1998 (2)

The Zimbabwe Law Reports 1982 [Part 2]

F v W & ANOR 1998 (2) ZLR 1 (HC)

Court **High Court, Harare**

Chinhengo J

Civil application

29 January & 11 March 1998 1(1) Judgment No. HC-152-98

Flynote

Family law - child - best interests of - teenage girl in custody of mother - girl in relationship with older married man - application by guardian father for interdict preventing contact with the man - whether such interdict in best interests of child

Family law - husband and wife - divorce - minor child in custody of mother - father objecting to child's association with older married man - interdict granted against other man

Headnote

The applicant and the second respondent were husband and wife but for some time had been experiencing marital problems and had been living apart. Divorce proceedings had been started by the second respondent. The second respondent had custody of the two minor children of the marriage, the younger of whom was 17 at the time of the application. She was attending a private school in Harare. About 6 months before he brought the application, the applicant became aware that his daughter had become friendly with the first respondent. The first respondent was aged 30 and was married with a young child. He and his wife were going through an acrimonious divorce. The applicant objected to the association, although the second respondent saw no harm in it. Failing in his attempts to persuade his wife and daughter that the relationship should be ended, the applicant sought an interdict preventing the first respondent from communicating with his daughter and ordering the second respondent to take all reasonable steps to prevent the girl from communicating with the first respondent. There was no evidence that sexual relations had taken place, although both parents would not have condoned such relations. The applicant was concerned that the girl would, if the first respondent got divorced, suffer the same fate as the first respondent's wife, who was married at the age of 18 when already pregnant. There was evidence that the girl was severely affected by the conflict in her parents' marriage and had been left emotionally vulnerable by it.

Held, that the question of whether an interdict should be granted was largely a moral one, though in other jurisdictions the law has been resorted to in order to achieve the desired goal.

Held, further, that the custodian parent has the right to determine such matters as the children's social associations and the courts will not interfere with this right as long it is exercised in good

Copyright Juta & Co Ltd

faith in what the parent believes to be the child's best interests.

CHINHENGO J

Held, further, that the legal right of a parent to custody ends when the child reaches the age of majority, and even up till that time it is a dwindling right which the courts will hesitate to enforce against the wishes if a child. The right starts with a right of control and ends with little more than advice. A child approaching the age of 18 is a ``near adult minor'', but where all factors point to the need for some parental control and where the parents provide all the necessaries of life for the child, the court may be persuaded to lean in favour of parental control if such a claim is made on reasonable grounds.

Held, further, that where a custodian parent espouses a view not in all respects in the interests of the child or encourages an association which is not beneficial, it is the duty of the court to make an order consonant with the wishes of one of the parents who has made a case favourable to the interests of the child. There was no good reason to believe that the association with the first respondent was in the girl's best interests. Even if the interdict would be difficult to enforce, the court would still be duty bound to pronounce itself in favour of the best interests of the child.

Cases referred to:

Edge v *Murray* 1962 (3) SA 603 (W)

Gordon v *Barnard* 1977 (1) SA 887 (C)

Hewer v *Bryant* [1969] 3 All ER 578 (CA)

Segal v *Segal* 1971 (4) SA 317 (C)

Case Information

F Girach, for the applicant

S V Hwacha, for the first respondent

F A Edkins, for the second respondent

Judgment

CHINHENGO J: The applicant and the second respondent were husband and wife. At the time that this matter came before me, they had been living apart since March 1996 because of their marital problems. A case was pending between them in which the second respondent had sued the applicant for divorce and other ancillary relief. When the parties separated, the second respondent moved out of the matrimonial home, leaving the applicant and two minor children with the applicant at the home. The first of these minor children was born on 30 March 1980 and the second, S, was born on 23 February 1981. This application is concerned with S (the minor girl).

Copyright Juta & Co Ltd

The minor girl was at a private school in Harare. She had sat for her ``O'' level examinations at the end of 1997 and was awaiting her examination results. She had already passed her examinations in English and Physics with Chemistry with A Grades by the time she sat for the November 1997 examinations. She was highly spoken of by her teachers. Her parents intended that as soon as her ``O'' level results were to hand they would forward them to an appropriate institution in England with a view to her gaining admission to study aeronautical engineering - her chosen career.

Sometime in 1996, the minor girl met the first respondent and befriended him. Their friendship blossomed to the point where in about September 1997 the applicant became aware of it.

CHINHENGO J

The first respondent was 30 years old, married with one child, a girl of about 41/2 years. His wife was only 18 years when she became pregnant. The first respondent and his wife were in the throes of an acrimonious divorce, also pending in this court at the time of this hearing. The custody of the minor child was a particularly disputed affair.

When the applicant became aware of the full circumstances of the relationship between his daughter and first respondent he objected to their continued association and spoke about his objections to his wife, the second respondent. She was not only opposed to his views but was, in fact, supportive of the continuation of the relationship. The minor girl had since December 1997 left the matrimonial home to live with the second respondent. The second respondent was therefore the custodian parent.

Having failed to make headway with either his daughter or the first respondent or the second respondent to procure that the relationship between his daughter and the first respondent is terminated, the applicant filed this application for an order interdicting the first respondent from contacting, meeting with or in anyway communicating with the minor girl and directing the second respondent to exercise her custodial rights and to do all that was reasonable to prevent the minor girl from contacting, meeting with or in anyway communicating with the first respondent. He also sought an order directing the second respondent to advise the minor girl to refrain from all contact with the first respondent. The applicant believed that it was not in the best interests of the minor girl to continue her association with the first respondent.

[*The learned judge considered the evidence in detail and continued:*]

When the parties first appeared before me in chambers, I issued an interim order in terms of which I directed that a *curator ad litem* be appointed in terms of Order 32 r 249 of the High Court Rules 1971. I also directed that the person so appointed would prepare a report on the matter and submit it to the parties and to me within a stated time frame. I also interdicted the first respondent as a temporary measure from communicating with the minor girl and directed the second respondent to exercise her custodial rights so as to prevent the minor girl from getting into contact with the first respondent. The report was duly prepared and submitted to the parties and to me. After hearing the parties again, I issued a final order on 11 March 1998 which provided that:

Copyright Juta & Co Ltd

``1. the first respondent be and is hereby ordered to refrain from contacting, meeting with or speaking to or in any way communicating with [the minor girl] (born 23 February 1981).

2. the second respondent be and is hereby ordered to exercise her custodian rights in such manner as to prevent [the minor girl] from directly or indirectly contacting,

CHINHENGO J

meeting with or speaking to or in any way communicating with the first respondent and is in particular directed to advise [the minor girl] to refrain from contact with the first respondent.

3. each party is to bear its own costs.''

I gave my reasons for this decision. I then decided that I should give those reasons in a written judgment as the matter was, in my view, of some public and legal significance. The problems faced by the applicant and the second respondent are not peculiar. Many more parents have to deal with similar problems in bringing up their children. There does not appear to be any decided cases on such a case in this jurisdiction. None was drawn to my attention. I thought that a written judgment would be a welcome development to provide some guidance in future.

It will be apparent that the decision which I reached was concerned with the position which a court should adopt where one of the parents of a teenage child applies to court for an interdict ordering that the teenage child should desist from associating with a person of the opposite sex in circumstances where the potential for intimacy existed. In this case, the question was whether the court would interdict a nearly seventeen year old girl from associating, with the potential of sexual intimacy, with a 30 year old married man. The question was largely a moral one but in other jurisdictions the law has been resorted to in order to achieve the desired goal.

In *Edge* v *Murray* 1962 (3) SA 603 (W) the rights of the custodian parent were articulated thus:

``It is true that the custodian parent generally has the right to regulate the child's life and determine such matters as the place where it should live and the school which it should attend and any changes that should from time to time be made in those respects, and the court will not interfere with the exercise of that discretion if the custodian parent acts *bona fide* in what he or she believes to be the best interests of the child (*Simleit* v *Cunliffe* 1940 TDP 67; *Niemeyer* v *de Villiers* 1957 (4) SA 100 (T)). But that general discretion of the custodian parent must yield to any specific provisions that the court has expressly laid down in its order in regard to such matters.''

Although the custodian parent's right to determine or accept the child's associations was not specifically dealt with, I think that the words quoted above are equally applicable to social contacts. A custodian parent would, in my view, have the right to regulate the child's life in regard to social association, to advise the child against any particular relationship or to approve of it. Indeed, a custodian parent would have the right to stop any association which he reasonably did not approve. The courts should however be reluctant, as a matter of principle, to interfere with the discretion of the custodian parent in such matters.

In *Gordon* v *Barnard* 1977 (1) SA 887 (C) an eighteen year old girl resided with her parents. She associated with the respondent, a 29 year old married

Copyright Juta & Co Ltd

man with one child aged 51/2 years. She admitted to sexual intercourse with respondent. She had at some point promised to stop the relationship but decided to continue it. She had been working for herself and had been in formal employment for nearly 31/2 years. The girl's father applied to interdict the respondent from meeting or communicating with the girl. The evidence before the court was that the respondent was estranged from his wife who had sued for divorce that he had conducted affairs with other women and that generally he was not an ideal suitor even if the divorce took place. The court granted the order applied for. At 890B-G STEYN J said:

> ``I think it is of considerable importance that the applicant's daughter has been working for nearly three years. It must be remembered, however, that during the initial stages of this period she must have been very young and would clearly have been subject to very strict parental control. It is also clear to me - reading these papers as a whole - that applicant and his wife do run a strict, almost puritan, regime in their home. It is of importance that applicant says that he has not permitted his daughter to have any close relationship with men and that he has insisted on her being chaperoned whenever she has gone out. In an age when much more permissive behaviour is very often tolerated, this may be somewhat unusual, but it is not necessarily so unreasonable as to prompt the court to withhold its support of the parent when he seeks to enforce that authority in the circumstances I have outlined hereinbefore.
>
> That being so and despite that there has been some diminution of the parental authority in the process of allowing applicant's daughter to work, I conclude, particularly in view of the fact that applicant's daughter has lived in his home for three years since leaving school at the age of 15, that applicant has retained a considerable measure of parental authority and the control of a father over the conduct of his daughter. This has specifically within its ambit the choice of her friends and those she has been permitted to associate with on a close personal level.
>
> It follows that, not only is the parental control extant, but extensive. Respondent's conduct in building up a surreptitious, intimate relationship with applicant's daughter, which included sexual intercourse with her, was a direct and unlawful challenge to applicant's authority. Respondent's attempts to assist her in leaving her parents' home and to take her away with him was also in my opinion conduct which brought the existing parental authority over applicant's daughter into contempt. Respondent's conduct in these circumstances amounts to an *injuria*. In view of the fact that it cannot be said that the applicant has acted in a grossly unreasonable or unduly oppressive manner in respect of his supervision and control of his daughter, I conclude that he is entitled to the relief claimed.''

It is significant to note that this case concerned an 18 year old girl who had been working for about 3 years although she was living with her parents. The present case concerns a girl who was sixteen years old and getting on to seventeen. The similarities are close. The respondent in *Gordon*'s case was married, 29 years old and with one child. He was in the process of a divorce. The same facts appear in this case. The first respondent is 30 years old, with one child and in the process of a divorce. No sexual relationship was admitted in the present case.

The first respondent's divorce is acrimonious and the battle for the custody of the minor child is intense. There is, however, no suggestion that the first respondent would be an unsuitable suitor if his divorce went through. The applicant is, however, concerned that his daughter may suffer the same fate as the first respondent's wife, who married the first respondent at the tender age of 18. In the present case, no sexual intercourse was admitted nor did the applicant

Copyright Juta & Co Ltd

and the second respondent suspect that sexual intercourse was taking place. I must, however, observe that the applicant appeared to me to be entertaining a reasonable apprehension that sexual intercourse might take place. He definitely expressed the fear that it might take place if the association continued, especially in view of the fact that the first respondent was estranged from his wife. I detected in the applicant the ordinary parent's reluctance to countenance the possibility of a sexual relationship between his daughter and another person out of wedlock. His reasonable apprehensions were apparent on the evidence as a whole. The second respondent, though condoning the association, did not and would not condone any sexual relationship. On this score, the applicant and the second respondent were at one. There would therefore be no reason why the court should not avoid the real possibility that if the association were allowed to continue, the minor girl and the first respondent would indulge in conduct which both parents of the minor girl did not approve of.

In *Gordon*'s case STEYN J approved the *dictum* of LORD DENNING MR in *Hewer* v *Bryant* [1969] 3 All ER 578 (CA) at 582E-F, where he stated that:

> ``The common law can, and should, keep pace with the times. It should declare, in conformity with the recent report on the age of majority (published in 1967), that the legal right of a parent to the custody of a child ends at the eighteenth birthday and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice.''

See also Erwin Spiro ``The Nearly Adult Minor'' (1976) 93 *SALJ* 200.

I agree that the parent's right to control a child's associations diminishes as she progresses towards the age of majority. In this country, the age of majority is fixed at 18 years of age. It may be said that the age of majority is by far too low. At the age of majority, many children in this country have just completed their ``A'' level studies. Many of them will be embarking on further academic studies and will be at least 3 years away from completing university education or from obtaining any recognisable diploma qualification. At the age of 18, parents are still providing for the children in many respects: food, clothing, school fees and all other requirements. In this country, a minor child approaching seventeen years is indeed a ``near adult minor'', to use Erwin Spiro's terminology. Parental control will be diminishing. But where all factors point to the need for some parental control, parental provision of all

necessaries of life for the child and parental guidance in all aspects of life, the court may be persuaded to lean in favour of parental control if such claim is made on reasonable grounds.

The applicant is a concerned parent. He had the custody of the minor girl until shortly before this application was made, when the girl moved out to reside with the mother. The girl was awaiting her ``O'' level examination results. She intended to pursue further academic studies. She was not yet 17 years old. No doubt she is an intelligent girl, going by some of her ``O'' level results and the perceptions of her parents. But that does not mean that at that age she is not impressionable. The court must take cognisance of certain facts of life and it is a fact of life that children at the age of sixteen are impressionable. There has to be cogent evidence, which was not proffered in this case, to rebut that commonly held view. The report prepared by Mrs Norma

Copyright Juta & Co Ltd

Hall, a social worker and family therapist, pursuant to my interim order, disclosed that the minor girl was severely affected by the conflict in her parents' marriage and that she had been left emotionally and physically vulnerable that her relationship with the first respondent somehow filled the void in her life. This added to the impressionable disposition of a nearly seventeen year old child, mature and intelligent though she may be, convinced me that the applicant should be granted the relief which he sought.

The first respondent is a married man. He has one child. He married his wife when she was about 18 years old. He had impregnated her. At 30 years of age, he was almost twice the age of applicant's daughter. He was going through a bitter divorce and was naturally deprived of a sexual partner. While no evidence was placed before me to the effect that he was getting sexual favours from the applicant's daughter or that he intended to engage in pre-marital sex with her, it would have been naive for me to believe that he did not entertain such designs. And such designs and the potential for their realisation were part of the reason that the applicant sought the interdict. Mrs Hall, in her report, noted that he has such charm that even the second respondent was taken by it. The applicant thought that the relationship was not in the best interests of the minor child. I think he was justified in the views he held and in the apprehensions he entertained.

The second respondent, on the other hand, may have held the view that a purely platonic relationship was not harmful - in fact she thought it was beneficial to her daughter - but that view is visited with a degree of naivety which in all the circumstances I was not prepared to uphold. Mrs Hall observed to the same effect in her report. There is much to be said about TROLLIP J's words in *Edge* v *Murray supra* where at 607C-D he said:

> ``There is one aspect of this matter that I should advert to. I think that it is deplorable that the parties (the parents) should allow their implacable hostility towards one another to

CHINHENGO J

> affect adversely the reasonable exercise of their respective rights of custody and access to the child. I feel certain that such acrimony must have a detrimental effect on the child's own peace of mind and feeling of security. Except to the limited extent mentioned above, it has not been necessary for me to determine where the fault lies but I think I am duty bound to say that, if the matter should come before the court again, and claim and counterclaim of protracted unreasonable conduct is made by the parties, it may well become necessary, in the interest of the child herself, for the court as the upper guardian, to enquire by means of *viva voce* evidence or otherwise, as to who is at fault, and according to its finding, to make an appropriate order to safeguard the interests of the child ... ''

Too often do parents who are divorcing resort to compromising the interests of minor children in order to score a point or two against the other spouse. Too often do they argue against common sense in respect of what is in the interests of the minor child to hurt the other and too often are they over-accommodative of minor children's demands to court favour from them. Such tendencies must be discouraged. The interests of minor children must be viewed dispassionately and separately from the interests of the parents. Where the custodian parent espouses a view not in all respects in the interests of the minor child or encourages an association which in all the circumstances is not beneficial to the minor child, as in the present case with respect to the second respondent, it is, in my view, the duty of the court to make such order as is consonant with the wishes of one of the parents who has, on balance, made a case

Copyright Juta & Co Ltd

favourable to the interests of the minor child concerned.

In the present case, I did not find any good reason, despite the custodian parent's views on the matter, to hold that the minor girl's best interests were served by the continuation of her association with the first respondent. In *Segal* v *Segal* 1971 (4) SA 317 (C) TEBBUTT AJ was incisive in his observation about the interests of minor children as they dovetail with the rights of the custodian parent. He said at 323A-C:

> ``In my view, even where the exercise of the right by the custodian parent to decide what is or is not in the interests of the child is not capricious or not carried out in an improper manner, or influenced by improper motives, the court must still be satisfied that such decision is not, in fact, contrary to the interests of the child, and the court is entitled to enquire into that, where such decision is challenged or disputed. It is not merely a question of substituting the court's discretion for that of the custodian parent. The court must, in my view, have regard objectively to all the relevant factors and decide whether the exercise by the custodian parent of his right of control is in fact contrary to the interests of the child. If it is, then the court will, and should, interfere. That this must be so is, in my view, implicit in the decisions to which I have already referred and is also in accord with the court's jurisdiction as upper guardian of all minors.''

It is my view, too, that the court has a duty as upper guardian of minor children to make such orders in their interests as it deems proper, despite the position adopted by the custodian parent if it is contrary to the interests of the child and despite any difficult that may arise in respect of enforcement or

supervision of the order. It was argued before me that the interdict would be difficult to enforce. I did not agree. Whether the order may be difficult to enforce or one or other of the affected parties is unwilling to see to its enforcement, the court would still be duty bound to pronounce itself in favour of the interests of the child and expect, in fact, require compliance with its order. That is what I expected of the first and second respondents when I made the order. To conduct themselves in disregard of the order would open them to other means of enforcement available to the applicant.

In conclusion, I would mention that Mrs Hall's report did not recommend the issuance of the order. She thought that it would not assist as it would further label the relationship, cause bitterness, encourage rebellion and further damage the relationship of the minor girl and her parents. To her, the solution lay in the parents talking to the minor girl and encouraging her to pursue her future plans. I must say that I was not favourably impressed by the report. The applicant had talked to the girl and impressed upon her the sense of dissociating herself from the first respondent. She had refused to do so and in fact expressed the view that the applicant was being inconsiderate. I was therefore not persuaded that the interests of the minor child would best be served by a continuation of the relationship.

These are my reasons for the order which I made on 11 March 1998 which order I have cited hereinbefore.

Winterton, Holmes & Hill, applicant's legal practitioners

Kantor & Immerman, first respondent's legal practitioners

Copyright Juta & Co Ltd

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

S *v* KUSANGAYA 1998 (2) ZLR 10 (HC)

Court **High Court, Harare**

Devittie J & Mungwira J

Criminal appeal

2 & 24 June 1998Judgment No. HH-100-98

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to fair trial within reasonable time - breach of such right - whether magistrate or High Court judge on appeal has jurisdiction to deal with this constitutional issue

Court - High Court - jurisdiction - court's jurisdiction to afford relief in event of breach of accused person's constitutional rights

Criminal procedure - stay of criminal proceedings - stay on ground of breach of right to trial within a reasonable period of time - whether magistrate or High Court on appeal can stay proceedings on this ground - High Court Act [Chapter 7:06] - s 29(3) - whether applicable in respect of violation of a constitutional right

Human rights - right to trial within a reasonable period of time

Headnote

The appellant had been tried in the magistrates court on a criminal charge. He applied for a stay of these proceedings on the grounds that the delay in bringing the trial to a conclusion constituted a violation of his right to trial within a reasonable period of time in terms of s 18(2) of the Constitution of Zimbabwe. The magistrate decided that he had no jurisdiction to stay the proceedings on the basis of the alleged breach of the appellant's constitutional right. The magistrate found the appellant guilty and proceeded to sentence him.

The appellant appealed to the High Court against conviction and sentence on the grounds of the alleged violation of his constitutional right to a trial within a reasonable period of time. The State submitted that the High Court had no jurisdiction to entertain the appeal, as a constitutional question can only be dealt with by the Supreme Court upon reference by a lower court.

Held, that, arising out of the High Court's inherent review jurisdiction, the High Court has jurisdiction to order a permanent stay of criminal proceedings. Using these powers, the High Court can grant an appropriate remedy where the constitutional right of a person to a fair trial within a reasonable period of time has been violated. The constitutional provision providing for reference to the Supreme Court of constitutional questions merely establishes a procedural mechanism whereby constitutional issues may be raised by the

Copyright Juta & Co Ltd

lower courts for decision by the Supreme Court. This provision does not affect the inherent review jurisdiction of the High Court.

Held, further, that s 29(3) of the High Court Act [*Chapter 7:06*] has no application to matters where constitutional rights have been breached. This provision lays down that a conviction or sentence can only be quashed or set aside by reason of an irregularity or defect in the record if the judge considers that a substantial miscarriage of justice has actually occurred. Where a fundamental constitutional right has been violated, the person affected is entitled to the appropriate remedy, immaterial of whether an actual miscarriage of justice has occurred. To have regard to whether a miscarriage of justice has resulted from the breach of the fundamental right negates the right and the remedy to which the person is entitled by virtue of the breach. Thus in a case of violation of the right to trial within a reasonable period of time, the person affected by the breach is entitled to his constitutional remedy whether or not an actual miscarriage of justice has occurred.

Held, further, that a magistrate has no inherent jurisdiction to grant a permanent stay of criminal proceedings. There are, however, ways in which a magistrate can provide an effective remedy where there has been undue delay in bringing an accused for trial or in concluding the trial. The matter may arise when the accused appears on remand, or where he has pleaded but there is undue delay in concluding the trial or where he is brought, after undue delay, for trial on a plea of guilty or not guilty. In all these instances, if the magistrate considers that the constitutional right of the accused to trial within a reasonable period of time has been violated, it is the duty of the magistrate to explain to the accused his constitutional rights. If the accused elects to invoke his constitutional right, the magistrate must elicit the relevant facts from the accused and then refer the matter to the Attorney-General for the institution of appropriate proceedings before the Supreme Court to have a stay of prosecution granted, if this is merited. Where, however, the trial has commenced and the prosecutor seeks a series of postponements, the trial magistrate may, in his discretion, refuse to grant a further postponement with the result that an acquittal follows on the merits.

Held, further, that for a magistrate to refuse a further remand or to grant a discharge for want of prosecution would not necessarily address the breach of the accused's constitutional rights, because in both instances he may be still be summoned to face trial on the same charges.

Held, further, that in the present case, the appellant was not entitled to a stay of the criminal proceedings as he had failed to take steps to assert this right.

Legislation considered:

Constitution of Zimbabwe 1980, s 18(2)

High Court Act [*Chapter 7:06*], s 29(3)

Cases cited:

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

S v *Banana* S-20-97

Copyright Juta & Co Ltd

S v *Chakwinya* 1997 (1) ZLR 109 (H)

S v *Marutsi* 1990 (2) ZLR 370 (S)

S v *Mbire* 1997 (1) ZLR 579 (S)

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

Case Information

H Chuma, for the appellant

T Zimba, for the respondent

DEVITTIE J

Judgment

DEVITTIE J: On 3 August 1992, the appellant appeared before the Chiredzi Magistrate's Court on a charge of contravening s 46(1) of the Road Traffic Act 48/76, the allegation being that he had driven his motor vehicle along Msasa Road in Chiredzi on 20 January 1992 whilst under the influence of alcohol or a drug, to such an extent as to be incapable of having proper control of the vehicle. Secondly, he was charged under the Prevention of Corruption Act, the allegation being that he had offered a bribe to an inspector in the Zimbabwe Republic Police to induce him not to prefer charges of drunken driving against him. He pleaded guilty to the first count and a verdict of guilty was returned. In respect of the second count, he pleaded not guilty and the matter proceeded to trial. It appears that during the course of the trial and before sentence was passed on the first count, the trial magistrate left the Public Service. The trial was not finalised until 9 February 1998 when the appellant appeared before the Magistrate's Court Chiredzi. On that date, the prosecutor withdrew the charge on the second count, on the ground that there had been an inordinate delay in finalising the matter. In respect of the first count, the trial magistrate confirmed the appellant's plea and proceeded to impose a sentence of $300 and, in default, 8 days' imprisonment. Further, the appellant was prohibited from driving for a period of 6 months and his driver's licence was cancelled.

The appellant appeals against the conviction and sentence on the ground that the delay in his trial constitutes a violation of his right to a trial within a reasonable period of time, in terms of s 18(2) of the Constitution of Zimbabwe.

The respondent raises a jurisdictional point. It is that this court does not have jurisdiction to entertain the appeal, as a constitutional question can only be dealt with by the Supreme Court upon reference by a lower court. The respondent's counsel cited *S* v *Mbire* 1997 (1) ZLR 579 (S), where GUBBAY CJ stated at 581:

> ``Having heard argument from both defence counsel and the prosecutor, the regional magistrate held that the magistrates court had no jurisdiction to stay criminal proceedings upon the constitutional violation contended for. I consider that decision to be correct. It is only the Supreme Court that is empowered to make such an order under the authority of s 24(4) of the Constitution when an application or a record comes before it pursuant to subss (1)

Copyright Juta & Co Ltd

and (2)."

It is the respondent's contention that in terms of s 24(2) of the Constitution, only the Supreme Court has jurisdiction to entertain a constitutional question that arises from proceeding in a lower court and that such jurisdiction is only exercisable by the Supreme Court upon reference. The relevant section reads as follows:

``If in any proceedings in the High Court or in any court subordinate to the High Court any

DEVITTIE J

question arises as to the contravention of the Declaration of Rights the person presiding in the court may, and if so requested by any party to the proceedings, shall refer the question to the Supreme Court, unless in his opinion the raising of the question is merely frivolous or vexatious."

Reference was also made to *S* v *Marutsi* 1990 (2) ZLR 370 (S). The facts of that case are that appellant's counsel submitted on appeal that the trial magistrate ought to have found that he had no jurisdiction to continue the trial in that the period from the date of the commission of the offence to the conclusion of the trial constituted an inordinate delay such as to constitute a breach of the appellant's rights under s 18 of the Constitution. MANYARARA JA resolved the question in these terms:

``Mr *Houston* for the State submitted and Mr *Carter* conceded that there had been no compliance with s 24(2) of the Constitution in this case. This provision requires any constitutional issue to be raised in the trial court for reference to this court. The appellant did not do so at his trial."

In dealing with the jurisdiction of this court to order a permanent stay of proceedings, GILLESPIE J stated in *S* v *Chakwinya* 1997 (1) ZLR 109 (H) at 115:

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

But the Supreme Court held in *S* v *Banana* S-20-97 that the High Court has an inherent jurisdiction to order a permanent stay of criminal proceedings. The jurisdiction of the High Court to grant a stay of prosecution is consequent upon the exercise of its inherent review jurisdiction. I am satisfied that where rights enshrined in the Constitution are breached, this court has jurisdiction to grant an appropriate remedy. In my view, the provisions of the Constitution which provide for reference to the Supreme Court of constitutional questions, merely provide a procedural mechanism whereby constitutional matters may be raised by the lower courts for decision by the Supreme Court. The inherent jurisdiction of the High Court is not thereby affected.

I am accordingly of the view that I have jurisdiction to entertain the constitutional question raised, and to grant such relief as may be appropriate. This notwithstanding, it seems to me that the appeal procedure is not appropriate. The appeal does not go to the merits of the conviction or of the sentence. It concerns a violation of the appellant's constitutional rights in the very act of

Copyright Juta & Co Ltd

bringing him to trial. The proper procedure would have been by

DEVITTIE J

way of review. I am nonetheless prepared to condone the failure to bring the application in proper form.

I propose to give some consideration to the approach which the court should adopt in considering whether a conviction should be set aside for breach of a constitutional right. The precise questions I wish to consider are:

(a) whether, in the exercise of its inherent review jurisdiction in criminal matters that implicate constitutional rights that are found to have been breached, this court cannot set aside a conviction and sentence unless, and in compliance with s 29(3) of the High Court Act, there has been an actual miscarriage of justice; and

(b) whether, quite apart from the provisions of s 29(3) of the High Court Act, regard should at all be had to the merits of the conviction.

Section 29(3) of the High Court Act provides as follows:

> ``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 unless the High Court or a judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred.''

In *S* v *Tau* 1997 (1) ZLR 93 (H) GILLESPIE J, in a case placed before him for criminal review, was confronted with a situation where the conviction and sentence in the matter had been passed some five years after the accused had been charged. Concerned at the delay in bringing the accused to trial, the learned judge demanded an explanation from the Attorney-General. Upon consideration of the explanation and the background circumstances, the learned judge came to the conclusion that the accused had been denied his constitutional right to a speedy trial and that he had not been afforded the protection of the law. With the concurrence of BARTLETT J, he issued a warrant for the liberation of the accused. The learned judge firstly examined the considerations that apply in determining whether there has been a contravention of s 18 of the Constitution.

He examined the reasons for the delay and found that these were not of the accused's own doing. He also found that, as the accused was uneducated, the fact that he had not complained of the delays could not be regarded as constituting a waiver of his rights. He concluded that the accused had been denied his right to a trial within a reasonable time, and that he had not been afforded the explanation of his rights by the magistrate. He further found that the delay may have prejudiced his trial, in that the evidence led by the State was ``questionable''. He also alluded to the failure to have regard to the delay as a mitigating factor. He held that all the foregoing disclosed a fatal irregularity in the proceedings and went on to say:

> ``I cannot possibly say that there has been no miscarriage of justice. I therefore quash the conviction and sentence''.

Copyright Juta & Co Ltd

DEVITTIE J

From that, it might appear that the learned judge felt that he had to be satisfied that a miscarriage of justice had occurred before he could set aside the conviction and sentence. In my view, s 29(3) has no application to matters where constitutional rights have been found to be breached. To have regard, in such cases, as to whether an actual miscarriage of justice has occurred negates rights enshrined in the Constitution. These rights should not be made to depend, for their enforcement, upon a finding of whether or not there has been an actual miscarriage of justice. In like vein, and quite apart from the provisions of s 29(3), it is not in my view proper to have regard to the strength of the State case. The rights found to be breached and the remedy that flows therefrom have an existence that is independent of the merits. The rights enshrined in the Constitution are so fundamental that, upon a finding that a breach has occurred, an appropriate remedy must be granted, regardless of the merits. In cases where a stay of proceedings is sought prior to conviction and sentence, the merits of the conviction cannot be considered. Considerations as to whether a miscarriage of justice has taken place do not arise. In such cases, a finding that a breach has occurred entitles the accused to a stay of proceedings. As was stated in Re *Mlambo* 1991 (2) ZLR 339 (S) at 355B:

> "Section 24(4) of the Constitution empowers the Supreme Court to make such orders, issue such right and give such directions as it may consider appropriate for the purpose of enforcing or security the enforcement of the Declaration of Rights. It is difficult to imagine language should give this court a wider discretion but relative to s 18(2) whereupon balancing the various factors it is decided that the accused's right to a fair hearing within a reasonable time has been contravened. A stay of proceedings must be the minimum remedy, and therefore, to direct for instance that the trial proceeds forthwith would be to contradict the accepted claim that an ordinary delay had denied him the very right that is safeguarded under s 18(2). It would amount to participating in a further violation of this provision."

The correct application of the above principle means that, where it is found, after conviction and sentence, that a breach of a constitutional right has occurred, it would amount to a violation of that right to set aside the conviction only upon a finding that a miscarriage of justice has occurred. There is a further aspect of the decision by GILLESPIE J that requires comment and this concerns the duty of a magistrate who is faced with a case where the delay in the proceedings is such as to constitute a breach of accused's rights.

At p 100A, the learned judge stated:

> ``A major part of the magistrate's task has always been to refuse further remand where such is insupportable; to discharge for want of prosecution where this is indicated. He ought not need to be asked to do this, but should where necessary intervene *mero motu* on behalf of an unrepresented accused."

As a magistrates court has no jurisdiction to grant a permanent stay of proceedings, it seems to me that the refusal of a further remand or a

DEVITTIE J

``discharge for want of prosecution'' would not necessarily address the breach of the accused's constitutional rights. In both instances, he may be summoned to face trial on the same charges.

Copyright Juta & Co Ltd

That this is so is clear from the provisions of ss 320(1) and 322 of the Criminal Procedure and Evidence Act, which provide that a person who has been dismissed for want of prosecution or in default of prosecution may be brought to trial in any competent court on the same charge. As GILLESPIE J noted in *Tau*'s case *supra* at 98:

> ``The withdrawal of charges before plea, an expedient often adopted by the State, does not interrupt and reduce this period (see *Mlambo* at 349 F)."

I propose therefore to suggest how magistrates may intervene *mero motu* with a view to ensuring that effective remedies are afforded. Cases where constitutional rights are implicated on account of delay in bringing an accused to trial will ordinarily come before a magistrate in the following way: where an accused appears on remand; where he has pleaded but the conclusion of the trial has been unduly delayed; and the third situation that arises is where an accused is brought for trial, on a plea of guilty or of not guilty in circumstances where the delay is inordinate and constitutes a breach of his rights. The duty of the trial magistrate in all these instances, if he considers that the delay may be such as to constitute a violation of the accused's rights, is to explain the accused's constitutional rights. If the accused elects to invoke his rights, then the duty of the magistrate is to elicit the relevant facts from the accused and to refer the matter to the Attorney-General for the institution of appropriate proceedings before the Supreme Court to have a stay of prosecution granted, if it be merited. A magistrate's court has no jurisdiction to grant a stay of prosecution. I accept, though, that where the trial has begun and because of continuous postponements at the behest of the prosecution, a trial magistrate may in his discretion refuse a further postponement, with the result that an acquittal on the merits follows.

I turn now to deal with the present challenge to the conviction and sentence upon the ground that s 18(1) of the Constitution has been breached. The constitutional question is raised for the first time in this appeal. In *Tau*'s case *supra* at 98D, GILLESPIE J dealt with the considerations to be applied in determining whether there has been a contravention of s 18:

> ``The decision whether or not there has been a contravention of s 18 involves a consideration of the length of the delay; the reason for the delay; whether the affected person has asserted his right; and prejudice to that person."

In the present case, the appellant first appeared in court in August 1992. The matter was finalised six years later, in l998. The appellant's counsel conceded that the appellant had taken no steps to assert his right. In regard to the reasons for the delay, I would ordinarily have requested an explanation from the Attorney-General. I chose not to do so because I am satisfied that,

DEVITTIE J

whilst the State must shoulder some blame, it is the appellant who made a deliberate decision not to assert his rights. The evidence that was led in the bribery trial, although no verdict was reached, indicates the possibility that the appellant was prepared to use corrupt methods to avoid being tried on the traffic charge. The offence for which he has been convicted does not carry a prison term. He was sentenced to a fine. I cannot find that the accused has been

Copyright Juta & Co Ltd

prejudiced.

The appeal is accordingly dismissed.

MUNGWIRA J: I agree.

Chuma & Gurasha, appellant's legal practitioners

CHAPENDAMA *v* CHAPENDAMA 1998 (2) ZLR 18 (HC)

Court **High Court, Harare**

Chinhengo J

Civil trial

30 January & 1 July 1998 Judgment No. HH-107-98

Flynote

Family law - husband and wife - property rights - termination of unregistered customary law union - no legal basis for division of assets

Customary law - marriage - unregistered customary law union - termination of union - division of assets - basis upon which court can make order for division of assets - whether may make division on basis of tacit universal partnership

Headnote

For some years, the plaintiff and the defendant had been married in an unregistered customary law marriage. Lobola had been paid and the customary rites had been followed. The parties then purported to solemnise their customary union. However, as the plaintiff was unable to be present at the solemnisation ceremony, her sister attended in her place as proxy. After the union was terminated, the plaintiff sought a division of the assets acquired during her marriage to the defendant.

Held, that in terms of s 3 of the Customary Marriages Act [*Chapter 8:05*] a marriage contracted in terms of that Act is not regarded as valid unless it is solemnised in terms of the Act. In terms of ss 4 and 7, a marriage can only be validly solemnised if the parties are present in person and have expressed their free and voluntary consent to the marriage. As the plaintiff had not been present when the purported solemnisation of the marriage took place, the marriage between the parties was not a valid marriage in terms of the Act and the marriage was of no force and effect. The parties therefore continued to be in an unregistered customary law union after the purported solemnisation. For there to be a putative marriage,

there must be an apparent marriage which is invalid because of an impediment but which one or both of the parties believe to be valid because of ignorance of the impediment.

In the present case, the entire solemnisation proceedings were invalid and thus the marriage

---

Copyright Juta & Co Ltd

did not become a putative marriage from the date that the purported to solemnisation.

Held, further, that as there was no putative marriage and as the marriage had not been solemnised under the Customary Marriages Act the court could not make an order with regard to the division of property in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:07*].

Held, further, that the common law concept of tacit universal partnership cannot be applied where the parties are married according to customary law unless on the application of the criteria set out in s 6 of the Customary Law (Application) Act [*Chapter 8:05*] the general law applies to their property dealings. In the present case, although there were some factors pointing in the direction of the applicability of customary law, their business dealings were

CHINHENGO J

extensive and were conducted on an organised level and this pointed more in the direction of the application of general law. If customary law did apply in these circumstances this would also lead to injustice.

Held, further, that as general law applied to the property relationships of the parties and as the parties had tacitly entered into a tacit universal partnership, the plaintiff was entitled to a share in the matrimonial assets.

Held, further, that although the monetary value of the contribution of the plaintiff was difficult to quantify, her contribution was considerable as throughout the marriage she had run the rural household and had engaged in various income generating projects. Had there been no other wives the plaintiff would have been entitled to a half share of all the assets. However, an adjustment had to be made in the light of the fact that the two wives whom the defendant had married a long time after he married the plaintiff had made some contribution. However, the plaintiff's contribution was far greater than that of the other two junior wives.

Held, further, that there had been an apparent reluctance on the part of the law makers to develop the customary law of marriage. Although the law refuses to recognise unregistered customary law unions in order to compel people to register their customary unions, nonetheless there are still a great number of customary law unions that are unregistered. There is therefore perhaps a need for suitable legislation to deal comprehensively with the problems that arise from such relationships.

Cases cited:

Ally v *Dinath* 1984 (2) SA 451 (T)

Annabhay v *Ramlall & Ors* 1960 (3) SA 802 (D)

Isaacs v *Isaacs* 1949 (1) SA 952 (C)

Mashingaidze v *Machingaidze* 1995 (1) ZLR 219 (H)

Copyright Juta & Co Ltd

Masimbe v *Mungofa* HH-96-94

Mujawo v *Chogugudza* 1992 (2) ZLR 321 (S)

V (also known as *L*) v *de Wet NO* 1953 (1) SA 612 (O)

Wachtel v *Wachtel* [1973] 1 All ER 113

Zimnat Ins Co Ltd v *Chawanda* 1990 (2) ZLR 143

(S)

Legislation considered:

Customary Marriages Act [*Chapter 8:05*], ss 3,4 and 7

Case Information

Miss *C K Bachi*, for the plaintiff

S M P Musitu, for the defendant

Judgment

CHINHENGO J: In this action, the parties' pleadings did not fully disclose all the facts on which this action was being contested. It was only during the trial that the facts and the background to this action were fully disclosed.

In her declaration, the plaintiff stated that on 30 July 1979, she and the defendant ``entered into a putative marriage union in terms of the African Marriages Act [*Chapter 238*]'' and that ``that union still subsists''. She stated that they had three minor children yet in reality they had seven children but as at the commencement of the proceeding only three were minors. One has since become a major. The plaintiff alleged that her relationship with the defendant had irretrievably broken down and that there was no prospect of

CHINHENGO J

a reconciliation. The plaintiff alleged further that during the subsistence of the union the parties had acquired for their joint benefit the property listed in Annexure ``A'' to the declaration. This property, she said, was acquired on the basis of a ``tacit partnership agreement''.

She alleged that they contributed in equal shares their labour, ``services'' and skills to the partnership; that although neither of them received a salary, they both from time to time enjoyed the fruits of the partnership and the partnership benefited their joint household. She said that they did not expressly agree on a division of the profits of the partnership but that it was tacitly agreed that the profits had to be divided in equal shares. The plaintiff alleged further that the defendant was in possession of all the assets of the partnership listed in Annexure ``A'', that the defendant refused to share them with her and that the minor children were in his

Copyright Juta & Co Ltd

custody. Her claim was formulated in detail as follows:

``(a) An order declaring the union entered between the parties on 30 July 1979 to be null and void;

(b) An order declaring all the minor children to be legitimate.

(c) An order declaring that a partnership existed between the plaintiff and the defendant in respects of the assets of the union;

(d) An order dissolving the partnership as from the date of the summons;

(e) An order awarding custody of the minor children to the plaintiff.

(f) An order awarding plaintiff a half share of the assets of the union.

(g) An order awarding maintenance in the sum of $500 per month in respect of each minor child; and

(h) costs of suit."

In annexure ``A'' the plaintiff listed five immovable properties and several movables as having been acquired by them in partnership. The immovable property consisted of three houses, Stand No. 2 Mhindu Street, Kadoma; Stand No. 8418, Glen Norah C Township, Harare; Stand No. 70 Taomina Avenue, Marlborough, Harare; and two other properties being a stand in Makomo Communal Lands and a supermarket under construction in Svosve Communal Lands. The movables consisted of motor vehicles, two tractors, agricultural implements, household goods, cattle chickens and crops. The total value of all movables was given as $282 570.

In his plea, the defendant alleged that the plaintiff deserted him and thereby ended the union; that the parties did not acquire property jointly and that most of the property belonged to MH Chipandama Co-operative Ltd (the co-operative) of which the plaintiff was not a member. He said that the articles of association of the co-operative provided for the manner in which profits were to be shared but plaintiff, not being a member, was not entitled to any share. He therefore denied the existence of any partnership agreement between him and the plaintiff.

CHINHENGO J

In her evidence, the plaintiff stated that she married the defendant under customary rites in 1964. Marriage consideration (lobola) was paid by the defendant. This union was only solemnised on 30 July 1979. She was unable to attend the solemnisation. At the instance of the defendant, the defendant's sister attended in her place as a proxy. The ``marriage'' between her and the defendant was in these circumstances solemnised in terms of the African Marriages Act [*Chapter 238*] (now the Customary Marriages Act [*Chapter 5:07*]. Her parents were present at the ceremony and agreed to defendant's sister standing in as a proxy.

At the commencement of the trial, the plaintiff said that she no longer contested the custody of the children and was satisfied with reasonable access to the minor children especially during the school holidays. The division of the matrimonial assets was all that the trial was concerned about.

Copyright Juta & Co Ltd

[*The learned judge considered the evidence and continued:*]

The plaintiff gave her evidence well. She did not however seem to be able to say exactly when and how the properties, both movable and immovable, were acquired. It appears that in respect of immovable properties, except those in the rural area, she was advised of their acquisition by the defendant and she believed that they had been acquired as matrimonial property. The Marlborough house appears to have been closely associated with her as some of the household goods which she took were kept there. I accept her evidence despite the lack of precise details as to the manner of acquisition. Her assertion that she contributed by working in the fields, bringing up the children, engaging in income generating activities using the motor vehicles, collecting bricks for the construction of the supermarket building and generally making available to the defendant the income she made from sales of vegetables, crops and chickens carries weight and should be regarded as a substantial contribution. I am therefore satisfied that she contributed in many ways to the creation of the family assets. Her relationship with the defendant subsisted for about 30 years. It is reasonable to accept her contribution over such a long period of time as substantial. The important feature about this case is that the parties lived a dual life - the plaintiff lived at the rural home and contributed in her own way to the welfare of the family while the defendant lived in town, worked there, and engaged in some other income generation activities. There is no doubt at all that over a period of time the parties acquired a reasonably comfortable standard of living. In *Wachtel* v *Wachtel* [1973] 1 All ER 113 at 118g ORMOND J, discussing the contribution of parties to the breakdown of a marriage, said:

> ``There are, of course, cases in which the contribution of one party seems to be either very

> marginal or quite clear, yet a more subtle approach will reveal how much the other has contributed to the ultimate result.''

The same can be said of the parties' contributions to the accumulation of matrimonial assets, especially if the parties have lived together as husband and wife for thirty years.

The defendant was an unreliable witness. He was evasive. His evidence was largely contradictory. It amounted to saying that all the assets were acquired by the co-operative, which assertion I reject. That the motor vehicles and refrigerators belonged to the co-operative's customers and that the defendant's partners in the co-operative and his family members, including the plaintiff, only used those items when the customers did not pay for the repair work done to them is an assertion which I also cannot accept. The only assets which the defendant said did not belong to the co-operative were the herd of cattle, the crops, the chickens. The others like the one tractor and wheel barrows, he said, were on hire. The clear impression created by the defendant was that while there was an appearance of wealth, at his home and in his family, all the assets were either encumbered, hired or belonged to other persons. This I find to be a deliberate ploy to hive away all the property accumulated over the thirty years during which he was ``married'' to the plaintiff. I find that there was not only no appearance of wealth but that they were, in fact, wealthy and most, if not all, the assets belonged to his large family. The only difficulty I have with the plaintiff's evidence is its lack of specificity in respect of when,

Copyright Juta & Co Ltd

how and for how much the various assets were acquired.

According to the certificate of incorporation, the co- operative was only incorporated as a limited liability company in August 1992. There is no evidence of its existence prior to that date. This lends credence to the plaintiff's assertion that the co-operative existed in name only. If it indeed existed and was engaged in all the activities mentioned by the defendant then the defendant should have at least produced some financial statements or asset registers to prove his assertions. No such statements or registers were produced. In any case, when the company was formally established the members thereof were the defendant and his two other wives - Alice and Rachel. The defendant said that these wives' contribution to the co-operative were knitting machines and cooking skills for the one and a photocopier, three typewriters and a fax machine for the other, respectively. He attempts to create the impression that their contribution was more direct and significant than the plaintiff's contribution over 30 years. It sounds hollow and it is, in my view, an afterthought. It is not disputed that Rachel became defendant's second wife in 1988 and Alice became the third wife in the 1990s. In respect of Rachel, the defendant said he did not remember when he formalised his

marriage with her. In respect of Alice, he was only able to say that he married her in the 1990s. He said that he had been associated with these women much earlier than the dates of his marriage to them. The truth seems to me to be that the second and third wives only came onto the scene much later when most of the family wealth had been accumulated. I am satisfied that on a balance, the plaintiff's version is to be preferred to that of the defendant. I am satisfied too that having rejected the existence of a co-operative or limited liability company even as from the time of its incorporation in 1992, and having not heard evidence as to the other wives' contribution to the acquisition of the assets specified in the schedule, I can only say that most of the assets were acquired by the plaintiff and the defendant jointly between 1964 and 1988, and by the defendant and his three wives between 1988 and 1994 before the plaintiff left the matrimonial home. There appears something from the plaintiff's evidence to say for the other wives' contribution. The plaintiff said that the idea of a co-operative was actually mooted by defendant's wives, including the plaintiff herself, to protect their collective family wealth. She said that when they thought about this idea, their projects were doing well.

I believe the plaintiff in her explanation for leaving the matrimonial home. She said that the second wife Rachel gave birth to a child. The child died and she (the plaintiff) was accused of bewitching the child. Then the mother of the child also died and she was again accused of bewitching her. When her aunt and sister attended Rachel's funeral, they were instructed to take the plaintiff away with them. The relationship had already broken down and she left with her relatives at the instance of the defendant. The defendant's version is that the plaintiff deserted him. He does not even admit that there was any problem connected with the death of Rachel and her child. He said in his evidence in cross examination that he did not give to the plaintiff a rejection token suggesting further that the plaintiff deserted him. He, however, accepts that the relationship had broken down irretrievably.

Having found that the parties acquired the assets in the manner I have outlined, the question

Copyright Juta & Co Ltd

which arises is what was the true relationship between them for purposes of a division of the assets. Was it based on a ``tacit partnership'' as alleged in plaintiff's declaration or was it based on some other relationship such as a customary union or customary marriage? It is easier to deal with the last question.

In her declaration, the plaintiff said that the parties entered into a putative union in terms of the African Marriages Act [*Chapter 238 of 1974*]. This is meaningless. The relationship of the plaintiff and the defendant, between 1964 and 1979, arose out of an unregistered customary union. Nothing, in my view, changed in 1979, when they purported to solemnise their customary union.

CHINHENGO J

Section 25(3) of the Marriages Act [*Chapter 5:11*] provides that under that Act no person shall be capable of contracting a valid marriage through any other person acting as his representative. The Act therefore renders a nullity a marriage soleminized with a proxy.

The Customary Marriages Act [*Chapter 5:07*] does not in specific terms prohibit a marriage by proxy, as does the Marriage Act. However ss 4 and 7 deal with the solemnisation of the marriage. It provides in s 4 that there must be present ``in addition to the customary marriage officer and the parties to the marriage'' the guardian of the woman or his deputy and a witness. Section 7(1)(b) provides that the customary marriage officer shall solemnise the marriage if he is satisfied ``that the *intended husband and wife freely and voluntarily consent to the marriage*'' (my emphasis) and such marriage shall be a valid marriage contracted according to customary law.

Section 3 of the Customary Marriages Act provides in subs (1)(a) that a marriage contracted in terms of that Act shall not be regarded as valid unless it is solemnised in terms of the Act. It seems to me that in order for the marriage to be validly solemnised, the parties thereto should be present in person as required by s 4(2) and should express their consent freely and voluntarily as required by s 7(1)(b). This cannot happen if one of the parties to the marriage is not present. It seems to me that a marriage according to customary law which is solemnised in the absence of one of the parties or where one of the parties is represented by another person is not a valid marriage in terms of that Act. It does not comply with the requirements stated in ss 4 and 7.

In the present case, the plaintiff was not present at the solemnisation. The marriage between her and the defendant is therefore invalid and of no force and effect. Subsection (5) of s 3 of the Act deems ``a marriage contracted according to customary law which is not valid in terms of this section'' shall be valid for other purposes: the status, guardianship, custody and rights of succession of the children of such marriage. The allegation in the plaintiff's declaration that the parties entered into a putative marriage in terms of the African Marriages Act is therefore misleading. A putative marriage is not a legal marriage. It is an apparent marriage affected by an impediment which one or both parties were ignorant about. That a marriage is putative is a conclusion which a court may reach on a consideration of the facts before it. A putative

Copyright Juta & Co Ltd

marriage cannot therefore be contracted in terms of any enactment.

The relationship of the parties to this action was in essence on unregistered customary marriage. This is the terminology used by MANYARARA JA in *Mujawo* v *Chogugudza* 1992 (2) ZLR 321 (S) at 325G-326A to describe such a ``marriage''. In that case, the learned JUDGE OF APPEAL said:

CHINHENGO J

> ``Generally speaking, the expression `marriage according to African Law and custom' bears the same meaning as `customary law marriage' which can be misleading.
>
> Traditionally, all that a man was required to do to take any unmarried woman as his wife was to agree the amount of lobola payable for the woman with her father or guardian and she became his spouse even before lobola was paid.''

The learned JUDGE OF APPEAL described this kind of marriage, correctly, in my view, as an ``unregistered customary marriage''. This is the ``marriage'' which the parties contracted between 1964 and 1979 before, in the latter year, it was purported to solemnise a proper customary marriage i.e. one registered in terms of the Customary Marriages Act. It seems to me that if the formalisation of the unregistered marriage was a nullity then the parties remained related to each other in terms of the unregistered customary marriage entered into in 1964. For the purposes of legitimation of the children, s 5 of the Customary Marriages Act puts it beyond doubt that the children are legitimate and the court may only really make an order which is declaratory of the position and not constitutive of it. The plaintiff's concern with regard to the legitimacy of the children is unfounded.

As regards whether or not the relationship between the parties became a putative marriage in 1979, I have a difficulty in answering it in the positive. The solemnisation was not in accordance with ss 4 and 7 of the Customary Marriages Act. One of the parties was not present. The solemnisation took place with the defendant and his sister appearing as the intending husband and wife. This was done with the plaintiff's parents' consent. It is trite that the incompetence of the marriage officer is a defect which does not exclude the marriage from being a putative marriage. The same cannot be said of the absence of one of the parties. The defect in the latter case is fatal. There was no means by which the parties' desire to marry could be expressed. The solemnisation could not have been an open expression or manifestation of parties' intention to marry. To constitute a putative marriage, the marriage must be an ``apparent marriage which but for some impediment or other, was invalid but which one or both of the parties, ignorant of the impediment, believed to be valid'' (see H R Hahlo *South African Law of Husband and Wife* 5 ed at 113, in particular footnote 84). It is not possible on the facts in the present case for me to hold that a putative marriage resulted from the ceremony held in July 1979. The whole proceeding was invalid and the parties's relationship remained unaltered.

At the conclusion of the trial, counsel for both parties agreed, at the request of the counsel for the applicant, to make their closing addresses in writing. In her written address counsel for the plaintiff argued at length that a putative marriage came into existence. In para 3 of her written address, she said that ``a putative marriage accords the parties a universal tacit partnership. It

Copyright Juta & Co Ltd

is

CHINHENGO J

named a tacit universal partnership because the parties draw no distinction between their business and private affairs but own everything in common''. I have shown that the parties did not at all bring a putative marriage into being. I note, incidentally, that the plaintiff's counsel was wrong when after stating that the house in Marlborough was acquired in 198l, the Glen Norah House in 1984 and the Kadoma house in 1980, she stated that these ``houses were acquired during the subsistence of the putative marriage.'' The putative marriage could only have come into existence, if it did, in July 1979 when there was the failed attempt to formalise the unregistered customary marriage. Her argument that, because a putative marriage was in existence, s 7(1) of the Matrimonial Causes Act [*Chapter 5:07*] applies is therefore untenable. This court is empowered to make an order with regard to the division of property in terms of s 7 of the Matrimonial Causes Act only in the case of a marriage solemnised under the Marriage Act or the Customary Marriages Act (see *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (H) at 223B).

The rejection of the existence of a putative marriage places the plaintiff's case in circumstances where I have to decide whether, despite the non-existence of a putative marriage, the parties nonetheless entered into a tacit universal partnership. This ROBINSON J refused to accept in *Mashingaidze's* case *supra*. In that case the learned judge dismissed the application by the wife who had been married to the respondent by way of an unregistered customary law union and who, when the union had been terminated, sought an order on the basis of a tacit universal partnership, awarding to her one half share of all assets acquired during the subsistence of the union. The application was dismissed because it had been brought by way of motion proceedings when the applicant should have known or knew that there were substantial disputes of fact. ROBINSON J however said at 222H-224A:

> ``On the merits the application is ill-founded, in that it seeks to apply a general law concept, namely, the concept of a tacit universal partnership, to an unregistered customary law union which has come to an end, without attempting to lay any foundation for applying general law to the facts of this case in lieu of the application of customary law, in accordance with the choice of law rules prescribed by s 3 of Part l (which still stands - see s 1 (1) as read with s 31 of the Customary Law and Local Courts Act 2 of 1990, as amended by s 18 of Act No. 22 of 1992, as read with SI 127A of 1993) of the Customary Law and Primary Courts Act 6 of 1981. No doubt the applicant grasped at the straw of a tacit universal partnership in the light of her knowledge that the court was empowered to make an order with regard to the division, apportionment or distribution of matrimonial assets in terms of s 7 of the Matrimonial Causes Act 33 of 1985 only in the case of a marriage duly solemnised under the Marriage Act [*Chapter 37*] or the African Marriages Act [*Chapter 238*].
>
> Too many legal practitioners tend to labour under the simplistic belief that the concept of a tacit universal partnership is their client's salvation where there appears to be no other solution open to them. However, they should be cautioned that in *Chiromo* v *Katsidzira*

CHINHENGO J

1981 ZLR 418 (A) at 421D FIELDSEND CJ referred to the South African case of *Verster* v *Verster* 1964 (4) SA

Copyright Juta & Co Ltd

> 310 (T) (the judgment is in Afrikaans) as demonstrating the difficulties in the way of establishing a claim of this nature. As it is, the closest to which I have come in finding a case in our jurisdiction where the concept of a tacit universal partnership has been applied is the case of *Masimbe* v *Mungofa* HH-96-94 (not reported), in which the applicant, a medical doctor, and the respondent, a nursing sister, had lived together as man and wife for a number of years before their relationship broke up. For cases in South Africa where the concept of a tacit universal partnership have been applied, see *Fink* v *Fink & Anor* 1945 WLD 226, *Isaacs* v *Isaacs* 1949 (1) SA 952 (C), *V (also known as L)* v *de Wet* No 1953 (1) SA 612 (O) and *Muhlmann* v *Muhlmann* 1981 (4) SA 632 (W). (In the last mentioned case at 634F-635E, McCREATH J summarised the principles which the court will apply where in divorce proceedings a spouse married out of community of property claims that a universal partnership had existed between them and claims an order in respect therof and a division of the assets of such partnership.) See also *Ally* v *Dinath* 1984 (2) SA 451 (T) and *Kritzinger* v *Kritzinger* 1989 (1) SA 67 (A).
>
> However, from my remarks I do not wish it to be thought that the applicant, for whose position I have much sympathy, does not have good grounds for recovering a share of, or a share in the value of the assets towards the acquisition or improvement of which she can establish that she has contributed financially or otherwise during her union with the respondent, particularly so in the case of the immovable properties in regard to which general law and not customary law applies ..."

The learned judge was quite emphatic that it is inappropriate to invoke a common law concept of a tacit universal partnership where the parties were married according to customary law. He postulated that the applicant could put forward her claim for alternative relief on alternate grounds. He did not articulate those grounds. Do such alternative grounds exist?

Masimbe v *Mungofa* HH-96-94 was a case in which the applicant sought to evict the respondent where the two parties had lived together or cohabited between 1986 and 1993. They had had one child born in 199l. Their relationship had deteriorated to such an extent that they could no longer live under one roof because of the applicant's refusal to marry the respondent. MUTAMBANENGWE J relied on *V (also known as L)* v *de Wet NO* 1953 (1) SA 612 (O) and *Ally* v *Dinath* 1984 (2) SA 451 (T) for his statement at 7-8 of the cyclostyled judgment that:

> ``The point of reference in both these cases is that the decisions show that there is no obstacle to a woman who has lived with a man, as man and wife for a long time, bringing the type of action that the plaintiff in those cases brought; and the plaintiff in this case is bringing, on the basis as alleged in all three cases, of a universal partnership ... In conclusion, I find that the respondent has an interest in the premises in question and that her claim is indefeasible on the basis as put forward in the papers in this matter."

Clearly, the learned judge accepted that the concept of a tacit universal partnership was applicable. The case before him was and is, in my view, distinguishable from the present. In that case, the parties were not married under customary law, that is to say, they did not, like in the present case, have

an unregistered customary marriage. They had simply lived together as man and wife. No lobola had been paid. Such a relationship could therefore not be covered by customary law, as it was neither a customary marriage under the Act nor an unregistered customary marriage. *Masimbe*'s case was therefore comparable to *Ally* v *Dinath supra* in that no marriage of any kind fell for consideration. The situation *in casu* is different, as I have shown. I respectfully incline towards the view of ROBINSON J in *Mashingaidze*'s case *supra* and conclude that this is not a case in which the common law concept of a tacit universal partnership would ordinarily be

Copyright Juta & Co Ltd

invoked without laying the foundation for doing so and without regard to the choice of law rules in our statutes.

The present case is also distinguishable to some extent from *Fink* v *Fink* 1945 WLD 226 in that, although the parties in *Fink*'s case were married out of community of property, that is to say, a marriage recognised at law was in existence between them, there was no choice of law provision to be considered by the court, as is the position in our law. The court had necessarily to fall back to the common law and rely on a tacit universal partnership in order to determine the parties' proprietary rights.

What, then, is the position of a spouse in an unregistered customary marriage in respect of property rights, if any, upon the unregistered customary marriage coming to an end?

Our courts and the law makers, in particular, have over the years appeared reluctant to develop the customary law of marriage. It must be an acknowledged fact of life that many unregistered marriages exist. The compulsion to register marriages which was the main reason for refusing to recognise unregistered marriages is a noble idea from a policy viewpoint. But the reality remains that a great number of marriages in this country are unregistered. Perhaps suitable legislation should be enacted to deal comprehensively with problems arising from such relationships.

The Matrimonial Causes Act does not apply to unregistered customary marriages. The Customary Marriages Act equally does not apply to such marriages except to the extent specified in s 5 thereof. The words of GUBBAY CJ (as he then was) in *Zimnat Insurance Co Ltd* v *Chawanda* 1990 (2) ZLR 143 (S) at 153E-154F, which were quoted with approval by ROBINSON J in *Mashingaidze*'s case *supra* at 225A-D, are apposite. He said:

> ``Today the expectations amongst people all over the world, and particularly in developing countries, are rising and the judicial process has a vital role to play in moulding and developing the process of social change. The judiciary can and must operate the law so as to fulfil the necessary role of effecting such development.
>
> It sometimes happens that the goal of social and economic changes is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and

CHINHENGO J

> application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.
>
> The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstruct the taking of such a course. If judges hold to their precedents too closely they may well sacrifice the fundamental principles of justice and fairness for which they stand for. In a famous passage LORD ATKIN, referring to judicial precedents, said:
>
> > `When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the judge to pass through them undeterred'."

It seems to me that customary law has been stifled in its development, all in the interest, I

Copyright Juta & Co Ltd

should say, of ensuring the due registration of all marriages in the country. That objective has not opened the way for the development of a legal r,gime or of legal principles which would effectively address a problem such as has presented itself in the present case.

Unregistered customary marriages exist and the fact of their existence is implicitly recognised in our statute law. For instance, s 3(1) of the Customary Marriages Act [*Chapter 5:07*], refers to a ``marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative'' and declares it to be invalid unless it is solemnised in terms of that Act. Subsection (5) refers to ``a marriage according to customary law which is not a valid marriage in terms of this section'' and declares that such marriage is to be regarded as valid for the purposes of the custody, status, guardianship and rights of succession of the children of the marriage. The Customary Law (Application) Act [*Chapter 8:05*] in s 6(1) provides as follows:

> ``Subject to section 3 of the Customary Marriages Act [*Chapter 5:07*], if in any civil case a question arises as to the effects of a marriage which was contracted according to customary law by a person at a time when he already had another wife o*r other wives married to him according to customary law*, the court may treat such marriage as valid for all civil purposes, in so far as polygamous marriages are recognised by customary law'' (my emphasis).

Again this provision clearly acknowledges the existence of unregistered customary marriages.

In s 3 the Customary Law (Application) Act provides for the choice of law rule by providing that customary law, which is defined as:

> ``the customary law of the indigenous people of Zimbabwe or any section or community thereof,''

shall be applicable in any civil case where the parties have agreed it should apply or if, from the nature of the case, it appears that the parties have agreed it should apply or if, from the nature of the case and the surrounding

circumstances, it appears just and proper that it should apply. The general law, so the section provides, shall apply in other cases. In terms of this enactment therefore, customary law shall apply depending on the agreement of the parties or on the nature of the case and its surrounding circumstances. ``Surrounding circumstances'' are defined as including the mode of life of the parties, the subject matter of the case, the parties' understanding of the provisions of customary law or the general law which apply to the case and the closeness of the case and the parties to customary law or the general law, as the case may be.

The parties in this case were ``married'' pursuant to an unregistered union. The defendant paid lobola and took the plaintiff to wife in accordance with customary rites. The defendant was employed in the towns while the plaintiff resided at the parties' rural home bringing up the children, growing and selling crops and other produce and generally supervising the general development of the parties' rural home. In 1979, the parties attempted to solemnise their marriage in terms of the Customary Marriages Act. In 1988 the defendant married a second wife and in the 1990 he married the third wife. It is common cause that as from 1988 the parties lived in a polygamous situation. These facts, among others, seem to me to suggest that the

Copyright Juta & Co Ltd

parties were closer to customary law than to the general law. They however acquired immovable property in the urban centres of Kadoma and Harare. They engaged in agricultural and other activities that made them participants in the modern economy of the country, judging by the implements they possessed. Theirs was not a subsistence form of agriculture, as is evidenced by the acquisition of tractors, ploughs and other non-rudimentary agricultural implements. They purchased motor vehicles and were building a supermarket structure as a business venture. Their property acquisitions and business activities brought them, no doubt, closer to the general law of Zimbabwe. The extent of their acquisition or accummulation of assets is evidence enough to lead to the conclusion that they were engaged in business at a very highly organised level bringing them closer to the general law than the customary law.

The plaintiff remained active at the rural home and her contribution, as I have found, though significant, is not susceptible to quantification in financial terms. She made no direct financial contribution to the acquisition of most of the properties. Whatever income she raised, it accrued to the general benefit of the family. In addition, her contribution as a wife, which is unquantifiable but extant and recognised in many similar cases that have come before our courts, suggests very strongly that the parties pooled their resources for their common good. If I were to apply customary law to the proprietary rights of the parties in the context of an unregistered customary marriage I would

come unstuck and in effect perpetrate an injustice. On the facts which I have outlined, it is impossible to say that the parties are closer to customary law than to the general law. They are closer to general law. On the basis of the choice of law rule in s 3 of the Customary Law (Application) Act I incline towards applying the general law of Zimbabwe.

The outstanding issues between the parties which were the subject of this trial related only to the division of the movable and immovable property acquired by them over the years. However unsatisfactory the application of the general law concept of a tacit universal partnership to an unregistered customary marriage scenario may be, it is the only legal r,gime available in order to do justice to the parties. And where a basis has been laid for the application of the common law as stated in *Mashingaidze*'s case *supra*, it is proper to do so. That basis has been laid in this case, if reference is made to the manner of acquisition of the asets by the parties, their contributions over a period of thirty years and the nature of the property so acquired. I must admit that the choice of law rule in the Customary Law (Application) Act offers no really useful guide. What I must emphasise, though, is that the proper approach in a case in which an unregistered customary marriage is alleged, is to apply the choice of law rule contained in the Customary Law (Application) Act. I think that it is not proper for the court, without applying its mind to the choice of law rule, to determine a matter which essentially is governable by customary law by applying the common law. Only when the court has determined that the parties' rights should be determined under the general law of Zimbabwe would it be entitled to apply it. For all one can tell, advertence to the choice of law may, in a given case, lead to the conclusion that customary law is applicable. The analysis is therefore a necessary step to undertake in order to provide a basis for the application of the general law in preference to the

Copyright Juta & Co Ltd

customary law. To omit this stage of analysis is an unwarranted disregard of the existence of the Customary Law (Application) Act. Such an approach will also encourage legal practitioners to lay the basis for the application of the general law. That, I think, was ROBINSON J's concern in *Mashingaidze*'s case *supra*.

Isaacs v *Isaacs* 1949 (1) SA 952 (C) was a case quite similar to the present. There the parties had been married for 28 years in accordance with Mohammedan rites. They had commenced their ``married'' life with no assets. They both engaged in commercial activities with the wife combining these activities with personally running the household and looking after the children's welfare. On the dissolution of their ``marriage'', the wife claimed a half share of certain immovable property. The court held *inter alia* that a tacit universal partnership existed between the parties and awarded the wife half the value of the property concerned.

CHINHENGO J

In *Annabhay* v *Ramlall* & Ors 1960 (3) SA 802 (D) HENNING AJ dealt with the two kinds of universal partnerships in Roman Dutch Law - the *universorum bonorum* which can only be entered into expressly and where a lawful marriage or putative marriage exists, and a *societas universorum quae ex quaestu veniunt* which may be entered into expressly or tacitly. The latter is defined at 805F as ``one where the parties agree that all they may acquire during its continuance and every kind of commercial venture shall be partnership property''. It is tacit if it can be inferred from the conduct of the parties.

The conduct of the parties in the present case, which I have outlined in some detail, is indicative of a tacit universal partnership - the *societas universorum quae ex quaestu veniunt.* The plaintiff is therefore entitled to a share of the assets on that basis.

The question of the proportion of the shares of each party is not an easy matter to determine. Except for her labour, skill and supervision at the rural home and the income she made from gardening, raising chickens, growing and selling crops, other activities which have not been quantified, and her responsibilities in respect of the children and the running of the household, it is difficult to determine her precise contribution. We know for a fact that the defendant used the proceeds from his employment and other commercial activities to purchase and develop the immovable properties. We know, too, that after 1988 the defendant married two other wives who contributed to the acquisition of the family assets. The extent of their contribution has not been identified. We know that the plaintiff made a more direct contribution towards the construction of the rural homestead and the supermarket building. We know that as at the time of her departure she left behind chickens, bagged crops and livestock. We know also that the plaintiff lived with the defendant for about 24 years before the other wives came onto the scene. Her contribution must of necessity have been greater by far than that of the junior wives as at the time the unregistered customary marriage was terminated. This is a case in which the court must take a robust view of the facts to determine a share for the plaintiff. Like in *Isaac*'s case *supra* ``The plaintiff, throughout her ``marriage'', devoted her whole time to work for the common purpose, either in running the house or providing for the defendant and her household ... '' (at 959).

Copyright Juta & Co Ltd

What cannot be denied, though, is that the defendant played a more significant part in the acquisition of the family assets hence the plaintiff did not know how and for how much most of the assets were acquired.

I am also cognisant of the fact that some of the assets have been disposed of by the defendant after the plaintiff's departure and after she had commenced these proceedings. I am satisfied that the defendant sold these assets, not to

pay the creditors as he alleged, but to deprive the plaintiff of her due. If there was no further complication created by the polygamous circumstances of the parties, I would have had no difficulties in awarding to the plaintiff a half share of the assets, which on the conservative figures provided by the defendant are valued at over $2 500 000. I have taken the defendant's indicative values as follows:

Kadoma house.....	$60 000
Marlborough house.....	$300 000
Glen Norah house.....	$35 000
(Plaintiff's) rural house.....	$44 000
The supermarket building.....	$2 000 000
Movables (as per plaintiff's list).....	$282 000

I have been alive to the possibility that some of the assets, especially the motor vehicles, may have been sold during the subsistence of the union and the proceeds thereof utilised to acquire further assets. I consider that the other two wives made a contribution to the acquisition of some of the assets. I am satisfied that an award of $300 000 is reasonable in the circumstances.

Accordingly, judgment is entered for the plaintiff in the sum of $300 000, together with interest on this sum at the rate of 25% per annum from the date of judgment to the date of payment. The defendant shall pay the costs of this action.

It is also ordered that the tacit universal partnership between the parties is hereby terminated.

Makarau & Gowora, plaintiff's legal practitioners

Messrs Manase & Manase, defendant's legal practioners

Copyright Juta & Co Ltd

S *v* HURLE & ORS (1) 1998 (2) ZLR 34

Court **High Court, Harare**

Gillespie J & Assessors

Criminal trial

3 July 1998 Judgment No. HH-112-98

Flynote

Criminal procedure - trial - accused - presence of - requirement for when verdict delivered - one of several accused persons absenting himself after all evidence given and arguments presented - permissible to give judgment in respect of all accused, even in the absence of one

Headnote

Three persons were charged with murder. All three were on bail during the course of the trial and attended faithfully throughout the proceedings. At the close of argument, the court reserved its decision and postponed the trial for a little over 2 weeks for verdict. By that time, the first accused had taken fright and disappeared. A warrant for his arrest was issued, and a further postponement ordered. The question arose whether it was permissible to deliver verdict in the absence of the first accused, the other accused being present.

Held, that although the Constitution and the Criminal Procedure and Evidence Act [*Chapter 9:07*] require that, subject to certain exceptions, the trial of a person charged with a criminal offence must take place in his presence, it was questionable whether the word ``trial'' should be interpreted to exclude the judgment. The requirement that the trial should take place in the presence of the accused is one going back to the Roman law, and is based upon principles of natural justice that he be given an opportunity to defend himself. The protection secured by the Constitution is also designed to ensure that an accused be given a fair hearing before being condemned. The giving of judgment involves no participation by the accused at all; there is nothing further that he can say or do before judgment is given. Where the trial is postponed to a specific date expressly for the handing down of judgment and the accused voluntarily absents himself, it would be right to hold that he must be taken as consenting to the delivery of judgment in his absence. The accused ought not to expect the unilateral power by his wrongful absence to frustrate the giving of judgment. Undoubtedly, though, sentence, in the event of a conviction, could not be passed until the accused could be brought before the court.

Held, therefore, that the court had a discretion to pronounce judgment in the absence of the accused.

Held, further, that such discretion should be exercised in favour of giving judgment: the other accused had a legitimate and pressing concern in hearing their fate; the State had an interest in hearing the result; it would be impracticable, because the findings in respect of the accused were inextricably intertwined, to attempt to excise findings in respect of the one who was absent from those in respect of the two who were present; and it would be artificial to deliver a

Copyright Juta & Co Ltd

judgment concerning all three but to withhold the verdict in respect of one, when the judgment must make clear what the verdict would be.

GILLESPIE J

Cases cited:

Poli v *Min of Finance* 1987 (2) ZLR 302 (S)

R v *Jones* [1972] 1 WLR 887 (CA)

R v *Lee Kun* [1916] 1 KB 337

S v *Mupatsi* 1998 (1) ZLR 224 (H)

S v *Sparks & Anor* 1972 (3) SA 396 (A)

R v *Streek* (1826) 2 C & P 413; 172 ER 187

Legislation considered:

Constitution of Zimbabwe 1980, ss 18(3) and 89

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 194(1)

Case Information

R K Tokwe, for the State

Miss *D Ruzvidzo*, for the first accused

I A Ahmed, for the second accused

Miss *C A F Finlayson*, for the third accused

Judgment

GILLESPIE J: The accused were on bail during the course of this trial. All attended faithfully throughout the proceedings. At the close of argument on 3 June, the court reserved its decision. The matter was postponed until 19 June for judgment. By that time, the first accused, Michael Hurle, had taken fright. He had taken flight. I issued a warrant for his arrest and, hoping that he would be taken into custody over the weekend, postponed proceedings until 22 June. On that day, he was still at large. I therefore ordered a further postponement until 3 July and directed counsel to be prepared to argue whether judgment could be handed down in the absence of the first accused should he still be a fugitive from justice. He is, in fact, still in default of appearance. I am informed from the Bar that the accused has been in telephonic communication with a lady friend of his. He has asked her to be present at court this morning to meet him, with his child by her. He is obviously aware of the proceedings. He has chosen to stay away. His counsel is present.

Copyright Juta & Co Ltd

The law does not permit a trial in the absence of the accused save in certain exceptional circumstances. 1(2) These exceptions are all provided for in statute. Unlike the South African legislation, which makes specific provision that would apply here, 2(3) none of the exceptions enacted apply to this case. I have therefore to consider whether the legislation as it stands, together with our common law, permits of the giving of judgment in this case.

GILLESPIE J

The Constitution decrees, as part of the protection of the law, in respect of every person who is charged with a criminal offence, that:

> ``[E]xcept 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.'' 3(4)

This protection is echoed in the criminal code which provides:

> ``Every criminal trial shall take place and the witnesses shall, except as is otherwise specifically 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 criminal 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.'' 4(5)

Neither of these provisions expressly provide for the giving of judgment. That is touched upon elsewhere in these terms:

> ``All judgments and sentences in criminal proceedings before any court against persons who are of or above the age of eighteen years shall be pronounced in open court.'' 5(6)

The question is whether a construction of all or any of these provisions yields a solution to the present problem.

It is tempting to read ``trial'', where that word appears in the first two provisions, as excluding judgment. ``Trial'' is defined, in criminal cases, as:

> ``the judicial investigation of a complaint preferred by the Crown ... against an accused person, as disclosed in an indictment or summons, after he has pleaded not guilty, and the hearing of such evidence as may be brought forward by the prosecutor, with the object of ascertaining the guilt or innocence of the accused in respect of the crime or offence wherewith he stands charged.'' 6(7)

``Trial'' is said to mean

> ``the stage from the commencement up to the conclusion of the judicial enquiry.'' 7(8)

There are many cases that hold that proceedings on a plea of guilty, where no evidence is led, do not constitute a trial. This might leave it open to one to conclude that once the disputation of evidence and argument is over, the trial is over. 8(9) Such a finding, however, might well be mere manipulation - special pleading. The danger of this is indicated by the possibility that the interpretation would leave outside the constitutional protection pleas of guilty and determinations of sentence. One ought therefore to be slow to interpret ``trial'' restrictively.

Copyright Juta & Co Ltd

GILLESPIE J

Similarly, to read the third provision, applying the *maxim expressio unius est exclusio alterius*, as impliedly permitting judgment in the accused's absence overlooks the reality that the provision is directed at the question of publicity rather than the presence of the accused. The statutory provisions are, in fact, all silent upon the point, save to the extent to which, by providing for the presence of the accused during trial, they must arguably be taken as requiring that presence throughout. This is the interpretation which ought to be applied unless there could be found any principle that would permit of the accused's absence when judgment is given.

If one is to find any principle by which one could permit the giving of judgment in the accused's absence it must be sought without the statute. The Roman law was firmly against the notion of trial in the absence of the accused.

> ``*Divi Severi et Antonini Magni rescriptum est, ne quis absens puniatur: et hoc iure utimur, ne absentes damnentur: neque enim inaudita causa quemquam damnari aequitatis ratio patitur.*'' 9(10)

The fugitive's goods, however, became liable to seizure. Appearance by the fugitive within a year, to purge his default and be restored to his goods, was permitted. 10(11)

The reason for the principle against condemning the absent appears from the following:

> ``*Absentem in criminibus damnari non debere divus Traianus Iulio Frontoni rescripsit, sed nec de suspicionibus debere aliquem damnari divus Traianus Adsidio Severo rescripsit: satius enim esse inpunitum relinqui facinus nocentis quam innocentem damnari.*'' 11(12)

A fine juristic legacy.

In Holland, custom and expediency permitted a deviation from this rule which permitted the condemnation of the accused in his absence and not only the forfeiture of goods, subject to the same year of grace. According to Groenewegen:

> ``*Hodie rei per contumaciam absentes condemnatur ... sed et post annum ad se purgandos admittuntur impetrato adversus contumaciam restitutionis auxilio.* 12(13)

GILLESPIE J

Voet explains more fully that it is not only the absence of contumacy that may be proven, but also innocence. 13(14) In Friesland, the Imperial law applied and trial *in absentia* was not permitted. 14(15)

In colonial South Africa at the turn of the century, Nathan records the following:

> ``When the jury have arrived at a verdict, the foreman must inform the Judge in open court, and in the presence of all the jury and of the prisoner, what their verdict is ... '' 15(16)

This, however, is not so much the common law as then existing practice and statutory provision.

Copyright Juta & Co Ltd

The presence of the ``prisoner'' is presumed. Certainly, no consideration is given to the question whether the verdict could be handed down absent the accused. The procedure he explains does, of course, owe more to the English influence than the old Roman-Dutch.

That very English influence, however, came from a system that permitted, in exceptional circumstances, the continuation of a trial in the absence of the accused. In particular, where an accused should default during the course of a trial, the judge would have a discretion to discharge the jury or to continue with the trial in the absence of the accused. 16(17) This discretion was available only in the case of misdemeanours - where the right to be present could be waived - -- and not where a felony was charged - where the accused could not waive his rights. But after the abolition of the distinction, then the rule in respect of misdemeanours applied to all charges. This was based upon the supposed consent of the accused who absents himself and leaves counsel to represent him. There is, too, some indication of the acceptability of giving judgment in the absence of the accused who is taken to have waived his rights to be present. In a case frequently cited in support of the principle that the right to be present could not be waived in the case of a felony, 17(18) the judge, despite the consent of counsel, refused to permit a trial on a charge of assault with intent to commit rape to proceed in the absence of the accused who fainted during the course of the complainant's evidence. For the reason, as he observed:

> ``this not being like the case of a defendant who is absent when the judgment is given on him in the court of the King's Bench, as that is done with his own consent, and generally on his own application.'' 18(19)

It seems to me that just as the English criminal procedure was grafted into

the legal system in South Africa, had the present problem arisen the approach exemplified in this paragraph, to the extent it was not repugnant to local legislation and common law, would have been regarded as the law in 1891. The law to be administered in Zimbabwe is:

> ``Subject to the provisions of any law for the time being in force relating to the application of African customary law ... the law in force in the Colony of the Cape of Good Hope on 10 June 1891 as modified by any subsequent legislation having the force of law in Zimbabwe.'' 19(20)

I am thus able to discover within our law a rule permitting judgment to be handed down in the absence of the accused. I must now examine whether any other principle renders that rule repugnant.

In summary, what I have set out above shows a very firm principle in our law, dating back to the Roman law, against holding a trial in the absence of the accused. This is based upon principles of natural justice which require that he be given an opportunity to defend himself. Dutch custom permitted a trial in the absence of the accused in certain circumstances and acknowledged a competing principle that required the law to take its course and not to be impeded by the contumacious default of the accused. Legislation and the reception of English law did away with any custom of trial *in absentia* but acknowledged a principle permitting certain proceedings in the accused's absence on the basis of his assumed consent. To the extent our law did not categorise offences as felonies or misdemeanours it would have been unaffected by the general

Copyright Juta & Co Ltd

discretion to proceed in the accused's absence on a charge of a misdemeanour. The overriding principle of hearing the accused's defence would undoubtedly have taken precedence. Nothing in all of this, however, suggests to me that the indication in *Streek*'s case, that a verdict could be delivered in the accused's absence, where that absence could be taken as assent to the pronunciation of verdict, would have been at all repugnant.

In particular, I do not consider the present law in Zimbabwe, and especially the Constitution, to prohibit such a result. The protection secured by the Constitution is designed to ensure that an accused be given a fair hearing before being condemned. That is the age-old rationale against permitting a trial *in absentia*. As regards the giving of judgment, this is a procedure, even if it be strictly termed part of the trial, which involves no participation by the accused at all. It occurs only after the accused has already participated to the full. By definition, it can only take place after a complete hearing has been given. As Mr *Tokwe* for the State has observed, the accused has absolutely nothing further that he can do or say before judgment is given. To the extent

that a trial is postponed to a specific date expressly for the handing down of judgment and the accused voluntarily absents himself, it seems to me to be right to hold that he must be taken as consenting to the delivery of the judgment of the court in his absence. Miss *Ruzvidzo* for the first accused has conceded that this is the correct interpretation of the first accused's conduct. He ought not to expect the unilateral power by his wrongful absence to frustrate the giving of judgment. I consider that no fundamental right of the accused would be affected were judgment to be handed down and a verdict pronounced in his absence. Undoubtedly, sentence should that be necessary, cannot be passed until an accused is brought before the court. One must be heard before one can be punished. Judgment, however, may be given.

I hold, therefore, that this court has a discretion to pronounce judgment in the absence of the accused. It seems to me that I ought to exercise that discretion in favour of giving judgment. There are two other accused affected by delay. They have a legitimate and most pressing concern in hearing their fate. Whilst it is true that I could separate the trials and give judgment against only the two present, I see no reason so to act. It is preferable to give judgment and discharge the learned assessors from further involvement and, if necessary, sentence the accused separately, if that be the result of the decision of the court. The State, too, has an interest in hearing the result. A trial is a quest for truth. A criminal trial attempts to disclose to the people the truth concerning harmful conduct. There is a greater interest in publishing that truth despite the accused's absence than otherwise. The court's judgment, moreover, is such that findings against or in favour of each accused are inextricably intertwined. It would be impracticable to attempt to excise findings in respect of the one who is absent from those concerning the two who submit themselves to judgment. It would be artificial to deliver a judgment concerning all three but to withhold the verdict on one when the judgment must make clear what that verdict will be.

Finally, I have asked myself what would be the result if I were wrong in handing down the verdict. What remedy would the absent accused have? There would, if I were in error, be an irregularity. That irregularity, however, will not have affected the trial at all. It would not have

Copyright Juta & Co Ltd

brought about a miscarriage of justice. It could not possibly vitiate the proceedings. The most the accused could hope to achieve is the delivery of verdict once again, in his presence. In my estimation, even that he could not insist upon, having knowingly absented himself when he knew that the giving of judgment was scheduled.

There is some comfort to be found in certain provisions which make this approach perfectly workable in practice. Thus:

> ``Any judge or magistrate presiding over a court before which any person is tried for an

> offence may reserve the giving of his final decision on questions raised at the trial, and his decision when given shall be considered as given at the time of trial." 20(21)

and

> ``If sentence is not passed forthwith, any judge may pass sentence on the convicted person." 21(22)

So in giving the verdict, after having reserved judgment, the decision is considered to have been given at the time of trial. The assessors may be discharged and the first accused, when apprehended, may be brought before me, or indeed any judge were fate to keep me from such a meeting, for sentence - if that be the result of the verdict.

I rule, therefore, that judgment will now be handed down despite the first accused's failure to present himself.

S *v* HURLE & ORS (2) 1998 (2) ZLR 42 (HC)

Court **High Court, Harare**

Gillespie J and assessors

Criminal trial

26, 27 & 29 May, 1-3 & 26 June;

3 July 1998 Judgment No. HH-105-98

Flynote

Criminal law - defences - voluntary intoxication - extent to which it may be a defence to charge of murder - crimes requiring ``special intent'' - inconsistency of approach in previous judicial decisions - why policy considerations demand that voluntary intoxication should never be a complete defence to a charge of murder, in spite of apparent illogicality of such a conclusion

Criminal law - general principles - intention -- - "special intent" doctrine - whether has any place in our law

Evidence - affidavit - medical report - proper procedure for recording - impropriety of commissioner of oaths signing in absence of deponent

Copyright Juta & Co Ltd

Headnote

The three accused were charged with murder. In respect of the second and third accused, the majority of the court found that they had a constructive intent to kill the deceased. In respect of the first accused, the evidence was that he had consumed extravagant quantities of alcohol, the toxic effect of which was exacerbated by his smoking a dangerous drug. The fatal assault was motiveless and senseless and shocking in its brutality. The court found that at the time he committed the acts in question, the first accused was rendered temporarily incapable by reason of intoxication of appreciating the consequences of his actions; or even if capable of appreciating the consequences, he was incapable of directing and restraining his conduct in accordance with his appreciation. The question arose for decision as to the appropriate verdict in law.

During the trial, a post mortem report was produced, in the form of an affidavit. The pathologist who produced the report admitted that the affidavit was typed by another person from his notes, placed on his desk for his signature, then taken to a policeman who was a commissioner of oaths. The policeman signed the document in the absence of the pathologist.

Held, that this was a most serious dereliction on the part of the commissioner of oaths. The deponent should have appeared before him and been duly sworn. The deponent should have signed in the commissioner's presence. The commissioner's signature is an assurance that all these procedures have been complied with. The gross dereliction of duty revealed

here called into question the applicability to such documents of the maxim *omnia praesumuntur rite esse acta*.

Held, further, that under Roman and Roman-Dutch law, intoxication was not an excuse for criminal liability, though it might be mitigating. However, the development of the principle *actus not facit reum nisi mens sit rea* brought this ancient principle into conflict with the law's desire to punish only those who form criminal intent. This led to the introduction into our law of the English doctrine of ``special intent'', though in later judgments the courts of South Africa began to doubt whether the doctrine had any place. An important result of the relevant judgments has been to show that, although initially grounded in the doctrine of ``special intent'', the rationale for allowing any scope to voluntary intoxication as a defence was swiftly placed on a policy ground. Nonetheless, the courts of South Africa repeatedly departed from the Roman-Dutch law, by holding that where the accused is charged with a crime requiring ``special intent'' (eg murder, rape, assault with intent to do grievous bodily harm), voluntary intoxication of a degree sufficient to negative that special intent is a defence and the accused will be found guilty of a less serious crime for which such a verdict is competent.

Held, further, that once the principle is acknowledged that the perpetrator of a crime must be *doli capax* and must have acted with *mens rea*, the fundamental inconsistency in principle between this and the law that voluntary intoxication is no defence becomes starkly apparent. But for several years the courts in South Africa accepted that a departure from logic was justified on policy grounds, it being unacceptable that drunkenness should be allowed to be pleaded as a defence. However, in *S* v *Chretien* the Appellate Division held that where the

Copyright Juta & Co Ltd

degree of intoxication does leave reasonable doubt as to the existence of criminal capacity, then an acquittal must follow. The decision in *Chretien* has been much criticised by academic writers, on the grounds that pure logic can go too far. Justice, the maintenance of a true balance of interests between the accused and society, convenience and common sense also have their place, and the court should have in the forefront of its mind the desire to do justice in such a way as satisfies the expectations of the general populace and the hopes and circumstances of the accused.

Held, further, that the doctrine of special intent has no place in our law and has never been accorded any place of substance. It has at most been a convenient rationalisation for the long-standing practice of allowing voluntary intoxication to justify, on a charge of murder, a lesser verdict of culpable homicide.

Held, further, that the conclusion in *Chretien* is correct if the court were to disregard policy considerations, but the court could not properly disregard the policy of generations not to extend a complete defence to a charge of murder on the grounds of voluntary intoxication. Recognising the need to pass a verdict that will satisfy ordinary members of the public that justice is done and that the law protects the public from death at the hands of violent drunken louts, and acknowledging the real undesirability of convicting of an offence a person who lacks the necessary elements of volition, capacity and intent, the conviction should be for an appropriate verdict, rather than murder. There is a perfectly good common law offence which has been resorted to for generations, that of culpable homicide. To the objection that a person should not be convicted even of culpable homicide if he lacks the necessary mental elements of criminality, the answer is that here theory must yield to policy. The policy is clear and persuasive and more conducive to justice, and must prevail.

Cases cited:

R v *Bourke* 1916 TPD 303

S v *Chamunorwa & Ors* S-137-86

GILLESPIE J

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

S v *Dube* 1997 (1) ZLR 229 (H)

R v *Fowlie* 1906 TS 505

R v *Innes Grant* 1949 (1) SA 753 (A)

S v *Johnson* 1969 (1) SA 201 (A)

R v *Leary* (1977) 74 DLR 3d 103

S v *Mayo* HH-468-86

Copyright Juta & Co Ltd

S v *Ndiwene* 1971 (2) RLR 23 (G)

R v *Ngobese* 1936 AD 296

Case Information

R K Tokwe, for the State

Miss *D Ruzvidzo*, for the first accused

I A Ahmed, for the second accused

Miss *C A F Finlayson*, for the third accused

Judgment

GILLESPIE J: In the City of Harare, between the suburbs of Braeside and Arcadia, lies the Arcadia Sports Club. This is more than a sporting facility. Its structures provide shelter for many who have nowhere else to lay their heads. Either because they have no homes of their own or because they realise that in a state of intoxication they will not be welcome in the bosom of their families. The women folk of Arcadia do not consign motherless husbands and sons to the couch or the spare room, but rather to a pavilion in the sports ground to join the homeless.

The deceased, Tony Martens, who was known as Jumbo to his cronies, was one of a number of destitute men who found a place for the night at the sporting centre. In the words of Grant Wakfer, whom we shall encounter shortly, he was:

> ``Just a good guy. A very good guy.''

It shall be his epitaph. During the night of 3 February 1997, he laid himself down to sleep on the verandah of a gated swimming pool complex, outside the locked gate. He was briefly awoken from his rest by a violent assault involving the three accused, the effect of which was to consign him to his eternal rest.

Much of the evidence surrounding the events of that afternoon and night is undisputed. The court knows from the uncontested facts that the three accused had spent many hours in each other's company. The first accused, Michael Hurle, was just over 18 years at the time. He had been expelled from senior school during his second year for truancy and substance abuse. He has been in the habit of smoking Indian hemp - dagga - ever since. The second accused, Jason Jackson, had been at school as a contemporary of Hurle. He completed his schooling and does not smoke dangerous drugs. The third accused, Harry Potgieter, is of the same age as the other two. Like Hurle, he was expelled from school (though in his third year and from a different

school) and has had a history of substance abuse ever since. 1(23) He had known the other two for approximately two years preceding the offence and lodged in the same premises as Jackson.

Copyright Juta & Co Ltd

The three came into one another's company on the afternoon in question when each of them went to a public drinking place at Braeside shopping centre. Having each arrived separately they fell into a crowd of other drinkers and eventually found themselves together. They drank opaque beer in considerable quantities. The beverage is sold in 2 litre containers known as ``scuds''. Perhaps it has an effect similar to the missile for which it is named. Between them they acknowledge drinking up to 6 scuds. Mention is also made of the consumption of quantities of ``Don Juan'', a cheap sherry, and brandy - ``Old Chateau''. Hurle and Potgieter were also smoking dagga. None of them had anything to eat all afternoon and night.

In the early evening, perhaps at 5 pm, although recollection of times seems quite unreliable, they left Braeside and went to Arcadia. Hurle had a girlfriend in Arcadia. They walked. The two who took the drug smoked dagga on the way. They were seen drinking at Arcadia by Colin Wolfenden, who features later in the tale. Eventually, they found themselves at the home of Nasim Ramjee, Hurle's girlfriend at the time.

She was roused from a peaceful evening by their banging on her door. She admitted them as they demanded. They were, in her words ``very loud''. One went to the kitchen and found a 750 ml bottle of vodka. It was full. They drank it. She became very upset with their behaviour. They were ``misbehaving''.

> ``One was fighting with my dog. One was whistling in my house. One broke my cake.''

is how she recalls various examples of their behaviour that she described as ``abnormal''. She does not drink and had never seen any of them drinking before but was persuaded that they were all drunk. By the time they had finished the vodka, she was upset and burst into tears. She insisted that they all leave. Jackson's behaviour was markedly more moderate than that of the other two. He apologised on behalf of the others and persuaded them to leave. Hurle was holding a glass of vodka at the time - about two or three fingers of liquor in it. He hurled the contents in Jackson's face. They all left.

