this volume. - *Editor.*

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**113 (Popup - Popup)**

Rule 39(2)(d) of the High Court Rules 1971.

**114 (Popup - Popup)**

*Fox & Carney (Pvt) Ltd v Sibindi* 1989 (2) ZLR 173 (S) at 175D-F.

**115 (Popup - Popup)**

Rule 40 High Court Rules 1971.

**116 (Popup - Popup)**

Rule 5(2) of the High Court Rules 1971.

**117 (Popup - Popup)**

The registrar, in typing out the query, has misread my handwriting and rendered "opposition" as "application".

**118 (Popup - Popup)**

The idiosyncratic capitalisation is that of the attorney who wrote the letter.

**119 (Popup - Popup)**

Rule 48 of the High Court Rules 1971.

**120 (Popup - Popup)**

Ibid, r 49.

**121 (Popup - Popup)**

Ibid, r 50.

**122 (Popup - Popup)**

This, the popular rendition of Nelson's famous remark, is recorded in *Southey Life of Nelson* as: "I have only one eye, - I have a right to be blind sometimes:... I really see no signal".

**123 (Popup - Popup)**

*Welsh The Civil Practice Handbook* §1/10

**124 (Popup - Popup)**

Lewis *Legal Ethics* 123, §27. For some general animad versions upon, and an object lesson in, the duty of lawyers to clients and each other, see *Ruzvidzo v Kanhanga* S-70-91 (unreported).

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**125 (Popup - Popup)**

Or at least a consent to rescission in terms of r 63A.

**126 (Popup - Popup)**

The expression connotes reprehensible conduct either in obtaining judgment by default through some stratagem or questionable conduct or in opposing anapplication for the rescission of such a judgment where opposition is not justified. See *Minister of Home Affairs & Ors v Vuta* 1990 (2) ZLR 338 (S) 344E; *Independence Mining (Pvt) Ltd v Soko* S-188-93 (unreported) p.8

**127 (Popup - Popup)**

Which discretion is recognised in r 4C(b).

**128 (Popup - Popup)**

See rr 57 and 58 and the wording "judgment may be granted or such other order may be made ..."

**129 (Popup - Popup)**

*Per* STEYN J in *Motaung v Mukubela & Anor NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 625A.

**130 (Popup - Popup)**

In terms of r 4C(a).

**131 (Popup - Popup)**

*Zapf v provident Insurance & Trust Co* 4 EDC 17.

**132 (Popup - Popup)**

Quoting CLAYDEN J in *Gibson & Jones (Pty) Ltd v Smith* 1952 (4) SA 87 (T) at 88H citing the order in *Zapf supra*.

**133 (Popup - Popup)**

In *Gibson & Jones (Pty) Ltd v Smith supra*.

**134 (Popup - Popup)**

So too had the court in Zapf declined to treat the irregular proceeding as non-existent.

**135 (Popup - Popup)**

The use of the word "allowed" was construed in a later cse, *KDL Motorcycles (Pty) Ltd v Pretorius Motors* 1972 (1) SA 505 (O) at 508B, as implying a discretion on the part of the registrar to permit a late filing. This, however, is an incorrect perception, as appears from the

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treatment of *Creux & Sons (Pty) Ltd v Groenewald (infra)* n 24, the term meaning no more than that the registrar did no check the dies induciae and id not attempt to prevent the late entry.

**136 (Popup - Popup)**

*Gibson & Jones (Pty) Ltd supra* at 89B and G-H.

**137 (Popup - Popup)**

*Ibid* at 89H.

**138 (Popup - Popup)**

*Per* VOSS AJ in *Pezel v Leinveber* 1953 (3) SA 62 (SWA) 63H-64A.

**139 (Popup - Popup)**

In *Creux & Sons (Pty) Ltd v Groenewald* 1953 (3) SA 726 (T).

**140 (Popup - Popup)**

*Ibid* at 728G.

**141 (Popup - Popup)**

At 729C-E.

**142 (Popup - Popup)**

At 728H-729A.

**143 (Popup - Popup)**

At 729H.

**144 (Popup - Popup)**

Such, for instance, as in *KDL Motorcycles (Pty) Ltd v Pretorius Motors supra* (n 20) at 509B-D.

**145 (Popup - Popup)**

*Ibid* at 508G.

**146 (Popup - Popup)**

See p 500 of this volume. - *Editor*.

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