They had formed the plan during the afternoon to go to a night club named ``Turtles''. Their extended carousing, however, had left them without the wherewithal for further jollification. Resigned to an end to a night of overindulgence, they headed back towards Braeside, taking a short cut through the Arcadia sports club. Here, on the verandah steps to the swimming pool complex, fate brought them together with Jumbo Martens.

1998 (2) ZLR p46

GILLESPIE J

The motive, if any for the assault on this unfortunate and unsuspecting man is in dispute, as are the precise details of the participation of each of them. The incident was witnessed by Ronald Jacobs, who habitually slept within the precincts of the swimming pool, and by Sylvester Chitiyo, the brother of the swimming pool attendant. It is enough to say for now that after an initial assault, during which participants were shouting:

> ``Ginger! Where's Ginger?''

Jackson and Potgieter both determined to take no, or no further, part in the violence. They

---

Copyright Juta & Co Ltd

desisted and sought to dissuade Hurle from persistence in the assault. All three of them left the scene.

Their further wanderings took them past the basketball shelter. Within were Colin Wolfenden, Grant Wakfer, and some others. Wolfenden was sleeping there since discretion and experience warned him not to venture home in a drunken state. Wakfer had nowhere else to sleep. They were aroused from sleep by the precipitate advent of the three accused, shouting for Ginger. Hurle went straight up to Wakfer and kicked him in the torso. He did not wish to desist even when Wakfer threatened to defend himself with a knife. He called out to his companions to attack Wakfer. They did not, having become embroiled in some other distraction described below. Hurle then seized a piece of cloth fortuitously to hand and wound it around the neck of Edward Max, who up until that moment had also been asleep in the shelter.

Wolfenden, in his wakefulness, demanded to know the meaning of these alarums and his voice was recognised by Potgieter. Jackson and Potgieter both know Wolfenden as ``Uncle Wolfie''. He is an old friend of the latter's uncle George, and is the father of two of the former's cousins. Potgieter said:

> ``Hey, it's uncle Wolfie, if he gets up he'll smack us. Let's go.''

Jackson was engaged in dancing on a table top and was not hearkening to Potgieter's admonition. Potgieter hit Jackson on the face, telling him to apologise and to leave with him, Jackson remonstrated and the two fell into some mild dispute and eventually left the shelter.

Hurle had in the meantime disappeared. He rejoined the others at or near the shelter and remarked to them that he had ``finished off'' someone who would be ``lucky if he survived''. There is dispute as to whether this was said in Wolfenden's hearing and whether anything further was said. The three wandered off to their places for the night. Jackson was left at his home in Braeside. Hurle and Potgieter went together to Hurle's home in nearby Hillside.

Police were called to the swimming pool at around midnight or shortly thereafter. They discovered Marten's dead body. On the indications of Wolfenden they arrested Jackson at his home in Braeside. On Jackson's

indications they arrested Hurle and Potgieter at Hurle's home in Hillside. All three were taken to the police station at Braeside. All showed the effects of intoxication to some degree. Jackson and Potgieter gave an account of themselves. In the jargon of the police, they were co-operative. Hurle did not talk. The reason for his failure to do so is in dispute.

Medical evidence establishes that the deceased died of contributory causes. These have been summarised as follows:

> ``Fractured skull and multiple rib fractures. Brain damage.
>
> Other significant conditions: haemorrhagic shock

Copyright Juta & Co Ltd

Comment: Blunt force causation

Multiple scalp bruisive (*sic*) and lacerations with adjacent comminution of temporal valves causive (*sic*) *(24) haemorrhage and brain laceration

Rib fracture and bilateral haemothorax.''

The haemorrhage was caused by the two sets of traumatic injuries. Each of the other two by itself could have caused death. The injury to the torso was, in the words of the pathologist, ``inconsistent with survival'' even without the other trauma being inflicted. Acknowledging a theoretical possibility of recovery, he would not normally expect a person suffering such injuries to the thorax and lungs to survive.

Hurle's defence is one of intoxication. He claims to remember nothing from the time he was expelled from Nasim Ramjee's house until he was awoken by police. He claims to know no Ginger. Jackson and Potgieter deny any personal participation in the assault on Martens, save that Jackson admits striking Martens one blow with a fist. He claims the blow was delivered thoughtlessly in the excitement and intoxication of the moment. Each claim to have exercised a restraining influence on Hurle and to have left the scene of the assault with Hurle whilst the deceased was relatively uninjured.

The controversial evidence as to an initial motive is entirely within the defence case. Jackson and Potgeiter both say that as they were nearing the swimming pool, in their impecunious state, Hurle exclaimed that Ginger owed him money and ran up to the pool where somebody was sleeping. Hurle denies knowing any person named Ginger.

The disputed evidence of Jacobs and Chitiyo is thus. Jacobs was awakened from sleep by a loud disturbance. Peering through the gate to the swimming pool, onto the verandah outside, he could see three men shouting ``Ginger! Ginger!'' and assaulting the deceased. Each of them was running up to the deceased and kicking him in the body or stamping on his chest as he lay on the ground. The kicks were so hard that he would expect ribs to be broken. He watched for some minutes and then went to call the caretaker's brother.

GILLESPIE J

He returned with Chitiyo and both watched further assaults lasting some minutes. The deceased was dragged off the verandah onto the ground. The deceased was still conscious. They were all jumping on him. Chitiyo then went to ask his brother to telephone the police. He went to bed. In the meantime, Jacobs saw Jackson and Potgieter pulling one another away from the deceased. Had Martens been left alone at that stage he would have survived. He was still alive. Hurle, however, took a stone and, sitting on Marten's chest, crashed the stone repeatedly against his skull. He discarded the stone for a bigger one. He repeated the violence. He looked up and seeing someone behind the gate uttered a warning to that person not to say anything. He rejoined his friends and told them that he had finished the job and that the deceased was dead. They all left. Neither Jacobs nor Chitiyo intervened because they were scared and in any event were behind the locked gate.

The response of the second and third accused to the foregoing is this. Hurle, having recalled

Copyright Juta & Co Ltd

the money owing to him, ran up to Martens calling for Ginger. He dragged Martens bodily from sleep, attempting to raise him to his feet by grasping his collar and shirtfront, and started assaulting him. Every time he loosed his grip to strike, Martens would fall back down again. Jackson ran up. He struck the deceased once on the face. Potgieter ran up but perpetrated no violence. Under Hurle's blows, Martens was screaming:

``I'm not Ginger! I'm Jumbo!''

Jackson and Potgieter, realising the wrongdoing, and that Martens had had enough, pulled each other, and Hurle, away from Martens. They went off towards the basketball shelter, leaving Martens in a condition they expected to be bruised but uninjured.

The evidence of events near the basketball shelter, which is not agreed to, relates to the circumstances of Hurle rejoining them after his unexpected disappearance. Wolfenden claims that he witnessed the rejoining and heard Hurle's remark about ``finishing off'' somebody. He claims also that Hurle said he had blood on his hands, to which Potgieter responded that he could wash at home. Jackson and Potgieter deny the possibility, saying that Hurle only rejoined them well after they had left, and out of earshot of, the shelter. They also deny the remark about washing blood. Each claims that they thought nothing significant of Hurle's remark - putting it down to braggadocio.

On this evidence, it is beyond dispute that after an initial assault on Martens all three left the scene. Martens was then probably alive but to a greater or lesser degree injured. Hurle later returned alone whilst his companions were at the basketball shelter and administered the final, fatal strokes of disgrace on Marten's helpless form. He rejoined the others. Issues arise, however, concerning the degrees of participation in the assault of the other two; their

contribution if any to the deceased's death; the effect of intoxication upon the conduct of the accused and the question of *mens rea*.

I have defined these issues, for the direction of the learned assessors, substantially in the form of the following questions:

1. Do you find that the first accused assaulted the deceased in the manner described by State witnesses?

2. Do you find that the second and third accused participated in the assault on the deceased as described by State witnesses or do you consider that reasonable doubt exists that:

   (a) the second accused did no more than punch the deceased once and then attempt to prevent any further assault; and

   (b) the third accused did no more than attempt to prevent any assault?

3. If you accept that the second and third accused participated in the manner described

Copyright Juta & Co Ltd

by the state witnesses, then:

(a) what injuries caused the death of the deceased; and

(b) what injuries had been inflicted upon the deceased before the second and third accused desisted from further assault; and

(c) does reasonable doubt exist as to whether fatal injuries were inflicted prior thereto?

4. Has the State excluded all reasonable doubt to the effect that each accused did whatever actions you find proven:

(a) automatically, without rational control of their minds; and

(b) in circumstances where each of them was both:

(i) capable of appreciating the consequences of their actions; and

(ii) capable of controlling their own conduct in accordance with that appreciation; and

(c) intending to kill or foreseeing the consequential death of the deceased as a substantial possibility but nonetheless persisting in such conduct?

The findings of the court on each issue of fact I now turn to enunciate.

[*His Lordship proceeded to consider the various issues and continued:*]

The third issue again finds the court divided. The majority hold beyond reasonable doubt that fatal injuries were inflicted upon the deceased prior to the dissociation of the second and third accused. This view is based upon an acceptance of the pathologist's evidence. This evidence, describing as it does two discrete sets of trauma to the torso and to the head, is strongly suggestive of two phases of an assault. The majority, although acknowledging the decision as very difficult, draw an inference from the description of the assault by Jacobs, with *Chitiyo*'s support. They attribute the injuries to the body to a preliminary assault, perpetrated by all three, and the injury to the

head to the ultimate dispatch of the deceased by Hurle with his rocks. They accept without reservation the pathologist's opinion that the rib fractures and lung injuries were themselves inevitably fatal. They exclude from doubt any possibility that the fractured ribs and haemothorax were caused likewise with the head injuries by Hurle bringing the rocks down heavily generally on the upper part of the deceased's body. They discount Jacobs' statement that if Martens had been left alone after the initial assault, he would have survived.

My minority view is prepared to entertain reasonable doubt on the point. The doubt is considered to arise primarily from the absence of certain and reliable evidence as to the time of

Copyright Juta & Co Ltd

infliction of the injuries to the torso, even if it be accepted that these alone would have killed Martens. Jacobs' acknowledgement in favour of the defence, although by no stretch of the imagination a probative opinion, at least suggests the possibility of survival after the dissociation of the two. Hurle's subsequent and furious assault could as easily have rained blows on the entire upper body rather than just the head. The evidence does not exclude this possibility.

A degree of uncertainty might be thought to arise in addition from the medical evidence itself. I cannot forbear to comment on certain most unsatisfactory features. The post mortem report, compiled and produced in the form of an affidavit, was patently not an affidavit. The pathologist admitted that, as a matter of general system, this affidavit was typed, not by himself, from detailed notes prepared by him at the autopsy; placed on his desk for signature; signed by him in the absence of a commissioner of oaths; placed in a basket for later delivery to a policemen stationed on duty at the hospital police post; and subsequently signed by a policeman at that post in a false attestation.

This was a most serious dereliction on the part of the supposed commissioner of oaths. A justice of the peace, or a commissioner of oaths, called upon to attest a document, has a duty, exemplified by the solemnity of the oath he is permitted to administer. He is obliged, without fail, to have the deponent appear before him. He has no excuse for not administering the oath, for not calling upon the deponent to swear that the deposition is, to the best of his knowledge true in every respect. A deponent's signature has to be affixed in the presence of the commissioner. The commissioner's own signature is an assurance that all these procedures have been complied with. Based upon the trust the administration of justice reposes in a commissioner, it presumes that all these procedures have been regularly complied with. The gross dereliction of duty in this instance calls into question the entire applicability to such documents of the presumption, *omnia rite esse acta praesumuntur*. In future, the court may well have to look with some scepticism upon the apparent

validity of such documents. I trust that these remarks will be made known to the Attorney-General and the Commissioner of Police.

That the report was not in affidavit form is, however, by no means fatal. The pathologist did give evidence himself and did state his own findings. Nevertheless, this did not completely cure the deficiency. In giving evidence, the pathologist undoubtedly refreshed his memory from the supposed post mortem report and affidavit. It was not a document from which he was entitled to refresh his memory. It was not compiled by him or under his direction contemporaneously with the events. It ought not to have been used to refresh memory, and would not have been used as such but for the fact that it was initially accepted on its mere production as an affidavit.

Although an exception exists to the foregoing rule pertaining to refreshing the memory, an exception described as ``more apparent than real'', 2(25) in respect of expert's reports, this document cannot benefit. It was a bare summary of conclusions. Despite the fact that its form provides for a detailed note of all injuries, observations and tests on all parts of the body, internal and external, no such note is recorded. All spaces for such notes are scored through

Copyright Juta & Co Ltd

with the legend ``see summary''. That cursory summary I have already reproduced.

There have accordingly been irregularities in the adduction of the medical evidence. The pathologist's opinion relies upon a memory refreshed from an incomplete note that should not properly have been relied upon for that purpose. Although one's assessment of the pathologist may well have been that he was a competent and reliable person who generally appeared to have some recollection of the injuries he examined and of their severity, in the circumstances one might be forgiven for questioning the conclusion that the chest injuries were inevitably fatal. I do not need to decide this point, however, in view of my finding of facts on the question of the infliction of fatal blows.

The fourth issue sees a happy restoration of unanimity in the court. The questions according to which the issues have been formulated have been calculated to assist the court to arrive at a conclusion pertaining to the degree of intoxication of each accused: first, as regards whether they acted voluntarily or in a state of automatism; second, as regards whether they had criminal capacity; and third, as regards whether they formulated *mens rea*. The first part of the question addresses the issue of the mental element of *actus reus*: whether the act were a voluntary act or one undertaken unconsciously without any involvement of the conscious will. In respect of all accused, there is no doubt that their actions were voluntary rather than purely mechanical or spasmodic or otherwise reflecting automatism.

The second part of the enquiry touches upon the issue of criminal capacity. The distinction between an enquiry into criminal capacity, and one into *mens*

GILLESPIE J

rea, is seldom clearly drawn in practice. It is obviously a fundamental enquiry in cases involving youth or insanity as a defence. The awareness of the need to enquire into criminal capacity is, in addition, invariably present in practice in those cases coming before the court where a defence is raised which impinges upon the accused's ability to foresee the consequences of actions and to exercise control over himself: cases where defences of intoxication or provocation are advanced. Such awareness is generally exemplified by reference, for instance, to such questions as whether the accused was capable of appreciating the consequences of his conduct (which addresses his cognitive capacity); whether his inhibitions were substantially reduced or he lost control of himself (which addresses his conative capacity); and whether he had the ability to formulate an intention to kill (which addresses both the cognitive and conative function). 3(26) Although an enquiry into mental capacity is specifically provided in legislation in South Africa, 4(27) the relevance of an enquiry into criminal capacity (even in a case of intoxication) was already recognised in case law prior thereto. A clear statement to this effect appears in the decision of *S* v *Johnson* 5(28) in these words:

> ``Before anyone can be held responsible for any act or omission it must be clear that (1) the act or omission was a voluntary act (*commissio)* or omission (*omissio*); (2) the act or omission is punishable according to law; (3) the perpetrator was at the time of the act or omission *doli capax* and (4) that he acted or neglected to act with the required *mens rea*.'' 6(29)

Copyright Juta & Co Ltd

Johnson's case has been regarded for three decades now as stating our law.

In connection with the first accused, the following considerations have weighed heavily with the court in assessing criminal capacity. The detailed evidence relating to Hurle's conduct shows throughout conscious action and words and deeds that all appear to suggest a complete appreciation of and control of his conduct. That accumulation of objective evidence is such as *prima facie* justifies any court in concluding that the perpetrator acted with criminal capacity, and indeed with intent. The assertion of amnesia by Hurle is, in addition, one that has been most carefully scrutinised. It is one easy to make and most convenient for the opportunity it gives for avoiding difficult and embarrassing questions. It has therefore been viewed with no little scepticism. Before committing ourselves to a rejection of this defence, and a finding of criminal capacity, however, we have anxiously examined all possible areas of support for the claim.

GILLESPIE J

Hence, we note that Hurle undoubtedly consumed extravagant quantities of alcohol. The toxic effect of this drink certainly was exacerbated by smoking a dangerous drug. The harmful consequences had by no means been mitigated by the consumption of food. The drinking occurred over a substantial period leaving plenty of time for the absorption into the bloodstream of the noxious cocktail. The alleged period of amnesia runs from the period after the consumption of alcohol and marijuana was complete, and absorption was possibly approaching its peak, until a time when Hurle was awakened by police from sleep. A sleep that must have been in some degree restorative. When he was questioned by police he said nothing. Silence borne of amnesia could conceivably be regarded by a policeman as lack of co-operation. It is unlikely Hurle was awaiting his lawyer (as one policeman remarked) for he did not have, and never called for, any legal representative until a lawyer was appointed *pro Deo*.

Hurle was throughout substantially affected by the drink and drugs. He behaved abnormally. He was loud. He was aggressive. He was unrestrained in all that he did. He exercised no control over himself. His own inhibitions were utterly lacking. His companions had to limit his excesses. He did not even buckle to their restraining influence in favour of Martens. The fatal assault was motiveless and senseless and shocking in its brutality. Hurle's attitude to his behaviour, whilst still drunk, was callously dispassionate and self-satisfied. There is a possibility that Jackson, and indeed Potgieter, experienced an inability to recall every detail. Hurle was a young man, only just 18 at the time. One already given to an abuse of intoxicating substances. All these points we have considered.

We have borne in mind that the onus is on the State to prove criminal capacity beyond reasonable doubt. We unanimously find, as a matter of reasonable doubt, that at the time he committed the acts laid to his charge he was rendered temporarily incapable by voluntary intoxication of appreciating the consequences of his actions. Or even if capable of appreciating the consequences, he was incapable of directing and restraining his conduct in accordance with his appreciation. We therefore accept the existence of reasonable doubt that he lacked criminal capacity.

The position of Jackson and Potgieter has been subjected to similar scrutiny. For their part,

Copyright Juta & Co Ltd

however, we hold unanimously that the very evidence that shows their attempts to restrain and control themselves and to inhibit Hurle from his outrageous behaviour, establishes their own criminal capacity at the time.

The question of *mens rea* of Hurle is rendered effete by the finding of a lack of criminal capacity. In respect of Jackson and Potgieter, the finding of the court has to be based upon the majority finding of their *actus reus*. On those

GILLESPIE J

facts, as held by the majority, the court holds unanimously that subjective intent to kill must be found. The participation by all three persons in a violent assault - involving heavy kicks to the body and stamping and jumping upon the body; causing extensive injury including multiple rib fracture and puncture of the lungs on both sides with broken bones - must have been done, provided criminal capacity were present, in circumstances of foresight of the substantial possibility of the occurrence of death and acceptance of that possibility. The very words of Jackson that Martens had ``had enough'' and his and Potgieter's dissociation reinforces the finding of foresight, whereas the dissociation itself cannot affect the finding of acceptance of the possibility, if the damage had been done before the dissociation.

We are all satisfied that an actual intent to kill is excluded. On the basis of the factual decision of the majority, however, the proper finding of *mens rea* is that Jackson and Potgieter both had constructive intent to kill.

It now becomes necessary to consider the appropriate verdict in law given these factual findings. The supposed defence of intoxication is one that has undergone much academic scrutiny and judicial development in the Roman-Dutch jurisdictions of Southern Africa. The Roman and Roman-Dutch law as received into South Africa did not regard voluntary intoxication as an excuse for criminal liability, but the influence of liquor might, according to the circumstances, afford ground for mitigation. Even then, mitigation would be available more readily in the case of the *ebrius*,

> ``who becomes drunk on an isolated occasion, led on by others, or by excessive indulgence at a feast or by ignorance of the strength of the liquor he has been drinking,'' 7(30)

than for the benefit of the *ebriosus* who deliberately becomes drunk or is an habitual drunkard. 8(31)

The continued development of a fundamental principle of criminality, *actus non facit reum nisi mens sit rea*, brought this ancient principle, of relative intolerance of criminal behaviour committed whilst intoxicated, into conflict with the law's desire only to punish those who form criminal intent. Hence in an early case dealing with the offence of malicious injury to property, 9(32) where the defence was unconsciousness and inability to form the intent to damage, through intoxication, a principle of English law, prior thereto not forming part of our law, came to have an influence upon our law. It was the doctrine of special intent. It was first introduced in these words:

Copyright Juta & Co Ltd

``drunkenness cannot as a rule be set up as an excuse for a crime, but it may sometimes

GILLESPIE J

absolve a person from a particular crime which requires in addition to ordinary *mens rea* some special intent. Thus if a person kills another without lawful cause he is certainly guilty of homicide. If, however, he was actuated by murderous malice he is not only guilty of homicide, but of murder as well.

A person who kills another under the influence of drink cannot plead intoxication as an excuse for the crime of killing his fellow-man; he will be as guilty of the crime of homicide as if he had the ordinary *mens rea* of a sober man, but he can plead his intoxication to show that he had no malicious intent to murder ...

This, I take it, is a fair statement of our general law on the subject." 10(33)

The passage was not necessary for the verdict, which was guilty, the requisite degree of intoxication not having been shown. The same court, indeed the same judge, who enuciated this *obiter dictum* considered it again a few years later. In a case of rape, where the defence was one of intoxication. 11(34) Dealing with the special intent doctrine, the learned judge said:

``This last principle as found in *R* v *Fowlie* ... is probably due to the influence of English law. Though it has been enunciated in our courts as a principle, I am inclined to agree with the *Attorney-General* that it would have been wiser if we had left that principle alone and adopted the principle of our own jurists, who would not in such a case have dealt with the intention of the criminal but would have said that it reduced the more serious crime to a less serious one, and as a consequence of this the punishment is less serious than it otherwise would be. I think this last proposition is only another way of stating the principle approved of by our authorities, that drunkenness serves to mitigate the punishment by reducing the seriousness of the crime." 12(35)

This was perhaps as graceful a retraction as that learned judge 13(36) could essay. Another judge, 14(37) who had concurred in the decision in the previous case, remarked that there was no need to depart from the Roman-Dutch law. He observed, however, that as a matter of practice, in charges of murder, verdicts of culpable homicide were brought in purely to avoid the death sentence. Otherwise, said he:

``we should follow the principle of the Roman Dutch law and look upon voluntary drunkenness, not as a defence, but as a circumstance which the judge can take into consideration in awarding punishment."

The third judge in this case pronounced that the special intent rule should be preserved in the case of murder - reducing the verdict to culpable homicide - and in the case of assault with intent - reducing the crime to common assault. In other respects, he preferred the retention of the Roman-Dutch rule, saying:

``The practice of our courts shows that it has not been regarded as the law that drunkenness

GILLESPIE J

is an excuse. I should certainly think in this country, especially in Johannesburg, where there is a great deal of crime committed under the influence of drink, the point would have been raised before if it were regarded that drunkenness was an excuse. It would be a dangerous doctrine to propound that a man could put forward drunkenness as a ground of immunity from punishment. Many people, quite mild when sober, become violent, quarrelsome and dangerous when they take drink, and these people know it and ought to be on their guard and

Copyright Juta & Co Ltd

> avoid the incitement which leads to crime. I think, when a man commits a crime under the influence of liquor, he has to take the consequences, even if there were every reason to think that if he were sober he would have restrained himself." 15(38)

The effect was to give only very limited, and grudging, scope to voluntary intoxication as a defence. A more important result of these *dicta*, in my view, is to show that although initially grounded in the doctrine of special intent, the rationale for allowing any scope to voluntary intoxication as a defence was swiftly placed upon a policy ground. All the judges cited preferred to follow the Roman-Dutch law, subject only to a relaxation, in the case of murder, based upon a long-standing practice brought about by a desire to avoid the imposition of the death sentence (with a possible further relaxation in the case of assault with intent).

In a later case, 16(39) a judge involved in both these two cases commented once again on the question of voluntary intoxication. He said:

> ``Personally, I think that our law does not take a sufficiently human view of the effect of liquor on the mind of a person where it is laid down that when one in a stateof drunkenness kills another, the offence will not be reduced from murder to culpable homicide unless the drunkenness was of such a nature as to deprive him of the power of appreciating what he was doing and of realising the probable consequences of his act, so that he could not have the intention to kill." 17(40)

Nevertheless, the learned JUDGE OF APPEAL acknowledged that ``under Roman-Dutch law drunkenness is no excuse for crime but only mitigates the punishment", 18(41) while at the same time noting, where intoxication is found as having negated ``express malice to make homicide murder", the existence of a

> ``practice ... not to regard the crime as murder but as culpable homicide where the accused was not in a state to realise the consequences of his act or to have the intention to kill." 19(42)

Although these decisions are all far from importing a doctrine of special intent holus bolus, that is nevertheless how they came to be understood.

Thus, in a subsequent case, the law relating to voluntary intoxication was stated as follows:

GILLESPIE J

> ``What the authorities describe as voluntary drunkenness may be relied upon by an accused to show that in committing the act charged against him he did not have the specific intent, which is a necessary element in the crime alleged to have been committed by him." 20(43)

Although this was an *obiter dictum*, and perhaps grants too much recognition to a doctrine of special intent, it fell from a most respected judge. In consequence, courts have -

> ``repeatedly departed from the Roman Dutch law ... by holding that where the accused is charged with a crime involving specific intent (eg murder, rape, assault with intent to do grievous bodily harm), voluntary drunkenness of a degree sufficient to negative the relevant specific intent is a good defence and the accused will be found guilty of a less serious crime for which such verdict is competent (eg culpable homicide, indecent assault, common assault)." 21(44)

This principle was revisited in the famous case of *S* v *Johnson*. 22(45)

Copyright Juta & Co Ltd

In that decision, it was expressly recognised that it is fundamental to criminal liability that the act or omission laid to a person's charge must be a voluntary one; that the perpetrator must have been *doli capax* and that he must have acted with *mens rea*. 23(46) Once this is acknowledged, then the fundamental inconsistency in principle between this and the law that voluntary intoxication is no defence becomes starkly apparent. That inconsistency is nowhere more clearly exemplified than in the present case, where Hurle has been found temporarily lacking in criminal capacity but may yet, depending upon which approach to intoxication I adopt, be convicted of a crime. The court in *Johnson*'s case was by no means oblivious to this inconsistency. It noted:

> ``If the appellant's inability, in the present case, to commit a voluntary act was due to any cause other than excessive use of liquor or drugs there would have been no doubt about his innocence. When someone is not able to commit a voluntary act, either as a result of the fact that he is asleep or that he is the victim of an epileptic fit or as a result of voluntary excessive drinking, he simply cannot act. Now the question may be asked, why in his case, where his inability was caused by voluntary excessive drinking, he must be held criminally responsible for a misdeed committed in that condition as if he did act and was able to act and how it can be justified in view of accepted principles, especially if borne in mind that if his inability should have been caused by involuntary drinking, he would have been acquitted because he would not have had *mens rea*.'' 24(47)

This same inconsistency had been perfectly apparent in the earliest cases cited, wherein the following had been observed:

GILLESPIE J

> ``It is therefore not unreasonable to consider that the person who voluntarily becomes drunk is responsible for all such acts as flow from his having taken an excess of liquor. It may conflict with our doctrine that a man who does an act when unconscious does so without *mens rea*, but, according to our law, logic has here to give way to expediency, because in practice, to allow drunkenness to be pleaded as an excuse would lead to a state of affairs repulsive to the community. It would follow that the regular drunkard would be more immune from punishment than the sober man.'' 25(48)

As can be seen from the above *dictum*, the basis upon which intoxication is not regarded as a defence, despite the general principles of criminal liability, is one founded on policy. This is the law that has been applied in Zimbabwe. It may be exemplified by the decision in *S* v *Ndiwene*. 26(49) In that case, a young man smoked marijuana, to which he was not accustomed. He became intoxicated and committed many irrational acts before killing someone. The court held:

> ``We come to the conclusion that what he did was done as a result of a state of intoxication produced by the drug. We are unable to say what intention he had at the time, if any, and in these circumstances we find him guilty of culpable homicide.'' 27(50)

Johnson was subjected to much adverse comment. The suggested illogicality of the decision and the departure from principle have all been unfavourably remarked upon. The unconvincing nature of many of the rationalisations for the decision have been exposed. The decision has been attached as ``based on policy considerations''. Nevertheless, it was law for many years.

The point was finally reconsidered by the South African Appellate Division in *S* v *Chretien*. 28(51) In that case, the decision in *Johnson*'s case was described as juridically impure and based on policy considerations. The doctrine of special intent was held to be unacceptable in our law. The court acknowledged the truth that, between the two extremes of mild inebriation

---

Copyright Juta & Co Ltd

and intoxication so profound as to obliterate any purposive control of conduct, there exist varying degrees of intoxication which may have different effects upon an individual's criminal capacity. It was held that where the degree of intoxication does leave reasonable doubt as to the existence of criminal capacity, then an acquittal must follow.

The *Chretien* approach has caused much academic criticism. The trend of academic view has undoubtedly been in favour of the proposition that fundamental legal principal required the acquittal of the individual who commits an offence where he acts involuntarily or where he lacks criminal

GILLESPIE J

capacity or *mens rea*. If this leads to a conclusion unacceptable in policy then the legislature should be asked to intervene. 29(52)

The decision in *Chretien* has not been subjected to any real scrutiny in this jurisdiction. It has not been cited in any reported case save in the recent decision in *S* v *Dube*. 30(53) It has been referred to in two unreported cases. 31(54) In each of these, *Chretien*'s case was referred to with apparent approval and in obvious awareness of the effect it had on the issue whether an act which was quite involuntary, the actor not being conscious of his conduct because of his voluntary intoxication, could be regarded as criminally punishable. In neither case, however, was the reference necessary for the decision 32(55) and the questions of principle and policy arising from *Chretien*'s case were neither argued nor adjudicated. In *Dube*'s case, reference was made to the conflict of principle involved and to the uncertainty as to the present position in our law of intoxication as a complete defence. No decision was made on the point, however, since it was unnecessary for the purposes of the judgment. On the facts of this case, it is now my task to decide whether to adhere to the *Johnson* approach; to follow the *Chretien* lead; or to find some other path to justice.

In *Dube*'s case, BARTLETT J commented on the approach in *Chretien*'s case and the absence of debate in these courts on the issue. Accepting as he did the logic and legal purity of the decision in *Chretien,* and acknowledging that *Johnson* was based on policy considerations, the learned judge observed that:

> ``[I]n matters of this nature, policy considerations are also of considerable importance - and RUMPFF CJ may well have underestimated the cogency of those considerations.'' 33(56)

An acknowledgement that the *Chretien* decision may pay too little regard to policy is also to be found in academic writing:

> ``While *Chretien* cannot be faulted on grounds of logic or conformity with general

GILLESPIE J

> principles, the judgment might well have miscalculated the community's attitude to intoxication. Should a person who commits a prohibited act while extremely intoxicated escape *all* criminal liability?'' 34(57)

Copyright Juta & Co Ltd

One-sided application of the principles of criminality can lead to only one ``logical'' answer to this rhetorical question. The *Chretien* answer.

I suggest, however, that law seldom involves the application of one principle without at some stage having to accommodate a competing principle. The fact that the competing principle arises out of that which is dismissively referred to as ``policy'' cannot in itself justify its abandonment. The policy can only be disregarded if it is properly recognised as being unacceptable or insufficiently persuasive to justify a compromise on principle.

The quest for inexorable logic in application of juristic principle, to the exclusion of appropriate considerations of policy, has been described as:

> ``a concentrated effort to force the common law into a Procrustean bed of logic.'' 35(58)

A balanced acknowledgment of the place of policy in law, in this particular context, is made in these words:

> ``Support for the [*Chretien*] approach ought not, it is submitted, to be based on the `logical' nature of these decisions or merely on the fact that they are in conformity with the general principles of the common law. Logic or conformity with general principles is not a virtue in itself; there is nothing objectionable to a general principle subject to a well-defined and recognised exception. If the decision in *Chretien* ... is to be defended it must be on the basis that it is just.
>
> The supporters of the [*Johnson*] approach stress that these decisions are in conformity with the public policy of protecting society from harmful conduct, which is undoubtedly one of the prime purposes of the criminal law, but one must not forget that the pursuit of justice and fairness to the individual is also an essential purpose of the criminal law.'' 36(59)

More generally, the following has been said of the court's approach to deciding which of competing principles or considerations to espouse as the law.

> ``Logic, analogy and resort to general principle have their place, but there are warnings against too great reliance being placed upon them. Convenience and common sense have been mentioned more than once, as has the maintenance of a true balance of interests. Particularly worthy of note are the cases in which attention is paid to what is fair, to what is equitable, and to what is in accordance with natural law, which some authorities prefer to call moral law ... Most important of all are the references by the courts to the concept of justice, justice simply and without qualification, under which, as I see it, the other concepts mentioned may be subsumed.'' 37(60)

In deciding what course to take, I have placed in the forefront of my mind

GILLESPIE J

the desire to do justice in such a way as satisfies the expectations of the general populace and the hopes and circumstances of the accused.

I accept that the special intent doctrine has no place in our law. I would go further and suggest that it has never really been accorded any place of substance. It has at most been a convenient rationalisation for the long-standing practice in Southern Africa of allowing voluntary intoxication of the requisite degree to justify, on a charge of murder, a lesser verdict of culpable homicide. The extension of that rationalisation to other crimes has done no more than manifest understandable judicial reluctance to convict where capacity or criminal intent is in doubt, and in

Copyright Juta & Co Ltd

the absence of clear principle. 38(61)

In *Johnson*'s case, which is frequently cited as confirming the doctrine of special intent in our law, the doctrine was in fact effectively disapproved:

> ``The `specific intent' theory which was accepted by WESSELS J in *Fowlie*'s case under influence of the English law was thereafter rejected by him in *Bourke*'s case. In *Innes-Grant*'s case it was again mentioned, although only in an *obiter dictum*." 39(62)

The doctrine was disregarded as a justification for the decision. The true justification was sought in Roman-Dutch law.

The proper rationalisation for the past equivocal approach to voluntary intoxication as a defence cannot be better stated than it was in Burchell and Hunt: 40(63)

> ``The difficulty of defining `specific intent' demonstrates the arbitrary and artificial nature of the rule. If a distinction has to be made, it would seem preferable to discard the phrase `specific intent' altogether and to say that where, upon a charge of a crime requiring intention for *mens rea,* a verdict of guilty of a less serious crime is competent, and voluntary intoxication negatives the intention for the crime charged, the accused may be convicted of the lesser crime. If, however, a verdict of guilty of the less serious crime is not possible ... or the charge is a crime not requiring intention ... the rule could be that drunkenness will not excuse but may be taken into account as a mitigating factor."

Each crime has its own separate and discrete intention. Our law does not recognise a group of crimes requiring a specific intent as opposed to a general intent. Reference to or citation of a doctrine of crimes requiring a special intent has no place in our law.

I accept, too, the ineluctable correctness of the conclusion in *Chretien* should one disregard that which has been dismissed as policy considerations. Depending upon the depth of intoxication to which one may have descended, one may well be entitled to a finding that one was acting involuntarily,

without criminal capacity or without guilty intent, as the case may be. I cannot accept, however, that one can properly disregard completely the policy of generations not to extend a complete defence to a charge of murder on the grounds of voluntary intoxication.

The fallacy in the *Chretien* approach, if I may respectfully refer to such a failing, is exemplified in the need, recognised by all the academic writers even prior to the decision, to fill the gap that would be left were intoxication a complete defence. The perceived gap was the requirement, clearly felt by all, that the law would be lacking if the man, who, whilst in his cups, wrought harm upon society and his fellow man, could escape accountability for his harmful conduct precisely because of his own prior conduct, regarded as reprehensible in itself, of so disarming his inhibitions by drunkenness. In order to fill the gap, most writers, and indeed the South African legislature, called for an enactment to criminalise the infliction of dangerous harm whilst intoxicated. 41(64) To my mind, there is something absurd in a court, or jurists, discovering that, on legal principle, conduct long recognised as criminal is not in fact criminally accountable and then feeling obliged to look to the legislature to reverse the anti-social effects of that discovery.

Copyright Juta & Co Ltd

A jurisprudential syllogism that satisfies the scholar but fails to convince the ordinary man of its justice is not the law. It is Bumble's ass.

The undesirable effects of the *Chretien* approach are, in my estimation, exemplified tellingly in this case. I cannot escape the clearest conviction that it would be a result unfair to all concerned, not least to the late Jumbo Martens, were Hurle to be acquitted while Jackson and Potgieter were convicted of murder. The legal sensibilities of the ordinary man would be outraged.

As to the extent to which to permit voluntary intoxication as a defence to the crime of murder, I hold as follows. On the one hand - recognising the need to pass a verdict that will satisfy ordinary members of the public that justice is done, and that the law protects its members from death at the hands of violent, drunken louts - an acquittal is out of the question. On the other hand, acknowledging the real undesirability of convicting of an offence a person who lacks the necessary elements of volition, capacity and intent, the conviction ought to be for an appropriate offence, if one can be found, rather than murder. In my estimation, it is not necessary to look to Parliament, in its own good time, to create an offence. There is a perfectly good common law offence ready to hand which has been resorted to for generations. The offence of culpable homicide.

I am sure that the legalist might still object, ``How can one be convicted

GILLESPIE J

even of culpable homicide if one lacks the necessary mental elements of criminality?'' I nevertheless hold that in this respect theory must yield to policy. The policy is clear and persuasive. It is not necessary, indeed it is counter-productive, to attempt a convoluted and unconvincing pseudo-theoretical justification. The policy is more conducive to justice and must prevail. In eschewing any other rationalisation for the decision than the requirements of policy, I find some comfort in the words of LORD STEYN, in his tribute to CHIEF JUSTICE CORBETT:

> ``[R]emorseless logic is not enough. Policy factors probably play a greater role - the development of the law than logic. And it is a distinctive characteristic of the great judge that his judgments will be free of formalistic reasoning and that he will instead fully expose the policy factors which influence his decision.'' 42(65)

I would follow the precept - while disclaiming any pretensions to greatness.

I have confined my finding of law to circumstances of homicide. It would be inappropriate to attempt to examine whether intoxication should be allowed as a complete defence to any other crime. It may well be that the principle *versus* policy controversy could shift somewhat in the direction of principle in cases other than the most serious ones such as murder and rape. It might even be that in cases of true automatism involving harm inflicted by what are truly insensate, muscular spasms a defence should be allowed even if the insensibility is brought about by alcohol. I hold, however, that on a charge of murder, voluntary intoxication that excludes criminal capacity or intent will permit the perpetrator to escape conviction for murder but the crime of culpable homicide will nevertheless be disclosed.

Copyright Juta & Co Ltd

It follows that in the judgment of the court the first accused, Michael Hurle, is found guilty of culpable homicide. The second and third accused, Jason Jackson and Henry Potgieter are each found guilty of murder by a majority finding.

I would add for completeness and lest there be an appeal, that on the finding of facts in my own minority opinion, the second accused should be found guilty of common assault and the third accused should be acquitted.

S v ANTONIO & ORS 1998 (2) ZLR 64 (HC)

Court **High Court, Harare**

Chinhengo J

Criminal review

6 July 1998 Judgment No. HH-110-98

Flynote

Criminal procedure (sentence) - community service - purpose of - when appropriate to impose - imprisonment - short term of - destructive effects of such a sentence

Criminal procedure (sentence) - principles - choice of one form of punishment rather than another - rational basis should exist for selecting and reasons for doing so should be stated

Headnote

Sentencing of offenders must be a rational and not a capricious process. When a judicial officer imposes a sentence he must give reasons for imposing the sentence. Failure to justify the sentence imposed amounts to a misdirection. It is particularly important that reasons be given for sentences imposed in non-serious cases where there is a whole range of options available to the sentencer.

Studies have shown that a short term of imprisonment is usually destructive to the offender and defeats the object of rehabilitation of the offender as the offender is stigmatised by imprisonment and is negatively influenced by hardened criminals in prison.

For a non-serious offence that might attract a sentence of less than twelve months' imprisonment, the sentencer must first consider whether non-custodial sentences are not appropriate. If he decides they are not, he must give full reasons for this decision. In a non-serious case, if a fine is a permissible sentence for the crime in question, the sentencer should consider first whether a fine with or without an alternative of community service should be imposed. If he considers that a fine is not appropriate, he should then consider whether a direct sentence of community service is appropriate. If he decides it is not, he should consider whether a term of imprisonment should be imposed but he should also consider whether this should be suspended on condition that the accused performs community service. Finally, if the sentencer decides that none of these options are appropriate and some effective term of

Copyright Juta & Co Ltd

imprisonment should be imposed, he should give proper reasons for his decision.

In three of the cases under review, the magistrates had misdirected themselves by imposing short effective prison sentences when it would have been appropriate to impose fines or other non-custodial sentences, such as community service, as alternatives to fines or terms of imprisonment.

In the fourth case, the accused was sentenced to community service as a direct punishment. The period of community service did not equate to the fine that would have otherwise have been imposed and the imposition of this period of community service had resulted in the accused being punished more severely than was warranted.

CHINHENGO J

Cases cited:

S v Chinyenze 1998 (1) ZLR 470 (H)

R v Dematema 1967 RLR 311 (G)

S v Gumbo 1995 (1) ZLR 163 (H)

Judgment

CHINHENGO J: The above-mentioned cases came before me on review. They were heard and scrutinised by different magistrates. The observations made by the scrutinising magistrates make it ideal for me to write one judgment in respect of all the cases. In *S v Savious Antonio*, the accused is 22 years old. He was charged with contravening s 56(2) of the Road Traffic Act [*Chapter 13:11*]. The allegation against him was that he manufactured and sold fake drivers' licences (certificates of competency) to various persons. The evidence on record is that he sold one certificate for $800. A total of three certificates were recovered from him. He was sentenced in February 1998 to 4 months' imprisonment and was prohibited from driving for a period of 6 months. He has since served the full sentence and any intervention at this stage cannot help him.

The scrutinising magistrate queried why a fine was not imposed or why the magistrate did not order the accused to perform community service. He also pointed out certain other anomalies. The trial magistrate has since left employment and responses to the queries could not be obtained.

Section 88 of the Road Traffic Act provides that a person who is guilty of an offence in terms of the Act or any regulations made thereunder shall, if no penalty is specifically provided therefor, be liable to a fine not exceeding $1 000 or to imprisonment for a period not exceeding 6 months or to both such fine and such imprisonment. The prescribed fine is admittedly low by current standards. The offence is a fairly serious one but considering that there is an option of a fine regard should be given to the imposition of a fine. This however is not to say that imprisonment may not be appropriate in certain cases. The prohibition from driving is wholly inappropriate as s 64 of the Road Traffic Act is not applicable. The concern of the scrutinising magistrate was that

Copyright Juta & Co Ltd

a fine or, alternatively, community service would have been the appropriate sentence.

In *S v Masawi* the accused was charged with theft by conversion. The allegation against him was that while he became lawfully possessed of the complainant's door and padlock he had sold this property without the complainant's consent. The value of the property was $425. The accused pleaded guilty to the charge. The door and padlock was not recovered. He had one previous conviction for common assault, which is not relevant. He was employed, earning $1 400 per month and had $370 in savings. He was sentenced to 6 months' imprisonment with labour, of which 2 months was suspended on condition of good behaviour and a further 2 months was

suspended on condition of restitution. The trial magistrate conceded that he erred in assessing sentence.

In *S v Zhou* the accused pleaded guilty to a charge of theft by false pretences. Two thousand dollars was the subject of the charge. The accused was a first offender. He was self-employed, earning $3 000 per month. He offered to make restitution. He was sentenced to 12 months' imprisonment, of which three months was suspended on condition of good behaviour and a further 3 months was suspended on condition that he pays restitution in the sum of $2 000 on or before 27 March l998.

The scrutinising magistrate queried the conviction of the accused. The trial magistrate maintained that the conviction was proper. I agree that the conviction is proper. The scrutinising magistrate also queried the harshness of the sentence pointing out that the magistrate did not at all investigate the suitability of sentencing the accused to perform community service.

In *S v Mutsago* the accused pleaded guilty to a charge of common assault. During a fight with his friend, the complainant, the accused attacked him with a knife, causing a slight injury on the thumb. The record is not complete as only mitigation and reasons for sentence appear therein. It is unclear how serious the injury was. He was sentenced to 70 hours of community service. This case raises a problem different from the other three cases. The scrutinising magistrate stated in his minute of 3 June l998 as follows:

> "The magistrates have already started implementing direct community service before any guidelines have been given. One of the problems already coming through is that if the sentence is equated to 35 hours - 1 month iwl there appears to be some disparities in that the sentence would then be severe comparatively.
>
> For example, this offence of common assault would probably attract a fine of some $100 or 20 days' imprisonment with labour. Community service of 70 hours is about 2 months' imprisonment with labour.
>
> Furthermore, if an accused person is given the option of a fine, he may find out that he can in fact pay the fine although he may not have savings. In this case the accused earns $500 per month. Given time to pay, he could pay a fine of $100 either at once on the month-end or in two 'instalments'. This way he continues with his normal duties of employment.
>
> It was probably not enough in this case to go on and consider community service before enquiring with the accused on whether if sentenced to pay a fine he could afford it.

Copyright Juta & Co Ltd

> We seek your guidance in this case. Although this sentence may not be manifestly harsh are these observations well founded? We are likely to see more cases like this one."

I have decided to deal with all these cases in one judgment because they raise two fundamental issues - first: when is community service an appropriate punishment, either as a direct punishment or as an alternative to imprisonment or the payment of a fine and, second: in what circumstances and how should a sentencer go about determining that community service is the appropriate penalty and its magnitude.

In the first three cases, the sentences imposed by the trial magistrate were

CHINHENGO J

12 months' imprisonment or less. In *Antonio's* case it was 4 months' imprisonment, in *Masawi's* case it was 6 months' imprisonment, of which 2 months was suspended on condition of good behaviour and another 2 months on condition of restitution. The accused was to serve an effective 2 months. In *Zhou's* case it was 12 months' imprisonment, of which three months was suspended on condition of good behaviour and another 3 months on condition of restitution. The accused was to serve an effective 6 months.

The object of community service is clearly summarised by J Reid Rowland in *Criminal Procedure in Zimbabwe* at p 25-48 as follows:

> "The object of community service is to enable non serious offenders - that is those who would otherwise have been sentenced to a term of imprisonment of twelve months or less - to benefit the community by doing useful work. The fiscus benefits by not having to pay for the upkeep of the person in prison. The offender benefits by being able, if he is employed, to continue in his employment and to avoid the destructive effect of a short term of imprisonment."

A short term of imprisonment is indeed destructive to the offender. During his short sojourn in prison he meets hardened criminals. He is likely to be detrimentally influenced by them and his whole outlook to life may change. He is stigmatised by society and may be treated by it as, or he may as a result consider himself to be, a social outcast. Recent studies have shown that there is little achieved by the traditional "short sharp imprisonment" type of sentence. All in fact is lost. The influence by hardened criminals and the stigmatisation invariably defeats one of the major purposes of punishment - reformation. Thus it must again be stated that where the presiding judicial officer is called upon to sentence a non-serious offender and decides on a sentence of 12 months or less (that being an indication that the offence is not serious) the judicial officer is required to undertake an inquiry into the suitability or otherwise of sentencing the convicted person to do community service either as an alternative to a fine or imprisonment or as a direct punishment.

In *S v Gumbo* 1995 (1) ZLR 163 (H) BARTLETT J stated as follows:

> "To my mind, this would have been an appropriate matter for the magistrate to have considered the imposition of community service. There is nothing in the magistrate's reasons for sentence to indicate that the option of community service was considered.
>
> It is particularly important that magistrates give active consideration to the new concept of community service (at

Copyright Juta & Co Ltd

166 A-C)."

This statement supports the position both of the National Committee on Community Service, which has been stated repeatedly at seminars held throughout the country during 1997 and 1998, that where a magistrate would otherwise impose a sentence of less than 12 months' imprisonment he is enjoined to consider the option of community service or the imposition of a fine. Community service is no longer only imposed as an alternative to

CHINHENGO J

imprisonment as provided in s 358 of the Criminal Procedure and Evidence Act but it is now a substantive punishment in its own right (see s 336 of the Criminal Procedure and Evidence Act as amended by s 11 of Act 8 of 1997 and imprisonment as provided in s 358 of the Criminal Procedure and Evidence Act but it is now a substantive punishment in its own right (see s 336 of the Criminal Procedure and Evidence Act as amended by s 11 of Act 8 of 1997 and *S* v *Chinyenze* 1998 (1) ZLR 470 (H)). That being the case, a judicial officer should give reasons in his judgment why he opts for one form of punishment as against any other. It is not a judicious exercise of the sentencing discretion to sentence an accused person to a custodial term, or to payment of a fine or to the suspension of either of them on any condition or to community service without showing why he has settled on any of those forms of punishment. In my opinion to do so is a misdirection. It is a misdirection because the sentencer will not have applied his mind to the most appropriate sentence. If he would have applied his mind to the question of sentence the clearest evidence of it is to reflect on the record the reason for his choice of sentence. The words of YOUNG J in *R* v *Dematema* 1967 RLR 311 (G) at 316C-D are apposite. He said:

> "The infliction of punishment is perhaps the most important and difficult aspect of the exercise of judicial discretion. A sentence must always have a rational content with no capricious element in it. The judicial officer must take into account, and give proper weight to all relevant factors. As in the case of convicting the accused, so with punishing him where the justification of the sentence is not obvious, the judicial officer should give reasons for his decision. As a member of society the accused is entitled to be treated as a rational being and both society and the accused are entitled to know the justification for the punishment."

It may be said that where an accused person is sentenced to imprisonment for 12 months or more, the justification for the custodial sentence is more readily understood. In any case, the judicial officer gives his reasons for sentence, but the seriousness of the offence, generally stands out as the obvious justification for imprisonment. This is not so with non-serious offences. Once the sentence which may be imposed is less than twelve months, the obviousness of any particular punishment is less likely to be grasped by the accused or the society. There are a number of options available to the judicial officer - a custodial term (which necessarily is a short one), the payment of a fine, community service and other conditions of suspension specified in s 358 of the Act. There must always be a justification of the sentence on which the judicial officer settles. As I have already stated, a failure to do so is a misdirection.

In the first three cases, no reasons were given as to why community service was not at all considered. In failing to do so, the magistrates concerned clearly misdirected themselves.

It is of grave concern to me that in all the cases a fine would in fact have been the appropriate

Copyright Juta & Co Ltd

sentence. The scrutinising magistrate was correct that for a contravention of s 56(2) of the Road Traffic Act in *Antonio*'s case a fine

CHINHENGO J

would have been appropriate. It is settled that in such a case the court should have recourse to a fine. Community service imposed either as an alternative to a fine or imprisonment would have also been appropriate. I decline to certify the proceedings in this case. The same is true in *Masawi*'s case where the scrutinising magistrate observed that a fine in the region of $300 would have met the justice of the case. I think a fine of $500 would have been appropriate. Alternatively, community service as an alternative to a fine would have met the justice of the case. In *Zhou*'s case the magistrate could also have imposed community service. Imprisonment was not warranted. No attempt was made to ascertain the propriety of community service. No inquiry was carried out. In my view, this was a proper case to have stressed the aspect of restitution. A sentence of 8 months' imprisonment with labour of which 2 months was suspended on condition of good behaviour, 3 months on condition of restitution and 3 months on condition of community service would have been the appropriate sentence. The accused has served his sentence and in all probability he has been discharged unless he has failed to make restitution. Again I decline to certify the proceedings. There is a failure in all these cases to exercise the sentencing discretion on a rational basis and thus provide a justification for the punishment. It is on this basis that I have not confirmed the sentences passed in these three matters. The sentences are not in accordance with real and substantial justice.

The problem in *Mutsago*'s case is different from the others. In that case, the accused was sentenced to community service as a direct punishment. The trial magistrate also fell into the error of failing to justify his sentence or provide a rational basis for it. In my view, the offence committed warranted a fine in the region of $300. I do not agree that a fine as suggested by the magistrate of $100 would suffice. But without explaining himself the magistrate ordered the accused to perform 70 hours of community service. In terms of the community service grid of hours, 70 hours is equivalent to 2 months' imprisonment. This is a classic case in which the imposition of community service has resulted in the accused being punished more severely. I cannot certify the proceedings as being in accordance with real and substantial justice.

I must complement the scrutinising magistrates for bringing these cases to my attention. Community service is a statutorily sanctioned non-custodial sentencing option which it is competent to impose as a direct form of punishment or as an alternative to the payment of a fine or imprisonment. It must be considered in every case where the accused would otherwise be imprisoned for less than 12 months. Full reasons for not imposing it must be given. In my view, and without being dogmatic, the proper approach to sentencing non-serious offenders in cases similar to the present, is to consider

CHINHENGO J

the following punishments in order of priority: a fine, with or without an alternative of community

Copyright Juta & Co Ltd

service; community service as a direct punishment; community service as an alternative to imprisonment; and imprisonment. It is only by adopting such an approach that a judicial officer can arrive at a rational sentence and avoid capriciousness.

In the result, I cannot certify the proceedings in all the above cases as being in accordance with real and substantial justice.

GARWE J agrees.

DIRECTOR OF CUSTOMS AND EXCISE *v* ABSA BANK & ANOR 1998 (2) ZLR 71 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Sandura JA

Civil appeal

3 & 8 July 1998Judgment No. S-108-98

Flynote

Customs and excise - Customs and Excise Act [Chapter 23:02] - imported goods - statutory lien to detain imported goods under control of Customs Department until duty paid - scope of such lien

Lien - what is - scope of - statutory lien to detain imported goods under control of Customs Department until duty paid - whether enforceable against all the world

Headnote

Certain goods were imported into Zimbabwe. Under the financing arrangements for the goods, a bank outside Zimbabwe was the owner of the goods and ownership was only to pass to the Zimbabwean company for which the goods were intended when the goods were delivered to the Zimbabwean company at named delivery points in Zimbabwe.

Purporting to act in terms of s 201(1) of the Customs and Excise Act [C*hapter 23.02*], the Customs Department claimed that it had a right to retain some of these imported goods until the Zimbabwean company had paid duty still owed by it on goods that it had previously imported into Zimbabwe.

Held, that the lien provided for in s 201(1) of the Act is a statutory lien which is akin to a debtor and creditor lien. It is not a real lien that can be maintained not only against the owner of the goods but against the whole world. The Director could therefore only retain goods belonging to the person who owed the customs duties. He could not hold the goods of a third party as security for a totally unrelated debt owed by another.

Cases cited:

Brooklyn House Furnishers (Pty) Ltd v *Knoetze & Sons* 1970 (3) SA 264 (A)

Copyright Juta & Co Ltd

Goudini Chrome (Pty) Ltd v *MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A)

Magor & St Mellons RDC v *Newport Corp* [1952] AC 189; [1951] 2 All ER 839

R v *Venter* 1907 TS 910

Sec for C & E v *Millman NO* 1975 (3) SA 544 (A)

Union Government v *Mack* 1917 AD 731

Volschenk v *Volschenk* 1946 TPD 486

Legislation considered:

Customs and Excise Act [*Chapter 23.02*], s 201(1)

Case Information

Miss *M Machaka*, for the appellant

A P de Bourbon SC, for the respondent

McNALLY JA

Judgment

McNALLY JA: This appeal was heard as a matter of urgency from a judgment in the High Court handed down on 17 June. The facts were set out by the learned judge as follows:

> ``The circumstances giving rise to this application are that on or about 22 January 1998 the second applicant (`Rubinelle') purchased certain jute bags and woolpacks from a company in Bangladesh and sold them to Cargill Zimbabwe (Pvt) Ltd (`Cargill'). Cargill uses the bags and packs for the packing of cotton that it sells.
>
> Rubinelle being a South African entity, the company in Bangladesh required payment to be effected by way of a letter of credit. Whilst a letter of credit was secured by Rubinelle to enable payment to be effected the terms of that letter of credit were unacceptable to the Bangladesh Company.
>
> The first applicant ABSA Bank Limited then paid the Bangladesh Company in cash and, to secure its own position it took cession of the letter of credit intended initially for payment to the Bangladesh Company. The first applicant became owner of the letter of credit which obliged delivery to be effected at Chegutu and Tafuna gins to enable payment to be effected.
>
> The goods were then imported into Zimbabwe by Cargill Zimbabwe (Pvt) Ltd and duty was paid. There were 118 containers in all and after 11 of them had been released the respondent sought to place a lien over the remaining 107 containers on the basis that Cargill owed money to Customs in respect of its unrelated previous imports during 1997. The money owed was in the form of unpaid duty resulting in the respondent invoking the provisions of s 201(1) of the Customs and Excise Act [*Chapter 23:02*].
>
> > That section provides as follows:
> >
> > `The correct amount of duty payable in respect of any goods shall, from the time when it should have been paid, constitute a debt due to the state *by the person concerned* and shall at any time after it becomes due, be recoverable in a court of competent jurisdiction by proceedings in the name of the Director *and*

Copyright Juta & Co Ltd

> *any goods in a bonded warehouse or in the custody of the Department and belonging to that person, and any goods afterwards imported or entered for export by the person by whom the duty is due*, shall, while still under the control of the Department, be subject to a lien for such debt and may be detained by the Department until such debt is paid, and the claims of the state shall have priority over the claims of all persons upon the said goods of whatsoever nature and may be enforced by sale or other proceedings if the debt is not paid within three months after the date upon which it became due''' (emphasis is my own).

The dispute is as to whether the wording of the section entitled the appellant (the Director) to detain the goods in question under a right of lien. The learned judge decided the matter against the Director, who has now appealed.

It was not in dispute between the parties that ownership in the goods does not pass to Cargill until delivery at the Tafuna and Chegutu gins. And only then can ABSA Bank encash the letter of credit. The argument for the Director relies on a simple grammatical interpretation of the words of the section, the so-called ``golden rule'' of interpretation enshrined in so many cases - Miss *Machaka* cited *Magor & St Mellons Rural District Council* v *Newport Corp* [1952] AC 189; [1951] 2 All ER 839; *R* v *Venter* 1907 TS 910

McNALLY JA

at 913; *Union Government* v *Mack* 1917 AD 731 at 739; *Volschenk* v *Volschenk* 1946 TPD 486 at 487.

The argument goes like this. The section allows the Director to exercise a lien over goods in two circumstances. One is when the goods are ``in a bonded warehouse or in the custody of the Department and belonging to that person''. In the circumstances of this case ``that person'' is Cargill, the alleged debtor, and it is clear that the goods do not yet belong to Cargill, so the lien does not arise on that basis.

But the second circumstance is where the goods are ``afterwards imported or entered for export by the person by whom the duty is due''. Those are the circumstances of this case, so it is argued. These goods have been imported by Cargill after the alleged debt to the State has arisen. The word ``import''is widely defined in the Act to mean ``bring goods or cause goods to be brought into Zimbabwe''. Cargill has been described in the various relevant documents as the importer. It is not disputed that Cargill is the importer in the sense that that word is used in the Act. Therefore, Cargill is covered by the reference to goods ``afterwards imported and entered for export by the person by whom the duty is due''. Therefore, so the reasoning goes, the Director is entitled to exercise his statutory lien over those goods. The fact that the words ``belonging to that person''are not used in the part of the section is significant. It means the lien applies to anyone's goods, so long as they are ``imported by the person by whom the duty is due''.

This reasoning seems to me to be perfectly sound insofar as it goes. But it does not go far enough. The reason why it does not go far enough is to be found in the meaning of the word ``lien''.

The constraints of time and the urgency of the matter do not allow of an extensive analysis of the term ``lien''. Reference may be made to the relevant chapter in Volume 15 of the *Law of*

Copyright Juta & Co Ltd

South Africa, starting at p 77. The appellant has cited two definitions, one from *Byrne's Law Dictionary* at p 533:

> ``Lien is a right by which a person is entitled to obtain satisfaction of a debt by means of property belonging to the person indebted to him ... a lien can only be a security on property which is or has been the subject of a transaction between the parties.''

The other is from *Claassens' Law Dictionary*:

> ``A lien is the right to retain possession of certain property belonging to another person as security for some claim in respect of that property, until such claim has been paid.''

The first of these definitions (it seems to me) relates to what are known as debtor and creditor liens, and it arises only as between debtor and creditor where the debtor owns the goods.

The second definition relates to what are called real liens, which are real rights, and which therefore may be maintained against the whole world, not

McNALLY JA

just against the owner. They arise where the possessor has spent money or done work on another's property. He is entitled to retain that property until the owner *or claimant* recompenses him for that expenditure. See *LAWSA supra*, para 99; *Brooklyn House Furnishers (Pty) Ltd* v *Knoetze & Sons* 1970 (3) SA 264 (A); and *Goudini Chrome (Pty) Ltd* v *MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 85A-C.

I would agree that the section is plainly intended to alter the common law, and widen the scope of the word ``lien''. It does so in a number of ways. First, it allows ``the Director'' to exercise a lien on behalf of the State. Second, it allows a lien to be exercised on the basis of ``control'', rather than on the narrower common law basis of ``possession''. Third, it allows a lien to be exercised in respect of goods unrelated to the transaction out of which the debt arose. Fourth, ``the claims of the State have priority over the claims of all persons upon the said goods of whatsoever nature''. Fifth, there is specific provision for the Director to sell the goods if the debt is not paid within three months.

In short, therefore, the lien with which we are here dealing falls into a third category of lien called a statutory lien, and we must determine the extent to which it differs from the other two types of common law liens. See *LAWSA* paras 122 *et seq*.

In interpreting the section we may, I think, be guided by two other principles of interpretation -

1. Statutes will be interpreted in conformity with the common law unless clearly intended to go beyond the common law;

2. Statutes will be interpreted so as to avoid causing an absurdity.

I start from the position that this statutory lien clearly is in its nature akin to a debtor and creditor lien rather than to a real lien. The language of the section is all about the means whereby the Director (the creditor) may recover a debt from the debtor. It has nothing to do with the

Copyright Juta & Co Ltd

Director's rights arising out of expenditure by him on or in relation to the goods. So essentially, it is a statutory variation on a debtor and creditor lien.

I do not see how it can possibly be interpreted as a real lien. One remembers that a real lien allows a possessor to retain the goods as against the owner or another claimant because he, the possessor, has improved the goods or spent money on preserving them. It is perfectly just and equitable therefore that he, the possessor, be allowed to hold the goods until he is reimbursed for that expenditure.

But in the present case the Director is claiming that he can not only hold the goods of a third party as security for a wholly unrelated debt owed (or allegedly owed) to him by Cargill, but that he can even sell those goods in satisfaction of that debt. One has only to state the proposition to illustrate its

absurdity. It is expropriation without compensation, in conflict with the provisions of s 16 of the Constitution of Zimbabwe.

The absurdity is avoided simply by interpreting the word lien in s 201 to mean essentially ``debtor and creditor lien''. That in turn means that the words ``belonging to that person'' must be read into the part of the section relating to what I have called ``the second circumstance''.

In other words, the phrase ``and any goods afterwards imported or entered for export by the person by whom the duty is due'' must be read as if the words ``belonging to that person'' appear after ``goods''.

Before concluding, and for the sake of completeness, I record that I have seen the decision in *Secretary for Customs & Excise* v *Millman NO* 1975 (3) SA 544 (A) which deals with the equivalent section in South Africa. Neither party referred to it, no doubt because it does not deal precisely with the issues with which we are here concerned.

Accordingly, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

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

Stumbles & Rowe, respondents' legal practitioners

S *v* CHIDAWU 1998 (2) ZLR 76 (HC)

Court **High Court, Harare**

Copyright Juta & Co Ltd

Chatikobo J

Criminal review

8 July 1998Judgment No. HH-113-98

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18 - right to fair trial - right to fair trial demands that charge and essential elements thereof be explained where serious offence charged or heavy punishment is going to be imposed

Criminal procedure - plea - guilty - conviction on basis of plea alone, without explanation of charge - whether community service may then be imposed directly

Criminal procedure - plea - guilty - explanation of charge and essential elements - purpose of

Criminal procedure (sentence) - community service - whether may be imposed when accused convicted on basis of plea alone - undesirability of imposing community service without explanation of charge

Headnote

Section 350A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] allows for the imposition of community service directly as a punishment. Section 271(1)(a) allows the court to convict a person on the basis of his plea alone and impose any punishment other than imprisonment without the option of a fine or fine of more than $500. The court is only permitted to impose imprisonment without the option of a fine, or a fine exceeding $500, where the provisions of s 271(1)(b) have been complied with. These require that the charge and the essential elements thereof be explained to the accused, so that he understands the nature of the offence to which he has pleaded guilty. The nature of the explanation which the court must give is allied to his right to a fair trial. It may thus be necessary for the court to go further and explain to the accused at an early stage that the offence is serious and attracts heavy sentences.

Community service is not the same as imprisonment or a fine, and it would thus, strictly speaking, be permissible for a court, where the accused pleads guilty and is convicted on the basis of his plea alone, to sentence him to perform community service. Community service may be imposed even where the accused has been convicted of a serious offence, and it is inconceivable that the legislature could have intended that a court could convict an accused person of a serious offence and sentence him to community service without canvassing the essential elements of the offence with him. Consequently, although

s 271(2)(a) does not preclude the imposition of community service without an explanation of the charge and essential elements, the requirement for a fair trial requires such an explanation.

Cases cited:

S v *Dube* 1988 (2) ZLR 385 (S)

Copyright Juta & Co Ltd

Mears v *Smith* 1963 R&N 617; 1964 (1) SA 319 (SR)

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 271(2), 336(1)(d1) and 350A

Judgment

CHATIKOBO J: This matter came before me on automatic review from the provincial magistrate at Rusape. The record of proceedings contained a copy of the charge sheet, a statement of agreed facts and a piece of paper on which had been inscribed the words ``plea - guilty - both counts. Facts read and understood. Annexure `A','' and then follows a record of the mitigation and the reasons for sentence. At the back of the charge sheet it was recorded that the accused pleaded guilty and was found guilty on both counts. The sentence imposed on the two counts is also recorded.

Initially, I formed the impression that the record was incomplete, so I returned it to the court of origin and asked that I be furnished with the full record. The trial magistrate has now responded. He advises me that he did not put the essential elements of the offences to the accused. He seems to recall that when the trial started he formed the impression that he could impose a sentence of a fine of less than $500 in which case he could proceed in terms of s 271(2) (a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Act). The need to put the essential elements of the offence to an offender in terms of s 271(3) of the Act only arises where the court proceeds in terms of s 271(2)(b) of the Act.

The offence charged on the first count is theft of tobacco valued at $800, all of which was recovered. On the second count the accused was charged with cultivating five dagga plants with an average height of five centimetres, in contravention of the Dangerous Drugs Regulations, as read with the Dangerous Drugs Act [*Chapter 15:02*]. On the first count, the accused was ordered to perform community service for 105 hours and on the second count he was ordered to perform community service for 175 hours. The trial magistrate is now of the view that the sentence of 175 hours of community imposed on the second count is incompetent because of non-compliance with the provisions of s 271(2)(b). He considered that it was wrong for him not to have canvassed the essential elements of the offence with the accused.

I do not share his view. Section 271(2)(a) of the Act provides that when a person who is arraigned before a magistrates court pleads guilty to the offence charged or a competent verdict thereto, and the public prosecutor

accepts the plea, the court may ``if it is of the opinion that the offence does not merit punishment of imprisonment without the option of a fine or of a fine exceeding $500,'' convict the accused of the offence to which he has pleaded guilty and impose any competent sentence other than imprisonment without the option of a fine or a fine exceeding $500. In turn, s 271(2)(b) provides that if the court is of the opinion that the offence merits any punishment of imprisonment without the option of a fine or a fine in excess of $500 or, if requested by the

Copyright Juta & Co Ltd

prosecutor, then in that event it shall canvass the essential elements of the offence with the accused and ascertain if his plea constitutes an informed admission of the facts and elements of the offence.

Now, the punishment to which the accused was sentenced is one of community service. The various punishments which a court may impose on a convicted offender are listed in s 336(1) of the Act. The penalty of community service is provided for in s 336(1)(dl) and in s 350A(1), which latter provision is in these terms:

> ``Subject to this section and to regulations made in terms of section *three hundred and eighty nine*, a court which convicts a person of any offence may, instead of sentencing him to imprisonment or a fine make a community service order requiring him to render service for the benefit of the community or any section of the community for such number of hours as shall be specified in the order.''

It can thus be seen that community service as a substantive penalty was created by s 336(1)(d1) and s 350A serves to define the nature of the service which should be rendered, namely, service for the benefit of the community or a section of the community. It also serves to specify that the community service should be ordered for a specific number of hours. The rest of the subsections in s 350A deal with various modes of ordering community service, such as that two sentences of community service can be made to run concurrently or that a community service order can be conjoined with other sentences.

It admits of no doubt that community service, as defined in s 335A or as provided for in s 336(1)(d1) or in s 350A, cannot be construed as meaning the same as ``imprisonment without the option of a fine or a fine exceeding $500'' as provided for in s 271(2)(b) of the Act. The need to put the essential elements of the offence to an accused only arises if the court forms the opinion that the offence merits the punishment of imprisonment without the option of a fine or a fine in excess of $500. An order that an offender should render service to the community for a specified number of hours is not synonymous with imprisonment without the option of a fine or a fine exceeding $500. Had the intendment of the legislature been to require that the essential elements of the offence be canvassed in those cases where the court forms the view that the offence merits a punishment of community service,

CHATIKOBO J

then one would have expected that s 271(2) (a) and s 271(2)(b) would have been amended by the insertion of subpara (iii) in each case to include community service as one of the punishments. The trial magistrate's concession that he should have canvassed the essential elements with the accused seems to be based on current practice. He reasoned that, in terms of the guidelines issued by the National Committee on community service, 175 hours of community service is equivalent to five months' imprisonment. That being so, the offence was serious enough to warrant proceeding in terms of s 271(2)(b) of the Act. My view is that, the guidelines are not a legal requirement. They exist purely for guiding magistrates in the exercise of their discretion. Also, s 271(2)(b) provides that the essential elements should be put if the court considers that the offence merits a specified sentence. It does not say that should be done when the court considers that the offence is serious.

Copyright Juta & Co Ltd

Prior to the promulgation of the Criminal Procedure and Evidence Amendment Act 8 of 1997, the court could, in terms of s 358(3)(d) of the Act, suspend a term of imprisonment on condition the offender renders service to the community. This provision remains in force. Where a court proceeds in terms of this section s 271(2)(b) must be complied with. That is so because suspension of a sentence on condition of community service does not carry with it the option of a fine. The phrase ``imprisonment without the option of a fine'' must mean a term of imprisonment which does not carry the alternative of paying a fine. When imprisonment is imposed but is conjoined with an alternative choice such as community service, an inquiry in terms of s 271(2)(b) is called for, as long as that choice is not a fine.

The enactment of s 336(1)(d1) and s 350A, to introduce community service as a direct punishment, should preferably have necessitated a corresponding amendment of s 271(2)(b) to include community service as one of the penalties calling for the explanation of essential elements. The purpose of s 271(2)(b) of the Act is to ensure that before a person is convicted of an offence the court must ensure that the plea of guilty is an informed admission of the offence charged in the sense that the accused understands the nature of the offence and acknowledges his guilt advisedly. The decision by the legislature not to amend s 271(2)(b) to incorporate community service creates a lacuna which the court cannot fill, for it is not for the courts to furnish omissions in the language of the statute. The question which arises is how to deal with the lacuna in the light of all the relevant provisions. YOUNG J observed in *Mears* v *Smith* 1963 R&N 617 (SR) at 620I-621A; 1964 (1) SA 319 (SR) at 322 that:

> ``The theory of a *casus omissus* has application in the light of the maxims *ad ea quae frequentiens accidunt jura adaptantur* (laws are adapted to those cases that most frequently

CHATIKOBO J

> occur) and *casus omissus et oblivioni datus communis juris relinquitur* (a case omitted and consigned to oblivion is left to the disposal of the common law). These two maxims are part of the juristic technique available to the court in ascertainment of legislative policy ... ''

In this case, the legislative policy is readily ascertainable by reference to s 350A of the Act, which gives the court power to order community service in respect of a person who has been convicted of any offence. Community service can thus be ordered even where a person has been convicted of a serious offence. It is inconceivable that the legislative policy or intendment could have been that a court which convicts a person of such a serious offence on his plea of guilty could proceed to convict him and impose community service without canvassing the essential elements of the offence with the accused, especially if the offence is one which is not only serious but entails difficult concepts such as possession. So even though there is an omission in the Act which makes it difficult for a court to achieve justice, there can be no doubt, to my mind, that the court has the power deriving from its inherent jurisdiction to ensure that a person who pleads guilty has understood the nature of the offence to which he has pleaded guilty. That is why, in *S* v *Dube* 1988 (2) ZLR 385 (S) and the cases that followed it, the Supreme Court held that the nature of the explanation which the court must give is allied to the accused's right to a fair trial. The Supreme Court laid down in this case the important principle that while the procedure laid down in s 271(2)(b) can be adequate in many cases to ensure a fair trial, there are equally others where it is necessary for the court to go further and explain to

Copyright Juta & Co Ltd

the accused at an early stage in the trial that the offence to which he is admitting is serious and attracts heavy sentences. By a parity of reasoning, the fact that the Act does not make it obligatory for the court to follow the procedure laid down in s 271(3) is by no means an indication that the court is absolved from its duty to ensure that the accused receives a fair trial. There can be no doubt that the surest and speediest way of ensuring a fair trial is to canvass the essential elements of the offence with the accused. In another situation, the court might choose to receive evidence to prove the offence but it would not be efficacious to follow this cumbersome route in a case where the accused is pleading guilty. It would suffice if the accused is afforded an opportunity to make informed admission of the offence. It is pertinent to note that s 271(2)(b) gives the prosecutor the power to ask the court to explain the essential elements of the offence to the accused in certain circumstances. I perceive this to mean that even in those cases where it is not necessary to do so the prosecutor can nevertheless request the court to do so in order to afford the accused a fair hearing.

In short, I have come to the conclusion that where a court forms the opinion

that the offence merits community service, the Act does not oblige it to proceed in terms of s 271(1) (a) or s 271(2)(b) of the Act. It is desirable that the Act be amended to make it obligatory for the court to follow the procedure. Although it is not obligatory to follow this procedure, there is an overriding requirement for the court to ensure that the accused receives a fair trial. I have suggested that the fairest way to afford a fair trial to an offender who pleads guilty is to canvass the essential elements with him in order to ensure the genuineness of the guilty plea.

What I have said in this judgment applies to both counts. I cannot in respect of each count be satisfied that the pleas of guilty were genuine or that the accused was afforded a fair trial.

The conviction on each count is quashed and the sentence is set aside.

CHINHENGO J agrees.

MAKOVAH *v* MAKOVAH 1998 (2) ZLR 82 (SC)

Court **Supreme Court, Harare**

McNally JA, Muchechetere JA & Sandura JA

Civil appeal

1 June & 13 July 1998Judgment No S-102-98

Flynote

Customary law - marriage - registered customary marriage - undissolved previous marriage under Marriage Act - second marriage void - division of matrimonial property

Copyright Juta & Co Ltd

Family law - customary marriage - marriage null and void on the grounds that it was bigamous - woman unaware that marriage bigamous - whether court can order division of matrimonial property

Headnote

The appellant had married a woman in a church wedding. Subsequently he had purported to enter into a customary marriage with the respondent in terms of the then African Marriages Act [*Chapter 238*] (now the Customary Marriage Act [*Chapter 5:07*]). In the marriage certificate for this marriage, the respondent was described as the appellant's first wife. The trial court decided that the marriage between the appellant and the respondent was null and void on the grounds that it was bigamous. The trial court ordered a division of the matrimonial property acquired during the marriage before it was annulled. On appeal:

Held, that when the respondent married the appellant she was unaware that the appellant was already married to another woman. On the other hand, the appellant was fully aware that he had already married another woman in church and that the subsequent registered marriage would therefore be bigamous. The second marriage was null and void on the grounds that it was bigamous.

Held, further, that as regards the division of the matrimonial assets of the annulled marriage African customary law knows no concept of putative marriage and to introduce the common law concept of putative marriage into customary law is to distort customary law. However, that when the court has declared a marriage to be null and void the court is empowered by s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] to order the division of the spouses' property and it is not necessary to find that the marriage is a putative marriage in order to do this. This provision applied in the present case. If this were not the case it would work an injustice and hardship on a party, such as the respondent, who had laboured during the marriage and had contributed to the accumulation of the matrimonial property under the impression that the marriage was valid. It would also unjustly enrich a dishonest party such as the appellant, simply because the property in question is either registered in his name or is under his control. Such a position would be unconscionable and the legislature by using the expression ``nullity of marriage'' in s 7(1) of the Matrimonial Causes Act must have envisaged that a situation such as the present one would be covered. Such situations are very common in African society because of the failure by many to realise that once they contract a ``church'' marriage their marriage becomes monogamous.

1998 (2) ZLR p83

MUCHECHETERE JA

Legislation considered:

Matrimonial Causes Act [Cha*pter 5:13*], s 7(1)

Case Information

P Nherere, for the appellant

R M Fitches, for the respondent

Copyright Juta & Co Ltd

MUCHECHETERE JA: This is an appeal against the judgment of the High Court, Harare, on 9 August 1996 in which it was held as follows that:

``1. the marriage purported to be contracted by the parties on 10 January 1980 is hereby declared null and void by virtue of being bigamous.

2. the defendant (appellant) shall pay to the plaintiff (respondent) the sum of $300 000 or one half of the value of the house at 4 Antelope Road, Matsheumhlope, Bulawayo, whichever is greater, on or before 31 December 1996.

3. in the event that payment is not made in terms of para 2 hereof by the said date, the said house shall be sold and the plaintiff shall be paid $300 000 or one half of the proceeds of the sale whichever is greater.

4. the defendant shall pay to the plaintiff the sum of $600 per month as maintenance for the minor child S until she attains the age of 18 years or becomes self supporting whichever occurs the earlier.

5. the defendant shall be solely responsible for the payment of the costs of S's educational requirements including fees for her primary, secondary and tertiary education.

6. within 30 days from the date of this order:

   (a) the defendant shall deliver to the plaintiff, in good working condition, the Morris Minor vehicle or failing that the sum of $5 000 representing its value.

   (b) the defendant shall pay to the plaintiff the sum of $5 000 being her share of the immovable assets of the parties.

7. there shall be no order as to costs.''

The appellant's notice of appeal, as amended, reads as follows:

``1. The learned judge (in the court *a quo*) erred in finding that the appellant and his witness lied to the court in their testimony.

2. The learned judge erred in preferring the respondent's version on whether or not she knew the appellant to be validly and monogamously married at the time she had the bigamous marriage to appellant registered.

3. In any event, even assuming that the learned judge was correct in holding that the respondent was an innocent party in the bigamous union, which is denied:

   3.1 the learned judge erred, in law, in finding that the relationship between the appellant and the respondent was a putative marriage as African Customary Law knows no concept of a putative marriage.

   3.2 further, and in any event, even if the relationship between the appellant and the respondent was a putative marriage, which is denied, s 7 of the Matrimonial Causes Act [C*hapter 5:13*] which empowers an appropriate court to apportion the spouses' assets upon judicial separation, annulment or dissolution of the marriage, does not apply to putative marriages. Accordingly, the court a quo had no power to apportion the parties' property in terms of s 7 of the Matrimonial Causes Act as it purported to do.

MUCHECHETERE JA

4. The learned judge erred in awarding half the value of house No. 4 Antelope Road, Matsheumhlope, Bulawayo to the respondent.

Copyright Juta & Co Ltd

5. The court erred in not taking into account the respondent's adultery in the award made in her favour.

6. The award made awarding the respondent $300 000 or half the value as sold, of the property No. 4 Matsheumhlope, Bulawayo, whichever is greater, was an error as it has the potential of awarding to the respondent more than half the value of the house in question, which is not what the court intended to do.

7. The court erred in placing the onus of proving the value of the appellant's assets on appellant.

8. The award of $600 per month in respect of maintenance for Shanani Mahovah in addition to the appellant being required to foot the educational requirements of the said child, is excessive in appellant's circumstances.

9. The learned judge erred in taking into account some of the appellant's assets acquired after the break down of the parties' relationship without the respondent's contribution whatsoever.

10. The learned judge erred in ignoring the fact that there is a bond registered against the Matsheumhlope house in making its award to the respondent.

11. Wherefore the appellant prays that this appeal be allowed and the order of the court *a quo* be altered by the deletion therefrom of paras 2 and 3 thereof and the substitution therefor of the following:

    `2. The defendant shall pay to the plaintiff the sum of $60 000 for her contribution towards the matrimonial home No. 4 Matsheumhlope Bulawayo'."

The respondent's evidence in the court *a quo* was to the effect that she met the appellant in 1973. When he proposed love to her, he told her that he was single and that he lived at No. 2 Luveve, Bulawayo, with a male cousin. After she accepted his proposal a sexual relationship developed between them and she fell pregnant by him in February 1974. When she told him about the pregnancy he proposed marriage immediately. He was particularly anxious the pregnancy be not visible before he approached her parents about the marriage.

In May 1974, the appellant's brother approached the respondent's father on behalf of the appellant asking for the respondent's hand in marriage. The respondent's father refused. The respondent's parents did not like the appellant. The father did not change in mind even after the parties' child was born on 18 November 1974. However, in May 1975, the respondent's mother sent her brother to find out more about the appellant. His enquiries revealed that the appellant was divorced and that he had four children from his previous marriage. When the respondent confronted the appellant with this information he told her that the marriage had been a customary union and that he had not disclosed its existence to her for fear of being rejected by her. He confirmed that he was divorced and sent his friends to assure her that he was in fact divorced.

In 1975, the respondent left home to go and live with the appellant. This

was after her parents had chased her from home on the ground that she had returned late from a date with the appellant. Once again, the appellant sent the same emissary to the respondent's father with a request for the respondent's hand in marriage. When asked about the appellant's marital status the emissary told the respondent's father that the appellant previously had a customary law marriage but that he was, at that time, divorced. The father this time agreed that

Copyright Juta & Co Ltd

the two be married. And on 10 January 1980, the appellant fetched her parents and drove them in his motor vehicle to the place where he and the respondent were married. In the marriage certificate in terms of the then African Marriages Act [*Chapter 238*] (now the Customary Marriages Act [*Chapter 5:07*] of the same date produced in court, the respondent is described as the appellant's first wife.

The parties thereafter continued to live in the appellant's said Luveve house. The appellant was a sales manager for a group of stores comprising Sales House, Edgars and Express Stores earning over $200 per month at the time. And the respondent was employed as a school teacher and earning about $76 at the time. She left employment in 1983. According to their arrangement she paid food, domestic servants' wages and certain household expenses. Items such as furniture, clothing, lights, water and motor vehicles expenses were paid for by the appellant.

In 1980, they moved to a company house in Suburbs, Bulawayo and were paying only $100 per month as rental. The family then consisted of eight people, that is, the appellant and the respondent, four children by the appellant's previous marriage and the parties' two children. The respondent cared for all the children. According to her, she worked in the mornings and in the afternoons she picked up the children from school. She also did the cooking and ran the home with the assistance of their two domestic workers.

In August 1982, they bought a house, the Matsheumhlope house, which they chose together. A bond was raised for this purpose from Edgars but they, together, had to raise the transfer fees. The appellant paid the deposit for the house from his savings and the bond requirements were deducted from his salary. They lived in the house from 1982 to 1986.

In 1983, they rented a butchery. She then left teaching to run the business as its manager on a full time basis. She paid herself a salary of $200 per month and spent the money on the household. The appellant obtained a loan to purchase stock. She put no money in the business but put in a lot of work. The butchery ceased operating in 1985 as they were experiencing problems with shortages of meat.

The parties started having marital problems in 1983 when the appellant had an affair. He then started assaulting the respondent frequently. In 1985, she also had an affair to spite him. When the appellant discovered the affair he

assaulted her and forced her to assist him in trapping the man concerned so that he could sue him for damages.

During 1985, they purchased a house in the Lake Kyle area which had been advertised in the press for $30 000. In order to raise a deposit for the house, they sold a Mazda 1300 which they had purchased for the butchery business for $12 000. They thereafter raised the balance of the purchase price for the house by borrowing from the Bank. The respondent signed as a guarantor for the Bank loan. The house was registered in the appellant's name. The respondent stated that she was not aware that the house was later registered in the appellant's son's name

Copyright Juta & Co Ltd

but stated that if that was the case then the appellant had donated the property to the son in order to deny her a share in it because at the time they had marital problems. A Morris Minor motor vehicle was bought by the appellant to replace the Mazda 1300 that was sold.

The respondent explained that she would not have courted or married the appellant if she had known that he was still married at the time. She was then 23 years old. In April 1988, she left the matrimonial home and returned to her parents' home. It was only after she claimed maintenance from the appellant that he took the stance that he would not maintain her and the children because the marriage was bigamous. It was the first time that she had heard of the allegation.

The respondent is now living in Hwange where she is now again employed as a teacher at a private school. She is provided with accommodation but has no house of her own. She earns a gross salary of $4 300 and has custody of Shanani, now eight years old, the last child of her union with the appellant. Shanani attends school where she teaches. She would, however, like the child to enjoy the same standard of education whilst living in a good residential suburb in Bulawayo. She is unable to provide that standard of education for the child because of her relatively poor financial circumstances. She is, however, certain that the appellant can provide her with financial resources for the purpose because according to her he can afford it. He has a company house, a company car and earns a high salary with high pension benefits.

In connection with the property she maintained her claim that she was entitled to a half-share in number 4 Antelope Road, Matsheumhlope, Bulawayo and also a half-share in the Lake Kyle house in Masvingo. She also claimed the Morris Minor motor vehicle valued at $4 000 and furniture and effects which she valued at $10 000. In this connection, she stated that she worked hard for the property they got and contributed fully as the appellant's wife. She, throughout her stay with the appellant, was not aware of the allegation that the marriage was bigamous and as such fully contributed to the family well being as a properly married wife. She also indicated that if the

court held her marriage to be bigamous then the property ought to be shared as if their relationship was a universal partnership.

Under cross-examination, she denied that she and her parents knew that the appellant was married at the time he was courting her. She explained that she first met one of the appellant's children in 1974 at which time she was expecting her first child by the appellant. Then the appellant's sister was residing with the appellant. The sister then told her that the appellant was divorced. She denied that the appellant felt obliged to marry her because she fell pregnant as she could not, in her state, have remained in the teaching profession without proof of marriage. She explained that all that was required of her as a teacher was a birth certificate. The respondent further explained that it was the appellant who instead kept constant pressure on her parents to consent to his marriage to her.

The appellant's evidence was to the effect that he met the respondent in October 1973 when he

Copyright Juta & Co Ltd

was then Chairman of the Young People's Christian Movement. Shortly after that members of that movement organised a trip from Bulawayo and he and the respondent were booked on the train as Mr and Mrs Makovah and shared one compartment. They engaged in sexual intercourse during the journey and on the return journey he told the respondent that he was married. This surprised her and as a result there was no communication between them for about a week. After that they resumed their relationship.

The two continued to meet at various hideouts until 1974 when the appellant invited the respondent to his home. His wife had left the matrimonial home in about March or April that year to think over how they would resolve their matrimonial problems.

Later, the respondent fell pregnant, well aware of his marital status. The appellant thereafter asked his elder brother to approach the respondent's parents and tell them that he (appellant) was responsible for the pregnancy and that although he was married he intended to resolve his problems with his wife and thereafter marry the respondent then five months pregnant. The appellant's friend one David Khabo (``Khabo'') was to be the go between. The respondent's parents, however, refused to talk to the two. When this was reported to the respondent she suggested that they ask one Mr Phiri to act as a go-between instead. Thereafter Khabo and the appellant again approached the respondent's parents but they again refused to see them because the appellant was married.

In 1980, the respondent's parents accepted the appellant as their son-in-law. The appellant, through his go-between, again made a further approach to the parents. This time they agreed and the appellant was ordered to pay damages. The appellant explained that some time in 1979 the respondent told

her that she intended to go back to teaching. He pointed out to her that she would not be allowed back because she had two children out of wedlock. It was then that the respondent suggested that they get married. She then arranged everything and they were married at the District Commissioner's Office on 10 January 1980. The respondent was registered as the first wife because he would not have been allowed to marry before divorcing his wife.

In connection with the matrimonial property, the appellant's evidence was to the effect that when he met the respondent in 1973 he was earning $500 a month. In 1980, he was earning $2 500 as Group Personnel Manager and the appellant was earning about $100. When he bought the house in the Bulawayo suburbs in 1982 he paid the deposit. He was granted a bond by his employers and he paid the transfer fees with his bonus. The bond instalments of $300 per month were deducted from his salary. The instalments were later increased to $800 per month because he had taken a further bond to cover such improvements as an electric gate, radio controlled alarm and a satellite dish. He denied that he received any financial assistance from the respondent in respect of the above matters.

In August 1985, he and the respondent went on an overseas trip. On their return, he learnt that she had an affair with one Gerald Masuku and as a result he assaulted her. He then became

Copyright Juta & Co Ltd

concerned about the welfare of his children. This resulted in him going to look for a house to buy in Masvingo for his children. He denied that the house was advertised in the press but stated that he simply consulted some estate agents on houses available and he settled on the Lake Kyle house. He purchased the house on a deed of sale. To make up the purchase price, he borrowed $9 000 to add to the $6 000 he had already paid. The house was transferred to him on 16 December 1987 and he donated it to his son Bruce Makovah the next day. The appellant again stated that he received no financial assistance from the respondent on the above transaction. According to him, she was not aware of the transaction until December 1985 when they went on holiday. However, the respondent's allegation that she signed a bank guarantee for some of the funds that were used in purchasing the house was not seriously challenged.

The appellant stated that the Morris Minor motor vehicle mentioned by the respondent was bought for his daughter although the respondent used it. The butchery was closed on 31 December 1985 because it was running at a loss.

All in all, the appellant admitted that the respondent made a contribution towards the acquisition of the family assets but considered that she was not entitled to half of the assets.

The appellant was of the view that the respondent was able to support Shanani. He, on the other hand, had heavy financial commitments which included paying for the secondary and university education of his seven

MUCHECHETERE JA

children. In particular, he was paying for the post-graduate education of his son Julius at the rate of R22 000 (twenty-two thousand South African rand) per year.

[*The learned Judge of Appeal considered the appellant's evidence under cross-examination and the other defence evidence, and continued:*]

In my view, the appellant's defence was generally dishonest. He got involved with an unmarried person when he was married without revealing his marital status. This was in spite of the fact that he was a Chairman of the Young People's Christian Movement and a member of the Catholic Church. He went as far as registering his marriage fully aware that he was married in church and that his subsequent registered marriage would be bigamous. He even allowed another lie to be entered on the subsequent registration certificate - that the respondent was the first wife. After all that he has the temerity to defend the respondent's suit on the basis that their marriage was bigamous. That, in my view, is the height of dishonesty. This tendency towards dishonesty is further displayed by the fact that even though he has still not yet divorced his first wife he is now living with another unmarried woman who he has a child with.

The learned trial judge, in my view, properly rejected the appellant's evidence and that of Khabo. Apart from anything else that evidence did not read well. It was therefore properly held that the respondent was unaware of the fact that there was still a subsisting marriage between the appellant and his first wife at the time the appellant registered their (appellant's and respondent's) marriage in terms of the African Marriages Act. She was the innocent party in the

Copyright Juta & Co Ltd

marriage whilst the appellant cannot, in any way, claim that he was also an innocent party.

I have no difficulty in accepting Mr *Nherere*'s well argued submission that African customary law knows no concept of putative marriage and that the learned trial judge therefore erred in finding that there was a putative marriage between the parties. I am always unhappy with the introduction of common law concepts into African customary law, as this distorts African customary law. Having said that, I am of the view that it is not a necessity that a finding of a putative marriage be made in order for the provisions of ss 7 to 11 of the Matrimonial Causes Act [*Chapter 5:13*] (``the Act'') to be triggered. Section 7(1) of the Act reads:

> ``(1) Subject to this section, in granting a decree of divorce, judicial separation or *nullity of marriage*, or at any time thereafter, an appropriate court may make an order with regard to -
>
> (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;

MUCHECHETERE JA

> (b) the payment of maintenance, whether by way of a lump sum or by way of periodic payments, in favour of one or other of the spouses or of any child of the marriage'' (emphasis is mine).

In my view, the above provisions cover a marriage, such as the present one, which is declared null and void. If it were not the case it would work an injustice and hardship on a party, such as the respondent in this case, who laboured and contributed towards the marriage and the accumulation of the matrimonial property under the impression that the marriage was valid. It would also unjustly enrich a dishonest party such as the appellant in this case simply because the property in question is either registered in his name or is under his control. Such a position is unconscionable and the legislature by using the expression ``nullity of marriage'' must have envisaged that a situation such as the present one would be covered. I should state that such situations are very common in African society because of the failure by many to realise that once they contract a ``church'' marriage their marriage becomes monogamous.

In the circumstances, the trial judge acted properly in applying the provision of s 7 of the said Act on the issue of the division of matrimonial property.

As for actual division of the property and award of the child's maintenance, the learned trial judge cannot in any way be said to have favoured the respondent. Rather, I would say that she ought to have been more generous towards the respondent, who was clearly the wronged party and a person who ``put her all into the marriage: her salary, her time, her service as housekeeper, butchery manager, chauffeur and nurse and mother for all the children, including those of the defendant's previous marriage''. I am therefore in general agreement with the following sentiments by the learned trial judge:

> ``... Even excluding the Kyle house which the defendant transferred to his son, the evidence shows the defendant's wealth to be well in excess of $3 000 000 when the shares as well as the two immovable properties are taken into account. In addition, he earns a very high salary. The defendant is by all standards a wealthy man. All the property was acquired during the subsistence of the putative marriage.''

I would have included the Kyle house in my consideration. And if the respondent had

Copyright Juta & Co Ltd

counter-appealed on the division of property I would have found in her favour and awarded her more than she was awarded. In the circumstances, I consider that the order by the learned judge ought to be upheld in every respect. By way of explanation, I should say that it is clear that the learned trial judge was of the view that in connection with the Bulawayo house the respondent was to be given at least $300 000 and that if it fetched more than $600 000 - say $700 000 - on the market she should be given half of the higher figure, say $350 000. She came to this conclusion after taking into account that the appellant had other property. In this connection, she said:

MUCHECHETERE JA

> ``Bearing in mind the wealth of the defendant, it seems fair and just that the plaintiff should be awarded a substantial share of the Bulawayo house. Since no formal valuation of the property is before the court, I assess the value of the plaintiff's share on the basis of the plaintiff's estimate of $600 000. Should the value of the property prove be less than $600 000 I am satisfied that the plaintiff should be awarded as her share a minimum of $300 000.''

The respondent is therefore not to receive less than $300 000, but should receive half of the value of the Bulawayo house if the house should fetch more than the $600 000 on the market.

In the result, the appeal is dismissed with costs.

McNALLY JA: I agree.

SANDURA JA: I agree.

Sawyer & Mkushi, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

DUBE *v* BANANA 1998 (2) ZLR 92 (HC)

Court **High Court, Harare**

Smith J

Special plea in bar

11 November 1997 & 15 July 1998 Judgment No. HH-103-98

Flynote

Prescription - date on which debt arose - mental stress resulting from unlawful sexual acts committed several years previously - claim that plaintiff only became aware during prescription period that stress caused thereby - patrimonial loss alleged to have been caused at time sexual acts committed - ``once and for all'' rule - when loss may be said to have been sustained - where separate causes of action may arise out of same act

Headnote

Copyright Juta & Co Ltd

The plaintiff sued the defendant, the former President of Zimbabwe, for damages arising out of sodomy and other sexual acts he alleged had been performed on him, against his will, by the defendant. The acts were alleged to have been committed during the period 1983 to 1986 when he was aide-de-camp to the defendant. The plaintiff claimed that as a result of the unwanted sexual acts performed on him, he became addicted to alcohol and drugs and his work performance deteriorated. In September 1995, he shot and killed a police officer, after having taken alcohol in excess. In February 1997, he was convicted of murder, but with diminished responsibility. The medical evidence led at his criminal trial showed that he was suffering from post-traumatic stress disorder, caused by the acts committed by the defendant. The medical evidence also showed that this disorder contributed to the plaintiff's addiction to drugs and alcohol.

Apart from denying the allegations, the defendant filed a special plea in bar, on the grounds that the plaintiff's claims were founded on wrongful conduct which occurred more than 3 years before the date of issue of summons. The plaintiff then amended his claim to one for damages for mental stress and disorder, suffering and loss of amenities of life.

It was argued for the plaintiff that he only became aware of the facts on which his claim was based in 1996, when he was made aware that the cause of his mental stress was the sexual acts performed on him by the defendant. The defendant argued that the acts complained of were wrongful in themselves and the sole issue was when the plaintiff became aware of the element of causation.

Held, that the only matter for determination was when the plaintiff became aware of the facts from which the claim arose or his ``cause of action''. The cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed in his action. The facts must enable the court to reach a conclusion regarding unlawfulness and fault, as well as damage. The occurrence of either patrimonial loss or emotional harm completes the delictual cause of action.

Held, further, that it is well established in our law that only one action may be instituted for all

the harm, actual and prospective, that results from a single cause of action. This rule is known as the ``once and for all'' rule, and its purpose is to prevent a multiplicity of actions based on a single cause of action and to ensure that there is an end to litigation. The essential question is whether a single cause of action arises for the purposes of extinctive prescription when an act unlawfully causes actual loss and, at the same time, creates the possibility of additional future loss. The approach of the courts has not been uniform. Different kinds of patrimonial loss can arise from the same act and may require proof of different facts. For example, the same act could cause bodily injury and loss of support, the *facta probanda* for one being quite distinct from those for the other.

Held, further, that in this case the claim was based on patrimonial loss allegedly suffered at the hands of the defendant. To allow that loss to give rise to different causes of action would be to

Copyright Juta & Co Ltd

open a Pandora's box. It would permit actions arising out of events which occurred possibly 20 or 30 years earlier. The plaintiff's cause of action arose when he was allegedly being assaulted by the defendant and thus was prescribed.

Cases cited:

Abrahamse & Sons v *SAR&H* 1933 CPD 626

Apalameh v *Santam Ins Co Ltd* 1975 (2) SA 229

Cape Town Municipality & Anor v *Allianz Ins Co* 1990 (1) SA 311 (C)

Coetzee v *SAR&H* 1933 CPD 565

Coetzee v *SAR&H* 1934 CPD 221

Custom Credit Corp v *Shembe* 1972 (3) SA 462 (A)

Evins v *Shield Ins Co Ltd* 1980 (2) SA 814 (A)

Gumbo v *Sunganayi Express Motorways* 1988 (2) ZLR 83 (H)

Kantor v *Welldone Upholsterers* 1944 CPD 388

Letang v *Cooper* [1964] 2 All ER 929; [1965] 1 QB 232

Oslo Land Corp Ltd v *Union Govt* 1939 AD 584

Patel v *Controller of C&E* 1982 (2) ZLR 82 (H)

Pickering v *Syfin Hldgs Ltd* 1981 ZLR 344 (H)

Sadomba v *Farayi Uzumba Ltd & Anor* 1982 (3) SA 558 (ZH)

Stubbings v *Webb & Anor* [1991] 3 All ER 949 (CA)

Stubbings v *Webb & Anor* [1993] 1 All ER 322 (HL); [1993] AC 498

Stubbings & Ors v *UK* (1997) 23 EHRR 213

Syfin Hldgs Ltd v *Pickering* 1982 (1) ZLR 10 (S)

Legislation referred to:

Prescription Act [*Chapter 8:11*], s 2(2) and 16

Case Information

H Zhou, for the plaintiff

E W W Morris, for the defendant

Judgment

Copyright Juta & Co Ltd

SMITH J: The plaintiff (hereinafter referred to as ``Dube'') issued summons claiming damages in the sum of $1.305 million from the defendant (hereinafter referred to as ``Banana''). His claim was based on the following allegations. He was an inspector in the Zimbabwe Republic Police. He attested in 1982. In 1983, he was transferred to State House as an aide-de-camp to Banana who, at the time, was President of Zimbabwe. During the period from December 1983 to 1986, Banana indecently assaulted and sodomized him on

SMITH J

a number of occasions. Between 1984 and 1986, he brought to the attention of his superiors his ordeal at the hands of Banana. From 1984 he became addicted to alcohol and drugs and his performance at work deteriorated. He began to suffer from memory-loss, poor concentration, absent-mindedness, nightmares involving Banana committing acts of sodomy on him against his will, and loss of sexual desire. In September 1995, shortly after he had taken alcohol in excess and been smoking dagga, he shot and killed a police constable. In February 1997, he was convicted of murder, but with diminished responsibility, and sentenced to 10 years' imprisonment. The medical evidence obtained in 1996 showed that he was suffering from post-traumatic stress disorder. That condition was caused by Banana's conduct of committing acts of rape on him. The medical evidence also showed that the post-traumatic stress disorder contributed to his addiction to alcohol and drugs.

Banana entered appearance to defend the action. He denied all the allegations made by Dube and put Dube to the proof thereof. He then filed a special plea in bar on the grounds that Dube's claims were founded on wrongful conduct which allegedly occurred more than three years prior to the issue of summons. Accordingly the claims were prescribed.

Before argument was heard on the special plea, Dube amended his claim by withdrawing the claim for damages in the sum of $1.305 million and substituting one for damages of $200 000 for mental stress and disorder, suffering and loss of amenities of life.

Mr *Zhou* argued that Dube's claim was not prescribed as he only became aware of the facts on which his claim is based in 1996. It was in that year that he became aware that the cause of his psychological or mental stress and disorder was the acts of sodomy and indecent assault, which Banana committed between 1984 and 1986. No amount of ``reasonable care'' would have enabled Dube to know the full facts underlying his state of mind prior to 1996, particularly given the level of his stress and psychological instability.

Mr *Morris* submitted that Mr *Zhou* had confused causation or *damnum* with the nature of the damage. He argued that the indecent and other assaults complained of are wrongful *per se*, and therefore the sole issue is when Dube became aware of the element of causation. Our law recognises the ``once and for all'' rule which states that a plaintiff, when suing for damages, must sue for all his damages in a single action, both for loss suffered and for prospective loss. To allow Dube to persist in his claim would be tantamount to allowing him to claim his damages piecemeal. He knew, as soon as he had been sodomised, that a wrongful act had been committed against him and that he had been damnified. The acts complained of are wrongful *per se* and so Dube knew of the fault. He knew at the time that the acts had caused some kind

Copyright Juta & Co Ltd

of damage and therefore, at that stage, his cause of action was complete.

SMITH J

In order to determine whether or not Dube's claim is prescribed one starts with the Prescription Act [*Chapter 8:11*]. In s 2(2) of that Act the word ``debt'' is given a very wide meaning. It is defined as follows:

> ```debt', without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.''

One then turns to s 16 which reads as follows:

> ``(1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due.
>
> (2) If a debtor wilfully prevents his creditor from becoming aware of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> (3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:
>
> Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care.''

Since the identity of the debtor in this case is not in issue, the only matter for determination is: when did Dube come aware of the facts from which his claim arises or, as it is usually expressed, his cause of action? In *Abrahamse & Sons* v *SA Railways and Harbours* 1933 CPD 626 at 637 WATERMEYER J said:

> ``The proper legal meaning of the expression `cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not `arise' or `accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.''

Similar views were expressed by GUBBAY J (as he then was) in *Patel* v *Controller of Customs & Excise* 1982 (2) ZLR 82 (H) at 85 where he said:

> ``In *Controller of Customs* v *Guiffre* 1971 (2) SA 81 (R) at 84A, BECK J (as he then was) discussed the meaning of the phrase `the cause of the action' and adopted the definition of LORD ESHER MR in *Read* v *Brown* (l888) 22 QBD 131 as being every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove such fact, but every fact which is necessary to be proved.''

Generally, the cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed in his action. The facts must enable the court to reach a conclusion regarding unlawfulness and fault and also damage. The occurrence of either patrimonial loss or emotional harm (for example *contumelia*, pain or mental illness) completes the delictual cause of action. In *Coetzee* v *SA Railways & Harbours* 1933 CPD 565 at 570-1 GARDINER JP said:

Copyright Juta & Co Ltd

``Now in delict, a wrongful act or omission does not always of itself entitle a person

SMITH J

complaining of it to judgment. There are cases where it does, eg where *contumelia* is involved, but there are many cases where the wrongful act does not give the plaintiff a right to judgment, unless damage has been sustained. And the damage need not be contemporaneous with the wrongful act. There may be a wrong without, at the time, any damage, and after an interval damage may for the first time result ... Now the present suit is in the form of an action under the *Lex Aquilia*, and for such an action to succeed, damage must be proved.''

It is well established in our law that only one action may be instituted for all the harm, actual and prospective, that results from a single cause of action. That rule is based on the policy consideration that a single cause of action should not give rise to a multiplicity of actions and to ensure that there is finality to litigation. If the person who has been injured in his person or property does not know the full extent of his losses in the future, or his potential losses, he must estimate what they will be, for he cannot keep bringing separate claims arising out of the same cause of action. The rule which is enunciated above is known as the ``once and for all rule''. In *Evins* v *Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835A-E CORBETT JA (as he then was) said:

``The `once and for all' rule applies especially to common law actions for damages in delict, though it has also been applied to claims for damages for breach of contract ... Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages...This rule appears to have been introduced into our practice from English law. Its introduction and the manner of its application by our courts have been subjected to criticism (see van der Walt *op cit* at 425-85), but it is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.''

A leading case concerning the application of this rule is *Oslo Land Corporation Ltd* v *Union Government* 1938 AD 584. The facts in that case were as follows. A company owning cattle farms alleged that it had suffered loss as a result of the spraying of locust poison of excessive strength on its farms by government agents. Containers still containing quantities of the poison were left behind and contributed to the damage. The spraying took place from February to April 1934 and the summons was issued in September 1937, more than the applicable prescription period of three years after the spraying. Before the spraying ceased, six head of cattle had already died, and during the next two years many more died or deteriorated in condition to such an extent that they had to be disposed of. Eventually, all the remaining cattle had to be sold and the stock farming operations had to be discontinued. The defendant raised the plea of prescription and the issue in this regard was when the cause of action accrued for the purposes of s 11(1)(a) of the Transvaal Prescription Act 26 of 1908.

The court held that in a negligence action under the *lex Aquilia*, the cause of action is made up of an unlawful act and damage. The cause of action is

SMITH J

complete as soon as damage is caused to the plaintiff by the defendant's unlawful act. Damage

Copyright Juta & Co Ltd

in this context does not mean physical injury to property, but *damnum*, ie the patrimonial loss suffered by the plaintiff as a result of the defendant's unlawful act. The court accepted the following finding by the trial court on the evidence:

> ``... [I]njury to the farms and danger to the cattle arose immediately after the application of the arsenical preparations and ... by the end of April six beasts had died from them.''

It was held, consequently, that a cause of action had accrued once and for all upon completion of the spraying of the poison. This cause of action accrued not only in respect of all loss already sustained at that stage, but also in respect of all loss sustained later. Because action was instituted more than three years after the accrual of the cause of action, the plea of prescription was upheld in respect of the defendant's total potential liability for damages, including the damages arising from later cattle losses that had occurred within the three-year prescription period preceding the date when the action was instituted.

In the *Coetzee* case *supra*, where the court was considering an exception taken by the defendant, the facts were as follows. Coetzee had sustained an injury in the course of his employment with the defendant. Some six years later a disease brought about as a result of the injury manifested itself and Coetzee became permanently incapacitated. He claimed damages from his erstwhile employer for loss of prospective earnings and pain and suffering. The court had to decide, on exception, whether prescription had taken effect in respect of the cause of action as set out in the pleadings. Since the pleadings contained no allegation by Coetzee that he had sustained loss or suffered pain prior to the manifestation of the disease, the court held that the cause of action in respect of patrimonial loss did not necessarily arise at the time of the injury nor necessarily at the time when the disease first manifested itself, but only when actual patrimonial loss was sustained. Furthermore, since it could not be determined on the pleadings that actual patrimonial loss had been sustained prior to the manifestation of the disease, the court held that the cause of action in respect of patrimonial loss did not necessarily arise at the time of the injury nor necessarily at the time when the disease first manifested itself, but only when actual patrimonial loss was sustained. Because it could not be determined on the pleadings that actual patrimonial loss had been sustained prior to the manifestation of the disease, the exception was not upheld.

Since the exception was not upheld, the matter went to trial. At the subsequent trial it appeared from the evidence that the plaintiff's capacity for work had already been impaired by his injury prior to the manifestation of the disease that led to his dismissal. He had also suffered a certain amount of pain,

but no appreciable pecuniary loss. In its judgment, reported in 1934 CPD 221, the trial court found on the evidence that the loss which the plaintiff had suffered, and which gave rise to a cause of action, was the initial injury to his body. This injury impaired his capacity to earn a living. His subsequent dismissal was, therefore, not a new loss, but a consequence of his impaired capacity to work. The applicable prescription period had therefore begun at the time of the injury and had expired before the action was instituted.

Copyright Juta & Co Ltd

This conclusion in the *Coetzee* judgment was based on the assumption that upon the occurrence of any loss or harm, emotional or pecuniary, in conjunction with the other constituent elements of Aquilian liability, a cause of action accrues once and for all. The cause of action in that case accrued when the injury and some pain occurred, even though there was no indication, at that stage of the disease, of the dismissal and concomitant pecuniary loss that were to follow. The once and for all rule had the effect in that case that prescription began to run in respect of a claim for a loss that was sustained long after the cause of action accrued, which loss was apparently both unforeseen and reasonably unforeseeable at the time of accrual of the cause of action. This judgment illustrates the unsatisfactory effect of the once and for all rule in cases where the loss or harm only becomes manifest many years later.

The once and for all rule has also been applied in actions arising from breach of contract. In *Kantor* v *Welldone Upholsterers* 1944 CPD 388 the plaintiff firm of upholsterers, Welldone, had bought wood from Kantor for making furniture. Beetle infestation made the wood unsuitable for use in the making of furniture. In ignorance of this fact, Welldone had used the wood to make furniture which it then sold. Subsequently, several purchasers cancelled their contracts and returned the furniture. Welldone instituted action and recovered the cost of the wood and damages for loss of profits from Kantor. Subsequently, other purchasers likewise cancelled their contracts and Welldone instituted a further action for damages against Kantor. Kantor excepted to the claim on the ground that it amounted to a splitting of claims and also on the ground that the matter was *res judicata*. DAVIS J said at p 391:

> ``In my opinion, the plaintiff who has once sued in an action such as the present, for damages, cannot bring a further action for any further damage he may suffer or may discover after the date when he has obtained judgment. In the case of *Oslo Land Co Ltd* v *Union Government* 1938 AD 504, this matter was dealt with by the present Chief Justice in connection with a claim for damages for negligence, and he points out that it has always been the practice - and he holds that it is the law - that all damages must be claimed in one action whether such damages have already accrued or are still prospective. That same principle was applied in the earlier Appellate Division decision in *Jacobs* v *Cape Town Council* 1917 AD at p 620. I can draw no distinction between an action such as this on a contract and an action on tort. The cause of action in both cases is the unlawful act of the defendant together with the occurrence of some damage suffered by the plaintiff.''

SMITH J

At p 392 the learned judge went on to say:

> ``It is a hardship perhaps on the plaintiff who does not know of some damages at the time he brings his action not to be able to bring a subsequent action in respect of them...But it is a hardship also on a defendant never to know when he is clear from the effects of his negligence or breach of contract ... and it is in my opinion a wise policy of law that there must be an end to lawsuits.''

In *Custom Credit Corporation* v *Shembe* 1972 (3) SA 462 (A) the Appellate Division dealt with a case where the purchaser of a vehicle had been successful in claiming damages and cancellation of the contract of sale and then instituted a second action claiming additional damages. His second action was dismissed. At p 472A-D VAN WINSEN AJA said:

> ``The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the ratio underlying the rule that, if a cause of action has previously been finally litigated between parties, then a subsequent attempt by the one to proceed against the other on the

Copyright Juta & Co Ltd

same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae*. The reason for this rule is given by Voet 44.2.1. (Gane's translation, vol 6, p 553) as being -

> `to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different judicial proceedings'.

This rule is part of the very foundation of our law and is of equal application to the criminal law - in support of a plea of *autrefois acquit* (see eg *R* v *Manasewitz* 1933 AD 165 at 168, 176, 184-187) - as it is to civil claims for damages resulting from negligent acts (see eg *Cape Town* v *Jacobs* 1917 AD 615 at 620; *Oslo Land Co Ltd* v *Union Government* 1938 AD 584 at 591) and to claims arising out of a breach of contract (see eg *Kantor* v *Welldone Upholsterers* 1944 CPD 388 at 391; *Boshoff* v *Union Government* 1932 TPD 345). The rule has its origin in considerations of public policy which require that there should be a term set to litigation and that an accused or a defendant should not be twice harassed upon the same cause.''

In Loubser's *Extinctive Prescription* the learned author, after discussing the cases mentioned above, said that the essential question in all the cases was whether a single cause of action arises for the purposes of extinctive prescription when an act unlawfully causes actual loss and, at the same time, creates the potential of additional future loss. The once and for all rule prevents more than one action being instituted for damage resulting from a single cause of action. The essential question is, therefore, whether only one cause of action is involved. At p 85 he points out that the approach of South African courts to the concept of ``cause of action'' in the context of prescription is not uniform and says:

> ``On the one hand, the concept is understood in a wide sense, with the emphasis on the substance of the claim and correlative debt rather than on the different facts which give rise to the claim and debt. This is also known as the `single cause' approach, characterised by the tendency to regard different items of damage arising from the same or substantially the same conduct, transaction or occurrence as elements of a single cause of action.

SMITH J

> On the other hand, there is the `*facta probanda*' approach, where the emphasis is placed on differences in the evidence needed to support the claim or to prove different items of damage, with the result that substantial differences in evidence will be regarded as an indication that different causes of action are involved.''

The *facta probanda* approach was formulated in the *Evin*s case *supra*, where the Appellate Division considered the situation where one act caused different kinds of patrimonial loss to a particular claimant. The court accepted that different kinds of patrimonial loss resulting from the same occurrence may constitute separate Aquilian causes of action, in respect of which prescription may begin to run at different times. In that case, the court decided that separate causes of action arose from a motor vehicle accident where the plaintiff suffered patrimonial loss as a result of her own bodily injury and also loss of support as a result of the death of her husband. As a general principle, separate actions could be instituted for these two different kinds of patrimonial loss and prescription would begin to run at different times where the bodily injury and the death did not occur at the same time. By the same token, the service of a summons interrupting prescription in respect of the claim for bodily injury would not also interrupt prescription in respect of the claim for loss of support.

CORBETT JA, with whom JOUBERT JA and GALGUT JA concurred, arrived at this decision by analysing the constituent elements of a delictual cause of action in the case where damages for bodily injury are claimed (class A) and in the case where damages for loss of support are

Copyright Juta & Co Ltd

claimed (class B). He concluded that in class A, the ingredients of the cause of action are: (a) a wrongful act by the defendant causing bodily injury; (b) fault on the part of the defendant; and (c) patrimonial loss caused by the bodily injury. In class B the ingredients of the cause of action are: (a) a wrongful act by the defendant causing the death of the deceased; (b) concomitant fault on the part of the defendant; (c) a legal right to be supported by the deceased; and (d) patrimonial loss in the form of deprivation of anticipated support. He further concluded that, despite a measure of overlapping, the *facta probanda* in a claim based on bodily injury differ substantially from the *facta probanda* in a claim for loss of support. Proof of bodily injury to the plaintiff is basic to the former claim, whereas proof of death of the breadwinner, and of the right to support and the real expectation that such support would have been forthcoming, are basic to the latter. Even where both claims flow from the same accident, the cause of action in respect of the two claims may arise at different times, and the applicable prescription period may likewise begin to run at different times.

Although the decision in the *Evins* case produced a satisfactory result, the criterion applied by the court to determine whether or not more than one

SMITH J

cause of action arose presents some problems, as is pointed out in Loubser's *Extinctive Prescription*, §4.6.3. At pp 90-91 the learned author says:

> ``If similarity of the *facta probanda* in respect of the different kinds of patrimonial loss is to be the criterion, it seems that the answer depends on the specificity of the concept of *facta probanda*. In broad terms, the *facta probanda* in this case were negligent driving that caused personal injury entailing medical costs and the death of a breadwinner entailing loss of support. The more specific the concept of *facta probanda*, the more readily different causes of action will be identifiable.
>
> Moroever, contrary to what the judgment in *Evins* case appears to suggest, it cannot be accepted as a general principle that different causes of action arise where one incident causes different kinds of patrimonial loss and each kind of loss occurs by way of a different causal sequence of events. For example, where the injuries sustained by the plaintiff in a motor-vehicle accident entail medical expenses and loss of earnings each of the two different kinds of patrimonial loss occurs by way of a different causal sequence of events, but the different kinds of loss are regarded as forming part of one cause of action. Likewise, where a father suffers financial loss in the form of medical expenses as a result of the injuries which he and his son sustained in the same accident, the different items of loss are regarded as forming part of one cause of action. It appears therefore that differences in respect of the kind of patrimonial loss and the causal sequence of events leading up to the loss are matters of degree, providing an imprecise and inconsistent criterion for determining when different causes of action arise out of the same incident.
>
> The other criterion referred to in the *Evins* judgment, namely the identification of `distinct wrongful acts' (the act of causing injury to the plaintiff and the act of causing the death of her breadwinner), also presents problems. In the first place, wrongfulness is not an attribute solely of the delictual act, but of the causally linked sequence of events set in motion by the act and resulting in harm. The expression `unlawful act' in the law of delict is therefore an abbreviation for `an act which unlawfully causes harm'. Furthermore, unlawfulness is determined directionally, with regard to the consequences of an act for a particular plaintiff, and not in the abstract. The negligent driver in the *Evins'* case did not commit two distinct unlawful acts, but rather by one act unlawfully caused two different kinds of patrimonial loss for the plaintiff, namely the loss resulting from her personal injury and the loss resulting from the death of her husband.''

Copyright Juta & Co Ltd

In *Gumbo* v *Sunganayi Express Motorways* 1988 (2) ZLR 83 (H) at 85, REYNOLDS J said:

> ``Although the debt often becomes due at the same time as it arises, this does not necessarily follow (see *Apalameh* v *Santam Insurance Co Ltd* 1975 (2) SA 229 at 232E). In the present matter, I consider that the plaintiff's claim for damages would not become due until it has been quantified, and demand made of the defendant."

The *Apalameh* case he referred to is indeed authority for the suggestion that a debt does not necessarily become due at the same time as it arises. That suggestion was supported by WADDINGTON J in *Sadomba* v *Farayi Uzumba Ltd & Anor* 1982 (3) SA 558 (ZH). At p 561A-C he pointed out that, in terms of s 15 (now s 16(1)) of the Prescription Act, prescription begins to run in a case not arising from contract not necessarily when the debt arises but only when it becomes due. Neither case, however, supports the proposition

enunciated by REYNOLDS J that prescription in a delictual claim only commences to run when damages are quantified and demand made. In this regard, see too the cases of *Pickering* v *Syfin Holdings Ltd* 1981 ZLR 344 (H) at 346H and *Syfin Holdings Ltd* v *Pickering* 1982 (1) ZLR 10 (S) at 19E and 24D.

In *Stubbings* v *Webb & Anor* [1993] 1 All ER 322 (HL); [1993] AC 498 the House of Lords had to deal with the question of prescription. The plaintiff in that case, Mrs Stubbings, who was 36 years of age at the time her appeal was heard in the House of Lords, claimed that she had been sexually abused on a number of occasions by her adoptive father and his son, which caused her to experience severe psychological problems. It was not until September 1984, however, following treatment by a psychiatrist, that she realised for the first time that there might be a connection between the childhood abuse and her state of mental health. On l8 August 1987, she commenced proceedings against the father and son, seeking damages for the alleged assaults. The defendants applied to have the claim dismissed as time-barred under the Limitation Act 1980 (``the 1980 Act''). Both the High Court and the Court of Appeal were bound by earlier authority (*Letang* v *Cooper* [1964] 2 All ER 929; [1965] 1 QB 232) to hold that Mrs Stubbings' claim was based on a ``breach of duty'' within the meaning of s 11 of the 1980 Act. The limitation period for such actions was three years, either from the date on which the cause of action accrued or from the date on which the plaintiff first knew the injury in question was both significant and attributable to the defendants. The Court of Appeal *(66) accepted Mrs Stubbings' argument that she did not realise that she had a cause of action until September 1984, when with therapy she grasped the causal link between the abuse and her mental health problems. In any case, s 33 of the 1980 Act provided that the court could allow such an action to proceed even if it commenced after the expiry of the three-year period, where it would be equitable to do so.

The defendants appealed to the House of Lords which, having considered the background to the 1980 Act, held that the words ``breach of duty'' in s 11 did not in fact embrace action based on intentionally inflicted injuries, such as rape and indecent assault. Instead, these types of claims were subject to the six-year limitation period provided for in s 2 of the 1980 Act. This limit, which could not be disapplied by the court, started to run from the plaintiff's eighteenth birthday (s 28). Mrs Stubbings' claim was thus out of time.

Copyright Juta & Co Ltd

The speech to the House of Lords in the *Stubbings*' case *supra*, was delivered by LORD GRIFFITHS. In the course of his speech, he expressed certain views which I consider to be relevant to the circumstances of this case.

SMITH J

In opening his speech at 324d-e of the All England Reports he said:

> ``My Lords, the respondent will be 36 years of age on 29 January 1992. The question before your Lordships is whether the law permits her to pursue a claim for damages against her adoptive father and stepbrother based upon allegations that she was sexually abused by the adoptive father between the ages of 2 and 14 and raped by her stepbrother when she was 12 and he was 17. It should be made clear that these allegations are denied by both the father and stepbrother who are the appellants before your Lordships. It would obviously be a matter of grave difficulty for any court to determine where the truth lies if this action was to proceed, for it would be investigating events that are alleged to have occurred in a period starting over 30 years ago and ending over 20 years ago. It is also to be observed that neither the stepfather nor the stepbrother would appear to have the means to satisfy any significant award of damages.''

The learned LORD OF APPEAL in Ordinary then set out the development of the 1980 Act, which is analogous to our Prescription Act. After referring to certain amendments to the Act he went on at 326-7 to say:

> ``The next significant development in the law of limitation in personal injury cases arose out of the discovery that plaintiffs might suffer injury to their lungs in the course of their employment as a result of inhaling noxious dusts long before they realised that their health was affected and the decision of the House of Lords in *Cartledge* v *E Jopling & Sons Ltd* [1963] 1 All ER 341, [1963] AC 758 that time ran for the purposes of limitation from the moment that the plaintiff had suffered injury irrespective of whether or not he was aware of it. This was a great hardship, for it meant that many men who had suffered injuries as a result of the employer's negligence or breach of statutory duty were unable to recover damages because by the time they sought medical advice their claims were already statute-barred. Parliament moved swiftly to remedy this injustice by enacting the Limitation Act 1963 which enabled the court to extend the three-year limitation period in cases such as *Cartledge* v *E Jopling & Sons Ltd*. As rightly stated by the editors of *Clerk and Lindsell on Torts* (16 ed 1989) para 9-46, p 406:
>
> > `Unfortunately, the provisions of the Limitation Act 1993 were over-complicated and worked extremely badly.''

CORBETT JA in the *Evins* case *supra* at 836B said:

> ``The concept of a cause of action is also of particular importance in regard to the prescription of claims for damages in delict. If a cause of action for such damages has accrued and the prescriptive period has run, the claimant's right of action is prescribed and he is precluded by prescription from suing for damages arising from the same cause of action even though the loss giving rise to the claim for damages occurs or becomes manifest after the prescriptive period has run.''

The case under consideration is, in my opinion, similar to *Coetzee*'s case *supra*. In that case, when the court was considering the exception in 1933, it held that because, on the pleadings, it could not be determined that actual patrimonial loss had been suffered prior to the manifestation of the disease, the exception should be dismissed. However, at the trial the following year, the court found, on the evidence, that the loss which Coetzee had suffered and which gave rise to a cause of action was the initial injury to his body. Therefore his claim was prescribed. In this case, Dube has amended his claim

Copyright Juta & Co Ltd

SMITH J

so as to base it on the post-traumatic mental stress from which he suffers and which was only diagnosed in 1996. Had that been his initial claim, I would have been disposed to follow the example set by *Coetzee*'s case *supra*, and -to dismiss the exception because there would have been no allegation of earlier patrimonial loss. However, that is not the case. The claim made in the summons clearly establishes that Dube did allege that he had suffered patrimonial loss at the time of the alleged actions of Banana. If I were to adopt the *facta probanda* approach enunciated in the *Evins* case *supra,* and decide that the different kinds of patrimonial loss suffered by Dube gave rise to different causes of action, I would be opening a Pandora's box. It would permit actions by a claimant arising out of events which occurred possibly 20 or 30 years earlier, as were the events in the *Stubbings* case *supra*. In my opinion, Dube's -cause of action accrued whilst he was allegedly being sexually abused by Banana.

In the *Evins* case *supra* at 840-1 CORBETT JA said:

> ``It was argued by appellant's counsel, on the authority of *Schnellen*'s case *supra* and *Green* v *Coetzer supra*, that claims for bodily injury and loss of support brought by a single plaintiff against the same defendant, arising out of the same occurrence and based upon the negligence of the defendant, constitute a single cause of action because in each case the claim is, as it were, based upon the *damnum* suffered by the plaintiff which is to be measured by the difference between the *universitas* of his rights and duties as it is after the wrongful act and what it would have been if the act had not been committed. It is true that the *universitas* concept does underlie the Aquilian action and that according to current theories (see also *Dippenaar* v *Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917B-D) the plaintiff's patrimonial loss is measured by the diminution of that *universitas*, but it does not follow, in my view, that, because in the same occurrence a defendant causes a diminution of the plaintiff's *universitas* in two ways, there is necessarily one cause of action. It depends on whether these different forms of diminution are traceable back to a single wrongful act. In the type of case under consideration there are, in my view, two distinct wrongful acts; in the one case it is the wrongful and negligent infliction of bodily injury to the plaintiff and in the other case it is the wrongful and negligent killing of the breadwinner, the person upon whom the plaintiff was dependent for support.''

Thus the learned JUDGE OF APPEAL found that there were two causes of action in that case, because the diminution in Evins' *universitas* was not traceable back to a single, wrongful act. In this case, the *damnum* or diminution of *universitas* suffered by Dube was traceable back to the alleged acts of Banana in the period from December 1983 to 1986.

Accordingly, for the reasons set out above, I consider that the exception must be upheld. Dube's right of action is prescribed.

The once and for all rule has been criticised by a number of well known authors. The criticism is mentioned by CORBETT JA in the *Evins* case *supra*. In *Cape Town Municipality & Anor* v *Allianz Insurance Co* 1990 (1) SA 311 (C) at 332 HOWIE J said:

> ``It seems to me that the once and for all rule may not endure unrestricted forever.''

SMITH J

In the *South African Journal on Human Rights* Vol 13 Part 3 at 482, there is reference to a

Copyright Juta & Co Ltd

judgment of the European Court of Human Rights - *Stubbings & Ors* v *United Kingdom* (1997) 23 EHRR 213. The case was brought by Mrs Stubbings and three other ladies who alleged that they had been sexually abused (in three cases by the father and in one by the deputy headmaster of the school she attended). In the case of the three other ladies, they had instituted actions claiming damages for sexual abuse inflicted when they were young girls. In each case the action had been discontinued because the legal practitioners concerned had decided that the action had become time-barred or prescribed. The applicants applied to the European Court complaining of violation of their rights in terms of various articles of the European Convention of Human Rights. The court found that there had been no violation as claimed. At p 485 of vol 13 the following is reported:

> ``The court found that the very essence of the applicants' right of access to court was not impaired since they had had six years from their eighteenth birthdays in which to initiate proceedings and since, subject to the need for sufficient evidence, a criminal prosecution could be brought at any time and a compensation order made.
>
> Limitation periods served the legitimate aims of ensuring legal certainty and finality, and protecting potential defendants from stale claims which might be difficult to counter. Limitation periods served to prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past.
>
> The court noted that there had been a developing awareness in recent years of the problems caused by child abuse and its psychological effects on the victims. It was possible that the rules on limitations of actions applying in Member States of the Council of Europe might have to be amended to make special provision for this group of claimants in the near future.'' *(67)

In my opinion, the once and for all rule should be modified. I consider that this can best be done by way of Act of Parliament rather than by ``judge made'' law which is, by its very nature, haphazard and piece meal.

The Law Development Commission of Zimbabwe issued a report in July 1995 entitled ``Report No. 43: Once and for all rule in claims for damages'' in which, as its title suggests, it examined the rule and in which it made recommendations for its reform.

I recommend that careful consideration be given to that Report and to the issues raised in this judgment in the light of the criticisms that have been made about the once and for all rule and to cater for the considerations referred to by CORBETT JA (as he then was) in the *Evins* case *supra* at 839-40.

The plaintiff's claim is dismissed with costs.

Hove, Dzimba & Partners, plaintiff's legal practitioners

Chirunda & Partners, defendant's legal practitioners

ZELLCO CELLULAR (PVT) LTD *v* POST & TELECOMMUNICATIONS CORP trading as NET* ONE 1998 (2) ZLR 106 (H)

Court **High Court, Harare**

Smith J

Copyright Juta & Co Ltd

Civil application

17 & 22 July 1998 Judgment No. HH-122-98

Flynote

Contract - breach - cancellation - arbitration clause in contract - effect - whether dispute first had to be submitted for mediation - whether genuine dispute existed requiring resolution - failure to pay dues - whether a breach of contract justifying cancellation thereof

Headnote

The PTC had entered into a contract with Zellco in terms of which Zellco was appointed by the PTC to supply and distribute cellular telephones to its customers and to administer the billing of its customers. The PTC sought to cancel the contract on the grounds of breach of contract by Zellco, in that Zellco had failed to pay the monthly charges raised by the PTC. In terms of the contract it was provided that if a party to the contract disputed the entitlement of the other party to terminate the contract, ``such dispute may be referred for resolution'' by way of mediation as provided for in the contract.

Held, that the word ``may'' in the context carried its ordinary grammatical meaning and was not to be construed as meaning ``shall''. Therefore it was not mandatory that the matter be referred for mediation.

Held, further, that even if it was obligatory to refer the matter for mediation when one party disputed the entitlement of the other to cancel, there had to be a real dispute requiring mediation. In this case, there was no genuine dispute requiring resolution through the process of mediation.

Held, further, that Zellco had committed a number of breaches of the contract and that PTC was fully justified in terminating the contract.

Cases cited:

Coopers & Lybrand & Ors v *Bryant* 1995 (3) SA 761 (A)

Desai v *Wessels & Torlage & Anor* 1964 (1) SA 783 (D)

Ditcher v *Denison* 11 Moore PC 325

Northwest Townships (Pty) Ltd v *Admin, Tvl* 1973 (2) SA 288 (W)

Owsianick v *African Consol Theatres (Pty) Ltd* 1967 (3) SA 310 (A)

Sassoon Confirming & Acceptance (Co) Ltd v *Barclays National Bank Ltd* 1974 (1) SA 641 (A)

Wellworths Bazaars Ltd v *Chandler's Ltd & Anor* 1947 (2) SA 37 (A)

Case Information

P Nherere, for the applicant

Copyright Juta & Co Ltd

A N B Masterson, for the respondent

SMITH J

Judgment

SMITH J: On 21 November 1996, the applicant (hereinafter referred to as ``Zellco'') entered into a service provider agreement with the respondent (hereinafter referred to as ``PTC'') in terms of which the PTC appointed Zellco to supply and distribute cellular telephones to its customers and to administer the billing of its customers pursuant to access by its customers to the public cellular telephone service which is operated by the PTC. In October 1997, the parties entered into an incentive agreement. The incentives covered connection fees, airtime and monthly subscriptions and were given at the rate of 20%. In a letter dated 30 June 1998, the PTC demanded from Zellco payment of an amount of $16 561 964. In that letter, it gave notice in terms of clause 16.3 of the service provider agreement that Zellco had committed a series of breaches of the agreement in that it had failed to pay the monthly charges raised by the PTC from January 1998 to June 1998. Accordingly, if the amount demanded was not paid by 15 July, the agreement would be deemed to have been terminated. It also gave notice in terms of clause 16.4 of the service provider agreement that because Zellco had breached clause 9.3 of the agreement on more than one occasion in 1998, it was going to cancel the agreement on 31 July 1997 unless the whole of the arrears, including interest, was paid by that date.

Zellco filed this urgent application seeking an order interdicting the PTC from terminating the service provider agreement pending the determination by arbitration or litigation of the dispute between Zellco and the PTC. As the PTC, in its letter of 30 June, threatened that notices would be published in the press advising all Zellco customers of the cancellation of the service provider agreement, Zellco also, in its urgent application, sought an order interdicting the PTC from issuing any press statements or advertisements regarding the purported termination of the service provider agreement.

The PTC opposed the application. It agreed that the matter was one of urgency. It submitted that it was entitled to cancel the service provider agreement because Zellco owes very substantial sums of money which the PTC has endeavoured to persuade it to reduce and pay off the arrears but Zellco allows the amount owed to grow every month.

Zellco bases its application on two grounds. Firstly, it submits that clause l6 of the service provider agreement does not permit the PTC to cancel the service provider agreement without first submitting the dispute to mediation, arbitration or litigation. Secondly, it submits that the amounts claimed by the PTC are not due and owing by Zellco. I will deal with these two issues. If Zellco were to establish that its claim on either of the two grounds is sound then it would, in my opinion, be entitled to the interim interdict it is seeking. I am satisfied that if the PTC were to advertise to the public that the service provider agreement had been cancelled, Zellco would suffer irreparable harm.

Copyright Juta & Co Ltd

SMITH J

Clause 16 of the service provider agreement deals with termination of the agreement. Clause 16.1 provides that the PTC shall be entitled to terminate the agreement on one month's written notice if the number of customers actually contracted by Zellco in any annual period falls short of the projected figures by 75% or more. Clause 16.2 provides that the PTC shall be entitled to terminate the agreement at any time by giving Zellco not less than three months' notice. Clause 16.3 provides that either party may terminate the agreement on written notice to the other if the other party commits a breach of its obligations, including failure to pay any charges due, and fails to remedy the breach within fourteen days after being called upon to do so. Clause 16.4 provides that the PTC shall have the right to terminate the agreement if Zellco is in breach of the agreement twice within a one-year period. Clauses 16.4 and 16.5 provide for termination if either party is put into liquidation or under judicial management or if there is a complete or major suspension of the network services for a period in excess of two calendar months. Clause 16.8 provides as follows:

> ``If either party disputes the entitlement of the other to terminate this agreement, pursuant to the provisions of this clause 16, such dispute may be referred for resolution in accordance with the provisions of 20 below.''

Clause 20 provides for dispute resolution. It provides that if any dispute arises between the parties which cannot be resolved amicably, the parties and their legal representatives shall meet to consider whether there is a possibility of resolution by mediation or conciliation. If they cannot agree to refer the dispute to mediation or conciliation they must consider whether to refer the dispute to arbitration. If the parties do not agree to refer the dispute to arbitration, ``they will proceed to litigation in the courts''.

Mr *Nherere* argued that, although clause 16.8 of the service provider agreement provides that if either party disputes the entitlement of the other to terminate the agreement, such dispute may be referred for resolution in accordance with clause 20, the word ``may'' must be construed as being mandatory rather than permissive. If it was not construed as meaning ``shall'' then clause 16.8 would be superfluous. Mr *Masterson*, on the other hand, argued that the word ``may'' should be given its ordinary meaning.

It is a basic principle of interpretation of a contract that every word should be given its ordinary commonly accepted meaning. In *Coopers & Lybrand & Ors* v *Bryant* 1995 (3) SA 761 (A) at 767E-768E JOUBERT JA said:

> ``According to the `golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument ... The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself ... The correct approach to the application of the `golden rule' of

> interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:
>
> (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including

Copyright Juta & Co Ltd

the nature and purpose of the contract ...

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted ...

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.''

In *Sassoon Confirming and Acceptance Co (Pty) Ltd* v *Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B JANSEN JA said:

``The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties.''

As the word ``may'' is ordinarily regarded as being permissive that must be the meaning accorded to it in clause 16.8 unless Zellco can show that, in the context, the parties meant the word to be construed as being mandatory. There are many cases where the courts have held that in a particular case the word ``may'' shall be construed as though the word ``shall'' had been used. However, as I have said, the onus rests on Zellco - see *Desai* v *Wessels and Torlage & Anor* 1964 (1) SA 783 (D).

Mr *Nherere* argued that if clause 16.8 of the service provider agreement were to be construed as being permissive, rather than mandatory, the clause would be superfluous because, if that provision had been omitted, the parties would be free to refer any dispute to arbitration or to litigation. In *Wellworths Bazaars Ltd* v *Chandler's Ltd & Anor* 1947 (2) SA 37 (A) at 43 DAVIES AJA quoted, with approval, the following passage from *Ditcher* v *Denison* 11 Moore PC 325 at 357:

``It is a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to ascribe - should not, without necessity or some sound reason, impute - to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.''

In *Owsianick* v *African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 324G BOTHA JA warned as follows:

``It is a sound principle that a written document should, if possible, be construed so as to give effect to every word in it. But that principle should not be employed to create variations in the meaning of words that could never have been intended. As in legislation, so in written documents, tautology is not unknown. A specific provision is not infrequently inserted to provide, *ex abundante cautela*, for a matter already covered by general provisions. In such a case the specific provision is mere surplusage, and care should be exercised that, in an attempt to avoid the tautology, a distorted meaning is not assigned to either the specific or the general provisions.''

SMITH J

In *Northwest Townships (Pty) Ltd* v *Administrator, Transvaal* 1973 (2) SA 288 (W) at 290C-D STEYN J said:

``In my view, the words `the Administrator may grant an application' in this statute are in themselves as unequivocal as those referred to by WESSELS JA in *Lynch* v *Union Government* 1929 AD 281 at p 284. As

Copyright Juta & Co Ltd

> WESSELS JA said in relation to the clause and a discussion in that matter the words, `may grant an application' in Act 84 of 1967 are, according to the normal meaning, permissive or enabling words only and therefore it was incumbent on the applicant in this matter to show that there is something in the circumstances which requires the court to interpret those words as not being permissive, but as being obligatory. In my view, no such circumstances have been proved or suggested with any force."

In this case, I am not persuaded that there are compelling reasons for me to hold that the ordinary grammatical meaning of clause 16.8 should be departed from.

If I am wrong in reaching this conclusion, it cannot be gainsaid that, before either party can refer a dispute for resolution in accordance with clause 20 of the service provider agreement, there must be a genuine dispute. Thus, for example, in terms of clause 16.2 Zellco is entitled to terminate the agreement at any time by giving the PTC not less than three months' notice. If such notice were given, the PTC would not be entitled to say that it disputes the entitlement of Zellco to terminate the agreement and therefore the dispute must be resolved in accordance with the provisions of clause 20. Likewise, if the number of customers contracted by Zellco in a specified period falls short by 75% or more of the projected figures and the PTC decides to terminate the agreement in terms of clause 16.21, if the figures are clear Zellco would not be able to say that it disputes the PTC's entitlement to terminate the agreement and therefore the dispute must be settled in accordance with clause 20 of the agreement. In order to determine whether or not there is a genuine dispute, one must look at the claims made by Zellco as the basis for the second ground on which it submitted that the application should be granted.

The second ground put forward by Zellco is that the moneys claimed by the PTC are not due and owing by Zellnet. This claim is based on clause 2.2.2. of the service provider agreement. According to the heading to clause 2, that clause is an introduction to the agreement. Clause 2.1 provides that the PTC wishes to appoint Zellco to perform certain functions specified therein. Clause 2.2 then provides that the parties accordingly wish to record the terms and conditions upon which Zellco may order and purchase smart cards from the PTC and -

> ``2.2.2. the PTC will make the network service available to Zellco for onward supply of (*sic*) Zellco's customers."

The arrangements between the PTC and Zellco are as follows. Zellco signs

up a customer. The PTC provides Zellco with a smart card programme which contains the subscriber's international dialling number. Zellco inserts the programme into the handset which it supplies to the customer. The PTC records the calls made by the subscriber and the duration of each call. It sends the necessary information to Zellco every day. At the end of each month, the PTC sends Zellco an invoice showing the amount due in respect of all calls made by Zellco's customers during the month.

The contention of Zellco is that the PTC does not make the network service available to Zellco for Zellco to supply the service to its customers. In fact, the PTC provides the network service direct to Zellco's customers. Therefore, since no service is being supplied to Zellco for which Zellco could be charged as such, Zellco is not liable for the charges. Zellco's responsibility is merely to collect money from its customers, deduct what it is entitled to in terms of the incentive

Copyright Juta & Co Ltd

agreement, and pass the balance on to the PTC. Zellco is merely the agent of the PTC and not an intermediary. If a customer does not pay, Zellco is not obliged to make the payment. It does not guarantee the payments due by its customers.

In a letter dated 2 July 1998, Zellco's legal practitioner wrote to the PTC's legal practitioner claiming that, because the PTC had never supplied Zellco with the network services but had instead supplied them direct to the customer, the PTC had in fact breached the service provider agreement. Furthermore, the PTC could not be paid for what it has not performed.

Mr *Masterson* argued that the PTC had complied with the terms of the service provider agreement. His argument was as follows. In terms of clause 2.2.2 of the agreement, the PTC will make the network service available to Zellco for onward supply its customers. In terms of clause 1.1.15, network services means those GSM telecommunication services which the PTC makes available to Zellco for onward supply by Zellco to its customers via the network. Therefore, all that clause 2.2.2 requires is that the PTC provides a selected element of the telecommunication service to Zellco, not the full telecommunication service. I agree with Mr *Masterson*. In clause 1.1.13, network is defined as meaning the public cellular telephone service to be operated by the PTC. It is clear, therefore, that the service provider agreement contemplates that the PTC will operate the public cellular telephone service but will make certain services available to Zellco for onward supply to its customers.

The effective date of the service provider agreement, as defined in clause 1.1.8, is the date of signature, which is 21 November 1996. That means that the agreement has been in operation for more than nineteen months. If Zellco felt that the PTC was in breach of the agreement because it was not providing the telecommunication services, why did it not do anything to have the breach

remedied? Why did it wait until the PTC started pressing hard for its money before it raised the issue? Zellco has not mentioned, either in argument or in the papers or correspondence filed in this case, what telecommunication services should have been made available to it and were not made available. Its argument is that it is not liable to the PTC for moneys due by its customers, but which have not been paid by them. However, when one looks at the correspondence that has been filed, that was not the attitude previously adopted. In a letter dated 30 June 1998 written to the PTC Zellco complained that the PTC seemed to be implying that Zellco was knowingly under-invoicing roaming calls. The writer went on to say ``It would not make sense for us to do that as we are ultimately liable to Net*One for all billed charges''. Then in the letter dated 3 July 1998 from Zellco to the PTC Board at p 2 of the letter, Zellco complains about the differences between the monthly invoices and the totals of the daily call data records. It then says ``It would not make sense for us to deliberately under-invoice as we would be liable for the full amounts, in any case, we would be doing ourselves out of commissions''. These are clear admissions that Zellco would be liable for the full amount billed, whatever amount was invoiced to or paid by the customer.

Zellco filed with its application the letter dated 2 July 1998 written by its legal practitioner to the

Copyright Juta & Co Ltd

PTC's legal practitioner. At p 4 of that letter, it is said that Zellco, without prejudice to its rights and under protest, and without abandoning the defences which it had raised and which are repeated in this application, would pay a specified amount in six equal instalments over a period of six months and that the June and subsequent invoices would be met on due date. That is a clear admission of liability. In an earlier letter dated 2 June 1998, written to the PTC, Zellco admitted that its reconciliation ``puts the outstanding arrears at $12 275 603.75 as of 31 March 1998''. The letter goes on to say that that amount included approximately $4 million owed to it (not to PTC) by its biggest dealer and that it had handed over other debtors in an amount of approximately $3 million and that another $3 million of debtors was being chased by a firm of debt collectors.

For the reasons set out above, I am satisfied that PTC is not in breach of the service provider agreement. Zellco did not raise the issue of the breach until the agreement had run for almost eighteen months. It then raised the issue when it was being pressed for payment. I am also satisfied that Zellco has committed a number of breaches of the service provider agreement in that, contrary to the requirements of clause 9.3 thereof, it has failed to pay the monthly charges due to the PTC. I am also satisfied that Zellco owes the PTC an amount substantially in excess of $12.25 million. I am also satisfied that the PTC was fully entitled to terminate the service provider agreement in

terms of clauses 16.3 and 16.4 thereof, without referring the matter for resolution in accordance with the provisions of clause 20.

The application is dismissed with costs.

Hussein Ranchod & Co, applicant's legal practitioners

Coghlan Welsh & Guest, respondent's legal practitioners

ROSE NO *v* FAWCETT SECURITY OPERATIONS (PVT) LTD 1998 (2) ZLR 114 (HC)

Court **High Court, Harare**

Blackie J

Civil action

22 July 1998 Judgment No. HH-124-98

Flynote

Delict - vicarious liability - servant acting outside scope of his employment - theft by employee to whom goods entrusted - ostensible authority of employees to receive goods - misuse of authority given by employer - security company employees stealing money after misusing authorisation vouchers

Copyright Juta & Co Ltd

Headnote

The plaintiff was the messenger of court for the Mashonaland Province. He contracted with the defendant security company to collect monies received by him in the course of his business and take it to be banked. The arrangement was that collections would take place twice weekly. On the date in question, a phone call was made to the defendant, purporting to be from the plaintiff's office, to say that no collection was required on that date. The defendant accordingly cancelled its security run to the plaintiff that day. Nonetheless two men, dressed in the defendant's uniform, arrived at the plaintiff's office and collected the box with the money collected by the plaintiff. A receipt was issued in the defendant's name. The men were armed with what appeared to be a written authority from the defendant to collect the money. The box and money were never recovered; it was accepted that the men, who were the defendant's employees, stole the money.

The plaintiff claimed that the defendant was vicariously liable for the acts of its employees, because they were acting within the terms and scope of their employment. Alternatively, he claimed that the defendant was negligent in employing dishonest persons. The defendant denied liability, arguing that the men were acting outside the scope of their employment. It also said that it had taken all reasonable care to employ honest persons and to ensure that its employees acted honestly.

Held, that the men who stole the money were acting contrary to instructions and against and in breach of the general purposes of their employment and the wishes and interests of the defendant. This did not mean that the defendant could not be liable. If the goods stolen were entrusted to the employee's care by the employer, then the employer would be liable. The word ``entrusted'' did not mean that the employer had to physically hand the goods to the employee, merely that he entrusted the employee with the receipt and care of the goods on his behalf.

Held, further, that the authority of an employee to receive and take care of goods includes an ostensible authority. Such authority covers acts to which the ostensible performance of the employer's work gives occasion or which are committed under the cover of the authority which the employee is held out as possessing or of the position in which he is placed as a representative of his employer. By appointing persons as security guards, a security

BLACKIE J

company would create a risk that the guard could be untrustworthy and abuse or misuse the powers given to him.

Held, that on the facts the defendant was liable to the plaintiff for the acts of its employees.

Cases cited:

Deatons (Pty) Ltd v *Flew* (1949) 79 CLR 370

Fawcett Security Ops (Pvt) Ltd v *Omar Entprs (Pvt) Ltd* 1991 (2) ZLR 291 (S)

Copyright Juta & Co Ltd

Min of Police v *Rabie* 1986 (1) SA 117 (A)

Case Information

P Nherere, for the plaintiff

A J Dyke, for the respondent

Judgment

BLACKIE J: The plaintiff is the messenger of the court for the Mashonaland Province. The defendant provides security services for persons or property. One of the services it offers is called a security carriage service, which provides security for cash or property in transit.

In June 1992, the plaintiff contracted with the defendant for a security carriage service to collect from him the money that he received in the course of his duties as messenger and to take that money to his bank. The contract stipulated that the defendant was to collect the money in a locked banking box from the plaintiff's office at 11.00 am every Tuesday and Friday, to take that box to the plaintiff's bank, hand it over to the bank's employees for its contents to be banked to the plaintiff's credit and then return the box to the plaintiff.

On the morning of Tuesday 27 July 1993, the defendant received a telephone call, ostensibly from the plaintiff's office, to say that the plaintiff did not require its banking box to be collected by defendant that day. The caller identified himself as Tafadza. The call did not come from plaintiff but the defendant, believing it did, cancelled its security service run to plaintiff that day. Nevertheless, at 11.00 o'clock, two men, both dressed in the uniform of the defendant, came to the plaintiff's office to collect the banking box from plaintiff. The box contained, *inter alia,* $80 343.67 in cash. The plaintiff handed the box over to the men in exchange for a receipt for the box issued in the defendant's name. The men took the box away. The box was not delivered to the bank nor was it returned to the plaintiff. It is common cause that the men who collected the box from the plaintiff have stolen it and its contents. Neither the box nor its contents have been recovered.

In this action, the plaintiff sues the defendant for the $80 343.67 stolen from him in the box. The plaintiff's case is that it was defendant's employees, acting within the terms and scope of their employment with defendant, who stole the box and its contents from him and that the defendant is therefore liable to him in law for their theft. In the alternative, the plaintiff claims that the defendant owed him a duty of care to employ honest personnel in its

business and to ensure that such personnel carried out their duties honestly. The theft occurred, the plaintiff submits, because defendant was in breach of that duty.

The defendant does not dispute the quantum of the plaintiff's claim. It admits that the men who stole the money from the plaintiff were its employees. However, it denies that those men were acting within the terms and scope of their employment when they stole the money and, therefore, denies that it is liable to plaintiff for their theft. It further denies that it was in breach of

Copyright Juta & Co Ltd

any duty of care to the plaintiff. It says it took all reasonable care to employ honest persons and to ensure that they acted honestly. It submits that the theft occurred because the plaintiff, in breach of the contract between them, or alternatively, in breach of the duty of care that he owed to defendant in this respect, failed to abide by the security procedures established by it to prevent dishonesty on the part of its employees. The defendant submits that it was the plaintiff's failure in this respect that was the cause of, or contributed towards, the theft and that the plaintiff's claim should accordingly be dismissed or reduced.

The principle that an employer is liable for the wrongful acts or omissions of his employees acting at the time in the course of and within the scope of their employment is well established in our law. Here the defendant employed the thieves. Their actions were admittedly wrongful. The issue is whether, in the circumstances of this case, the men can be said to have been acting within the terms and scope of their employment with defendant.

The plaintiff does not claim, and his evidence does not establish, that the thieves were acting on instructions from the defendant or that the defendant received any benefit from their action. It is common cause that the guards were acting contrary to instructions, and against and in breach of the general purposes of their employment and the wishes and interests of the defendant. They were acting in their own interests. They alone received any benefit that flowed from their actions.

In *Fawcett Security Operations (Pvt) Ltd* v *Omar Enterprises (Pvt) Ltd* 1991 (2) ZLR 291 it was held by the Supreme Court that although ``it was formerly thought that an employer could not be held vicariously liable for a theft committed by his employee on the ground that the act of stealing necessarily took the employee out of the course of his employment, this view no longer prevails''. In the words of the CHIEF JUSTICE, who delivered the judgment of the court:

> ``It is now recognised and accepted that theft by an employee to whom goods have been *entrusted* is, in fact, an improper and dishonest mode of performing what he was employed to do, namely, to take care of the goods. In such circumstances, the employee is acting nonetheless in the course of his employment, and so the employer is vicariously liable for the loss of the goods'' (p 294D-E) (emphasis in the original).

BLACKIE J

It is, however, an

> ``essential element of liability ... *that the employer ...* ***entrusted*** *possession (of the item stolen) to its employee* ... Where an employee has committed a theft, the test to be applied is whether *the goods stolen had been* ***entrusted*** *to his care by his employer*. If they had not the theft is outside the scope of his employment and the employer is not vicariously liable.

The theft is the act of the employee pursuing his own selfish ends - something he has done entirely on his own account'' (p 295D-F) (emphasis in bold in the original. My emphasis otherwise).

From the context in which they appear, the words ``the employer ... entrusted the (goods stolen) to the employee'' and ``the goods stolen had been entrusted to his care by his employer'' are not are not taken in the strict and literal meaning that the goods must be physically entrusted by

Copyright Juta & Co Ltd

the employer to the employee. The words carry the wider meaning that the employer has entrusted the employee with the receipt and care of the goods on his behalf. The distinction is important because in this case the plaintiff gave the banking box to the defendant's employees.

From ``the somewhat different test'' referred to, and apparently approved of by the CHIEF JUSTICE later in the same judgment at pp 298F-299E, the authority of the employee to receive and take care of the goods includes an ostensible authority.

The ``somewhat different test in the issue of whether the employer is vicariously liable for the loss caused to a third party by the intentional wrongdoing for his own benefit by the employee'', referred to by the CHIEF JUSTICE in *Omar*'s case, is that suggested by the Australian academic, Professor John Fleming, in his acclaimed work *The Law of Torts* 7 ed at p 356. Relying on a passage in the judgment of DIXON J (as he then was) in *Deatons (Pty) Ltd* v *Flew* (1949) 79 CLR 370 at 381, he writes:

> ``In order to attract vicarious liability, the servant's dishonesty must consist of `acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master'. It is pre-eminently in this context that the courts have forsaken the `course of employment' test and reduced the employer's responsibility by invoking the agency doctrine of actual or ostensible authority, borrowed from the law of contract.''

A similarity of thought is to be found in the majority judgment of JANSEN JA in *Minister of Police* v *Rabie* 1986 (1) SA 117 (A) in which he said at 134J-135A that:

> ``by appointing van der Westhuizen as a member of the Police Force and thus clothing him with all the powers involved, the State created a risk of harm to others, *viz* the risk that van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution.''

Applying this approach, the same may be asserted of a security guard in

commercial employment who is ``clothed'' by his employer with certain ostensible authority. If in the abuse or misuse of that authority he were to cause harm to others, his employer would be liable.

Three witnesses gave evidence in this case, the plaintiff and a former employee of defendant for the plaintiff and a Mr Cullen for the defendant. Neither side suggests that any of the witnesses have been or are in any way dishonest or, subject to one exception, unreliable in their actions or in their evidence. There is no reason to make such a finding. The one exception, which will be dealt with shortly, is the plaintiff's mistake over his knowledge of the defendant's Daily Authorisation Voucher system. The result is that much of the factual evidence in this case is common cause.

Mr Cullen's evidence dealt with the defendant's system for carrying out its security service contracts. A crew of guards under a crew commander would be sent to the client at the prearranged time to collect the cash and to take it to its destination. Because the defendant has

Copyright Juta & Co Ltd

a large number of clients using this service, it has established several crews to do this work and each crew would usually be given a run of several clients from whom to collect the money on any particular day. The crew commander would be given a Daily Authorisation Voucher for the crew's security service run. This document authorised the team to collect, from the defendant's clients, the money or goods due for collection on that day. It named the crew commander and was signed by a designated person in defendant's employ. It was valid for the day of issue. Each of defendant's clients was notified who was authorised to sign the voucher on behalf of defendant. The clients were asked to demand from, and the crew commander instructed to produce to the client, his personal identity card and the Daily Authorisation Voucher issued to him for that day. From October 1992, each of the defendant's receipts issued to a client for a collection under a security carriage service, contained, on its face, a statement that the person signing the receipt had checked the identity of the guard receiving the box and on its back an explanation of the daily authority voucher system. Mr Cullen stated that the system was designed to prevent theft of the type with which the case is concerned.

The plaintiff in his evidence denied that he knew of the Daily Authorisation Voucher system prior to the theft of the box. The defendant says he did know of it or ought to have known of it. The defendant appears to be right in this regard. The defendant's security manager wrote to plaintiff a letter, dated 7 October 1992, headed ``Daily Authority Vouchers''. It set out the names and signatures of the persons whom defendant said were authorised to sign ``our Daily Authority Vouchers''. It then continued:

> ``May we take this opportunity to please remind you to instruct your staff to demand sight of the Daily Authority Voucher and the Crew Commander's Personal Identity Card.''

The defendant produced a delivery receipt, dated 9 October 1992, which the plaintiff admits bears his signature, for the delivery of a letter to plaintiff. Mr Cullen says, and he was not seriously challenged in what he said, that the receipt relates to the letter of 7 October. In addition, Mr Cullen gave evidence that on the day after the theft he saw the letter stuck to the wall of the plaintiff's office behind the plaintiff's desk. Further, the plaintiff personally signed the vast majority of the receipts issued to him by defendant's employees on collection of the banking box. Clearly, the plaintiff knew or ought to have known of the Daily Authorisation Voucher system. In making that finding, I do not suggest that the plaintiff has been dishonest in his denial. There is nothing in his demeanour or other evidence to suggest that. He is, however, obviously mistaken in his denial of knowledge of it.

Be that as it may, the plaintiff admits that he did not ask the men, who came to collect the box on 27 July, to show him their daily authority voucher or personal identity cards. He says that he recalls that the men on this occasion, as on previous occasions, produced some form of documentation but he did not look at it. As far as he was concerned, and in particular on this occasion, he relied upon the fact that one of the men had previously collected the box from him on behalf of the defendant, the men came on the right day and at the right time, wore the defendant's uniform and provided him with the defendant's receipt.

The evidence establishes that, of the two men who took the box from the plaintiff, one was Sergeant Dingilizwe, the other a man, identified by his appearance as being an employee but

Copyright Juta & Co Ltd

whose name and position with defendant was not precisely established. Sergeant Dingilizwe was employed by defendant as a crew commander in the section that carried out cash in transit runs in terms of security service contracts. He had previously collected the banking box from the plaintiff and was recognised on 27 July by the plaintiff as having done so. Neither Sergeant Dingilizwe nor the man with him was authorised by the defendant to collect the plaintiff's banking box from him on 27 July. Nevertheless, Sergeant Dingilizwe was employed in the defendant's Armoured Division. He was on cash in transit duties on 27 July and he had in his possession that day a Daily Authorisation Voucher valid for the 27 July, which authorised him to collect property from defendant's clients. The voucher did not specify which run or the route the sergeant was to follow nor did it specify from which clients he was to collect.

On these facts and in terms of the law, which has already been set out, the defendant must be vicariously liable to the plaintiff. Sergeant Dingilizwe and his companion were members of the teams that collected money from defendant's clients under security carriage contracts. He had lawfully collected the banking box from the plaintiff on a previous occasion. The plaintiff knew

this and gave Sergeant Dingilizwe the box on 27 July because he had been to collect the box previously, because he and the man with him were dressed in the defendant's uniform and because they came at the time that the box was due to be collected. Further (although this factor did not influence the plaintiff into handing over the box), Sergeant Dingilizwe came with an apparently lawfully issued general mandate from the defendant to collect from defendant's clients on that day. The men, therefore, came to the plaintiff's office ``clothed'', literally and metaphorically, with ostensible authority from the defendant to collect the box from the plaintiff. The theft was committed under cover of the authority that Sergeant Dingilizwe and his companion were held out as possessing and because of the position in which they were placed as representatives of the defendant.

In view of the finding that I have made that the defendant is vicariously liable to the plaintiff for the theft by Sergeant Dingilizwe and his companion, it is not necessary to consider the plaintiff's alternate claim in delict against the defendant for the theft. However, in case that decision is wrong, I will deal with that claim. The result is, however, the same.

The defendant accepts that a claim in delict can arise in a case such as this, where it is alleged that a dishonest guard has been employed or where there has been a failure to supervise a guard properly: *Omar*'s case *supra.*

The onus is on the plaintiff to prove the negligence he alleges alleged against the defendant.

The plaintiff alleges two grounds of negligence against the defendant. First, and generally, the plaintiff submits that the defendant was negligent, in that it failed to ensure that it employed only honest persons and that it failed to supervise its employees properly to ensure that they carried out their duties honestly. Second, and in relation to the telephone call received by the defendant on the morning of 27 July, the plaintiff submits that the defendant was negligent in not having a code or checking system in relation to all calls made to it canceling or rescheduling security

Copyright Juta & Co Ltd

carriage service runs. In addition, and in particular, it was negligent on 27 July, in that it failed to take any step to check genuineness of that call because the call did not come from the plaintiff personally.

The evidence does not establish that the defendant failed to ensure that it employed only honest persons. Mr Cullen's unchallenged evidence was that the defendant does not employ any person unless they have and maintain a clean police record. Further, nobody is taken into the defendant's Armoured Division, from which the security carriage service is carried out, until they have worked for the defendant for at least two years, maintained a trouble free record of service with the defendant in that time and passed an interview with the manager of the Armoured Division. The plaintiff has not suggested or

established any other precaution that the defendant could and should have taken before taking on any employee or transferring an employee to serve in the Armoured Division. In any event, the defendant first employed Sergeant Dingilizwe in 1984 and he had served the defendant for many years, including service in carrying out security carriage contracts, without any sign of dishonesty.

The evidence concerning the defendant's supervision of its employees on the security carriage run to prevent theft by its employees shows a serious flaw in the defendant's Daily Authorisation Voucher system. The Daily Authorisation Voucher held by Sergeant Dingilizwe was a general one. It did not specify the clients from whom the sergeant was authorised to collect on 27 July. It merely identified him as a person authorised by the defendant to collect from its clients on its behalf on that day. Mr Cullen was unable to say on which run the sergeant should have been on that day. Whatever run he should have been on, the Daily Authorisation Voucher held by him from the defendant enabled him collect the box from the plaintiff on that day with every appearance of lawfulness. Even if the plaintiff had followed the defendant's procedures to the letter and asked for his identity card and Daily Authorisation Voucher, Sergeant Dingilizwe could have produced both and taken the box away with him. The system, therefore, provided protection to the defendant and its client against a third party from posing as an employee, but it did not provide protection against an authorised employee from abusing the very general authority given to him by the system. Mr Cullen admits that the defendant was aware of the danger of theft by its employees of the money or property that they collected from clients in terms of the security service contracts and accepted the need to protect the clients against this type of theft. He says that the defendant introduced the Daily Authorisation Voucher system to prevent such thefts. That that voucher system failed to achieve that object is clear from this case. The defendant therefore has been shown to have failed in its duty to the plaintiff in this regard and is liable to the plaintiff for that failure.

The general evidence in regard to telephone calls canceling or rescheduling security service runs was that defendant again was aware of the danger of false calls being made to it. However, it did not use codes except for particularly large or valuable cargoes. Mr Cullen discounted the need to use code for general security carriage service runs and denied that to call back the person canceling the collection was practical or added any security to the system.

Copyright Juta & Co Ltd

Codes, said Mr Cullen, were difficult to administer. All calls, except those for which special arrangements had been made were made over the ordinary telephone system and were made in ordinary language. The unreliability of the telephone system, the number of clients that the defendant

had on its security carriage register and the number of calls made to it for cancellation or rescheduling, made it impossible, according to Mr Cullen, for the defendant to call back each client after that client had made a call to cancel or reschedule the service to it. Besides, said Mr Cullen, there might not be any protection in returning a call, as suggested, because the person who answered the returned call could just as easily be the person who made the call in the first place. Finally, Mr Cullen said, the plaintiff's telephone line was a very busy one. It was particularly difficult to get through to the plaintiff on that line and therefore, in plaintiff's case, it would be impractical to verify the genuineness of a call by returning that call.

I accept the validity of Mr Cullen's difficulties in and objections to the general use of codes or call back procedures as described by him. However, it is not enough for the defendant, if it says it provides a security service and is alive to the possibility of false calls, to say it is difficult to reduce this risk and therefore nothing will be done about it. The defendant was aware of the risk and was therefore under a duty to eliminate or to reduce that risk, as far as possible, and in some way. It did not do so in this case. It did nothing. The use of a code word to identify the caller or an arrangement whereby only messages from nominated individuals, who could be identified by some means over the phone, are obvious and simple examples of how the defendant could have significantly reduced the risk of false messages. The defendant was, therefore, negligent in this aspect.

What is said now regarding the telephone call received by defendant on 27 July cancelling the collection by defendant of the banking box from plaintiff that day must be understood as being subject the defendant's general duty in regard to such calls which has been set out in the preceding paragraph. The evidence as to the call on 27 July has been set out earlier in this judgment. The plaintiff submits that, regardless of any general system of checks that the defendant should have had in place to deal with calls of this sort, the defendant was negligent in way it responded to this call. The plaintiff says that, if it was necessary for him to cancel a collection, as for instance where a collection day was a public holiday, he personally would call the defendant to cancel the collection. He says that the fact that the call on that day was made by someone other than himself should have alerted the defendant to the possibility of fraud and put it on its guard and defendant should have taken special steps to check that call. Mr Cullen admits that it was usually the plaintiff personally who called to cancel or reschedule a collection, but, he says, not all the calls came from the plaintiff personally. Some calls came from other persons in the plaintiff's office. There was no reason therefore to be on the alert simply because the call came from someone other than the plaintiff personally. The plaintiff, under cross-examination, appeared to

Copyright Juta & Co Ltd

accept the correctness of Mr Cullen's assertion on this point. The evidence, therefore, does not establish that the defendant should have been alerted to the possibility of fraud by the fact that the telephone call came from someone other than the plaintiff and taken precautions to deal with that possibility.

The defendant seeks to counter any finding that it is liable to the plaintiff, either in terms of its employment of the thieves or because it is in a breach of a duty of care owed to the plaintiff, by asserting that the true cause of the theft, and the loss consequent on that theft, was the plaintiff's failure to abide by the terms of the contract in regard to the security procedures introduced by it to prevent such theft or, alternatively, the plaintiff's negligence in not following those procedures.

The contract document of June 1992 does not refer to the Daily Authorisation Voucher procedure and there is no general requirement in the contract that the plaintiff abide by any security procedures followed or introduced by the defendant. Clause 4 of the contract provides that no alteration or addition to the contract or any part of its terms and conditions will be binding on the parties unless that alteration or addition was in writing and signed by both the parties. Clause 8 of the contract provides that the conditions contained in it constituted the entire contract between the parties and no provision in any extraneous document was to be, or to be deemed to be, incorporated into it.

The defendant seeks to bind the plaintiff contractually to follow the procedure prescribed for the Daily Authorisation Voucher by means of the letter of 7 October 1992 and the receipts from October 1992 signed by the plaintiff on delivery of the banking box. The letter, says the defendant, was signed by it and advised the plaintiff of the procedure to be followed. The plaintiff raised no query to it and no objection. The receipts showed that the plaintiff understood what was to be done, agreed with it and was doing it. In the defendant's submission, the defendant's signed letter of 7 October, together with the plaintiff's acceptance of that letter and his signature on the receipts indicating compliance with the its requirements, constitutes a valid written and signed variation of the original agreement.

I am unable to accept the defendant's submissions in this respect. The letter of 7 October does not even purport to be, and cannot be construed as, an amendment to the contract. It is not set out in the language of a proposed amendment. No attempt was made in the letter or otherwise to bring to the plaintiff's attention that the document was intended as a proposed amendment to the contract between the parties. The letter is only signed by one party and not by both the parties as required by the contract. Similarly, the receipts signed by the plaintiff are not, and do not purport to be, the plaintiff's acceptance of a proposed amendment. They are no more than they say they are - receipts. The plaintiff was therefore under no contractual duty to abide

by the procedure set up by defendant under the Daily Authorisation Voucher system.

The defendant also submits that, even if the contract does not specifically cover, in unamended

Copyright Juta & Co Ltd

or amended form, adherence by plaintiff to defendant's security procedures, nevertheless the plaintiff, by not raising any query to the letter of 7 October 1992 and by signing the receipts acknowledging that he had checked the identities of the persons who collected the banking box, accepted the use of that system and led the defendant into believing that he was adhering to it.

The defendant's final submission is that, even if it is found to have been negligent, the plaintiff was the author of its own misfortune. The Daily Authorisation Voucher system was introduced to prevent the theft and loss of the money that the plaintiff wanted taken to the bank. The money, says the defendant, was stolen and disappeared because the plaintiff ignored that system. I am prepared to accept that the plaintiff was at fault in ignoring the procedures introduced by the defendant. However, on the facts of this case, it cannot be said that that fault of the plaintiff's caused or contributed to the theft or loss that occurred. I have set out earlier in this judgment how it cannot be said that the plaintiff's failure to look at the Daily Authorisation Voucher and Sergeant Dingilizwe's identity card caused the theft. Nor, on the evidence, can it be said that, if the plaintiff had looked at those documents, the theft would have been prevented and the money might have been recovered. It was the failure of the defendant's system of security to protect against theft by its own employees that caused the theft and the loss to occur.

In the result, judgment, with costs, is entered for the plaintiff in the sum of $80 343.67 together with interest thereon *a tempore morae* from 27 July 1993 to date of payment.

Kantor & Immerman, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

S *v* PAZVAKAVAMBWA 1998 (2) ZLR 125 (SC)

Court **Supreme Court, Harare**

McNally JA, Muchechetere JA & Sandura JA

Criminal appeal

27 July 1998 Judgment No. S-124-98

Flynote

Criminal law - statutory offences - corruption - Prevention of Corruption Act [Chapter 6:16] - s 3(1)(f) - agent failing to disclose transaction, with intent to deceive and obtain a consideration for himself - managing director of company authorising loan and donation to co-operative in which he had an interest - whether director was obliged to disclose loan and donations to board of directors

Headnote

The managing director of an insurance company, NICOZ, had authorised a loan and two donations from NICOZ to a co-operative society, a society in which he was a shareholder. He had also authorised two donations from NICOZ to the ZANU (PF) Women's League. He had not

Copyright Juta & Co Ltd

disclosed any of these transactions to the board of directors of NICOZ. He was convicted of five counts of contravening s 3(1)(f) of the Prevention of Corruption Act [*Chapter 9:16*], that is, failing to disclose the full nature of a transaction in connection with the principal's business with intent to deceive the principal and obtain a consideration for himself or others. In respect of this offence, once there is non-disclosure of a transaction, there is a presumption that there was an intention to deceive unless the contrary is proven.

Dismissing his appeal against conviction,

Held, that the duty of a director of a company is to conduct the affairs of the company in the interests of the company and not for his own benefit. In regard to all of these transactions, the appellant had had a duty not only to disclose the transactions to the board of directors but also to seek the authority of the board for them As regards the loan and gifts to the co-operative society, as he had a financial interest in the society, he was one of the beneficiaries of those transactions and he could not possibly have had authority to carry out these transactions without the knowledge and approval of the board. As soon as the conflict of interest arose, he had the duty to seek the authority of the board. As regards the donations to the Women's League, it was the clear practice in NICOZ that the board of directors authorised all donations. The appellant knew of this practice and this knowledge overrode any argument that he could act on his own initiative in terms of the provisions of a power of attorney given to him by the company.

Held, further, that the presumption operated against the appellant that he had carried out these transactions with intent to deceive his principal and to obtain a gift or consideration for himself or any other person. He had failed to discharge the onus resting upon him to prove, on a balance of probabilities, that he did not have such intention. In respect of the transactions in relation to the co-operative society, he had deliberately deceived the board in relation to these transactions that had benefited himself and others. In respect of the donations to the Women's League, as a member of the political party concerned who had

McNALLY JA

stood unsuccessfully in the party's primary elections, it was clear that he could enhance his prospects of selection as a candidate by sponsoring these generous gifts and thus he had obtained a consideration for himself.

Cases cited:

Martin v *A-G & Anor* 1993 (1) ZLR 153 (S)

R v *Milne & Erleigh (7)* 1951 (1) SA 791 (A)

S v *Moodie & Ors 1992* (1) ZLR 132 (S)

S v *Nemapare* 1988 (2) ZLR 430 (S)

Case Information

Copyright Juta & Co Ltd

D P Drury, for the appellant

J Matimbe, for the respondent

Judgment

McNALLY JA: The appellant was convicted on five counts of contravening the provisions of s 3(1)(f) of the Prevention of Corruption Act [*Chapter 9:16*]. He was acquitted on 22 other counts. He was sentenced on 2 May 1997 to a total fine of $30 000 or, in default of payment, to a total period of imprisonment of five years eight months.

He appealed against conviction and sentence, but in the event Mr *Drury* did not press the appeal against sentence.

The five counts alleged that in his capacity as managing director of the National Insurance Company of Zimbabwe (NICOZ) he did the following acts, each of which was alleged to be an offence in terms of the Act:

(1) He authorised a $250 000 loan from NICOZ to the Sky High Savings and Credit Co-operative Society, an organisation consisting largely, though not exclusively, of NICOZ staff members, including himself, without a ``formal arrangement'', and without the approval of the Board of Directors. This was done on 8 March 1994.

(2) On 9 March 1994, he authorised a donation from NICOZ to the same Society of $18 000 without the approval of the Board of Directors.

(3) On 20 April 1994, he authorised a donation from NICOZ to the same Society of $3 000, without the approval of the Board of Directors.

4&5 On 16 May 1994 and 11 July 1994, he authorised payment of a donation from NICOZ to the ZANU (PF) Women's League in a total amount of $125 000 without the approval of the Board of Directors, and further approved payment of the amount to individual women in amounts of $10 127 000, $30 000 and $85 000 respectively.

The appellant admitted all the facts alleged against him. The defence was, in simple terms, that he had authority to make these disbursements in terms of a very wide power of attorney given him by the Board on his appointment, and that he was therefore under no duty to disclose these transactions to the Board. He was acting in what he considered to be the best interests of NICOZ as its Managing Director.

McNALLY JA

The offence is defined in the Act as follows:

> ``If any agent, with intent to deceive his principal or to obtain any gift or consideration for himself or any other person, fails to disclose to his principal the full nature of any transaction carried out in connection with his principal's affairs or business, he shall be guilty of an offence.''

Copyright Juta & Co Ltd

The definition must be read in connection with the presumption in s 15(2)(d) that:

> ``If it is proved in any prosecution for an offence in terms of section 3 or 4 that any agent has failed to disclose to his principal the full nature of any transaction carried out in the course of his agency, it shall be presumed, unless the contrary is proved, that the agent did so with intent to deceive his principal and to obtain a gift or consideration for himself or for any other person.''

The elements of this offence were considered and analysed in *Martin* v *Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 159E.

Finally, it must be recorded that the power of attorney given to him on appointment was very wide. It was a power:

> ``to be the company's attorney in Zimbabwe and on its behalf and in its name to carry on and manage its business and affairs therein and to do any act or thing whatsoever which may be necessary of (or?) which the attorney may deem advisable including (but without prejudice to the generality of the foregoing authority) any of the following that is to say:''

There follows a series of powers whose details are not significant for the purposes of this decision.

Looking at the provisions of the section under which he was charged, it is clear that the appellant's principal was the Board of Directors. It is meaningless to say that his principal was ``the company'' and therefore that insofar as he made disclosure to himself and/or his subordinates he was making disclosure to the company. In a hierarchical structure, one makes disclosure to one's superiors. The only body superior to the managing director is the Board. So if disclosure had to be made, it had to be made to the Board.

It is common cause that he did not disclose any of these transactions to the Board. Mr *Drury* argued that the transactions were in the books of the company. Even assuming that to be correct (and I am not sure that it was shown to be correct in the case of the loan to the Society the subject of count 1) it does not amount to disclosure to the Board of Directors who would not normally be familiar with the books. Compare *S* v *Nemapare* 1988 (2) ZLR 430 (S) at 440D and *S* v *Moodie & Ors* 1992 (1) ZLR 132 (S) at 137.

So in the final analysis, the critical question is: ``was there a duty to disclose?''

Mr *Matimbe* very appropriately drew our attention to the remarks of CENTLIVRES CJ in *R* v *Milne & Erleigh (7)* 1951 (1) SA 791 at 828D, where he said:

> ``It is, of course, clear that the duty of all agents, including directors of companies, is to

McNALLY JA

> conduct the affairs of their principals in the interests of the principals and not for their own benefit. If an act is done which falls within the terms of an express power but is done by the agent for his own benefit but not for the benefit of his principal, it is not an authorised act.''

It seems to me that both the loan and the gifts to the co-operative society (Counts 1, 2 and 3) fall into this category. The co-operative society existed for the benefit of its members, one of

Copyright Juta & Co Ltd

whom was the appellant. In fact, he held far more shares than anyone else, just over 20% of the total shares. He was therefore both donor and recipient, both lender and borrower. He could not possibly have the authority without the knowledge and consent of the Board, to lend or donate money to himself, either alone or as a member of a co-operative with others. As soon as a conflict of interest arose, he had a duty to seek the authority of the Board. The fact that it is arguable that the prosperity of the co-operative society might be beneficial to NICOZ because of its effect on staff morale, does not save him. Rather, it is the conflict of interest which condemns him.

As far as the donations are concerned (and this covers counts 4 and 5 relating to the ZANU (PF) Women's League, as well as counts 2 and 3 already dealt with) the appeal must fail on a different basis.

It is quite evident from exhibits 16, 17 and 18 that it was an established practice of the Board, at its November meetings, to approve a list of donations for the year. Exhibit 16 is the minutes of the Board meeting of 17 November 1992. The appellant was present. Under Item 8.2 eight donations totalling $25 000 were approved. Exhibit 17 is the minutes of the Board meeting of 19 November 1993. Eight donations totalling $20 000 were approved. The appellant was again present. Exhibit 18 is the minutes of the Board meeting of 24 November 1994. The appellant was present. Item 8.1 reads:

> ``*1994 Donations to Charitable Organisations*
>
> Management would be submitting the proposed list of names of charitable organisations to the Chairman for his approval before disbursements were effected.''

The donations with which we are concerned were effected on 9 March 1994 ($18 000 to the Co-operative Society); 20 April 1994 ($3 000 to the same recipient); 16 May 1994 ($40 000 to two ladies from ZANU (PF) Women's League); and 11 July 1994 (a third lady from the same organisation received $85 000).

The clearly established practice of the Board over those three years, with which the appellant was familiar, overrides any argument that he could act on his own initiative in terms of the provisions of the power of attorney. Insofar as that power authorised him ``to do any thing whatsoever which he may deem advisable'', he cannot be heard to say that he deemed advisable an action which the Board explicitly and to his knowledge would not countenance without their prior approval.

McNALLY JA

On those grounds alone, I am satisfied that the appellant had a duty not only to disclose his actions to the Board, but to obtain the authority of the Board for those actions. His failure to do so brought him squarely within the purview of the section.

The presumption then operates, and the appellant had to prove, on a balance of probabilities, that he did not do the acts with intent to deceive his principal and to obtain a gift or consideration for himself or for any other person.

Copyright Juta & Co Ltd

He does not begin to establish his innocence on this score. He admitted in evidence that he was a member of the political party concerned in counts 4 and 5 and had stood unsuccessfully in primary elections. Clearly, he could enhance his prospects of selection as a candidate by sponsoring this generous gift and thus ``obtain a consideration for himself''.

In relation to the benefits obtained from NICOZ by the co-operative society, he was obtaining a consideration for himself and for others. And in each of the cases his actions reveal a deliberate avoidance of the Board. He should have obtained their authority. He did not do so. That can only have been because he did not wish the Board to know what he was doing with the company's money. He deceived the Board by deliberately leaving them in ignorance of actions which he had no right to take without their authority.

I would dismiss the appeal in its entirety.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Gollop & Blank, appellant's legal practitioners

DELCO (PVT) LTD *v* OLD MUTUAL PROPERTIES & ANOR 1998 (2) ZLR 130 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Ebrahim JA JA & Korsah AJA

Civil appeal

8 June & 30 July 1998 Judgment No. S-104-98

Flynote

Landlord and tenant - tenant - ejectment - statutory tenant ejected from premises consequent upon judgment - judgment subsequently overturned on appeal - whether entitled to be reinstated in occupation

Headnote

The landlord had obtained an order for the eviction of its tenant from rented commercial premises. The tenant, which was a statutory tenant in terms of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) (``the Commercial Rent Regulations''), had vacated the premises after a provisional order had been granted for its eviction, which order had subsequently been confirmed by the High Court. Subsequently the tenant had successfully appealed against the decision of the High Court, the Supreme Court ruling that the eviction order should not have been granted as the landlord had failed to show good and sufficient grounds for requiring the order. The tenant then applied to the High Court for an order directing the landlord to reinstate the tenant in the rented premises. The High Court refused to grant the order. On appeal:

Held, that the purpose of s 22(2) as read with s 23 of the Commercial Rent Regulations is to

---

Copyright Juta & Co Ltd

protect the right of the statutory tenant in actual physical possession of premises to resist eviction; these provisions do not give a right to a tenant to regain possession of premises lost through ejectment under a wrong court judgment or order.

Held, further, that the reversal on appeal of the High Court's order for the eviction of the tenant did not mean that it was a nullity or an order without jurisdiction. It was wrong in the sense that the proved facts did not warrant the eviction. Nonetheless, it was an order lawful and binding at the time.

Held, further, that the tenant had prematurely relinquished his possession of the premises. What the tenant should have done was immediately to have appealed against the provisional order, thereby suspending its operation and preserving its right to occupy the premises.

Held, therefore, that the court could not grant an order reinstating the tenant in occupation of the premises.

Cases cited:

Anderson & Co v *Byron* 1955 (4) SA 395 (N)

Berzansky v *Hersch* 1950 (2) SA 439 (T)

Brown v *Draper* [1944] 1 KB 309

Byron v *Anderson & Co* 1955 (3) SA 590 (D)

Delco (Pvt) Ltd v *Old Mutual Properties (Pvt) Ltd* 1997 (2) ZLR 414 (S)

Jasmat v *Bhana* 1951 (2) SA 496 (T)

GUBBAY CJ

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

Maisel v *Camberleigh Court (Pty) Ltd* 1953 (4) SA 371 (C)

Makhubedu & Anor v *Ebrahim* 1947 (1) SA 19 (W)

O'Sullivan v *Mantel & Anor* 1981 (1) SA 664 (W)

Wood NO v *Edwards & Anor* 1966 RLR 336 (G)

Yekelo v *Bodlani* 1990 (3) SA 970 (TkG)

Legislation considered:

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), ss 22(2) and 23

Case Information

Copyright Juta & Co Ltd

A P de Bourbon SC, for the appellant

R M Fitches, for the first respondent

F Girach, for the second respondent

Judgment

GUBBAY CJ: The factual background to the present dispute is set out in the judgment of this court in *Delco (Pvt) Ltd* v *Old Mutual Properties (Pvt) Ltd* 1997 (2) ZLR 414 (S) at 415A-416D, and does not need to be repeated. The determination made was that the High Court had erred in confirming the provisional order obtained by the first respondent on 19 March 1997, for the eviction of the appellant from the commercial premises it occupied, namely, shop 5 and 13, in the building known as Stanley House, by 27 March 1997. It ought to have found that the first respondent had failed to show good and sufficient grounds for requiring the order, and discharged it with costs, leaving it to the appellant, which had vacated the shops on 22 March 1997, to pursue whatever claims it may have for the unlawful termination of the statutory tenancy (see at 419B).

On 20 October 1997, just four days after its appeal had been upheld, the appellant applied to the High Court, upon a certificate of urgency, for an order interdicting both the respondents from finalising an agreement of lease in respect of shops 5 and 13, and interdicting the second respondent from occupying the shops. A further order was sought directing the first respondent to reinstate the appellant to the shops with immediate effect after completion of the refurbishment exercise.

At the outset of the hearing before the learned judge, the appellant altered its claims to one of reinstatement to the premises in an area of square footage equivalent to that it had occupied prior to the unlawful eviction. This change in relief was necessitated by an acceptance that shops 5 and 13 had been demolished; and the entire ground and mezzanine floors in Stanley House redesigned as an open area, and occupied by the second appellant pursuant to an agreement of lease.

The learned judge refused the application with costs. His reasons for doing so are contained in the final paragraph of the judgment, which reads:

> ``This is not an application for reinstatement of the applicant's statutory tenancy. That

> cannot be done. The shops have disappeared. They have been knocked out and replaced by an open area. This is an application for a new right of occupation to replace that which the applicant previously enjoyed in terms of its statutory tenancy. The court will not force a new and different right on parties where an old one cannot be enforced. Even if I am wrong in that conclusion, then the right claimed is too vague and undefined to be capable of enforcement. The applicant says it wants occupation of an area within the premises equivalent to that which it occupied when it occupied the shops. It is not clear from the papers, nor does the applicant say, where that area is to be. The applicant makes no suggestion as to how it should be accommodated in the premises or whether it can accommodate in them at all. The applicant accepts that it cannot have accommodation in the premises on the same terms as it enjoyed in the shops. It does not suggest the terms on which it is to be accommodated. It says

Copyright Juta & Co Ltd

that that must be settled by negotiation between the parties. Clearly the court cannot and should not grant a vague and open-ended order of this nature. The applicant's remedy is in damages.''

Dissatisfied with the outcome of those proceedings, the appellant comes again before this court. It challenges the conclusion of the learned judge that reinstatement to the premises is wholly inappropriate and that any remedy it may have must lie in damages.

Counsel for the first respondent supported the decision of the High Court upon an argument not raised before it in opposition to the application; in this he was joined by the second respondent's counsel. It was that the appellant had no legal right to be reinstated. It had relinquished possession of shops 5 and 13 before confirmation of the provisional order, albeit such order had been granted in its absence and later held on appeal to have been wrong. What it ought to have done was to have appealed against the provisional order, thereby staying execution upon the order of eviction, and so enabling it to remain in occupation pending the determination of the appeal.

If this point is well taken it will be unnecessary to consider whether the basis upon which the learned judge refused the application was correct.

The legislative provisions dealing with the right of a statutory lessee to remain in premises are to be found in s 22(2) and, to some extent, in s 23 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) (``the Regulations'').

Section 22(2) provides that:

``No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee -

(a) continues to pay the rent due, within seven days of due date; and

(b) performs the other conditions of the lease;

unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that -

(i) the lessee has declined to agree to an increase in rent; or

(ii) the lessor wishes to lease the premises to some other person.''

GUBBAY CJ

And s 23, which underscores the importance of retention of possession, reads:

``A lessee who, by virtue of section 22, retains possession of any commercial premises shall, *so long as he retains possession*, observe and be entitled to the benefit of all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would have been so required, on giving reasonable notice:

Provided that, notwithstanding anything contained in the contract of lease, a lessor who *obtains an order for recovery of possession of the premises or for the ejectment of a lessee retaining possession* as aforesaid shall not

Copyright Juta & Co Ltd

be required to give any notice to vacate to the lessee'' (emphasis added).

The wording of s 22(2) is not materially different from that of s 14(2) of the South African Rents Act 32 of 1942. The effect of the latter provision was considered for the first time in *Makhubedu & Makhubedu* v *Ebrahim* 1947 (1) SA 19 (W).

In that case, the respondent had successfully sued the applicants in the magistrates court for ejectment from certain premises upon due notice given. After the time for noting an appeal had expired, the respondent obtained a warrant of execution and the applicants were ejected. Subsequently, the late noting of an appeal by the applicants was condoned. The appeal succeeded and the applicants brought proceedings for reinstatement to the premises. CLAYDEN J (as he then was) dismissed the application. After a close examination of relevant South African and English authorities, the learned judge expressed the opinion, at p 22, that:

``In none of these cases has the court considered that the right of the statutory tenant is greater than the right which he is in words given, a right not to have an order for ejectment granted against him except in certain circumstances; except that of course a lessor who cannot obtain ejectment by process of law cannot be allowed to take the law into his own hands and so succeed in obtaining possession which he could not have obtained in law.''

He went on, at p 23, to point out that as the effect of s 14(2) of the Rents Act was to deprive the landlord of rights which he would have at common law to eject the lessee when the lease came to an end, it had to be construed restrictively (interpreted). So approached, he held that the provision did not confer upon a statutory tenant any right to regain possession when once he had lost it (see at p 24). The learned judge then dealt with the question of whether the applicants, having been ejected from the premises pursuant to the order of the magistrate, could be treated as being in possession. In holding that they could not, he said at p 25:

``In the present case, the proper parties were before the court and the magistrate found that the lessor had proved a prerequisite to ejectment demanded by s 14(2). The judgment on appeal *Makhubedu* v *Ebrahim* (TPD 4 October 1946) reversed the decision of the magistrate because, on the evidence, the plaintiff, the lessor, had not proved that she

GUBBAY CJ

required the premises for her personal use, which was the ground for ejectment under s 14(2) sought to be proved. *That judgment does not in my opinion show that the order of the magistrate, until reversed, was a nullity, an order given without jurisdiction. That a magistrate mistakenly considers that a lessor has proved a particular fact should not, I think, open the way to a fiction that a loss of possession which has in fact taken place should be disregarded*. To recognise that fiction would be in effect to read into s 14(2) the right to obtain possession, which is not in my view provided for'' (emphasis added).

An appeal to the Transvaal Provincial Division was dismissed by BARRYarry JP and DE VILLIERS J, with BLACKWELL J dissenting. The case is reported as *Makhubedu & Anor* v *Ebrahim* 1947 (3) SA 155 (T). Both majority judgments approved the proposition enunciated by CLAYDEN J that a statutory lessee who had been evicted by process of law is not entitled to be given possession of the premises against the lessor who has re-occupied if it is subsequently shown that the process of law was based on a wrong judgment (see respectively at pp 160 and 169). In the course of his dissent, BLACKWELL J said at 165:

``A common-sense view of the meaning of s 14(2) is that both parties are bound as before - at any rate, so far as

Copyright Juta & Co Ltd

the ordinary obligation of a lessor are concerned - and in effect the original lease is prolonged by statute so long as certain conditions are observed.''

However, as subsequently explained by RAMSBOTTOM J (as he then was) in *Berzansky* v *Hersch* 1950 (2) SA 439 (T) at 444:

``The difficulty in the way of adopting this view is that the statute does not provide for the prolongation of the lease. It gives the ex-lessee the right to remain in occupation under certain conditions, and from that right certain obligations upon the ex-lessor can be implied such as the obligation to allow the statutory tenant to remain in undisturbed possession of the dwelling or business premises which he had occupied under the lease. That, I think, is what BLACKWELL J meant by `the ordinary obligations of a lessor'. But those obligations arise, in my opinion, not from any prolongation of the lease, but, by implication, from the statutory rights which are possessed by the occupier. However that may be, BLACKWELL J did not suggest that a statutory tenant retained the right to enforce all covenants which the lessor had made in the expired lease.''

The decision of CLAYDEN J and that of the majority in the *Makhubedu* cases *supra* have resolutely stood the test of time. They have been referred to without disapproval on many occasions over the last fifty years. See *Kramer* v *Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 756; *Berzansky* v *Hersch supra* at 444; *Jasmat* v *Bhana* 1951 (2) SA 496 (T); *Byron* v *Anderson & Co* 1955 (3) SA 590 (D) and, on appeal, 1955 (4) SA 395 (N) at 398H-399A; *O'Sullivan* v *Mantel & Anor* 1981 (1) SA 664 (W) at 668F-H; *Yekelo* v *Bodlani* 1990 (3) SA 970 (TkG) at 977I-978A. Nor has there been any academic criticism of the reasoning. See Wille *Landlord and Tenant in South Africa* 3 ed at 268; Cooper *South African Law of Landlord and Tenant* 1 ed at 492; WOH Menge ``Restoration of the *Status Quo* in Cases of Wrongful Eviction'' (1955) 72 *SALJ* 86 at 88.

GUBBAY CJ

The *Makhubedu* cases did not have to decide what the position would have been if the magistrate's judgment had been a nullity without any force and effect *ab initio* or at the time of execution. Yet, the remarks of BARRY JP at p 60, in reference to *Brown* v *Draper* [1944] 1 KB 309, seem to indicate that in such an event the evictee perhaps could be treated as being still in possession. Subsequently, in *Maisel* v *Camberleigh Court (Pty) Ltd* 1953 (4) SA 371 (C), it was held that a statutory lessee who had lost occupation of premises by virtue of a judgment which was a nullity was entitled to be reinstated (see at 379, *per* WATERMEYER AJ).

In my opinion, the law as expounded in the *Makhubedu* judgments is wholly applicable to the present matter. I perceive of no basis upon which to adopt a different interpretation to s 22(2) as read with s 23 of the Regulations. The purpose behind the two sets of provisions is identical. It is to protect the right of the statutory lessee in actual physical possession of premises to resist eviction; and not the right to regain occupation of premises lost through ejectment under a wrong judgment or order.

The reversal on appeal of the High Court order does not mean that it was a nullity or an order given without jurisdiction. It was wrong in the sense that the proved facts did not warrant the eviction of the appellant from shops 5 and 13. Nonetheless, it was an order lawful and binding at the time.

Copyright Juta & Co Ltd

The appellant relinquished possession prematurely on 22 March 1997. It ought immediately to have appealed against the provisional order thereby suspending its operation and preserving the right of occupation. Had it done so, it would not have been ordered to vacate, in the event of an application for it to do so being made, as it would have been difficult, if not impossible, to restore the *status quo ante*, if the appeal were to be upheld. See *Makhubedu & Anor* v *Ebrahim supra* at 159 *in fine*; *Wood NO* v *Edwards & Anor* 1966 RLR 336 (G) at 341E.

It follows that this court would not be justified in recognising the fiction that the appellant is still in occupation of shops 5 and 13 and read into s 22(2) of the Regulations a right to obtain possession that is not provided for.

Accordingly, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

KORSAH AJA: I agree.

Ali Ebrahim, appellant's legal practitioner

Scanlen & Holderness, first respondent's legal practitioners

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

---

VICTORIA FALLS PROPERTIES (PVT) LTD *v* FEDERATED PROPERTIES (PVT) LTD 1998 (2) ZLR 136 (SC)

Court **Supreme Court, Harare**

McNally JA, Sandura JA & Korsah AJA

Civil appeal

16 June & 30 July 1998 Judgment No. S-117-98

Flynote

Immovable property - ownership - sectional title - right of sectional title holder to use common areas - no subdivision made to exclude common areas - notarial deed - amendment of - when deed may be amended - requirement to give notice to Registrar of Deeds - title to one section sold to third party - whether deed can be amended on basis of what parties had originally intended

Headnote

The appellant owned a stand in Victoria Falls township, on which it built a shopping arcade which consisted of several shops and flats. Part of the stand was undeveloped. There was also on the land a smaller building. In respect of the shopping arcade, the appellant wanted to sell off the shops and flats under the procedure specified in s 27 of the Deeds Registries Act [*Chapter 20:05*]. This allows for the creation of undivided shares with exclusive rights of occupation and equates in other countries to sectional title. No subdivision of the property was made to exclude the undeveloped part of the stand or the smaller building from the scope of the sectional title

---

Copyright Juta & Co Ltd

scheme.

Several years after the scheme was drawn up and the shops and flats disposed of, the respondent bought five of the undivided shares from the original owner. The respondent then asserted that it had the right to make use of the ``common property'', which was defined in the constitution of the shop owners' association as being that portion of the property over which no exclusive right of occupation had been granted. The appellant sought a declaratory order to the effect that the land outside the shopping arcade, as well as the smaller building, did not belong to the respondent and the other shop and flat owners as their common property, and that the appellant was entitled to register its ownership of the land either by amending the original notarial deed or by obtaining a certificate of registered title. The High Court declined to grant the order. On appeal:

Held, that s 27(3) of the Deed Registries Act prohibits an amendment to a notarial deed which would have the effect of altering the number of undivided shares in the land as originally created unless the land had been subdivided. A permit would be required from the local authority before there could be any subdivision, and the appellant would have to make the necessary application to the authority.

Held, further, that the original deed, which the shop and flat owners had no part in drawing up, was so full of mistakes and contradictions that no clear intent could be said to emerge from it. While a contract can be amended by the court to reflect what the parties originally intended, to prevent the document being used as a vehicle for fraud whereby a person could

McNALLY JA

obtain what he knows he was never entitled to, this was not the situation here. The respondent was an innocent purchaser for value. Secondly, the true intentions of the original parties (as contended by the appellant) could not have been given effect to, because subdivision was a legal requirement. Thirdly, there was no mutual mistake: the respondent claimed to have bought what the deed stated, that is, exclusive rights of occupation of five shops with an undivided share in the common property.

Held, further, that the court could not rectify an error in the deed of transfer. The error lay outside the deed, in drawing the deed without seeking subdivision. Once the appellant did that, the scheme necessarily resulted in the land shares becoming common property.

Cases cited:

Guthrie Hldgs (Pvt) Ltd v *Arches (Pvt) Ltd* 1989 (1) ZLR 184 (S)

Matanzima & Anor v *van Jaarsveld NO & Anor* 1991 (4) SA 304 (TkA)

Myers v *van Heerde & Ors* 1966 (2) SA 649 (C)

National Industrial Credit Corp (Rhod) Ltd v *Kluckow* 1970 (1) RLR 92 (G)

Copyright Juta & Co Ltd

Nhalpo v *Nhlapo* 1946 NPD 492

Weinerlein v *Goch Bldgs Ltd* 1925 AD 282

Wells v *SA Alumenite Co* 1927 AD 69

Legislation referred to:

Deeds Registries Act [*Chapter 20:05*], ss 27 and 79

Regional, Town and Country Planning Act [*Chapter 29:12*], s 39

Case Information

A P de Bourbon SC, for the appellant

J B Colegrave, for the respondent

Judgment

McNALLY JA: I will refer to the parties as the appellant and the respondent. On 28 September 1973, the appellant obtained title to Stand 4, Victoria Falls Township. On this stand, it built a large shopping arcade known as Sopers Centre (``the Centre''). It had twenty-three shops and five self-contained flats.

The appellant wanted to sell off these individual shops and flats under what is elsewhere known as sectional title. In Zimbabwe, this is achieved by a procedure specified in s 27 (formerly s 25A) of the Deeds Registries Act [*Chapter 20:05*]. The section allows for the creation of what are called ``undivided shares with exclusive rights of occupation''. I will refer to it as ``a s 27 scheme''.

Unhappily, in attempting to achieve this objective, the appellant and/or his conveyancer made several major errors. The first, and most important, was that it failed to do what it says it intended to do, namely exclude from the ``common property'' large areas of undeveloped land around the main building known as Building A, and also to exclude a smaller building known as Building B. This undeveloped land, variously referred to as Land Share 1 and Land Share 2 (but there is also a Land Share 3), together with Building B, were intended to be retained as the property of the appellant.

The second error is that the notarial deed refers in clause 8 to thirty shares

instead of twenty-eight as set out in clause 1. The additional two shares are alleged to be ``for storerooms'' and appear to relate to Building B which has two rooms.

The third error, which in a sense is the same as the first error, is that Land Shares 1 and 2 (and for that matter Land Share 3 as well) are not mentioned in the notarial deed. In fact, the deed provides in clause 9 that ``once all the undivided shares hereby created have been transferred

Copyright Juta & Co Ltd

the Company (the appellant) may be wound up''. What then happens to the land shares?

The position is further complicated by the terms of s 39 of the Regional, Town and Country Planning Act [*Chapter 29:12*]. The section provides that a permit is required from the local authority before there can be sub-division of any property. In effect, that is what the appellant wants. It wishes to exclude Land Shares 1 and 2 (apparently it is not concerned about Land Share 3) from the property governed by the notarial deed. That will effectively also exclude Building B, which is on Land Share 1. In order to achieve that exclusion, it will have to apply to the local authority for a permit to sub-divide Stand 4. That permit may or may not be granted. It is not for the courts to usurp the power of the local authority. The application should, of course, have been made before the notarial deed was drawn up.

It seems to have been (albeit somewhat vaguely) understood by the various original owners of the undivided shares that the undeveloped land around the Centre was to be retained by the original owner. The problem surfaced when the respondent in July 1993 acquired five of the undivided shares, not from the appellant, but from the original purchaser, and asserted that it was unaware of any such restriction. It claimed that its rights were as defined in the deed, and that the land around Building A had to be regarded as common property as defined in clause 1.9 of the constitution of the Sopers Centre Owners Association. The definition reads:

> ``Common Property:That portion of the property over which no exclusive right of occupation has been granted.''

There is one last problem. Section 27 of the Deeds Registries Act, in subs 1(b)(vi), requires that a notarial deed providing for undivided shares with exclusive rights of ownership shall provide for the manner in which the notarial deed may be amended. In para 6 of the deed it is provided that the deed may be amended as provided in the constitutions. (There is one constitution for the shop owners and another for the flat owners.) But neither constitution makes any such provision.

In an effort to unscramble this thoroughly scrambled egg, the appellant sought a declaratory order. It asked the court to declare that:

1. The land outside Building A on Stand No. 4, Victoria Falls, does not

McNALLY JA

belong to the respondents (and it cited all the twenty-eight shareholders as respondents) as their common property, or as the property of any one or more of them.

2. The whole land outside Building A referred to in para 1 hereof is the property of the applicant (the appellant) and the applicant is entitled to register its ownership of the land either by an amendment to the original notarial deed, or by obtaining a certificate of registered title, notwithstanding any objections by the respondents.

3. The applicant is entitled to amend the notarial deed which it executed on 23 August 1990 as shown in para 17.4 of its founding affidavit.

In the High Court, the respondent opposed the application. The other owners either consented

Copyright Juta & Co Ltd

to the order or refrained from opposing it, save for one of them who joined the respondent (but who was not a party to the appeal).

In its judgment, handed down on 22 January 1997, after a hearing on 1 August 1996, the High Court dismissed the application with costs.

The learned judge pointed out, with respect correctly, that subs (3) of s 27 of the Deeds Registries Act prohibits an amendment to a notarial deed which has the effect of altering the number of undivided shares in the land as originally created unless the land has been sub-divided. That would seem to rule out the relief sought as a first choice in para 2 of the draft order cited earlier.

He then went on to conclude that Building B was included as BS 29 and BS 30, and those two building shares were therefore properly part of the deed as conveying exclusive rights of occupation of them on the appellant.

By analogy with the South African Sectional Titles Act 95 of 1986, the learned judge went on to conclude that those parts of the Stand outside Buildings A and B had to be regarded as common property. If it had been the intention to exclude them, they should first have been separated by sub-division.

In response to the submission that the notarial deed should be rectified, to reflect the appellant's true original intention, the learned judge pointed out that it had taken a long time (some three years) to seek rectification. But in any event, the deed was clear that the whole of the Stand was to be disposed of in terms of the deed, so that the appellant would cease to have any meaningful existence after the twenty-eight or thirty rights had been disposed of. Hence Clause 9 of the deed, which states:

> ``Once all the undivided shares hereby created have been transferred the Company (the appellant) may be wound up.''

While His Lordship recognised that many of the documents produced

McNALLY JA

showed that a number of the respondents acknowledged the ``right'' of the appellant to exclude the land outside the buildings from the scope of the deed, he concluded that their view was based on a misconception of the law. Nor could their view alter the intention of the appellant as clearly spelt out in the deed. The respondents (other than the respondent who has persisted in opposing the appeal) were simply mistaken in thinking that they had no rights in respect of the undeveloped land. Nor was there mutual mistake. The respondents took no part in drawing the notarial deed.

Mr *de Bourbon* on appeal has argued that it is not correct to speak of the clear intention of the appellant as manifested in the notarial deed. The deed is so full of internal contradictions that no clear intent can be said to emerge.

I think there is some merit in that submission, though it is not clear whether the appellant can

Copyright Juta & Co Ltd

derive any comfort from it.

In the first place, there is the inherent contradiction in the reference to twenty-eight shares and then to thirty shares. It seems that it was an error to speak of the two storerooms in Building A as BS 29 and BS 30.

Secondly, clause 8 of the notarial deed sets out the percentage share in the Company's property of each of the building shares, and then goes on to describe the ``Common Area'' as amounting to 27.95% of the total. The affidavit of the architect makes it clear that that 27.95% is the percentage of Building A which was common. Had it included Land Shares 1, 2 and 3, it would have been a far higher figure. These figures are consistent only with an assumption that the undeveloped land was not seen as part of the common area. (On the other hand, it might be said that it was necessary to define the ``common area'' in Building A, but not necessary to say that the land outside it was ``common property'', because that was self-evident).

Thirdly, there is the clear indication by the appellant, through its principal shareholder, Mr M P Patel, and by a number of the share purchasers, that it was their understanding that the undeveloped land was excluded. They seem to have been understandably confused about the status of Building B, but they were not confused about the undeveloped land. They were even content to allow the appellant to lease that land to someone else.

Assuming that the deed did not reflect the true intention of the appellant, how can the court come to its relief? I may say that there is an additional difficulty, not raised in argument, created by the provisions of s 79 of the Deeds Registries Act. Notice of the application should have been given to the Registrar of Deeds. His report as to any possible practical solution would have been of great assistance to the court.

Mr *de Bourbon* contends that this court can ``rectify the error'', because it has the power to rectify a deed ``just as it has power to rectify any other contractual document''. He relies for this submission on *Weinerlein* v

McNALLY JA

Goch Buildings Ltd 1925 AD 282 at 291-293; *Nhalpo* v *Nhalpo* 1946 NPD 492; *Myers* v *van Heerde & Ors* 1966 (2) SA 649 (C) at 654-656;

Matanzima & Anor v *van Jaarsveld NO & Anor* 1991 (4) SA 304 (Tk A) at 309G-H.

The decision in *Weinerlein* v *Goch Buildings Ltd supra* has been followed many times, *inter alia* in *National Industrial Credit Corporation (Rhodesia) Ltd* v *Kluckow* 1970 (1) RLR 92 (G). In that case at p 97A, GOLDIN J (as he then was) said:

> ``I have already pointed out that, in reforming an agreement, all that the court does is to allow to be put in writing what both parties intended or wanted to be put in writing, and erroneously thought they had. Despite a mutual mistake, the parties must be *ad idem*, and it must be proved that both wished the same thing, but, merely by accident, a mistake was made in the writing. (See *Weinerlein* v *Goch Buildings Ltd supra*).''

(See also *Guthrie Hldgs (Pvt) Ltd* v *Arches (Pvt) Ltd* 1989 (1) ZLR 184 (S) at 189B). Similarly, in

Copyright Juta & Co Ltd

Weinerlein's case itself, the passage in the judgment of WESSELS JA on which reliance is placed reads, in part:

> ``All therefore that s 30 says in effect is that the courts will not recognise any contract of sale as a legal act unless it is in writing, but once the contract is in writing the court will not allow it to be used as an engine of fraud to extort from an adversary what the claimant knows that he never was entitled to, and in order to prevent this it will cause the written contract and the register to be rectified.''

It will be apparent that there are two major differences between that case and this.

First, the respondent in this appeal is (or at least so it must be accepted) an innocent third party, an innocent purchaser for value. It is not ``extorting that which he knows he never was entitled to''. Second, if the facts for which the appellant contends are true, then the true intention of the parties cannot be given effect to. The law does not allow a s 27 scheme on part of a stand. Without subdivision the arrangement intended by the appellant simply could not have been put into effect.

The court cannot rectify the notarial deed in the manner requested because to do so would be to contravene the law. If the land shares and Building B are to be excluded from the scope of the deed, a prior sub-division permit from the local authority is needed. If the land shares and Building B are to be made separate undivided shares with exclusive rights of occupation, then proviso (i) to s 27(3) of the Act also requires a prior sub-division.

And, in any event, there is no mutual mistake here, as between these particular parties. The respondent claims that it bought what the deed said it bought, namely, exclusive rights of occupation of five shops with an undivided share in the common area in Building A and in the common property surrounding that building. There is force in this argument. A person buying a flat in a block of flats would assume that the garden around the

building is common property. So here, there would be no reason for the respondent to suppose that the land shares were not common property, but were to be regarded, quite illegally, as a separate entity.

Nhlapo's case, cited next, is authority only for the proposition that in a proper case the courts have inherent jurisdiction ``to authorise the rectification of errors in, or in connection with, deeds of transfer'' (at p 499). The problem in the present case, however, is different. We cannot correct the error, because the error is outside the notarial deed. The error lay in drawing the deed without first seeking sub-division. That was the appellant's error and its alone.

Myers v *van Heerde* contains this relevant *dictum* at 655H:

> ``The deed speaks for itself and the only grounds upon which it can be altered or added to are: (a) that there was no *justa causa* for the execution of the deed, for example, because the transfer was induced by fraud or because the contract, in execution of which the deed was registered, was induced by fraud; and (b) that the deed does not reflect truly the agreement entered into by the parties, for example, because the deed as registered does not truly carry out, and is not a true record of, the contract entered into by the parties, or because the contract, in execution of which the deed was registered, does not, on account of mutual error, reflect the true intentions of the parties,

Copyright Juta & Co Ltd

and the deed in consequence does not carry out the contract nor is it a true record of the execution of the contract.''

Again, it seems to me, the facts of this case take it out of the purview of these comments: First, because the notarial deed is not a contractual document. It is an unilateral act by the appellant. In creating a s 27 scheme, the appellant acted alone. It created that scheme in respect of Stand 4 - the whole of Stand 4. What subsequent purchasers bought - whether they realised it or not - was an exclusive right (a real right) of occupation of their shop or flat, plus a common right of ownership, through the Association, of the remainder of the unexclusive property.

The respondent in the present case is one step further removed. It has never been in any relevant contractual relationship with the appellant. It bought its five s 27 rights from its predecessor in title.

Finally, I turn to consider *Matanzima*'s case. The judgment of GOLDIN JA (with whom JAMES JA and DUMBUTSHENA JA agreed) includes the comment that ``there is ample authority (for the proposition) that the court is entitled to order rectification of a title deed or deed of grant''. I have no problem at all with that statement. But there is no way this particular notarial deed can be lawfully rectified to deal with the land shares in the way the appellant wants to deal with them. Nor can we simply declare the deed null and void, because to do so would be to nullify real rights lawfully acquired.

I am thus forced to the same conclusion as was the learned judge below, and for essentially the same reasons.

The fact is that the appellant's error lay in its own decision to create a s 27

McNALLY JA

scheme on Stand 4 without first sub-dividing it. Once it did that, the scheme necessarily resulted in the land shares becoming common property. They were, as a matter of law, part of the scheme. They were, in terms of the notarial deed, not subject to exclusive rights of occupation. They could therefore only be common property. The reference to ``common area'' in clause 8 of the deed clearly refers to the common area in Building A. It does not mean, in law, that the land shares are not part of the common property. It cannot mean that. It is true that one of the diagrams annexed to the deed contains the words ``Buildings A-B and Land Share 1 situate thereon (ie on Stand 4) are subject to exclusive rights of occupation''. But that statement is simply inconsistent with the deed which says nothing about an exclusive right in respect of Land Share 1 (or, for that matter, Land Shares 2 or 3). Nor is the statement part of the deed.

Indeed, one wonders whether the Registrar of Deeds could have approved a s 27 scheme in which some of the shares were left undeveloped, to be used not necessarily as flats or shops but possibly in some totally different way in the future. In this context, compliance with s 79 of the Deeds Registries Act, earlier referred to, would have been useful.

However, in the circumstances that question is not relevant. I am satisfied that the notarial deed under scrutiny cannot be interpreted or rectified in the way the appellant wants it to be. Insofar

Copyright Juta & Co Ltd

as there is confusion in relation to building shares 29 and 30, (and there certainly is confusion) that has been resolved in favour of the appellant and there is no cross-appeal in that regard. Nor can the court effectively destroy the deed and the real rights of the participants by authorising an application for sub-division. The unfortunate appellant is left in the position so graphically described by INNES CJ in *Wells* v *SA Alumenite Co* 1927 AD 69 at 73:

> ``No doubt the condition is hard and onerous, but if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands.''

He then went on to quote LORD JESSEL MR:

> ``If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice.''

The appellant created a s 27 scheme on stand 4. The whole of Stand 4 had, by law, to be included in that scheme. The land shares, whether by the appellant's unilateral mistake or not, became ``common property'', if only because they were not ``coupled with an exclusive right of occupation''.

I should perhaps deal with the appellant's third prayer for relief. It seems to me that that relief is not necessary. The deed does provide for amendment.

McNALLY JA

It is only the constitutions which do not. It is up to the Shopowners and Flatowners Associations to amend their constitutions to give effect to clause 6 of the deed.

I would dismiss the appeal with costs.

SANDURA JA: I agree.

KORSAH AJA: I agree.

Kantor & Immerman, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

MUCHONGWE *v* REDCLIFF MUNICIPALITY 1998 (2) ZLR 145 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

16 & 30 July 1998 Judgment No. S-116-98

Copyright Juta & Co Ltd

Flynote

Employment - contract - termination - dismissal - urban council employee - council proceedings under labour legislation and not under Urban Councils Act - effect of failure to apply forthwith for permission to terminate

Local authority - employee - dismissal of - procedure - council entitled to proceed either under Urban Councils Act or under labour legislation - requirement for full compliance with legislation under which council proceeded

Headnote

An employee of an urban council who had absented himself from his employment for a number of days had been suspended without pay in terms of the Labour Relations (General Conditions of Employment) Regulations (``the Regulations''). An application had been made to a labour officer for permission to terminate the employee's employment. This application was successful, the labour relations officer finding that the employee had absented himself from employment without reasonable excuse. This determination was upheld by a senior labour relations officer and an appeal by the employee to the Labour Relations Tribunal against this determination was unsuccessful. The employee then appealed to the Supreme Court against the decision of the Labour Relations Tribunal.

Held, that ``reasonable excuse'' may be something less than lawful excuse but in the circumstances of this case the employee had failed to establish that he had had a reasonable excuse for his absence and that he had not repudiated his contract.

Held, further, that in terms of the legal provision that applied at that time, namely s 90(7) of the Urban Councils Act [*Chapter 214*], an urban council had the choice to dismiss an urban council employee on notice of three months or summarily on any ground that justified discharge without notice. But if it proceeded in terms of this provision, then, in terms of s 90(9) of the Urban Councils Act, it had to obtain the consent of the Minister of Local Government, Rural and Urban Development to dismiss the employee. It was, however, no longer obliged to obtain the written approval of the Minister of Labour, Manpower and Social Welfare for the discharge of an urban council employee.

Held, further, that the employer had not proceeded in terms of s 90(7) of the Urban Councils Act. It chose to proceed under the labour relations legislation and in doing do it was obliged to comply with the requirements of s 3(1) of the Regulations. This it failed to do, as it had not applied ``forthwith'', as it was obliged to do, for an order terminating the appellant's contract of employment and there was no meaningful excuse for the protracted delay in applying for such order.

1998 (2) ZLR p146

GUBBAY CJ

Held, therefore, that although the Labour Relations Tribunal was correct to have dismissed the appeal, it ought to have altered the date of the employee's discharge to the date on which the labour relations officer granted permission to terminate the employee's contract of employment and should have ordered that the employee be paid his salary and terminal benefits up to that date.

Copyright Juta & Co Ltd

Cases cited:

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

Mhowa v *Beverley Bldg Soc* 1998 (1) ZLR 546 (S)

Mutare City Council v *Matamisa* 1998 (1) ZLR 512 (S)

Myers v *Sieradzki* 1910 TPD 869

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

Zimbabwe Sun Hotels (Pvt) Ltd v *Lawn* 1988 (1) ZLR 143 (S)

Legislation considered:

Urban Councils Act [C*hapter 214 of 1974*], s 90(7) and 90(9)

Case Information

A J Dyke, for the appellant

E W W Morris, for the respondent

Judgment

GUBBAY CJ: The appellant was employed by the respondent urban council as its personnel officer having been engaged in that capacity in January 1990.

On 16 June 1995, the appellant was advised in writing that he was suspended from duty without pay in terms of ss 3(1)(a) and (f) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations SI 371 of 1985 (``the Regulations''). The suspension was followed on 9 August 1995, by an application to a labour relations officer for permission to terminate the appellant's contract of employment. The stated ground was that in contravention of s 3(1)(f) of the Regulations, the appellant had absented himself from work for a period of ten working days, from 5 to 16 June 1995, without reasonable excuse.

After conducting a lengthy and careful investigation, the labour relations officer found that the appellant had indeed absented himself from work for a period of five or more working days without reasonable excuse. The ground for suspension thus having been established, the respondent was, on 3 January 1996, granted permission to terminate the appellant's contract of employment.

On 29 May 1996, the determination of the labour relations officer was upheld by a senior labour relations officer, and on 8 April 1997 the Labour Relations Tribunal dismissed the appeal brought before it with no order as to costs.

Section 90(9) of the Urban Council Act [*Chapter 214*] (``the Act''), as amended by the Urban Councils Amendment Act 15 of 1986 (applicable at

Copyright Juta & Co Ltd

the time since the Urban Councils Act [*Chapter 29:15*] came into operation on 22 December 1995), recited that:

> ``Notwithstanding any other law to the contrary, if the consent of the Minister [*ie* 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.''

The significant modification brought about by the introduction of the provision was that it was no longer obligatory to obtain written approval from the Minister of Labour, Manpower and Social Welfare for the discharge of an urban council employee. As an alternative option, the approval of the

Minister of Local Government, Rural and Urban Development was made acceptable. See *Gumbo* v *Norton-Selous Rural Council* 1992 (2) ZLR 403 (S) at 409G; *Mutare City Council* v *Matamisa* 1998 (1) ZLR 512 (S) at 516.

Relying on the impact of s 90(9) of the Act, Mr *Dyke*, who appeared for the appellant, argued that as the respondent had opted to travel the labour relations route it was not entitled thereafter to endeavour to justify its action by adverting to the procedure laid down for the discharge of an employee in s 90(7). Accordingly, so the argument went, as the respondent had omitted to apply ``forthwith'' for an order terminating the appellant's contract of employment in compliance with s 3(1) of the Regulations, the suspension was invalid but not the subsequent application. In the event, the respondent was obliged to pay the appellant's salary and terminal benefits from 16 June 1995 to 3 January 1996 when the determination of the labour relations officer was handed down. See *Standard Chartered Bank Zimbabwe Ltd* v *Matsika* 1996 (1) ZLR 123 (S) at 131D-132G.

I should make it clear that the point now taken was raised only obliquely in the appellant's heads of argument (which were not prepared by Mr *Dyke)*. Wisely, he did not press the remaining contentions addressed therein; they are entirely devoid of merit.

It was common cause that the appellant deliberately absented himself for a period of working days in excess of those permitted. The excuse proffered was that his presence was required to entertain and comfort the husband of his wife's sister, who happened to be gravely ill at Rusitu Mission Hospital in Chimanimani.

The concept of ``reasonable excuse'' was considered recently by this court in *Mhowa* v *Beverley Building Society* 1998 (1) ZLR 546 (S). It was emphasised in that case that ``reasonable excuse'' may be something less than ``lawful excuse''; that the non-existence of a lawful excuse did not necessarily imply the lack of a reasonable excuse.

In upholding the finding of the labour relations officer that the appellant

had not been shown to have had a reasonable excuse, the Deputy Chairman of the Tribunal

Copyright Juta & Co Ltd

observed as follows:

> ``I take the view that both the appellant's wife and the sick man's wife who were closely related to the sick man were better suited to take care and comfort the sick man. This is amply demonstrated by the fact that the appellant later left the sick relative in circumstances where nothing had changed.
>
> Instead of proceeding straight to his work place, the appellant decided to pass through Chinhoyi checking on his mother whom he had gathered had fallen sick. There is nothing on record to suggest that the appellant's mother was seriously ill and in need of his immediate attention.''

Mr *Dyke* did not feel constrained to urge that the Deputy Chairman had erred in law in concluding that the given facts did not establish the existence of ``reasonable excuse''. Again I regard the concession as properly made. After all, the burden of proving ``reasonable excuse'' fell upon the appellant. It was for him to prove that he had not repudiated his contract of employment.

See *Zimbabwe Sun Hotels (Pvt) Ltd* v *Lawn* 1988 (1) ZLR 143 (S) at 151F-G.

Mr *Morris* resisted the contention that the respondent was obliged to pay the appellant any salary and terminal benefits. He did so on two fronts. First, he argued, with much resourcefulness, that by virtue of the provisions of s 90(7)(b) of the Act it had been open to the respondent to discharge the appellant summarily; and that being so, it was equally entitled to have its opinion whether to do so confirmed by a labour relations officer.

At the material time s 90(7) read:

> ``Subject to subsection (8) [which was of no application as the appellant was not a senior official as defined] and to the conditions of service of the employee concerned [which had not been fixed in terms of subs (6)], a council may at any time discharge an employee -
>
> (1) upon notice of not less than three months; or
>
> (2) summarily on the ground of misconduct, dishonesty, negligence or *any other ground that would in law justify discharge without notice*'' (emphasis added).

I do not think it can be doubted that the appellant's misconduct constituted a ground for dismissal under the common law. See *Myers* v *Sieradzki* 1910 TPD 869 at 876; *Strachan* v *Prinsloo* 1925 TPD 709 at 718. The word ``law'' embraced the grounds of discharge recognised both under the common law and by statutory enactment. Subsection (7) therefore gave to an urban council a choice: it could discharge an employee on notice of not less than three months, or summarily on any ground that justified discharge without notice. But if recourse was had to subs (7) then, subs (9) came into play. The consent of the Minister of Local Government, Rural and Urban Development would have had to be obtained. Normally, one assumes that such consent would be obtained by a council in advance.

The respondent did not, of course, invoke the provisions of subs (7)(b) of

s 90 to rid itself of the appellant. It chose to proceed under the labour relations legislation and

Copyright Juta & Co Ltd

in doing so was obliged to comply with the requirements of s 3(1) of the Regulations. This it failed to do by not applying ``forthwith'' for an order or determination terminating the appellant's contract of employment.

The second and alternative argument advanced by Mr *Morris* was that the appellant was not at liberty to rely upon the invalidity of the suspension as it had not been specified as a ground of appeal.

It is true that ground 2:5 of the notice of appeal, read in context, related to a submission that the invalidity of the suspension was consequential upon the procedure adopted under the labour relations legislation being expressly excluded by s 90(9) of the Act.

Nonetheless, as I have noted, the point was taken, albeit *en passant*, in the heads of argument. And I do not believe that the late stage at which it was raised has prejudiced the respondent. Having proceeded in terms of the Regulations the respondent ought to have appreciated the necessity to apply *forthwith* for permission to terminate the appellant's employment. Its letter of 9 August 1995 to the labour relations officer, though advising that the appellant had been suspended on 16 June 1995, offered no explanation for the ensuing delay of seven weeks in making the application. The probability is that there was no meaningful excuse for such delay.

Consequently, I am of the view that, though correct in dismissing the appeal, the Tribunal ought to have altered the date of the appellant's discharge to 3 January 1996 and ordered that he be paid his salary and terminal benefits to that date.

Finally, it does not seem to me that it can fairly be said that the appellant has achieved such a degree of success in this appeal as to warrant an order for costs in his favour. He was at fault in only raising the issue upon which he has succeeded succinctly at the hearing. I am not inclined therefore, to deprive the respondent of the costs of appeal.

Accordingly, I would order that the appeal be dismissed with costs, save that the respondent is directed to pay to the appellant his salary and terminal benefits for the period from 16 June 1995 to 3 January 1996.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Danziger & Partners, respondent's legal practitioners

ZIMBABWE UNITED OMNIBUS CO *v* MABANDE & ANOR 1998 (2) ZLR 150 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Muchechetere JA & Sandura JA

Appeal from decision of Labour Relations Tribunal

Copyright Juta & Co Ltd

21 & 30 July 1998 Judgment No. S-122-98

Flynote

Employment - contract - termination - dismissal - grounds for - failing to obey lawful order - driving instructors refusing to drive passenger buses during strike by bus drivers - whether driving of passenger buses a related or similar duty requiring instructors to drive such buses

Headnote

The respondents were driving instructors employed by the appellant bus company. During a strike by the drivers of passenger buses, the company directed the respondents to drive buses on normal passenger routes. When they refused to do so, the company applied for the termination of their contracts on the grounds that they had disobeyed a lawful order. The respondents' contracts of employment made no mention of driving passenger buses, merely of giving driving instruction, and carrying out ``related or similar duties''. The company argued that the driving of passenger buses was covered by this phrase.

Held, that the ``related or similar duties'' which the respondents could be required to perform had to be in accord with the nature of the duties laid down in the rest of the contract. In terms the contract, the respondents' duties were confined to training other employees to drive buses and to what was allied thereto. The fact that the respondents retained the ability and skill to drive the company's buses did not affect the situation.

Held, further, that the company could not require the respondents to drive passenger buses as ``emergency work'', as the emergency work which could be required of them could only be overtime work of the same kind as that performed during their normal hours of work.

Cases cited:

Matereke v *C T Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S)

Muchakata v *Netherburn Mine* 1996 (1) ZLR 153 (S)

Zimbabwe Sun Hotels (Pvt) Ltd v *Lawn* 1988 (1) ZLR 143 (S)

Case Information

A Mugandiwa, for the appellant

Respondents in person

Judgment

GUBBAY CJ: At the beginning of April 1992, the omnibus drivers in the employ of the appellant embarked on a period of go-slow. On the seventh day of that month, and while the industrial action was still in progress, the respondents, who were employed by the appellant as drivers' instructors,

Copyright Juta & Co Ltd

were ordered to drive passengers for hire or reward. Both declined to comply with the order. Letters of suspension were served upon them three days later.

On 21 April 1992, the appellant applied to a labour relations officer for permission to terminate the respondents' contracts of employment. The stated ground was their wilful disobedience to a lawful order in breach of s 3(1)(b) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations (SI 371 of 1985).

The Labour Relations Tribunal, confirming the determination of the regional hearing officer, held that as the order contravened the terms of the contracts of employment, the respondents were not obliged to obey it. It was unlawful and unenforceable. The *dictum* in *Matereke* v *C T Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S) at 212E was cited in support of the proposition.

Whether or not an order is lawful is certainly a question of law. See *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) at 155B. Hence, an appeal was brought before this court pursuant to s 99(2) of the Labour Relations Act [*Chapter 28:01*].

The facts which gave rise to the issue of law were not in dispute. Clause 1 of the respondents' identical contracts of employment spelt out their duties and responsibilities as follows:

> ``(a) Give driving instruction to all new employees through induction programmes.
>
> (b) Run driving instruction seminars for old drivers.
>
> (c) Recommend solutions to problems of poor driving to Training Officer to prevent and/or curb future poor workmanship of drivers.
>
> (d) Suggest, analyse, formulate and introduce courses to improve the calibre of our drivers.
>
> (e) Give driving instruction lessons (theory and practice) to learner bus drivers including shunting/yard drivers.
>
> (f) Help prepare drivers for Defensive Driving and Advanced Courses for our employees and Members of the public who so wish (for a fee).
>
> (g) Plan and organise routine day to day work.
>
> (h) Advise the Training Officer what courses should be run by the technical Training Officer for drivers.
>
> (i) Carry out any related or similar duties as and when required.''

Clause 2 required the respondents to work on Monday to Friday from 8.00 am to 5.00 pm with a lunch break of 75 minutes; and, occasionally, on Saturday mornings, depending on the circumstances prevailing at the time.

The contention advanced on behalf of the appellant, before both the Tribunal and this court, was that part of the duties and responsibilities of the respondents was to give practical driving lessons. The driving of buses for hire or reward was said to be but a natural and logical progression from instructing persons how to drive; such activity, therefore, fell squarely within the ambit of ``related or similar duties'' as envisaged in sub-clause (i).

Copyright Juta & Co Ltd

GUBBAY CJ

I am unable to agree. The nature of the duties detailed in sub-clauses (a) to (h) make it clear, to my mind, that the ``related or similar duties'' the respondents could be required to perform had to be in accord therewith; an essential identity was necessary. The duties of the respondents were confined to training of employees to drive buses and to what was allied thereto. The driving of buses for the conveyance of fare-paying passengers was not a related or similar duty. It was an activity foreign to the type of duties the respondents were employed to perform - one which did not appertain to the character or capacity of their contracts of employment.

The fact that the respondents may have been employed initially as drivers, but had risen in the ranks of the organisation to instructors, did not clothe the appellant with authority to order them to perform duties unrelated to and dissimilar from those required of instructors. Upon promotion, the capacity in which they were employed was changed. It mattered not that they retained the ability and skill to drive the appellant's passengers.

Reference was made by the appellant to s 5(4) of the Transport Operating Industry, Collective Bargaining Agreement (SI 18 of 1989), in force at the time (since repealed and substituted by SI 94 of 1995). It read:

> ``An employer shall not require an employee to work overtime except in the case of emergency work.''

``Emergency work'' was defined in s 3 as:

> ``... work which must be performed immediately in order to prevent harm to the employer's assets or to the employees, or to nearby persons or properties, or which must be carried out without delay in the public interest.''

In reliance upon s 5(4), the argument was advanced that the ``go slow'' engaged in by its drivers justified the appellant in ordering the respondents to perform this ``emergency work'' of driving fare-paying passengers.

In considering this argument, it may be accepted that if the appellant's buses did not run, its assets would be adversely affected, in the form of a loss of income. Nonetheless, the difficulty facing the appellant, so it seems to me, is that the ``emergency work'' that it was empowered to require of its employees to perform, in overtime, was only the work that they were engaged by it to do during normal hours. Stated otherwise, an employee could not be required to perform in an emergency, any work which fell outside the scope of his or her contract of employment. Thus, the appellant's drivers could be required to perform emergency work in conveying passengers for reward. But not, as I have found, the appellant's instructors, since their contracts of employment did not require them to perform that type of work.

Finally, and for the sake of completeness, let me say that I agree entirely with the learned Deputy Chairman, that having obtained permanent

GUBBAY CJ

Copyright Juta & Co Ltd

employment elsewhere the respondents were from that date deemed to have elected to have terminated their employment with the appellant. See *Zimbabwe Sun Hotels (Pvt) Ltd* v *Lawn* 1988 (1) ZLR 143 (S) at 151F-G.

In the result, I would confirm the order made by the Tribunal and dismiss the appeal with costs.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

MAKAMURE *v* MUTONGWIZO & ORS 1998 (2) ZLR 154 (HC)

Court **High Court, Harare**

Devittie J

Election petition

3 March & 5 August 1998 Judgment No. HH-56-98

Flynote

Elections - election petition - local government election - election for position of executive mayor - need to bring election petition in respect of mayoral election expeditiously

Election - election petition - investigation of allegations of irregularities - should be by trial action, rather than through affidavits

Elections - election morality - enforcement of - -- adequacy of systems provided by Zimbabwean legislation - history of development of such systems in Britain and adaption of them in Zimbabwe

Headnote

The applicant was the unsuccessful candidate for the mayoral elections in Harare, held on 14 and 15 September 1996. On 29 October, he instituted the present proceedings to set aside the election, citing irregularities of five main types. No explanation was given as to why the petition could not have been presented more expeditiously. On 20 November 1996 and 28 February 1997, the respondents filed their opposing affidavits. These affidavits did not deal adequately with some of the complaints raised. On 5 May 1997, the applicant filed his answering affidavit. His heads of argument were filed on 27 November.

Held, that in view of the dilatory manner in which the applicant had pursued his petition, and the lack of explanation for the delay, the application should be dismissed, without considering the merits. The need to present election petitions expeditiously was particularly important in the case of the election of an executive mayor, because, in view of the powers vested in the mayor, the validity of many things done by him would be impugned if the election were declared to be void.

Copyright Juta & Co Ltd

Held, further, that there appeared to be much merit in the application's allegations, when regard was had to the failure of the respondents to deal adequately with some of the complaints raised. While it is permissible in an ordinary civil application to take a robust view of the facts where a party fails to controvert allegations made, in an application of this nature the failure of a public officer to deal adequately with the allegations is not a proper basis on which to make firm findings of fact. The case showed the desirability of resolving election disputes by trial action.

Held, further, that although it was not necessary to comment on the adequacy of the electoral system and the machinery for enforcing election morality, an examination of the history of the development of such machinery in Britain - which took place over several decades - showed that the machinery developed there was largely reproduced in the Zimbabwean

DEVITTIE J

legislation, which, if properly implemented, provided an effective machinery for enforcing electoral morality.

Cases cited:

Electoral Commission v *Pirimita & Ors* 23/96 (Supreme Court of Malawi)

Kutama v *Kwe Kwe Town Council* 1993 (2) ZLR 137 (S)

Mhashu v *Chiroodza* HH-43-97

Mvundura v *Mudehwe & Anor* HH-176-96

Legislation considered:

Electoral Act [*Chapter 2:01*], ss 124, 125, 136 and 149

Case Information

H Zhou, for the applicant

J C Andersen SC, for the first, second and third respondents

Judgment

DEVITTIE J: The following is an eyewitness account of the 1874 British elections in Wolverhampton:

> ``Blood flowed freely and they were terribly kicked, one so shockingly about the head and face that his life is in much jeopardy - so soon as the roughs were able they got back to the railway station, where the profuse flow of blood has left painful evidence of the extent of the injuries the most injured have sustained. The victorious mob then paraded the streets, smashing windows of three public houses where the landlords are Tories, and similarly attacked the residence of the Chairman of the Conservative Party.''

This application raises a question of general importance concerning our electoral system. It is whether adequate provisions exist for the enforcement of electoral morality in Zimbabwe.

Copyright Juta & Co Ltd

The elections for the post of mayor of Harare were held on 14 and 15 September 1996. The elections were contested by the third respondent and the applicant. The third respondent won the elections by a substantial majority and was duly elected mayor. The applicant instituted the present proceedings on the 29 October 1996. The applicant alleges certain irregularities prior to and during the elections. The returning officer for the elections is the first respondent.

The applicant's papers are voluminous. He has alleged every possible breach of the electoral laws. The main grounds upon which applicant relies may be conveniently placed under the following broad categories.

Firstly, the applicant alleges that the period leading up to the election was characterised by violence and intimidation directed at his supporters. Prudence Kaseke lives in Sunningdale, Harare. She is a 22 year old single parent. In support of the applicant's allegations that widespread intimidation and violence took place in the Harare mayoral elections of September 1996, she has stated the following:

[*His Lordship cited the evidence relating to this allegation and continued:*]

DEVITTIE J

The first respondent was the returning officer. His response to the allegations of widespread violence and intimidation is best illustrated in his own words:

> ``The applicant criticises me as Returning Officer for not doing the impossible. For example -
>
> 1. Am I to organise patrols covering every house in the election area so as to prevent the injuries which Mrs Kaseke sustained?
>
> 2. Am I to attend all election meetings to prevent candidates being threatened?
>
> 3. Was I required to guarantee and assure that entry to the Town House was restricted to persons who were lawfully there?
>
> 4. Generally, was I responsible for controlling unruly or even criminal elements and prevent their intimidation of voters?
>
> The answers to these questions is, I submit `No'. These matters were under the control of the Police and were outside my practice'' [*sic*].

The other respondents deny knowledge of any violence or intimidation having been instigated by them or having taken place.

The second ground relates to the alleged manipulation of the voters rolls. The applicant states that persons who were not entitled to be registered were registered for the sole purpose of increasing the third respondent's votes. He further states that names of his supporters were removed from the roll. He says he received ``intelligence information'' in this regard. No further details are given to substantiate these allegations. In the absence of these details, the first respondent states that he is unable to deal with these complaints. In support of the allegation that the voters roll was manipulated, the applicant has produced an affidavit by Mrs Margaret Dongo, Independent MP. She states that in an attempt to check the accuracy of the roll she

Copyright Juta & Co Ltd

sent 8 000 envelopes with a return address to addressees and names on the voters roll. Of these, 3 500 were returned marked ``not known'' and ``address does not exist''. But Mrs Dongo does not suggest that any votes were cast in the names of the persons to whom these letters were addressed. Nor is it suggested that any such votes were cast for the third respondent. The first respondent appears to have carried out no investigation of this complaint and states that Mrs Dongo must have incorrectly addressed her letters.

Thirdly, the applicant contends that the voting process was manipulated. He states that ``check-points'' were erected in the vicinity of the polling booths, and that these were manned by ZANU (PF) personnel who gave voters voting slips as they proceeded to the polling booth. It is alleged that voters were intimidated at these ``check-points''. The first respondent states that this practice is legitimate. For my part, I see no irregularity in allowing a party to give its supporters voting slips as they proceed to the polling booths, if all that is intended is to facilitate the task of the polling officer in identifying the person's name on the roll. But it is a facility that ought to have been accorded to the applicant as well. If all voters are forced to go through a

check-point which is manned by one political party, there is a very real possibility that intimidation will occur.

Fourthly, the allegation is made that, contrary to lawful procedures, ballot boxes were opened in the absence of the candidate and that of his representatives, and that the counting began in his absence. The applicant says that he attended at the Town House to complain to the first respondent, the returning officer. He says he then held a meeting with the returning officer at which he inquired as to how many boxes had been illegally opened and votes counted. He states that the returning officer was unable to give a reply. According to the applicant, his agent instructed the returning officer that the applicant's team was not prepared to have anything further to do with the counting. He states that first respondent, as the returning officer, agreed to stop all the counting so as to determine the full extent of the boxes which had been illegally opened. Shortly thereafter, the applicant's agent advised him that Mr Mutongwiza had been unable to halt the counting. In the applicant's words:

> ``Mr Mudzana after the inspection reported to me that Mr Mutongwiza had been unable to halt the counting and that ZANU (PF) was now in full control of the process and that Ministers and other types of Provincial officials were present in the building to oversee that ZANU (PF) take over. We agreed that what we were seeing was not the end of a democratic election but the on going process of the overthrow of law and the progress of the *coup d',tat*.
>
> At our emergency meeting we discussed the threat to life of myself, a candidate and Mr Mudzana his agent being heard all around the Town House. We also considered the threat of injury or even death to our scrutinisers being imposed by a threatening ZANU (PF) crowd, which had laid siege to the Town House. We agreed that it was prudent to avoid a blood bath and to take the matter to the court. We accordingly ordered an evacuation of our supporters from the Town House. Three of our scrutinisers were subsequently assaulted, one of them being Innocent Mwashita.
>
> It is my honest opinion that the policemen present were part and parcel of the ZANU (PF) plot to overthrow the law at the Town House. The indifference to the violent threats and to acts of assaults on our Independent supporters was proof enough to us that they were incapable of performing the constitutional duty to uphold the

Copyright Juta & Co Ltd

law."

These allegations are strenuously denied.

Fifthly, the allegation is made that certain persons who were entitled to vote were turned away. In the opinion of the applicant, this was partly due to a deliberate withdrawal of some of the voters rolls from certain wards.

[*The learned judge outlined the evidence relating to this allegation and continued:*]

In respect of this and other alleged instances where the right to vote was denied, the first respondent states that such irregularities that did occur would

DEVITTIE J

not have affected the result. He has in this regard made a comparison of the number of votes cast for the third respondent as against the number of persons who were denied the right to vote. He states that the number of persons who were denied the right to vote is insignificant, in number terms, when regard is had to the fact that the applicant polled approximately 20% of the valid votes cast. The actual number of persons who claim to have been denied the right to vote on the grounds that their names did not appear on the roll is no more than fifty. The applicant suggests that several other persons were denied the right to vote. I think that it has been established that many persons were denied the right to vote. This may be attributable more to administrative problems and inefficiency than to any grand design masterminded by any of the respondents to deny applicant's supporters the right to vote. It may well be that, if a trial were held, many more cases would come to light, or it may be revealed that there was a deliberate scheme to tamper with the roll. On the papers before me, there is no evidence to suggest that the non-appearance of some names on the roll was attributable to more than administrative incompetence. It has not been shown, as SMITH J stated in *Mvundura* v *Mudehwe & Anor* HH-176-96, that the applicant was prejudiced to a greater extent than the third respondent was. The holding of a trial or an inquiry may have established otherwise.

The applicant seeks an order in the following terms:

``(1) That the third respondent be and is hereby disqualified from holding the office of Executive Mayor of Harare and that applicant be and is hereby declared the duly elected lawful Executive Mayor of the City of Harare;

or, alternatively,

that the election and the results thereof for the Executive Mayor for the City of Harare held on the 14 and 15 September 1996 be and is hereby annulled and set aside and declared null and void.

In the event that the alternative is granted, Orders 2 and 3 as set out below are also granted.

(2) That the first respondent be and is hereby ordered to begin preparing a voters' roll for the City of Harare that complies with the requirements of the Urban Councils' Act [*Chapter 29:15*].

(3) That fresh elections which are conducted in term of the Urban Councils Act be held within 90 days of the granting of this order under strict conditions of supervision to ensure that the respondents comply with the

Copyright Juta & Co Ltd

requirements of the Act."

The second respondent's counsel, Mr *Andersen*, submitted that the delay in setting the application down was such that this court should not entertain the merits of the application. The elections were held on 14 and 15 September 1996. The applicant instituted the present proceedings on 29 October 1996, approximately six weeks after the election. No explanation is offered as to why the application could not have been brought more expeditiously. On 20 November 1996 and 28 February 1997, the respondents filed their opposing

affidavits. On 5 May 1997, the applicant filed his answering affidavit. The applicant filed his heads of argument on 27 November 1997. It is clear from the above chronology that the applicant was extremely dilatory. No explanation has been given for the delay. In *Kutama* v *Town Council of Kwekwe* 1993 (2) ZLR 137 (S) at 140, KORSAH JA stated:

> ``Having the results of an election declared void is of such paramount urgency that delay in making applications to set aside such results cannot be brooked ...
>
> The appellant has delayed the finalisation of this matter beyond the point where the remedy he seeks can be justified on any ground."

This application was heard eighteen months after the election results. It seems to me, therefore, to use the words of KORSAH JA in *Kutama*'s case, that this application has been delayed beyond the point where the remedy applicant seeks may be justified on any ground.

I have also had regard to the dictum by SMITH J in *Mvundura*'s case *supra*.

> ``The setting aside of an election of a councillor would not have any significant effect on the affairs of a municipal or town council. The council could still manage the affairs of the municipality or town whilst a fresh election is held and the actions of the council whilst the deposed councillor would, in most if not all cases, not be affected. In the case of an executive mayor, however, the position is very different. He would, by virtue of the powers vested in the executive mayor, do many things and sign many documents the validity of which would be impugned if his election were declared null and void."

I would accordingly dismiss the application on account of the applicant's failure to bring this matter before the court with reasonable expedition.

The conclusion I have reached renders it unnecessary for me to consider the merits. I propose, however, to make some general observations. It may appear that there is a great deal of truth in the applicant's allegations when regard is had to the first respondent's failure to deal adequately with some of the complaints raised. It is permissible in an ordinary civil application to take a robust view of the facts where a party fails to controvert allegations made. I make no specific finding, but it does not seem to me that, in an application of this nature, the failure of a public officer, for whatever reason, to deal adequately with allegations made, is a proper basis upon which firm findings of fact ought to be made. An oral inquiry should be held.

I am also of the view that a proper application of the provisions of s 149 of the Electoral Act [*Chapter 2:01*] will ordinarily require the leading of oral evidence. Section149 provides that an election shall be set aside on account of non-compliance with the provisions of the act or a

Copyright Juta & Co Ltd

mistake only if such mistake or non-compliance contravened a principle of the Act and affected the result of the election.

The ground on which I have dismissed this application causes me great difficulty. The applicant may, had he brought his application in time, have placed the court in a position where the matter could have been referred to

trial for a just resolution of the factual dispute. But I am not prepared to foist on the applicant more blame than he should justly bear. This case has demonstrated the desirability of resolving electoral disputes by trial action. The nature of the disputes that have emerged in this case demand, for their just resolution, oral evidence to be adduced. For example, forty or more persons are named in connection with violence and intimidation and other malpractices. They would have had to be given an opportunity to be heard before any findings were made against them. The trial would have taken anything up to four weeks. It seems therefore that even if the application had been brought expeditiously, and been heard say three months after the election, a referral to trial may have necessitated further delay. On the other hand, the applicant was entitled to request the registrar of this court to set the matter down expeditiously, for a four-week trial. But I am unaware of any precedent in this regard. An examination of cases where challenges to election results have been brought before the courts demonstrates that where a challenge to election results involves disputes of fact, these matters have been heard as opposed applications and the factual disputes have remained unresolved. In *Kutama*'s case *supra*, the appellant challenged the election results in terms of the Urban Councils (Election) Regulations 1987 (SI 210/87). Section 48 thereof provides that a voter may petition the High Court to conduct an investigation into any alleged irregularity. The allegations of intimidation that appellant made were serious, as the court noted:

> ``In a supporting affidavit to the appellant's petition deposed to by Edison Gazimbe, the deponent averred that those people suspected by members of the said women's league of being the appellant's supporters were openly abused and intimidated; that even at the polling desk, the ZANU(PF) election agents, notably Mrs Hama and Mrs Waoemuka, literally took over the duties of the polling officer and explained all the procedures to the voters ... while not dismissing the very serious nature of these allegations which, if true, constituted an irregularity of grave proportions, the law demands that a person or persons accused of wrong doing must be given an opportunity to face their accusers and have a right to answer the charge or charges against them.''

The learned JUDGE OF APPEAL dismissed the appeal on the grounds that s 48(2) of the Urban Council (Election) Regulations provided that persons complained of in the petition must be served with notices of the petition. As this requirement was mandatory, failure to comply with it was fatal to appellant's case. It is clear from the judgment of KORSAH JA that the disputes of fact were not capable of resolution on the papers and that the court of first instance had not resolved the factual disputes on which the application turned. It is significant that KORSAH JA noted that the failure to give notice in terms of the election regulations can be remedied in the court of first instance but not in a court of appeal. In other words, if the matter had not been heard as an opposed court application and instead, an election trial had been

Copyright Juta & Co Ltd

held, the persons whose conduct was complained of in the petition would have had to be summoned to testify. In *Mhashu* v *Chiroodza* HH-43-97, I had cause to comment upon the need for a separate election court to try factual disputes expeditiously:

> ``I would add that complaints of this nature, particularly allegations of fraud, are more properly and expeditiously dealt with by an election court which can sit at short notice to determine allegations of the nature made in this application. It would ensure minimum disruption to the affairs of a municipal council. In the instant case, the Mayor has been in office for several months and the setting aside of an election can only have a disruptive effect on the financial and administrative well being of the Council.''

The adduction of oral evidence enables the court to have proper regard to the provisions of the Electoral Act. Section 125 of the Act provides that where a candidate or his agent has been found guilty of an illegal practice, the court shall not nullify the election if the candidate proves (a) that no corrupt or illegal practice was committed by the candidate or his election agent, or with their sanction (b) that the offences were trivial and of a limited character, and (c) that the candidate and his election agent took all reasonable steps to prevent the commission of any corrupt or illegal practices. Thus, even where a robust approach may be adopted to disputes of fact, a proper application of this provision requires a trial setting.

I am aware that in the light of the conclusion which I have reached I am not required, for the purposes of this judgment, to comment on the adequacy of the electoral system in this country - still less to assume the mantel of a crusader for electoral reform. I consider that to be the function of the legislature. But this application raises important questions about the existing machinery for enforcing electoral morality. The concerns which the applicant and Mrs Dongo raise seemed to me to justify the discussion that now follows, on whether our electoral system had adequate mechanisms to enforce electoral morality.

The applicant, a senior law lecturer at the University of Zimbabwe, expresses no confidence in the electoral system. In his heads of argument, the following submission is made:

> ``A ruling in this case against those who employ violence, intimidation and deceitful means in elections is one way to prevent Zimbabwe falling into the abyss of civil war and violence. The courts as the constitutional guardians and custodians of justice, should therefore treat the presumption of honesty and faithfulness on the part of our election officials with the necessary suspicion. Only when our system is totally reformed and when men and women with integrity run our elections can it be safely presumed that integrity and honourable behaviour reigns within the returning officers office and the polling booths.''

Mrs Margaret Dongo, an independent member of Parliament expressed similar sentiments.

> ``It is my belief that if the registration exercise in the campaign rules continue to allow

> ZANU PF to manipulate the voting process then vote rigging in Zimbabwe will remain prevalent.''

I am not prepared to assume that the evidence in this case proves a deliberate design by any of the respondents to subvert the electoral process. It does not. When removed from the heat of the mutual political antagonism generated by the election campaign, the substance of the

Copyright Juta & Co Ltd

allegations raised are concerned about the failure of the electoral system to deal effectively with electoral misconduct.

It was the French philosopher Voltaire who said: ``I disapprove of what you say, but will defend to the death your right to say it''. *(68) Until recently, perhaps 1990, the values expressed by Voltaire would not have given any advocate of electoral law reform in Zimbabwe any cause for disquiet. Prior to 1980, we did not have universal adult suffrage. The relatively small electorate largely shared a common political view, and the enforcement of electoral morality did not arise as a practical matter.

In 1980, the first democratic elections were held under a universal adult franchise. The euphoria that swept the nation then, and continued throughout the 1980s, meant that at local and national level, no opposition candidates emerged. In consequence, the question whether there existed adequate provisions to enforce electoral morality did not arise. The advent of the 1990s decade changed all that. In the wake of the Tiananmen Square uprising, a tide of democracy swept through Eastern Europe, leaving in its wake the dismantled foundations of the Soviet Empire. Africa, too, was affected, and the principle of multi-party elections began to take root. In Zimbabwe, the mood of the 1990s saw the emergence of opposition candidates in national and local elections. The period between 1990 and 1995 saw an increasing number of losing candidates bringing before the courts applications seeking the setting aside of the elections. As in the present application, disturbing questions were raised about the enforcement of electoral morality. This trend is likely to continue.

At the beginning of this judgment, I quoted an eyewitness account from the British elections of 1874 to demonstrate the corrupt practices that pervaded the British electoral system. It is true to say that the present British electoral system is largely free of violence and intimidation and other corrupt practices. Evidence of this is the absence of elections petitions by losing candidates. This state of affairs is, to a degree, attributable to the valiant struggle waged by English Parliamentarians to impose upon the British electorate an Electoral Act, which observes a strict code of electoral morality. It is instructive

therefore to travel, if only briefly, through that turbulent period of British electoral history.

In 18th century England, corruption, intimidation, violence and acts of bribery were accepted as part of the normal behaviour of a rude age. 1(69) The secret ballot was not permitted on the ground that it would jeopardise the legitimate influence of the ruling classes. The right to vote was restricted to the landed gentry and aristocrats. Initially, therefore, the reform movement focussed on the extension of the franchise to the lower classes with little attention being paid to electoral morality. That is not to say that no code of electoral morality existed. An Act of 1429 imposed a fine of £100 for electoral misconduct. In 1604, Parliament abolished the system whereby Chancery judges dealt with election petitions. Parliament deemed that it was the proper judge of its own returns. The practice that was introduced then, and continued until 1770, was that election petitions were decided by a vote of the whole House of Commons. In 1770, the Grenville Act was introduced. It took away the determination of contested elections

Copyright Juta & Co Ltd

from the Commons as a whole and gave it to a committee of the House. The reform movement, however, continued its pre-occupation with the extension of the franchise. Corruption, violence and other malpractices continued unabated.

It was not until 1854 that a real attempt was made to deal with corruption. A Royal Commission established in that year revealed astounding malpractices. In most of the large urban constituencies widespread intimidation and violence were common.

In 1857, a Bill was introduced to remove jurisdiction over election petitions from the House of Commons to a selected panel of distinguished persons. The Grenville committees were abolished. But in the elections of 1857 a Royal Commission established that electoral malpractices still prevailed.

Parliament's concern at the persistence of widespread electoral malpractice led to the appointment in 1867 of a Select Committee to make recommendations to deal with the persistence of widespread electoral malpractice. The committee recommended that jurisdiction over a controverted election be transferred to the court of the Queens Bench. Lord Chief Justice COCKBURN expressed ``the judiciary's strong and unanimous feeling of insuperable repugnance'' upon three grounds. Firstly, that the prestige of the judges would suffer if their decisions were subject to public debate. Secondly, that the proposed duties were beyond the scope of the duties they had undertaken. Thirdly, complaints were made in regard to the excessive workload. Disraeli proposed a compromise solution. At the beginning of each term, each of the

three superior courts of the Common Law would elect one of its members to try election petitions. Each judge so selected would receive an extra £500 a year. To relieve the pressure of work, three extra judges would be appointed. These provisions were incorporated into the Election Petitions and Corrupt Practices Act 1868. The transfer of the courts of jurisdiction over contravented elections proved to be a significant milestone in British electoral history.

In the elections of 1868, thirty-four election petitions were presented. The courts had to conduct quasi criminal proceedings and could go beyond the charges in the petition. If they thought they had not uncovered the full facts, a report in those terms would be made to the Speaker. The decision of the judges in the election trials provided the beginnings of judicial law on electoral misconduct. Politicians, now faced with the real prospect of a trial in open court, sought the best criminal lawyers of the day. When corrupt practices were extensive, the judges recommended the appointment of a Royal Committee to investigate the matter.

In the 1874 elections, twenty petitions were brought. A Select Committee recommended that election petitions be tried by two judges, instead of one, and that no respondent should be deprived of his seat or punished unless both judges agreed and further, that a representative of the Attorney-General should attend every trial and at the end prosecute these against whom corrupt practices had been established.

The 1880 election petition trials, conducted for the first time by two judges, brought to the public

Copyright Juta & Co Ltd

attention the persistence of corrupt practices. Twenty-eight petitions came up for trial. The findings of the Royal Commissions set up in the case of eight English boroughs led ultimately to the passing of the Corrupt and Illegal Practices Act 1883. The judgments in the election trials that followed the general election of 1880 were published within a few months. Eight Royal Commissions were appointed and heard evidence in the winter of 1880-1. Public anger and shame was aroused at the prevalence of malpractices, despite thirty years of remedial legislation. Parliament acted. The Attorney-General introduced the Parliamentary and Illegal Practices Bill, which was passed in 1883. One of the objects of the Bill was to make penalties for corrupt practices much more severe. The other was to draw a distinction between offences that were merely ``illegal'' and those that were corrupt, by visiting the latter with much heavier penalties. Bribery, treating, intimidation, abduction of voters and undue influence were classified as corrupt. Those found guilty by an election court or Royal Commission were liable to a sentence of two years' imprisonment, with or without hard labour, a fine of £500, and the loss of voting rights for ten years. In addition, a candidate found guilty of corrupt practices was barred for life from representing the constituency concerned.

DEVITTIE J

The Act of 1883 marked a turning point. It was generally recognised that, it represented the limit of legislative intervention over electioneering habits. After the 1883 elections, the number of election petitions fell dramatically. Thus, as the curtain was drawn on the 19th century, electioneering methods in the United Kingdom had reformed to an extent that would not have been thought possible twenty years earlier.

The following tribute was paid to the British House of Commons for its successful efforts that spanned several decades to improve electioneering morality:

> ``When all is said, however, it was the members of the House of Commons who from first to last set the moral tone, unprompted by outside pressure groups. At the cost of personal sacrifice to some of its members, Parliament managed, within one generation, to sweep away traditions that were centuries old and were regarded by many as well-nigh ineradicable. It is an achievement of which any legislature might well be proud.'' 2(70)

What lessons can be learnt from the British experience? It may seem startling, but the provisions of the British Electoral Act, which provides for the enforcement of electoral morality and whose history I have traced, are largely embodied in our Act. There is no significant omission.

I shall briefly summarise the provisions in our Act. A registered voter, a person claiming to have had the right to vote and a losing candidate may each present an election petition. The election may be challenged for ``want of qualification, disqualification, corrupt practice, illegal practice, irregularity or any other cause whatsoever''. The petitioner must provide security for expenses that may become payable to the persons summoned to trial.

It sets a high standard of electoral conduct. A distinction is drawn between ``corrupt'' and ``illegal'' practices. Part XX of the Act deals with corrupt practices. These include bribery, intimidation and the use of undue influence. In terms of s 109(3), a person guilty of a corrupt practice is liable to a fine not exceeding two thousand dollars or imprisonment not exceeding

---

Copyright Juta & Co Ltd

one year or to both such fine and such imprisonment. In addition, a person convicted of a corrupt practice by the High Court may be declared incapable, for a period not exceeding five years from the date of his conviction, of:

``(a) being registered as a voter or voting at an election; or

(b) filling a public office, other than a public office the tenure of which is regulated exclusively by or in terms of the Constitution, and, if he holds any such office, the High Court may declare that that office shall be vacated by him on the date of his conviction.''

Part XXI of the Act deals with illegal practices and these include corrupt procurement of a candidate, prohibition of certain symbols and conduct

---

DEVITTIE J

prohibited at polling stations. A person convicted by the High Court of an illegal practice is liable to a fine not exceeding two thousand dollars. Where the High Court convicts a person of an illegal practice, that person is liable, in addition to any other penalty, to be declared incapable, for a period not exceeding five years from the date of conviction, of holding public office or voting at an election.

In terms of s 124 of the Act, an election may be set aside if a candidate or his agent is found guilty of corrupt or illegal practice. It provides:

``If upon the trial of an election petition the High Court certifies to the Minister that any corrupt practice or illegal practice has been committed with reference to the election the subject of the petition, or by or with the knowledge and consent or approval of the candidate returned at that election, by or with the knowledge and consent or approval of any of his agents, the election of that candidate shall be void, and a fresh election shall thereupon be held.''

Provision is made for the disqualification from voting or holding public office of an election agent found by the High Court to be guilty of a corrupt or illegal practice. The election of a candidate is not invalidated and no penalties are visited upon the candidate or his agents if it is proved that -

``(a) no corrupt practice or illegal practice was committed at that election by the candidate himself or by his election agent and that the offences mentioned in the said finding were committed without the sanction or connivance of the candidate or his election agent; and

(b) the candidate and his election agent took all reasonable precautions for preventing the commission of corrupt practices and illegal practices at that election; and

(c) the offences mentioned in the finding were of a trivial, unimportant and limited character.''

It will be seen from the above that the Act, in addition to visiting criminal penalties upon the agent and his candidate, imposes certain disabilities upon them. With regard to the actual election results, the High Court is vested with wide powers. In terms of s 136 of the Act, it may deduct the votes of a person who was bribed or guilty of malpractice from the respondent's voters. At the conclusion of the trial, the court is required to determine whether the respondent was duly elected and what person, other than respondent, is entitled to be declared duly elected. If the court finds that no other person was duly elected, it shall so certify to the Speaker

---

Copyright Juta & Co Ltd

who shall notify the President that a vacancy has occurred.

The powers of the High Court to impose criminal sentences for contraventions of the Act extend to persons other than the candidate and his agent. Our Act ensures that if, during the hearing of an election petition, a person who is not a party to the proceedings is found by the High Court to have been guilty of any corrupt practice, the High Court shall cause notice to be given to such person to afford him an opportunity to be heard. Proceedings

DEVITTIE J

against such person must be instituted within six months after the offence is committed or within three months after the report of the High Court.

Where the High Court in its report states that any person has or may have been guilty of a corrupt or illegal practice or that there is reason to believe that corrupt practices have extensively prevailed at an election, the record of the evidence shall be transmitted to the Attorney-General ``with a view to the institution of any prosecution proper to be instituted in the circumstances''.

In any election petition, the High Court shall, in addition to reporting on the validity of the election report, in writing to the Speaker on the following matters:

> ``(a) whether any corrupt practice or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of a candidate at that election or by or with the knowledge and consent of any of his agents, and the nature of such corrupt practice or illegal practice; and
>
> (b) the names of all persons who have been proved at the trial to have been guilty of any corrupt practice or illegal practice; and
>
> (c) whether corrupt practices or illegal practices have, or whether there is reason to believe corrupt practices or illegal practices have, extensively prevailed at the said election.''

In addition, the High Court may make a special report to the Speaker as to any matter arising in the course of the trial, including the commission or possible commission of any corrupt practice or illegal practice, where the High Court considers that an account of such matter ought to be submitted to Parliament.

The features of the Electoral Act which deserve to be highlighted are these:

(a) it establishes an effective inquisitorial machinery to enforce electoral morality. It subjects candidates and their agents to public scrutiny in open court in respect of allegations of electoral malpractice levelled against them. A witness in an election trial is obliged to answer questions that may be incriminating. The High Court is given inquisitorial powers: it may summon and examine a witness not called by either party.

(b) The Act provides an effective machinery for visiting criminal penalties upon all persons guilty of contravening the code of conduct. If, in its report to the Speaker, the court finds that certain persons are guilty of electoral malpractice, the Registrar must submit the report to the Attorney-General for possible institution of criminal proceedings in the

Copyright Juta & Co Ltd

High Court. The court may, in the course of the election trial, inquire into and impose appropriate penalties against any person found guilty of contravening the provisions of the Act.

(c) The Act, by providing that the Speaker shall present the report of the High Court to Parliament, affords the legislature an opportunity after

DEVITTIE J

every election petition to consider the efficacy of the provisions that enforce electoral morality and to take appropriate legislative action.

We thus have at our disposal as effective an instrument as in any English-speaking jurisdiction to deal with electoral malpractices. I have attempted to demonstrate that the provisions in our Act which deal with the enforcement of electoral morality were refined on the anvil of British electoral experience.

In Britain, the establishment of an election court enabled the full inquisitorial machinery for which provision was made in the British Act, and in our Act, to be triggered. I have in mind those provisions in terms of which after an election trial, the court submits a report to the Speaker for debate in Parliament. These provisions, which only have meaning if an election court is established, set in motion a process that gradually transformed electoral morality in Britain. They ensure that the function of the court goes beyond deciding upon the validity of an election. In the British Act, and our Act, the provision for the court to submit reports to the Speaker of Parliament places ultimate responsibility for proper electoral behaviour and for enacting remedial legislation where it should lie and that is with Parliament.

The allegations made in this application cause grave concern. The allegations reflect adversely on our electoral morality. I have shown that the Electoral Act contains all the necessary provisions to provide an effective means of dealing with electoral malpractices. Section 156 of the Electoral Act provides that the Chief Justice and Judge President of the High Court, after consultation with a committee appointed by the Chief Justice, may make rules as to the practice and procedure to be observed in respect of any jurisdiction which under this Act is exercisable by the High Court under the Act. The Electoral (Applications, Appeals and Petition) Rules 1995 make provision for the form in which election petitions are to be brought. The rules provide that election petitions shall take the form of a ``court application''. Section 31 provides as follows:

> ``The Registrar and all parties to any stated case, petition, appeal or application referred to in these rules shall take all steps necessary to ensure that the matter is dealt with as quickly as possible.''

I appreciate that this application concerns an election at local government level and not a national election. I am of the view the provisions that deal with the enforcement of electoral morality in the act apply to local as well as national elections. Whether the bringing of an urgent trial action should have a clearly defined procedural path with a court reserved exclusively for that purpose, as opposed to leaving the matter to the Registrar to take appropriate steps, is a matter which requires public debate.

Copyright Juta & Co Ltd

I propose however to make some observations in regard to the future conduct of election petitions on the basis of the present system where the

DEVITTIE J

Registrar has to take appropriate action to ensure that a matter is heard urgently.

I deal firstly with pre-election complaints.

The Electoral Act provides that election petitions are to be brought within thirty days after the election results. This does not prohibit the bringing of an election petition during the election campaign. Where an election campaign is so marred by violence, intimidation or serious irregularities that a free and fair election cannot take place, I think that any interested party may petition the court for appropriate relief. He need not wait until the electoral process is complete. He would have to make arrangements with the Registrar, where disputes of fact have to be determined, for a trial to be heard expeditiously. I consider that aggrieved election candidates have a duty to acquaint themselves with the provisions of the Act. As this case demonstrates, some of the irregularities complained of could and ought to have been raised in the pre-election period and the appropriate remedies invoked. A postponement of the election could have been sought upon the grounds relied on in this application. If the evidence showed that intimidation was taking place at the ``check-points'' or if any other irregularity was proved, this court could have granted appropriate relief. The Supreme Court of Malawi, in *Electoral Commission* v *Pirimita & 4 Ors* 23/96, held that where an irregularity occurs in the registration of voters, a party aggrieved may approach the court at any stage. He does not have to wait until the entire electoral process is completed. In that case, the respondent had obtained an *ex parte* injunction restraining the Electoral Commission from proceeding with a poll. When the matter came before the High Court the entire registration was annulled and an order made to effect new registration.

This case has placed the first respondent and, to an extent, the third respondent in a difficult position. The first respondent, faced with allegations of intimidation and violence, has stated that it is not his responsibility to monitor and deal with such practices. More importantly, the first respondent has failed to investigate and answer serious allegations made by the applicant. It seems to me that the Registrar General and the Electoral Supervisory Commission are responsible in terms of the Act for the proper conduct of elections and ought in future to be cited as respondents. In regard to post-election challenges, where disputes of fact that would necessitate a lengthy trial are envisaged an aggrieved candidate ought, on the basis of the present election rules, to ensure in consultation with the Registrar, that adequate arrangements are made for an election trial to be conducted. Whether the right of appeal against a finding of fact should be restricted is a question I prefer to leave open.

In my view, the provisions of the Electoral Act which deal with the

DEVITTIE J

Copyright Juta & Co Ltd

submission of reports by the High Court to the Speaker of the House of Assembly and to the Attorney-General ought in future to be applied with vigour. This may largely turn on the capacity of this court to accommodate lengthy election trials. As the citizens of this country begin to exercise their democratic rights in the arena of electoral law, it is more than likely there will be a dramatic increase in the number of election petitions. They will require, for their just resolution to be put to proper use, election trials spanning several days and even weeks to be heard expeditiously. I have demonstrated that, in terms of the Electoral Act, the jurisdiction of this court is not limited to a determination of the dispute between the election candidate; it encompasses an investigation into the level of electoral morality found to exist at the contested election and requires a report of that investigation to be made to Parliament. The proper performance of this function requires a trial to be heard. I would accordingly recommend that in the light of the above considerations Parliament debates the desirability of adopting the measures taken by the British Parliament in 1868.

I must now begin a process whereby our Parliament plays the role played by the British House of Commons in creating a society where the right to exercise a vote is accorded the protection it deserves.

In the circumstances, I would dismiss the application. In regard to costs, I have some sympathy with the applicant's position. Even if he had brought the application much sooner than he did, there would have been great delay occasioned by the need to refer the matter to trial because no machinery exists for the expeditious hearing of election petitions where there are factual disputes. Furthermore, any appeal lodged against the decision of the trial court would have necessitated a further delay. In the circumstances, I accordingly order that each party pays his own costs.

Scanlen & Holderness, applicant's legal practitioners

Honey & Blanckenberg, first and second respondents' legal practitioners

Kanokange & Partners, third respondent's legal practitioners

Chihambakwe, Mutizwa & Partners, fourth respondent's legal practitioners

---

BGANYA *v* CHITUMBA & ORS 1998 (2) ZLR 171 (HC)

Court **High Court, Harare**

Smith J

Election petition

16 July & 5 August 1998Judgment No. HH-128-98

Flynote

Elections - election offences - ``treating'' - what is - supplying of food and drink to election officials not treating

Elections - election petition - need to file and pursue expeditiously - 2 month delay before filing and lengthy

---

Copyright Juta & Co Ltd

delays on petitioner's part thereafter - delays sufficient to justify dismissal of action

Elections - irregularities - action which should be taken by candidate complaining of irregularities

Headnote

The applicant was the unsuccessful candidate in a local council election. He sought an order setting aside the election on various grounds, including undue influencing of voters. The application was filed almost two months after the election. The respondents replied within five weeks, but the applicant's answering affidavit was not filed until a further five months had passed. His heads of argument were filed three months after that. No explanation was given for the delays.

One of the grounds given by the applicant for the setting aside of the election was that the winning candidate had provided food and drink to voters, police officers and polling officers.

Held, that the petition should have been launched as soon as possible after the election. Having the results of an election declared void is of such paramount urgency that delays cannot be brooked. The delays in this case were such that the application must be dismissed, irrespective of the merits.

Held, further, that ``treating'', which is proscribed by s 104 of the Electoral Act [*Chapter 2:01*], does not refer to cases where food is given to polling officers or police officers at polling stations.

Held, further, that where an unsuccessful candidate alleges that there were a number of mistakes or examples of non-compliance with the Act, the court should look at the totality of the facts established. An election should not be set aside for an informality or a triviality; the objection must be something substantial, really calculated to affect the result of the election.

Held, further, that if the applicant really thought that the acts he complained of were being committed, he could have taken other steps at the time: he could have complained to the returning officer, or sought an interdict, or petitioned the court to have the complaints investigated.

1998 (2) ZLR p172

SMITH J

Cases cited:

Chitungo v *Munyoro & Anor* 1990 (1) ZLR 52 (H)

Kutama v *Town Clerk, Kwe Kwe* 1993 (2) ZLR 137 (S)

Mvundura v *Mudehwe en Andere* HH-176-98

Scott v *Theron en Andere* 1976 (1) SA 612 (O)

Legislation considered:

Copyright Juta & Co Ltd

Electoral Act [*Chapter 2:01*], s 104

Urban Councils Act [*Chapter 29:15*], s 77(b)

Case Information

L Mazonde, for the applicant

T Nyapadi, for the first respondent

D Kanokanga, for the second respondent

Judgment

SMITH J: On 22 and 23 March 1997, elections were held to choose a councillor for ward 12 of the Harare City Council. The applicant (hereinafter referred to as ``Bganya'') was the ZANU (PF) candidate. He received 238 votes. The first respondent (hereinafter referred to as ``Chitumba'') stood as an independent candidate and received 263 votes. She was declared duly elected. There was a third candidate, the third respondent, who received 11 votes. There were 17 spoilt papers.

Bganya filed this application, seeking an order setting aside the election and declaring the result null and void. His application was based on four grounds, namely, undue influencing of voters; vote-buying; intimidation and physical violence or threats thereof; illegal electoral practices; double voting. The allegations by Bganya are denied by Chitumba and the second respondent (hereinafter referred to as ``the returning officer''). Chitumba claims that the application is frivolous, misguided and vexatious. She points out that the headline on the front page of the newspaper *The People's Voice* Vol 8 No 14 of 6-12 April 1997 was ``I was abandoned: Bganya''. The article then goes on to say that the losing ZANU (PF) contestant in the recent ward 12 election had accused the party of leaving him fight a losing battle. The other excuses allegedly put forward by Bganya for losing the election were apathy among the voters, anomalies in the voters' roll and intimidation of ZANU (PF) supporters. The returning officer says that none of the complaints raised by Bganya were brought to his notice before, during or immediately after the election.

This application was filed on 19 May 1997, almost two months after the election in question. The opposing applications were filed reasonably expeditiously on 9 and 25 June. However the answering affidavit was not filed until 26 November, some 5 months later. Bganya's heads of argument were then filed about 3 months later, on 24 February 1998. There is no explanation for these delays. The heads of argument of the returning officer

were filed on 12 March, whilst those of Chitumba were not filed until l6 April. Since the latter heads of argument were filed out of time, when the application was heard on 19 May the presiding judge noted that Chitumba was barred. Her legal practitioner applied for the bar to be lifted but Bganya's legal practitioner was not prepared to consent to the lifting of the bar unless a written application was filed. Such an application was filed on 22 May and Bganya consented

Copyright Juta & Co Ltd

to the lifting of the bar on 29 May. There is nothing in the papers to show why consent to the lifting of the bar was given on 19 May. Apparently, the parties were ready to argue the matter then and everyone was prepared to proceed with the case. The refusal on the part of Bganya's legal practitioner to consent at the hearing to the lifting of the bar has meant that the hearing of the application has been further delayed by almost 2 months.

In *Kutama* v *Town Clerk, Kwekwe* 1993 (2) ZLR 137 (S) the Supreme Court dealt with an appeal by an unsuccessful candidate in a municipal election, who had petitioned the High Court, claiming that the election had not been freely and fairly conducted and whose petition had been dismissed. It held that it was imperative that the petition be launched as soon as reasonably possible after the election. After referring to s 48 of the Urban Councils (Election) Regulations 1987 (SI 210/1987) KORSAH JA said at 142C:

> ``It is unusual to find a statute which requires something to be done, but which does not specify the time within which that act is to be done. I am disposed to the view expressed by HARMAN LJ in *Hillingdon London Borough Council* v *Cutler* [1968] 1 QB 124 at 135 that, as a general rule, when no specific time is fixed by an enactment for the exercise of a right conferred by the legislation then it is implied that that right would be exercised within a reasonable time.''

At 143C-E the learned JUDGE OF APPEAL went on to say:

> ``In the instant case, the appellant should have petitioned the High Court soon after the irregularities complained of on 7 August 1991 were perpetrated. Instead, he chose to lodge his petition on 16 November 1991. The excuse he gives for the delay, that he was intimidated by members of ZANU (PF), of which he is a member, is not a reasonable explanation for the delay. What could they have done to him then that they cannot do now? No cogent reason was advanced as to why the appellant himself did not immediately bring to the notice of the respondent the threats made against him and his family. Nor indeed does he aver, apart from the mistake in not listing the names of the candidates in alphabetical order, that he brought to the attention of the respondent any of the irregularities complained of. That irregularity, in my view, was of so minor a nature that it had no effect on the outcome of the election.
>
> Having the results of an election declared void is of such paramount urgency that delays in mounting applications to set aside such results cannot be brooked. And any appeal from a decision refusing to order an investigation should be pursued as a matter of urgency. By his failure to have this appeal set down as an urgent matter, the appellant has delayed the finalisation of this matter beyond the point where the remedy he seeks can be justified on any ground.''

SMITH J

These views were cited with approval and adopted in *Mvundura* v *Mudehwe & Anor* HH 176-96.

I am satisfied that in this case the delays, which have not been explained, are such that the application must be dismissed. However, I consider that it might be helpful if I gave my views on the merits of the application.

Bganya has raised four issues which he alleges warrant the setting aside of the election. I will deal with each separately.

First, he alleges that Chitumba unduly influenced voters by publishing highly defamatory false allegations against him and by providing food and drink to voters, policemen and polling

Copyright Juta & Co Ltd

officers. The allegation is that Chitumba issued a circular to ward 12 residents, in which he is described as ``a cunning criminal'', and it is said that he misappropriated school funds and is a person who demanded sexual favours. Chitumba denies that she circulated the document in question. The fact that the document urges voters to vote for Chitumba does not mean that she circulated it or was a party to the circulation. Bganya does not offer any evidence that she was a party to the circulation of the document. He filed affidavits by two people who averred that Bganya's agents distributed the pamphlet to the majority, if not all of the residents of Mbare and people in the streets were being given the pamphlet physically. The statement on oath by these two people that it was Bganya's agents, and not Chitumba's, that distributed the pamphlet gives the lie to Bganya's allegation that Chitumba had issued the circular. One wonders how these two deponents were able to assert that the circular was distributed to ``the majority, if not all of the residents of Mbare''. If these two deponents made a mistake in the affidavits (which are very short and virtually identical) in that they meant to refer to ``first respondent's agents'' but said ``applicant's agents'', then one wonders what credence can be given to the affidavits.

The second allegation is that Chitumba threw a week long party at her house, for which 2 cows and 6 goats were slaughtered and free beer was supplied. Furthermore, that on polling day Chitumba supplied meat pies and drinks for voters, polling officials and policemen at the polling station. Chitumba denies that there was any party at her home. Section 104 of the Electoral Act [*Chapter 2:01*] (which is applicable to municipal elections by virtue of s 83(2) of the Urban Councils Act [*Chapter 29:15*]) deals with treating. It provides that any person who corruptly gives or provides or pays the expenses of giving or providing any food, drink, entertainment, lodging or provisions to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at an election, shall be guilty of the offence of treating. This section clearly does not refer to cases where food is given to polling officers or policemen at polling stations. One wonders why Bganya thinks that such conduct is

SMITH J

reprehensible. Be that as it may, however, I consider that the evidence as to the so-called ``week long party'' is hardly credible. Even if I were to accept that there was such a party, I do not consider that there is any convincing evidence that Chitumba did so corruptly and for the purpose of corruptly influencing persons to vote for her.

Second, Bganya alleges that supporters of Chitumba and her election agent were guilty of vote-buying and of intimidation and physical violence. He claims that these actions contravene ss 104 and 105 of the Electoral Act [*Chapter 2:01*]. Vote-buying is not covered by s 104. That section provides that any person who makes use of, or threatens to make use of, force or violence against another in order to compel that other person to vote or refrain from voting is guilty of an offence of undue influence. The evidence proffered by Bganya to support his claims of intimidation and violence is not very convincing but, even if I were to accept it, there is no evidence that the force or violence was used to compel any person to vote or refrain from voting. The evidence, if accepted, merely shows that there were some scuffles between the supporters of the two candidates, not that one group was trying to compel members of the other to vote or not to vote.

Copyright Juta & Co Ltd

Third, Bganya alleges that Chitumba breached s 116 (3) and (7) of the Electoral Act [*Chapter 2:01*] in sending out a pamphlet containing an imitation of a ballot paper showing people how to vote. He claims that the pamphlet could easily mislead, and did mislead, people into thinking that the only way to vote was to follow what the pamphlet said. Chitumba denies sending out the pamphlet. Bganya does not establish that it was Chitumba who distributed the pamphlet, neither does he attempt to show that it misled people into thinking that they had to vote for her.

Bganya also claims that Chitumba sent people on the voters roll a postcard which contravened s 116 (3) of the Electoral Act [*Chapter 3:01*]. That subsection provides that any pamphlet, circular or other printed matter having reference to an election must bear the names and addresses of the printer and publisher thereof. Subsection (7) of s 116 prohibits a candidate from issuing or distributing any document containing any facsimile or imitation of a ballot paper and advising persons how to record his or her vote unless the candidate has obtained a certificate of approval from the constituency registrar. Chitumba denies issuing or distributing the documents in question. Even if I were to accept that she did issue them, there is no evidence to establish that either of the documents influenced voters to vote for her or not to vote for Bganya.

Fourth, Bganya claims that the voters roll for ward 12 was inadequately prepared, in that some voters names appeared twice on the roll. That double registration, so he says, enabled the voter to cast two votes, especially since

SMITH J

there was no indelible ink provided to mark the thumb of persons who had voted. He also claims that the names of some voters appeared on the voters rolls for both ward l0 and ward 12. Bganya has not produced any proof to establish his allegations that the voters' roll was inadequately prepared. As the returning officer states in his opposing affidavit, it is not unknown for two people to have the same name or names that are almost identical. In *Chitungo* v *Munyoro & Anor* 1990 (1) ZLR 52 (H) at 61B it is mentioned that the Makoni East voters' roll had more than 58 voters with the surname Mutasa and of those there were 8 whose first names began with the letter ``J'', three of them being ``Joyce''. Even if a person's name does appear twice on the voters roll, that does not mean that he or she voted twice. The returning officer also pointed out that there was nothing irregular in a person's name appearing on the voters' roll for ward 10 and that for ward 12, due to the mobility of voters. There is nothing in the Electoral Act [*Chapter 29:15*] which requires the use of indelible ink to mark voters who have cast their votes. The returning officer also averred that Bganya had never brought to his attention, either before or during the elections, any of the allegations made in Bganya's founding affidavit.

Section 77(b) of the Urban Councils Act [*Chapter 29:15*] provides that an election:

> ``shall not be declared invalid or set aside by any court solely on account of any mistake or non-compliance with the provisions of this Act if it appears to the court that the election was conducted substantially in accordance with the principles laid down in this Act and that the mistake or non-compliance is not likely to have affected the result of the election.''

I accept that in cases such as this, where an unsuccessful candidate has alleged that there

Copyright Juta & Co Ltd

were a number of ``mistakes or non-compliance with the Act'', the court should look at the totality of the facts established. In doing so, I find that few, if any, of the allegations made by Bganya are sufficiently substantiated. The impression given is that he is scraping the bottom of the barrel in an attempt to get a second bite at the cherry. If he really thought that the acts he complains of were committed by Chitamba or on her behalf, why did he not register a complaint at the time with the returning officer? Why did he not seek an interdict, as was done by a candidate in the case of *Scott* v *Theron en Andere* 1976 (1) SA 612 (O)? Why did he not petition the court, in terms of s 48 of the Urban Councils (Election) Regulations 1987, to have the complaints investigated? Why did he not file this application within a week or two of the election and prosecute it more vigorously?

In the *Chitungo* case *supra*, the court considered the effect of s 156 of the then Electoral Act (now s 149). That section is worded almost identically to s 77(b) of the Urban Councils Act [*Chapter 29:15*]. At p 62B-E the judgment reads:

SMITH J

> ``In *Hackney* case: *Gill* v *Reed & Holmes* (1874) 31 LT 69 GROVE J said at 72-73:
>
> > `An election is not to be upset for an informality or for a triviality. It is not to be upset because the clock at one of the polling stations was five minutes too late or because some of the voting papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated really to affect the result of the election.'
>
> Similar sentiments were expressed by WILLIS J in *Gunn & Ors* v *Sharpe & Ors* [1974] 2 All ER 1058 (QBD) at 1063-64:
>
> > `We are very conscious of the importance of the principle, which occurs throughout the cases to which we have been referred, that elections should not be lightly set aside, simply because there have been informalities and errors, and that both s 13 of the l872 Act and s 37 of the 1949 Act were framed with this principle in mind'.''

For the reasons set out above, I consider that there is no merit in the claims made by Bganya. Even if there were irregularities in the voters' roll, there is no evidence that the irregularities prejudiced Bganya to a greater extent than Chitumba was prejudiced. With regard to the other alleged irregularities, Bganya should have petitioned the court in terms of s 48 of the Urban Councils (Election) Regulations 1987 to have the grounds investigated. See *Mvundura* v *Mudehwe & Anor* HH-176-98.

The application is dismissed with costs.

Mandizha, Chitsunge & Associates, applicant's legal practitioners

Gutu & Associates, first respondent's legal practitioners

Kanokanga & Partners, second respondent's legal practitioners

Copyright Juta & Co Ltd

S *v* MABWE 1998 (2) ZLR 178 (HC)

Court **High Court, Harare**

Garwe J

Criminal review

5 August 1998 Judgment No. HH-130-98

Flynote

Criminal procedure - charge - splitting - single incident leading to a number of deaths - whether can charge as multiple counts of murder or attempted murder

Headnote

The accused had rammed a forklift into a vehicle in which there were two persons. He intended to kill these two persons. He was convicted of two counts of attempted murder. On review, the issue that arose was whether this amounted to an improper splitting of charges.

Held, that the accused had been properly convicted of two counts of attempted murder and that there was no improper splitting of charges. Where in one incident the accused intentionally kills or attempts to kill more than one person, as where he sets fire to a hut in which he knows there are a number of persons, he can be convicted of the murder or attempted murder of each of the victims. Each intended death constitutes a separate crime.

Held, however, that where in one incident the accused has negligently caused the death of a number of persons, he can only be charged with one count of culpable homicide. Unlike the case of murder, where the accused can form a separate criminal intent in respect of each of his victims, in a case of culpable homicide the accused does not intend the deaths but instead negligently fails to advert to the deaths. He cannot therefore be said to have committed separate offences in respect of each of his victims.

Cases cited:

R v *Chamboko* 1964 (1) PH H69 (SR)

S v *Collin* HH-88-86

S v *Muuzhe* S-17-98

S v *Mampa* 1985 (4) SA 633 (C)

S v *Mavuso* 1989 (4) SA 800 (T)

S v *Mutawarira* 1973 (3) SA 901 (RA)

R v *Ndhlovu* 1971 (2) RLR 190 (G)

R v *Peter* 1965 RLR 155 (G); 1965 (3) SA 19 (R)

Copyright Juta & Co Ltd

S v *Rayiti* 1984 (1) ZLR 269 (H)

R v *van der Merwe* 1921 TPD 1

Judgment

GARWE J: The accused in this case was convicted on two counts of attempted murder. It was the finding of the trial court that following a misunderstanding the accused had driven a fork lift vehicle and deliberately rammed the forks into a company vehicle in which the two complainants

GARWE J

were. The forks had pierced the body of the vehicle which had then been pushed against a wall. The accused had reversed the fork lift vehicle and again rammed the forks into the company vehicle, which at this stage was trapped against the wall. For this offence, he was sentenced to 5 years' imprisonment with labour, half of which was suspended for a period of 5 years on the usual conditions of good behaviour.

The issue that arose in this matter was whether there had been improper splitting of charges. It was common cause during the trial that there had been one act giving rise to the charges against the accused.

The general rule is that charges should not be multiplied out of what is in reality one and the same offence - *S* v *Mutawarira* 1973 (1) RLR 292 (A); 1973 (3) SA 901 (RA). Various tests have from time to time been proposed and applied by the courts in determining whether or not there has been an improper splitting of charges. The main tests are, however, the single intent test and the same evidence test. In respect of the former, where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then as a general rule he ought only to be indicted for one offence because the two acts constitute one criminal transaction. In respect of the latter, if evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purposes of a criminal conviction - *South African Criminal Law and Procedure* Vol V by Lansdown and Campbell pp 228, 230. Attention is also drawn to *S* v *Rayiti* 1984 (1) ZLR 269 (H).

In *R* v *Peter* 1965 RLR 155 (G); 1965 (3) SA 19 (R), the accused, who was employed at a mission school in Murewa, entered a dormitory from where he stole property belonging to six scholars. The theft of the property occurred at the same time. He was convicted on six counts of theft. On review, it was held that there had been improper splitting of charges. GOLDIN AJ remarked at p 20:

> ``In these circumstances, it is clear that the conviction on six separate counts cannot stand. Since the evidence led at the trial revealed that there had been a theft of property from several persons at the same place and time, one *contrectatio*, the magistrate should have brought in a single verdict of theft and not a verdict of guilty on six separate counts ... "

In *S* v *Collin* HH-88-86, however, the accused smuggled prepared dagga into Zimbabwe. He was charged with and convicted on two counts, namely unlawfully possessing dagga in

Copyright Juta & Co Ltd

contravention of the Dangerous Drugs Act and secondly smuggling the same dagga into the country in contravention of the Customs and Excise Act. The convictions were confirmed on review on the basis that the evidence necessary for a conviction on either did not require proof of the other.

GARWE J

In the present matter, there was but one single act. That there was an intent to kill there can be no doubt. There were, however, two persons inside the vehicle. Should the accused have been charged with and convicted of one count of attempted murder involving the two complainants, or was he correctly charged with two counts of attempted murder? A perusal of the authorities reveals that, unlike culpable homicide, the position with regard to murder is slightly different. Where two deaths result from the same act of negligence, it would be an improper splitting of charges to indict on two counts of culpable homicide - see *R* v *Chamboko* 1964 (1) PH H69 (SR). However, in the case of murder, since death is caused intentionally and unlawfully, two charges of murder arising out of a single operation would be more appropriate. On the other hand, where an accused delivers three successive knife stabs, he commits one offence of assault, notwithstanding his three separate actions - *South African Criminal Law and Procedure supra* p 227.

Out of caution, I also solicited the views of the Attorney-General on the propriety of the conviction on two counts of attempted murder. The Attorney-General has remarked:

> ``The drafting of a charge where multiple victims are involved always causes problems. This is mainly faced when one has to draft an indictment for murder where a number of deceased persons were burnt to death in a hut.
>
> In the case of culpable homicide, it is now settled both in Zimbabwe and South Africa that where a number of deaths result from one act of negligence in one incident, it would be an improper splitting of charges to charge a multiplicity of counts. See *R* v *Chamboko* 1964 (1) PH H89 (SR), *S* v *Mampa* 1985 (4) SA 633, *S* v *Mavuso* 1989 (4) SA 800. The accused ought to be charged with one count irrespective of the number of deaths involved. The rationale behind doing so was put by FLEMMING J in *Mavuso*'s case *supra.* In the Headnote of that matter, where the judgment is in Afrikaans, the court held that:
>
> > `Since in the case of culpable homicide the accused does not reconcile himself with the consequences of this actions, there is in his mind during the process of causation no difference whether one or two people are killed, and that current opinion as regards fairness in this context was that the fact that more than one person was killed did not detract from the fact that an accused was essentially committing one culpable act.'
>
> With regards to murder, there is a difference between the current Zimbabwean position and the South African one. In Zimbabwe, it seems that where multiple deaths result from one act, an accused ought to be charged with one count. This was said to be the position in the *obiter dictum* contained in the review judgment of GREENFIELD J in the case of *R* v *Ndhlovu* 1971 (2) RLR 190 where at p 191 he said:
>
> > I have always understood it to be the practice in cases of multiple murder to charge each count separately, unless special circumstances show a single act accompanied by a single intent to kill a number of people all present together. Thus, if A shoots and kills B and C in quick succession he would be charged with two counts of murder. But if A burns down a hut occupied by B, C and D, and kills all of them he would probably, so the Director of Public Prosecutions informs me, be charged with murder of B, C and D in a single count. In the first case, there are two separate acts divided, it is true, by only

Copyright Juta & Co Ltd

GARWE J

a moment of time, each act being accompanied by its own intention. In the second case, there is a single act and intention.'

From the above reasoning of GREENFIELD J, it is quite clear that in Zimbabwe, the issue was not conclusively settled. It was left hanging. Since *Ndhlovu*'s case *supra*, I have not come across any other case in which the issue was further discussed by our courts. *Ndhlovu*'s case itself concerned a different pedigree of splitting of charges. It was a situation where the accused's accomplice had stabbed two complainants with a knife in quick succession. The trial magistrate had convicted accused of one count of assault with intent to do grievous bodily harm. On review, the court altered the magistrate's verdict and convicted the accused of two counts as originally charged. As an *obiter*, the learned judge said what has been quoted above.

Contrary to this, in South Africa, they apply what they call the `one death one murder principle'. This principle was espoused by ROSE INNES J in *S* v *Mampa supra* where, after a thorough review of authorities on splitting of charges, he said at p 638:

> `In multiple murders, the accused foresees and intends the death of each one of his victims, even where his intent takes the form of *dolus indeterminatus*. An accused who throws a bomb at a group of persons intending to kill them, reckless of how many and which of them he kills, clearly intended the deaths of each one of those who died. There is no injustice to the accused if he is, and common sense demands that he should be, convicted of murder for each intended death which he sought to bring about and did bring about. In *R* v *van der Merwe* 1921 TPD 1 at 5 BRISTOWE J said:

``Generally speaking, the law is one act one offence, or rather perhaps, that one offence is constituted by the outcome of one criminal intent in the accused's mind, and that it is the carrying out of that intent into effect which constitutes the criminal act.''

> In murder, therefore, an intention to kill two persons A and B when acted upon and carried into effect, in reality is the carrying into effect of two distinct criminal intents, an intention to kill A and an intention to kill B, which constitutes two separate counts of murder. Each intended death constitutes a murder because it is the intended result which determines the commission of each crime.'
>
> He drew a distinction from culpable homicide when he continued:

In culpable homicide, however, the nature of the accused's conduct is essentially different. He does not foresee the death of the deceased and has no intention to kill him. In determining the criminal blameworthiness of the accused in a case of unintentional homicide the emphasis falls upon the culpability of the accused's act which caused the death.

In offences based on negligence, the prime consideration is the degree of negligence and not the result, although this is a factor which may properly be taken into account. *R* v *Chamboko* 1964 (1) PH H69 (SR).'

From the above, it is quite clear that the South African position is settled. It is submitted that that position is more in line with common sense and other principles of criminal law. There is no point in convicting an accused of one count where it is clear that his *mens rea* was directed at a number of specific individuals whom he clearly saw and intended to kill. The situation in *R* v *Peter* 1965 RLR 155 (G); 1965 (3) SA 19 (R), for example, is distinguishable because in that case it was one transaction prompted by a single purpose. In multiple murders, it may be one transaction, but prompted by multiple purposes, which are, to kill multiple persons.

In fact, it has been the practice in our courts over the years, in cases of multiple murders

Copyright Juta & Co Ltd

GARWE J

where victims are burnt to death in a hut, to charge and convict an accused with multiple counts. No objection has been recorded in all the judgments I went through. One example is the case of *S* v *Muuzhe*, case number 23495, which his Lordship Mr Justice GARWE heard at Masvingo Circuit Court in February, 1997. The accused had set on fire a hut in which two children were sleeping. They were burnt to death. The accused was charged with two counts of murder and his Lordship proceeded to convict the accused accordingly and sentenced him to death. The question of splitting of charges did not arise. On appeal, the issue of splitting of charges did not arise either, and was thus not discussed in the Supreme Court's judgment (see S-17-98).

One can therefore safely assume that the trial court saw no irregularity and neither did the Supreme Court. That is thus the accepted practice.

In the case under review, the accused intended to kill two persons. Even though it was one transaction, that transaction had been prompted by two purposes. Thus, the two counts that resulted were what the accused purported. There was therefore no splitting of charges in that event.

No injustice resulted. In any case, the accused did not suffer any prejudice. Both counts were taken as one for sentence. It is therefore submitted that the accused was properly charged and convicted."

The above commentary by the Attorney-General appears to correctly reflect the law in cases of murder where more than one count arises out of a single incident. The situation is different in the case of culpable homicide. In summary therefore, one incident can give rise to multiple counts of murder. I am, like the Attorney-General, satisfied that the accused was correctly convicted on two counts of attempted murder. The conviction is accordingly confirmed.

No issues arise as far as sentence is concerned.

In the result, I certify the proceedings as being in accordance with real and substantial justice.

CHINHENGO J agrees.

1998 (2) ZLR p183

MASENGA *v* MINISTER OF HOME AFFAIRS 1998 (2) ZLR 183 (HC)

Court **High Court, Harare**

Mungwira J

Special plea

8 May & 30 December 1997;19 August 1998 Judgment No. HH-83-98

Flynote

Police - action against - prescription period - action must be commenced within eight months - interruption of prescription - prescriptionm only interrupted from date of service of summons

Prescription - period - action against police - action must be commenced within eight months - interruption of prescription - whether prescription period interrupted as soon as summons is issued or only from date of service of summons

Headnote

Copyright Juta & Co Ltd

In terms of s 70 of the Police Act [*Chapter 11:10*], civil proceedings against the State or a police officer have to be commenced within eight months after the cause of action has arisen. The plaintiff argued that the running of the prescription period was interrupted as soon as summons was issued whereas the defendant argued that the period was only interrupted when there has been service of the process.

Held, that on a correct interpretation of s 70 of Police Act [*Chapter 11:10*], as read with ss 6(4) and 9 of State Liabilities Act [*Chapter 8:14*], the running of the prescription period is only interrupted when there has been service of the summons. To hold otherwise would be to defeat the intention of the legislature. The purpose of the legislation is to ensure that the defendant is forewarned of the cause of the action so that he is able to collect any relevant evidence and decide whether or not to defend the claim. This purpose would be frustrated if the period of prescription could be interrupted by the unilateral act of issuing summons without the debtor being aware that this has been done.

Held, further, that although the court can condone the failure to give the required two months' notice of the claim, it cannot condone the failure to serve summons within the eight month period.

Cases cited:

Arab Monetary Fund v *Hashim & Ors* [1992] 4 All ER 860

Chinedze v *Comr of Police* HH-133-96

du Plessis v *Joubert* 1968 (1) SA 585 (A)

Hodgson v *Granger & Harvey<B>* HH-133-91

Kleynhans v *Yorkshire Ins Co Ltd* 1957 (3) SA 544 (A)

Lewis & Anor v *SAR&H* 1945 NPD 320

Marine & Trade Ins Co Ltd v *Reddinger* 1966 (2) SA 407 (A)

MUNGWIRA J

MV Jute Express v *Owners of the cargo lately laden on Board the MV Jute Express* 1992 (3) SA 9 (A)

Nxumalo v *Ministry of Justice & Ors* 1961 (3) SA 663 (W)

R v *Bradshaw* 1925 CPD 53

R v *West* [1898] 1 QB 174

Republikense Publikasies (Edms) Bpk v *Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A)

Copyright Juta & Co Ltd

Stambolie v *Comr of Police* 1989 (3) ZLR 287 (S)

The Espanoleto [1920] P 223

Union Govt v *Willemse* 1922 OPD 1

Legislation referred to:

Police Act [*Chapter 11:10*], s 70

State Liabilities Act [*Chapter 8:14*], ss 6(4) and 9

Case Information

A Chinake, for the plaintiff

Mrs *J Zindi*, for the defendant

Judgment

MUNGWIRA J: The plaintiff's claim arises out of a shooting incident involving the Zimbabwe Republic Police Riot Squad, wherein the plaintiff was wounded in his right arm.

In terms of s 70 of the Police Act [*Chapter 11:10*], the plaintiff was required to institute action within eight months from the date of the incident which date is 12 July 1995. The summons was served on the Civil Division of the Attorney General's Office on 12 February 1996, this being well within the time limit. Service of the summons on the defendant was however effected on 19 March 1996 some seven days out of time.

Prior to the service of the summons, a notice of intention to institute proceedings against the Minister and his officials was served. The service was however defective, in that it was not effected in terms of r 43 of the High Court Rules. The defect arose from a failure to serve the notice of intention to sue upon the Deputy Secretary (Finance and Administration) of the Ministry of Home Affairs.

The defendant raises a special plea on the grounds that, firstly, the plaintiff's cause of action arose more than 8 months prior to the date upon which summons was served on the defendant resulting in the claim being prescribed and, secondly, on the basis of the non-compliance with rr 43B and 43C.

The plaintiff's reaction to the special plea is a concession that the factual situation is as stated by the defendant but that consideration be given to the grant of condonation in terms of s 6 of the State Liabilities Act [*Chapter 8:14*]. The plaintiff applies for condonation on the basis that late service of the summons was caused by the Deputy Sheriff who misplaced the papers. The failure to serve the notice of intention to sue on the Deputy Secretary

Finance and Administration) is attributed to an oversight on the part of the plaintiff's legal

Copyright Juta & Co Ltd

practitioners. It is submitted in this regard that service of letters on the Civil Division of the Attorney-General's Office and on the Police Commissioner, who is the person responsible for the Riot Squad, amounts to substantial compliance and that no prejudice has arisen to the defendant.

It is clear that this court has the discretion to condone failure to give notice in terms of the rules. The purpose giving notice is to inform the defendant of the cause of action and the intention to institute action. Thus forewarned, the defendant is placed in a position whereby he is able to investigate the merits of the proposed action and to collect any relevant evidence that enables him to make a decision on whether or not to meet the claim. This may prevent the incurrence of unnecessary legal costs.

In the instant case, the requisite notice was served upon the Commissioner of Police, who is the authority responsible for the riot police and the one best positioned to investigate and collect relevant evidence and information. In addition, there is no suggestion or indication of prejudice present or future in the event that this court were to condone the lack of compliance with rr 43B and 43C.

In the event of the late service of summons, however, such a discretion does not appear to exist. In the case of *Stambolie* v *Commissioner of Police* 1989 (3) ZLR 287 (S), which dealt with the constitutionality of s 76 of the Police Act [*Chapter 98 of 1974*], GUBBAY CJ stated at p 298F-G:

> ```Although one may envisage situations in which the person would be absolutely unable to give notice and commence action within the times permitted (for instance, he may be incapacitated in an accident), the adequacy of the periods must be tested against the normal and not the extraordinary situation. For statutes of limitation do not distinguish between just and unjust delay. This means that in the very rare case a person with a good claim, through no dilatoriness or fault on his part but due to circumstances beyond his control, will be barred from asserting a constitutional right. But, in the pragmatic words of Justice HOLMES in *Blinn* v *Nelson* 222 US 1 (1911) at 7.
>
> > `Now and then an extraordinary case may turn up, but constitutional law, like other moral contrivances, has to take some chances and in the great majority of instances, no doubt, justice is done.'
>
> It has been said that statutes of limitation are conservators without which society cannot govern. They are founded on grounds of public policy and give effect to two maxims : First, *interest rei publicae ut sit finis litium* - the interest of the State requires that there be a limit to litigation. Second, *vigilantibus non dormientibus jura subvenient* - the laws aid the vigilant and not those who slumber. They exist to prevent oppression, to protect individuals from having to defend themselves against claims when basic facts have become obscured with the passage of time. All this is true of s 76 of the Police Act.''

In the same judgment, the learned CHIEF JUSTICE goes on to expound upon the various other objects and purposes of the imposition of the limitation.

MUNGWIRA J

At the request of the court, supplementary heads of argument were filed in order to determine the meaning to be given to the words ``commencement of proceedings''. This resulted in considerable delay in finalising the matter.

Copyright Juta & Co Ltd

The relevant statutory provisions are s 70 of the Police Act [*Chapter 11:10*] which reads:

> "Any civil proceedings instituted against the State or member in respect of anything done or omitted to be done under this Act shall be commenced within eight months after the cause of action has arisen, and notice in writing of any such civil proceedings shall be given in terms of the State Liabilities Act [*Chapter 8:15*]."

Mr *Chinake*, for the plaintiff, has submitted that in terms of the above section *only* the notice of impending proceedings must be given in terms of the State Liabilities Act and that the proceedings themselves shall be commenced within eight months after the cause of action arose, there being no requirement in this section that the commencement of proceedings shall be in terms of the State Liabilities Act. He goes on to say that it thus follows that, had the legislature intended the commencement of proceedings to be governed by the State Liabilities Act, the legislature would have made its intention explicit, as with the requirement of notice.

He makes reference to the old Police Act [*Chapter 98 of 1974*] where the original provision was in s 76. This section reads thus:

> ``Any civil action instituted against a member in respect of anything done or omitted to be done under this Act *shall be commenced* within six months after the cause of action has arisen, and the notice in writing of any civil action and the cause thereof shall be given to the defendant one month at least before the *commencement* of the action'' (emphasis added).

It is argued that the word ``commencement'' or its variables has been a traditional feature of this provision of the Act and that this case turns on the interpretation to be placed on this word.

The pertinent provisions are ss 6(4) and 9 of the State Liabilities Act [*Chapter 8:14*]. These sections read as follows:

> ``9. Sections *two* and *six* shall not be construed as affecting the operation of any other law which -
>
> (a) ...;
>
> (b) prescribes a specific period within which a claim in respect of any liability referred to in paragraph (a) shall be made;
>
> (c) ...;
>
> and accordingly sections *two* and *six* shall be construed as being complementary and supplementary to any such law.''

Section 6(4) provides:

> ``For the purposes of this section, legal proceedings shall be deemed to be instituted by the service of process, including a notice of application to court and any other document by which legal proceedings are commenced, in which the claim concerned is made.''

MUNGWIRA J

The plaintiff draws a clear distinction between the *commencement of proceedings* and the *institution of proceedings by service of process*. It is the plaintiff's contention that s 6(4) seems to favour the interpretation that proceedings are commenced by the issue of process. If that interpretation were accepted the result would be that if the plaintiff issued the process within the

Copyright Juta & Co Ltd

eight-month period, the proceedings were commenced within the time limits prescribed by s 70 of the Police Act.

Reference is made to a number of cases where the South African courts ruled that the use of the word ``commence'' in statutes that the issue of summons constituted the commencement of an action (*Lewis & Anor* v *SAR & H* 1945 NPD 322; *R* v *Bradshaw* 1925 CPD 53; *Republikense Publikasies (Edms) Bpk* v *Afrikaanse Pers Publikasies (Edms) Bpk* 1972 1 SA 773A- I; *Marine and Trade Insurance Co Ltd* v *Reddinger* 1966 (2) SA 407 (A); *Nxumalo* v *Ministry of Justice & Ors* 1961 (3) SA 663 (W); *MV Jute Express* v *Owners of the cargo lately laden on board the MV Jute Express* 1992 (3) SA 9 (A)).

It is submitted that the English law on the point is well established and that it is well understood that proceedings are commenced by the issue of a summons. The following English cases were adverted to: *R* v *West* [1898] 1 QB 174; *Arab Monetary Fund* v *Hashim & Ors* [1992] 4 All ER 860; *The Espanoleto* [1920] P 223.

I do not intend to delve into the detail of the above cases, as it is trite that the issue of a summons, not service, ordinarily constitutes commencement of proceedings subject to statutory provisions in particular cases.

The plaintiff concludes by stating that the provisions of s 70 of the Police Act are clear and unambiguous and that the provisions of the State Liabilities Act are incorporated only in regard to the requirement of notice and the fact that this statutory provision may have anomalous or unreasonable consequences does not in itself provide sufficient reason for departing from the usual meaning of the words used. The usual meaning can only be departed from in those exceptional cases in which it is clear that the meaning was in conflict with the clear and undoubted intention of the legislature and not merely an assumed intention and as such the ordinary meaning of the word ``commence'' ought to prevail: *du Plessis* v *Joubert* 1968 (1) SA 585 (A) at 595 A.

The defendant's approach is that the words ``commencement of proceedings'' have been subjected to extensive judicial discussion and interpretation, as has the application of the Prescription Act to statutes which provide for a particular limitation period different to that specified in the Prescription Act.

Reliance is placed upon *Union Government* v *Willemse* 1922 OPD 1 as authority for the proposition that proceedings commence upon service of

process. This interpretation was followed in *Klenyhans* v *Yorkshire Insurance* Co Ltd 1957 (3) SA 544 (A) and in *Chinedze* v *Commissioner of Police* HH-133-96.

The case of *Nxumalo* v *Minister of Justice & Ors* 1961 3 SA 663 (W) is said to be of particular relevance as it deals with the interpretation of the words ``commencement'' as used in the equivalent s 32(1) of the Police Act in South Africa which reads:

Copyright Juta & Co Ltd

``Any civil action against the State or any person in respect of anything done in pursuance of this Act shall be commenced within six months after the cause of action arose, and the notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof."

It is argued, and correctly so in my view, that the South African provision does not encompass an equivalent of the State Liabilities Act and that neither does it contain the words ``instituted against the State''. It is therefore sound reasoning that the *Nxumalo* case can be readily distinguished, in that the court in that matter was confined to a consideration of the meaning to be given to the words ``the commencement of a civil action'', whereas in the present case consideration must necessarily be given to when civil proceedings are instituted against the State.

The defendant submits that the by reference to the provisions of s 6(4) of the State Liabilities Act any doubt as to the correct position as far as our s 70 is concerned is effectively clarified as the section as it accords with s 19(2) of the Prescription Act and is consistent with the object and purposes of the limitation period as expressed in *Stambolie* v *Commssioner of Police* 1989 (3) ZLR 287 (S) and *Hodgson* v *Granger & Harvey* HH-133-91 which are, in summary, to ensure timeous prosecution by a person with a valid cause of action before the events become stale and to avoid situations whereby defendants are brought to court after memories have faded and witnesses have died or disappeared and evidence has been lost.

The question to me appears be answered if one has due regard to s 9 of the State Liabilities Act which provides that ss 2 and 6 shall not be construed as affecting the operation of any law which:

``(a) ...

(b) prescribes a specific period within which a claim in respect of any liability referred to in paragraph (a) shall be made;

(c) ...

and accordingly sections *two* and *six* shall be construed as being complementary and supplementary to any such law."

The Oxford Complete Word Finder defines the words ``complement'' and ``supplementary'' in the following terms:

``complement - **a**. something that completes, completion, finishing touch, consummation, **b**. one of a pair, or one of two things that go together.

MUNGWIRA J

``supplementary - additional, added, annexed, adjunct, ... supportive, contributory, ancillary ... auxiliary, accessory ..."

The State Liabilities Act, being as described in the preamble as ``An Act to impose Liabilities upon the State in respect of acts of its employees'', and the Police Act, being a legislative instrument governing the establishment of the organisation and control of the Police Force which is an organ of the State, the provisions of s 70 of the Police Act cannot be considered in

Copyright Juta & Co Ltd

isolation of the relevant provisions of the State Liabilities Act. If this court were to accept the argument advanced by the plaintiff, the result would be that the intention of the legislature would be defeated, given the purpose of the limitation. The import would be that a claimant could, by issuing summons unilaterally and without the debtor being aware, interrupt the running of the period of prescription. I would conclude with the words of WESSELS JA in the case of *Marine & Trade Insurance Co Ltd* v *Reddinger* 1966 (2) SA 407 at 413 (A):

> ``Although an action is commenced when summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him'' - (emphasis mine).

The unavoidable conclusion, therefore, is that the interruption of a limitation period by legal process does not take place in the mere issue of summons and that service is required.

This view is not inconsistent with the provisions of s 19(2) of the Prescription Act [*Chapter 8:11*].

I would accordingly, uphold the special plea and order costs against the plaintiff.

Kantor & Immerman, plaintiff's legal practitioners

Attorney General's Office, defendant's legal practitioners

BEITBRIDGE RURAL DISTRICT COUNCIL *v* RUSSELL CONSTRUCTION CO (PVT) LTD 1998 (2) ZLR 190 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Sandura JA

Civil appeal

6 July & 21 August 1998 Judgment No. S-129-98

Flynote

Practice and procedure - default judgment - rescission - grounds in which rescission may be granted - failure to enter appearance due to inactivity on part of defendant's legal practitioners - no reasonable explanation for such inactivity possible - practitioner's non-compliance with rules treated as non-compliance by defendant

Headnote

After failure by the appellant council to pay the respondent for construction work carried out, summons was issued against the council in September 1993, claiming the sum due plus interest. No appearance to defend was entered within the 10 day period and the council was automatically barred. At that stage, both parties were represented by the same firm of practitioners, who advised both to seek other practitioners. The council's new practitioners were briefed in January 1994, and purported to enter appearance to defend. They did not apply for removal of the bar. The respondent briefed its practitioners in June, and applied for default judgment in respect of the interest claimed, the capital having in the meantime been paid. Default judgment was granted, of which the council became aware when its property was

---

Copyright Juta & Co Ltd

attached. In August, the council applied for rescission of the default judgment. The application was refused by the High Court. On appeal:

Held, that in granting rescission the court normally considers (a) the applicant's explanation for his default; (b) the applicant's good faith; and (c) the *bona fides* of his defence on the merits as well as the prospects of success. In regard to (a), no explanation at all was advanced by the council for its failure to enter appearance to defend, nor did the council's legal practitioners give any explanation as to why, after they assumed agency, no application was made for the lifting of the bar. The failure by the practitioners to act was such that no reasonable explanation could have been given.

Held, further, that though the fault was largely that of the council's legal practitioners, this did not assist it. Non-compliance with or a wilful disdain of the rules of court by a party's legal practitioner should be treated as non-compliance or a wilful disdain by the party himself.

Held, further, that on the facts there was no *bona fide* defence to the claim for the payment of interest.

Cases cited:

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

GD Haulage (Pvt) Ltd v *Mumurgwi Bus Svc (Pvt) Ltd* 1979 ZLR 447 (A); 1980 (1) SA 729 (ZRA)

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

SANDURA JA

S v *McNab* 1986 (2) ZLR 280 (S)

Case Information

A D Murphy, for the appellant

J S Sayce, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court, which dismissed with costs the application by the appellant for the rescission of a default judgment granted against it. The default judgment was granted in June 1994 following the appellant's failure to enter appearance to defend the respondent's claim timeously.

The background facts in this case are as follows. In July 1992, the appellant and the respondent concluded an agreement in terms of which the respondent undertook to construct for the appellant a number of sewage ponds in the first phase of a proposed development scheme. In terms of that agreement, interest on overdue payments to the respondent was payable at a rate equivalent to the prevailing minimum commercial bank rate for overdrafts plus two percent per

---

Copyright Juta & Co Ltd

annum.

After construction of the ponds, the parties agreed that the respondent would construct further ponds in the second phase of the development scheme. However, whilst the respondent contends that the second phase ponds were to be constructed on the same contractual terms as the first phase, the appellant alleges that there was a variation in respect of interest on overdue payments. In this regard, the appellant alleges that it was agreed that payment for the work done by the respondent would not be due (and, therefore, interest would not begin to accrue) until the appellant was put in funds by the Ministry of Local Government, Rural and Urban Development (``the parent Ministry''). I shall deal with this in greater detail later in this judgment.

However, when the appellant failed to pay the sum of $1 209 276.56 which, according to the respondent, was due on 13 July 1993, the respondent issued a summons on 8 September 1993, claiming payment of that sum together with interest thereon at the rate of 39% per annum from 14 July 1993 to the date of payment and costs of suit. The summons, which gave the appellant ten days within which to enter appearance to defend the respondent's claim, was served on the appellant on 10 September 1993. When no appearance to defend the respondent's claim was entered within the ten day period the appellant was automatically barred in terms of r 50 of the High Court Rules 1971.

Subsequently, the capital sum claimed was paid but the interest was not. The appellant refused to pay interest on the ground that the delay in paying the capital sum did not attract interest because the capital sum was only due when the appellant received the relevant funds from the parent Ministry.

At this stage, I should mention that when the dispute between the parties

arose, both parties were represented by the same firm of legal practitioners. That firm tried to settle the dispute amicably but failed. It then advised both parties to look for other lawyers to represent them.

Thereafter, on 18 January 1994, the appellant briefed its present legal practitioner. On the following day, 19 January 1994, the legal practitioner purported to enter appearance to defend the action on behalf of the appellant, but this was a nullity because the *dies induciae* had already expired, with the result that the appellant had automatically been barred. No application for the removal of the bar was made.

About five months later, the respondent briefed its present legal practitioners who assumed agency on 13 June 1994 and on the same day applied for a default judgment in respect of interest amounting to $189 939.22. The judgment prayed for was granted on the same day, but the appellant first became aware of it on 20 July 1994 after its property had been attached pursuant to a writ of execution issued earlier.

Thereafter, on 5 August 1994, the appellant filed an application for the rescission of the default

Copyright Juta & Co Ltd

judgment. That application was dismissed with costs on 7 April 1995. This appeal is against that dismissal.

Rule 63(2) of the High Court Rules 1971 provides that the court may set aside a default judgment if it is satisfied that there is good and sufficient cause for doing so. In determining whether or not there is good and sufficient cause for granting such relief, the court normally considers: (a) the applicant's explanation of his default; (b) the *bona fides* of the application to rescind the judgment; and (c) the *bona fides* of the applicant's defence on the merits as well as its prospects of success: *du Preez* v *Hughes NO* 1957 R&N 706 (SR); *GD Haulage (Pvt) Ltd* v *Mumurgwi Bus Service (Pvt) Ltd* 1980 (1) SA 729 (ZRA).

I now wish to consider whether the appellant in this case advanced a reasonable and acceptable explanation for its default. In the court *a quo*, the appellant did not advance any explanation for its failure to enter appearance to defend the respondent's claim. Mr Pell, its chief executive officer, could have filed an affidavit explaining the appellant's default but did not do so. The appellant's legal practitioner, in his affidavit, which was the founding affidavit, gave no explanation for the default but merely stated that the appellant's former legal practitioners should have entered appearance to defend the action. In addition, he gave no explanation as to why from 18 January 1994, when he assumed agency on behalf of the appellant, to 13 June 1994, when the default judgment was granted, he did not make an application for the lifting of the automatic bar which had come into operation in September 1993.

Whilst it is true that the fault was largely that of the appellant's former and

SANDURA JA

present legal practitioners who failed to take appropriate action to protect the appellant's interests, that fact, in my view, does not assist the appellant. This court has, on a number of occasions, clearly stated that non-compliance with or a wilful disdain of the rules of court by a party's legal practitioner should be treated as non-compliance or a wilful disdain by the party himself.

In *S* v *McNab* 1986 (2) ZLR 280 (S), DUMBUTSHENA CJ considered whether a party should be punished for the negligence of his legal practitioner and had this to say at 284A-E:

> ``In my view, clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by STEYN CJ in *Saloojee & Anor NNO* v *Minister of Community Development supra* at 141C-E when he said:
>
> > `There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise, might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (*Cf Hepworths Ltd* v *Thornloe & Clarkson Ltd* 1922 TPD 336;

Copyright Juta & Co Ltd

Kingsborough Town Council v *Thirlwell & Anor* 1957 (4) SA 533 (N)).'

I have dwelt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the rules will encourage some legal practitioners to disregard the rules of court to the detriment of the good administration of justice.''

Subsequently, in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) McNALLY JA considered the same issue and had this to say at 290C-E:

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

The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subvenient* - roughly translated, the law will help the vigilant but not the sluggard.''

Although there will always be cases where the legal practitioner can give a reasonable explanation for his failure to act, I am satisfied that the present case is not one of them. In fact, the failure to act on the part of the appellant's former and present legal practitioners was such that no reasonable explanation could have been given for it. It was accurately summed up by the learned judge in the court *a quo* as follows:

``The summons was served on the applicant on 10 September 1993. The *dies induciae* expired ... No appearance to defend was entered. The applicant was barred automatically in terms of the Rules. The applicant's present legal practitioners filed a notice of appearance to defend with the registrar on 19 January 1994. That notice was out of time. No application was made for condonation of the late filing of the notice ...

The applicant's practitioner knew that the applicant was barred. Six months went by. He did nothing. The applicant did nothing.''

In the circumstances, I am satisfied that the learned judge was correct in concluding that the appellant had failed to proffer a reasonable explanation for its default.

I turn now to consider whether the appellant had a *bona fide* defence to the respondent's claim. In this regard, the following facts were common cause: (a) that in terms of the contract concluded by the parties the appellant was liable to pay interest on any capital sum which remained unpaid thirty days after it became due; (b) that the appellant delayed payment of the capital sum claimed by the respondent in the summons beyond the thirty day period; and (c) the amount of interest claimed by the respondent.

However, what was not common cause was whether the respondent had waived its entitlement to interest. The appellant alleged that the respondent had done so. That claim was based on the contents of a letter from the respondent to the appellant which was written by the respondent's senior contracts technician. The relevant part of that letter, which is dated 14 September 1992, reads as follows:

``Payment for the above work will only be expected on your receipt of the funds from the Ministry.''

Copyright Juta & Co Ltd

Commenting on the contents of this letter, the learned judge said:

> ``I am unable to find anything in the wording of that letter which provides the defence claimed by the applicant. There is no express statement about interest. It cannot be implied from the wording of the letter that, because the first respondent was prepared to accept late payment of the capital sum due to it, it was waiving its claim to interest for that late payment."

I entirely agree with that comment.

In any event, it is quite clear from the papers filed by the respondent that the appellant considered itself bound to pay interest in terms of the contract. On 2 December 1993, the respondent's former legal practitioners sent a fax message to the appellant's chief executive officer, Mr Pell. The relevant part reads as follows:

> ``Further to our letter dated 10 November 1993 please be advised that the amount due to our client is as follows:

Claim	$1 209 276.56
Interest 14.7.93 - 30.11.93	$ 182 866.71
	$1 392 143.27

SANDURA JA

> The balance attracts interest of 39% per annum from 1 December 1993 to date of payment."

No objection was raised by the appellant to the claim for interest.

Subsequently, after the appellant paid the capital sum, the respondent's former legal practitioners wrote to the appellant's chief executive officer on 14 December 1993 as follows:

> ``We have been informed by Russell Construction that you paid them $1 209 276.56 recently. You have not taken account of interest in the payment and enquire whether you intend to pay it. In the event that you refuse to pay interest, the issue must proceed to trial ..."

In reply, the appellant's chief executive officer wrote to the respondent on 21 December 1993 as follows:

> ``Your letter of 14 December 1993 refers.
>
> Council will be paying the interest on the outstanding a/c, and the necessary vouchers have been completed and passed for payment ...
>
> (A) cheque will be forwarded as soon as it is signed."

In my view, this letter makes it clear beyond any doubt that the appellant considered itself bound to pay interest in terms of the contract, and that the allegation that it believed that the respondent had waived its right to claim interest has no foundation. The appellant does not, therefore, have a *bona fide* defence to the respondent's claim, and has failed to establish good

Copyright Juta & Co Ltd

and sufficient cause for the rescission of the default judgment.

In the circumstances, the appeal is dismissed with costs.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Anthony Murphy Attorneys, appellant's legal practitioners

Coghlan & Welsh, respondent's legal practitioners

AGRICULTURAL LABOUR BUREAU & ANOR *v* ZIMBABWE AGRO-INDUSTRY WORKERS UNION 1998 (2) ZLR 196 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

16 July & 21 August 1998 Judgment No. S-126-98

Flynote

Employment - trade union - application for registration - existing registered trade union in the same sector - criteria that Registrar must take into account in deciding whether second union should be registered

Headnote

An unregistered trade union in the agricultural sector (ZAWU) applied to the Registrar of Labour Relations to become registered in terms of the Labour Relations Act [*Chapter 28:01*]. A trade union which was already registered in the agricultural sector (GAPWUZ), and a registered employers' organisation, opposed this application on several grounds. The main objection of GAPWUZ was that it was already effectively representing the agricultural workers concerned and the registration of ZAWU would not benefit the workers in question.

After holding accreditation proceedings, the Registrar decided that ZAWU should be granted registration. GAPWUZ appealed against this decision to the Labour Relations Tribunal. This appeal was unsuccessful. GAPWUZ then appealed to the Supreme Court against the decision of the Labour Relations Tribunal.

Held, that whether it was desirable to have more than one trade union in a particular industry is fundamentally a matter of policy. The Registrar is given power to determine this issue. The factors that he is required to take into account in deciding this matter are set out in s 45 of the Labour Relations Act and in terms of s 44 of the Act he is obliged to give reasons for his decision. The reasons given must be reasonable.

Held, further, that the only basis upon which the court can normally interfere with the exercise

---

Copyright Juta & Co Ltd

of this decision making power is if the Registrar had failed to conduct himself in the manner prescribed by the Labour Relations Act and has improperly exercised his discretion.

Held, further, that the brief reasons given by the Registrar were such that it was not possible to determine whether he had properly exercised his discretion. A number of important salient questions were left unanswered. These questions were also left unanswered in the appeal to the Labour Relations Tribunal and the Labour Relations Tribunal had given insufficient

consideration to whether the Registrar had correctly exercised his discretion in terms of s

45 of the Labour Relations Act.

Held, therefore, that because the Registrar had failed to exercise his discretion correctly, his decision should be set aside, together with the decision by the Labour Relations Tribunal, and the matter remitted to the Registrar for reconsideration in the light of the points raised by the Supreme Court.

McNALLY JA

Cases cited:

Continental Fashions (Pvt) Ltd v *Mupfurirriri & Ors* 1997 (2) ZLR 405 (S)

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

Metal & Allied Workers Union v *Min of Manpower* 1983 (3) SA 238 (N)

National Foods Ltd v *Magadza* S-105-95

Paper, Printing, Wood & Allied Workers' Union v *Pienaar NO* 1993 (4) SA 621 (A)

S v *Mohamed* 1977 (2) SA 531 (T)

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

Legislation considered:

Labour Relations Act [*Chapter 28:01*], ss 43, 44 & 45

Case Information

R M Fitches, for the appellants

D T Mwonzora, for the respondent

Judgment

McNALLY JA: This case pits an employers' organisation (ALB) and an employees' organisation (GAPWUZ), on the one side, against another employees' organisation (ZAWU), on the other.

The matter comes to the Supreme Court as an appeal from the Labour Relations Tribunal

Copyright Juta & Co Ltd

(LRT). It concerns a dispute arising out of Part VII of the Labour Relations Act [*Chapter 28:01*] which deals with trade unions. Both ALB and GAPWUZ are registered in terms of s 29 of the Act, the former as an employers' organisation and the latter as a trade union. ZAWU, on the other hand, was an unregistered trade union. The powers of an unregistered trade union are severely limited by the provisions of s 30 of the Act. It may not, *inter alia*, make representations to the LRT; be represented on any employment board; recommend collective job action; or levy, collect, sue for or recover union dues.

ZAWU wished to become a registered trade union. The procedure prescribed in the Act is that representations must be made to the Registrar of Labour Relations (s 36). The Registrar, if he considers it appropriate, may require that accreditation proceedings be held (s 41). In this case, he did so, and notice of such proceedings was given in terms of s 42. The procedure he has to follow is set out in s 43. The factors he is required to take into account are set out in s 45. At the end of the proceedings, the Registrar is required to notify all interested parties, in writing, of his decision and of the reasons therefore (s 44).

Accreditation proceedings were held on 18 January 1995 in the office of the Registrar. The meeting lasted from 10.31 am to 12.45 pm. The minutes cover three pages and are not very clear. Nor were they apparently circulated and accepted as correct.

The argument presented for ZAWU, as recorded, was as follows:

1. Section 27 of the Act provides that (subject to the Act) any group of employees may form a trade union.

McNALLY JA

2. Section 28 of the Constitution of Zimbabwe enshrines freedom of association. (But not, I should point out, an automatic right to have your trade union registered).

3. The ZAWU Constitution had been approved in terms of s 28 of the Act.

4. The ALB, as an employers organisation, had no right to object. Inherent in this submission was the suggestion that the ALB did not want another union because it was able to dominate GAPWUZ, which was described as a ``yellow'' (ie subservient) Union.

5. Most of the workers in the Eastern Highlands favoured ZAWU. 1 104 workers had resigned from GAPWUZ and joined ZAWU.

6. ZAWU had 3 044 members and potentially 6 000.

7. Originally agricultural workers had been divided into those from general agriculture and those from agro-industry. However GAPWUZ and ALB had amalgamated the two groups, which had disadvantaged workers in the agro-industry sector.

8. A promised job evaluation exercise had not been carried out.

9. GAPWUZ had actually agreed to a reduction of the minimum wage for Agro-Industrial

Copyright Juta & Co Ltd

workers at the 1992 wage negotiations.

The argument for GAPWUZ, as recorded, may be summarised as follows:

1. All the job titles which ZAWU wants to represent are already covered by GAPWUZ.
2. GAPWUZ and ALB had formed an effective national employment council (NEC) for Agriculture. The emergence of a splinter union will result in poor management of the NEC and affect donations from donor agencies.
3. GAPWUZ is effective in representing the workers.
4. ZAWU will not benefit the workers. It is the brain child of a few individuals dismissed by GAPWUZ.
5. The job evaluation exercise would be completed within eighteen months. (But it was not, according to evidence before the LRT).

The submissions by the ALB were:

1. ALB has every right to object. (This was confirmed by the Registrar).
2. ALB had no objection to the registration of a genuine trade union representing interests not already covered.
3. The claim that 1 104 workers had joined ZAWU should be checked, as well as their reasons for leaving. (The Registrar undertook to check the claim that ZAWU had 3 044 members and potential membership of 6 000).
4. GAPWUZ had done an excellent job.

The Registrar's decision and ``reasons'' handed down on 26 June 1995 were as follows:

McNALLY JA

> ``After careful consideration of the arguments put forward by the applicant and objectors, I hereby make the following observations:
>
> Government's policy has always been to distinguish between `General Agriculture' on one hand and `Agro-Industry' on the other. This was reflected in the now repealed SI 160 of 1991.
>
> The registration of NEC Agriculture did not necessarily mean that the amalgamation of the sectors was welcomed by Government. This failure by the NEC to address the conditions of service of Agro-industry workers has indeed disadvantaged them. I am sure if they are registered as a separate union, this anomaly is going to be redressed.
>
> I understand the NEC is embarking on a job evaluation exercise which is expected to be completed within the next 18 months. It is not certain whether this action will address the plight of these workers. In the premises, I hereby grant registration of the said union.''

These ``reasons'', which he himself describes as ``observations'', are really very unsatisfactory, particularly when one bears in mind the considerations which he is enjoined by s 45 of the Act

---

Copyright Juta & Co Ltd

to take into account. The section reads:

``45(1) In any determination of the registration or certification of a trade union or employers' organisation or of the variation, suspension or rescission thereof, the Registrar shall -

(a) take into account -

(i) representations by -

A. employers and employees who might be affected; and

B. the Minister and any other Minister whose Ministry or Department may be affected; and

C. any member of the public or any section thereof likely to be affected;

and

(iii) the desirability of affording the majority of the employees and employers within an undertaking or industry effective representation in negotiations affecting their rights and interests;

and

(iv) the desirability of reducing, to the least possible number, the number of entities with which employees and employers have to negotiate;

and

(vi) whether representations made in terms of subsection (3) of section *thirty-nine* or at any accreditation proceedings in terms of section *forty-one* indicate that the trade union or employers organisation will not be substantially representative of the employees or employers it proposes to represent;

and

(b) ensure compliance with the following requirements -

(i) a trade union shall not represent employers or managerial employees;

(ii) an employers organisation shall not represent employees other than managerial employees;

(iii) the constitution of a trade union or employers organisation shall not be inconsistent with this Act.

(2) Where any person asserts that there should, in any particular case, be any departure

McNALLY JA

from the general rule referred to in paragraph (d) of subsection (1), the burden of proving such assertion shall lie on such person.'' *(71)

There are several reasons why the ``observations'' made are unsatisfactory. In particular:

1. The Registrar does not seem to have consulted his own Minister or the Minister of Agriculture. It is true that he published a notice in the *Gazette* in terms of s 42. But one would have thought that he would more directly have sought the views of the relevant

Copyright Juta & Co Ltd

Ministers in view of the provisions of s 45(1)(a)(i)B.

2. He says in his ``observations'' that ``Government's policy has always been to distinguish between General Agriculture on the one hand and Agro-Industry on the other. This was reflected in the now repealed SI 160 of 1991''. It is true that in its ``classification of occupations in grade'' in SI 160/91 there are various parts. Part I has no heading. Part II relates to Sawmills, Part III to Poultry Processing Plants, etc. It is also true that the minimum wages for Part I are lower than for the other parts. But every trade union represents workers in different grades and sectors and it does not necessarily follow that this means that the Government favours a multiplicity of unions for the different grades, or for the different sectors of the industry. Indeed, ALB argues that later statutory instruments reverse that trend. And it is very significant that the Act provides specifically, in s 39(2), for the Minister to intervene if he is of the opinion that a registered trade union ``no longer adequately represents the interests or area for which it was registered''. There is no suggestion that he has done so.

3. The Registrar's next ``observation'' was that ``the registration of NEC Agriculture does not necessarily mean that the amalgamation of the sectors was welcomed by Government.'' This observation is with respect meaningless. If it was *not* welcomed by Government one would have expected the Minister to act in terms of s 39(2). If, on the other hand, it *was* welcomed by Government, there would be no reason to interfere.

4. The next ``observation'' was that ``the failure by the NEC to address the conditions of service of agro-industry workers has indeed disadvantaged them. I am sure if they are registered as a separate union, this anomaly is going to be redressed.'' This comment is based on the fact that at the previous wage negotiation the lowest paid (ie general agriculture) workers had received a higher percentage wage increase than the higher paid (Agro-Industry) workers. Indeed, there was a reduction of the minimum wage for future entrants into the Agro-Industrial sector. One

McNALLY JA

would think that this is not an uncommon phenomenon, and is not *per se* an indication of failure to protect the interests of the higher paid workers. And is the remedy to start a new trade union, or to vote out of office the executives of the old one?

5. The Registrar has not, apparently, checked the figures of membership, both actual and potential, which are claimed by ZAWU and disputed by the other parties. Yet at the hearing he undertook to do so. See the minutes, para 11, final sentence.

6. The Registrar has not addressed the argument that it is impractical and unworkable to have two unions in the same industry so that individual farmers may have to deal with two unions on the basis that one or two of their employees may belong to ZAWU.

7. Finally, and importantly, the Registrar does not address, in his ``observations'', the consideration he is specifically required to take into account in s 45(1)(a)(iv) of the Act,

Copyright Juta & Co Ltd

namely:

> ``the desirability of reducing, to the least possible number, the number of entities with which employees and employers have to negotiate.''

This court cannot and does not claim any expertise in what is fundamentally a matter of policy, to be determined by the Registrar, namely the question whether or not it is desirable to have more than one trade union in this industry. The only basis upon which we can normally interfere is that the

Registrar has not conducted himself in the manner prescribed in the Act. Compare *Director of Civil Aviation* v *Hall* 1990 (2) ZLR 354 (S) at 360C-361E.

It seems to me, that he has not done so. This does not necessarily mean that he has come to a wrong conclusion. It means only that neither the LRT nor this court can determine whether he has properly exercised his discretion. He has not complied with the requirements:

1. that he shall give his reasons;

2. that he shall take into account the considerations set out in s 45.

The giving of reasons that are bad at law constitutes a failure to hear and determine according to law: *National Foods Ltd* v *Magadza* S-105-95 at p 4.

From the Registrar's decision an appeal lay to the LRT in terms of s 47 of the Act. The appellants appealed to the LRT. That Tribunal decided, at the request of the appellants, to hear further evidence, and it did so at some length. It concluded:

1. that GAPWUZ had ``failed dismally'' to discharge its duties by negotiating for a decrease in the minimum wage for agro-industrial workers.

2. that the Registrar had observed the provisions of s 45 of the Act by publishing a notice; holding accreditation proceedings; and hearing the parties.

McNALLY JA

3. that ZAWU's representatives had given uncontroverted evidence that it had a potential membership of 75% in the agro-industry; that their present membership was low because the GAPWUZ leadership confiscated receipt books from their filed agents; that ZAWU was run by competent and experienced leaders; that its financial books were in order and its membership register well maintained.

It must be said initially that it is doubtful whether it was useful, in the event, for the LRT to hear evidence in this appeal. In saying so, I am conscious of the remarks that I made in *Continental Fashions (Pvt) Ltd* v *Mupfuriri & Ors* 1997 (2) ZLR 405 (S) at 410B-411A. And I am aware of the wide procedural powers given to the LRT (despite the odd heading given to the section) by s 49 of the Act. But ultimately the decision of the Registrar is a policy decision rather than a judicial one.

Copyright Juta & Co Ltd

Perhaps one can clarify the position by looking at the widely accepted classification of appeals as formulated to (r)MDUL TROLLIP J in *Tickly & Ors* v *Johannes NO & Ors* 1963 (2) SA 588 (T), and approved by the Appellate Division in South Africa in *S* v *Mohamed* 1977 (2) SA 531 (A) at 538 and again in what is now KwaZulu-Natal in a case similar on the facts to the present one, *Metal and Allied Workers Union* v *Min of Manpower* 1983 (3) SA 238 (N) at 242B-D.

The three classes of appeals, re-stated in the last of these cases, are:

1. an appeal in the wide sense, *ie* a complete rehearing of and fresh determination on the merits of the matter with or without additional evidence or information;

2. an appeal in the ordinary strict sense, *ie* a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;

3. a review in which the question is not whether the decision was correct or not, but whether those who made it had exercised their powers honestly and properly.

While normally an appeal to the LRT will be an appeal in the wide sense, the present case is one in which, as matters turned out, the fundamental issue is the review issue: did the Registrar conduct the enquiry properly in terms of the Act? Compare the decision of BOTHA JA in *Paper, Printing, Wood and Allied Workers' Union* v *Pienaar NO* 1993 (4) SA 621 (A) at 648C-E.

The Registrar is required, in terms of the Act, to give reasons (which clearly must be reasonable reasons) and to take specified considerations into account. If he fails to do that, the proper intervention is to remit the matter to him with appropriate directives.

McNALLY JA

In the final analysis, it does not seem to me that the further evidence led did anything more than clarify the standpoint of the various parties. It did not in any way answer the important questions:

1. On what basis did the Registrar assume that the two Ministers concerned favoured the registration of a second union?

2. Why had the Minister (of Public Service, Labour and Social Welfare) not acted in terms of s 39 of the Act?

3. Why were no reasons given as to the decision to override the criterion in s 45(1)(a)(iv) that it is desirable to minimise the numbers of entities with which employers (or employees) have to negotiate?

4. Why did the Registrar not check the numbers of actual and potential members of ZAWU as he undertook to do?

5. Why did the Registrar not give reasons to rebut the contention that it was impractical to

Copyright Juta & Co Ltd

have two unions in the one industry covering overlapping interests?

As to the reasons given by the LRT for upholding the decision of the Registrar (summarised earlier in this judgment), I would say:

1. It may be arguable, though it was certainly disputed, that GAPWUZ had failed dismally in its negotiations on wages in 1992. But it is not clear to me, even if that is true, that the solution lies in the formation of a new union. It could as well lie in the appointment of a new negotiating team for subsequent years.

2. For the reasons given earlier, I do not with respect agree that the Registrar complied with the provisions of s 45.

3. I do not read the record as suggesting that the evidence of the ZAWU representative was uncontested. The allegation as to potential membership was disputed and the Registrar failed to honour his undertaking to check it; GAPWUZ claimed that it confiscated receipt books because the books were the property of GAPWUZ and were being used by GAPWUZ employees to recruit members for ZAWU; and the other value judgments were likewise disputed.

But in any event I would uphold, as a matter of law, the first ground of appeal to this court. The LRT ``gave insufficient regard as to whether the Registrar of Labour Relations had correctly exercised his discretion under s 45 of the Labour Relations Act [*Chapter 28:01*] in allowing the respondent to be registered as a trade union'' My conclusion is that he did not.

In the circumstances, I would make the following order:

1. The appeal is allowed with costs.

2. The decision of the Labour Relations Tribunal is set aside.

3. In its place, the following order is substituted:

   (a) the appeal is allowed with costs.

McNALLY JA

   (b) the decision of the Registrar of Labour Relations is set aside.

   (c) the matter is remitted to the Registrar for reconsideration and if necessary rehearing in the light of the judgment of the Supreme Court.

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

Coghlan, Welsh & Guest, first appellant's legal practitioners

B M W Kahari, second appellant's legal practitioner

Copyright Juta & Co Ltd

Sengwayo Mwonzora & Associates, respondent's legal practitioners

S *v* NYAMANDI 1998 (2) ZLR 205 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Muchechetere JA & Sandura JA

Criminal appeal

23 July & 21 August 1998 Judgment No. S-137-98

Flynote

Criminal procedure (sentence) - culpable homicide - motoring case - failure to give way at intersection with which familiar - gross negligence displayed - prison sentence appropriate

Headnote

The appellant was the driver of a motor vehicle one evening when he failed to give way at an intersection with which he was familiar, as it was near his home. His vehicle collided with another one on the major road and a passenger in the other vehicle was killed. He was sentenced to 12 months' imprisonment, of which 5 were conditionally suspended.

Held, that anyone who drives through a ``give way'' sign at a T junction and hits a lighted vehicle on the main road is *prima facie* grossly negligent. The sentence was accordingly not so severe as to induce a sense of shock.

Cases cited:

R v *Bredell* 1960 (3) SA 558 (A)

S v *Dzvatu* 1984 (1) ZLR 136 (H)

Case Information

G E Mandizha, for the appellant

M Zimba, for the respondent

Judgment

SANDURA JA: The appellant was found guilty of culpable homicide and was sentenced to 12 months' imprisonment with labour, of which five months' imprisonment with labour was conditionally suspended for three years. In addition, he was prohibited from driving all classes of motor vehicles for eight months. He now appeals against conviction and sentence.

The allegation against the appellant was that on 11 June 1994 at about 7.30 pm, he was driving a Mitsubishi sedan motor vehicle (``the Mitsubishi'') in the easterly direction on Lauchlan Avenue in Mabelreign when, at the intersection of Lauchlan Avenue and Sherwood Drive, he

Copyright Juta & Co Ltd

collided with a Mazda 323 motor vehicle (``the Mazda''), having failed to give way to that vehicle, which was being driven in the northerly direction along Sherwood Drive. As a result of that collision, a passenger in the Mazda (``the deceased'') was killed. In the circumstances, it was alleged that the appellant negligently killed the deceased.

SANDURA JA

In his defence, the appellant denied that he was driving on Lauchlan Avenue at the relevant time. Instead, he alleged that he was driving the Mitsubishi on Sherwood Drive in a southerly direction when, at the intersection of Sherwood Drive and Lauchlan Avenue, the Mazda, which was being driven in a northerly direction along Sherwood Drive, suddenly turned right into Lauchlan Avenue in front of on-coming traffic and collided with the Mitsubishi. In the circumstances, he alleged that it was the driver of the Mazda who caused the deceased's death.

It was common cause that the deceased, who had been occupying the front passenger seat in the Mazda, died on the spot, and that the appellant sustained moderate injuries, whilst the driver of the Mazda sustained minor injuries. It was also common cause that the Mitsubishi sustained extensive frontal damage and that the Mazda was extensively damaged on the left side, especially the left front door area. After the collision, both vehicles landed on the eastern side of Sherwood Drive.

The State called two witnesses. These were Sgt Mupeta (``Mupeta''), a policewoman who went to the scene of the collision shortly after it had occurred, and George Musoko (``Musoko''), the driver of the Mazda.

Mupeta's evidence was as follows. When she arrived at the scene, she found two other police officers already there. The body of the deceased was still there, and she was informed that three injured people had already been taken to hospital. As there was no one who had witnessed the accident, she compiled a sketch plan of the scene from her own observations. She observed that the intersection was controlled by a ``Stop'' sign facing Lauchlan Avenue, and that the point of impact was at the intersection but in the north-bound lane on Sherwood Drive near the ``Stop'' sign. There were street lights which enabled her to observe skid marks on the tarmac indicating the point of impact.

She then went to the hospital where she saw Musoko in the casualty department. He told her that he had been driving the Mazda along Sherwood Drive in a northerly direction and that the collision had occurred because the appellant, who had been driving along Lauchlan Avenue, in an easterly direction, failed to stop at the intersection. She also saw the appellant in the X-ray department, but could not question him because he was in severe pain. However, he told her that before the collision he had been driving on Lauchlan Avenue. Unfortunately, she forgot to record this statement in her notebook.

From her observations at the scene and from what she gathered from the two drivers, she concluded that the collision occurred because the appellant failed to stop at the intersection.

Copyright Juta & Co Ltd

The evidence given by the second State witness, Musoko, was as follows.

SANDURA JA

He had returned from a funeral at Gutu and was proceeding to Mabelreign shopping centre where the deceased, who was his sole passenger in the Mazda, wanted to purchase something before proceeding to his residence at Bluff Hill.

When he arrived at the intersection of Sherwood Drive and Lauchlan Avenue, the Mitsubishi, which was on Lauchlan Avenue, suddenly appeared and collided with his vehicle. Everything occurred so suddenly that he did not even have the time to take any evasive action. He was travelling at about 60 km/h at the time, but thought that the appellant was travelling at a speed in the region of 100 km/h. He did not see the Mitsubishi before the collision because of the existence of a hedge on the western side of the intersection which obscured part of Lauchlan Avenue.

That sums up the evidence led by the State. The appellant gave evidence and had no witness to call. His evidence was as follows. He was driving the Mitsubishi on Sherwood Drive in the southerly direction. As he approached the intersection of Sherwood Drive and Lauchlan Avenue he saw the headlights of the Mazda which was approaching the intersection from the opposite direction.

When his vehicle was about ten metres away from the approaching Mazda, the Mazda suddenly, and without giving any signal, turned right in front of him and the collision occurred.

In the circumstances, as often happens in road traffic cases, we have two different versions of how the collision occurred. However, the trial magistrate carefully assessed the evidence given by the witnesses. He did not attach much weight to the policewoman's evidence, partly because she did not record, in her notebook, the statement allegedly made by the appellant, and partly because she made no mention of the presence of debris on the tarmac when there must have been some. These are valid criticisms of the policewoman's evidence.

However, the trial magistrate found Musoko, the driver of the Mazda, a credible witness. I agree with that observation. He admitted that he had not taken any evasive action because the collision occurred suddenly. He did not even have the time to brake or reduce speed. In addition, he conceded that if the appellant had been travelling in the southerly direction and the Mazda had turned right in front of the appellant's vehicle, both vehicles might have sustained the same damage as they in fact sustained. On the whole, he gave his evidence well and was not in any way discredited in cross-examination.

In any event, the probabilities are in his favour. There was no reason for him to turn right into Lauchlan Avenue, and none was suggested by the appellant. He was driving to Mabelreign shopping centre where the deceased wanted to purchase something, and from there he intended proceeding to Bluff Hill

Copyright Juta & Co Ltd

SANDURA JA

where he was going to drop the deceased before going to Kuwadzana where he lived.

However, with regard to the appellant, a different picture emerges. The trial magistrate, in my view correctly, found him unreliable as a witness. For example, when he was asked to explain how the collision occurred he was evasive and contradicted himself. At first, he said that the collision was something like a head-on collision. When questioned further, he said that it was not exactly a head-on collision but something like a side-swipe. Later on he said that it was not quite a side-swipe. He certainly painted a confused picture of the manner in which the collision occurred and did not give a plausible explanation.

To add to that confusion, when he was asked whether, when the Mazda was about ten metres away from him, it had turned right and was facing the eastern direction, his answer was:

> ``No, it was in my lane. He had encroached onto my lane as if turning right.''

If that is correct and bearing in mind the appellant's allegation that the Mazda approached the intersection at a high speed, one wonders how a head-on collision was avoided. In my view, the appellant was simply attempting to avoid telling the truth that he caused the collision.

In the circumstances, I am satisfied that he was properly convicted.

I now wish to deal with the question of sentence. In my view, the trial magistrate was correct in finding that the appellant was grossly negligent. In the words of MCNALLY J (as he then was) in *S* v *Dzvatu* 1984 (1) ZLR 136 (H) at 138F:

> ``... anyone who drives straight through a `give way' sign at a T-junction and hits a lighted vehicle travelling in the main road, killing two people, is *prima facie* grossly negligent.''

That applies to the appellant.

In addition, the appellant lived in the area and was familiar with the intersection where the collision occurred. He lived at No 12, 44th Ave, Mabelreign. That avenue branches off Lauchlan Avenue and, on the street map of Harare, does not appear to be far away from the intersection in question. It is also significant that the appellant has chosen to lie and has not given any explanation for his conduct.

In my view, the sentence imposed on the appellant is not so severe that it induces a sense of shock. As RAMSBOTTOM JA said in *R* v *Bredell* 1960 (3) SA 558 (A) at 560G-H:

> ``... the time has come when it is the duty of judicial officers to exercise greater severity in passing sentence in cases of the negligent use of motor vehicles. A motor car is a most dangerous instrument if negligently handled, and it may be that the only way to remind drivers of their duty to use proper care is for magistrates and judges to make more frequent use of the deterrent effect of prison sentences.''

SANDURA JA

In that case, the appellant, who was driving a lorry, approached a sharp bend in the road and drove across the angle of the bend. He collided with a motor vehicle approaching the bend from

Copyright Juta & Co Ltd

the opposite direction and three people in that vehicle were killed. He was found guilty of culpable homicide and was sentenced to three years' imprisonment with labour, of which one year's imprisonment with labour was conditionally suspended. In addition, his driver's licence was suspended for three years. On appeal, the sentence of imprisonment was confirmed.

In the circumstances, there is no merit in this appeal and it is, therefore, dismissed in its entirety.

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

Nedziwe & Partners, appellant's legal practitioners

ZIMBABWE BANKING CORPORATION LTD *v* PINDI ELECTRICAL AND HARDWARE (PVT) LTD & ORS 1998 (2) ZLR 210 (HC)

Court **High Court, Harare**

Mubako J

Civil application

5 June & 26 August 1998 Judgment No. HH-146-98

Flynote

Company - legal proceedings - whether company entitled to act through a director or servant

Practice and procedure - party - company - whether company or partnership is obliged to act in High Court proceedings through a legal practitioner

Headnote

In a number of cases, such as *Pumpkin Construction (Pvt) Ltd v Chikaka* 1997 (2) ZLR 430 (H), it had been decided that a company had to be represented in the High Court through a legal practitioner. These cases were incorrectly decided. Since 1981, in terms of the proviso to s 9(2) of the Legal Practitioners Act [*Chapter 27:07*], a company may act for itself in any court through a director or an officer in its sole employment. The fact that the judges had failed to incorporate this right into the Rules of the High Court did not nullify the right of company to act for itself through a director or officer and without the assistance of a legal practitioner.

Case cited:

Pumpkin Construction (Pvt) Ltd v *Chikaka* 1997 (2) ZLR 430 (H)

Legislation referred to:

Legal Practitioners Act [*Chapter 27:07*], s 9(2)

Copyright Juta & Co Ltd

Case Information

Respondent in person

R Barretto, for the applicant

Judgment

MUBAKO J: In your latest application, you pray for a default judgment on the basis that the first defendant was barred because all process filed on behalf of the first defendant is invalid, since, being a company, it was not represented by a legal practitioner.

You were asked to state ``who is representing the first defendant and in what capacity he/she is doing so''. You declined to respond to that query. Instead, you reiterated your assertion that process by the first defendant is invalid because it is not done through a legal practitioner. Elsewhere, you state that

---

MUBAKO J

the first defendant, being a company, cannot self-act hence the pleadings are invalid.

I appreciate the submission but you cite no authority to support your statement. I assume that you base your assertion on the South African law or Zimbabwean law prior to 1981. Since then a company or partnership may self act in *any court* through its director, or officer in its sole employment and doing so for no extra pay or reward: Legal Practitioners Act [*Chapter 27:07*], proviso to s 9(2)(c).

I should emphasise that s 9(2)(c) applies to all courts of law and to all persons, including corporations and partnerships.

This rule is followed faithfully in the magistrate courts before and after Act of 1981. The main effect of s 9(2)(c) is therefore, to extend the rule to the High Court and Supreme Court.

I am aware that our rules have not incorporated the provisions of s 9(2)(c) and that certain decisions have sought to point to this as proof that the old prohibition over self-action still subsists eg *Pumpkin Construction (Pvt) Ltd v Chikaka* 1997 (2) ZLR 430 (H). However, it is self-evident that neither an omission to alter the rules of the High Court nor decisions of judges can amend or nullify a right granted by Act of Parliament - namely, the right of self-acting by corporations or partnerships. For a clear statement of the law since 1981, see also Professor RH Christie *Business Law In Zimbabwe* (1985) p 421.

I notice that Mr Lovemore Nyasha Bvumbe entered appearance to defend on behalf of the first defendant and on his own behalf as the second defendant. Provided he is a director or officer of the company, he is perfectly entitled to do so.

Accordingly, I hold that the first defendant's process is valid and is not barred. I am therefore unable to accede to your prayer for default judgment.

Copyright Juta & Co Ltd

The application is dismissed with costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

S *v* MILANZI & ANOR 1998 (2) ZLR 212 (HC)

Court **High Court, Harare**

Garwe J

Criminal review

26 August 1998 Judgment No. HH-142-98

Flynote

Criminal law - common law offences - housebreaking - elements - meaning of terms ``breaking'', ``entering'' and ``premises''

Criminal procedure - charge - explanation of - housebreaking with intent to steal - terms of art used in elements of offence should be carefully explained to unrepresented accused

Headnote

The offence of housebreaking with intent to steal consists of five essential elements: (a) breaking, (b) entering (c) premises (d) unlawfully (e) with intent to steal. Each of these should be carefully explained to an unrepresented accused who pleads guilty to such a charge. These are terms of art whose meaning may not be readily apparent to the layman. The correct method of explaining the elements of the charge and questioning the accused is set out.

Judgment

GARWE J: The terms ``breaking'' and ``entering'' are terms of art which must be carefully explained to unrepresented accused in cases of housebreaking with intent to steal and theft. It is not sufficient to ask an unrepresented accused if he ``broke'' and ``entered'' into premises without explaining what breaking and entering entails in the particular circumstances of the case. I note with dismay that even provincial magistrates of several years' standing experience considerable difficulty in properly explaining to unrepresented accused persons the essential elements of housebreaking with intent to steal and theft.

The offence of housebreaking with intent to steal consists of the following essential elements (a) breaking (b) entering (c) premises (d) unlawfully (e) with intent to steal. Each of these essential elements, in particular the elements of breaking and entering, must be properly and carefully explained to the accused. There are cogent reasons why this should be so. In *S* v *Mahaso* HH-94-94, I attempted to explain the need for each of the essential elements of the offence to be carefully explained. It would appear that, that review judgment has had little, if any, impact on magistrates as most are still unable to properly explain the essential elements of the offence. Hereunder is a

Copyright Juta & Co Ltd

GARWE J

further attempt to re-state the correct approach in this regard. I proceed to deal with each of the essential elements in turn.

(a) *Breaking*

This is a term of art. What amounts to ``breaking'' is a question of both fact and law. Breaking may entail physical damage to premises such as the breaking of a windowpane. It may simply involve the opening of a partially open window or an unlocked door. Where no part of the premises is displaced, then there is no breaking.

(b) *Entering*

This, too, is a term of art and what amounts to entering is both a question of fact and law. It may involve physically entering the premises. It may involve inserting a hand or finger or some instrument into the premises.

(c) *Premises*

This is also a term of art, for there are many types of premises in respect of which the crime can be committed but which a layman would scarcely refer to as premises. For example, a permanently occupied tent, a storeroom and an immovable display cabinet forming part of a shop have been held to be ``premises''.

(d) *Unlawfully*

It is necessary that this element be carefully canvassed. The entry must be unlawful and not something which the accused has a right to do under some title eg a domestic worker who has access into the house during the scope of his duties. If the entry is lawful, then the offence is not housebreaking.

(e) *Intent*

Three aspects must be stressed:

(i) The accused must intend to effect an unlawful breaking and entry. If he erroneously supposes the premises to be his or that he has permission to enter the premises, he lacks the intent to housebreak.

(ii) Mere breaking and entering does not on its own constitute the offence of housebreaking with the intent to steal. There must be an intention thereby to commit theft.

(iii) The intention to steal must be present when both the breaking and entering are effected. It follows that if an accused makes the decision to steal only after breaking and entering, he cannot be convicted of housebreaking with intent to steal.

Copyright Juta & Co Ltd

It is imperative, particularly in the case of unrepresented accused, that each of the above elements is properly and carefully canvassed. It is not proper to inquire of an unrepresented accused if he ``broke'' and ``entered'' the premises, as he might not appreciate what these terms mean. To the layman, the mere act of entering another person's house is housebreaking and it is possible

GARWE J

therefore that an unrepresented accused could admit breaking and entering when in fact he did neither in law.

For the assistance of trial magistrates, I suggest the following questions in canvassing the essential elements of housebreaking with intent to steal and theft.

Question: Do you admit that you broke into the complainant's premises by displacing the door (or damaging the window pane, etc) in order to create an opening?

Answer: Yes.

Question: Do you admit that you then entered the premises by climbing in through the window you had opened?

Answer: Yes.

Question: Do you admit that you had no right to break and enter into the premises?

Answer: Yes, I admit.

Question: At the time you broke and entered into the premises, it was your intention to steal from the premises?

Answer: Yes.

Question: Do you admit taking the complainant's property (identified)?

Answer: Yes.

Question: And that you had no right to take that property?

Answer: I admit I had no right.

Question: Was it your intention to permanently deprive the complainant of that property?

Answer: Yes.

Question: Is your plea an admission of the charge, the facts and the essential elements of the offence?

Answer: Yes.

Copyright Juta & Co Ltd

Verdict: Guilty as charged.

Only by asking questions such as the above can a court satisfy itself as to the guilt of the accused.

In the present case, there was a failure to explain what breaking and entering meant. The accused were simply asked whether they broke and entered. The facts admitted by the accused, however, reveal that they broke windowpanes to the workshop and to the homestead, after which they used a hammer and pliers to damage the burglar bars securing the window. Although this should have been specifically canvassed with the accused during the explanation of the essential elements, I am satisfied in all the circumstances that the accused were properly convicted of the two counts of housebreaking with intent to steal and theft and one count of housebreaking with intent to steal. Notwithstanding the failure to properly canvass the

essential elements, I confirm the conviction. It should however be stressed once again, that the essential elements must be carefully and properly canvassed.

On sentence, it is noted that on the first count the accused stole property worth $2 900. The property was all recovered. On count two, they found nothing worth stealing. On count three, they stole property worth $22 117. Of that property, $2 116 worth has been recovered. Although both accused are first offenders and pleaded guilty, the offences are serious. The offences were committed on two consecutive days. The accused are a menace to society. The sentence of 30 months' imprisonment of which 10 months is suspended in respect of all three counts that was imposed on each accused is in my view exceedingly lenient. In my view, a sentence of l year on count 1, 6 months on count 2 and 21/2 years on count 3 would have been more appropriate and, in order to palliate the severity of the sentence, a portion of the cumulative sentence should have been suspended on the usual conditions of good behaviour.

I am unable to certify the sentence as being in accordance with real and substantial justice.

KAMOCHA J agrees.

KENCOR HOLDINGS (PVT) LTD & ANOR *v* MOUNT PLEASANT RATEPAYERS ASSOCIATION 1998 (2) ZLR 216 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Muchechetere JA & Sandura JA

Civil appeal

23 July & 28 August 1998 Judgment No. S-142-98

Flynote

Copyright Juta & Co Ltd

Town and country planning - local plan - document prepared by a third party adopted by local planning authority - validity of plan - objections to - in which court such objection must be heard

Headnote

A developer had applied under s 26 of the Regional, Town and Country Planning Act [*Chapter 29:12*] to the local planning authority for a development permit in respect of the property upon which it wished to carry out the development. The plan, which had not been prepared by the local authority but by a consultant on behalf of the developer, had been adopted by the local planning authority as if it were its own. Numerous objections to the draft local plan had been made to the planning authority and, acting in terms of s 19(1) of the Act, the local authority referred those objections to the Administrative Court for determination.

In the Administrative Court, the objectors challenged the validity of the draft local plan, arguing that s 17(1) of the Act only allowed the local planning authority to prepare a local plan for the area and did not allow it to abrogate its responsibility in this regard by simply adopting as its own a plan prepared by a developer. The Administrative Court decided that the plan was invalid. On appeal:

Held, that the sole way to challenge the validity of a draft local plan is in terms of s 71 of the Act. This provides that an application must be made to the High Court within six weeks of the publication of the public notice by the local planning authority that it has adopted the draft local plan. The Administrative Court does not have jurisdiction in terms of s 19 of the Act to determine the validity of a draft local plan.

Held, therefore, that the order of the Administrative Court declaring that the draft local plan was invalid had to be set aside.

Cases referred to:

Chinamora v *Angwa Furnishers (Pvt) Ltd & Ors* 1996 (2) ZLR 664 (S)

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

Legislation considered:

Regional, Town and Country Planning Act [*Chapter 29:12*], ss 17(1), 19(1) and 71(1)

Case Information

E Matinenga, for the appellants

J C Andersen SC, for the respondents

Judgment

GUBBAY CJ: The first appellant, Kencor Holdings (Pvt) Ltd is ``the

GUBBAY CJ

Copyright Juta & Co Ltd

developer'' of the unimproved immovable property known as Remainder of Lot 57 of Mount Pleasant, situate in the District of Harare. The registered owner of the property is EPH Properties (Pvt) Ltd. Mr and Mrs Joe Kennedy are the shareholders of both companies.

On 25 November 1994, the developer applied, pursuant to s 26 of the Regional, Town and Country Planning Act [*Chapter 29:12*] (``the Act''), to the second appellant, the City of Harare, which henceforth I shall refer to as ``the local planning authority'', for a development permit in respect of the property. The response was that a permit could not be granted until a local subject plan had been prepared.

A draft plan, entitled ``Golden Stairs Local Subject Plan No. 40'', was duly prepared by a chartered town planner, Mr Malcolm Logan. It proposed a regional shopping centre on the property with ancillary activities, as detailed in an attached concept plan. The estimated cost of this development was one hundred million dollars.

Draft local subject plan no. 40 was adopted by the local planning authority, in terms of s 18(2) of the Act, on 22 February 1996, and a copy thereof placed on public exhibition for the prescribed two month period from 18 March to 18 May 1996. The closing date for the receipt of objections or representations was given as 1 June 1996.

Numerous objections to the draft local subject plan were made to the local planning authority. Members of the Mount Pleasant Ratepayers Association, now the respondent, comprised the vast body of objectors.

On 5 August 1997, the local planning authority, under s 19(1)(a) of the Act, referred to the Administrative Court for determination those objections which, by then, had not been withdrawn. The hearing was eventually set down for 8 January 1998, with leave given to the objectors to argue certain points *in limine* in advance of the application for approval of draft local subject plan no. 40. The main preliminary objection challenged the essential validity of local subject plan no. 40. It was worded thus:

> ``Section 17(1) of (the Act) allows the local planning authority to prepare a local plan for any part of the area and does not permit the local planning authority to abrogate that responsibility to a developer or to a private individual. The local subject plan no. 40 was prepared by [Mr Logan] on behalf of the company EPH Properties (Pvt) Ltd and/or Kencor Holdings (Pvt) Ltd and not by the City of Harare as the local planning authority.''

After the parties had led evidence on the objection, the Administrative Court determined that draft local subject plan no. 40, referred to it, was not a local plan prepared by the local planning authority or on its behalf. It was a document prepared extraneous to the provisions of s 17(1)(a) of the Act and merely adopted by the local planning authority as though it were its own. The

Administrative Court declared, accordingly, that that plan was invalid. No order was made as to costs.

Against such declaration, the developer and the local planning authority have appealed to this court. Two grounds were relied upon. The first raised a point not taken before the Administrative

Copyright Juta & Co Ltd

Court. It was that the Act does not vest the Administrative Court with jurisdiction to determine the *validity* of a draft local plan. The second was that even if the Administrative Court was possessed of the requisite jurisdiction, it had erred in holding that draft local subject plan no. 40 was invalid, as being an impermissible delegation of authority by the local planning authority in contravention of s 17(1) of the Act.

A decision upholding the first contention will dispose of the appeal against the respondent and render consideration of the second contention unnecessary. To this issue, I now turn.

For a proper understanding of the opposing arguments, it is of advantage to outline briefly the procedure pertaining to local plans, which is contained in Part IV of the Act.

Subsection (1) of s 17 gives to the local planning authority the right to prepare a local plan for any part of the area for which it is the local planning authority. In the exercise of such right, the requirements specified in the remaining subsections, and in subs (1) of s 18, have to be complied with.

The second step is the adoption of the draft local plan by the local planning authority. Upon its adoption, the local planning authority is obliged by subs (2) of s 18 to: (a) submit a copy of the draft local plan to the Minister; (b) thereafter, place it on public exhibition for two months, indicating the time within which objections or representations concerning the plan may be made to it; and (c) give public notice of the place or places at which, and the period for which, the draft local plan will be exhibited, again indicating the time within which objections or representations concerning the plan may be made.

The third step relates to the receipt by the local planning authority of objections or representations to the draft local plan. Subsection (1)(a) of s 19 provides that objections which have not been withdrawn must be referred by the local planning authority either to the Administrative Court for determination, or to a local enquiry for investigation. Representations, on the other hand, may be referred to a local enquiry under subs (1)(b).

As mentioned above, the route taken by the local planning authority was to seek a determination of the objections from the Administrative Court, and not to refer the objections for investigation. That being so, any determination made by the Administrative Court in respect of any objection referred to it had to be complied with by the local planning authority.

As the final step, the local planning authority approves the plan and

publishes a notice of approval in the *Gazette*, giving a date on which the plan shall become operative in terms of s 71(5) of the Act.

Section 71 of the Act is concerned with the validity and operation of master plans and local plans. Subsection (1) reads as follows:

> ``Any person who -

Copyright Juta & Co Ltd

(a) is aggrieved by a master plan or local plan or by any alteration, repeal or replacement of any such plan; *and*

(b) desires to question *the validity* of such plan on the grounds that it is *ultra vires* the powers conferred by Part IV or that any requirement of Part IV or of any regulations made in terms of this Act was not complied with;

may, *before* or within six weeks of the date of the publication of the *notice of approval of such plan*, apply to the High Court for an order setting aside such plan or a particular provision thereof'' (emphasis added).

This provision does not permit *any* objection to a master plan or local plan to be raised before the High Court. The objector must not only be aggrieved, he must also confine the objection to the question of the validity of the plan. In which event he may, before or within six weeks of the date of publication of the notice of approval of the plan, apply to the High Court to have it set aside. Thus the objector, if qualified to do so, may apply to the High Court as soon as the local planning authority, having *adopted* a draft local plan, has placed it on public exhibition and given public notice indicating the time within which objections may be made. He need not wait for the commencement of the six week period from the date of publication of the notice of approval by the local planning authority. It was, therefore, open to the respondent to bring the complaint of invalidity before the High Court - indeed, it would have been well advised to have done so - soon after 22 February 1996, much in advance of the Administrative Court's hearing on 8 January 1998.

Furthermore, it is significant that in subs (2) the lawmaker has detailed the powers of the High Court following upon the making of an appropriate application. It may issue an interim order suspending the master plan or local plan or any provision contained therein until final determination of the proceedings. And, if satisfied that such plan or provision is wholly or partially *ultra vires* the powers conferred by Part IV, or that the interests of the applicant have been substantially prejudiced by the failure to comply with the relevant requirements of Part IV or any regulations made under the Act, the High Court may issue an order setting aside such plan in whole or in part, or any provision thereof.

But it is subs (5) that, in my view, is the most telling. This is a provision which is both jurisdictional and prescriptive. It reads:

``*Subject to the provisions of this section*, the validity of a master plan or local plan, whether before or after it has been approved, shall not be called in question in any legal proceedings and such plan shall become operative at the expiration of six weeks from the date on which the notice notifying the approval of that plan is published in the *Gazette*'' (emphasis added).

GUBBAY CJ

In context, the governing phrase ``Subject to the provisions of this section'', can only mean ``Except as provided for by this section'', or, to similar effect, ``Without prejudice to what is provided for by this section''. See *Comr -of Police* v *Wilson* 1981 ZLR 451 (S) at 463D-E; *Chinamora* v *Angwa Furnishers (Pvt) Ltd & Ors* 1996 (2) ZLR 664 (S) at 689D-F. In other words, the validity of a master plan or local plan cannot be called in question save in terms of s 71, which sets out the qualifications, the proper forum and the time limits for so doing, and the

Copyright Juta & Co Ltd

nature of the relief available to the aggrieved objector.

My perception that s 71 affords an objector the sole means of attacking the validity of a local plan obliges me to reject the argument, advanced so persuasively by counsel for the respondent. Essentially it was that s 19, by necessary implication, vested the Administrative Court with jurisdiction to determine whether or not draft local subject plan no. 40 was valid.

In support of my conclusion as to the effect of s 71, I would draw attention to the following consistent features:

Firstly, in contrast to the question of validity being expressly provided for in s 71, is the omission in s 19, both to mention any power in the Administrative Court or investigator to determine the validity of a draft local plan, and any elaboration as to the type of relief the Administrative Court may grant consequent upon the receipt of such objection.

Secondly, I deem it most unlikely that the legislator intended to permit an objector to challenge the validity of a draft local plan in two *fora*. For this leads to the anomaly that, having received an unfavourable determination from either the Administrative Court or the investigator, the objector could ignore it and raise the same objection before the High Court. Such a situation militates against finality.

Thirdly, it seems improbable that the legislator was minded to repose in an investigator, who only exceptionally would be a person versed in the law, authority to rule upon the validity of a draft local plan.

In the result, the appeal must be allowed with costs. The order of the Administrative Court declaring draft local subject plan no. 40 invalid is set aside. The Administrative Court is to proceed to determine the objections to such plan as were referred to it by the local planning authority.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

Kantor & Immerman, respondent's legal practitioners

PTC *v* SUPPORT CONSTRUCTION (PVT) LTD 1998 (2) ZLR 221 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Muchechetere JA & Sandura JA

Civil appeal

23 July & 28 August 1998Judgment No. S-144-98

Copyright Juta & Co Ltd

Flynote

Contract - formation - tender - acceptance by party inviting tenders of bid - contract thereby formed with party submitting bid - signature of contract documents by party submitting bid - not necessary for party inviting tenders also to sign documents for contract to be formed

Headnote

The appellant corporation invited tenders for the construction of a post office in Marondera. The tender documents were to be submitted to the Secretary of the Government's Tender Board. The respondent submitted a bid, and the appellant wrote to the respondent to say that the bid had been successful. Shortly afterwards, a further letter was sent, enclosing a contract documents, to be signed by the respondent and returned to the appellant. A few months later, the appellant wrote to the respondent, saying that the Tender Board had ordered it to cancel the contract and to accept a bid by another company.

After fruitless discussions with the appellant, the respondent finally pointed out that the appellant was, in terms of the contract, obliged to pay the compensation for cancellation provided for in the contract. The appellant's response was that there was no contract. It was argued that acceptance of the respondent's bid should have been by the Tender Board, not by the appellant; alternatively, that the documents signed by the respondent had not been signed by the appellant and thus did not constitute an agreement.

Held, that the evidence was clear that the respondent had submitted his bid to the Tender Board, as required.

Held, further, that the tender was put out as a ``PTC Tender'' and the contract was to be entered into between the PTC and the successful bidder. The acceptance of the bid was therefore to be by the appellant, not by the Tender Board.

Held, further, that the evidence showed that there had been acceptance by the appellant of the tender. An invitation to tender is an invitation to treat. The tender is the firm offer and the acceptance of the tender results in a binding contract. The wording of the appellant's letter was not conditional. Even if the first letter could not be taken as an acceptance, the second one clearly stated that the respondent's bid had been accepted.

Held, further, that even if the letters did not constitute acceptance, the contract was concluded when the respondent signed, stamped and returned the contract documents sent to it by the appellant. It was not necessary for the appellant to sign them for the contract to be binding.

Cases cited:

Assd Printing & Packaging (Pvt) Ltd & Ors v *Lavin & Anor* 1996 (1) ZLR 82 (S)

Fourie v *Datsun Finance Co Ltd* 1978 (4) SA 193 (T)

Fraser & Chalmers (SA) (Pty) Ltd v *Cape Town Municipality & Anor* 1964 (3) SA 303 (C)

Copyright Juta & Co Ltd

MUCHECHETERE JA

National Overseas Distributors Corp (Pty) Ltd v *Potato Bd* 1958 (2) SA 473 (A)

Nyami Nyami Rural District Council v *Zindele Safaris* S-109-97

Case Information

J C Andersen SC, for the appellant

P Nherere, for the respondent

Judgment

MUCHECHETERE JA: This is an appeal against the judgment of the High Court, Harare, on 18 November 1997, in which it was held that the parties entered into a valid agreement in terms of which the respondent would construct a post office savings bank complex at Marondera; that for the resolution of the dispute between them in relation to the construction of the building the parties must submit to arbitration in terms of the provisions of contract number BE/F18/95/96; that within seven days of the service of the court *a quo*'s order the appellant should nominate an arbitrator and umpire for the arbitration and communicate its choice to the respondent's legal practitioners; and that the costs of the application should be paid by the appellant.

The facts in the matter are that the appellant invited tenders for the construction of the said post office building at Marondera. The tender documents indicated that all tenders were to be submitted to the Secretary,

Government Tender Board (``the Tender Board''). The respondent submitted a bid for $11 670 000. On 10 April 1996, the appellant wrote to the respondent as follows:

> ``Dear Sir,
>
> TENDER BE/F18/95/96: SERVICES AND SALES/POSB COMPLEX AT MARONDERA
>
> Thank you for your valued quotation for the above tender.
>
> I am pleased to advise that your bid has been successful. An order will be placed by our Buildings and Estates Branch in due course.
>
> Please note that this letter is not an official order and any goods or services supplied on the basis of this letter will not be accepted.
>
> Yours faithfully,
>
> (Signed)
>
> Y MANDA
>
> SECRETARY PTC PURCHASING COMMITTEE.''

On 16 April 1996, the appellant wrote to the respondent as follows:

> ``Dear Sir,

Copyright Juta & Co Ltd

MUCHECHETERE JA

RE: PROPOSED P.O.S.B. SERVICES AND SALES COMPLEX AT MARONDERA TENDER BE/F18/95/96

Please be advised that your bid on this tender was successful. Kindly attend to the following:

...

All the documents duly completed should reach this office not later than 1 May 1996.

Yours faithfully,

(Signed)

N CHOTO

DIRECTOR SERVICES

FOR POSTMASTER GENERAL."

Having secured an extension of the above deadline, the respondent returned the contract duly completed and signed under cover of a letter dated 21 June 1996.

The appellant's requirements for the project included the need by the respondent to secure a surety bond representing about 0.15% of the value of the contract and also for the respondent to secure insurance cover for the project. These cost the respondent in excess of $51 800. In addition, the respondent spent considerable sums of money, energy and effort in preparation for the commencement of the project - securing quotations for materials, preparing a team of builders, carpenters and other staff, and disregarding and/or ignoring and/or abandoning other tenders which came up on the market.

The appellant, through its Building and Estates Branch, advised the respondent that the Tender Board had ordered it (the appellant) to cancel the contract and to accept another bid by a company called 21st Century Contractors (Pvt) Ltd. And by a letter dated 2 September 1996, the appellant purported to cancel the contract. The letter reads as follows:

``Dear Sir,

TENDER BE/F18/95/96: SERVICES AND SALES/POSB COMPLEX AT MARONDERA

Following review of award of tender BE/F18/95/96 communicated to you on 10 April 1996, I regret to advise that the decision has been rescinded in line with Government Tender Board resolution. The tender has now been awarded to 21st Century Contractors.

Yours faithfully,

(Signed)

Y MANDA

SECRETARY PTC PURCHASING COMMITTEE."

Copyright Juta & Co Ltd

MUCHECHETERE JA

The respondent queried the appellant's action, which it considered was a breach of contract. And, after fruitless discussions with the appellant, the respondent finally pointed out to the appellant that, having decided to terminate the contract, the appellant was obliged to pay the respondent in terms of clause 19(d) of the contract, which reads:

> ``The Corporation (the appellant) shall have full power to terminate the contract for reasons other than those referred to in (a) and (b) and in such case the Contractor (the respondent) shall be paid as a just reasonable compensation a sum calculated at five percent of the value of the Works still remaining to be completed at the date of such termination of the Contract.''

The appellant's response, through its legal department, was to the effect that the contract which the respondent sought to rely upon was not duly executed and that in the circumstances clause 19(d) thereof did not apply.

The respondent referred the matter to its legal practitioners. They in turn wrote to the appellant demanding that the matter be settled in terms of clause 19(d) of the contract. On 24 January 1997, the appellant's legal practitioners replied as follows:

> ``Our client has handed to us your letter of 20 January 1997 together with background documentation in the above matter, to which documentation we are now giving some consideration. We have recommended to our client that senior counsel's opinion be obtained in order to establish the detailed legal effect of the cancellation by Presidential directive of various tenders, including that which appears to have been awarded to your client, with a view to being able to recommend further to our client whether settlement is appropriate.''

As was stated in the respondent's heads of argument, the sole issue for determination in this matter is whether the appellant and the respondent concluded a contract in terms of which the respondent would construct for the appellant a post office savings bank complex at Marondera.

Mr *Andersen*, for the appellant, submitted that no contract was concluded between the parties in this matter. In his submission, the mere acceptance of the respondent's tender by the appellant, as evidenced in the appellant's letters of 10 and 16 April 1996, did not constitute an agreement between the parties. He argued that because the tender was addressed to the Tender Board, acceptance should have been by the Tender Board. And that as there is no suggestion that the Tender Board delegated authority in the matter to the appellant to do so, no agreement was entered into. Mr *Andersen* also cast doubt upon whether the respondent had, as indicated on the tender documents, sent its tender to the Tender Board. In this connection, he stated that there was no assertion to that effect on the papers.

In the alternative, Mr *Andersen* submitted that the letter of 10 April 1996 did not constitute acceptance because of the provisions of the last paragraph. And that the letter of 16 April 1996, carried the matter no further as it was

made clear therein that the existence of the agreement depended on the execution of the contract referred to. In this connection, he pointed out that the form of agreement sent to and completed by the respondent was not executed by the appellant and therefore did not constitute

Copyright Juta & Co Ltd

an agreement. He also stated that the invitation to tender made it clear that the award of tender was to be followed by the conclusion of a written agreement and that the completed tender documents do not constitute the full terms of a written agreement.

The first issue to resolve is whether or not the respondent forwarded its tender to the Tender Board. It is common cause that the tender documents indicate clearly that the tender was to be submitted to the Tender Board. The physical and postal address of the Tender Board are stated thereon. The respondent got to know of the tender through the Zimbabwe Building Contractors Association. That organisation's tender information document clearly states that the tenders were to be submitted to the Tender Board either by hand or post and gives the physical and postal addresses of the Tender Board. It was therefore clear to the respondent where the documents were to be submitted. In my view, when the respondent states in the founding affidavit that: ``The applicant (the respondent) submitted a bid ...'', it is clear that it is being stated that the respondent complied with tender documents requirements, which included submitting the bid to the Tender Board. If it had not been the case, the appellant would have been entitled to reject the bid and pointed this out in its letters and in the opposing affidavits. It did not.

In any event, this issue is clarified by the fact that the respondent's tender documents were stamped on the first, fifth and last pages by the Tender Board's stamp dated 5 October 1995. This signifies that they were submitted to the Tender Board on that date.

The next issue to consider is whether or not the Tender Board adjudicated on or was involved in the award of the tender. I am of the view that, once it has been established that the tender was submitted to the Tender Board, it must follow that the Tender Board must have considered it and thereafter passed on its views or opinion or recommendation to the appellant. The respondent is entitled to expect that that was what happened. Indeed, the appellant did not say anything to the contrary. This tender was put out as a ``PTC Tender'' and the contract was to be entered into between the appellant and the respondent. In the circumstances, the acceptance of the tender was to be done by the appellant and not by the Tender Board. Although I agree with Mr *Andersen*'s submission, that Treasury requirements are to the effect that substantial parastatal tenders are subject to the Tender Board's approval, I am of the view that that requirement is satisfied by the fact that the tender was

MUCHECHETERE JA

sent to the Tender Board. In this connection, I agree with the following sentiments expressed by the learned judge in the court *a quo*:

> ``The Government Tender Board it would appear is tasked with assisting the applicant (the appellant) in determining bids submitted by tenderers. It is of course not in dispute that the Government Tender Board plays a significant rôle in matters of this nature and that once the Government Tender Board approves a tender that is then communicated to PTC in this particular case for further communication to the successful tenderer.''

In connection with whether or not there was acceptance of the respondent's tender, I am in agreement with Mr *Nherere*'s submission to the effect that the evidence on the papers shows

Copyright Juta & Co Ltd

that there was acceptance of the tender.

In the first instance, Mr *Nherere* submitted that the law in matters of this nature is to the effect that an invitation to tender is an invitation to treat; the tender is the firm offer and acceptance of the tender results in a binding contract. See Christie *Law of Contract in South Africa* 3 ed at p 44 where the learned author says:

> ``A call for tenders, then, is normally no more than a request to submit offers, and each tender is an offer which the advertiser may accept or reject at will ... The offer which, by mere acceptance, created the contract was his own.''

See also *National Overseas Distributors Corporation (Pty) Ltd* v *Potato Board* 1958 (2) SA 473 (A) at 479D; *Fraser & Chalmers (SA) (Pty) Ltd* v *Cape Town Municipality & Anor* 1964 (3) SA 303 (C) at 306G; and *Nyami Nyami Rural District Council* v *Zindele Safaris* S-109-97 at 10. Mr *Andersen* did not demur.

On the facts, Mr *Nherere* submitted that the contract was concluded when the appellant by its letter of 10 April 1996 accepted the respondent's tender. As for the last paragraph in that letter, Mr *Nherere* argued that all it does is to defer the performance of the contract and not its inception. And that the inclusion of that paragraph is predicated on the assumption that a contract has been concluded, hence the need to advise the other party not to render immediate performance pursuant to the concluded contract. Had it been the appellant's intention not to be contractually bound at that stage it is more likely that the last paragraph would have been couched along the lines ``Please note that this letter is not an official acceptance of your tender'', or ``Please note that this letter is not binding on the Corporation''. I agree with Mr *Nherere*'s submission and argument on the matter. I also am of the view that the appellant's letter of 2 September 1996, partly quoted above, reinforces the view that the letter of 10 September 1996 accepted the respondent's tender.

I also agree that, even if it were to be held that the last paragraph in the letter of 10 April 1996 was fatal to the contractual character of that letter, then the contract was concluded when the appellant accepted the respondent's tender

---

MUCHECHETERE JA

by its letter of 16 April 1996. The first paragraph of the letter, quoted above, clearly states that the respondent's bid had been accepted and then states that the respondent was to attend to certain matters, which it eventually did. It does not say that to conclude the contract certain matters were to be attended to. The requirements the respondent had to attend to included incurring expenditure pursuant to the contract - providing surety for the performance of the contract. This presupposes that both the appellant and the respondent are contractually bound. If that were not so, the appellant would have had no basis for calling upon the respondent to take steps pursuant to the contract which entailed substantial costs.

Mr *Nherere*'s alternative submission also has validity, in my view. It is to the effect that, if the letters of 10 and 16 April 1996 did not constitute acceptance, then the contract was concluded when the respondent signed, stamped and returned to the appellant the Articles of Agreement

---

Copyright Juta & Co Ltd

and Conditions of Contract. This was dated 21 June 1996. The appellant's contention is that the document does not constitute a contract because it was not duly executed - it was signed by the respondent but not signed by the appellant. In this connection I agree with Mr *Nherere*'s submission which was to the effect that the requirement was that a written contract be concluded. And that there was no requirement that it be signed by both parties to be binding. See *Fourie* v *Datsun Finance Co Ltd* 1978 (4) SA 193 (T), where it was contended by the plaintiff that the defendant could not rely on a document as it had only been signed by one of the parties, the defendant. It was in that case held that the fact that a document was unilateral in that sense did not necessarily mean that it was not a written record of contract. At p 196, NICHOLAS J said:

> ``The plaintiff by its conduct in submitting the document to the defendant for his signature, in receiving it back after it had been signed and in repossessing the vehicle in terms thereof, manifested its consent to the terms ... as if it had affixed its signature thereto.''

And in *Associated Printing & Packaging (Pvt) Ltd & Ors* v *Lavin & Anor* 1996 (1) ZLR 82 (S) a contractual document which was not signed was held to be binding.

The issue, as pointed out by Mr *Nherere*, is whether the intention of the parties was that the contract would not come into being unless and until the document was signed by both parties. The appellant has not, in my view, shown that that was the intention of both parties. On the contrary, the contents of the first paragraph of the letter of 16 April 1996 indicate that the intention of the parties was that they were to be bound as soon as the respondent signed the document and returned it to the appellant.

Lastly, I agree that the appellant itself was of the view that the tender had been awarded to the respondent and then rescinded. In the letter of 2

MUCHECHETERE JA

September 1996, the appellant speaks of ``review of award of tender communicated to you on 10 April 1996 ... regret to advise that the decision has been rescinded ...'' In the letter dated 22 October 1996, it speaks of ``... it was common cause that the award of the tenders in question was rescinded ...'' And the appellant's legal practitioners, in their letter of 24 January 1997, speak of ``... the cancellation by Presidential directive of various tenders including that which appears to have been awarded to your client ...'' The legal practitioners compound the appellant's dilemma by revealing that it was a Presidential directive which caused the cancellation of the award, whilst all along it had been contended that it was the Tender Board. This, in my view, cast doubt on the main assertion of the appellant, which was to the effect that the contract had not been approved by the Tender Board. It cannot be seriously contended that the contract would have been considered at Presidential level before it had been considered by the Tender Board.

All in all, I consider that the learned judge's finding in the court *a quo* cannot be faulted.

In the result, the appeal is dismissed with costs.

Copyright Juta & Co Ltd

GUBBAY CJ: I agree.

SANDURA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

BRIGHTSIDE ENTERPRISES (PVT) LTD *v* ZIMNAT INSURANCE CO (2) 1998 (2) ZLR 229 (HC)

Court **High Court, Harare**

Chinhengo J

16 July, 2 August &

2 September 1998 Judgment No. HH-150-98

Flynote

Court - judicial officer - when functus officio - *judge clarifying judgment given earlier - not* functus officio

Practice and procedure - judgment - clarification of - judgment omitting to specify date from which interest on judgment debt was to run

Interest - date from which applies - judgment debt - whether interest runs from date of letter of demand or date of service of summons

Headnote

On 4 February 1998, a High Court judge gave judgment in favour of the plaintiff in a certain amount together with interest *a tempore morae* at the rate of 25% *per annum*. No date was specified in the judgment as the date from which interest was to run.

The parties sought clarification from the judge as to the date from which interest should be calculated. The plaintiff argued that it should run from 1 July 1996, which was the date upon which the plaintiff had sent a letter to the defendant calling upon the defendant to respond to the plaintiff's claim. On the other hand, the defendant argued that interest should run from the date of the service of the summons, which was a much later date.

Held, that the court was not *functus officio* in respect of this matter, as it was merely being asked to supplement its order by dealing with an accessory matter.

Held, further, that a letter of demand only has the effect of placing a defendant *in mora* if it satisfies certain criteria. The demand must be unequivocal or unambiguous. It must specify a date on which payment must be made or performance given and clearly indicate that the plaintiff requires to be paid or receive performance by that date. In the present case, the letter sent by the plaintiff to the defendant on 1 July 1996 did not satisfy these criteria. It did not clearly state that the plaintiff required to be paid on its claim by a stated date. It merely sought a

---

Copyright Juta & Co Ltd

formal response to a claim previously filed with the defendant. It was aimed at facilitating negotiations. It did not therefore have the effect of placing the defendant *in mora*. Consequently, interest only started to run from the date of the service of the summons.

Cases cited:

Brightside Entprs (Pvt) Ltd v *Zimnat Ins Co Ltd* 1998 (1) ZLR 117 (H)

Kragga Kamma Ests CC & Anor v *Flanagan* 1995 (2) SA 367 (A)

Case Information

J O'Brien, for the plaintiff

A J Dyke, for the defendant

CHINHENGO J

Judgment

CHINHENGO J: On 4 February 1998, my judgment in *Brightside Enterprises* v *Zimnat Insurance Co Ltd* 1998 (1) ZLR 117 (H) was handed down. The operative part of that judgment read:

> ``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.''

This formulation of the order has given rise to a dispute between the parties as to the date from which interest should be calculated. On 8 April 1998, the defendant's legal practitioner in reply to an earlier letter by the plaintiff's legal practitioner spelt out the nature of the dispute in the following words:

> ``We advise that our client has agreed to pay your client the judgment debt plus interest. We note that in your client's declaration you claimed interest a *temporae morae* without specifying when exactly you say that our client was placed *in mora*. Chinhengo J did not specify either from what date interest runs. It is our view that, in the circumstances, our client must be said to have been placed *in mora* by the service of the summons and interest should, therefore, run from the date of service. It is not clear from the summons when exactly service was effected on our client. From what little information is on file on this aspect of the matter, we believe that service was effected on 29 August 1996 and, assuming this to be correct we calculate the accrued interest to amount to $64 438.36 and the total amount of capital and interest to be $224 438.36. Assuming that we are correct, we have asked our client for its cheque for the sum of $224 438.36 and we shall forward it to you as soon as it is to hand.''

The plaintiff's legal practitioners conceded that my judgment did not specifically identify the date from which interest was to run. They, however, stated that interest was to run from the date of the letter of demand which was 1 July 1996. They accepted, on a ``without prejudice'' basis, the sum of $224 438.36.

Further correspondence was exchanged between the parties' legal practitioners, with the defendant's legal practitioners arguing further that the pleadings did not specifically or by necessary implication state that the defendant was placed *in mora* by the letter of demand. They

---

Copyright Juta & Co Ltd

suggested that clarification be sought from me because the date from which interest was to run was uncertain. In the result, a letter was written to the Registrar seeking clarification of this issue.

The issue which I am asked to clarify is this - whether interest should be calculated from the date of service of the summons or it should be calculated from the date of the letter of demand (a much earlier date) as contended respectively by the defendant and the plaintiff.

That this dispute has arisen at all is due largely to the fact that my judgment was consequent upon a stated case where the parties did not canvass the question of interest in their written submissions. The date from which interest was to be calculated was not identified. The wording of my order followed

CHINHENGO J

the wording of the plaintiff's prayer in the summons and declaration for ``interest *a tempore morae*''. I somewhat clarified the issue by specifying that the rate of interest was to be the prescribed rate currently at 25% *per annum*.

I invited the parties' legal practitioners to make oral submissions to me in chambers on the issue in dispute. They opted to make written submissions which they filed on 16 July 1998.

The issue placed before me is in essence a request for the court to supplement its order. It does not raise the problem whether I am *functus officio* or not. The clarification sought is an accessory or consequential matter which was overlooked because of the manner in which the case being a stated case came before me. It is consequential or accessory also, because whilst the claim for interest was in fact made, the only defect was that the date from which such interest must be calculated was not specified in the summons, declaration or prayer. I am therefore not *functus officio* in respect of this matter. The judgment of INNES CJ in *West Rand Estates Ltd* v *New Zealand Insurance Co Ltd* 1926 AD 173 is supportive of the position I have adopted. At 176-177 he said:

> ``What the court is asked to do in this instance is to supplement its judgment and the reason why we are entitled, in my opinion, to grant the application is because the interest now claimed may be properly regarded as included in the *reliqua quae ad consequentiam pertinent* of the civil law. That that would have been the view of the Dutch Courts is fairly clear. *Wassenaar (Praxis judiciaria I*, 21, sec 9) after stating that the fruits of property claimed are included in the award, remarks that if the judge has forgotten or neglected to include them, the plaintiff nevertheless retains them in a real action irrespective of whether he had claimed them or not; but in a personal action only if he had asked for them ... Interest in this connection stands on the same footing as fruits; they are both consequential and accessory matters, and there is ample authority for the proposition that in a case of inadvertent omission the trial court would, under Dutch procedure, have had jurisdiction, if timeously approached, to supplement its order so as to grant the party entitled the necessary relief.''

Though the facts of *Westland Estates supra* are slightly different from the present case in that in the former no reference was made to a claim for interest *a temporae morae*, such claim is made in the latter. This slight difference does not detract from the fact that the issue to be clarified in the present case is a consequential and accessory matter. I therefore have jurisdiction to supplement or clarify my order.

Copyright Juta & Co Ltd

It is true, as argued on behalf of the defendant, that the summons and declaration did not specify the date on which the defendant was placed *in mora*. It is not in dispute, however that later in the pleadings and by way of further particulars furnished by the plaintiff at defendant's request, a date upon which demand was made is disclosed. On 1 July 1996, the plaintiff's legal practitioners had dispatched to the defendant a letter purportedly a demand, in which it was stated that:

CHINHENGO J

> ``We act on behalf of the abovenamed whose Toyota Hiace Super 10 motor vehicle, Registration Number 522-827P you insured under the above referred to policy number.
>
> As you are aware, on 11 January 1996, whilst leaving the Killarney Toyota Garage in Johannesburg, our client's motor vehicle was accidentally struck by one of the vehicles owned by the garage. The Garage owners admitted liability and undertook to have the motor vehicle repaired. Whilst the motor vehicle was in the process of being repaired, it was stolen and the report of this was made and confirmed with the Republic of South Africa Police.
>
> On our client's return to Zimbabwe, it lodged the abovementioned claim through its insurance brokers, Farming and Industrial Insurance Brokers (Pvt) Ltd. To date, our client has received no official response from you to its claim and is becoming extremely anxious as to the delay.
>
> From our perusal of our client's insurance policy, there seems to be no basis upon which our client's claim could be repudiated and we hereby call upon you, within the course of the next fourteen days from the date hereon, to provide us with an answer to our client's claim. Failing your doing this, we regret that we will have no alternative but to take appropriate steps, on behalf of our client, without further notice to you. We trust that this will not be necessary and look forward to hearing from you.''

The defendant argued that even assuming that interest should be calculated from the date of this letter, the letter falls short of making a demand. It does not stipulate that payment should be made or a date by which it should be made. It simply enjoins the defendant to reconsider its repudiation of liability and purge its silence. The letter does not at all serve to place the defendant *in mora.*

The plaintiff interprets the letter to be, not a request for information, but a demand for payment. Reference is made to the emphasis in the letter on the fact that there was no basis upon which the debt could be avoided. The plaintiff said that the answer which it sought could not be anything other than a payment of the claim within fourteen days of the date of the letter. This I think is stretching the meaning of the letter beyond realistic limits.

The letter must, of course, be read in context. It is apparent from it that the plaintiff had not received a formal response to its claim. The formal response which the plaintiff could have received could well have been a denial of liability, an acceptance of liability coupled with a payment, or an acceptance of liability without an immediate payment of the claim.

The plaintiff's case is that it placed the defendant *in mora* (*ex persona*) on 1 July 1996 by means of the letter of that date. Whether a person has been placed *in mora* was a question which arose in *Kragga Kamma Estates CC & Anor* v *Flanagan* 1995 (2) SA 367 (A). NESTADT JA dealt with the question in these words (at 374D-F):

> ``However on the assumption that the first defendant had to be placed *in mora* (*ex persona*), the question for

Copyright Juta & Co Ltd

decision is whether this was done. If the demand for payment did not have this effect, an essential prerequisite to the defendant's right thereafter to cancel would be missing.

CHINHENGO J

So we must examine the terms of the demand. There was nothing *per se* impermissible about it being contained in the pleadings. It would be a case of *interpellatio iudicialis*. But whatever its form, the demand had to be unambiguous and indicate a fixed date, reasonable in the circumstances, for performance (*Nel* v *Cloete* 1972 (2) SA 150 (A) at 159H). And, of course it had to indicate that the creditor wished to receive his money (*Dougan* v *Estment* 1910 TPD 998 at 1001); that the debtor was required to perform (*Alfred McAlpine & Son (Pty) Ltd* v *Transvaal Provincial Administration* 1977 (4) SA 31 (T) at 351H); and he must have been placed on terms to do so (*Johannesburg City Council* v *Norven Investments (Pty) Ltd* 1993 (1) SA 627 (A) at 633E). Whether this has been done is a question of fact for the decision of the court (*Wessels' Law of Contract* 2 ed vol II para 2893)."

I respectfully agree with the criteria set out above for a valid demand which has the result of placing a defendant *in mora*. A demand must be unequivocal or unambiguous. It must specify a date on which payment must be made or performance given and indicate clearly that the plaintiff wishes to be paid by that date or to receive performance. The defendant must be placed on terms by the letter. *In casu* the purported letter of demand called upon the defendant to respond formally to the plaintiff's claim within fourteen days of the date of the letter. The response expected by the plaintiff could have been any of the responses I have earlier alluded to. In my view, the letter of demand did not clearly state that the plaintiff wished to be paid on its claim by a stated date. It merely sought a formal response to a claim previously filed with the defendant. It is in the nature of correspondence to open up or facilitate negotiations. It is not a demand meeting the criteria I have outlined. I therefore find that the defendant was not placed *in mora* by the letter of 1 July 1996 and consequently the date of the service of the summons should in this case be the date from which interest begins to run. The defendant has paid the principal claim plus interest from that date. It has discharged its entire indebtedness. The plaintiff's claim for interest from the date of the purported letter of demand must therefore fail. In any case, even if I had found that the letter of demand was valid for the purpose of placing the defendant *in mora*, the date from which interest was to be calculated would have been the date fourteen days after 1 July 1996 as stated in the letter.

In view of my finding, I do not propose, nor is it necessary for me to consider the defendant's main contention that interest should not be awarded from the date of demand because that date was not specifically mentioned in the summons, the declaration or the prayer. Suffice to mention that had I found the letter of demand to be in order, I would not have had any difficulty in finding that the interest has to be calculated from the date of demand. The date of demand is established as a matter of fact and where a plaintiff prays for interest *a tempore morae* but omits to specify the date thereof in his summons or declaration but that date is capable of easy ascertainment on the pleadings as a whole, interest should be awarded as from that date. In this

CHINHENGO J

case, the further particulars furnished by the plaintiff had referred to the letter of demand and if

Copyright Juta & Co Ltd

only the letter satisfied the criteria for a proper demand, the date in the letter would have been the date from which I would have awarded the interest.

My judgment is therefore clarified or supplemented by providing that interest shall be calculated from the date of service of the summons. There will be no order of costs, as the request for me to supplement my judgment was jointly made by the parties and neither sought an award of costs consequent upon such clarification.

McNaught Wickwar, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

HALES *v* DOVERICK INVESTMENTS (PVT) LTD 1998 (2) ZLR 235 (HC)

Court **High Court, Bulawayo**

Malaba J

Application for summary judgment

27 March & 4 September 1998Judgment No. HB-61-98

Flynote

Practice and procedure - judgment - summary judgment - defence to - defendant must establish that has good prima facie defence - not enough to make bald assertions or vague generalisations

Property - lien - purchaser of land claiming to have made improvements - requirements for establishing such lien

Headnote

A sale of a hotel and the land on which the hotel was situated was cancelled by the seller because the buyer had breached the contract by failing to make payments in accordance with the contract. The buyer did not deny that it had breached the contract by failing to make these payments. However, it opposed the seller's application for summary judgment for its ejectment from the property on the grounds that it had made improvements to property and was therefore entitled to retain possession of the property under an improvement lien. The seller denied that the buyer had made any improvements on the property and that the buyer had any defence to the application for summary judgment for ejectment.

Held, where a plaintiff applies for summary judgment against the defendant and the defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good *prima facie* defence. He must allege facts which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts upon which he bases his defence with sufficient clarity and in sufficient detail to allow the court to decide whether, if these facts are proved at the trial, this will constitute valid defence to the plaintiff's claim. It is not sufficient for the defendant to make vague generalisations or to provide bald and sketchy facts.

Copyright Juta & Co Ltd

Held, further, that a buyer of property has an improvement lien if he has made useful and not luxurious improvements to the property and that he has made the improvements for his own use and with the *bona fide* intention of becoming the owner of the property. The improvements made must have actually enhanced the value of the property such that the seller would be unjustly enriched unless the buyer is compensated for these improvements.

Held, that the buyer in the present case had failed to satisfy the court that it had a good *prima facie* defence to the seller's claim. It had simply made bald assertions that it had made improvements, but failed to give any details of the improvements and the value thereof. It had failed to allege that the improvements were useful and not luxurious. It made no allegation that the seller had been unjustly enriched at the expense of the buyer. It made no allegation that the improvements had been made for its own use with the *bona fide* intention of becoming the owner of the property.

MALABA J

Cases cited:

Abelman v *Weeber* 1928 TPD 398

Anderson & Co v *Pienaar & Co* 1922 TPD 435

Auby & Pastellides v *Glen Amil Invstms* 1960 (4) SA 165 (A)

Banjo v *Sungrown (Pty) Ltd* 1969 (1) SA 401 (N)

Breitenbach v *Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T)

Chetty v *Naidoo* 1973 (3) SA 13 (A)

de Beers Consol Mines v *London & SA Exploration Co* (1893) 10 SC 359

District Bank Ltd v *Hoosain & Ors* 1984 (4) SA 544 (C)

Jena v *Nechipote* 1986 (1) ZLR 29 (S)

Kings Hall Motor Co v *Wickens & McNicol* 1931 NLR 37

Kommissaris van Binnelandse Inkomste v *Anglo-American (OFS) Housing Co* 1960 (3) SA 642 (A)

Mbayiwa v *Eastern Highlands Motel (Pvt) Ltd* S-139-86

Maharaj v *Barclays National Bank Ltd* 1976 (1) SA 418 (A)

Ngomezulu v *Alexandra Township Ltd* 1927 TPD 401

Oceana Leasing Svcs v *B G Motors* 1980 (3) SA 267 (W)

Quarrying Entprs (Pvt) Ltd v *John Voil (Pvt) Ltd* 1985 (1) ZLR 77 (H); 1985 (3) SA 575 (Z) *R* v

---

Copyright Juta & Co Ltd

Joseph 1964 (4) SA 54 (SRA)

Rex v *Rhodian Invstm Trust (Pvt) Ltd* 1957 R&N 723 (SR); 1957 (4) SA 631 (SR)

United Bldg Soc v *Smookler's Trustees & Anor* 1906 TS 623

Case Information

J K H Stirling, for the applicant

E E Marondedze, for the respondent

Judgment

MALABA J: In a summary judgment delivered *ex tempore* on 27 March 1998, I granted the applicant an order directing the Deputy Sheriff to eject the respondent and all those claiming rights through it from the premises known as ``Jessie Halfway Hotel'' situated in the District of Gwanda. The respondent was to pay the costs of suit.

The respondent has now asked that the reasons I gave orally for the judgment be reduced to writing. In doing so, I shall refer to the applicant as the plaintiff and to the respondent as the defendant.

The facts forming the background to the application for summary judgment are not in dispute and are set out by the plaintiff in the declaration she filed when the summons commencing action was issued on 15 September 1997. These facts show that in terms of an agreement of sale signed by the parties on 14 February 1997, the plaintiff sold to the defendant which agreed to buy the business, land, buildings, movable assets and stock-in-trade at the premises known as ``Jessie Halfway Hotel'' situated in the District of Gwanda for the sum of $800 000.

The defendant undertook, in terms of the agreement of sale, to pay and paid $15 000 on the date of signature of the agreement. It bound itself to pay $515 000 on 15 May 1997 and the balance of the purchase price in monthly instalments with effect from 15 August.

MALABA J

In terms of clause 7 of the contract of sale, the delivery and ownership of movable assets and the stock-in-trade were to be deemed to have been given and passed to the defendant upon payment by it of $15 000 on the date of signature of the agreement by both parties. The defendant entered into occupation of the premises on 14 February following the payment of $15 000.

Transfer of ownership in immovable assets was only to take place after the defendant had paid $515 000 on 15 May 1997 failing which the plaintiff had a right to cancel the agreement of sale. It is common cause that the defendant failed to pay that amount when it became due and payable on 15 May. By written notice dated 28 July 1997, the plaintiff called upon the defendant to remedy the breach of contract and pay the full balance of the purchase price by 4 August 1997, failing which to consider the contract as having been cancelled that day. There was no

Copyright Juta & Co Ltd

response from the defendant notwithstanding the fact that it received the notice.

On 18 August, the plaintiff wrote to the defendant confirming the fact that the agreement of sale had been cancelled and demanding that it should vacate the premises. When the defendant refused to vacate the premises the plaintiff caused summons to be issued claiming an order of its ejectment. On 17 September 1997, the defendant entered appearance to the summons prompting the plaintiff to make an application for summary judgment on 10 October for its ejectment.

In the affidavit filed in support of the application, the plaintiff sets out the facts on which the claim is based, verifies the cause of action and states that in her belief the defendant has no *bona fide* defence to the claim for its ejectment but has entered appearance solely for the purposes of delay. She attached to the affidavit a copy of the agreement of sale and copies of the letters mentioned above which she wrote to the defendant.

On 22 October, the defendant filed a notice of opposition and had an affidavit sworn on its behalf by one Dennis Masotsha who averred that he was authorised by the defendant to depose to the affidavit on its behalf. He also stated that the facts set out therein were within his personal knowledge. The defendant did not deny that it was in breach of contract by reason of its failure to pay $515 000 on 15 May 1997. It did not put in issue the fact that the contract of sale was cancelled on 4 August 1997.

The defendant averred that it made improvements valued at $668 800 to the ``the land and buildings''.

Paragraph 9 of the affidavit which contained all that the defendant stated about the alleged defence of an improvement lien reads as follows:

> ``[That] we have made improvements in the property that far exceed the purchase price on land and buildings. The improvements made are valued at $668 800. We thus have an improvement lien over these disputed properties. Furthermore, new beds and sofas were

> bought and put into the hotel on a total cost of $439 000. These items constitute further improvements made in the said hotel.''

No documents were attached by the defendant to its affidavit. The plaintiff asked the defendant in writing on 1 January 1998 to supply her with particulars of the alleged improvements. No such particulars were supplied. In *Anderson* v *Pienaar & Co* 1922 TPD 435, it is stated by MASON J at p 438 that ``the duty of an owner of goods who is confronted by a claim for a lien is quite simple. If he contests the lien he is entitled to demand particulars to show that the claim is of no substance''. When defendant failed to supply plaintiff with details of improvements she did not have to file an answering affidavit.

The plaintiff denied that the defendant made any improvements to the land and buildings. She denied that the defendant had an improvement lien over her property (land and any fixtures thereon). The onus is on the defendant to satisfy the court by its affidavit that it has a good

Copyright Juta & Co Ltd

prima facie defence to plaintiff's action.

The test that is to be applied to the defendant's affidavit is clear on the authorities. In *Rex* v *Rhodian Investments Trust (Pvt) Ltd* 1957 R&N 723; 1957 (4) SA 631 (SR) the phrase ``good *prima facie* defence to the action'' in r 66(1)(b) of the Rules of Court 1971, was interpreted by MURRAY CJ at p 633G to mean:

> ``.... that the defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence at the trial.''

In *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) GUBBAY JA (as he then was) said at p 30D-E:

> ``All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that `there is a mere possibility of success'; `he has a plausible case'; there is a real possibility that an injustice may be done if summary judgment is granted.''

The defendant's affidavit should not only disclose the nature of the defence relied upon to resist plaintiff's claim for ejectment, but must set out the material facts on which that defence is based in a manner that is not inherently or seriously unconvincing. In *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S-139-86 at pp 4-5 of the cyclostyled judgment MCNALLY JA referred to the degree of particularity and completeness which the facts averred by the defendant in its affidavit filed in opposition to an application for summary judgment must achieve as being that:

> ``... while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence (*Maharaj* v *Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426D).

MALABA J

> ... the statement of material facts [must] be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial will constitute a defence to the plaintiff's claim .... if the defence is averred in a manner which appears in all the circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of *bona fides* (*Breitenbach* v *Fiat SA (Edms) Bpk* 1976 (2) SA 226 at 228D-E)
>
> ... he must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts (*District Bank Ltd* v *Hoosain & Ors* 1984 (4) SA 544 at 547G-H).''

On the facts which are common cause, the plaintiff is *prima facie* entitled to an order for recovery of her immovable property. Her claim is based on ownership of the property.

She has proved that the right under which the defendant occupied the property was lawfully terminated when the agreement of sale was cancelled on 4 August 1997. The plaintiff has not claimed the return of the movable assets and the defendant accepted that she has no valid cause of action. The onus is on the defendant to justify its claim for a right of retention over the immovable property: *Chetty* v *Naidoo* 1973 (3) SA 13 (A).

The onus burdens the defendant to identify by affidavit rights it has against the plaintiff arising from the alleged improvements to the property whose enforcement a right of retention is a

Copyright Juta & Co Ltd

remedy. It had to allege facts which, if proved at the trial, would show that the plaintiff is under an obligation to pay it compensation for useful improvements. The fact that a lien is accessory to the principal obligation on the owner of the improved property to pay some money for improvements is clear from its definition. Wille & Millin's *Mercantile Law of South Africa* 17ed defines a lien (*jus retentionis*) at pp 329 and 335 as:

> ``... a right tacitly conferred on a person who is in possession of someone else's property, of retaining possession of that property until some expenditure of money or money's worth incurred by himself in respect of the property is paid to him ... if the expenses are useful that is they have increased the market value of the property, the possessor if *bona fide*, has an improvement lien.''

It is clearly not compliance with the requirements of r 66(1)(b) for the defendant to merely make a bald and conclusory statement of the fact that it has an improvement lien without setting out in some detail the material facts which, if proved at the trial, will show that it made improvements of the type that entitle it to a right for compensation against the plaintiff.

The paucity of information on the nature of improvements allegedly made and their usefulness gives one the impression that the deponent to the affidavit has either no personal knowledge of the facts or circumstances he ought to disclose or the improvements are non-existent.

There was, for example, no indication whatsoever of what the defendant

did on the land and to the buildings in the form of improvements. One expected the defendant which is in possession of the property to say, for example, that it built new houses or effected extensions to existing buildings or dug a borehole.

As the defendant is in possession of the property and it planned its improvements, it is expected to be the party to give full particulars of the improvements. The plaintiff asked for these particulars but the defendant failed to supply them. That suggests that no useful improvements were made. How could the defendant put $668 800 into plaintiff's property in the form of improvements when it could not pay $515 000 on account of the purchase price?

In *Ngomezulu* v *Alexandra Township Ltd* 1927 TPD 401 TINDALL J said at p 404:

> ``The buyer determines the nature and extent of the improvements that he will make on the property. The buyer who could afford to make improvements of a substantial character could afford to pay off the full purchase price before making the improvements and could thus avoid the risk of losing them.''

The court is left in complete darkness as to whether the undisclosed improvements are useful, as opposed to being luxurious. It is clear from an analysis of case law that whether an improvement must be seen as useful is primarily a question of fact, depending on the circumstances of each case: Joubert *Law of South Africa* Vol 15 para 113.

The affidavit ought to have made an allegation of the enhancement of the market value of the land and buildings by the improvements to lay a foundation for a finding that they are of a type entitling the defendant to claim compensation from the plaintiff. It is not said whether the amount of $668 800 represents the cost of material and labour or is the amount by which the value of

Copyright Juta & Co Ltd

the property was increased by the alleged improvements. The figure of $668 800 appears to have been sucked from the air, as there is no basis for it in the affidavit. It is false to state that the improvements would far exceed the purchase price in value. The purchase price of the property was $800 000.

There was no allegation whatsoever of the fact that the plaintiff is unjustly enriched at the expense of the defendant. The defendant has no reasons for claiming the right of retention over plaintiff's property. It is clear from *United Building Society* v *Smookler's Trustees* 1906 TS 623 that an improvement lien rests upon the equitable principle that no man should be allowed to be unjustly enriched at the expense of another. The defendant should have averred facts or circumstances that show *prima facie* that he has been impoverished to unjustly enrich the plaintiff.

No dates were mentioned. We do not know when the alleged improvements could have been made. It is even not known whether the defendant was *bona*

fide when it effected the improvements (if they were made). There is no allegation of the fact of its state of mind. The defendant was clearly not a *bona fide* possessor or occupier in the strict sense. It knew that ownership lay with the plaintiff.

The only claim to being treated as a *bona fide* possessor or occupier would have been on the ground that it made the improvements for its own use and with the intention of eventually becoming an owner. It would then be treated as a person who was entitled to claim the rights of a *bona fide* possessor or occupier: *Kommissaris van Binnelandse Inkomste* v *Anglo-American (OFS) Housing Co* 1960 (3) SA 642 (A) at 649; *Banjo* v *Sungrown (Pty) Ltd* 1969 (1) SA 401 (N); *Auby & Pastellides* v *Glen Amil Investments* 1960 (4) SA 865 (A) at 871-872A.

The defendant ought therefore to have said that it made the improvements for its own use with the *bona fide* intention of becoming the owner of the land and buildings. As it did not state facts to that effect and did not mention any dates, the court will never know whether it was a *bona fide* possessor or a *mala fide* possessor with no *jus retentionis* unless the plaintiff was aware of its activities and failed to protest: *De Beers Consolidated Mines* v *London & South African Exploration Co* (1893) 10 SC 359 at 372; *Quarrying Enterprises (Pvt) Ltd* v *John Viol (Pvt) Ltd* 1985 (3) SA 575 (Z) at 581C-G.

The defendant has failed to disclose the basis of the right of retention he is claiming over plaintiff's property. I have derived support for the approach I adopted in the analysis of the defendant's affidavit from *Abelman* v *Weeber* 1928 TPD 398; *Kings Hall Motor Co* v *Wickers & McNicol* 1931 NPD 37 at 42-44; and *Oceana Leasing Services* v *B G Motors* 1980 (3) SA 267 (W). Although each of these cases dealt with, failure to prove the facts at the trial stage of the action, they show what facts a defendant raising a right of retention as a defence in an application for summary judgment has to allege. What a defendant alleges in an application for summary judgment he has to prove at the trial. The legal principles applied to the facts of these cases are applicable to a defendant's affidavit claiming a right of retention as a defence to a

Copyright Juta & Co Ltd

claim by a plaintiff in an application for summary judgment.

In *Abelman supra*, the appellant had sued the respondent and two other persons in the magistrate's court and claimed from the respondent the return of a certain motor-car. This motor car was admittedly the property of the appellant, who had given it to the possession of one Saley and it had been unlawfully sold by Saley to one Braak, who was *bona fide* in buying the car.

Braak had sold the car to the respondent who also bought it *bona fide.* The respondent raised the defence of a right of retention on the ground that he had caused repairs and improvements to be effected to the car to the amount of

---

MALABA J

£38 12s 6d and that by reason of the repairs and improvements the actual value of the car had been enhanced to the amount of £38 12s 6d.

The appellant denied that the respondent had caused repairs and improvements and had enhanced the value of the car. The magistrate could not make a finding on the actual amount by which the value of the motor car had been enhanced. He granted an absolution from the instance.

The question arose as to who bore the onus of establishing the right of retention and the extent of that burden. After stating that the appellant's claim was based on ownership of the article and that *prima facie* he was entitled to possession GREENBERG J said at pp 402-403:

> ``The way in which that *prima facie* right is sought to be met is by the respondent setting out that he has *bona fide* expended money on the property and has enhanced its value. It seems to me that it is necessary for the respondent to set up that he has incurred expenditure and improved the values and to state to what amount ... On common sense grounds, I think that must be the position. He is the person who is in possession of the article and who claims to have effected the enhancement. He cannot recover more than he has expended and he is pre-eminently the person who can prove what he has expended. And on the broad rule that the onus is on him to show that he has a right of possession, it follows that he must prove all the facts on which his right of possession is based, which includes proof of the expenditure and of the enhancement of value on which his lien depends."

In *King's Hall Motor Co supra*, HATHORN AJ (as he then was) approved of the principles enunciated in the *Abelman* case. Although *King's Hall Motor Co* involved a salvage lien the learned acting judge said the same principles that applied to an improvement lien also applied to a salvage lien. He then said at pp 44-45:

> ``... the truth is that the proof of the amount paid in expenses and its nature is a matter of vital importance in a salvage lien case and it is very difficult to arrive at a true decision unless the details and nature of the amount are investigated.''

By parity of reasoning, the defendant in this case was under an obligation to allege in its affidavit the amount of expenses it paid and that the expenses are useful in the sense that they actually enhanced the value of plaintiff's land and buildings. Unless these details are given, it is very difficult for the court to arrive at a decision whether the defendant has a good *prima facie* defence to plaintiff's claim.

Copyright Juta & Co Ltd

In *Oceana Leasing Services supra*, the respondent raised a defence of a salvage lien to a claim for the recovery of a motor vehicle on the ground that it had incurred expenses in the towing and storage of it. Dismissing the claim based on a right of retention MELAMET J said at p 274E-G:

> ``It is not stated how far the vehicle had to be towed. There is no evidence as to how much was expended in towing in the vehicle. There is no evidence as to the measure to which the applicant was enriched and the respondent impoverished. There is no proof of the actual expenditure in relation to the towing in or storage. There is not an allegation, apart from

MALABA J

> proof that the vehicle would have depreciated or been destroyed if it had not been towed in or stored - there is no allegation or proof that the expenditure was to prevent the deterioration or destruction of the vehicle. The failure in this regard is sufficient, in my opinion, to negate the claim based on what is termed a salvage lien: *King's Hall Motor Co* v *Wickers & McNicol* 1931 NPD 37.''

It is clear from these cases as well as from the examination of the affidavit that the defendant has failed to satisfy the court that it has a good *prima facie* defence to the plaintiff's claim for its ejectment from the premises known as ``Jessie Halfway Hotel'' in the District of Gwanda. The plaintiff's case remains unanswerable. Summary judgment is therefore granted as claimed with costs.

Coghlan & Welsh, applicant's legal practitioners

Sibusiso Ndlovu & Associates, respondent's legal practitioners

S *v* MUKUNGATU 1998 (2) ZLR 244 (SC)

Court **Supreme Court, Harare**

Ebrahim JA, Muchechetere JA & Sandura JA

28 May & 4 September 1998 Judgment No. S-132-98

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(8) - right of accused not to be compelled to give evidence - legislative provisions allowing adverse inferences to be drawn where accused refuses to answer questions put to him - whether such provisions ultra vires *the Constitution*

Human rights - right of accused not to be compelled to give evidence in criminal case - scope of such right

Headnote

In terms of ss 198(9) and 199(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] where an accused declines to give evidence, the prosecutor and the court can still question him. If the accused refuses to answer any of these questions, he will then be asked why he is refusing. If the court decides that there was no just cause for the refusal, the court may draw

Copyright Juta & Co Ltd

such adverse inferences as are proper and, on the basis of such inferences, the court may treat the refusal as evidence corroborating any other evidence given against the accused.

Counsel for the applicant argued that these provisions were *ultra vires* s 18(8) of the Constitution of Zimbabwe, which provides that no accused person shall be compelled to give evidence at his trial.

Held, that ss 198(9) and 199(1) are not *ultra vires* s 18(8) as these provisions are saved by s 18(13)(e) of the Constitution.

Held, further, that in any event s 18(8) of the Constitution does not prevent the court from drawing an adverse inference against the accused who declines to testify on his own behalf or who, having elected to testify, refuses to answer questions put to him without just cause. The courts have always had this power. Where there is a *prima facie* case against the accused, the refusal by the accused to testify in his own defence may be sufficient to convert the *prima facie* case into a proven case.

Legislation considered:

Constitution of Zimbabwe 1980, ss 18(8) and 18(13)(e)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 198(9) and 199(1)

Cases cited:

Haw Tua Tau v *Public Prosecutor* [1981] 3 All ER 14 (PC)

R v *Joseph* 1964 (4) SA 54 (RA)

R v *Stidolph* 1965 RLR 552 (A)

S v *Brown en 'n Ander* 1996 (11) BCLR 1480 (NC)

S v *Sidziya & Ors* 1995 (12) BCLR 1626 (Tk)

SANDURA JA

Case Information

H Zhou, for the applicant

J Matimbe, for the respondent

Judgment

SANDURA JA: This application has come before this court following the order made by the magistrate sitting at Marondera. The magistrate referred the matter to this court in terms of s 24(2) of the Constitution of Zimbabwe (``the Constitution''), for the determination of the question as to whether ss 198(9) and 199(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]

Copyright Juta & Co Ltd

(``the Act'') are *ultra vires* s 18(8) of the Constitution.

The background facts are as follows. The applicant was charged with two counts of stock theft in the magistrate's court at Marondera. He pleaded not guilty to both counts. At the close of the case for the prosecution, his counsel applied for his discharge in terms of s 198(3) of the Act, alleging that there was no evidence that the applicant committed the offences alleged or any other offence of which he might be convicted thereon. When that application was dismissed, the applicant declined to give evidence. However, the presiding magistrate, relying upon s 198(9) of the Act, informed him that the prosecutor and the court would, nevertheless, question him. His counsel then submitted that ss 198(9) and 199(1) of the Act were *ultra vires* s 18 (8) of the Constitution, and requested the presiding magistrate to refer that issue to this court for determination in terms of s 24(2) of the Constitution.

At the hearing of this matter, the counsel for the applicant made the following submission:

> ``... that s 198(9) of the Act as read with the proviso to ss 198(8) and 199(1) of the same Act infringes the applicant's right not to be compelled to give evidence in a trial in which he is being tried for a criminal offence. The section contravenes the applicant's right protected by s 18(8) of the Constitution, and is accordingly null and void.''

Before considering the submission made by counsel, I wish to set out the provisions of s 18(8) of the Constitution and ss 198(8), 198(9) and 199(1) of the Act. Section 18(8) of the Constitution reads as follows:

> ``No person who is tried for a criminal offence shall be compelled to give evidence at the trial.''

The relevant provisions of the Act are as follows:

> **198**
>
> (1) to (7) ...
>
> (8) ... any witnesses called for the defence shall be examined by the accused or his legal representative ...
>
> Provided that no evidence shall be adduced for the defence before the accused is called to give evidence or is, in terms of subsection (9), questioned by the prosecutor or the court, unless the court in its discretion otherwise allows.
>
> If the accused declines to give evidence, the prosecutor and the court may nevertheless question him and, if the accused is legally represented, his legal

> representative may thereafter question him, subject to the rules applicable to a party re-examining his own witness.
>
> **199**(1) If an accused who gives evidence or is questioned in terms of subsection (7), (8) or (9), as the case may be, of section *one hundred and ninety-eight* refuses to answer any question, he shall be asked to give his reasons for so refusing and, if he persists in his refusal, the court, in determining whether the accused is guilty of the offence charged or any other offence of which he may be convicted on that charge, may, unless satisfied that he had just cause for so persisting, draw such inferences from the refusal as appear proper and the refusal may, on the basis of such inferences, be treated as evidence corroborating any

Copyright Juta & Co Ltd

other evidence given against the accused.''

Counsel for the applicant submitted that the provisions of the Act set out above compel the accused to give evidence at his trial in contravention of s 18(8) of the Constitution. I disagree. In my view, the said provisions are saved by s 18(13)(e) of the Constitution which reads as follows:

``Nothing contained in or done under the authority of any law shall be held to be in contravention of -

(a) to (d) ...;

(e) subsection (8) to the extent that the law in question authorises a court, where the person who is being tried refuses without just cause to answer any question put to him, to draw such inferences from that refusal as are proper and to treat that refusal, on the basis of such inferences, as evidence corroborating any other evidence given against that person.''

It was submitted by counsel for the applicant that the provisions of s 18(13)(e) of the Constitution should be restricted to the situation where the accused has elected to give evidence in his defence, but thereafter refuses, without just cause, to answer questions put to him. I cannot agree with that submission. In my view, there is nothing in the wording of s 18(13)(e) of the Constitution which would justify such an interpretation. The words used are clear and unambiguous, and the section must, therefore, apply where the accused has declined to give evidence.

In any event, s 18(8) of the Constitution does not prevent the court from drawing an adverse inference against the accused who declines to testify in his own defence or who, having elected to testify, refuses to answer questions put to him without just cause. So, where the accused declines to give evidence in his own defence, when evidence in rebuttal is expected from him, he takes the very real risk of having an adverse inference drawn against him. The court does not derive the power to draw such inferences from the provisions of the Act complained of in this case. This is a power which our courts have always had.

In *R* v *Joseph* 1964 (4) SA 54 (SRA) QUÉNET JP, commenting on the appellant's failure to testify in his own defence said the following at 57A-F:

``So far I have not referred to the fact that at the end of the Crown case the appellant failed to give evidence or make a statement. Apart from the statement he made when called upon to plead, he gave no explanation for the swerve. The magistrate took that circumstance into

SANDURA JA

account. The risk involved in a failure to give evidence was examined by SCHREINER JA in *R* v *Ismail* 1952 (1) SA 204 (A) at 209 and 210 ... And in *Rex* v *Slabbert & Prinsloo* 1944 TPD 327, the same learned judge discussed the matter in relation to cases depending on circumstantial evidence. At p 330 of the report, he said:

`In cases turning mainly or wholly on circumstantial evidence, the court has to explore the possibility that there may be an innocent explanation of apparently damaging facts. It will depend on the circumstances whether the fact that any particular explanation was not advanced by the accused is important or not. Sometimes defence evidence would be required to make an explanation appear reasonably possible. The cases relating to the recent possession of stolen goods provide frequent examples. To take a related sort of case, if the accused's hat were found in a house that had just been burgled it would theoretically be

Copyright Juta & Co Ltd

> possible, even in the absence of defence evidence, to imagine circumstances explanatory of the hat's presence there consistently with the accused's innocence. The hat might have been lost by or stolen from the accused or he might have lent it to someone. It might be one of a number of hats belonging to the accused and might simply have disappeared. But unless he gave evidence laying the foundation for one or other of these explanations, the possibility that one of them might be the true explanation would presumably be regarded as remote and not reasonable. In such cases, the accused would fairly certainly have been alive to the explanation if true and so his failure to propound it would remove it from the range of reasonable possibility ...'."

It is important to remember that when, at the close of the case for the prosecution, the court asks the accused or, if he is legally represented, his legal practitioner whether it is intended to adduce evidence for the defence and whether the accused himself intends to give evidence, as the court is obliged to do in terms of s 198(6)(a) of the Act, the court would have been satisfied of the existence of a *prima facie* case against the accused. I say so because if, at the close of the case for the prosecution, there is no evidence that the accused committed the offence with which he is charged or any other offence of which he might be convicted on that charge, the court must discharge the accused in terms of s 198(3) of the Act. However, where there is a *prima facie* case against the accused the refusal or failure by the accused to testify in his own defence ``may be sufficient to convert a *prima facie* case into a proven case'' (*per* BEADLE CJ in *R* v *Stidolph* 1965 RLR 552 (A) at 555B).

In England, where the accused's right to silence is well established, the law has always recognised the court's right in a criminal trial to draw inferences from the accused's failure to give evidence in his own defence.

In *Haw Tua Tau* v *Public Prosecutor* [1981] 3 All ER 14, the Privy Council had to determine whether s 195(2) of the Criminal Procedure Code of Singapore violated the accused's right to silence. That section provided as follows:

> ``If the accused -
>
> (a) after being called upon by the court to give evidence or after he or the advocate representing him has informed the court that he will give evidence, refuses to be sworn or affirmed; or

SANDURA JA

> (b) having been sworn or affirmed without good cause refuses to answer any question;
>
> the court, in determining whether the accused is guilty of the offence charged, may draw such inferences from the refusal as appear proper.''

Commenting on this section, LORD DIPLOCK had this to say at 20f-j:

> ``Section 195 (2) provides expressly that the court may draw such inferences as may appear proper from the failure of the accused to give evidence on oath. This, in their Lordships' view, made no change in the existing law. The Criminal Procedure Code was previously silent on the matter, and consequently s 5 made applicable the law of England relating to criminal procedure where it was not inconsistent with the code. English law has always recognised the right of the deciders of fact in a criminal trial to draw inferences from the failure of a defendant to exercise his right to give evidence and thereby submit himself to cross-examination. It would in any event be hopeless to expect jurors or judges, as reasonable men, to refrain from doing so. Although the Criminal Evidence Act 1898 prohibited the prosecution itself from inviting the jury to draw inferences from the accused's failure to

Copyright Juta & Co Ltd

testify in his own evidence, it did not prohibit judges from commenting on such failure; very often the judge did comment and draw to the attention of the jury inferences that they might properly draw, if they thought fit, from the failure of the accused to go into the witness box to contradict the evidence of the prosecution on matters that were within his own knowledge or to displace a natural inference as to his mental attitude at the time of the alleged offence that, in the absence of some other explanation, would properly be drawn by any reasonable person from his conduct at that time."

At 21a, his Lordship continued:

``What inferences are proper to be drawn from an accused's refusal to give evidence depend on the circumstances of the particular case, and is a question to be decided by applying ordinary common sense ... "

In the result, it was determined that the section in question did not violate the accused's right to remain silent.

Finally, in South Africa it was determined in *S* v *Brown en 'n Ander* 1996 (11) BCLR 1480 (NC) that the drawing of adverse inferences against the accused who declined to give evidence did not violate s 25(3)(c) of the Interim Constitution of South Africa which entrenched the fundamental right of every accused ``to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during the trial". In his judgment, BUYS J made the comment that the election not to testify entailed certain consequences, one of which was that *prima facie* evidence left uncontroverted might be found to be sufficient proof of guilt. The same conclusion was reached in *S* v *Sidziya & Ors* 1995 (12) BCLR 1626 (Tk).

In the circumstances, I am satisfied that the application has no merit and it is, therefore, dismissed.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Hove, Dzimba & Associates, applicant's legal practitioners

VIKING WOODWORK (PVT) LTD *v* BLUE BELLS ENTERPRISES (PVT) LTD 1998 (2) ZLR 249 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Sandura JA

Civil appeal

30 June & 4 September 1998 Judgment No. S-138-98

Flynote

Practice and procedure - condonation - late application for rescission of default judgment - where breach of rules is flagrant, court may refuse condonation irrespective of merits

Practice and procedure - default judgment - rescission - late application for rescission - application for condonation also required - if application for condonation is made late, applicant must explain delay in respect

---

Copyright Juta & Co Ltd

of both applications

Headnote

A defendant against whom a default judgment has been granted has a period of one month from the date he becomes aware of the judgment to apply for rescission of that judgment. If he does not make the application within that period, but wants to make it after the period has expired, he must first make an application for condonation of the late filing of the application. This should be done as soon as he realises that he has not complied with the rules. If he does not seek condonation as soon as possible, he should give an acceptable explanation, not only for the delay in making the application for rescission, but also for the delay in seeking condonation. There are thus two hurdles to overcome.

In the event of flagrant breaches of the rules, the indulgence of condonation may be refused, no matter what the merits of the application are. This applies even where the blame lies solely with the party's legal practitioner.

Cases cited:

CIR v *Burger* 1956 (4) SA 446 (A)

S v *McNab* 1986 (2) ZLR 280 (S)

Saloojee & Anor NNO v *Min of Community Development* 1965 (2) SA 135 (A)

Tshivhase Royal Council v *Tshivhase & Anor* 1992 (4) SA 853 (A)

Case Information

A J Dyke, for the appellant

A Muchadehama, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the application by the appellant for (a) the condonation of the late filing of the application for the rescission of a default

---

SANDURA JA

judgment granted against it on 18 March 1994, and (b) the rescission of that default judgment. The default judgment was granted following the appellant's failure to enter appearance to defend the respondent's claim for payment of the sum of $19 304.39.

In this judgment, I shall refer to the application for condonation of the late filing of the application for rescission of the default judgment as the application for condonation. Similarly, I shall refer to the application for the rescission of the default judgment as the application for

Copyright Juta & Co Ltd

rescission.

This matter has had a long history which is as follows.

On 1 February 1994, the respondent issued a summons against the appellant claiming payment of the sum of $19 304.39, together with interest and costs of suit, for goods sold and delivered by the respondent to the appellant between 30 January and 14 February 1991. According to the Deputy Sheriff's return of service, the summons was served on the appellant's General Manager, Mr John van Eden (``van Eden''), personally on 10 February 1994 at the appellant's place of business.

When the appellant did not enter appearance to defend the claim, the respondent applied for a default judgment on 14 March 1994 and this was granted on 18 March 1994. Thereafter, a writ of execution was issued on 2 June 1994 and served on a responsible person at the appellant's place of business on 14 June 1994.

Subsequently, on 20 July 1994, the appellant filed an application for the rescission of the default judgment. The application, which was opposed by the respondent, was heard on 22 November 1994, and was dismissed with costs on the ground that the appellant had not been granted condonation for the late filing of the application. However, in his judgment the learned judge went on to consider whether the appellant had a *bona fide* defence to the respondent's claim. He concluded that the appellant did not have such a defence and that even if condonation for the late filing of the application had been granted the application would, in any event, have been dismissed on that basis.

The appellant then brought the matter to this court on appeal, but upon realising that the appeal might be dismissed, as no condonation for the late filing of the application had been granted by the High Court, later withdrew the appeal. It then went back to the High Court where, on 25 January 1996, it filed a fresh application for (a) the condonation of the late filing of the application for rescission, and (b) the rescission of the default judgment.

That application was heard by a different judge on 16 May 1996, and was dismissed with costs on the ground that no reasonable explanation had been given for the delay in filing the application for rescission. Nevertheless, the learned judge went on to consider whether the appellant had a *bona fide*

SANDURA JA

defence to the respondent's claim and concluded that it did not. The appellant has now appealed to this court against the dismissal of the application.

Rule 63 of the High Court Rules 1971 (``High Court Rules''), reads as follows:

> ``(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
>
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do

Copyright Juta & Co Ltd

> so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action ..."

In terms of r 63(1), a defendant against whom a default judgment has been granted has a period of one month, from the time he becomes aware of the judgment, within which to file an application for the rescission of that judgment. If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for the condonation of the late filing of the application. This should be done as soon as he realises that he has not complied with the rule.

If he does not seek condonation as soon as possible, he should give an acceptable explanation, not only for the delay in making the application for the rescission of the default judgment, but also for the delay in seeking condonation. As STEYN CJ said in Saloojee & *Anor NNO* v Minister of Community Development 1965 (2) SA 135 (A) at 138H:

> ``What calls for some acceptable explanation, is not only the delay in noting an appeal and in lodging the record timeously, but also the delay in seeking condonation.''

There are, therefore, two hurdles to overcome.

The same view was expressed by CENTLIVRES CJ in *CIR* v *Burger* 1956 (4) SA 446 (A) at 449F-G where the learned CHIEF JUSTICE said:

> ``In the present case, there is no explanation whatsoever of the long delay which took place after the Commissioner received the letter from the respondent's attorneys refusing to agree to an extension of time. Those attorneys wrote to the Commissioner on 11 April and the petition for condonation was not lodged until 25 May - a delay of some six weeks. Whenever an appellant realises that he has not complied with a rule of court he should, without delay, apply for condonation.''

Although the comments by STEYN CJ in the *Saloojee* case *supra* were made in relation to an application for the condonation of the late noting of an appeal, and the comments by CENTLIVRES CJ in *CIR* v *Burger* case *supra* were made in relation to an application for the condonation of the delay by the appellant in lodging the record of the case, in my view, the principles enunciated in both cases apply to an application for condonation of the late filing of an application for rescission, because the basic issue is whether condonation for failure to comply with the Rules should be granted. I shall, therefore, apply those principles in determining whether the appellant in this

SANDURA JA

case should be granted condonation for the late filing of the application for rescission.

As already stated, the default judgment was granted on 18 March 1994 and the appellant first became aware of it on 14 June 1994 when the warrant of execution was served on it. Thereafter, an application for the rescission of the default judgment was filed on 20 July 1994. This was after the expiration of the period of one month within which the application should have been made.

Before the application for rescission was filed, no application for the condonation of the late

Copyright Juta & Co Ltd

filing of the application was made.

The issue of condonation was specifically raised by the respondent in its opposing affidavit filed in that application. The relevant paragraph reads as follows:

> ``Further, I submit that the applicant company is not serious with this application because it is being made out of time, and no application for condonation has been made. The applicant company knew of the judgment on 14 June 1994 when the writ was served. The application was made on 20 July 1994, more than the one month period required by the rules.''

One would have thought that the opposing affidavit reminded the appellant of the provisions of r 63(1) of the High Court Rules, but it does not appear to have had that effect. I say so because the appellant did not deal at all with the issue of condonation in its answering affidavit filed on 19 September 1994. In fact, the affidavit makes no mention of condonation.

Subsequently, when the application for rescission came up for hearing on 22 November 1994, no application for condonation was made at that hearing. Consequently, the learned judge dismissed the application.

After the dismissal of the application for rescission, no application for condonation was made. Instead, an appeal was noted against the dismissal. It was only long after that that it dawned upon the appellant that the appeal had no prospects of success because no condonation for the late filing of the application for rescission had been granted by the High Court. The appellant then withdrew its appeal.

Subsequently, on 25 January 1996, the appellant finally filed its application for condonation. That was about eighteen months after the necessity for making such an application had been drawn to its attention by the respondent in its opposing affidavit which was filed on 28 July 1994, and served on the appellant most probably on that date or shortly thereafter.

In my view, a delay of eighteen months in making an application for condonation is completely inexcusable. In addition, the appellant has given no explanation whatsoever for such a delay.

Although the fault was most probably that of the appellant's legal practitioners, the appellant cannot escape the consequences of the lack of

SANDURA JA

diligence on the part of its lawyers. As STEYN CJ said in the *Saloojee* case *supra* at 141B-E:

> ``I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise, might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court, was due to negligence on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the

Copyright Juta & Co Ltd

circumstances of the failure are."

This passage was quoted with approval by DUMBUTSHENA CJ in *S* v *McNab* 1986 (2) ZLR 280 (S) at 284A-D.

In the circumstances, as the appellant has not given any acceptable explanation for the delay of eighteen months before making the application for condonation, it has failed to overcome the first hurdle. That should be the end of the matter.

However, in my view, the application for condonation would, in any event, have failed. I now proceed to show why that is so.

As already stated, the warrant of execution was served on the appellant on 14 June 1994. Thereafter, van Eden, the appellant's general manager, visited the Deputy Sheriff's office on or about 24 June 1994 in order to ascertain which Deputy Sheriff was alleging that he had served the summons on him. On the same day, he wrote a letter to the appellant's legal practitioners which, according to him, would not have reached the legal practitioners until 27 June 1994. That letter gave them instructions to act for the appellant, and eventually on 20 July 1994 an application for rescission was filed.

In an attempt to explain the delay in filing the application for rescission, van Eden avers as follows:

``Inadvertently, this application was made one week out of time and without a request for condonation having first been filed because it was generally believed that the application was within the time allowed for filing of such an application.

For this lapse, my legal practitioners and I apologise ..."

Later on in his affidavit, he avers as follows:

``... I was not aware that my tardiness was a serious matter and I believed that one week or two would not be fatal to the application."

It is quite clear from this that he thought that a delay of one or two weeks was nothing to worry about, but does not say why he held that view.

Even if it were accepted that the appellant's legal practitioners were given

instructions on 27 June 1994, as alleged by Eden, the appellant gave no explanation whatsoever for the delay of about three weeks before the application for rescission was filed on 20 July 1994.

In the circumstances, the learned judge in the court *a quo* was correct in concluding that the appellant had not given any acceptable explanation for the delay in filing the application for rescission. The appellant, therefore, fails to overcome the second hurdle as well.

In my view, the conclusion that there was a disdain of the Rules is inescapable, and the

Copyright Juta & Co Ltd

decision of the judge in the court *a quo* is unassailable.

Having come to that conclusion, there is really no need for me to consider in detail whether the appellant had a *bona fide* defence to the respondent's claim. It suffices for me to say that I am in agreement with the conclusion reached by the learned judge on that issue.

However, even if the appellant had a *bona fide* defence, that fact would not have necessarily assisted it. In this regard, the words of NESTADT JA in *Tshivhase Royal Council & Anor* v *Tshivhase & Anor*; *Tshivhase & Anor* v *Tshivhase & Anor* 1992 (4) SA 852 (A), are pertinent. At p 859E-F, the learned JUDGE OF APPEAL said:

> ``This court has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney (see eg *P E Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D-H)."

In the circumstances, the appeal is dismissed with costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Coghlan Welsh & Guest, appellant's legal practitioners

Chihambakwe Mutizwa & Partners, respondent's legal practitioners

---

DAJEN (PVT) LTD *v* DURCO (PVT) LTD 1998 (2) ZLR 255 (SC)

Court **Supreme Court, Harare**

Ebrahim JA, Muchechetere JA & Sandura JA

Civil appeal

22 June & 7 September 1998 Judgment No. S-141-98

Flynote

Arbitration - award - effect - second arbitration involving same subject - whether rights under an award may be waived and matter submitted to further arbitration - maxim interest reipublicae ut sit finis litium - *applicability to arbitration proceedings*

Headnote

The respondent wished to sell maize on the Zimbabwe Commodity Exchange; the appellant wished to buy maize. The respondent's broker concluded a contract with the appellant's broker, but the appellant subsequently refused to take delivery, on the grounds that its broker had not authority to conclude the contract. The maize was disposed of at a loss, which the respondent claimed. The matter was referred to arbitration and it was found that the appellant's broker did not have the required authority. This left open the possibility that if there was arbitration between the respondent and the broker, and the broker was found to be liable, the respondent

Copyright Juta & Co Ltd

would be left without a remedy against either the broker and or the appellant. It was decided that a second arbitration be held, involving the appellant, the respondent and the broker. At those proceedings, the broker was found to have acted with authority and that the appellant was liable to the respondent. When the respondent applied to court to enforce the arbitration award, the respondent opposed the application, on the grounds that the second award was not valid and, even if it was valid, it would be contrary to public policy to enforce it. The High Court (CHATIKOBO J) found against the appellant. The same grounds were advanced on appeal.

Held, that although there is always need for finality in litigation, a distinction should be drawn between arbitration and litigation. Arbitration allows the parties to have the dispute resolved in the manner they feel comfortable with. Against this background of flexibility it was open to the parties to have the effects of the first arbitration set aside. It was open to the appellant to waive its rights under the first award and allow the matter to be re-submitted to arbitration.

Held, further, on the facts, that none of the alleged irregularities or improprieties relied on by the appellant had any substance which could lead to the possibility of such impropriety as would make the enforcement of the award contrary to public policy.

Cases cited:

Bheka v *Disablement Benefits Bd* 1994 (1) ZLR 353 (S)

Bowman v *de Souza Roldao* 1988 (4) SA 326 (T)

Durco (Pvt) Ltd v *Dajen (Pvt) Ltd* 1997 (2) ZLR 199 (H)

Joseph & Jeans v *Spitz & Ors* 1931 WLD 48

Stambolie v *Comr of Police* 1989 (3) ZLR 287 (S)

MUCHECHETERE JA

Stumbles & Rowe v *Mattinson; Mattinson* v *Stephens & Ors* 1989 (1) ZLR 172 (H)

Tilly's Bar & Bottle Store (Pty) Ltd v *ABC Garage (Pty) Ltd & Ors* 1974 (4) SA 362 (T)

Victor v *Victor* 1938 WLD 16

Case Information

A N B Masterson, for the appellant

F Girach, for the respondent

Judgment

MUCHECHETERE JA: This is an appeal against the decision of the High Court, Harare, on 20 August 1997 in which the court ordered that an arbitral award issued on 23 January 1997 in favour of the respondent and against the appellant be recognised and enforced; that the

---

Copyright Juta & Co Ltd

appellant pay to the respondent the sum of $92 577.44 with interest thereon at the rate of 25% per annum from 16 December 1996 to the date of payment; and that the appellant should pay the costs of the application.

The facts in the matter are fully set out in *Durco (Pvt) Ltd* v *Dajen (Pvt) Ltd* 1997 (2) ZLR 199 (H). These were briefly summarised in the case's headnote. They are to the effect that the respondent (``Durco'') wished to sell maize on the Zimbabwe Commodity Exchange (``Zimace'') and the appellant (``Dajen'') wished to buy maize. Durco's broker, Croplink (Pvt) Ltd (``Croplink''), concluded a contract with Dajen's broker, Atrax Commodities (Pvt) Ltd (``Atrax''), in terms of which Durco was to sell maize to Dajen. Later Dajen refused to take delivery of the maize, claiming that its broker had not been authorised by it to conclude the contract. This resulted in Durco disposing of the maize to a third party at a loss. There was a dispute between the parties as to whether Atrax actually had authority to conclude the contract and, if it did, whether Dajen was liable for the loss suffered by Durco.

By agreement between the parties, the matter was referred to arbitration. The outcome of this arbitration was that Dajen was found not be to be liable because it was found that Atrax did not have authority to conclude the contract on its behalf. Subsequently a representative of Zimace discussed with an arbitrator the implications of the decision and the possibility of further arbitration proceedings between Durco and Atrax. And that if it was found at this subsequent arbitration that Atrax was authorised to act on behalf of Dajen, Durco would then be left without a remedy as it would have no recourse against Atrax, because it would have been found to have acted without authority and it would have no recourse against Dajen which was not a party to the second arbitration. To avoid this possible end result, it was decided that a second arbitration should be held, involving Durco, Dajen and Atrax. The three parties are alleged to have agreed to this second arbitration. The arbitrators found by a majority that Atrax did have authority to act for Dajen and that Dajen was therefore liable to Durco.

When Durco subsequently demanded payment of the above-stated amount

MUCHECHETERE JA

from Dajen, the latter refused to pay. In the result, Durco applied to court for the enforcement of the second arbitration award. Dajen opposed the application on two grounds: firstly, that the second arbitration award was not valid and enforceable, and secondly, that even if it was valid, it would be contrary to public policy to enforce it. The court *a quo* found against Dajen on both grounds.

Mr *Masterson*, for the appellant, firstly submitted that the second arbitration was invalid by virtue of Croplink's want of authority to act for Durco in concluding the agreement to go to arbitration again. In this connection, he stated that the agreement in question was not signed by an officer of Durco but by one Ivor John Prior (``Prior''), the managing director of Croplink, who is also a director of Zimace. He also stated that the respondent's founding affidavit sworn to by one Hermann van Duren (``van Duren'') makes no attempt to explain what authority Prior had to conclude that agreement for Durco. He further submitted that the mandate Croplink had from Durco to sell its maize through Zimace must be held to have terminated when the purchaser,

Copyright Juta & Co Ltd

that is, Dajen, was taken to arbitration and a determination issued, that is, at the end of the first arbitration. In the circumstances, there was the need to show in the founding affidavit that Croplink was given a further mandate to complete the agreement for the second arbitration. He argued that the attempt to rectify the matter through Prior's affidavit in the answering papers was too late. See *Bowman* v *De Souza Roldao* 1988 (4) SA 326 at 327, *Joseph and Jeans* v *Spitz & Ors* 1931 WLD 48, *Victor* v *Victor* 1938 WLD 16 at 17, and *Tilly's Bar & Bottle Store (Pty) Ltd* v *ABC Garage (Pty) Ltd & Ors* 1974 (4) SA 362 (T) at 369B, for the proposition that, generally, an applicant in notice of motion proceedings must stand or fall by his founding affidavit and that he is not allowed to make out his case or rely upon new grounds in the replying affidavit. But that the court is vested with a discretion in regard to whether or not to permit an averment clarifying an issue to be made in the answering papers.

Mr *Masterson* went on to submit that, while the courts have discretion to permit such defects to be rectified in the answering papers, such discretion should not be permitted in this case because the validity of the need to go to the second arbitration was contested from the outset and that in the circumstances it was incumbent upon Durco to ensure that the founding affidavit covered all points relevant to the validity of the agreement that led to the second arbitration. On the question of the validity to go to the second arbitration, it was pointed out that Prior stated in his affidavit that the legal practitioner who represented the appellant at the hearing of the arbitration did initially object to the arbitration but the arbitration did go ahead with that legal practitioner's full participation. Durco was also later advised, through

a letter dated 27 January 1997 to Croplink, that the validity of the award was not accepted by Dajen.

The other reasons submitted by Mr *Masterson* for the court not to use its discretion in favour of Durco on the above issue are that Durco delayed filing its answering papers until after Dajen had filed its heads of argument which raised the issue. And that Prior's assertions that he did obtain Durco's authority to act for it are so broad and brusque that they lack any conviction - he did not mention who in Durco gave him his instructions and acted for Durco. And, further, that Prior had an interest in the matter, in that Croplink was vulnerable to severe criticisms and demands from Durco.

I am, however, of the view that Durco's founding affidavit covered all points relevant to the validity of the agreement which led to the second arbitration. In para 3(1) of the founding affidavit, van Duren alleges that a written agreement was entered into between Durco, Dajen and Atrax. And in para 3(2) it is indicated that the agreement is annexed to the affidavit. The agreement was indeed annexed to the affidavit and a perusal of the agreement indicates that it was between the parties indicated by van Duren and that someone, whom it is agreed was Prior, signed it ``For and on behalf of Durco (Pvt) Ltd''. In my view, it is clear that van Duren, a director and shareholder of Durco, was saying that Durco entered into the agreement and that it was being represented by Prior. He was confirming Prior's authority to act on behalf of Durco. The subsequent affidavit by Prior, in my view, only serves to emphasise and confirm an

Copyright Juta & Co Ltd

allegation which had already been made by van Duren.

After the allegation had been made, it thereafter fell upon Dajen to prove that Prior did not in fact have the authority to act on behalf of Durco. This, in my view, it failed to do. Firstly, as pointed out by Mr *Girach* for Durco in his heads of argument, at the outset the opposing affidavit filed on behalf of Dajen makes no issue about Prior's alleged lack of authority to act on behalf of Durco. Indeed, even when Dajen's legal practitioners objected to the proceedings at the second arbitration no issue was made of Prior's alleged lack of authority. And in response to the demand made by Durco for payment in terms of the award Dajen only denied the validity of the award but did not raise the alleged lack of authority on the part of Prior. It is worthy of note here that the letter of demand to Dajen was written by Croplink, that is, Prior's company, and that Dajen's legal practitioners replied to it - an apparent recognition of the fact that Croplink, and therefore Prior, was Durco's representative in the matter. I also agree that if the question of lack of authority on the part of Prior was a serious issue it should have been raised at the arbitration proceedings or at the very least in the opposing papers. It was only raised for the first time in Durco's heads of argument in the court

MUCHECHETERE JA

a quo. It cannot also, in my view, be seriously contended that Durco would have permitted itself to be involved in the second arbitration if the person who signed the arbitration agreement had no authority to act on its behalf.

Secondly, I do not agree that Croplink's general mandate to act for Durco in the matter ended with the determination in the first arbitration. The second determination arose from problems which arose in connection with the sale of the maize - the possibility of arbitration proceedings between Durco and Atrax. In my view, Croplink's mandate extended to that because it was the broker who dealt with Atrax in the matter.

Lastly on this issue, the allegations of impropriety against Prior are, in my view, an afterthought. They were not raised in the opposing affidavit and have not been satisfactorily substantiated.

The second ground raised by Mr *Masterson* is that even if the second arbitral award was valid it would be contrary to public policy to enforce it. In this connection, he firstly submitted that the award offended against the principle of finality of proceedings. See *Stumbles & Rowe* v *Mattinson*; *Mattinson* v *Stephens & Ors* 1989 (1) ZLR 172 (H); *Stambolie* v *Commissioner of Police* 1989 (3) ZLR 287 (S) at 299; and *Bheka* v *Disablement Benefits Board* 1994 (1) ZLR 353 (S) at 357G.

While it is agreed that there is always a need for finality in litigation, I agree with the submission by Mr *Girach* that one must draw a distinction between arbitration and litigation. The very essence of arbitration is the flexibility it offers the parties. There are the advantages of speedy resolution, the choice of arbitrator and the like, and the all important factor of flexibility. It is open to the parties to have the dispute resolved in the manner they feel comfortable with. Where the parties elect to litigate, on the other hand, they are bound by the practice and procedure relating not only to the filing of proceedings, but also in relation to what evidence will be admissible. In

Copyright Juta & Co Ltd

arbitration proceedings it is, however, open to the parties to set stricter rules for the conduct of proceedings or, indeed, more flexible rules should they so choose. I therefore agree that it is against that background of flexibility that it was open to the parties in this case to have the effects of the first arbitration set aside. And, as contended by Durco and not seriously challenged on behalf of Dajen, the parties elected to set aside the award in the first arbitration.

I also agree with the following sentiments by the learned judge in the court *a quo* at 205E-F of his judgment:

> ``But that is as far as the principle (finality of litigation) goes. It does not supplant or destroy a party's power to waive any rights derived from an award. It is crystal clear to me that the finality of an award and, by a parity of reasoning, the finality of the litigation, is no more than a shield of defence which can be raised by a party to the *lis* where, for example, he is sued by one of the parties on the same cause of action which had been determined by an

> arbitral award. It is not intended to provide a willing contracting party with an avenue of escape from the consequences of a deliberate waiver of its rights.''

In the result, I agree that the principle of finality of litigation does not afford assistance to Dajen.

Mr *Masterson* also submitted that a number of irregularities in the setting up of the second arbitration would all add up to constitute an infringement of public policy. He stated that, although it was not being suggested that the arbitrators in the second arbitration were biased, his submission was that the circumstances in which the second arbitration was set up contain elements that work towards a lack of public confidence in the impartiality of these and other Zimace arbitrators. He went on to state that Prior, as a director of the representative of a disqualified litigant, appears to have arranged for a second body in which he also had influence as a director to secure the re-submission of a litigant to the judicial process of that second body.

[*The learned JUDGE OF APPEAL analysed the evidence and concluded:*]

In the circumstances, I do not consider that any of the various alleged indications of irregularities or improprieties raised by Mr *Masterson* have any substance. Their cumulative effect does not therefore amount to a real possibility of impropriety which would render the enforcement of the award contrary to public policy. There is no allegation that any of the alleged indications were either induced by fraud or corruption or that the rules of natural justice were breached in connection with the making of the award. All in all, I am of the view that the enforcement of the award of the second arbitration would not be contrary to public policy.

In the result, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Copyright Juta & Co Ltd

Coghlan, Welsh & Guest, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

KADHANI *v* HUNYANI PAPER AND PACKAGING LTD & ANOR 1998 (2) ZLR 261 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Sandura JA

Civil appeal

29 June & 8 September 1998 Judgment No. S-118-98

Flynote

Insolvency - sequestration - application - whether sequestration to advantage of creditors - what must be shown - whether any onus on debtor - counterclaim by debtor against creditor - when may be regarded as an asset

Headnote

Where sequestration is granted, the court merely has to be satisfied that there is reason to believe that it would be to the advantage of creditors. It is probably incorrect to say that when an act of insolvency has occurred, the onus is on the debtor to show that sequestration is not in the interests of creditors. Once it has been established, as here, that creditors have taken judgments in large amounts and that other sums are owed, there must certainly be reason to believe that it would be in the interests of creditors generally that there be an orderly distribution of assets.

A counterclaim by a debtor against a creditor, his former employer, for salary and wages is not a debt owed by the creditor to the debtor. It is merely a *spes*. *In casu*, the counterclaim was made in circumstances which indicated that it had been lodged merely to frustrate the sequestration proceedings.

Cases cited:

Hanan v *Turner* 1967 RLR 293

Ex p *Meaker*, in re *Heyns Bros* 1965 RLR 237

National Milling Co Ltd v *Learmont* 1954 SR 18; 1954 (2) SA 90 (SR)

Nield v *UDC Ltd* 1989 (3) ZLR 142 (S)

Scottish Rhodesian Finance Ltd v *Ridgeway* 1978 RLR 452 (G)

Legislation considered:

Insolvency Act [*Chapter 6:04*], s 15

Copyright Juta & Co Ltd

Case Information

E Matinenga, for the appellant

A J Dyke, for the respondents

Judgment

McNALLY JA: Mr Kadhani's estate was provisionally sequestrated at the instance of the respondents, and that provisional order was confirmed by judgment of the High Court dated 4 December 1996. The appeal is against that confirmation.

McNALLY JA

The appellant takes the following points in his notice of appeal:

1. Sequestration was not to the advantage of creditors.

2. The appellant's claim for unpaid salary should have been held to be *bona fide*.

3. In all the circumstances, the learned judge should have exercised his discretion in favour of the appellant.

The first point has no merit. In terms of the Insolvency Act [*Chapter 6:04*], s 15, the court has merely to be satisfied ``that there is reason to believe that it will be to the advantage of creditors ...'' It has been held (probably wrongly) that the onus is on the debtor to show it is not in the interests of creditors when an act of insolvency has been proved, as it has in this case. See Ex p *Meaker*: in re *Heyns Brothers* 1965 RLR 237; *Hanan* v *Turner* 1967 RLR 293.

The debtor in this case merely put forward the assertion himself. He was not supported by any creditor asserting that it would not be to his advantage. Compare *Nield* v *UDC Ltd* 1989 (3) ZLR 142 (S) at 145F-G. Whether one follows the reasoning in the two cases cited above, or whether one prefers, as the learned judge below did, the reasoning of HATHORN J in *National Milling Co Ltd* v *Learmont (t/a The Scotia Bakery)* 1954 SR 18, that there is no shifting of onus but that a *prima facie* case requires to be rebutted, the result is the same. The learned judge *a quo* derives support for his approach from the decision of WHITAKER J in *Scottish Rhodesian Finance Ltd* v *Ridgeway* 1978 RLR 452 (G), whose reasoning is, with respect, convincing.

Once it is established, as it was in this case, that these creditors have obtained judgments totaling $1.688 million, that at least one other creditor has taken judgment, and a fourth creditor is owed in the region of $2 million, there must certainly be reason to believe that it is in the interests of creditors generally that there be an orderly distribution of assets.

The second ground of appeal relates to a claim for a very large amount by way of salary and allowances which the appellant has made against the second respondent. This claim, in the region of $5 million, is based on an allegation that his leaving office as managing director of the second respondent was conditional on certain terms. Some of these terms, it transpired, were illegal. They contravened the provisions of the Companies Act [*Chapter 24:03*]. Accordingly, so

---

Copyright Juta & Co Ltd

it is argued, he remained employed until 30 September 1995 and it owed him his salary and allowances till that date. If this claim is regarded as an asset, the debtor is not insolvent. He should not therefore be sequestrated.

The learned judge noted that this claim for $5 million was lodged only in July 1996, long after the date of his departure from office and in the same week that the confirmation proceedings were heard. He also noted that the

McNALLY JA

claim was for salary and allowances during a period when he did no work for his alleged employer and made no tender of his services. He was not convinced that the claim was genuine. He took the view that it had been lodged in order to frustrate the sequestration proceedings.

It seems to me there is a great deal of merit in that view. The claim for salary and wages is not a debt owed by the second respondent to the appellant. It is not an asset in the hands of the appellant. It is no more than a *spes*. And it may fairly be offset against the countervailing *spes* of the second respondent which has instituted proceedings in the Bulalwayo High Court against the appellant for some $3 million.

The learned judge discounted the appellant's claim in effect on the basis that it was no more than a *spes*. On the same basis, he ignored the second respondent's claim against the appellant. On the balance of the remaining figures, it is clear that the appellant's liabilities exceed his assets.

It may be noted in passing that in *National Milling Co Ltd* v *Learmont supra*, which was referred to by the learned judge *a quo* by the name under which it is reported in 1954 (2) SA 90, the debtor also sought to rely on a claim he had (or said he had) against the petitioning creditor. HATHORN J (as he then was) held that the information placed before him was ``quite inadequate to enable me to decide whether the claim ought to be taken into consideration in adjudicating upon the points that are in issue''. The learned judge in this case took very much the same view and I see no reason to disagree with him.

The final ground of appeal has no merit because, once we reject the criticism of the findings of the learned judge, there remains no basis for interfering with the way in which he exercised his discretion. In my view he exercised that discretion properly.

I would dismiss the appeal with costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Gula-Ndebele & Partners, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

Copyright Juta & Co Ltd

BLIGH-WALL *v* BONAVENTURE ZIMBABWE (PVT) LTD & ANOR 1998 (2) ZLR 264 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Sandura JA

Civil appeal

2 July & 8 September 1998 Judgment No. S-120-98

Flynote

Contract - divisibility - contract containing a ``whole agreement'' clause - effect - whether that agreement was in fact the whole agreement - unlawful agreement to pay part of purchase price outside Zimbabwe - whether this portion of agreement severable from rest of contract

Headnote

The seller sold her shares in a company to the buyer. The agreed purchase price was Z$1.2 million which was later amended to Z$700 000, with the remainder to be paid outside the country in foreign currency. The agreement was initially oral, but later the parties signed a written agreement in which the purchase price was shown as Z$700 000. The written contract contained a whole agreement clause. The payment of the foreign currency component was dealt with in a letter addressed to the seller and signed by a director of the company which was the buyer. The buyer failed to pay a portion of the foreign currency component and when the seller sought to claim the outstanding amount, the buyer resisted the claim, *inter alia*, on the grounds that the signed written agreement represented the whole agreement and that the agreement to pay part of the purchase price outside Zimbabwe was illegal and unenforceable.

Held, that the seller was not precluded from claiming by the whole agreement clause in the signed written contract. In the papers before the court, the parties had accepted that the written agreement was not the whole agreement. Indeed, it could be said that the written agreement was not the agreement at all since the purchase price is an essential part of an agreement of sale and both parties knew that Z$700 000 was not the full purchase price.

Held, further, that although the agreement to pay part of the purchase price outside Zimbabwe was unlawful, this agreement was not unenforceable in the circumstances. The seller had initially sought payment of the entire purchase price in Zimbabwe in local currency and had somewhat reluctantly agreed to be paid abroad. This provision was easily severable from the rest of the contract as this provision was not the main consideration for the entering into the contract. It was a negligible consideration for the seller and was of no consequence for the buyer.

Held, further, the seller had not based her claim only on an illegal contract because in her alternative prayer the seller asked for payment in Zimbabwean dollars. By making such claim she was in fact abandoning the illegal portion of the contract, namely the stipulation for payment abroad, and relying on the legal portion.

Copyright Juta & Co Ltd

Cases cited:

Baines Motors v *Piek* 1955 (1) SA 534 (A)

McNALLY JA

Benlou Properties (Pty) Ltd v *Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A)

Bob's Shoe Centre v *Heneways Freight Svcs (Pty) Ltd* 1995 (2) SA 421 (A)

Cameron v *Bray Gibb & Co (Pvt) Ltd* 1966 RLR 418 (G); 1966 (3) SA 675 (R)

Clyde-Wiggins v *Maba Ests (Pvt) Ltd* 1966 RLR 677 (G); 1967 (1) SA 240 (R)

Kriel v *Hochstetter House (Edms) Bpk* 1988 (1) SA 220 (T)

National Bd (Pretoria) (Pty) Ltd v *Est Swanepoel* 1975 (3) SA 16 (A)

Union Govt v *Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43

Case Information

J C Andersen SC, for the appellant

A P de Bourbon SC, for the respondent

Judgment

McNALLY JA: Mrs Bligh-Wall sold the shares in her company, Mwari Komborera Safaris (Pvt) Ltd, to the first respondent (Bonaventure) for an amount of $1.2 million, which was later amended to $700 000 in Zimbabwean currency and $400 000 which was to be paid abroad by the deposit of US$65 000 into her bank account in Guernsey. The second respondent (Mr Pemberton) who was a director of Bonaventure, allegedly guaranteed the latter payment.

The $700 000 was paid on 3 May 1994 and the share transfer documents were backdated to 31 March 1994. The agreement of sale was initially oral, but a written agreement was signed by both parties on 28 April 1994 in which the purchase price was shown as $700 000. Moreover, this agreement had the usual ``whole agreement'' clause providing that:

> ``The presents contain and record the whole Agreement entered into between the parties relating to the matters dealt with herein and supercede and replace any previous agreement relating thereto, and the parties hereto acknowledge that no condition, representation, warranty, undertaking or promise whatsoever with regard to this Agreement and not expressly embodied herein has been made or given by any representative, agent or servant of the other at any time. The headings herein are for reference purposes only and do not form part of this Agreement."

The agreement recorded the ``effective date'' of the purchase as 1 April 1994.

The payment in US dollars was dealt with in a document which, though undated, was signed by Mr Pemberton in April/May 1994. It was addressed to Mrs Bligh-Wall c/o her Guernsey bankers

Copyright Juta & Co Ltd

and reads:

> ``We the undersigned, hereby acknowledge that there is an amount of US$65 000 owing to you which is to be paid, one quarter on signature of these documents and the balance in three instalments, the full amount of the debt to be extinguished within one year from 1 April 1994.''

The first instalment of US$16 250 was received by the Guernsey bank on 27 April 1994. No further instalments were paid. Accordingly, she applied on notice of motion for an order that the respondents pay, jointly and severally, the sum of US$48 750 or its Zimbabwe dollar equivalent at the time of payment, together with interest at the prescribed rate on the three

McNALLY JA

instalments reckoned from 27 July 1994, 27 October 1994 and 27 January 1995 respectively, plus costs of suit. Alternatively, in respect of interest she sought interest *a tempore morae* at the prescribed rate on each of the said amounts converted to Zimbabwe dollars at the time of payment and reckoned from the said dates.

In reply to this Mr Pemberton, speaking for himself and his company, justified the failure to pay on two grounds:

1. Mrs Bligh-Wall had vociferously and firmly denied, before the agreement was concluded, the rumours he had heard about imminent and dramatic increases in licence fees. These denials induced the respondents to enter into the agreement. These denials were false, to the knowledge of Mrs Bligh-Wall. As a result the respondents were prejudiced and are entitled to a reduction in the purchase price to the figure of $700 000 already paid.

2. The respondents now believe, he says, that the agreement to pay externallyin foreign currency was in contravention of Zimbabwe's exchange control laws, and on that ground alone the application should fail.

It is interesting that in her founding affidavit, Mrs Bligh-Wall said that it was Mr Pemberton who first suggested that the $1.2 million be paid abroad. She had expressed a preference to be paid in Zimbabwe dollars but had eventually agreed to accept part of the payment externally. This paragraph of her affidavit was expressly admitted by Mr Pemberton.

I must confess I have difficulty in believing that either of them could have been unaware of the exchange control laws which had been in force in Zimbabwe since just before UDI in 1965 and which were particularly relevant to the tourist trade in which all parties had been involved. Be that as it may I now proceed to consider these two defences, bearing in mind that the learned judge *a quo* found against Mrs Bligh-Wall on the second (legality) point, but indicated that, had she not done so she would have found for her on the first (misrepresentation inducing the contract) point.

As to that first point, I have no hesitation in agreeing with the learned judge. One does not give a warranty or make a binding representation about the correctness of rumours, more particularly where these rumours concern possible action by a third party, ie the Government. Mrs Bligh-Wall denies the allegations quite convincingly. And in any event, the feared increases

Copyright Juta & Co Ltd

came into effect only two-and-a-half years later, and then in a form less severe than rumoured. It was for the respondents to enquire of the Department of National Parks about the correctness or otherwise of the rumours.

The second point involves questions of law. What we are considering is s 8 of the Exchange Control Regulations 1977, contained in RGN 399 of 1977. That section reads as follows (I have substituted ``Zimbabwe'' for ``Rhodesia''):

McNALLY JA

``8(1) Subject to the provisions of subsection (2), unless otherwise authorised by the Minister -

(a) no Zimbabwean resident shall do any act which involves or is in association with -

(i) the making of any payment outside Zimbabwe; or

(ii) the incurring of any obligation to make any payment outside Zimbabwe;

(b) no foreign resident carrying on any trade, business or other gainful occupation or activity in Zimbabwe shall do any act which involves or is in association with -

(i) the making of any payment outside Zimbabwe; or

(ii) the incurring of any obligation to make any payment outside Zimbabwe;

in respect of the trade, business or other gainful occupation or activity carried on by him in Zimbabwe.

(2) The provisions of subsection (1) shall not apply in relation to any act which -

(a) is done by a Zimbabwean resident who is an individual; and

(b) relates to any payment from money which -

(i) is lawfully held by him outside Zimbabwe; and

(ii) is available to him at the time of the act concerned; and

(iii) was acquired by him otherwise than by way of the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe.''

It is quite evident that the agreement to pay part of the purchase price outside Zimbabwe was unlawful, at least on the part of Mrs Bligh-Wall and Bonaventure.

The learned judge found that the agreement was illegal and declined to enforce an illegal contract, relying on *Dube* v *Khumalo* 1986 (2) ZLR 103 (S) at 109. She agreed that the written agreement was not the ``whole agreement'' since both parties acknowledged that it was not. She found that there was initially a lawful agreement for sale of shares at a price of $1.2 million. But she ruled that since Mrs Bligh-Wall had decided to rely on the illegal contract, the court could not assist her. Had she resiled from that agreement and based her claim on the original lawful agreement she might well have succeeded.

In my view, the learned judge was entirely correct in rejecting the argument that the ``whole agreement'' clause in the written agreement precluded Mrs Bligh-Wall from claiming any more

Copyright Juta & Co Ltd

than the $700 000 she has already received. All parties, in the papers before the court, accepted that the written agreement was not the whole agreement. One might go further and say it was not the agreement at all, since the purchase price is an essential part of an agreement of sale and both parties knew that $700 000 was not the purchase price.

The matter might have been different had the interests of innocent third parties been involved, but they were not. I am quite satisfied that the written document is irrelevant. Indeed, it is not the agreement on which Mrs Bligh-Wall relied in her founding affidavit. She claimed not to remember signing

McNALLY JA

the written document, and relied on the oral agreement. The written document was never intended to contain the whole agreement, or to be the real agreement.

Nothing in *Union Government* v *Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47 or in *National Board (Pretoria) (Pty) Ltd* v *Estate Swanepoel* 1975 (3) SA 16 (A) at 26 seems to me to conflict with this view.

But in going on, as she did, to find the oral agreement illegal and unenforceable, the learned judge, with respect, fell into error.

I come to this conclusion primarily on a basis not raised by either party. The illegality of this agreement lies solely in the provision that part of the purchase price was to be paid outside Zimbabwe. That provision was (so she says) not even requested by Mrs Bligh-Wall. That provision is easily and readily severable from the rest of the contract. That is demonstrated by the fact that it was not originally stipulated for by Mrs Bligh-Wall. It was later introduced by Mr Pemberton. Moreover, in her draft order she asks, as an alternative, for the payment of the Zimbabwean equivalent of US$48 750.

The question of the severability of illegal parts of a contract from the rest of the contract is considered extensively in Christie on *Contract* 3 ed at pp 426-432. In particular, I rely on the decision in *Baines Motors* v *Piek* 1955 (1) SA 534 (A), followed as authoritative in this jurisdiction by GOLDIN J (as he then was) in *Clyde-Wiggins* v *Maba Estates (Pvt) Ltd* 1966 RLR 677 (G); 1967 (1) SA 240 (R). The same learned judge in *Cameron* v *Bray Gibb & Co (Pvt) Ltd* 1966 RLR 418 (G) at 421D; 1966 (3) SA 675 (R) at 676G-H said:

> ``In my respectful view, the correct approach is that in a proper case the court will strike out some of the promises while leaving the consideration on the other side unaffected ... The test appears to be whether the illegal promise is substantially the whole or the main consideration for the promise sought to be enforced.''

In the present case, on the evidence, Mrs Bligh-Wall originally sought payment in Zimbabwe dollars; somewhat reluctantly agreed to payment abroad; and had in fact repatriated most of the money paid to her in Guernsey. The element of payment abroad was therefore a negligible consideration for her, and of no consequence to Mr Pemberton and his company, who could just as easily have brought the money into Zimbabwe.

The facts satisfy the test set out in *Kriel* v *Hochstetter House (Edms) Bpk* 1988 (1) SA 220 (T)

Copyright Juta & Co Ltd

at 227H-228A that (in Christie's translation, *op cit* p 431):

> ``To decide whether an offending clause is merely subsidiary to the main purpose, a useful test is whether the parties would have entered into the contract without the clause.''

This test was upheld in *Benlou Properties (Pty) (Ltd)* v *Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) at 190A, though the judgment was otherwise

McNALLY JA

critical of the decision, and in *Bob's Shoe Centre* v *Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A) at 430G-H.

I conclude therefore, that the illegal provision as to payment abroad may be severed and discarded, and the agreement may be enforced on the basis that the payment stipulated for was to be payable in Zimbabwe. Where, I think, the learned judge erred was in thinking that Mrs Bligh-Wall was basing her claim only on the illegal contract. In fact, her alternative prayer was for payment in Zimbabwe dollars. By making such a claim, she was in fact abandoning the illegal portion of the contract, namely the stipulation for payment abroad, and relying on the legal portion.

I have come to this conclusion on the assumption that the provision for payment abroad was illegal. If I am wrong in that, as Mr *Andersen* argued by reliance on *Hattingh & Ors* v *van Kleek* 1997 (2) ZLR 240 (S), then *a fortiori* the agreement is enforceable.

It follows that the appeal must succeed. But the relief to be granted must be on the basis of payment in the currency of Zimbabwe.

There are two other difficulties remaining to be considered.

First, the provision as to payment in US dollars spoke of payment ``one quarter on signature of these documents and the balance in three instalments, the full amount of the debt to be extinguished within one year from 1 April 1994''. Mrs Bligh-Wall, in her draft order, has interpreted this to mean three equal instalments, payable at three monthly intervals. This seems to me to be a reasonable approach. Moreover, since the first payment was only on 27 April 1994, she has accepted that the one year period be extended to 27 January 1995. Again, this is a reasonable interpretation, which amounts to a concession on her part.

The second difficulty concerns the liability of Mr Pemberton personally. The matter was not really dealt with in argument. Mr *de Bourbon* referred to him, both in his heads of argument and in his oral submissions, as a surety. That would mean that he was not a co-principal debtor.

However, the allegation by Mrs Bligh-Wall in her founding affidavit (para 15) was that he ``personally undertook payment of the US dollar amount''. That allegation was specifically admitted by Mr Pemberton in his para 3.16. Accordingly, I propose to treat him as surety and co-principal debtor, which is how he was treated in the draft order.

In the circumstances, I would make the following order:

Copyright Juta & Co Ltd

1. The appeal is allowed, with costs.

2. The order of the court *a quo* is altered to read:

``That the respondents jointly and severally pay to the applicant, the one paying the other to be absolved, the Zimbabwe dollar equivalent of US$48 750, that figure to be calculated at the rate of exchange prevailing

on 1 April 1994, with interest a *tempore morae* and costs of suit.

The interest is to be calculated, in respect of one third of the sum, from 27 July 1994 to date of payment; in respect of one third of the sum from 27 October 1994 to date of payment; and in respect of the final one third, from 27 January 1995 to date of payment."

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Lofty & Fraser, respondents' legal practitioners

S *v* KACHIPARE 1998 (2) ZLR 271 (SC)

Court **Supreme Court, Bulawayo**

Gubbay CJ, McNally JA & Sandura JA

Criminal appeal

6 July & 10 September 1998 Judgment No. S-139-98

Flynote

Criminal procedure - trial - discharge at end of State case - whether court may refuse discharge if it considers that inadequate State case may be bolstered by defence evidence - effect of failure to discharge - whether a fatal irregularity justifying setting aside of conviction

Criminal procedure - trial - multiple accused - separation of trials - may only be ordered on application of accused or prosecutor

Interpretation of statutes - meaning of words - statute dealing with procedure rather than substantive law - pragmatic or expedient interpretation used

Headnote

The appellant and a co-accused were jointly charged with the murder of a newly born child. The child was that of the co-accused. The co-accused pleaded guilty, but the appellant denied the charge. An application was made at the end of the State case for the discharge of the appellant. There was no evidence directly linking the appellant with the offence. The trial judge refused the application, relying on the fact that there was evidence placing her close to the

Copyright Juta & Co Ltd

events and that the question of the truth of falsity of the evidence could not be determined without hearing the appellant's version. At the end of the trial, the court having heard the evidence of both accused, the co-accused was convicted of contravening the Infanticide Act [*Chapter 9:12*]. The appellant was convicted of murder.

On appeal, it was argued that (a) the trial judge should have ordered a separation of trials; (b) putting the appellant on her defence at the close of the State case was an improper exercise of the court's discretion, in that it was designed to fill gaps in the State case; and (c) the trial court erred in accepting the evidence of the co-accused implicating the appellant.

Held, that because neither the prosecutor nor counsel for the appellant applied for a separation of trials, the judge could not order a separation *mero motu*. The power to order a separation is pre-conditioned by the making of an application.

Held, further (*per* GUBBAY CJ and SANDURA JA), that the wording of s 198 (3) of the Criminal Procedure and Evidence Act made it clear that where, at the end of the State case, there is no evidence upon which a reasonable court might convict, the court has no discretion: it must discharge the accused. The court may not exercise its discretion against the accused if it has reason to suppose that the inadequate State evidence might be bolstered by defence evidence. The evidence in this case was purely circumstantial and was not evidence upon

which a reasonable man might draw the inference suggested by the State. The appellant should have been discharged at that stage of the trial.

Held, further, however, that once an accused person is put on his defence, albeit wrongly, and is ultimately convicted, the refusal to discharge the accused is not in itself a sustainable ground for appeal against the ultimate conviction. At the stage the appeal is heard, the court cannot close its eyes to the evidence lead on behalf of the accused or a co-accused which, taken in conjunction with the State evidence, proves the accused's guilt conclusively. The question which the appeal court must consider is whether, on the evidence and the findings of credibility (if any), unaffected by the irregularity, there is proof of guilt beyond a reasonable doubt. If the court does so consider - and the onus is on the State to satisfy it - there is no resultant miscarriage of justice and the irregularity will be ignored.

Held, further, that the wording of s 198(3) of the Criminal Procedure and Evidence Act, which provides that the court ``shall'' discharge the accused where there is no evidence on which a reasonable man might convict, should be amended so as to restore the discretion to the trial court as to whether to discharge.

Held, further, that the trial court's conclusion was justified on the facts.

Held, further (*per* McNALLY JA, dissenting in part) that there is no need to amend s 198(3). As the provision was one dealing with procedure rather than substantive law, it was preferable to avoid the strictly logical path in favour of a pragmatic or expedient interpretation. The wording of the provision - ``no evidence that the accused committed the offence'' - allowed the court to take into account all evidence before it, even if the evidence was not, in terms of the rules of evidence, admissible against the accused at that stage. In this case, there was evidence (albeit

Copyright Juta & Co Ltd

at that stage not admissible) against the appellant, in the form of the statement made by the co-accused.

Cases cited:

A-G v *Bvuma & Anor* 1987 (2) ZLR 96 (S)

A-G v *Mzizi* 1991 (2) ZLR 321 (S)

A-G v *Tarwirei* 1997 (1) ZLR 575 (S)

R v *Deputy Governor of Camphill Prison* ex p *King* [1984] 3 All ER 897 (CA)

R v *Eiman* 1947 (2) SA 1031 (C)

S v *Hartlebury & Anor* 1985 (1) ZLR 1 (H)

S v *Ismail* 1994 (1) ZLR 377 (S)

R v *Lakatula & Ors* 1919 AD 362

R v *McAlister* (1924) 45 NLR 258

R v *Mafangosa* 1924 EDL 124

S v *Makofane* 1998 (1) SACR 603 (T)

S v *Mathebula & Anor* 1997 (1) SACR 10 (W)

S v *Mdudu & Anor* 1991 (2) SACR 223 (Tk)

R v *Mkize* 1960 (1) SA 276 (N)

S v *Mondlane en Andere* 1987 (4) SA 70 (T)

S v *Mubaiwa* 1980 ZLR 477 (A)

R v *Ncanana* 1948 (4) SA 399 (A)

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

S v *Sibanda* 1992 (2) ZLR 438 (S)

S v *Strydom & Ors* 1980 ZLR 364 (A)

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 190 and 198(3)

GUBBAY CJ

Copyright Juta & Co Ltd

Supreme Court Act [*Chapter 7:13*], s 12(2)

Case Information

D P Carter, for the appellant

Mrs *M Moyo-Matshanga*, for the respondent

Judgment

GUBBAY CJ: The appellant and Chibwara (``the first accused'') were jointly arraigned before the High Court at Gweru on a charge of murder. It was alleged that on 16 September 1995 and at or near Gweru Municipal Park, one or other or both, killed and murdered Masline Chibwara, an infant in her lifetime. The first accused tendered a plea of guilty of contravening s 2(1) of the Infanticide Act [*Chapter 9:12*], the maximum permissible sentence for which is five years' imprisonment with labour. Her plea was not accepted by the prosecutor and a plea of not guilty to the charge was entered. The appellant denied the charge unequivocally.

The gist of the State case, as revealed in the summary of evidence served in terms of s 110(6)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], was this. The first accused, who was seventeen years of age, was employed by the appellant. On 29 August 1995, she gave birth to a premature baby girl. During the afternoon of 16 September 1995, she was discharged from hospital. Shortly thereafter, she and the appellant, acting in concert and with common purpose, murdered the baby. The next morning the appellant was seen to be in possession of a medium sized black travel bag, which she locked in a cupboard of her house. A little later a bloodstained baby's towel was found in the washing basket.

On 19 September 1995, the first accused left the house carrying a travel bag similar to the one the appellant had locked inside the cupboard. She returned the following day. Asked to account for the absence of the baby, she said it was with her mother.

On 10 October 1995, the first accused, who was under arrest, led members of the Criminal Investigation Department to a toilet at Gwe Gwe Butchery, Chiwundura Communal Lands, where the body of the deceased was recovered. Two days later, a consultant pathologist examined the remains of the deceased and concluded that the cause of death was a head and neck injury.

A five page warned and cautioned statement was recorded from the first accused and confirmed before a magistrate. It was highly incriminatory of the appellant. The first accused confessed to having murdered her baby near the Gweru Municipal Park. She claimed that she had been coerced by the appellant, who was present at the time. The body of the deceased was then placed in a bag and carried by the first accused to the appellant's house. The appellant returned separately.

The trial commenced on 25 January 1996 and terminated, after adjournments, on 4 March 1997. The first accused was found guilty of

Copyright Juta & Co Ltd

contravening s 2(1) of the Infanticide Act. She was sentenced to two years' imprisonment with labour the whole of which period was conditionally suspended for five years. The appellant, on the other hand, was found guilty of murder with an actual intent to kill. No extenuating circumstances were found by the court and she was sentenced to death.

THE NOTICE OF APPEAL

The three substantive grounds upon which the propriety of the appellant's conviction was challenged, were that:

1. The learned judge had erred in not ordering a separation of trials when the first accused had pleaded guilty, and the appellant not guilty, to the intentional killing of the child.

2. The placing of the appellant on her defence at the close of the case for the prosecution was an improper exercise of a judicial discretion by the learned judge, in that it was designed to fill the gaps in the State case.

3. The trial court erred in accepting as true the evidence of the first accused and in not finding that the evidence of the appellant was reasonably possibly true.

It is to these issues that I now turn.

THE ISSUES

(1) *A separation of the trials*

Section 190 of the Criminal Procedure and Evidence Act provides that:

> ``When two or more persons are charged in the same indictment, summons or charge, whether with the same offence or with different offences, the court may at any time during the trial *on the application of the prosecutor or of any of the accused*, direct that the trial of the accused or any of them shall be held separately from the trial of the other or others of them, and may abstain from giving a judgment as to any of such accused'' (emphasis added).

What emerges clearly from the record of the proceedings is that at no time during the trial did either the appellant's counsel or the prosecutor apply to the learned judge for the trial of the first accused to be held separately from that of the appellant.

It is conceivable that the decision on the part of the appellant's counsel (who did not argue the appeal) not to seek a separation, was deliberate. In the first place, she should have been aware from the summary of the State case that the only real evidence linking the appellant to the commission of the crime would be if the first accused, in testifying in her defence, were to adhere to the content of her warned and cautioned statement and defence outline;

and, secondly, that the confirmed extra-curial statement of the first accused, although receivable in evidence upon its mere production, was inadmissible against the appellant. This

Copyright Juta & Co Ltd

was because the statement had been made not while the conspiracy to murder the infant was in progress, but after it was no longer operating and had ceased to exist. See *S* v *Strydom & Ors* 1980 ZLR 364 (A) at 366A-B; *S* v *Sibanda* 1992 (2) ZLR 438 (S) at 441G-442G.

Clearly, it was the prosecutor who ought to have made the application. In the knowledge that the first accused heavily implicated the appellant in the murder, the overwhelming probability was that her evidence would accord with her warned and cautioned statement, defence outline and plea. There was therefore every advantage to the State in a separate disposal of the trial against the first accused and in then calling her to testify at the trial of the appellant. Such an expedient would have strongly bolstered the case against the appellant. It would have ensured that at the close of the State case sufficient evidence had been adduced to avoid a successful application being made for the appellant's discharge.

Because no application was moved by either party, the presiding judge could not order a separation of the trial *mero motu*. For the discretion so to order is pre- conditioned by s 190 upon the making of an application. See *S* v *Ismail* 1994 (1) ZLR 377 (S) at 379F-G; and Geldenhuys and Joubert *Criminal Procedure* 2 ed at 207.

It follows that this ground of complaint about the conduct of the learned judge is baseless.

(2) *The application for discharge*

At the close of the case for the prosecution, the evidence of Maphosa and Kachipare was before the court, together with the confirmed warned and cautioned statement of the first accused and the post mortem report on the deceased prepared by Dr Mathe. It was also formally admitted by the defence that on 10 October 1995, the body of the deceased was retrieved from a toilet at Gwe Gwe Butchery, Chiwundura Communal Lands and that, having not suffered any further injuries, it was conveyed by the police to Gweru General Hospital and, subsequently, to Mpilo Central Hospital mortuary. There it was identified to Dr Mathe as being that of the deceased. He found that death was due to a head and neck injury. It was apparent to him that a sharp instrument had been used to remove the deceased's lower lip and cut open the head and neck. The brain and voice box were missing.

Neither female witness was able to provide any direct evidence in relation to the essential elements of the charge. Yet the learned judge dismissed the application for the discharge of the appellant. In doing so he relied on the following pieces of evidence:

(i) that after the birth of the baby the appellant had visited the first accused at Gweru General Hospital;

(ii) that during the course of such visit the appellant gave the first accused, for the baby, a bottle containing what appeared to be some form of medicine;

(iii) that on 16 September 1995, the appellant was conveyed to the hospital by her husband and returned home almost at the same time as the first accused.

Copyright Juta & Co Ltd

The learned judge concluded his ruling with these words:

> ``This evidence clearly puts (the appellant) very close to whatever drama was going on at the time regarding the birth of the child. Whether that evidence is true or false is not a matter to be determined now as far as this application is concerned without (the appellant) having given her version of what she says happened.''

Section 198(3) of the Criminal Procedure and Evidence Act provides that if, at the close of the case for the prosecution, the court considers that there is *no evidence* that the accused committed the offence charged or any other offence of which he (or she) might be convicted thereon, it *shall* return a verdict of not guilty.

There is sound basis for ordering the discharge of the accused at the close of the case for the prosecution, where:

(i) there is no evidence to prove an essential element of the offence: see *Attorney-General* v *Bvuma & Anor* 1987 (2) ZLR 96 (S) at 102F-G;

(ii) there is no evidence on which a reasonable court, acting carefully, might properly convict: see *Attorney-General* v *Mzizi* 1991 (2) ZLR 321 (S) at 323B;

(iii) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it: see *Attorney-General* v *Tarwirei* 1997 (1) ZLR 575 (S) at 576G.

It is significant that s 198(3), unlike its precursor s 188(3) of *Chapter 59*, uses the word ``shall'' and not ``may'' - ``it shall return a verdict of not guilty''. The amendment was probably occasioned by the *dictum* in *Attorney-General* v *Bvuma & Anor supra* at 102F that it is:

> ``not a judicious exercise of the court's discretion to put an accused on his defence in order to bolster the State case in a case which, standing alone, cannot be proved.''

Hence, so far as the law in Zimbabwe is concerned, there is no longer any controversy as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution it has reason to suppose that the inadequate evidence adduced by the State might be supplemented by defence evidence. The conflicting South African authorities are commented upon in *S* v *Hartlebury & Anor* 1985 (1) ZLR 1 (H) at 3D-5B; *S* v *Mathebula & Anor* 1997 (1) SACR

GUBBAY CJ

10 (W) at 30i-31i; and, in both Lansdown and Campbell *South African Criminal Law and Procedure* vol V at 519-520 and Geldenhuys and Joubert *op cit* at 216.

Recently, the courts in South Africa have been faced with the question of whether the discharge of an accused may be properly refused at the close of the prosecution case if there is a reasonable possibility that a co-accused will, during the course of testifying, implicate the applicant-accused in the commission of the offence with which they are charged. The decisions are not entirely harmonious.

Copyright Juta & Co Ltd

In *S* v *Mondlane en Andere* 1987 (4) SA 70 (T), VAN DER WALT J refused an application for the discharge of accused no. 4 on the ground that his co-accused had made confessions which had been ruled admissible and in which accused no. 4 was incriminated (see at 71G-72B). Although the learned judge cited no authority, it would seem that he followed the controversial view that an accused should be placed on his defence if there is a reasonable possibility that the defence evidence might supplement the State case.

WHITE J reached a similar conclusion in *S* v *Mdudu & Anor* 1991 (2) SACR 223 (Tk). At 225a-d, he postulated two extreme yet telling examples of a failure of justice resulting from an accused being acquitted in a joint trial at the close of the State case:

> ``Assume that A and B are jointly charged and that the evidence of the single State witness implicates A only, who in cross-examination contends that not he, but B, committed the offence. If the court at this stage acquits B, it will at the end of the trial have to decide the issue of whether A or B committed the offence on the contradictory evidence of the State witness and A only, and without hearing the evidence of B on the matter. An even more harmful situation to the administration of justice could arise if B were to testify for the defence that he, and not A, committed the offence, which he could do with impunity as he would by then have been acquitted. The acquittal of B at the close of the State case could consequently result in a travesty of justice for one or more of the following reasons: the court being unable to determine, in the absence of B's evidence, whether he or A committed the offence and so having to acquit A also; the court finding that B committed the offence, either on A's evidence or on B's evidence, and once again having to acquit A also. In the latter event, the law will truly be seen to be an ass, which could hardly have been the intention of the legislator.''

Then came *S* v *Mathebula & Anor supra* in which the sole evidence against the accused on charges of murder and robbery at the close of the case for the prosecution was an incriminating statement made by his co-accused. CLAASSEN J refused to exercise his discretion in favour of the State and allowed the application for discharge. He reasoned at 34j-35d:

> ``(The) duty to prove an accused's guilt rests fairly and squarely on the shoulders of the State. As I said previously, the accused need not assist the State in any way in discharging this *onus*. If the State cannot prove any evidence against the accused at the end of the State's case, why should the accused be detained any longer and not be afforded his constitutional

> rights of being regarded as innocent and thus being acquitted and accorded his freedom? Can it be said that he was given a fair trial if, at the close of the State's case wherein no evidence was tendered to implicate him in the alleged crimes, the trial is then continued owing to the exercise of a discretion in the hope that some evidence implicating him might be forthcoming from the accused himself or his co-accused? To my mind, such a discretionary power to continue the trial would fly in the face of the accused's right to freedom, his right to be presumed innocent and remain silent, not to testify and not to be a compellable witness. To my mind, it would constitute a gross unfairness to take into consideration possible future evidence which may or may not be tendered against the accused either by himself or by other co-accused and for that reason decide not to set him free after the State had failed to prove any evidence against him.''

This decision was not followed by MYNHARDT J (SWART J concurring) in *S* v *Makofane* 1998 (1) SACR 603 (T). The court favoured the approach that although the evidence adduced against the accused may be insufficient for a reasonable man to convict him, if there is a reasonable possibility that a co-accused, during the course of his case, will implicate the accused in the commission of the offence with which they are jointly charged, then his

Copyright Juta & Co Ltd

discharge may be refused and he be placed on his defence.

In dismissing the appellant's application, the learned judge placed no reliance upon the overwhelming probability that the first accused would incriminate the appellant in her evidence.

With due deference, I am unimpressed by the reasoning of the learned judge in the *Mathebula* case. The judicial discretion which vests in the court in terms of s 174 of the South African Criminal Procedure Act 51 of 1977 requires it to consider the interests of justice, by which is meant the interests of the accused, the interests of the prosecutor and the interests of the administration of justice in general. To discharge one accused at the close of the State case, where there is the real possibility of his being implicated by the evidence of a co-accused, would disable the court from deciding the issues before it fairly owing to a temporary absence of evidence. It would constitute a wholly unrealistic approach.

If as, I shall endeavour to show was the situation, there was ``no evidence at the close of the case for the prosecution'' that the appellant had committed the murder, or had played any part in its commission, the learned judge would have erred had he refused the discharge on the ground of what was a likelihood of incrimination of the appellant in the forthcoming testimony of the first accused. In that situation, it would have been mandatory for him, in terms of s 198(3) of the Criminal Procedure and Evidence Act, to have discharged the appellant; he would have had no discretion to do otherwise.

The State evidence relied on by the learned judge as justifying the decision to place the appellant on her defence, was purely of a circumstantial nature. It was not evidence, in my view, upon which a reasonable man might draw

the inference suggested by the State. One cannot by any stretch of the imagination, infer from it that the appellant had a hand in the murder of the deceased. It simply allowed of conjecture and speculation. Consequently, I am constrained to agree with the submission of counsel that the appellant should have been acquitted at that stage of the trial.

The question that now arises is whether, the defence case having been proceeded with and the charge found proved, the verdict should be set aside on appeal on the ground that the appellant ought to have been discharged at the close of the case for the prosecution.

It is to be noted that subs (3) of s 198 gives the accused person no right of appeal against a refusal to discharge. Only the Attorney-General under subs (4) -may, with the leave of a judge of the Supreme Court, exercise the right of appeal, if dissatisfied with a decision given in terms of subs (3). However, the express grant to an accused may have been considered unnecessary by the legislature as s 44(a) of the High Court Act [*Chapter 7:06*] permits a person -convicted in a criminal trial, held by the High Court, to appeal as of right to the Supreme Court against such conviction on any ground of appeal which involves a question of law alone. The refusal of a discharge upon consideration of whether the evidence was such that a reasonable man, acting carefully, might properly convict, involves a question of law. See *Attorney-General* v *Mzizi supra*

Copyright Juta & Co Ltd

at 323B; du Toit *et al*, *Commentary on the Criminal Procedure Act* sect 178.

There is a strong line of authority in South Africa which lays down that once an accused is put on his defence, albeit wrongly, and is ultimately convicted, he cannot argue on appeal that the trial court erred in refusing to discharge him at the close of the State case. Lansdown and Campbell *op cit* at 520 state the principle thus:

> ``Where, at the close of the prosecution case, any evidence justifying a conviction is absent, but nevertheless a verdict of not guilty is not recorded, and the defence case, being proceeded with, furnishes the proof of guilt which was lacking in the case for the prosecution, a verdict of guilty is properly returned, and the appeal court will not interfere.''

The leading authority on the matter is *R* v *Lakatula & Ors* 1919 AD 362, where at 364 SOLOMON ACJ said:

> ``It may well be that, even if the judge is wrong in his view, (*viz* that at the close of the *Crown*'s case there was sufficient evidence in justifying a conviction) the deficiency in the evidence for the prosecution may be supplied by the witnesses for the defence, and so a case may be established against the accused. But I do not think that in such an event the court of appeal would be entitled to set aside the conviction on the ground that the learned judge ought at the close of the evidence for the prosecution to have withdrawn the case from the jury.''

These remarks have been held applicable where the trial is not by jury. See *R* v *Mafangosa* 1924 EDL 124 at 125-126; *R v McAlister* (1924) 45 NLR 258 at 259; *R* v *Eiman* 1947 (2) SA 1031 (C) at 1032-1033.

GUBBAY CJ

In *R* v *Petersen* 1925 EDL 186 at 187, it was pointed out that an appeal in a criminal case can be against only the conviction of the accused, and that in order to decide whether such conviction was right the court cannot confine its attention to the evidence of the Crown. It must also take into consideration the evidence led on behalf of the accused. Deficiencies of proof in the case for the prosecution may be supplied from the evidence adduced for the defence.

The same view was expressed in *R* v *Mkize* 1960 (1) SA 276 (N). BURNE AJ (as he then was), with the concurrence of HENOCHSBERG J, said at 281A-C:

> ``This court can only become seized of the matter after the magistrate has convicted the accused. That pre-supposes that there has been a full trial in which not only the Crown case but also the defence case has been heard. This is so in principle, even though the defence may have chosen not to lead any evidence at all. The authorities make it clear, in my view, that if this court is approached by way of appeal, and if any deficiencies in the Crown case have been supplied by the defence case, the mere fact that the magistrate has not discharged the accused at the close of the Crown case would not, standing by itself, be a good ground of appeal, whether an application for discharge had been made or not. This seems to me to follow from *Lakatula*'s case *supra*.''

I think there is good sense in the approach that a refusal to discharge the accused upon the conclusion of the State case is not in itself a sustainable ground for appeal against an ultimate conviction. At the stage the appeal is heard, and in order to decide whether the conviction was justified, it would be absurd for the appeal court to close its eyes to any evidence led on behalf of the accused, or a co-accused, which, taken in conjunction with the State evidence, had been

---

Copyright Juta & Co Ltd

held correctly by the trial court to prove guilt conclusively.

However, it is unnecessary to consider whether to adopt the reasoning of the courts in South Africa, attractive and commendable though it is. For in a situation like the present, this court is enjoined to have regard to s 12(2) of the Supreme Court Act [*Chapter 7:13*].

Proceeding on the premise that the learned judge committed an irregularity in refusing to discharge the appellant at the close of the case for the prosecution, the question is whether it appears, in the words of s 12(2), ``that a substantial miscarriage of justice has in fact resulted''. Put simply, whether the court hearing the appeal considers on the evidence (and credibility findings, if any) unaffected by the misdirection or irregularity, that there is proof of guilt beyond a reasonable doubt. If it does so consider, and the onus is on the State to satisfy it, then there is no resultant miscarriage of justice. See *S* v *Strydom supra* at 367F; *S* v *Ngara* 1987 (1) ZLR 91 (S) at 97B-C.

It follows that if the totality of the evidence allows of no reasonable possibility of the appellant's innocence in the crime, the irregularity in failing

to discharge her at the close of the case for the prosecution will be of no consequence and is to be ignored by this court.

Although it is unlikely that the situation which arose in this case will occur again, I am conscious that if it did, this judgment will create the following dilemma for judges and magistrates: ``If I discharge the accused notwithstanding the reasonable possibility of the testimony of a co-accused incriminating him in the commission of the offence charged, I shall be legally correct but acting against the interests of the administration of justice. If, on the other hand, I refuse to discharge him, my decision will be wrong, but should the incriminating evidence of the co-accused be found to be sufficiently reliable, together with other evidence, to justify a conviction, my verdict will be upheld on appeal''.

It seems to me that the means of avoiding this anomaly lies in the hands of the legislature. I would recommend that immediate steps be taken to amend s 198(3) of the Criminal Procedure and Evidence Act so as to revert to the wording ``it may return a verdict of not guilty''. If the legislature were to do so, I would not regard the above quoted *dictum* from *Attorney-General* v *Bvuma & Anor* as obliging a trial court to grant the discharge of an accused in a situation like the present.

Bvuma's case was concerned with the trial of a single accused, with the *dictum* being applied and appropriate to that context. Consequently, the issue of whether, in the exercise of the court's discretion, the discharge of one accused should be refused or granted, at the close of the evidence for the prosecution, where there is a reasonable possibility of a co-accused's forthcoming evidence incriminating the applicant-accused, was not considered. If, therefore, s 198(3) were amended so as once more to vest a discretion in the court, the exercise thereof would not be restricted by what was said in *Bvuma*'s case. And, as I have indicated, there is much to commend the approach adopted in *S* v *Makofane supra* and the two other earlier

Copyright Juta & Co Ltd

similar decisions I have referred to.

[*The learned Chief Justice considered the evidence, and continued:*]

The learned judge and assessors closely examined the evidence of the first accused. They were satisfied that the first accused had told the truth. She was not, in their opinion, a suspect witness. And they were convinced that the appellant's denial of any involvement in the death was blatantly false.

This was a case where there was proof *aliunde* that the crime of murder had been committed. The pathologist testified to the injuries inflicted upon the deceased whose body was recovered from a toilet. In terms of s 270 of the Criminal Procedure and Evidence Act, it was necessary for the trial court to

apply the ``cautionary rule'' and satisfy itself that it could safely rely on the first accused's evidence that the appellant had coerced her into murdering the baby. In other words, the trial court was required to warn itself of the danger of false incrimination inherent in the evidence of an accomplice, and be satisfied that such danger had been safely eliminated. See *R* v *Ncanana* 1948 (4) SA 399 (A) at 405-406; *S* v *Mubaiwa* 1980 ZLR 477 (A) at 480B-C.

I entertain no doubt that the trial court properly applied the mandates of the cautionary rule. That being so, the conclusion that the first accused and the appellant committed the crime together was fully justified. Accordingly, there being no miscarriage of justice arising from the irregularity in the learned judge's refusal to discharge the appellant at the close of the case for the prosecution, the conviction of the appellant must stand.

THE SENTENCE

There is no indication in the trial court's ruling on extenuating circumstances that it was satisfied that the State had proved that the appellant was responsible for the removal of the deceased's lip, brain and voice box. I assume that it accepted that it was reasonably possible that these parts had been removed after the first accused had left the appellant's home for the Chiwundura Communal Lands with the body of the deceased. The suggestion that the appellant's motive in coercing the first accused to kill the child so that subsequently she (the appellant) would be able to sell the human parts profitably in South Africa, was speculative and depended on what the first accused heard the appellant say in a context not related to the murder of the deceased.

Nonetheless, I share the trial court's opinion that there were no extenuating circumstances which reduce the moral blameworthiness of the appellant's conduct in committing the crime. The murder was premeditated and its gravity was not lessened from the appellant's point of view by the fact that she was not the actual executioner. For reasons best known to herself, the appellant used her authority over the youthful first accused to induce her to murder her newly born infant. It is doubtful that in the absence of such pressure the first accused would have done so. As was said in *S* v *Kuyeri* S-188-95 (not reported), ``this was the taking of an innocent soul

Copyright Juta & Co Ltd

whose only sin was that (she) had been born''.

THE ORDER

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

McNALLY JA

SANDURA JA: I agree.

McNALLY JA: I agree with the conclusion to which the CHIEF JUSTICE has come, and I am happy that he has incorporated in his judgment a reference to the dilemma which is created for judicial officers if a similar situation occurs again before the law is amended.

I believe, however, that the dilemma can be avoided. I agree with the CHIEF JUSTICE that the decision in *Attorney-General* v *Bvuma & Anor* 1987 (2) ZLR 96 (S) did not contemplate a situation involving more than one accused person. Nor, I would respectfully suggest, did the legislature think of this possibility when it subsequently replaced ``may'' with ``shall'' in s 198(3).

I take the view that one is entitled to look closely at the wording of the section in order to find an interpretation which achieves sense rather than nonsense, justice rather than injustice, in the application of the section in a situation almost certainly not contemplated by the legislature. This must especially be so in a statute which deals with procedure rather than with substantive law. See eg *Cross Statutory Interpretation* 2 ed p 168; Bennion *Statutory Interpretation* p 259 r 117 and p 336 r 141 (and see also rr 120, 122, 127, 128, 136, 137, 140 and 321); *Maxwell on the Interpretation of Statutes* 12 ed p 208). See also the remarks of GRIFFITHS LJ in *R* v *Deputy Governor of Camphill Prison*, ex p *King* [1984] 3 All ER 897 at 903:

> ``The common law of England has not always developed on strictly logical lines, and where logic leads down a path that is beset with practical difficulties the courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society.''

Where, as here, we are dealing with procedure rather than substantive law, I would prefer to avoid the strictly logical path in favour of a pragmatic or expedient interpretation, if that is possible.

I propose to set out the subsection and then to examine it. It reads:

> ``If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.''

The first point to be noted is the phrase ``no evidence''. The statute does not say ``no evidence admissible against one or more of the accused where there are more than one''. I do not find it necessary to create a problem by reading those words into the statute, when the literal interpretation (the primary rule of interpretation) is perfectly satisfactory.

The second point arises from the longer phrase ``no evidence *that the accused committed the*

Copyright Juta & Co Ltd

offence'' (my emphasis). It does not say ``no evidence

McNALLY JA

upon which the accused might be convicted of the offence'', ie no *prima facie* case. Interestingly, that phrase is used immediately afterwards, but in a different context to deal with the question of competent verdicts.

It seems to me therefore, in the present case, that it is unnecessary, undesirable and productive of great injustice, to read into the subsection words which are not there. The fact is that there is clear evidence, properly on the record, that the appellant committed the offence charged. Why go further than the statute and ask: ``But is it at this stage admissible against her?'' or ``Is it evidence upon which she might be convicted without more?''?

In my view therefore, the learned judge should have refused the application for discharge at the end of the State case, not for the reasons he gave, but for the simple reason that there was in fact clear evidence that the accused had committed the offence charged. Moreover, and importantly, that evidence was virtually certain to become admissible against the second accused in the course of the defence case (as indeed it did). By adopting my suggested approach, he would have eliminated the dilemma. If we endorse that approach the legislative amendment becomes unnecessary (although I think it is desirable anyway). In my view, we should adopt that approach. My colleagues do not agree, but I record my opinion for what it is worth.

Subject to these observations, I agree with the order proposed by the CHIEF JUSTICE.

Pro deo

HAMBLY *v* CHIEF IMMIGRATION OFFICER (3) 1998 (2) ZLR 285 (SC)

Court **Supreme Court, Harare**

McNally JA, Ebrahim JA & Korsah AJA

Civil appeal

18 May & 10 September 1998 Judgment No. S-147-98

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 22(1) - right of freedom of movement etc - right of woman citizen of Zimbabwe to have her husband reside with her in Zimbabwe - marriage alleged by immigration authorities to be marriage of convenience, designed to evade immigration laws - what must be shown by authorities

Immigration - marriage of convenience - what is - what must be proved - need for immigration authorities to produce evidence to establish that parties had no intention of living together - mere suspicion not enough

Copyright Juta & Co Ltd

Headnote

Where a woman who is a Zimbabwean citizen marries a foreign man, she has a constitutional right to have her spouse reside with her in Zimbabwe unless the marriage is one of pure convenience. In order to prove that the marriage is one of pure convenience, it is necessary to establish both that the marriage was entered into for the sole purpose of evading the immigration laws and that the parties to the marriage had, from its inception, no intention of living together permanently as husband and wife. Even where the facts considered cumulatively could give rise to a suspicion that the marriage is one of convenience, it is only where the marriage is proved to be a sham that it could be concluded that the marriage is one of convenience, so that the constitutional rights of the citizen can be defeated.

In the present case the marriage was not one of pure convenience. The parties had fallen in love and had lived together for some time before getting married. The marriage arose from their long standing relationship of love and was a formalisation of their previous relationship. They intended to live together permanently. The marriage was not a sham entered into in order to evade the immigration laws.

Decision of SANDURA JP in *Hambly* v *Chief Immigration Officer (2)* 1995 (2) ZLR 431 (H) overruled.

Cases cited:

Rattigan & Ors v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S); 1995 (1) BCLR 1 (ZS)

Kohlhaas v *Chief Immigration Officer & Anor* 1997 (2) ZLR 441 (S)

R v *Immigration Appeal Tribunal,* ex p *Kahn (Mahmud)* [1983] 2 All ER 420 (CA)

Salem v *Chief Immigration Officer & Anor* 1994 (2) ZLR 287 (S)

KORSAH AJA

Case Information

A P de Bourbon SC, for the appellant

Mrs *J Zindi*, for the respondent

Judgment

KORSAH AJA: In a series of decisions commencing with *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S), 1995 (1) BCLR 1 (ZS), followed by *Salem* v *Chief Immigration Officer & Anor* 1994 (2) ZLR 287 (S), and culminating with *Kohlhaas* v *Chief Immigration Officer & Anor* 1997 (2) ZLR 441 (S), this court has recognised and upheld the constitutional right of a citizen of Zimbabwe, who is a female, to have her husband reside with her in Zimbabwe.

The respondent herein does not impugn the soundness of these decisions but, in order to

Copyright Juta & Co Ltd

prevent the appellant from asserting her constitutional right to have her husband reside with her in Zimbabwe, it contended that the marriage entered into between the appellant and Andrew George Hambly on 1 July 1994 was a marriage of convenience, in that Andrew Hambly married the appellant in order to evade the immigration laws of Zimbabwe, and, therefore, does not entitle Andrew Hambly to reside with the appellant in this country.

The appellant was born in the city of Bulawayo on 18 November 1959 and is the holder of a Zimbabwe passport by virtue of her citizenship of Zimbabwe. She has resided and worked in Zimbabwe all her life and has no desire to live anywhere else.

In 1990, she met her present husband, Andrew Hambly. He had come to Zimbabwe with his mother, who was then attached to the British High Commission in Harare. The appellant and her husband were soon attracted to each other and entered into a close relationship while he was in Zimbabwe and by July 1991 they were going out and living together.

In 1992, the appellant and her father were looking for someone to work in Malawi for a company which is associated with the company that the appellant manages in Zimbabwe. Andrew Hambly was given that job. The relationship between the appellant and Andrew Hambly continued to blossom and it is common cause that before and since the wedding ceremony on 1 July 1994 the appellant and Andrew Hambly have lived together as man and wife.

We have here a situation where the appellant and Andrew Hambly are not only professing their love for each other, but also a commitment to live together as man and wife anywhere in the world. That their marriage is one based on a longstanding relationship and on love was attested to in the affidavit of the appellant's father, which evidence the respondent specifically did not wish to challenge. Likewise, the assertion by Mrs Keene in her affidavit that the marriage ceremony between the appellant and Andrew Hambly was no more than a formalisation of the relationship they previously

enjoyed went unchallenged. These are independent pieces of evidence corroborative of the professed love and commitment of the appellant and Andrew Hambly to live together as husband and wife till death do them part (for the time being). Looking merely to these facts, there cannot be entertained a shadow of doubt, and indeed, it is not in dispute, that by the laws of this country there is in existence between the appellant and Andrew Hambly a marriage by consent, of which cohabitation with habit and repute is evidence.

Marriages may be entered into for diverse reasons: for beauty, for protection, for power, for the union of families, to unite two estates, for procreation, or purely for love. So many are the vicissitudes of human nature that it is impossible to fathom all the reasons why people get married. It is perhaps arguable that all marriages entered into in accordance with civil law are, in their generality, marriages of convenience if only because, the law attempts to ensure the continuance of conjugal rights as between husband and wife to the exclusion of all others. But the underlying factor in the relationship of marriage is the intention to live together as man and wife. Though I do not rule out the possibility, I am unaware of any instance where a party has

Copyright Juta & Co Ltd

entered into a contract of marriage for the purpose of inconveniencing himself/herself.

Thus the law, in its wisdom, requires that in order to prove that a marriage was one of pure convenience, as alleged by the respondent, it is necessary to establish two things:

(a) that the marriage was entered into for the primary purpose of evading the immigration laws; and

(b) that the parties to the marriage had, from its inception, no intention of living together permanently as man and wife.

Both factors must coexist before a court of law can declare the marriage one of convenience as contended for by the respondent. See *Kohlhaas* v *Chief Immigration Officer & Anor supra*.

In the instant case, it is evident that the immigration authorities undertook no investigations whatsoever to establish that the appellant and Andrew Hambly had from the inception no intention of living together as man and wife or were not living together as man and wife. In fact, the totality of the evidence on record points to the contrary, as hereinbefore indicated.

The approach of the learned trial judge, and indeed that of the respondent, was that the timing of the wedding led to an inference that the marriage was solemnised in order to evade the immigration laws of this country.

It was not disputed, on behalf of the appellant, that the evidence is capable of interpretation as showing that the timing of the wedding was to some extent influenced by the decision of this court in the *Rattigan* case *supra*, taken with the fact that at the time of the solemnisation of the marriage the

applications for a residence or employment permit being made on behalf of Andrew Hambly were being rejected. But that is a far cry from saying that the marriage was entered into for the sole purpose of evading the immigration laws of this country.

I am wholly in agreement with Mr *de Bourbon*'s contention that, where a party has an intention to reside in Zimbabwe, and that intention is being frustrated as a result of the decision-making process of the State, and where his intention to live in the country is motivated in part by his desire to obtain work and in part by a genuine relationship that exists between him and a resident of the country, the decision when to marry may be influenced by various factors, not least among them is the convenience to the parties.

The decision of this court in the *Rattigan* case *supra* and allied cases is that a wife, who is a citizen of Zimbabwe, can assert her constitutional right to have her husband reside with her in this country. If the decision to marry is taken to enable that right to be asserted, it is taken to regularise a situation which the law itself recognises, and not to avoid any law.

Mr *de Bourbon* submitted, rightly in my view, that the type of evasion dealt with in *R* v *Immigration Appeal Tribunal*, ex p *Khan (Mahmud)* [1983] 2 All ER 420 (CA) at 422a is

Copyright Juta & Co Ltd

distinguishable from the right which the appellant herein seeks to assert. In the English case, the husband was seeking to acquire a right which the law would not otherwise clothe him with except by virtue of the marriage. By virtue of the ``marriage'' the so-called husband would be seeking to assert a right to live in the United Kingdom given under law by virtue of his marriage. That is not the situation here. The fact of marriage, submitted Mr *de Bourbon*, bestows no rights on the husband in Zimbabwe. What is noteworthy is that the fact of marriage does not alter the right of the citizen woman to live in this country. What the marriage does is to confer upon her the right to have the person to whom she is married reside with her in Zimbabwe. It is thus her rights as a citizen which are enhanced by the marriage, and not the accrual of any right to the husband to avoid the consequences of the law. This is evidenced by the title as well as the nature of the application.

With all due respect to the learned trial judge, while the sequence of events, the age difference between the couple and the intention of the couple not to procreate may, when considered cumulatively, give rise to a suspicion that the marriage may be one entered into for some convenient reason, it is only when the marriage is proved to be a sham, in the sense that neither of the parties intended that they should live together as a married couple, can it be concluded that the marriage is one of convenience and that the constitutional right of the appellant should be defeated. In the absence of proof of the second requirement, there was no warrant for declaring the marriage between the appellant and Andrew Hambly to be one of convenience.

KORSAH AJA

Accordingly, the appeal is allowed with costs. In the result, the order of the High Court dismissing the appellant's application is reversed and in its place is substituted the following:

``(1) The application is allowed with costs to be paid by the first respondent.

(2) It is hereby declared that the right of the applicant under s 22(1) of the Constitution of Zimbabwe to freedom of movement, that is to say, the right to reside in any part of Zimbabwe, has been contravened by the actions of the first and second respondents.

(3) By virtue of the applicant's right under the aforementioned s 22(1) to have her husband residing with her in any part of Zimbabwe, it is hereby ordered that -

(a) the first respondent issue to Andrew George Hambly, within thirty days hereof, such written authority as is necessary to enable him to remain in Zimbabwe on the same standing as any other alien who is a permanent resident;

(b) the said Andrew George Hambly be accorded the same rights as are enjoyed by all permanent residents of Zimbabwe, including the right to engage in employment or other gainful activity in any part of Zimbabwe, and that the first respondent impose no restriction upon such right.

(4) The costs of this application are to be borne by the first respondent.''

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Copyright Juta & Co Ltd

Winterton, Holmes & Hill, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners

S *v* MUTEMI 1998 (2) ZLR 290 (HC)

Court **High Court, Harare**

Garwe J & Chinhengo J

Criminal review

23 September 1998 Judgment No. HH-158-98

Flynote

Criminal law - common law offences - theft - of incorporeal property - whether such property can be stolen - theft of documents which had taken considerable time and effort to produce - whether thief can be convicted of anything more than theft of papers themselves

Criminal procedure (sentence) - common law offences - theft - incorporeal property - theft of documents which had taken considerable time to produce - relevance to sentence of value to owner

Headnote

The accused had been convicted of theft from a motor vehicle. He had broken into the complainant's car and stolen a bag containing a number of documents. The complainant placed a high value on two of the files included in the documents, the high value being based on the time he had spent working to produce them. Having heard submissions from the prosecutor, the magistrate convicted and sentenced the accused on the basis of the intrinsic value of the goods stolen.

Held, that the general principle of Roman-Dutch law was that incorporeals could not be stolen.

This principle had been challenged in modern times: theft of money can occur in others ways than the taking of physical cash. It can occur through incorporeal credits in books of account. The courts look at the economic effect of the act by which a person fraudulently converts value to his own use; in other words, at the prejudice suffered.

Held, further, that the conviction in this case, based on the theft of a physical thing, capable of being touched, could not be faulted. The difficulty arose when consideration had to be given to whether the value to the complainant represented by the contents could also be said to have been stolen. From the accused's point of view, all that he stole was paper. From the complainant's point of view, it represented far more: ideas, research, time, skill, disbursements, and so on. When it comes to *mens rea*, and conviction, it is the value perceived by the thief that is important.

Held, further, that the immense prejudice to the complainant should in principle have been treated as an aggravating feature; but because of the vagueness of the evidence presented it

Copyright Juta & Co Ltd

was not possible to say that the prejudice had been established.

Held, further (*per* GARWE J), that the ``value'' of stolen documents should be measured by their intrinsic or market value; but for the purposes of sentence, the value to the complainant should be taken into account, but not so that a sentence is passed which is out of proportion to the offence committed.

1998 (2) ZLR p291

CHINHENGO J

Cases cited:

Angel v *Jay* [1911] 1 KB 666

Bacon v *Grimsby Corp* [1950] 1 KB 272

Inworth Property Co v *Southwark London Borough Council* (1977) 34 P & R 186

R v *Cheeseborough & Anor* 1948 (3) SA 756 (T)

S v *Graham* 1975 (3) SA 569 (A)

R v *Harlow* 1955 (3) SA 259 (T)

R v *Kinsella* 1961 (3) SA 519 (C)

R v *Milne & Erleigh (7)* 1951 (1) SA 791 (A)

R v *Renaud* 1922 CPD 322

R v *Sibiya* 1955 (4) SA 247 (A)

Stanton v *Drayton Commercial Invstm Co* [1980] 3 All ER 221 (ChD)

Judgment

CHINHENGO J: The accused was charged with the crime of theft from a motor vehicle. It was alleged that on 23 October 1997 the accused in the company of an accomplice broke into the complainant's motor vehicle. He stole a bag containing a wide selection of property belonging to the complainant. The value of the property was, according to the statement of agreed facts, $260 000 of which property worth $1 910, was recovered.

In terms of the Stolen Property List (Form 162) Exh 2, the most valuable property was listed as follows:

``1 x IYF File with documents	$220 000.00
1 x Research File with Data	$ 40 000.00
1 x ZAIDE File	$ 2 000.00

Copyright Juta & Co Ltd

3 x File with documents from
Dept of Culture $ 2 000.00

1 x SADC File on SADC
Theatre Festival $ 2 000.00.''

The accused pleaded guilty to the charge. He was sentenced to 30 months' imprionment, of which 15 months was suspended on condition of good behaviour.

The complainant was not cross examined by the accused on his evidence that one of his files had a value of $220 000. The files contained a report and an agreement. The complainant said that the value was in the report ``that I spent time in doing and a research file $40 000 - research over a year''.

This case was postponed on two occasions to enable the prosecutor ``to check on the question of values''. The prosecutor advised the court that he had discussed the ``question of values'' with the complainant and was satisfied that it cost the complainant about $220 000 to do the research. The court, it appears, accepted that the complainant had suffered prejudice of his magnitude. At p 3 of the record, after mitigation, the following appears to be the approach taken by the magistrate:

> ``Tell him (the accused) I will have to remand him for sentence. There is the question of

CHINHENGO J

> how to go about this question of all these notes which the man (complainant) has spent a number of years compiling, spending a lot of money and time doing it. I just want to give some thought to that.''

And at p 6 where the magistrate deals with the question of sentence he said:

> ``The facts of the case - he and a companion broke into this car and stole a bag of mainly papers and files. When we started off the value was $260 000 or thereabouts but in fact the State has conceded that that value was really not one that can be properly taken into account for the purposes of sentence. It is what is termed an incorporeal value, that it is the expense the man has incurred during the course of making his researches ...
>
> If you had the money he could civilly sue you.
>
> Anyway, the value of goods stolen is roughly $2 500. That is the actual value and the bulk of it has been recovered. Just about $1 900 has been recovered ...''

When the proceedings were submitted to me on review, I immediately noticed that the court, both the prosecutor and the magistrate, had a not inconsiderable difficulty in dealing with this case. I dispatched a minute to the magistrate seeking an explanation for his finding that the contents of the documents were incorporeals and not capable of being stolen. I drew his attention to the fact that the complainant had incurred considerable expenses in the preparation of his documents, in his research and that such cost could be computed which the complainant had done. So, too, could the prejudice he had suffered. I also asked the magistrate to explain

Copyright Juta & Co Ltd

the exact offence of which he convicted the accused.

In reply to my minute the magistrate said (and I produce his reply *in extenso*):

> ``Accd pleaded guilty. Agreed with the facts and admitted all the essential elements. In essence he and his friend had broken into a car and stolen the property described in the charge. He had only taken the cash, while his friend had also taken some of the cash and all the other property. There was no dispute on this.
>
> At that stage, I was not happy about the values given. Comp was called and very briefly said that the values represented what it had cost him over the years to prepare such files. These are the ones marked with asterics (*sic*) on ex. 2., the form 162. There was no challenge by accd. I entered a verdict of guilty that is to the items charged. accd had no dispute, it was just that I considered that the values should be dealt with in sentence. (On reflection now, I am inclined to think it might have been better to have waited for the prosecutor's views before recording a verdict). Still with that nagging doubt I had asked the prosecutor to seek authority on this aspect, that is whether an item, on the face worth a few dollars, could have reached the values given because over the years the owner had incurred various expenses.
>
> Then the prosecutor indicated he had discussed the matter with the Attorney-General's Office and this resulted in him being advised not to place them at the high levels given by comp. I attach a memo from the Prosecutor.
>
> This by now was my view also. I had done some reading on the matter. I wish I could say the answer is clear cut but I do not really think it is nor is there case authority on the matter.
>
> ...

CHINHENGO J

> So in view of the concession by the State and my own views, I went ahead and sentenced accused for theft, but of the documents *simpliciter*, not with the value of the ideas linked to complainant's expenses, plus the other items in the charge.
>
> I may add that I have read through the Copyright, Industrial Design and Patents Acts. There is nothing I can see that relates to theft of ideas.
>
> Those are my views on why I regarded the contents of the files as incorporeals. The actual file itself is capable of being stolen and that is what the accused was convicted of plus the other items in the charge.
>
> As to the query, how should such expenses by complainant be regarded, I must confess that this is a difficult question. On the one hand, it seems somewhat unfair to burden the accused with a sentence based on values higher than which he was convicted. Perhaps the situation is analagous (*sic*) to an assault case where the accused using minor force pushes a person who falls, strikes his head and dies. It is unlikely the accused would be sentenced harshly. Depending on other factors he might well expect a moderate fine. I did observe in sentence that comp could always sue civilly, but in the present instance that would be a waste of time.
>
> Complainant had given values totalling $262 000 in the Form 162. For sentence purposes, I assessed the value at $2 500 that is having deleted the values comp had said were his `expenses'.''

This case was no doubt as unusual as it was difficult for the magistrate to deal with. The magistrate convicted the accused of the theft of files or documents, books and other property including cash, all to the value of $2 500. He sentenced the accused on that basis too. The magistrate cannot at all be faulted for the approach he took.

I will, for the purpose of this judgment, simplify the facts and cast them in the following manner.

Copyright Juta & Co Ltd

An accused person breaks into another person's vehicle and steals therefrom a bag containing a file. That file consist of research material of the complainant which he had collated and handwritten over a period of say two years. His expenses were, over the period of research, some $260 000. The complainant loses the file. If he has to have the research work on hand, he will have to embark on another research at similar cost if not more. The prejudice he has suffered is not only the loss of his research material in physical form, but also the amount of expenses which have gone to waste.

In these circumstances, what should the accused be convicted of? And following conviction what value should the court have regard to in assessing an appropriate sentence. Is it the value of the file as a physical document, ie paper with writing thereon or is it the cost of preparing that document, that is to say, the prejudice in monetary terms that the complainant has suffered as a result of the loss of the physical document?

The essential elements of the crime of theft are (a) unlawful, (b) *contrectatio*, (c) intent to steal, and (d) property capable of being stolen. Of these elements of the offence, perhaps only the element of unlawfulness need not be considered in this case.

CHINHENGO J

The intention to steal (*animus furandi*) exists where the accused intentionally effects a *contrectatio* intending to deprive the owner permanently knowing that the property is capable of being stolen. To avoid circuitous reasoning I must also say that in this case the c*ontrectatio* and the intent to deprive permanently need not be dealt with. They are a given. But they must exist in respect of a thing capable of being stolen.

The starting point in my inquiry is the passage in *South African Criminal Law and Procedure* vol II (3 ed by JRL Milton) where at pp 600-601 the learned author states:

> ``According to Roman and Roman-Dutch Law, since a *contrectatio* involves a handling of a thing, it follows that theft cannot be committed of an incorporeal thing which cannot be touched and so cannot be taken in hand. Although the Appellate Division left the point open in *R* v *Milne and Erleigh (7*) 1951 (1) SA 791 (A) at 826, the general rule of our law seems to be that only corporeal movable things are capable of being stolen and thus incorporeal property cannot be stolen. In *R* v *Renaud* 1922 CPD 322, it was held that `board and lodging' cannot be stolen and in *R* v *Cheeseborough* 1948 (3) SA 756 (T) that there cannot be theft of a `design or idea'.
>
> On the other hand, the Appellate Division has come to regard money as being capable of being stolen, even where it is not corporeal cash but is represented by a credit entry in books of account; a rule which, at least tacitly, admits that theft may be committed in respect of an incorporeal. It is not clear whether this practice is merely an exception to the general rule, demanded by modern financial transactions, or whether it represents a general principle that incorporeal things are capable of being stolen.
>
> Documents evidencing rights, such as a share certificate, or containing an idea are of course corporeal things and thus can be stolen. Where the accused is charged with the theft of such documents it is unnecessary for a court to concern itself with whether an incorporeal has been or can be stolen.''

(See also the many cases and authorities referred to in the footnotes to this passage.)

The present case falls outside the normal run of cases where the court need not concern itself with whether an incorporeal has been or is capable of being stolen, and if capable of being

Copyright Juta & Co Ltd

stolen what value to place on it. It is necessary, in this case, for the purposes of conviction and for the purpose of providing a proper basis for assessing an appropriate sentence to concern oneself with these issues.

A document consists of two component parts, the physical paper which is usually of little or insignificant value and the ideas contained in it which can be of tremendous value. The intrinsic value of a document may be unknown to the person who steals it. The document in the present case had an intrinsic value which was unknown to the accused. This value derives from the expenses that went into the preparation of the document which may be referred to as the replacement value of the document. This value is important because it is the prejudice which the complainant has suffered as a result of the loss of the document. It is the value which concerns the complainant.

CHINHENGO J

It is evident from the passage by Milton (above) that the law is not at all clear. One has to analyse it to discover the trends in judicial thinking and the likely direction in which the law will develop.

That incorporeals cannot be stolen appears to be the abiding principle of Roman-Dutch Law. But this principle has been challenged in the modern setting. This has been the case with regard to the theft of money. It has been argued that in modern times money changes hands quite often and as a matter of course by a process involving book entries, cheques, bills of exchange credit cards and computers. This process may involve the unlawful appropriation of credits or economic assets as for example where money is transferred, not as tangible notes or coins but as incorporeal credits in books of account. If incorporeals cannot be stolen then a person who dishonestly credits his account and debits that of another with a sum of money does not commit theft for there has been no physical handling of money in note or coin form.

In *S* v *Graham* 1975 (3) SA 569 (A) the appellant received a cheque for R37 153.88 from P which had been mistakenly sent in payment of a debt which P had owed to appellant's company but had previously paid. The appellant was aware of the prior settlement of the debt but nevertheless gave instructions for the cheque to be encashed with the intention to repay P later. The proceeds of the cheque were consumed by appellant's company. The appellant was convicted of theft. HOLMES JA dealt with what had been stolen in that case and said at 575H:

> ``It will be recalled that the indictment alleged a theft of the cheque or of the R37 153.88 or of both. It also alleged that these were the property of Pongola. The trial court found the appellant guilty of the theft of the R37 153.88. In my view, it was competent to hold that the cheque for R37 153.88 was stolen. In *R* v *Milne and Erleigh supra*, the appellant was charged with the theft of shares. It was argued that these were incorporeal and incapable of being stolen. The court held at pp 825 (last line) to 826A, that what were stolen were share certificates. At p 831F it was indicated that the question of the proceeds from realisation was relevant to sentence.''

And at 576D:

> ``To sum up so far, it would have been competent for the trial judge to have convicted the accused of the theft of the cheque for R37 153.88. However the trial judge convicted him of the theft of R37 153.88. That conviction must stand unless this court is persuaded that it is wrong.''

Copyright Juta & Co Ltd

The learned judge examined the question whether the proceeds of the cheque which were not money in the corporeal sense were capable of being stolen. He referred to a number of authorities and concluded that money is capable of being stolen even where it is not physical cash but is represented by a credit entry in the books of account. I refer to a passage by VAN DEN HEEVER JA in *R* v *Sibiya* 1955 (4) SA 247 (A) at 261, to which HOLMES JA referred in *Graham*'s case at 576G. It states:

CHINHENGO J

> ``Nowadays, in cases of theft we are apt to look at the economic effect of the act by which a person fraudulently converts value to his own use rather than be hypnotised by the concrete mechanics by means of which the crime is committed."

From this case, it is quite evident that the law now recognises that incorporeal property is capable of being stolen. The emphasis is, in my view, on the economic effect that the act of theft has on the victim, in other words, the prejudice which the victim of the offence suffers. The mechanics by which the offence is committed remain in the background.

In *R* v *Cheeseborough & Anor* 1948 (3) SA 756 (T) it was held that a design or idea cannot be stolen. The court found that the appellant had only stolen two documents belonging to the complainant and not the ideas or designs contained in those documents. In *R* v *Renaud* 1922 CPD 322, the accused obtained board and lodging on the basis of a misrepresentation. Holding that the board and lodging were incorporeal and incapable of being stolen, the court quashed the conviction. It noted that the accused should have been charged with fraud.

The general principle of law that an incorporeal cannot be the subject of a charge of theft is supported by the cases I have referred to and by the writings of various distinguished authors. The case of *S* v *Graham supra* makes an inroad into this general principle and it must be said now that incorporeal property can in fact be stolen. The example of theft of money by credit transfers is in point. This cannot be the only example in a fast changing world. In the present case, the accused stole documents, physical paper, after breaking into the complainant's motor car. The unlawful taking of the documents can properly be the subject of a charge of theft. The magistrate convicted the accused of the theft of the documents and other property all valued at $2 500. That conviction based on the theft of a physical thing capable of being touched, a corporeal thing, cannot be faulted. The document can be likened to the cheque for $37 153.88 in *Graham*'s case.

The difficulty arises when consideration has to be given to whether in fact the value to the complainant represented by the contents of document can be said to have been stolen in addition to the document itself. Looking at it from the accused's perspective and not crediting him with knowledge that the documents were more valuable that their face value, what he stole is a set of papers, the document. But looking at it from the complainant's perspective, what he lost or was stolen from him was not so much the physical paper (document) but his research work, his labour power and skill and expenses congealed in that document. The complainant spend a long time researching, collecting information and writing out his research work. This cost him in excess of $260 000. For the complainant, this is what the accused stole from him - it

Copyright Juta & Co Ltd

is not only ideas (incorporeal thing) in his research results but the

CHINHENGO J

effort, time, skill, disbursements, cost of travel, etc. all expressed as being the cost of producing the work - what the magistrate referred to as his ``expenses".

The *mens rea* of this offence must extend to all the elements of the offence. Can it be said that the accused had the necessary *mens rea* to deprive the complainant permanently of the value of his work, in the sense that he appreciated that he was taking from him $260 000 worth of concealed labour power, that is to say, that he was prejudicing the complainant by that amount? Does ever a thief consider the value to the complainant of the item which he steals? No, and perhaps. Is the prejudice which he causes a matter of moment at the time of the commission of the offence? No and yes. Theft is theft, whether the thief steals one dollar or a million dollars. At conviction stage, the court is primarily concerned with establishing that a theft has been committed. In practice, of course, a distinction between the physical item stolen and its value is rarely necessary to make as in the majority of cases the thief is aware of what he is taking and the prejudice he is causing to the complainant because the value of the item stolen which is apparent to the thief and the prejudice to the complainant normally co-inside. The intention to cause prejudice is not relevant to liability (see *R* v *Harlow* 1955 (3) SA 259 (T) and *R* v *Kinsella* 1961 (3) SA 519 (C)). The intention to prejudice is only relevant to punishment as it is but part of his motive. I think however that the proper approach to take in cases where the value of the property stolen, apparent to the thief, does not coincide with the real value of the property or the prejudice suffered by the complainant, is the value which is apparent to the thief. His intention to steal can only be regarded as extending to this apparent value. The magistrate correctly proceeded on the basis that the prejudice to the complainant was not material to the conviction of the accused, hence he convicted him of the theft of documents and other property whose value was readily ascertainable at $2 500.

I think that on the facts of this case, the magistrate in passing sentence, misdirected himself. He said at p 6:

> ``The facts in this case - he and a companion broke into this car and stole a bag of mainly papers and files. When we started off the value was $260 000 or thereabouts but in fact the State has conceded that the value was really not one that can be properly taken into account for the purpose of sentence. It is what is termed an incorporeal value, that is, it is the expense the man has incurred during the course of making his researches."

The prejudice to the complainant was immense. That should have been an aggravating feature in the consideration of sentence in this case. This is the approach which our courts have taken with regard to bag snatching cases, where, in sentencing the accused account, is taken of the prejudice to the complainant. Thus, if two bag snatchers are convicted and in respect of

CHINHENGO J

one the prejudice to the complainant is, say, $10 while in respect of the other the prejudice is $50 000, the accused persons invariably receive different punishments, not so much because

Copyright Juta & Co Ltd

the offences of which they are convicted are intrinsically different, but because the prejudice to the complainants is different. A magistrate in a case such as the present one should take into account the prejudice to the complainant in assessing the sentence.

I have pointed out that prejudice to the complainant is a factor to be taken into account in assessing sentence. This is a valid observation in so far as such cases are concerned, but I doubt that on the facts of the present case, the sentence would have been any different. The complainant did not give details of his loss. He made bold assertions as to prejudice, which assertions were unfortunately accepted by the court without investigation. It was necessary for the magistrate to have investigated the extent of the complainant's prejudice and not accept it on his mere say so. Because there is no evidence on record to establish that prejudice, it is not possible for me to make a finding that such prejudice was actually occasioned to the complainant. In this time and age, with computers and other information storage systems largely available, it is doubtful that a researcher who expends so much money on his research work does not store the information so that when the hand-written or typed information is lost, he can retrieve it from the storage systems. I am inclined to think that the complainant exaggerated somehow the extent of his loss. If he indeed lost the information, as he says he did, he has himself largely to blame.

I will therefore, despite the failure by the magistrate in principle to adopt the correct approach to sentencing in this matter, confirm the proceedings as having been in accordance with real and substantial justice.

In England, the law relating to theft has been codified in the Theft Act 1978. Our legislature may have to give consideration to enacting legislation along the same lines. Theft in this day and age can take different forms by which the thief appropriates to himself value that belongs to another. With the increased use of computers, the element of contrectatio takes a different form. This is evident from the development in the sphere of monetary transaction where money changes hands without being physically handled. The law as it stands now can serve the ends of society but not without the undesirable processes of having to adapt valid but old concepts to suit the new and emerging circumstances in which such crimes may be committed. It is only for this reason that the legislature may step in. The suggestion I make here is also commended to the Law Development Commission for its consideration.

GARWE J

GARWE J: I have no difficulty with the proposition that incorporeals cannot as a general rule be stolen. In my view, this accords with common sense. If something is incorporeal, it cannot be ``taken'' in the normal sense of the word. Because it cannot be taken, there cannot therefore be a *contrectatio* and consequently it cannot be stolen. It is quite clear in this day and age, however, that there are exceptions to this general statement of the law. Courts in this country and elsewhere have dealt with several cases of computer frauds involving in some cases the theft of substantial sums of money. In such situations, the theft is made possible by false credit and debit entries. To suggest in these circumstances that there is no theft is untenable and flies in the face of ordinary logic. The position is now settled that even where it is not corporeal cash but is represented by a credit entry in books of accounts, money is capable of being stolen. See

Copyright Juta & Co Ltd

S v *Graham* 1975 (3) SA 569 (A).

The real issue in this matter is the value to be attached to a stolen item for purposes of sentence. Is it the actual cost to the owner of the item? In other words, does ``value'' in these circumstances include the cost of research and other incidental expenses necessarily incurred in producing the material?

There can be no doubt in this case that the trial magistrate found himself in the rather difficult situation where he had to decide between the ordinary value of the file on the one hand and the cost of producing similar research material on the other. It is not an area free from difficulty and indeed has been the subject of many a decision in other jurisdictions.

I will give an example. A person steals research papers into which millions of dollars have been poured. As the research papers have no immediate economic value, the thief throws them away into the dustbin. The actual cost of the paper and the typing might be, as in this case, minimal. What value is to be placed on the research material for purposes of sentence? If the court considers that the prejudice to the complainant is in the millions and imposes a sentence on the accused on that basis, then clearly a long custodial sentence would be called for. On the other hand, if the court accepts, as did the court in this case, that the items were worth, say, $2 500, then a much more lenient sentence would be called for. But what would be the position if in the same circumstances, a thief steals research material but by good fortune the author has duplicate copies of such material? What value is to be accepted for purposes of sentence? Common sense would seem to suggest that ``value'' in these circumstances is the ordinary value of the papers, excluding the costs of the research.

In *Stanton* v *Drayton Commercial Investment Co* [1980] 3 All ER 221 it was held that ``value'' for purposes of the English Finance Act 1965 means the ``market'' value.

In *Angel* v *Jay* [1911] 1 KB 666, ``value of the property'' was held to mean

GARWE J

the value of the property in relation to which litigation is existing and not the value of the rights in such property.

In *Bacon* v *Grimsby Corporation* [1950] 1 KB 272, the words ``value of the house'' were held to point to an objective standard and not the value to a particular person. It was the freeholder's point of view, and not the general leases, that was to be considered.

In a number of cases, it has been held that the ``value'' of a house for purposes of the English Housing Act of 1957 is its open market value. See, for example, *Inworth Property Co* v *Southwark London Borough Council* (1977) 34 P & CR 186.

In *R* v *Milne and Erleigh (7)* 1951 (1) SA 791 (A) the accused was charged with theft of shares. It was argued that these were incorporeal and incapable of being stolen. The court held that what was stolen were the share certificates. At p 831, it was held that the question of the proceeds from realisation was only relevant to sentence.

Copyright Juta & Co Ltd

What was stolen in this case were the files containing research material. The ``value'' of those items in my view is $2 500. However, in passing sentence, the trial magistrate, had this been properly proved, would have been entitled to take into account the fact that the complainant had spent a sum of $220 000 in putting together the research. In so doing, the trial magistrate would have ensured that a realistic sentence was imposed, a sentence that would have adequately taken into account not only the actual value of the files and the paper, but also the expense incurred in putting the material together during the research. In other words, the expense of $220 000, though relevant, should not be given undue weight, as clearly a sentence out of proportion with the offence committed would be imposed. It is only a factor to be taken into account. In my view, it is an area where one needs to strike a mean between the prejudice suffered by the complainant and the ordinary value of the items stolen.

Like CHINHENGO J, I reach the conclusion, though for different reasons, that the sentence is in accordance with real and substantial justice.

GENERAL TRANSPORT & ENGINEERING (PVT) LTD & ORS *v* ZIMBABWE BANKING CORPORATION LTD 1998 (2) ZLR 301 (HC)

Court **High Court, Harare**

Gillespie J

Chamber application

8 & 23 September 1998 Judgment No. HH-159-98

Flynote

Costs - de bonis propriis - legal practitioner - practitioner issuing certificate of urgency in circumstances amounting to abuse of process

Practice and procedure - application - urgent - requirement that legal practitioner certify that matter is urgent - legal practitioner must not certify where does not genuinely consider that matter is urgent

Headnote

The preferential treatment of allowing a matter to be dealt with urgently is only extended if good cause shown for treating the litigant in question differently from most litigants. Where a party brings a chamber application for urgent relief, it is a procedural requirement that the application be supported by a certificate by a legal practitioner setting out with reasons the legal practitioner's belief that the matter is urgent. The reason behind such a certificate is that the court is only prepared to act urgently, in a matter where a legal practitioner is involved, if the legal practitioner is prepared to give his assurance that such treatment is required. Before putting his name to such a certificate, the legal practitioner must apply his mind and judgment to the circumstances and reach a personal view that the matter is urgent. He must support this judgment with reasons. It is an abuse for a lawyer to put his name to such a certificate where he does not genuinely hold the situation to be urgent. The genuineness of his belief can be tested by the reasonableness of the purported view. Where a legal practitioner could not reasonably

---

Copyright Juta & Co Ltd

entertain the belief that he professes he runs the risk of a judge concluding that he acted wrongfully, if not dishonestly, in giving his certificate of urgency.

Cases reported:

Dilwin Invstms (Pvt) Ltd v *Jopa Eng Co (Pvt) Ltd* HH-116-98

Legislation considered:

High Court Rules 1971, r 223A

Case Information

J Patel, for the applicant

Miss *S Nyoni*, for the respondent

Judgment

GILLESPIE J: The extension of protection as a matter of urgency is relief available from this court as a matter of discretion.

GILLESPIE J

> ``A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it." 1

It is a procedural requirement that a chamber application for urgent relief be supported by a certificate by a legal practitioner

> ``setting out, with reasons, his belief that the matter is ... urgent ... " 2

I would draw attention to the use of the word ``belief".

Normally a legal practitioner is not entitled to express his view, his opinion or his belief to the court unless specifically invited to do so (an invitation seldom extended). The subjective belief of counsel, no matter how well informed it may be, is immaterial to the court. Should his private view be offered by counsel, it is likely to be brushed aside with the admonition that counsel should keep his belief to himself and confine himself to proper submissions. 3 This convention protects the court from the invidious position of having to attempt to weigh submissions and arguments according to its own assessment of the legal practitioner as a lawyer or a person. It also spares counsel the potentially major embarrassment of being expected to endorse with his own subjective approval the case he has to advance. The proper place for a lawyer to express his views is in his opinion to his client. The cause of justice is served by permitting counsel to advance such arguments as may be proper, but without him pretending to reinforce those arguments with the possibly dubious persuasive value of that which he claims to be his own view. 4

Copyright Juta & Co Ltd

Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable conscientiously to concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. The reason behind this is that the court is only prepared to act urgently on a matter where a legal practitioner is involved if a legal practitioner is prepared to give his assurance that such treatment is required.

GILLESPIE J

It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably entertain the belief that he professes in the urgency of a matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency.

In this case, the first, second and third applicants were the joint and several debtors of the respondent for a certain debt, which appears to have arisen in 1991. Default judgment was obtained against them in a summons issued as long ago as 1995. A writ of execution was served upon them, and immovable property attached, in May 1996. Since then nothing more has been accomplished between the parties than correspondence as to the settling of the indebtedness.

The respondent evidently wearied of this temporizing and in 1997 (apparently) preferred to factor the indebtedness to a third party. In terms of its agreement with the third party, it has been paid its debt and has ceded to the third party its right of recovery. Upon learning of this development, allegedly in June this year, the applicants began addressing to the respondent demands that a caveat against the immovable property, noted in consequence of the attachment, be uplifted. This demand was based upon the fancied ground that since it had been paid in full the respondent had no right to a caveat retained on the property in its name.

One does not know what response this demand drew from the respondent. Unsurprisingly, since the rights flowing from the debt, including the judgment debt and right to attachment and execution have been ceded, the caveat has not been uplifted. The applicants therefore brought this application on a certificate of urgency for an order claiming the uplifting of the caveat on the ground adumbrated in the preceding paragraph.

To expose the defect in the cause of action is the work of but a moment. In fact, I have already done so. The defect is that the caveat is protecting a right which is ceded to the third party and cannot be removed while that party's claim exists or without that party being joined in the proceedings.

What prompted this short judgment, however, is the fact that a legal practitioner, in the circumstances that I have described in this case, should have been prepared to put his name to

---

Copyright Juta & Co Ltd

a certificate of urgency. And yet one has done so. A professional assistant in the firm of Gollop and Blank has certified that the matter is urgent on the grounds that:

``(a) the respondent has registered a caveat No. 1248/96 over the immovable property belonging to the second and the third applicants known as 44 Coull Drive, Mount

GILLESPIE J

Pleasant Harare when it has no *locus standi* to register such caveat over the said property, having ceded its right title and interest in the debt owed by the applicants to the respondent to Climax Investments (Pvt) Ltd.

(b) without the granting of a Provisional Order as set out in the Draft Order annexed hereto, the applicants will suffer irreparable harm if the aforesaid immovable property is sold in execution.''

Even if there were any merit to the submission in para (a) of the certificate, that itself is not a ground for urgency. It is merely a supposed cause of action. As for para (b) of the certificate of urgency, there is no suggestion at all that a sale in execution is imminent, far less threatened. Nor is there any explanation as to why this matter should suddenly become urgent some two years after the attachment of the property and noting of the caveat.

It seems to me that this is a prime example of a most undutiful certificate of urgency. The bringing of these proceedings as a matter of urgency is in my estimation an abuse. Where legal practitioners lend themselves to this sort of abuse then they might expect to have to bear unnecessary costs occasioned by their wrongful conduct. Some such costs have been caused in this matter since the papers have been served upon the respondent's attorneys, who will have been obliged to peruse them even if nothing else has yet been done. I consider that these costs ought to be borne by the firm responsible for the improper certificate of urgency rather than anyone else.

I therefore dismiss the application with costs on an attorney and client scale which costs are to be borne by Messrs Gollop & Blank *de bonis propriis*.

Gollop & Blank, applicant's legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners

WHEELER & ORS *v* ATTORNEY-GENERAL 1998 (2) ZLR 305 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Criminal application

15 & 24 September 1998 Judgment No. S-156-98

Flynote

Copyright Juta & Co Ltd

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(3) - right to prepare for trial and be represented by legal practitioner - postponement being refused when new and serious charges were added 10 days before trial date - time inadequate to prepare - when court may be justified in refusing postponement at request of accused who wants to engage counsel of his choice

Criminal procedure - trial - postponement of - at request of accused - postponement requested when new and serious charges added 10 days before trial date - time inadequate to prepare - postponement refused - court not justified in refusing postponement at request of accused who wants to engage counsel of his choice

Headnote

The three applicants were on 19 May 1997 arrested and charged with a number of serious common law offences. They were placed on remand, at first in custody, but later on bail. The trial was initially set down for 17 September 1997, but at the request of the legal practitioner for the applicants, postponed until 16 December. The legal practitioner briefed senior counsel to defend the applicants in respect of the charges on which they had been arrested.

On 5 December, the legal practitioner was advised that a further four charges were being added. He protested, as the trial date was only ten days hence; the trial was to take place in Beit Bridge; the applicants lived at West Nicholson; and counsel had to come from Harare. Because the practitioner was unavailable, due to being engaged in a High Court trial on 16 December, to appear to apply for a further postponement, a representative of the Director of Public Prosecutions instructed the prosecutor by fax to postpone the matter. The prosecutor disregarded this instruction, and the trial began. The applicants pleaded not guilty and effectively declined to take part in the proceedings. The magistrate was a few days later asked to refer to the Supreme Court the question of whether his refusal to grant a postponement was a violation of the applicants' rights under s 18(3) of the Constitution.

Held, that the prosecutor acted unreasonably in refusing to agree either to proceed only on the original charges or to a postponement. His conduct in failing to acknowledge his own responsibility for the situation and in failing to comply with the instructions from his superior was deserving of censure. The magistrate's consequent order that the trial was to proceed resulted in the applicants being tried on offences upon which they had been denied

GUBBAY CJ

adequate time to instruct their chosen legal representative, and thus was a contravention of s 18(3)(c).

Held, further, that the magistrate was obliged under s 18(3)(c) to permit, rather than ensure, legal representation. Legal representation is not an absolute right. But the magistrate should have exercised his discretion judicially and should have had regard to the attitude of the Director of Public Prosecutions. He should have asked himself whether the absence of the senior counsel requested was any fault of the applicants. It clearly was not, and it was wrong to penalise them.

Held, further, that it is only in exceptional circumstances that a court would be justified in refusing a postponement of the trial to an accused who wanted to engage a legal practitioner at

Copyright Juta & Co Ltd

his own expense, or whose chosen legal practitioner was absent for good reason. It would only be so justified where the application is obviously frivolous or vexatious, or the accused is guilty of gross negligence in failing timeously to engage the services of his chosen representative, or of a deliberate tactic to delay the trial unreasonably.

Held, therefore, that the proceedings should be set aside and the case remitted for trial before a different magistrate.

Legislation referred to:

Constitution of Zimbabwe 1980, s 18(3)

Cases cited:

Bull v *A-G & Anor* 1987 (1) ZLR 36 (S)

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

Paweni & Anor v *A-G* 1984 (2) ZLR 39 (S)

Powell v *Alabama* 287 US 45 (1932)

S v *Dangatye* 1994 (2) SACR 1 (A)

S v *Nqula* 1974 (1) SA 801 (E)

R v *Second* 1969 (2) RLR 285 (A)

S v *Seheri en Andere* 1964 (1) SA 29 (A)

S v *Solo* 1995 (5) BCLR 587 (E)

Case Information

J C Andersen SC, for the applicants

P Muziri, for the respondents

Judgment

GUBBAY CJ: The first applicant is a director of EAS (Pvt) Ltd, which is the registered owner of Twin River Ranch, situated in the district of Beitbridge. The second and third applicants are, respectively, the manager and foreman of that ranch. The three were arrested on 19 May 1997 without warrant in terms of s 25(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], on reasonable suspicion of having committed the offences of kidnapping, malicious injury to property and assault with intent to do grievous bodily harm. On the same day, they were remanded in custody to 2 June 1997 by the magistrate at Beitbridge, but were released on bail by order of the High Court on 30 May 1997.

On 2 June 1997, the applicants were placed on remand by the magistrate to appear on 16 June 1997 and, then, to 16 July 1997, when the trial was set down for 17 September 1997.

Copyright Juta & Co Ltd

GUBBAY CJ

On the aforementioned day, a legal practitioner from Harare, Mr Siphosami Malunga, appeared for the applicants. He applied to the presiding magistrate for a postponement of the trial in order to secure the services of senior counsel to defend the applicants. This application was granted; another for a change of venue was dismissed. With the agreement of the State, the trial was set for 16 December 1997 with the applicants remanded to appear on that day. At this juncture, the charges facing the applicants comprised of three counts of kidnapping, two of malicious injury to property and one of assault with intent to do grievous bodily harm. It was on these charges that senior counsel was briefed by Mr Malunga to represent the applicants at their trial.

On 5 December 1997, Mr Malunga was advised by the prosecutor at Beitbridge that copies of the statements of certain witnesses, together with the outline of the State case, to which had been added four additional charges, had been despatched to him by road transport. Mr Malunga immediately protested. He stressed that although the defence was ready to go to trial on 16 December 1997 on the six original charges, they were not being allowed adequate time to take instructions from the applicants on the additional charges. A letter confirming this complaint was sent to the prosecutor who had indicated previously that all ten charges were to be proceeded with. The concluding paragraph to the letter read:

> ``We simply wish to place on record that we are only prepared to proceed with the six counts and not the additional four the details of which the writer is not yet aware. We fail to understand why you had to wait to the last hour to notify us of the extra charges. As you are aware, the trial is scheduled for 16 December 1997 and our clients reside in West Nicholson which makes it difficult to obtain further instructions. Please let us hear from you.''

The papers arrived from Beitbridge three days later. But because of an outbreak of unrest in the city the next day, which kept Mr Malunga away from his office, he only received them on the morning of 10 December 1997. He immediately consulted with senior counsel and was advised that as the State intended to proceed with all ten charges on 16 December 1997 it would not be possible, by that date, to take instructions from the applicants and prepare their defences on the additional four offences. These were offences of a serious nature, being extortion, kidnapping, malicious injury to property, and assault with intent to do grievous bodily harm. A further letter was addressed to the prosecutor in which it was stated:

> ``We note that the additional charges are indeed as serious as the other charges and further reiterate our stance that we are simply unable to proceed on the additional counts. We have not advised our clients about the additional charges owing to the communication hitches between Harare and West Nicholson. Our clients' telephone is difficult to access and surface mail takes at least one week to reach West Nicholson and, in any event, our clients' farm is at least thirty kilometres off the main road.''

GUBBAY CJ

As there was no communication from the area prosecutor, Mr Malunga held himself available to appear on behalf of the applicants on 16 December 1997 and apply to the magistrate for a postponement of the trial. An unforeseen turn of events, however, prevented his presence on

Copyright Juta & Co Ltd

that day.

On 12 December 1997, Mr Malunga was engaged in a part-heard criminal trial before the High Court. It was the last day allocated for the case. As the prosecutor, Mr Joseph Musakwa, a member of the Attorney-General's Office, was due to terminate his employment at the end of the year, the presiding judge required the trial to resume on 16 December 1997 and to continue the following day. When Mr Malunga made his commitment to appear in Beitbridge known, Mr Musakwa telephoned the area prosecutor and instructed him to postpone the case to 19 December 1997.

On the morning of 16 December 1997 and while engaged in the trial before the High Court, Mr Malunga learned that it was the intention of the magistrate and prosecutor to commence to try the applicants upon all ten charges. Upon being advised of this, Mr Musakwa, on behalf of the Director of Public Prosecutions, sent a facsimile message to the prosecutor which read:

> ``RE: STATE v R S WHEELER, MAZVO ZVIROKWAZO AND PFARISENI NSINGO
>
> On 12 December 1997, Mr Maredza and Mr Musakwa spoke to you over the phone. You were instructed to have the above matter postponed to Friday 19 December 1997.
>
> You are again directed to have the matter stood down to Friday. You spoke to Mr Musakwa over the telephone whereupon you sought to doubt his identity. If you have any queries contact him on 772993 (the Director's line).''

Notwithstanding this instruction, the trial proceeded. The applicants pleaded not guilty to all the charges. They objected to being tried in the absence of the legal representative of their choice and contrary to the directive from the Director of Public Prosecutions that there be a postponement to 19 December 1997. The prosecutor strenuously resisted any postponement and the magistrate ruled as follows:

> ``Quite understandably, counsel for the State opposed this application and appears taken aback by the fact that the fax makes mention of the Director of Public Prosecutions as having already agreed to the postponement without the court being involved in making a decision on the merits of the matter on whether or not a postponement must in the circumstances be allowed again. If the Director of Public Prosecutions agreed with the accused to have the matter postponed then it will be sad indeed that the administration of the criminal justice system is run this way. The court has not heard anything from the Director of Public Prosecutions confirming the fact of such an agreement and the reasons thereof. What I have before me is a fax which makes reference to the Director of Public Prosecutions as having made such an agreement and I am unable in the circumstances to rely on such a document as the voice of the Director of Public Prosecutions.
>
> In any case, the Director of Public Prosecution's officers here are opposed to this application as they have been on all other occasions. The defence lawyer at the last hearing

> agreed that the matter be heard today, in fact four days in a row. He made this commitment. He is not the only lawyer from this firm.
>
> Justice now demands that the fourth or third postponement of the matter is extremely undesirable. No-one has denied the accused legal representation. The application cannot succeed. It must fail. I will order that the trial take off and take off now.''

There, upon the applicants declined to outline their defences. The evidence of seven witnesses

Copyright Juta & Co Ltd

was led by the prosecutor. In respect of each of them, the applicants indicated that they were not prepared to cross-examine. In short, the applicants resolutely declined to take part in a trial in which they were being denied the right to legal representation.

The following morning the magistrate was informed that an *ex parte* chamber application against his order had been lodged with the registrar of the Supreme Court. He therefore, adjourned the trial to the next morning and then to the following day. The application was placed before me. I was not prepared to order the magistrate to discontinue the trial. Such an application could be heard only by the Supreme Court (and not by a single judge) with notice given to interested parties.

On 19 December 1997, Mr Malunga appeared before the magistrate. He moved an application in terms of s 24(2) of the Constitution of Zimbabwe for the magistrate to refer to the Supreme Court the question of whether his refusal to postpone the trial was a violation of the applicants' rights as specified in s 18(3)(c) and (d). Fortunately, on this occasion the magistrate acceded to the application.

It is in the context of this necessarily lengthy scenario that the complaints of the applicants have to be considered.

Sections 18(3)(c) and (d) provide that:

> ``Every person who is charged with a criminal offence -
>
> (c) shall be given adequate time and facilities for the preparation of his defence;
>
> (d) shall be permitted to defend himself in person or ... at his own expense by a legal representative of his own choice."

The first issue for decision is whether the applicants were given adequate time for the preparation of their defences to the additional four serious offences, of whose nature and particulars Mr Malunga only became aware on 10 December 1997. The trial was a mere six days away. The applicants resided in West Nicholson while senior counsel practised in Harare. Distance made the ability to obtain meaningful instructions from the three applicants manifestly difficult, if not well-nigh impossible. It had been made clear to the area prosecutor that the defence remained prepared to proceed to trial on the original six charges.

I am firmly of the view that the area prosecutor acted unreasonably in refusing to agree either to proceeding solely upon the six charges on 16 December 1997 or to a postponement of the trial. His late notification of the

additional charges was the sole cause of the problem. Instead of acknowledging responsibility and complying with the instruction twice received from the office of the Director of Public Prosecutions, he informed the magistrate that the State was not willing to agree to a postponement to 19 December 1997. That conduct is deserving of censure. Had he obeyed the directive and accepted the blame for the need to postpone the hearing, it is doubtful whether the

Copyright Juta & Co Ltd

magistrate would have ruled as he did. In the event, the magistrate's order that the trial was to proceed resulted in his trying the applicants on offences upon which they had been denied adequate time to instruct senior counsel, who was their chosen legal representative. It amounted to a contravention of the applicants' rights under s 18(3)(c); a provision that serves to remind prosecuting authorities that the desirability of bringing an accused person to trial with the minimum of delay is subject to a prohibition on excessive haste which may breach the residual fair trial right.

An even stronger argument for justifying this court in vitiating the proceedings was the violation of the applicants' fundamental right to be defended by a legal representative of their choice.

The supreme importance of the right to legal representation, which is recognised in every democratic country and is now enshrined in s 18(3)(d) of the Constitution, was underscored eloquently by JUSTICE SUTHERLAND of the United States Supreme Court in *Powell* v *Alabama* 287 US 45 (1932). He said at 68-69:

> ``Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Section 18(3)(c) imposes an obligation to permit, not to ensure, legal representation. The right is not absolute. See *Paweni & Anor* v *Attorney-General* 1984 (2) ZLR 39 (S) at 44G. The magistrate was correct, therefore, in observing that whether to allow the trial to proceed in the absence of the applicants' legal representative lay in his discretion; and that he was not bound by a directive from the Director of Public Prosecutions that it be postponed or, indeed, by any such agreement between the State and the defence. Yet that discretion had to be exercised judicially. Certainly, the magistrate ought to have had regard to the attitude of the Director of Public Prosecutions. If he entertained any reservation about the authenticity of the facsimile he could so easily have arranged for the Director to be

contacted. Furthermore, no account was taken of the ground upon which the postponement was sought; the fact that the four charges were added very late was not even mentioned in the ruling. Finally, the magistrate should have asked himself whether the absence of senior counsel was due to any fault of the applicants. Clearly, it was not; so it was wrong to penalise them. See *S* v *Seheri en Andere* 1964 (1) SA 29 (A) at 34E-G; *S* v *Nqula* 1974 (1) SA 801 (E) at 805E-F.

In my view, it is only in exceptional circumstances that a court would be justified in refusing a postponement of the trial to an accused who wanted to engage a legal representative at his own expense; or whose chosen legal representative was absent for good reason. But where the application for the postponement is obviously vexatious or frivolous, or where the accused is guilty of either gross negligence in failing timeously to engage the services of a legal representative of his choice or of a deliberate tactic to unreasonably delay the trial, he cannot

Copyright Juta & Co Ltd

complain that his constitutional rights are infringed if the trial is ordered to commence. See *R* v *Second* 1969 (2) RLR 285 (A) at 287I. In addition, there is no right to seek to secure the services of a legal practitioner who is disabled from representing a client, for instance, by not being permitted to enter the country; or who, because of heavy commitment, is unavailable to appear for an excessively long period. If the State is unable to prove any such reason, the trial should be postponed until the chosen legal representative is available. In this way, an accused will enjoy the full protection of the Constitution.

The length to which a court should be prepared to go in order to accommodate an accused is well illustrated in *S* v *Dangatye* 1994 (2) SACR 1 (A) and *S* v *Solo* 1995 (5) BCLR 587 (E).

In the present matter, I have not the slightest doubt that the refusal of the postponement constituted such a grossly improper exercise of the magistrate's discretion as to oblige interference by this court. See *Paweni & Anor* v *Attorney-General supra* at 45B-C. Indeed, I should mention that it was conceded by Mr *Muziri*, who appeared for the respondent, that such intervention is necessary.

The relief I propose to grant is to set aside the proceedings and remit the case for retrial. Plainly, a different magistrate should preside. I consider also that the Attorney-General would be well advised to appoint another prosecutor to appear on his behalf.

It is permissible in an application of this nature to order that the costs incurred should follow the event. See *Bull* v *Attorney-General & Anor* 1987 (1) ZLR 36 (S) at 44E; In re *Mlambo* 1991 (2) ZLR 339 (S) at 355F. I can perceive of no basis upon which to deprive the applicants of their costs.

Accordingly, I would order that:

GUBBAY CJ

1. The proceedings in the magistrate's court, Beitbridge, in the case of *S* v *Shannon Wheeler, Mazvo Zvirokwazvo and Pfariseni Nsingo*, being case number CR 205/247/5/97, are set aside.

2. The case is remitted for trial before a different magistrate.

3. The Attorney-General is to pay the costs of this application.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan, Welsh & Guest, applicants' legal practitioners

SCROPTON TRADING (PVT) LTD *v* KHUMALO 1998 (2) ZLR 313 (SC)

Copyright Juta & Co Ltd

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

17 & 24 September 1998 Judgment No. S-155-98

Flynote

Practice and procedure - summary judgment - application for - requirements of r 64 of High Court Rules - need for applicant to bring himself squarely within ambit of rule - cause of action must be verified and substantiated by proof - claim cannot be amended - material differences between particulars and substituted claim - summary judgment not permissible

Headnote

A plaintiff seeking summary judgment must bring himself squarely within the ambit of r 64(1) of the High Court Rules, which requires that the cause of action must be verified. It must be substantiated by proof and the supporting affidavit must contain evidence which establishes the facts upon which reliance is placed for the contention that the claim is unimpeachable.

In the present case, the application for summary judgment had two fatal defects. Firstly, the particulars of claim alleged that the appellant was the party liable, whereas the affidavit deposed to by the claimant in support of the application for summary judgment alleged that a separate and distinct legal *persona* was the party liable. In other words, there was before the court no affidavit from the claimant verifying the facts alleged in the particulars of claim against the appellant, as the affidavit dealt with a claim against a party other than the appellant. Secondly, in the particulars of claim a monetary claim was made for which summary judgment could not be obtained. The trial judge substituted a claim for delivery of the contract item. As the substituted claim was materially different from the claim in the particulars of claim, the trial judge was wrong to amend the claim as he had done.

Cases cited:

Art Printing Works Ltd v *Citizen (Pvt) Ltd* 1957 R & N 62 (SR)

BCCZ v *Jani Invstms (Pvt) Ltd* 1983 (2) ZLR 317 (H)

Cold Storage Commission v *Gey van Pittius* G-B-21-73

C Stenslunde & Co (Pvt) Ltd v *Banwell Engrs Ltd* 1988 (2) ZLR 327 (H)

Hugo Franco (Pty) Ltd v *Gordon* 1956 R & N 448 (SR)

Jena v *Nechipote* 1986 (1) ZLR 29 (S)

Maclaurin v *Horne* 1965 RLR 639 (G)

Shingadia v *Shingadia* 1966 RLR 285 (G)

Legislation considered:

Copyright Juta & Co Ltd

1998 (2) ZLR p314

GUBBAY CJ

Case Information

N T Maredzo, for the appellant

W Sansole, for the respondent

Judgment

GUBBAY CJ: The order of the High Court granting summary judgment with costs is appealed against on two grounds: first, that procedurally the application was fatally defective; and second, that the opposing affidavit set out a good *prima facie* defence to the action.

On 18 October 1995, the respondent issued summons, endorsed in terms of Order 3 r 13 of the Rules of the High Court, against the appellant. The annexed particulars made the following claims in the prayer: (a) the return of the sum of $175 000; (b) interest thereon at the rate of twenty-five *per centum per annum*; (c) refund of interest charges and loan repayments to the Zimbabwe Banking Corporation; (d) damages at the rate of $600 per day with effect from 1 June 1995 until the date of payment; and (e) costs of suit. These claims were alleged by the respondent to have arisen consequential upon a breach of contract by the appellant to deliver a Toyota Hiace commuter omnibus on or before 31 May 1995.

The appellant entered an appearance to defend the action on 24 October 1995. Thereafter nothing happened until 17 April 1996 when, under Order 10 r 64(1), a court application was made for summary judgment to be entered. The notice of application was supported by an affidavit deposed to by the respondent. Accompanying these papers was a notice advising that at the hearing of the matter application would be made to amend the summons in the following manner:

> `1. The description of the defendant to read Luveve Motors (Pvt) Ltd t/as Scropton Trading (Pvt) Ltd t/as Exceed.
>
> 2. Paragraph (a) of the prayer to read `delivery of a brand new Toyota Hiace commuter omnibus or payment of the market value thereof'."

These documents were served, not on the appellant, but on the separate and distinct legal *persona*, Luveve Motors (Pvt) Ltd.

The respondent's supporting affidavit was headed:

> ``Mrs L Khumalo *Plaintiff*
>
> and
>
> Luveve Motors (Pvt) Ltd *Defendant*."

It was therein averred, contrary to the particulars of claim, that the contract had been entered

Copyright Juta & Co Ltd

into by Luveve Motors (Pvt) Ltd, and that it was the latter which was in breach thereof. Summary judgment was sought against Luveve Motors (Pvt) Ltd.

Subsequently, yet before the hearing, the respondent, realising her mistake, filed another notice in which she reverted to the appellant as the defendant/respondent. The amendment to para (a) of the prayer to the particulars of claim, however, stood.

GUBBAY CJ

The learned judge expressed the view that the procedural objection taken *in limine* by the appellant was purely technical. He gave as the reason that the director of the appellant in her opposing affidavit had acknowledged that the appellant was the correct defendant and had answered the factual allegations contained in the respondent's supporting affidavit. He went on to hold that the appellant had no bosna fide defence to the action. Appreciating that the respondent was not entitled to the return of the sum of $175 000, prayed for in para (a) to the particulars of claim, his Lordship granted her an order for ``delivery of a brand new Toyota Hiace commuter omnibus as soon as possible'', which was part of the second amendment in the notice of 17 April 1996; the alternative ``payment of the market value'' being thus substituted.

I entertain no doubt that the learned judge erred in dismissing the procedural objection to the application. Such cases as *Hugo Franco (Pty) Ltd* v *Gordon* 1956 R&N 448 (SR) at 451G-H, *Art Printing Works Ltd* v *Citizen (Pvt) Ltd* 1957 R&N 62 (SR) at 65D, *Maclaurin* v *Horne* 1965 RLR 639 (G) at 640F, *Shingadia* v *Shingadia* 1966 RLR 285 (G) at 288I-289A, and *Bank of Credit & Commerce Zimbabwe Ltd* v *Jani Investments (Pvt) Ltd* 1983 (2) ZLR 317 (H) at 320F, lay down clearly that it is for the plaintiff seeking summary judgment to bring herself squarely within the ambit of r 64. More recently in *C Stenslunde & Co (Pvt) Ltd* v *Banwell Engineers Ltd* 1988 (2) ZLR 327 (H), MTAMBANENGWE J dismissed with costs an application for summary judgment where the amount claimed in the summons differed from that verified in the plaintiff's supporting affidavit (see at 328G).

One simply cannot ignore the requirements of r 64.

In casu, there were two fatal defects. The first related to the requirement that the cause of action must be verified. It must be substantiated by proof. The supporting affidavit must contain evidence which establishes the facts upon which reliance is placed for the contention that the claim made is unimpeachable. Here the affidavit deposed to by the respondent, and upon which the learned judge granted summary judgment, sought to verify a cause of action against Luveve Motors (Pvt) Ltd; whereas the particulars of claim alleged that the appellant was the party liable. In other words, there was before the court no affidavit from the respondent verifying the facts alleged in the particulars of claim à propos the appellant. The particulars of claim sought relief against the appellant, yet the respondent's supporting affidavit made the claims against Luveve Motors (Pvt) Ltd.

In the second place, the principal claim in the particulars was for ``the return of the sum of $175 000''. This was erroneous, and the respondent appreciated that she was not entitled to obtain summary judgment in respect of it. Hence the amendment made and granted for it to be

---

Copyright Juta & Co Ltd

replaced by ``delivery of a brand new Toyota Hiace commuter omnibus''. Since the particulars of claim were

GUBBAY CJ

therefore not completely in order, and as the substituted claim was materially different, there was no room for an amendment. See *Cold Storage Commission* v *van Pittius* G-B-21-73 (unreported) *per* DAVIES J (as he then was); *Bank of Credit & Commerce Zimbabwe Ltd* v *Jani Investments (Pvt) Ltd supra* at 320G.

The application was accordingly abortive. This conclusion makes it unnecessary to consider whether the defence to the action raised by the appellant met the type of criteria mentioned in *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) at 30D-F. Certainly, that issue was not as straightforward as the learned judge found it to be.

Because the respondent should not have proceeded with the application without complying with the Rules, there is no warrant to deprive the appellant of the costs of opposition. See *Maclaurin* v *Horne supra* at 642F; *C Stenslunde & Co (Pvt) Ltd* v *Banwell Engineers Ltd supra* at 329C.

In the result, the appeal is allowed with costs. The order of the court *a quo* is altered to read:

``1. The application for summary judgment is dismissed with costs.

2. The defendant is granted leave to defend the action.''

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Wilmot & Bennett, appellant's legal practitioners

Sansole & Senda, respondent's legal practitioners

STANDARD CHARTERED FINANCE ZIMBABWE LTD *v* MARONGWE TRANSPORT (PVT) LTD 1998 (2) ZLR 317 (HC)

Court **High Court, Harare**

Smith J

Stated case

18 & 30 September 1998 Judgment No. HH-164-98

Flynote

Hire-purchase - finance charges - rates of interest - limits on - extent to which purchase price may exceed cash price - hire-purchase agreements entered into with finance institutions or between April 1990 and

Copyright Juta & Co Ltd

January 1995 - rate specified in agreement applies, irespective of rate specified by Minister

Headnote

The defendant company entered into a hire-purchase agreement in March 1992 with another company to buy a heavy motor vehicle. The selling company, not being a registered finance institution, ceded all its rights, title and interest in the hire-purchase agreement, and its ownership of the vehicle, to the plaintiff, which was a registered finance institution. The defendant acknowledged the cession and the plaintiff's rights.

For the next three years, the defendant met its obligations under the agreement but defaulted on the final payment, which was a large one, over ten times the value of the regular monthly payments. Arrangements were made for the payment of the outstanding amount, but six months later the defendant had still paid less than half of it. The plaintiff sued for the outstanding balance plus interest. The defendant claimed that the price fixed in the hire-purchase agreement exceeded the maximum permitted by s 28 of the Hire-Purchase Act [C*hapter 14:09*], as read with the Hire-Purchase (Finance Charges) Notice 1992 (SI 64 of 1992). It claimed that it had in fact overpaid the plaintiff and filed a claim in reconvention for the amount of the alleged overpayment.

The parties submitted a stated case for determination, the question being whether the manner in which the plaintiff calculated the finance charges was lawful, in particular having regard to s 29(2) of the Act.

Section 28(1) of the Act provides that the Minister of Finance shall, by notice in a statutory instrument, fix the maximum amount by which the purchase price under a hire-purchase agreement may exceed the cash price. Where a hire-purchase agreement provides for a higher amount, the amount of each instalment must be reduced in accordance with the notice. The agreement otherwise remains valid and in effect.

Section 29 of the Act provides for exemptions. Subsection (2), which was introduced with effect from January 1995 by the General Laws Amendment Act 1994, provides that s 28(1) shall not apply to any hire-purchase agreement subsisting between 1 April 1990 and 20 January 1995. The General Laws Amendment Act also amended the definitions contained in the Hire-Purchase Act, so as to exclude from the definition of hire-purchase a ``financial lease''. It was argued for the plaintiff that although the agreement in this case did not conform with the law at the time it was entered into, the effect of s 29(2) was to validate it.

1998 (2) ZLR p318

SMITH J

The Hire-Purchase (Finance Charges) Notice 1992 (SI 64 of 1992), published on 21 February, replaced a previous notice, and introduced rates which differed, depending on whether or not the goods were sold by a registered finance institution. Goods sold by such an institution were subject to a higher rate. The rates were increased by further notices in September 1992 and September 1995. The latter notice applied the rate to goods sold by a specified finance institution or where the rights and obligations of the seller had been acquired by a specified

Copyright Juta & Co Ltd

finance institution.

Held, that the classification of goods for the purpose of fixing maximum purchase prices that was introduced in February 1992 was intended to fix a higher maximum for goods sold under a hire-purchase agreement where the sale was financed by a registered finance institution. Until September 1995, the higher rate would only have applied to sales directly financed by a finance institution, not to those transactions ceded to a finance institution.

Held, further, that the effect of introducing s 29(2) in January 1995 was that, in respect of hire-purchase agreements which subsisted during the specified period, any provision in a hire-purchase agreement which exceeded the rate specified by the Minister was not nullified, and the rate specified in the agreement would apply. The charges calculated by the plaintiff were therefore lawful.

Legislation referred to:

Hire-Purchase Act [*Chapter 14:09*], ss 3(1), 28 and 29(2)

Case Information

A P de Bourbon SC, for the plaintiff

S Hwacha, for the defendant

Judgment

SMITH J: This case has been brought for decision by way of a stated case. The facts of the case are as follows. The plaintiff (hereinafter referred to as ``Standard Chartered'') is a registered finance institution. The defendant (hereinafter referred to as ``Marongwe'') entered into a hire-purchase agreement on 27 March 1992 with a company, Hubert Davies and Company (Pvt) Ltd (hereinafter referred to as ``Hubert Davies''), for the purchase of an ERF mechanical horse. The total purchase price was $846 000, payable by way of a cash payment of $126 000 with the balance, together with finance charges of $664 453.41, being payable in 36 monthly instalments, 35 in the sum of $30 236 and the final one in the sum of $325 293.41. Hubert Davies is not a registered finance institution. On 27 March 1992, it ceded and assigned all its rights, title and interest in the hire-purchase agreement and ownership of the mechanical horse to Standard Chartered. Marongwe acknowledged the cession and Standard Chartered's rights under the agreement.

Marongwe met all its obligations in terms of the hire-purchase agreement until March 1995 when it failed to pay the final instalment of $325 293.41. By agreement between the parties, the contract between them was varied on two occasions so as to provide for the manner of payment of the balance owing by Marongwe. As at 30 September 1995, Marongwe remained indebted to Standard Chartered in the sum of $195 756.76, with interest

thereon in terms of the agreement at the rate of 41% *per annum*. Standard Chartered issued

Copyright Juta & Co Ltd

summons claiming this amount.

Marongwe claimed that the purchase price fixed in the hire-purchase agreement exceeded the maximum permitted by s 28 of the Hire-Purchase Act [*Chapter 14:09*] (hereinafter referred to as ``the Act'') as read with the Hire-Purchase (Finance Charges) Notice 1992 (SI 64 of 1992). It denied that it was liable to Standard Chartered for any further payments and averred that it had in fact overpaid what was due by an amount of $358 156.13. It therefore filed a claim in reconvention for that amount.

The parties have submitted a stated case for determination. The issue is as follows:

> ``Was the manner in which Standard Chartered calculated the finance charges in accordance with the law, in particular having regard to the provisions of s 29(2) of the Act?''

The Act, according to its long title, makes provision for the regulation of hire-purchase agreements and certain instalment sales. In s 3 of the Act, there are definitions which set out what contracts constitute hire-purchase agreements and what constitute instalment sale agreements; and then ``agreement'' is defined as meaning a hire- purchase agreement or an instalment sale agreement. The Act then, in Part II thereof, sets out general provisions relating to agreements. Part III thereof (ss 25 to 28) provides for certain financial controls. Section 25(1) sets out requirements for initial payments and periods for repayment. If an agreement does not comply with the provisions of subs (1) of s 25, the consequences are set out in subs (3) thereof. Section 28 of the Act provides for controls over the purchase price of goods, which is defined as the total sum payable by the purchaser under an agreement, including deposits or initial instalments. Subsection (1) of s 28 provides that the Minister of Finance shall, for all classes of agreements and goods, fix the maximum amount by which the purchase price under an agreement may exceed the cash price. He does so by notice in a statutory instrument. The Minister fixes the maximum amount by specifying the percentage rate *per annum* payable in relation to the balance of the cash price remaining unpaid before the due date of each instalment. Subsection (4) of s 28 provides as follows:

> ``(4) A provision in an agreement shall be of no effect in so far as it provides for the payment of a purchase price exceeding the cash price by more than the appropriate amount, fixed for the time being in terms of subsection (1), and the amount of each instalment payable under an agreement containing such a provision shall be decreased accordingly.''

Thus, where an agreement specifies a purchase price which exceeds the prescribed maximum, the consequence is that the provision shall be of no effect in so far as it provides for the excess, and the amount of each instalment must be decreased accordingly. The agreement continues to be of force and

effect, save that the purchase price and the amount of each instalment must be reduced so as to bring them into conformity with the prescribed maximum purchase price.

It should be noted that, unlike the other provisions of the Act, s 28 does not specify what a hire-purchase agreement should or should not provide for in relation to the purchase price.

Copyright Juta & Co Ltd

Subsection (1) thereof confers a power, and a duty, on the Minister of Finance to prescribe a maximum purchase price for all classes of agreement. Subsection (4) thereof then sets out the consequences if an agreement provides for a purchase price which exceeds the prescribed maximum. It would not be correct, in my opinion, to visit upon a hire-purchase agreement which fixes a purchase price that does exceed the prescribed maximum any penalty or consequence other than that provided for by the legislature in subs (4) of s 28.

Section 29 of the Act provides for exemptions. Subsection (1) empowers the Minister of Finance to order that any agreement or class of agreements entered into by a parastatal shall be exempted from any of the provisions of the Act. Subsection (2), which was inserted by s 11 of the General Laws Amendment Act 20 of 1994, provides as follows:

> ``For the purposes of calculating any amount owing under a financial lease or hire-purchase agreement which subsisted at any time between 1 April 1990 and 20 January 1995, subsection (4) of section *twenty-eight* shall be deemed not to have applied to such financial lease or hire-purchase agreement during that period.''

Mr *de Bourbon* conceded that the purchase price and the monthly instalments fixed in the agreement between Hubert Davies and Marongwe did not conform with the law that was in force when the agreement was concluded. However, he argued that the effect of s 29(2), and indeed the intention of the legislature when it enacted that provision, was to validate and render enforceable the manner in which Standard Chartered had calculated its finance charges. Mr *Hwacha*, on the other hand, argued that the effect of s 29(2) was either to suspend s 28(4) so that the Minister of Finance could fix new maximum rates retrospectively to cover the period from 1 April 1990 to 20 January 1995 (which he did not do) or else to provide that the rights of the parties, to a hire-purchase agreement insofar as they were consistent with the law, were to be governed by their agreement. If the latter is the proper interpretation, so he submitted, then the agreement between Standard Chartered and Marongwe provides that the rates allowed at law will be payable and the relevant rates are those prescribed in the Hire-Purchase (Finance Charges) Notice 1992.

During the period 1990 to 1995, four notices were issued by the Minister in terms of s 28(1) of the Act. At the beginning of 1990, the maximum purchase prices for goods sold under a hire-purchase agreement were as

prescribed in the Hire-Purchase (Finance Charges) (No. 2) Notice 1981 (SI 714 of 1981). The maximum rate was 20% for new goods and 23% for used goods. On 6 April 1990, the Hire-Purchase (Finance Charges) Notice 1990 (SI 58 of 1990) introduced new maximum charges with a different classification of goods. The new maximum rates were 16.5% for goods for use in a business and 18% for other goods for private use. Those maximum purchase prices remained in force until 21 February 1992 when new maximum purchase prices were prescribed in the Hire-Purchase (Finance Charges) Notice 1992 (SI 64 of 1992). The new maximum rates were 25% for goods other than goods sold under a lease agreement by one of the five specified finance institutions and 40% for goods sold under a lease agreement by one of the specified finance institutions. On 11 September 1992, the Hire- Purchase (Finance Charges) Notice 1992 (SI 277 of 1992) increased the maximum purchase price for goods sold under a hire-purchase

Copyright Juta & Co Ltd

agreement by one of the specified finance institutions by increasing the rate to 70%. Finally, on 1 September 1995 the Hire-Purchase (Finance Charges) Notice 1995 (SI 203 of 1995) prescribed new maximum purchase prices: it retained the rates of 25% and 70% but changed the classification of goods. The rate of 70% applied to goods where the agreement was for the sale or hire of goods by a specified finance institution or where the rights and obligations of the seller had been acquired, by cession, assignment or otherwise, by a specified finance institution.

It seems clear that the classification of goods for the purpose of fixing maximum purchase prices that was introduced on 21 February 1992 was intended to fix a higher maximum for goods sold under a hire-purchase agreement where the sale was financed by one of the registered finance houses. However, when one looks at s 2(b) of the Hire-Purchase (Finance Charges) Notice 1992, one sees that the class of goods is described as goods sold under an agreement by an institution specified in the Schedule to the notice. Since the institutions so specified are finance houses and not commercial firms, it is obvious that the great majority of hire-purchase sales financed by them would relate to goods sold by other persons, with the purchasers' rights being ceded to a finance house. Clearly, therefore, the higher maximum purchase prices would apply to only a small proportion of sales financed by one of the specified finance houses. That position pertained from 21 February 1992 until 1 September 1995 when the classification was amended so as to include goods sold under a hire-purchase agreement where the rights and obligations of the seller were ceded to a finance institution.

The General Laws Amendment Act 1994 was promulgated on 20 January 1995. Section 11 of that Act amended what is now s 29 of the Act by inserting the new subs (2) which I have referred to above. That subsection provides

that, for the purpose of calculating the amount owing under a hire-purchase agreement which subsisted between 1 April 1990 and 20 January 1995, subs (4) of s 28 shall be deemed not to have applied. The subsection does not amend or suspend any other provision of s 28 of the Act. Therefore it cannot have been the intention of the legislature to empower the Minister of Finance to fix new rates retrospectively to cover the period specified in the new subsection. Had that been the intention, then subs (1) of s 28 of the Act would have been amended so as to enable the Minister to issue notices with retrospective effect. Without such specific empowerment, the Minister would not be able to provide that the maximum rates he prescribed would operate retrospectively. The legislature did not give him the necessary authority. It merely suspended the effect of subs (4) of s 28 in so far as that subsection applied to hire-purchase agreements that subsisted at any time during the specified period. This meant that where such a hire-purchase agreement provided for the payment of a purchase price which exceeded the cash price by more than the appropriate rate specified by the Minister of Finance, the excess was not nullified by virtue of the provisions of s 28(4) of the Act. Thus the relevant hire-purchase agreements remain valid and enforceable despite the fact that they did not comply with the provisions of s 28(1) of the Act. If the intention of the legislature had been to empower the Minister to regulate the maximum purchase price with retrospective effect, that intention could

Copyright Juta & Co Ltd

not have been achieved by suspending the operation of s 28(4) of the Act. I say that because the suspension of s 28(4) would mean that whatever maximum purchase price was prescribed, the requirement that the purchase price, insofar as it exceeded the prescribed maximum, must be reduced would not apply.

I agree with the submission by Mr *Hwacha* that the rights of the parties are governed by the agreement they entered into. I do not agree, however, with his conclusion that the agreement must be read as meaning that the purchase price and instalments must be those fixed in accordance with the provisions of s 28(1) of the Act as read with the notice issued by the Minister that was in force when the agreement was entered into. The purchase price and instalments must be as specified in the agreement because, as provided by s 29(2) of the Act, the consequences specified in s 28(4) of the Act are not visited upon offending hire-purchase agreements that subsisted between 1 April 1990 and 20 January 1995. Section 28 of the Act does not interfere with the common law rights of parties to enter into agreements, save to the extent that the parties may not agree on a purchase price which exceeds the maximum rate prescribed by the Minister of Finance. If they agree on a purchase price which does not exceed the

prescribed maximum, s 28 does not affect the agreement. If they agree on a purchase price that does exceed the prescribed maximum, the agreement remains of force and effect save that the purchase price and monthly instalments must be reduced. In respect of hire-purchase agreements which subsisted in the period 1 April 1990 to 20 January 1995, even if new maximum purchase prices were fixed with retrospective effect, hire-purchase agreements could still provide for greater purchase prices with impunity because the consequences of exceeding the maximum purchase price were suspended.

Section 11 of the General Laws Amendment Act 1994 not only amended s 29 of the Act by inserting the new subs (2) but it also amended what is now s 3(1) thereof. The amendment to s 3(1) inserted a new definition of the term ``financial lease'' and also amended the definition of a ``hire-purchase agreement'' so as to exclude financial leases from the types of contracts specified in paragraphs (b) and (c) of the definition. The term ``financial lease'' was defined as follows:

> ```financial lease' means a written agreement for the letting and hiring of capital goods to be used by the purchaser for the purposes of his trade, where -
>
> (a) the seller is -
>
> (i) a commercial bank; or
>
> (ii) an accepting house; or
>
> (iii) a discount house; or
>
> (iv) a financial institution;

Copyright Juta & Co Ltd

registered or required to be registered under the Banking Act [*Chapter 24:01*]; or

(b) an institution referred to in paragraph (a) has acquired the rights and obligations of the seller by discounting the agreement."

The General Laws Amendment Act 1994 was promulgated on 20 January 1995. The effect of the amendments made by s 11 thereof were, in my opinion, as follows. With effect from 20 January 1995 financial leases ceased to be regarded as hire-purchase agreements. The intention clearly was that the controls provided for in the Act were not to apply in relation to financial leases. Therefore, when s 28(1) of the Act provides that the Minister shall fix the maximum purchase price for all classes of agreements, that does not include financial leases. Therefore the maximum purchase prices fixed by the Minister of Finance do not, with effect from 20 January 1995, apply to financial leases.

For the reasons set out above, therefore, my views on the legal position in relation to the maximum purchase price of goods sold under hire-purchase agreements are as follows. In the case of goods sold under a hire-purchase agreement or financial lease which subsisted at any time between 1 April 1990 and 20 January 1995, whatever purchase price was fixed in the agreement may be claimed by the seller because the provisions of s 28(4) are suspended. However, where the goods were sold under an instalment sale agreement entered into between 1 April 1990 and 20 January 1995, the

SMITH J

prescribed maximum purchase prices would be applicable. With effect from 20 January 1995, in the case of capital goods which are leased under a financial lease, the purchase price is as determined in the agreement because the Minister of Finance has no authority to prescribe the maximum purchase price for financial leases. With effect from 20 January 1995, the maximum purchase price for goods sold under a hire-purchase agreement or instalment sale agreement will be, if the agreement was entered into after 20 January 1995 and before 1 September 1995, the prices prescribed in the Hire-Purchase (Finance Charges) Notice 1992 and, if the agreement was entered into on or after 1 September 1995, the prices prescribed in the Hire-Purchase (Finance Charges) Notice 1995.

In this case, the agreement under which Standard Chartered is suing Marongwe was entered into on 27 March 1992. It therefore subsisted in the period 1 April 1990 to 20 January 1995. The finance charges being claimed by Standard Chartered are in accordance with the provisions of the said agreement, but they exceeded the maximum that was prescribed in the Hire-Purchase (Finance Charges) Notice 1992 which was in force on 27 March 1992.

To answer the stated case, it is declared that the finance charges calculated by the Bank are lawful, having regard to the provisions of s 29(2) of the Act.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Dube, Manikai & Hwacha, defendant's legal practitioners

Copyright Juta & Co Ltd

MURANDA *v* TODZANISO & ORS 1998 (2) ZLR 325 (HC)

Court **High Court, Bulawayo**

Sibanda J

Civil application

3 April & 2 October 1998Judgment No. HB-64-98

Flynote

Contract - cancellation - sale - of land - land sold to one person - before transfer to first buyer had taken place, land sold at a higher price to another - whether seller entitled to cancel first sale

Contract - conditional - sale of immovable property on condition that guarantee and bond obtained - no time limit specified - seller not entitled to repudiate contract where contract and bond obtained within a reasonable time

Headnote

The first respondent sold a piece of land to the applicant. It was a condition of the contract that the applicant had to get a guarantee from his employer and a first mortgage bond from a building society. While the applicant was making arrangements for these matters (which took 51 days to obtain), the first respondent found a buyer, the second respondent, who was prepared to pay a higher price for the property. The applicant sought an order under which he would be entitled to take transfer of the property and requiring the first respondent to transfer the property to him and to no-one else.

The application was opposed on the grounds that the first respondent had cancelled the contract.

He claimed that he was entitled to do so in terms of the contract. He also claimed that time was of the essence and that the applicant took too long to get the guarantee and bond.

Held, that in terms of the relevant clauses in the contract, if the first respondent wanted to cancel the contract he had to give notice to the applicant of his intention to do so.

Held, further, that there was no time limit stipulated in the contract and the time taken by the applicant to get the guarantee and bond was entirely reasonable.

Held, further, that where there has been a successive sale of property, and transfer has been passed to neither purchaser, the first purchaser can, in the absence of special circumstances affecting the balance of equities, interdict the seller from passing transfer to the second purchaser and obtain specific performance of the contract. The second purchaser's only remedy is for damages. There was nothing in this case to affect the balance of equities in favour of the second purchaser, and the application would be granted.

Cases cited:

Copyright Juta & Co Ltd

Barrowby Real Estate (Pvt) Ltd v *Olsen* 1980 ZLR 448 (A)

B P Southern Africa (Pvt) Ltd v *Desden Properties (Pvt) Ltd & Anor* 1964 RLR 7 (G)

Chansa v *Leeds & Anor* HH-33-88

Chingwaru v *Chirinda & Ors* HH-152-91

SIBANDA J

North Vaal Mineral Co Ltd v *Lovasz* 1961 (3) SA 604 (T)

Racec (Mooifontein) (Pty) Ltd v *Devonport Invstm Hldg Co (Pty) Ltd* 1976 (1) SA 299 (W)

Rautenbach v *Venner* 1928 TPD 26

Case Information

A Morris-Davies, for the applicant

S Nkiwane, for the first respondent

No appearance for the second and third respondents

Judgment

SIBANDA J: The applicant on 16 January 1998 filed an urgent *ex parte* chamber application in which he sought and obtained a provisional interdict and an order for specific performance against the first respondent. The first respondent, on being served with the application and provisional order filed his opposing papers challenging the confirmation of the provisional order.

On the return day, the first respondent was in default due to the operation of the automatic bar having been barred for his failure to comply with r 238 of the High Court Rules, that is to say, he failed to file his heads of argument within the time allowed by the rules.

After hearing submissions on the return day from Mr *Morris-Davies*, for the applicant, I confirmed the provisional order.

Mr *Nkiwane* for the first respondent, now seeks reasons for the confirmation of the provisional order and these are my reasons.

The facts in this case are common cause and are that, on 18 November 1997, the applicant and the first respondent entered into a written agreement of sale in terms of which the applicant purchased a certain piece of land, being Stand No. 8125 Famona, Bulawayo Township, also known as No. 7 Dunfermline Road, Famona, Bulawayo, from the first respondent for the sum of $450 000.

In terms of the agreement, the purchase price of $450 000 was payable in cash against transfer. It was also subject to a suspensive condition that the applicant had to obtain a guarantee from his employer, T A Holdings Ltd, for the full purchase price and a first mortgage

Copyright Juta & Co Ltd

bond loan from a registered building society.

The applicant has complied and satisfied the said conditions. He has been granted a loan for the full purchase price by Beverley Building Society (hereinafter referred to as the Society). The Society has, in accordance with normal practice, instructed Messrs Lazarus and Sarif to register the bond.

While the above arrangements were in progress, unknown and without prior notice to the applicant or formal repudiation of the agreement in terms of clauses 2 and 8 of the agreement, on 10 December 1997 the first respondent resold the same property, Stand No. 1825 Famona, Bulawayo Township, to the second respondent for the sum of $479 925, as evidenced by a receipt

SIBANDA J

issued by her legal practitioners, Messrs Nkiwane & Khuphe. Following the said resale, he instructed the above law firm to conduct the registration and transfer of the property to the second respondent. These facts are confirmed by Mr Bell, a partner in Brian Bell's Estate Agency (which was responsible for the sale of the property to the applicant), in his affidavit in support of the applicant. Yet, on the other hand, the first respondent has made no efforts to facilitate the transfer of the same property sold to the applicant on 18 November 1997. The applicant became concerned that a transfer to the second respondent would defeat his prior right to take transfer of the property. Should the second respondent take transfer of the same property, he would suffer irreparable harm, as such transfer would effectively prevent him from claiming an order for specific performance against the first respondent. He then instituted these proceedings and was granted a provisional interdict and an order for specific performance in the following terms:

1. That the applicant is entitled to take transfer of certain piece of land, being Stand 8125 Bulawayo Township situate in the District of Bulawayo in extent 1933 square metres.

2. That the first respondent shall, within thirty days of the date of service of this final order upon him, take all necessary steps to transfer to the applicant certain piece of land, being Stand 8125 Bulawayo Township situate in the District of Bulawayo in extent 1933 square metres.

3. That in the event of the first respondent failing to comply with the order in para 2 above, the Deputy Sheriff, Bulawayo, be and is hereby authorised to sign all necessary documents to effect transfer of the said property to the applicant.

4. That the first respondent shall pay the applicant's costs of suit.

5. That the first respondent is hereby interdicted and restrained from transferring certain piece of land being Stand 8125 Bulawayo Township situate in the District of Bulawayo in extent 1933 square metres to anyone other than the applicant.

6. That the third respondent shall not cause or allow certain piece of land being Stand 8125

Copyright Juta & Co Ltd

Bulawayo Township situate in the District of Bulawayo in extent 1933 square metres to be transferred to anyone other than the applicant.

The provisional interdict and order for specific performance was served upon all the respondents. The first respondent filed opposing papers, seeking the discharge of the order. To advance his case, the first respondent has raised in his defence a number of allegations, appropriately termed by Mr *Morris-Davies* ``red herrings''. None of the issues raised as defence addresses the primary issue, which is why the first respondent sought to renege from the contract. The purported defences tendered are in the main irrelevant.

SIBANDA J

He elected to delve into his own personal affairs and problems that have nothing to do with the applicant.

The first respondent alleges in his affidavit, *inter alia*, that the Small Enterprises Development Corporation (herein after referred to as SEDCO), ought to have been joined as a party to the proceedings because it is a bond holder over the property. SEDCO, as a bond holder over the property, is certainly not without a remedy. If it wants payment from the first respondent, then it must foreclose on the bond. I am in agreement with Mr *Morris-Davies* that SEDCO has no legal interest in the outcome of these proceedings. If it has, then that interest has not been shown. There was no need to secure SEDCO's prior consent in order to conclude the sale agreement. If the first respondent felt that such consent was required, then the onus was upon him and not the applicant to secure such consent.

The first respondent says he was under pressure from his creditors. That has nothing to do with this agreement. If it has, then it can only mean that he has himself to blame for not selling the property earlier than he did, rather than waiting until it was too late, if it was indeed too late.

He alleges that he validly cancelled the contract. He is, in my view, not entitled to repudiate or cancel the agreement until he has given due notice to the applicant in terms of clauses 2 and 8 of the contract of sale and no such notice was given. In any event, he can seek repudiation only on legally valid grounds and not on the grounds that he has been offered a better price.

There is no stipulation in the contract that the mortgage bond was to be secured by a particular date. Neither 10 nor 30 December 1997 is mentioned anywhere in the contract. He was, therefore, not entitled to cancel the agreement of sale unilaterally, without due notice to the applicant. It follows, in the circumstances, that the agreement remained valid and in force.

The allegation that he advised Mrs Bell about the cancellation is irrelevant. Even if he told her, there is no evidence that Mrs Bell was the applicant's agent. In fact, Mrs Bell's estate agency was the first respondent's agent which conducted the sale in the first place. He further alleges in his affidavit that ``time was of the essence''. Reference to the agreement of sale shows that there was no time limit stipulated for the fulfilment of the suspensive condition in respect of the mortgage bond. The agreement between the parties was concluded on 18 November 1997 and by 9 January 1998 applicant had fulfilled all the conditions. In my opinion, it could not be said

Copyright Juta & Co Ltd

that 51 days was not ``within a reasonable time''.

Indeed, it was well within the time I would expect a transaction of this nature to take. In fact, the first respondent resold the property within only 22 days of the signing of the agreement of sale with the applicant. On the papers before me, it is clear that the purported resale to the second respondent

SIBANDA J

was not motivated by the alleged delay but most certainly by greed: compare $450 000, the sale price to the applicant, as against $479 925, the resale price to the second respondent.

The parties are bound by the agreement of sale signed on 18 November 1997 and the first respondent is therefore hit by the *caveat subscriptor* rule. He could not just purport to cancel the agreement without giving the applicant due notice. The applicant is entitled to notice in terms of clauses 2 and 8 of the agreement. There is merit in Mr *Morris-Davies*' submission that clause 8, as read with clause 2 of the agreement of sale, constitutes a valid *lex commissoria* and the parties are strictly bound by its terms. See *Rautenbach* v *Venner* 1928 TPD 26; *Racec (Mooifontein) (Pty) Ltd* v *Devonport Investment Holding Co (Pty) Ltd* 1976 (1) SA 299 (W); and *North Vaal Mineral Co Ltd* v *Lovasz* 1961 (3) SA 604 (T).

In *Barrowby Real Estate (Pvt) Ltd* v *Olsen* 1980 ZLR 448 (A) at 453, a case whose facts are on all fours with the instant case, LEWIS JP stated:

> ``On the basis, however, that he [defendant] did knowingly sign the completed document Exhibit 2 and that this was a binding agreement, he thereby accepted the fact that this sale was subject to the suspensive condition that Mr Msengezi had to obtain a Government guarantee and building society bond. He therefore accepted Mr Msengezi as that type of purchaser. Nothing was said about any time limit within which these conditions should be fulfilled.
>
> In the circumstances, some delay was contemplated by the parties. The Government guarantee in principle was obtained in a matter of two weeks ie on 22 February 1979; but nevertheless about a week later, that is, at the end of February, or at the beginning of March, the defendant resold the property to someone else and thereby repudiated the sale. He made no attempt to put Mr Msengezi *in mora* by calling on him to provide a bond within a reasonable time. The law is that where, as in this case, the contract is silent as to when payment is to be made, and where, therefore, time is not stated to be of the essence, transfer and payment must occur *pari passu.* Even where a date is fixed for payment, but without the provision of *lex commissoria* entitling the seller to cancel if payment is not made by that date, the seller has to place the purchaser *in mora* after expiry of a reasonable notice given by him to the purchaser ... The position is an *a fortiori* one where no time is fixed for payment or for the giving of transfer. See *Nel* v *Cloete* 1972 (2) SA 150 (A), and the article dealing with this case in (1972) 89 *SALJ* at p 395.''

On these authorities, it is clear that the first respondent could not unilaterally and justifiably cancel the agreement as he alleges he did. The agreement between the parties in my opinion, is valid and the first respondent is bound and could not resale the property as he did.

This is a case involving a successive sale of the same property, in which ownership has neither been passed to the first purchasers, the applicant, nor the second purchaser, the second respondent. This, therefore, brings into forecast and consideration, the general principle of the law of contract, ie that of the sanctity of contracts. The inviolability of the said principle has

Copyright Juta & Co Ltd

come

before this court for consideration in respect of, *inter alia*, disputes arising from successive sales.

The issue of competing claims for specific performance made by successive purchasers of the same property came for adjudication in this court for the first time, before MACDONALD J (as he then was) in *B P Southern Africa (Pvt) Ltd* v *Desden Properties (Pvt) Ltd & Ors* 1964 RLR 7 (G).

The learned judge considered the views expressed on the subject by G A Mulligan in two articles in the *South African Law Journal*, ``Double Sales and Frustrated Options'' (1948) 65 *SALJ* 564; ``Double Sales'' (1953) 70 *SALJ* 299, which views are summed up at pp 575 and 577 of the author's first article and cited at p 10H of MACDONALD J's judgment. At 11G, the learned judge proceeded to emphatically reject those views.

He accepted the following statement of Professor McKerron as correctly stating the test to be applied, thus where A sells to B and then to C the rights of the parties are as follows:

> ``Where transfer has been passed to neither B (the first purchaser), in the absence of special circumstances affecting the balance of equities, can interdict A from passing transfer to C and obtain specific performance of the contract and in that event C's only remedy is an action for damages against A.'' *

However, the learned judge, after reviewing a number of authorities, proceeded to uphold the sanctity of contracts in the following incisive terms, at p 11E-F.

> ``It is the policy of the law to uphold, within reason, the sanctity of contracts. It follows that courts of law should, as far as possible, in matters of this kind, adopt an approach which will discourage sellers from entering into contracts the performance of which will necessarily involve a breach of an earlier contract, and by adopting such an approach reduce a potential cause of hardship. The concern of the courts should primarily be with the removal of the cause of these cases of hardship rather than with the results in a particular case.''

The learned judge continued at p 11H.

> ``In my view, the policy of the law to uphold the sanctity of contracts will, best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract. I do not suggest that this should be the invariable rule, but I agree with the view expressed by Professor McKerron that save in `special circumstances', the first purchaser is to be preferred.''

See *Chansa* v *Leeds & Anor* HH-33-88.

In *Chingwaru* v *Chirinda & Ors* HH-152-91, SMITH J applied the principle of the sanctity of contract and, having had regard to the priority and efficacy of the first contract, nonetheless held that there were in that case ``special circumstances'' that enabled him to prefer the second purchaser.

SIBANDA J

In the instant case, I am unable to find any ``special circumstances affecting the balance of

Copyright Juta & Co Ltd

equities'', thus enabling me to prefer the second purchaser. Therefore it follows that, in the absence of such ``special circumstances'', the maxim *qui prior est tempore potior est jure*, that is, ``he who is earlier in time is stronger in right'', must be applied and the first purchaser is therefore to be preferred.

On the return day, the matter proceeded as unopposed.

This was because the first respondent had been automatically barred for failure to file his heads of argument within the time allowed by the rules.

Order 32 r 238 of the High Court Rules provides, *inter alia*, that:

> ``(1a) An application, exception or application to strike out to which subrule (1) applies shall not be set down for hearing at the instance of the applicant or excipient, as the case may be, unless -
>
> (a) his legal practitioner has filed with the Registrar in accordance with subrule (1) -
>
> (i) heads of argument; and
>
> (ii) proof that a copy of the heads of argument has been delivered to every other party ...
>
> (2a) Heads of argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after the heads of argument of the applicant or excipient, as the case may be, were delivered to the respondent in terms of subrule (1):
>
> Provided that:
>
> (i) ...
>
> (ii) the respondent's heads of argument shall be filed at least five days before the hearing.''

Subrule (2b) as amended provides that:

> ``Where heads of argument that are required to be filed in terms of subrule (2) are not filed within the period specified in subrule (2a), the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll.''

The applicant's heads of argument were filed and served upon the first respondent on 2 March 1998.

The first respondent failed or ignored or neglected to file his heads of argument within ten days allowed by the Rules. On 19 March 1998, the applicant set down the matters for hearing on 27 March 1998 under rules returnable and served the first respondent with notice of set down. Despite receipt of notice of set down, the first respondent just ignored the matter.

It was not until 25 March 1998 that the applicant received a letter from the first respondent's legal practitioners, Mr *Nkiwane*, informing the applicant's legal practitioner, Mr *Morris-Davies*, that he would be filing his heads of argument the next day. The heads were filed on 26 March 1998, less than 24 hours before the date of hearing. Mr *Nkiwane* conceded that the first

SIBANDA J

Copyright Juta & Co Ltd

respondent was barred and that he would at the hearing be applying for the removal of the bar. It will be noted that the first respondent, in filing his heads of argument, failed even to comply with and was also out of time in respect of the 5 days indulgence period provided by the Rules.

On 27 March 1998, the matter was postponed, due to the unavailability of counsel for the applicant, with a request that it be set down for 3 April 1998 now under opposed applications. The first respondent was again served with the notice of set down.

In terms of r 84(1), the first respondent is afforded an opportunity to seek the removal of the bar. Subrule (1) provides that:

> ``A party who has been barred may -
>
> (a) make a court application to remove the bar; or
>
> (b) make an oral application at the hearing if any, of the action or suit concerned;
>
> and the judge or court may allow the application on such terms as the costs and otherwise as he or it, as the case may be, thinks fit.''

By 3 April 1998, the date of the hearing, the first respondent had not made a court application for the removal of the bar in terms of r 84(1)(a). The expectation was that an oral application would then be made in court on the date of hearing. Counsel for the first respondent did not appear in court. He sent his junior, a Mr Hikwa, to come and seek postponement. The effect of a bar is clearly set out, under r 83. It provides that:

> ``Whilst a bar is in operation -
>
> (a) the registrar shall not accept for filing any pleadings or other documents from the party barred; and
>
> (b) the party barred shall not be permitted to appear personally or by his legal practitioner in any subsequent proceedings in the action or suit;
>
> except for the purpose of applying for the removal of the bar.''

I am aware that the Assistant Registrar did not enforce subrule (a) because the first respondent's heads of argument were accepted and filed on 26 March 1998. This was most irregular.

As already indicated, Mr Hikwa appeared and sought to apply for a postponement. In terms of r 83(b), the first respondent or his legal practitioner had no right of audience to address the court to seek a postponement, except only in pursuance of an application for the removal of the bar. Therefore, Mr Hikwa could not, and I did not permit him to, address the court to seek such a postponement because in terms of r 83(b) he had no right to appear to make submissions for the purpose.

When the provisions of r 83 were brought to Mr Hikwa's attention, he indicated that he knew nothing about the merits of the matter, as he had only been instructed to come to court, ``about two hours ago to come and apply for a postponement'', he said. He was not in a position to address the court on the issue of the removal of the bar. I then drew his attention to the provisions of

Copyright Juta & Co Ltd

SIBANDA J

r 83(b), pointing out to him that in terms of that subrule he could not address the court seeking a postponement but only for the removal of the bar.

That in my view, was the end of the first respondent's efforts. The matter then proceeded as unopposed. In any event, even if the first respondent had been in attendance or represented I would not have been persuaded to come to a different conclusion. On the merits, the first respondent is in breach of the agreement and he deliberately sought to do so.

It is clear on the papers that the first respondent, after concluding the agreement of sale with the applicant, found the second respondent who was prepared to offer him, for the same property, $479 925, a purchase price in excess of that offered by the applicant by $29 925 which constitute irrefutable evidence of greed. To justify his breach of contract, the first respondent has raised a number of what clearly amounts to his own personal problems, problems which have nothing to do with the applicant and indeed the agreement of sale. The alleged cancellation of the agreement between applicant and the first respondent is without legal justification and the first respondent is bound.

I would therefore for the foregoing reasons confirm the provisional order.

Morris-Davies & Co, applicant's legal practitioners

Nkiwane & Khupe, first respondent's legal practitioners

NDLOVU *v* POSTS & TELECOMMUNICATIONS CORPORATION 1998 (2) ZLR 334 (HC)

Court **High Court, Bulawayo**

Malaba J

Special plea

24 July & 2 October 1998Judgment No. HB-71-98

Flynote

Prescription - interruption - acknowledgement of liability - clerk in debtor's employment passing creditor's account for payment - not an acknowledgement to creditor of liability - institution of criminal proceedings against creditor at instance of debtor - prescription not thereby interrupted - waiver - when waiver of debtor's right to rely on prescription may be construed

Headnote

The plaintiff, an architect, had performed professional work for the defendant corporation in 1992 and presented a fee note in November of that year. On receipt of the fee note, an officer in the corporation's buildings and estates department recorded that the claim was ``certified correct for payment'' and sent it to the budget officer for payment. Payment was not made,

Copyright Juta & Co Ltd

however, because the corporation preferred criminal charges against the plaintiff, alleging that he had committed fraud against it in the performance of the work.

In January 1995, the plaintiff was tried on the charges and acquitted. On 26 February 1995, he wrote to the corporation, demanding payment. Unaware of the acquittal, the corporation replied that the matter was still with the courts and that it would communicate with him later. He took no further action until June 1997, when he issued summons. The corporation pleaded prescription.

Held, that the prescription period applicable to this debt was three years from the date the work was complete, 15 November 1992.

Held, further, that although prescription may be interrupted by an acknowledgement of debt, any such acknowledgement must be made to the creditor or his agent. The comments and instructions made on the fee note by a PTC employee, addressed to another employee, were not intended to be communicated to any other person and did not constitute an acknowledgement of liability.

Held, further, that the initiation of criminal proceedings by the corporation did not interrupt the running of prescription. Criminal proceedings are brought by the Attorney-General and the process by which he does so is not process issued and served on a debtor by a creditor. The plaintiff was not prevented from enforcing his right of action.

Held, further, that the letter written by the corporation to the plaintiff did not amount to a waiver of its right to rely on prescription. Whether waiver has occurred is a question of fact, but it is not to be lightly assumed. The letter was written before the right to rely on prescription had accrued and the corporation could not be held to have waived rights that it did not yet have. Prescription was not being considered by either party at that stage.

1998 (2) ZLR p335

MALABA J

Special plea upheld.

Legislation considered:

Prescription Act [C*hapter 8:11*], ss 16(1), 17(1) and 19(2)

Cases cited:

Benson & Anor v *Walters & Ors* 1981 (4) SA 42 (C)

Benson & Anor v *Walters & Ors* 1984 (1) SA 73 (A)

Coburn v *Colledge* [1897] QB 702

Deloitte Haskins & Sells Consultants (Pty) Ltd v *Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A)

Escom v *Stewarts & Lloyds SA (Pty) Ltd* 1979 (4) SA 905 (W)

Copyright Juta & Co Ltd

Markham v *SA Finance & Industrial Co Ltd* 1962 (3) SA 669 (A)

Patel v *Controller of C & E* 1982 (2) ZLR 82 (H)

Severn & Wye & Severn Bridge Rly Co [1896] 1 Ch 559

Case Information

T Cherry, for the plaintiff

A Moyo, for the defendant

Judgment

MALABA J: On 24 June 1997, the plaintiff (Mr Ndlovu) served on the defendant (the PTC) summons in which he made a claim on it for the payment of a sum of $140 000 in respect of professional services rendered by him to the defendant in and during the month of November 1992 and which amount notwithstanding demand defendant refused to pay. Interest on the capital sum at the prescribed rate *a tempore morae* and costs of suit were also claimed in the summons.

The declaration, amplified by further particulars, sets out the cause of action in the following terms. The parties entered into a verbal contract on 29 October 1992 in terms of which the plaintiff agreed to prepare plans and working drawings of an extension the defendant intended to add to its store in Bulawayo. The plaintiff completed the work in terms of the agreement sometime ``in mid-November 1992'' and presented the defendant with a fee note demanding payment of the sum of $140 000 on 23 November 1992.

The defendant refused to pay the amount claimed, alleging that Mr Ndlovu had committed fraud against it in the performance of the contract. The allegations of fraud were reported to the police who after some investigations arrested Mr Ndlovu and charged him with fraud. He was placed on remand on bail but on 13 January 1995, was acquitted of fraud charges by a regional magistrates court in Harare.

On 26 February 1995, Mr Ndlovu wrote a letter to the defendant demanding payment of the debt. The defendant, unaware that the criminal proceedings had come to an end on 13 January 1995, replied on 9 February 1995 in these terms:

> ``We acknowledge receipt of your letter dated 26 January 1995. The above matter is still with the courts and we await the outcome. We will advise the position in due course.''

MALABA J

Mr Ndlovu took no action on the matter until 6 June 1997 when he had summons issued claiming the payment of the amount of $140 000 from the PTC. After a request for further particulars had been replied to by Mr Ndlovu, the PTC filed a special plea of prescription, based on the following allegations:

Copyright Juta & Co Ltd

``(a) that the plaintiff presented his invoice for payment by the defendant on 23 November 1992.

(b) that summons in this matter was issued on the 6th of June 1997 and served on the defendant during the month of June 1997 and after the expiry of three years.

(c) that by virtue of the provisions of ss 14 and 15 of the Prescription Act [*Chapter 8:11*] plaintiff's claim is prescribed.''

It is not in dispute that the period of prescription applicable to the debt is three years. Section 16(1) of the Prescription Act (the Act) provides that that period would have started to run against Mr Ndlovu's claim as soon as the debt became due. The authorities show that a debt is due when it is ``owing and already payable'' (*Escom* v *Stewarts & Lloyds SA (Pty) Ltd* 1979(4) SA 905 (W) at 908E) or ``immediately claimable'' (*Deloitte Haskins & Sells Consultants (Pty) Ltd* v *Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532 (H) or ``immediately exigible at the will of the creditor'' (*Benson & Anor* v *Walters & Ors* 1984 (1) SA 73 (A) at 82H).

Although in its plea, the defendant alleges that the debt became due on 23 November 1992 when the fee note demanding the payment of the debt was presented to it, it is clear that the debt became due when Mr Ndlovu completed the work in terms of the verbal agreement on 15 November 1992. In *Coburn* v *Colledge* [1897] QB 702 LORD ESHER MR at p 705 said:

> ``In the case of a person ... who does work for another person at his request on the terms that he is to be paid for it unless there is some special terms of the agreement to the contrary, his right of payment arises as soon as the work is done and there upon he can at once bring his action.''

See also *Benson & Anor* v *Walters & Ors* 1981 (4) SA 42 (C) at 48F-G.

Prescription started to run and continued running against Mr Ndlovu but in favour of the PTC until the completion of three years on 15 November 1995, unless it is shown by Mr Ndlovu that he interrupted it by serving process on the PTC whereby he claimed payment of the debt or that the PTC expressly or tacitly acknowledged liability for the debt before the period of prescription lapsed: *Markham* v *South African Finance & Industrial Co Ltd* 1962 (3) SA 669 (A).

The papers show that on receipt of the fee note from Mr Ndlovu on 24 November 1992 an officer in the ``buildings and estates'' department of the PTC recorded in the document that the claim was ``certified correct for payment'' and that payment was ``approved''. He then addressed the documents with the above mentioned comments to the ``budget officer'' with an instruction recorded in the document:

MALABA J

> ``Please effect payment as soon as possible.''

I am not convinced that the entries made in the document constitute an acknowledgement of liability by PTC which interrupted the running of prescription. For the entry to constitute an acknowledgement of liability with the legal effect of interrupting the running of prescription, it must contain an admission by the debtor of the fact that the debt exists and that he is liable for its payment. The admission of the fact of the existence of the debt and liability therefore must

Copyright Juta & Co Ltd

be made to the creditor or his agent.

The comments and instructions recorded in the fee note were addressed to another employee of the PTC. It appears the notes in the document were not intended to be communicated to any person yet other than employees of the PTC. The defendant made allegations of fraud against Mr Ndlovu before he had notice of the comments and instructions made in the fee note.

In *Markham*'s case *supra* it was held that for the manner of acknowledgement of liability to interrupt the running of prescription it:

> ``must be an admission of present liability (see *Petzer* v *Radford (Pty) Ltd* 1953 (4) SA 314 (N) at p 318) and ... must be such that the admission is made to the creditor or his agent.''

The reason for the requirement that the acknowledgment of liability has to be made to the creditor is that the creditor is the person interested in knowing that the debtor has foregone the advantages of the running of prescriptions.

In that case, an item ``unsecured creditors, sundry £961 4s 2d'' was recorded in a balance sheet. The appellant claimed that the respondent had, by making the entry in the balance sheet, acknowledged liability for £961 4s 2d in which was included fees owing to him and thus interrupted the running of prescription against his claim. There was no evidence before the trial court that the shareholders at the meeting where the balance sheet was considered or the majority whereof knew who these sundry creditors were or what the amount was that was owed to each creditor.

RUMPFF JA said at pp 676-677:

> ``Once extinctive prescription has begun to run the debtor has acquired an advantageous position under the Act. That position is destroyed if the creditor performs an act of interruption or if the debtor himself makes an acknowledgment in terms of the Act. It seems to me that here too, if the debtor declines to retain this position the section intends his declinature to be directed to the creditor who is the person legally interested in his position. Having come to the conclusion that in terms of s 6(1)(a) [our s 18(1)] the acknowledgment by the debtor must be made to the creditor (or his agent) it is necessary to consider whether or not on the facts of this case there was an acknowledgment to the creditor.''

The learned JUDGE OF APPEAL concluded that the general admission of the amount of £961 4s 2d owed to sundry creditors and not made to the appellant in a specific amount could not be said to be an act done as between debtor and creditor so as to be an acknowledgment of liability for purposes of interrupting prescription.

MALABA J

In Re *Severn & Wye & Severn Bridge Railway Co* [1896] 1 Ch 559 it was held that an entry in a debtor's books of account of a liability to a creditor without notice being given to the creditor is not an acknowledgement of liability preventing prescription running in his favour. A finding that the endorsements on the fee note by the defendant's employee constituted an acknowledgment of liability would in any case only render the date when the debt became due to be 24 November 1992 without promoting Mr *Ndlovu*'s case.

Copyright Juta & Co Ltd

Mr *Cherry* wisely did not pursue the argument that the institution of criminal proceedings against Mr Ndlovu interrupted the running of prescription. Process by which criminal proceedings are instituted is issued by the Attorney-General on behalf of the State and calls upon the addressee to answer criminal charges. It is not process issued and served on a debtor by a creditor whereby the latter claims payment of a debt. (See s 19(2) of the Act).

The criminal proceedings did not have the legal effect of delaying the completion of the period of prescription (s 17(1)(g)). The Criminal Procedure and Evidence Act [*Chapter 9:07*], which is the law under which the criminal proceedings were instituted and conducted, does not have a provision to the effect that a person is prohibited from bringing action to the civil court claiming payment of a debt until the criminal proceedings are terminated. The failure by Mr Ndlovu to issue and serve process on the PTC to interrupt the running of prescription was not a result of a prohibition from performance of that act imposed on him by a superior force. Mr Ndlovu had a good cause of action which he could, if he was so disposed, enforce within the period of prescription without breaking any law. The failure to exercise the right that he had was due to lack of vigilance or negligence on his part.

The strongest point advanced by Mr *Cherry* on behalf of Mr Ndlovu was that, in its letter of 9 February 1995, the PTC waived its right to rely on extinctive prescription. It is common cause that extinctive prescription is an advantage made by law solely for the benefit and protection of a debtor. A debtor has a right to waive and to agree to waive the advantage. Whether or not a debtor has exercised that right in a particular case is a question of fact to be proved by the party alleging waiver. Waiver of a benefit granted by operation of law is not to be lightly assumed.

In *Patel* v *Controller of Customs & Excise* 1982 (2) ZLR 82 (H), GUBBAY J (as he then was) said at p 88D-G:

> ``The principles which govern the determination of the question of whether the defendant waived the benefit of the statutory rights conferred upon him in the letter of 30 July 1981, were enunciated by INNES CJ in *Laws* v *Rutherfurd* 1924 AD 261 at 263:
>
> > `The onus is strictly on the appellant. He must show that the respondent with full

MALABA J

> > knowledge of her right decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact depending on the circumstances. It is always difficult to establish.'
>
> ... Thus in order to succeed in establishing a waiver by the defendant, the plaintiff must prove knowledge by the defendant of his rights under s 178 of the Act and a deliberate surrender of those rights, whether expressly or by conduct plainly inconsistent with an intention to persevere with their exercise. No stronger proof than a preponderance of probability is required. See *Alberts* v *Bryson* 1976 (2) RLR 193 (A); 1977 (1) SA 857 (RA) at 859F; but a court does not lightly assume that a party has abandoned or renounced his right. See *Bay Loan Invstm (Pty) Ltd* v *Bay View (Pty) Ltd* 1971 (4) SA 538 (C) at 540E-G.''

The timing of the letter of 9 February 1995 is crucial in the determination of the question of unilateral waiver of its rights by the PTC. In *Patel*'s case *supra*, the letter of 30 July 1981, on which waiver was claimed, was written by the respondent after the expiry of the period of

Copyright Juta & Co Ltd

prescription. The right to rely on prescription had in fact accrued to the respondent.

When the letter of 9 February 1995 was written by the PTC in this case the period of prescription was not complete. There were still more than eight months over which prescription was to run. The right to rely on prescription had not accrued to the PTC. It could not unilaterally waive rights that it did not have. The PTC could not have known, in the absence of a declaration, to that effect that Mr Ndlovu would not bring action to enforce his claim before the lapse of the period of prescription.

The remaining question is therefore whether the letter of 9 February 1995 can be construed as representing an agreement to waive the benefit of prescription when the period had run its full length. Mr Ndlovu did not in fact allege that the letter of 9 February 1995 represents an agreement in terms of which the PTC agreed not to raise prescription against Mr Ndlovu's claim.

The letter does not make any reference to the running of prescription. It was not a response to a request by Mr Ndlovu not to rely on the protection of prescription when the period completed. There cannot be a waiver of something which was not being considered by the parties. The running of prescription was not in the contemplation of the parties at the time the letter of 9 February 1995 was written. Mr Ndlovu had not in the letter of 26 February 1995 threatened to bring action before the lapse of the period of prescription. The letter does not therefore say Mr Ndlovu should hold fire in consideration for waiver of the right to rely on prescription. All it does is to postpone the decision whether or not to pay the debt until the outcome of the criminal case.

Even if the letter of 9 February 1995 constituted an agreement of waiver, it would be a *pactum nudum* (naked agreement). The PTC did not know at the time it wrote the letter that the criminal proceedings had in fact come to an end on 13 January 1995. The condition precedent for the waiver would never have materialised.

MALABA J

The parties would in fact not have been *ad idem* by reason of the mistake of fact under which one of them laboured.

In the result, the special plea is upheld. The plaintiff's action is dismissed with costs.

Ben Baron & Partners, plaintiff's legal practitioners

Coghlan Welsh & Guest, defendant's legal practitioners

S *v* MAVHARAMU 1998 (2) ZLR 341 (HC)

Court **High Court, Harare**

Gillespie J

Copyright Juta & Co Ltd

Criminal review

7 October 1998 Judgment No. HH-168-98

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to fair trial within a reasonable period of time - accused being convicted of rape eleven years after the offence was committed and the accused originally arrested - subsequent delays attributable to the State - High Court's power to protect constitutional rights - appropriate remedy - if trial has not yet taken place, a stay of proceedings - if trial has taken place, setting aside of proceedings - delays - extent to which unrepresented and unsophisticated accused can be expected to assert right to early trial - prejudice - nature of prejudice to be considered in assessing delay - whether prejudice to the defence a sine qua non *to relief*

Criminal procedure - trial - unrepresented accused - court's duty to assist - duty to ensure trial takes place within reasonable period of time

Criminal procedure - trial - delays - magistrate's duty to query requests for remand

Headnote

Eleven years after the crime was committed, the accused was convicted of rape and sentenced to a term of imprisonment which would normally have been appropriate. At the time of the offence in November 1986, the accused was 18 years old, and single. By the time he was convicted in November 1997, he was a married man with a young family. He had been arrested shortly after the crime was committed, but a trial date was not set until nearly 18 months after the offence. By this time, the accused was at liberty. An attempt was made to secure his appearance by service of a summons, but by then he had left his rural home and gone to work in Mutare. He was re-arrested in September 1989, nearly two years after the crime was committed, and placed on remand at the periodical court at Nyazura until January 1990. A trial date was set for June 1990 but for reasons which were not clear matters fell into abeyance. No further action was taken. The accused again went to seek work in Harare.

In October 1996, the police happened to find the accused. He was arrested. The witnesses were found. This process took nearly a year. The trial was finally concluded in November 1997. The matter was only sent for review in June 1998. The Attorney-General argued that

although the delay was lengthy it was justifiable. He attributed the bulk of the delay to the fault of the accused.

Held, that the initial delay of a year to complete investigations was not acceptable. The delay of 18 months waiting for trial date was also avoidable. The accused could not be criticised for the lengthy delay before his final re-arrest. He was not a fugitive from justice. His absence followed action, or inaction, which placed him at liberty, without any duty to report or present himself to any person or court. He was under no constraint and could not be held responsible for the delays.

Held, further that although the accused failed to assert his rights to a speedy trial, this did not exclude from consideration the manifest delays which occurred. The accused was a person with

Copyright Juta & Co Ltd

no recourse to legal representation. His only knowledge of the law must have been that it is, to all intents and purposes, overwhelming in its might and intractable in its exigencies. His failure to take assiduous steps to enforce his freedom could not be held against him. He could only look to the presiding magistrate for an explanation of his rights or an investigation of the apparent breach of those rights.

Held, further, that actual prejudice, in the sense of inhibition in the conduct of the defence case, is not the only criterion. Just as the constitutional protection should not be withheld where the delay is not excessive but prejudice is caused, so too, where there is unconscionable delay, relief should not be denied on the grounds that a procedurally fair hearing eventually took place. Prejudice to the conduct of the defence is the weightiest species of prejudice, but is not a *sine qua non*. The constitutional requirement is also that the hearing should take place within a reasonable time.

Held, further, that the High Court has jurisdiction to entertain applications for constitutional protection and give the appropriate remedy. The remedy which is applied must be a broad based one, within the discretion of the court, and tailored to meet the actual breach which is proven. Once a breach has been established, no order expediting a hearing can remedy that breach, for to press on to trial would be to deprive the person of his protection. If the trial is not complete, the minimum remedy will be a stay of proceedings. Where a proven breach only receives judicial attention after the conclusion of proceedings, the question arises whether the conviction and sentence should be allowed to stand.

Held, further, that although rape is an offence for which the public demands more severe and exemplary treatment of offenders, the doing of justice requires striking a balance between competing rights. Full weight should be given to the serious harm done to the accused. To preserve the conviction, but set aside the sentence, would be to grace the proceedings with undue legitimacy. Consequently, the conviction should be quashed.

Legislation considered:

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

Cases cited:

Banana v *A-G* 1998 (1) ZLR 309 (S)

Barker v *Wingo* 407 US 514 (1972)

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

Mlambo In re 1991 2) ZLR 339 (S)

S v *Banga* 1995 (2) ZLR 297 (S)

S v *Chakwinya* 1997 (1) ZLR 109 (H)

R v *Rahey* (1988) 33 CRR 275

S v *Ruzario* 1990 (1) ZLR 359 (S)

Copyright Juta & Co Ltd

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

Smyth v *Ushewokunze & Anor* 1997 (2) ZLR 544 (S)

GILLESPIE J

Judgment

GILLESPIE J: The accused was on 24 November 1997 convicted of rape. The offence had been committed on 8 November 1986. There had been no inquiry by the regional magistrate presiding (or at least there was none reflected on the record) into the cause of the delay. The sentence imposed was 5 years' imprisonment, of which 2 years were suspended on conditions of good behaviour. On the evidence, the conviction appeared to be justified. Because of the lengthy delay, however, I was moved to inquire into the reasons for the delay and whether for that reason alone the conviction should be regarded as improper or the sentence excessive.

I have received a most helpful minute from a law officer in the Attorney-General's office. This contains a detailed explanation for the delay. It appears that the accused was arrested shortly after the commission of the offence and held on remand, certainly until February 1987. Thereafter, unfortunately, records were lost and it cannot be said whether the accused was on remand and, if so, whether or not out of custody. Subsequent events, however, suggest that he had been placed at liberty. Whatever the case, investigations were completed by 11 September 1987 and by 6 October 1987 the Attorney-General had ordered the prosecution of the accused. This almost one year after the offence.

After the direction to proceed with the trial had been given, another year and a half passed before a trial date was set. The date allocated was 10 April 1989. The reason given for this delay is that the accused was arraigned in the Mutare Regional Court, which was operating as a circuit court and experiencing delays of two to three years in setting down trials. An attempt was made to secure the attendance of the accused by the service of summons (the factor which suggests that a further remand had at some stage been refused) but he could not be located. Inquiries revealed that he had left his rural home for Mutare to seek employment and had given no contact address. The trial, therefore did not commence and no further date was allocated before the apprehension of the accused.

This occurred on 6 September 1989. Having been arrested, the accused was placed on remand at Nyazura periodical court from that date until 9 January 1990. A trial date was set for 11 June 1990 but, in the words of the law officer who has provided the explanation,

> ``by then the accused had ceased being remanded. One can only assume the matter fell out of circulation when the record was sent to Mutare for the 9 January 1990 remand."

This seems to me to mean that, for one reason or other, a magistrate failed to hold a court at the periodical venue on the day to which the accused had been remanded. 1(72) On a presumed appearance on that day the accused would

Copyright Juta & Co Ltd

therefore have been subjected to no further order. It transpires that once again the accused had left his country home in order to seek work in Harare. The accused is said to have been ``carded'' on 11 September 1990. 2(73)

Many years later, on 6 October 1996, the police stumbled across the accused. They arrested him. They then set about finding all the witnesses. This took them almost another year. Finally, the trial was set down for 1 September 1997. It concluded, as I have said, in November that year. That, regrettably, was not the last of the delays. The matter was only placed before me on review in June 1998. My minute to the Attorney-General requesting an explanation, and dated 15 July 1998, was only answered on 9 September 1998.

In the face of all this, the Attorney-General has submitted, to quote the law officer again, that:

> ``the period of delay is 11 years approximately. It is exceeding, [*sic*], but justifiable under the circumstances:
>
> - approximately 1 year was taken up by investigations.
> - 11/2 years was due to back log and systemic delays at court.
> - Approximately 71/2 years' delay was due to the accused's own fault. He deliberately made himself unavailable for trial.
> - Approximately 11 months was due to the need to locate witnesses. This was reasonable under the circumstances considering that the offence had occurred in 1986.
>
> The overall delay caused by the State is approximately 31/2 years. This delay has been properly explained.''

Citing various authorities, it was submitted that the delay was excusable and afforded no ground for complaint at the accused's instance in that he had caused the bulk of it. I am unable to accept this submission.

I have difficulty with the first rung of the argument, that the delay of a year in completing the docket was acceptable. The accused was located and arrested and all the witnesses to hand within days of the offence. I have yet to have it explained to me how, in circumstances such as that, a policeman can expect to be permitted a year to finalise investigations. I am gratified to infer that the same sentiment must have commended itself to an unknown magistrate who, apparently, refused to remand the accused further after a certain date. That attitude was entirely in accordance with what I was to write some ten years later:

> ``I would venture to suggest that the scrupulous magistrate would in all cases be questioning the State very closely indeed on any application for further remand made after delays approaching a year.'' 3(74)

That delay, even if it may not have been sufficient to justify any relief under the constitutional right to a trial within a reasonable time, nevertheless justified the refusal of further remands in custody.

The second source of delay, the eighteen months awaiting a trial date in the regional circuit

Copyright Juta & Co Ltd

court, is also one which I cannot regard with any complaisance at all. I have serious reservations concerning State counsel's suggestion that delays of two to three years in those circumstances were acceptable. I am not prepared to accept that that sort of delay is unavoidable. Again, since the accused had been placed at liberty it might be that had he appeared for trial on the first date given he would not have been entitled to claim any stay of proceedings, but an argument to that effect would have been by no means completely without merit.

The State's contention that the delay is excusable, however, rests in the main on the proposition that the next delay of over 7 years is not to be taken into account since it was caused by the accused's own wrongdoing in deliberately making himself unavailable for trial. This submission I reject. It is, of course, true that a person cannot claim relief in terms of the constitutional protection if he has been responsible for the delays which are the basis of his claim, or has failed to do what can properly be expected of him to assert his rights in the face of that failure. I am not satisfied, however, that it can be said that the accused can properly be criticised under either of these heads.

As to whether he has acted wrongfully in ``deliberately making himself unavailable for trial'', I say this of the accused. It is nowhere suggested that he was at any time a fugitive from justice. There is no reason to suppose that he failed to appear on a date to which he was remanded or in accordance with any summons. No basis exists for holding him to have been in contempt of any court process or in default of any court proceedings. His two absences seem to have followed action or inaction that placed him at liberty. In the first instance, it seems that a court refused to remand him further. In the second, it seems that his case stopped being called in court or even that a court failed to convene on the last date to which he was remanded.

In those circumstances, he was under no constraint whatsoever. He had apparently complied with all that had been required of him and in the absence of any further order he was free to come and go as he pleased. It was his privilege to attempt to further his career by seeking employment in a city. He had no duty to report or to present himself to any person or court. In these circumstances, he cannot be held responsible for the delays that were occasioned. Those delays were the fault of the State, which had held him on remand for a period longer than a magistrate would tolerate and then failed to place, or to retain, him under constraint thereafter.

The period when he was at large is no more a delay attributable to him than

GILLESPIE J

is a period following the alleged commission of an offence and the time when an accused is charged, or is the period after withdrawal of a charge before plea. These periods, as is settled by precedent, are regarded as part of the delay to be taken into account. 4(75)

In my judgment, therefore, the delay attributable to the State in this matter is over 10 years before trial commenced and 11 years before conviction and sentence were passed. In considering whether this affords an accused person a claim for relief in terms of the constitutional right to a trial within a reasonable time, 5(76) I apply the principles enunciated in

Copyright Juta & Co Ltd

Mlambo's case. 6(77) The four factors which in their interplay are held to contribute to a decision as to whether or not the right to a timeous trial has been infringed are the length of the delay; the reason given for it; the affected person's attempts to assert his rights; and prejudice to that person.

It ought to be emphasised that these considerations are not discrete requirements, each of which must be satisfied, but competing or contributing circumstances which on balance assist in the arrival at a value judgment on the individual circumstances of every case. As GUBBAY CJ has said:

> ``What is emphasised in determining the cut- off point after which a delay becomes unreasonable is a `balancing test, in which the conduct of both the prosecutor and the defendant are weighed' ... The variety of factors to be considered may pull in opposite directions. In the absence of acquiescence, express or implied, a certain degree of prejudice resulting from a long delay may be inferred, if not rebutted by the State. Actual prejudice, such as impairment of a right to a fair hearing ... may further militate in favour of the accused. Against this must be weighed factors related to the cause of the delay. Was the responsibility that of the State? ... " 7(78)

I have already shown the delay to have been very great and found the explanation to have been such that shows the delay to have been caused by avoidable systemic delays brought about by the conduct of the State. I turn to consider the other balance the other relevant contributing factors.

First, the conduct of the accused and whether he could be said either to have failed to assert his rights. Undoubtedly, he did so fail. Or to have acquiesced in the State's handling of the matter. Beyond question, he has given the appearance of accepting his lot. The Supreme Court -

> ``has stressed frequently that if an accused is of the view that the State is dragging its feet in bringing him to trial, he must assert his constitutional right to be tried within a reasonable time and in default of compliance with such protest seek a stay of proceedings ...
>
> A failure to object along the way until the stage is reached where the State is able to

> commence with the trial will lead to the inevitable inferences that the accused was quite content to leave the situation in abeyance in the hope that somehow the charge would be forgotten; and that he eleventh hour protest was nothing more than a desperate tactic to avoid the outcome of the trial." 8(79)

The question therefore is whether the accused's undeniable failure to assert his rights at any time can justify excluding from consideration the manifest delays that have occurred.

I acknowledge not only the binding nature but also the persuasive force of this, and other pronouncements, on the duty to stand up for oneself. I would nevertheless suggest that there is a real and necessary point of distinction between the class of cases that would and do justify the remarks cited above, and the present. This is a matter involving a person with no recourse to legal representation. One who has no learning or knowledge of the law. He has no obvious education on his rights. He had no legal assistance at any stage. His only knowledge of the law must have been that it is, to all intents and purposes, overwhelming in its might and intractable

Copyright Juta & Co Ltd

in its exigencies.

The duty of the administration of justice towards the unrepresented accused is taken very seriously by this court. It may be that in a jurisdiction with a burgeoning population of legal practitioners and generous budgets for public defenders, or for work *pro bono publico*, a more demanding view can be taken of a duty to assert one's own rights. As I have elsewhere suggested, 9(80) however, it would be most inappropriate to hold against an unrepresented accused failure to take assiduous steps to enforce his freedom. Such an one relies for his protection upon the court itself. He can look only to the presiding magistrate for an explanation of his rights or an investigation of apparent breaches of those rights. Where that advice or protection is not afforded he cannot be expected either to have known of or to have waived the rights which he never asserted. To hold otherwise, would be to retain the constitutional safeguard as the preserve of the privileged rather than to extend it as the birthright of the ordinary person.

The other major factor to bear in mind in this exercise is whether delay has caused prejudice. There are a number of *dicta* from the Supreme Court suggesting that before the constitutional right can be held to have been infringed or to be threatened, it is necessary to prove actual prejudice in the sense of some serious obstacle to one's ability to conduct a defence to the charge. For example, in *Smythe* v *Ushewokunze*:

> ``There must be real prejudice to the applicant's ability to mount a full and fair defence resulting from the inordinate delay on the part of the State in charging him with the offences.'' 10(81)

GILLESPIE J

It is necessary to examine the full extent of the requirement expressed in this *dictum*.

The requirement of prejudice to the accused is to be found in the persuasive statement of principle, which was at the heart of the decision in the definitive judgment on the point in this jurisdiction. It is a passage in the opinion of JUSTICE POWELL in the case of *Barker* v *Wingo*. 11(82)

> ``A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants, which the speedy trial right was designed to protect. This court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.''

The passage in which this appears was cited with approval in its entirety in *Mlambo* as it had already been in two earlier decisions of our Supreme Court. 12(83) It has also been referred to on many occasions since. To understand the concept of prejudice only in the limited sense in which it was relevant in *Smythe* v *Ushewokunze* would involve a considerable restriction on the full extent of the expression as it has already been understood.

Another case in which there appears an apparently restrictive application of the notion of prejudice is *S* v *Banga*. 13(84) In the course of a criticism of a tendency to support a claim for constitutional protection by informal submission from the bar, it was noted that this was

Copyright Juta & Co Ltd

insufficient and that it is necessary to call the applicant's evidence:

> ``to testify to the extent to which, if at all, the cause of the delay was his responsibility; to whether ... he had asserted his right to be tried within a reasonable time; and, even more importantly, to whether any *actual* prejudice had been suffered as a result of the delay.'' 14(85)

The apparently restrictive meaning to prejudice, however, was not intended, since shortly thereafter there is express acknowledgment of the relevance of a wider type of prejudice:

> ``Moreover, the absence of *viva voce* evidence completely disables findings to be made that the long delay has been the cause of mental anguish and disruption to the business and social activities of the accused, particularly where, as here, his liberty was not interfered with; and that it has impaired his ability to exonerate himself from the charge due to the death, disappearance or forgetfulness of potential witnesses.'' 15(86)

I am therefore persuaded that any reference in various judgments to a need

to prove actual prejudice, in the sense of inhibition in the conduct of the defence case, is intended to refer to the desirability in the particular case of proving prejudice to that extent because of the added weight it would carry in the circumstances.

This view is further justified by the following. In *Mlambo*, the learned CHIEF JUSTICE referred expressly to a difference of opinion as to whether the proof of prejudice was relevant to an inquiry into unconstitutional delay. 16(87) He expressly approved of and adopted the view that prejudice was a relevant factor. The learned CHIEF JUSTICE cited the following words of WILSON J:

> ``I believe that in assessing whether or not the delay in disposing of charges against an accused was reasonable or not, prejudice to the accused resulting from delay is very relevant. I cannot accept a `water-tight compartment' approach to Charter rights. I believe that the same factors, which are relevant to an alleged violation of one right, may also be relevant and entitled to consideration in relation to an alleged violation of another. To say otherwise may well be to deny an accused the full measure of protection which the right he asserts was intended to provide.'' 17(88)

The clear intention of the learned judge was to interpret constitutional protections expansively. That where prejudice occurs the protection should not be withheld merely on the grounds that the delay was not excessive. Conversely, where there is unconscionable delay, relief should not be denied on the assertion that a fair hearing, procedurally at least, nevertheless (eventually) took place. The combination of delay and prejudice might disclose an infringement of liberty that neither the prejudice nor the delay in itself would have suggested.

That this was the meaning of WILSON J appears clearly from the context of her judgment. She was expressing disagreement with LAMER J where he wrote that:

> ``prejudice which impairs the ability of the accused to mount a full and fair defence, goes to the fairness of the trial and is more properly related to the right to a fair trial than the right to be tried within a reasonable time.'' 18(89)

LAMER J was intending to ensure that excessive delay would not be discounted solely on the grounds that no prejudice was shown - hence his insistence that:

Copyright Juta & Co Ltd

``actual prejudice need not be, indeed is not, relevant to establish a violation [of the speedy trial right].'' 19(90)

WILSON J, in differing from this, was not intending to restrict the constitutional right by adding a further requirement of prejudice. She was, in

GILLESPIE J

my respectful understanding of her comments, agreeing that actual prejudice need not be relevant but differing from the proposition that it is never relevant. Even if this were not sufficiently clear from her own words, it is confirmed by the assenting remarks of LA FORREST J:

> ``I agree, therefore, with WILSON J's conclusion ... that Charter rights are not to be considered in isolation from one another, so that in finding that a certain interest (such as the right to a fair hearing) is protected under one section of the Charter will preclude the possibility that it may also be protected, tangentially at least, under another section. The fact that protection may be available under [the right to a fair trial] should not prevent an accused from having recourse to the [right to a speedy trial] in those cases where the alleged unfairness is demonstrably the product of delay.''

As GUBBAY CJ went on to point out, the protection which our Constitution gives is -

> ``the right to a *fair* hearing within a reasonable time. Consequently, prejudice to the accused's ability to mount a `full and fair defence' resulting from the delay in affording him a hearing is a most relevant factor.'' 21(91)

I respectfully understand this *dictum* as illustrating the relative nature of the inquiry. The proof of prejudice, in any of the respects identified by JUSTICE POWELL, is a relevant - and indeed important - factor. Prejudice to the conduct of the defence is indeed the weightiest species of prejudice. It impinges on the question whether the hearing was fair at all. Depending upon the balance of the other relevant factors, however, it is not a *sine qua non*. The requirement is also that the hearing, which must in any event be fair, should take place within a reasonable time.

If that were not so, then I might not be able to interfere in this case. The delay is quite extravagant in its excess. It is the fault of the State. It has brought about some prejudice to the accused, in that he has on two separate occasions been arrested and subjected to pre-trial incarceration and subsequent release. Upon a third arrest, he has again been imprisoned before trial and held there for almost a year further until his conviction and sentence. He has in the interim grown from an 18-year-old single person to a married man of 29 with children. He has held a job and raised a family. He now has a further sentence of imprisonment to face, 11 years after the wrong he committed. Nevertheless, he seems to have suffered no constraint in defending himself and the conviction was on the face of it warranted. Yet, despite the absence of prejudice in the defence, I have no doubt that one can and should hold that all the other factors show that this hearing, be it fair or otherwise, was not held within a reasonable time. Indeed, the very delay has wrought unfairness in pre-trial incarceration and disruption to life, even though the defence may

GILLESPIE J

Copyright Juta & Co Ltd

have been presented as well as an unrepresented man could hope to do it.

In this case, I consider the the absence of actual prejudice, in the sense of ability to mount a full and fair defence, not to be decisive. I am firmly of the view that the combination of length of the delay, the cause thereof and the degree of prejudice that is to be found, disclose an infringement of the accused's right to a fair hearing within a reasonable time.

As to the remedy for this unconstitutional delay, that must be dependent upon the nature of the breach. Our Constitution does not prescribe any specific remedy for any breach of the Declaration of Rights that may be proven in any particular case. It provides for the Supreme Court that it -

> ``may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights.'' 22(92)

It makes no specific provision in relation to the powers of the High Court. As I have written elsewhere, however, this -

> ``does not mean that the High Court is powerless to give a remedy. Indeed, this clause pertaining to the Supreme Court appears *ex abundante cautela* and lest otherwise it be thought that the Supreme Court, a court of appellate jurisdiction, has no original jurisdiction pertaining to the point at issue. *Ubi ius, ibi remedium*; and the remedy for the accused here lies in the inherent jurisdiction of this court to regulate its own proceedings and to protect the rights of those coming before it.'' 23(93)

The correctness of the view that the High Court does have jurisdiction to entertain applications for constitutional protection and give the appropriate remedy was acknowledged 24(94) in the Supreme Court. 25(95) The remedy which is applied must be a broad based one, within the discretion of the court, and tailored to meet the actual breach which is proven in any case. 26(96)

If all that is shown is that the point is being reached where a breach will occur if remedial measures are not taken, then the court will in its inherent power to prevent abuse give appropriate protection, for instance expediting a hearing or releasing a prisoner. Once a breach has been established, then no order expediting a hearing can remedy that breach, for to press on to trial would be to deprive the aggrieved person of his protection. 27(97) Rather, if the trial is not yet complete then the minimum remedy will generally be a stay

of proceedings. 28(98) Where a proven breach, however, only receives judicial attention after the conclusion of proceedings, then the question arises whether the conviction and sentence can stand.

Undoubtedly, there is a legitimate need to satisfy the public requirement that wrongdoers be brought to book for their offences. In an offence, such as the present, a rape, the general view of the ordinary person in the street is in favour of more severe and exemplary treatment of offenders. There may be a degree of adverse reaction to the prospect of a person, whose culpability for a serious offence is established on evidence, being set at liberty, and retaining a

Copyright Juta & Co Ltd

record free of criminal conviction, on the ground of excessive delay.

The doing of justice, however, requires the striking of a balance between competing rights. One cannot strike that balance in this case without giving full weight to the serious harm done to the individual accused. Had he been tried within a reasonable time of the offence, he would have been convicted and sentenced, as a young man, only just an adult, to the three years' effective sentence which was eventually imposed. He would have been at liberty for the last seven years at least. He would have paid his debt to society and rehabilitated himself. In fact, he has already rehabilitated himself, having become married man with a family. He has provided for himself and his dependents and has settled down to a blameless life. Any effective sentence at this late stage is entirely unacceptable.

I go further. I have given anxious consideration to the possibility of allowing the conviction to stand and merely setting aside the sentence and staying any further proceedings to sentence. To preserve the conviction intact would be to grace the proceedings, irregular and a breach of the Constitution as they were, with undue legitimacy. There has been much judicial debate in recent years on the subject of unconstitutional delay in the hearing of trials. The effect of that has been to give notice to those responsible for delay that the courts will not be slow to give the appropriate remedy where dilatory proceedings become a breach of the Constitution. It seems to me that where proceedings that violate a person's rights have been completed and have resulted in a conviction then that verdict ought not to be allowed to remain in force. To do so would be to condone the breach that those proceedings involved.

I would accordingly quash the conviction and set aside the sentence.

OMERJEE J agrees.

MOYSE & ORS *v* MUJURU 1998 (2) ZLR 353 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

13 July & 12 October 1998 Judgment No. S-153-98

Flynote

Delict - defamation - defamatory nature of statement - what is - reference to plaintiff's ``goings- on'' - such words capable of defamatory meaning - defences - fair comment - requirements for defence - whether defence only applies if the facts commented upon are stated

Headnote

At a time when he was a member of Parliament and occupied prominent leadership positions in the ZANU (PF) party, the plaintiff had acquired business interests in the Bindura-Shamva area. The plaintiff admitted that his business activities were in violation of the party's Leadership Code

Copyright Juta & Co Ltd

which prohibited such activities on the part of leaders.

A story was published in a magazine edited by the appellant, in which reference was made to the plaintiff's ``goings on in his beloved Bindura-Shamva area''. The plaintiff brought an action for defamation against the appellants, editors and publishers of the magazine. The appellants raised several defences:

- the statement was not defamatory
- the statement constituted a fair and *bona fide* comment on matters stated in the article and known to the magazine's readers
- even if the statement was defamatory, the printers and distributors of the magazine (who were also sued) could not in law be held accountable for any damage the respondent may have suffered
- the damages claimed ($250 000) were excessive.<SIZE 10>

The trial judge found that the sentences were defamatory and, by implication, that they did not constitute fair comment. He also found the printers and distributors liable and awarded damages of $40 000.

On appeal:

Held, that the person claiming defamation damages is bound by the specific meaning selected by him as being defamatory and the court will deal with that meaning and no other.

Held, further, that in order to decide whether a person has been defamed, the court will first consider whether the words specified are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning is within the ordinary meaning of the words. Next, the court will decide upon the meaning that would probably be attached to the words by ordinary readers. Finally, it will decide whether the meaning identified is defamatory. Applying these tests to the words identified, the term ``goings-on'' were capable of bearing the meaning attributed to them, namely activities or conduct of a dishonourable, disreputable or dishonest nature. Given the capacity of ordinary readers to draw derogatory inferences from such a statement, ordinary readers would probably understand the words to mean that

the activities of the respondent were at very least of a dishonourable or disreputable nature and perhaps even dishonest. Therefore, the words in question were defamatory.

Held, further, that for the defence of fair comment to succeed, there were several tests to meet, and which were met:

- the allegation must amount to a comment, not a statement of fact. The words ``goings-on'' amounted to a comment on the respondent's activities.
- the comment must be fair. The comment was a fair one, in the sense of not being intemperate or immoderate. It was a mild comment, a verbalised raising of the

Copyright Juta & Co Ltd

eyebrows.

- the factual allegations on which the comment was based must be true. The undisputed facts were that the respondent had, contrary to the Leadership Code of the ruling party, by which he was bound, acquired business interests in the Bindura-Shamva area. The respondents's acquisition of business interests in these circumstances was an activity of questionable moral integrity.
- the comment must be on a matter of public interest. It was self-evident that the public has a legitimate interest in the extent to which political leaders adhere to their professed standards of public morality.
- the comment must be based on facts expressly stated or referred to in the document or speech concerned, or generally known to the relevant audience. The existence and contents of the Leadership Code had been widely publicised at the time, as had allegations that some leaders were ignoring it. The Code specifically provided that leaders should not own an interest in a business organised for profit (other than ``petty side-line activities''), so any involvement at all in business activities was morally questionable. It was not disputed that the respondent was involved in business activities in the Bindura-Shamva area, nor that the extent of his activities exceeded the limits set out in the Code.

Appeal allowed.

Cases cited:

Auridiam Zimbabwe (Pvt) Ltd v *Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359 (H)

Chinamasa v *Jongwe P & P Co Pvt Ltd & Anor* 1994 (1) ZLR 133 (H)

Crawford v *Albu* 1917 AD 102

Demmers v *Wyllie & Ors* 1978 (4) SA 619 (D)

Dorfman v *Afrikaanse Pers Publikasies* 1966 (1) PH J9 (A)

Golding v *Torch P & P Co (Pty) Ltd* 1948 (3) SA 1067 (C)

Heard v *Times Media Ltd & Anor* 1993 (2) SA 472 (C)

Johnson v *Beckett & Anor* 1992 (1) SA 762 (A)

Madhimba v *Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H)

Makova v *Modus Publications (Pvt) Ltd* 1996 (2) ZLR 326 (H)

Marais v *Richards en `n Ander* 1981 (1) SA 1157 (A)

Moyse & Anor v *Mujuru* HH-269-92

Mujuru v *Moyse & Ors* 1996 (2) ZLR 642 (H)

Copyright Juta & Co Ltd

Roos v *Stent & Pretoria Printing Works* 1909 TS 988

Vorster v *Strydpers Bpk en Andere* 1973 (3) SA 482 (T)

Zvobgo v *Kingstons Ltd* 1986 (2) ZLR 310 (H)

Case Information

A P de Bourbon SC, for the appellants

C K Hungwe, for the respondents

THE FULL COURT

Judgment

THE FULL COURT: The parties concerned in this litigation are the following: Andrew Moyse, the first appellant, who is the editor of the monthly *Horizon* magazine; Column Width (Pvt) Ltd, the second appellant, which publishes *Horizon* Magazine; Zimbabwe Newspapers (1980) Ltd trading as National Printing and Packaging, the third appellant, which is the printer of *Horizon* magazine; and Nationwide Newsagents (Pvt) Ltd, the fourth appellant and Kingstons Ltd, the fifth appellant, which are the distributors of *Horizon* magazine. General Tapfumaneyi Solomon Mujuru, formerly Commander of the National Army of Zimbabwe, a member of Parliament, farmer and business man, is the respondent.

In the High Court, the respondent sued the appellants for defamatory damages in the sum of $250 000 arising out of an article in the second issue of *Horizon* magazine, published in October 1991. At that date, the respondent who had not yet retired as Army Commander, was a well known public figure with some business interests.

In para 7 of the declaration, the respondent complained about two sentences in the article. These read:

> ``*The Times* is owned by Herbert Munangatire of Lonrho, independent shareholders and Kestrel Holdings, an organisation in which army commander Gen Mujuru has large interests.
>
> One wonders how *The Times* will report on the general's goings on in his beloved Bindura-Shamva area."

And in para 8, it was alleged that the words were understood to mean:

> ``... that *The Times* if partly owned by Kestrel Holdings a company which the plaintiff has interests in, it would not report on dishonourable, disreputable or dishonest activities being undertaken by the plaintiff in Shamva and Bindura."

In their pleas, the appellants raised the following defences:

(1) The sentences relied upon in the article were not defamatory of and concerning the respondent.

(2) The sentences constituted a fair and *bona fide* comment on matters stated in the article and

---

Copyright Juta & Co Ltd

known to its readers.

(3) Even if the sentences were defamatory of and concerning the respondent, the printer and distributors of *Horizon* magazine could not be held accountable in law for any damages he may have suffered thereby.

(4) The amount of damages claimed was excessive.

The case came for trial before CHIDYAUSIKU J (as he then was). He held that the respondent had been defamed by the article and, by implication, that the sentences complained of did not amount to fair comment. He dismissed the defences raised by the printer and distributors that they bore no responsibility for the defamatory matter, and awarded the respondent the sum of $40 000 as damages (being the amount to which the claim had been reduced by him in evidence) with costs against the appellants jointly and severally, the one

THE FULL COURT

paying the others to be absolved. The judgment is now reported in 1996 (2) ZLR 642 (H), *sub. nom. Mujuru* v *Moyse & Ors*.

A decision upholding the first or second defences relied upon by the appellants will dispose of the appeal against the respondent; while the success of the third defence raised by the third, fourth and fifth appellants, will free them from all liability to the respondent. To be resolved, therefore, is whether any of these defences ought to have found favour with the learned judge.

It was not alleged in the declaration that the defamatory nature of the two sentences arose from the context of the article taken as a whole and having regard to other matter published in the same issue of the magazine. Nor was an *innuendo* pleaded. The complaint was simply directed at the primary meaning of the two sentences. The meaning attributed - a *quasi innuendo* so as to point to the sting of the imputation - was that because the Times newspaper is partly owned by Kestrel Holdings, in which company the respondent held an interest, it would not report on the dishonourable, disreputable or dishonest activities being undertaken by him in Shamva and Bindura.

In seeking judgment, the respondent was bound by the specific meaning selected by him as being defamatory. It was that meaning the appellants were required to deal with, and no other. That was the charge they came to court to meet. In other words, the area of enquiry before the trial court was dictated by paras 7 and 8 of the declaration. See *Demmers* v *Wyllie & Ors* 1978 (4) SA 619 (D) at 622F, and on appeal, 1980 (1) SA 835 (A) at 843E-G; *Auridiam Zimbabwe (Pvt) Ltd* v *Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359 (H) at 366.

In both *Chinamasa* v *Jongwe Printing & Publishing Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) at 149E-F and *Madhimba* v *Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H) at 400F-G, BARTLETT J set out a three pronged test which a court should apply in deciding whether a plaintiff has been defamed. It is an approach which the learned judge followed. We are content to follow suit, although there is in force the argument that a two pronged approach, as in *Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H) at 315, is better. See 1995 *Zimbabwe Law Review* at

Copyright Juta & Co Ltd

166-169. The three stages of the test are that a court must:

(a) first, consider whether the words as specified are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning alleged is within the ordinary meaning of the words;

(b) secondly, assess whether that is the meaning according to which the words would probably be reasonably understood; and

(c) thirdly, decide whether the meaning identified is defamatory.

THE FULL COURT

Each facet of the test must be satisfied.

We turn to the first part of the inquiry. The statement that the respondent had large interests in Kestrel Holdings, a part owner of the Times newspaper, was incorrect, and was accepted to be so in the March 1992 issue of *Horizon* magazine. An apology was tendered. The error made was, however, *bona fide*. It was prompted by the factual existence of a close business relationship between the respondent and one James Makamba, a shareholder in Kestrel Holdings. The degree of negligence involved in the making of the statement was not of a reasonably serious nature. See *Vorster* v *Strydpers Bpk en Andere* 1973 (3) SA 482 (T) at 487F-G. In any event, it is clear to us that the defamatory meaning specified is not within the ordinary meaning of the words contained in the first sentence complained of. That sentence is innocuous.

The second sentence raises the query of how *The Times* will report on the ``goings-on'' of the respondent in his beloved Bindura-Shamva area. It does not say that this newspaper will not report at all on the ``goings-on'' of the respondent or will cover them up. It merely ponders what emphasis will be placed on such ``goings-on''.

The *Shorter Oxford Dictionary* defines the term ``goings-on'' as ``proceedings, actions, doings (usually with implied censure). And *Funk and Wagnalls Standard Dictionary* (International Edition) provides ``behaviour, conduct, actions: used to express disapproval''. Thus the word may be said to connote activities or conduct of a morally questionable though not necessarily of a dishonourable or disreputable or dishonest nature.

In addressing the first stage of the inquiry, the learned judge said this as 647H-648C:

> ``The most obvious and patent suggestion is that *The Times* will be in a difficult situation when it comes to reporting the `goings-on' of the General, the plaintiff in this matter. The inescapable inference is that there will be a conflict of interest when it comes to reporting on the goings on of the General. Why should there be such a conflict or difficulty if the goings on referred to were ordinary activities that were normal, lawful, honourable and honest? Why should anybody wonder how *The Times* would report on any `goings-on' of the General that were lawful, honourable honest and reputable? If anything one would expect *The Times* to be delighted to report on lawful, honest and reputable activities of the General. The obvious inference or meaning the words are capable of conveying is that alleged in para 8 of the plaintiff's declaration, namely that the plaintiff was involved or was undertaking some, dishonourable, disreputable or dishonest activities in the Bindura area.''

Copyright Juta & Co Ltd

We are in entire agreement with this view and with that similarly expressed by ADAM J in the unreported judgment on exception in *Moyse & Anor* v *Mujuru* HH-269-92. It follows that we must reject the contention advanced on behalf of the appellants that the words specified in the second sentence are not capable of bearing the meaning attributed to them by the respondent. We

THE FULL COURT

are satisfied that the defamatory meaning he alleged is within the ordinary meaning of those words.

The second stage of the test remained to be met by the respondent. The defamatory meaning must be the meaning according to which the words alleged would probably be reasonably understood by the ordinary reasonable reader of *Horizon* magazine.

We respectfully agree with the approach adopted by GILLESPIE J in *Makova* v *Modus Publications (Pvt) Ltd* 1996 (2) ZLR 326 (H) as to the manner in which a reasonable reader tends to read and understand an article. This is what His Lordship said at 353G-354B:

> ``It is plainly necessary, when attempting to discover the ordinary meaning of a passage, to strike a balance between subtle analysis and hasty misconception; between cool reserve and excitability. In doing so, in my view, one should nevertheless tend to favour the more reasoned approach to the illogical, for that is at the very heart of the definition of a reasonable man. One is entitled to assume of the ordinary reasonable reader that, although prone to a certain amount of loose thinking:
>
> > `he gets a general impression and one can expect him to look again before coming to a conclusion and acting upon it'.''

See also *Madhimba* v *Zimbabwe Newspapers (1980) Ltd supra*, at 403G-404G; and generally, *Demmers* v *Wyllie & Ors supra*, at 851G-H; *Dorfman* v *Afrikaanse Pers Publikasies (Edms) Bpk en Andere* 1966 (1) PH J9 (A) at 45 *per* HOLMES JA; Burchell *The Law of Defamation in South Africa* at 84-85.

In our mind, the ordinary reasonable reader of average intelligence, sophistication and education, with no legal training or other special discipline, glancing somewhat quickly at the article would become aware immediately that it concerned *The Times* newspaper and its ownership, with specific emphasis on the respondent's link to it. The reader would have his attention directed to the well-known public figure of the respondent and as to how the paper would overcome its consequent problem of reporting on the respondent's goings-on in Bindura-Shamva. The ordinary reader would be likely to understand the nature of those goings-on, which are not particularised but left to fertile imagination, in a negative and censorious sense. For as the trial judge so pertinently observed if the goings-on of the respondent were beyond criticism, *The Times* would obviously have no difficulty in covering them (see the judgment, *supra*, at 651C-D). Given the capacity of the ordinary reader to draw derogatory inferences, especially in respect of a snippet like the present, in all probability he or she would understand that the activities of the respondent in the Bindura-Shamva area were, at the very least, of a dishonourable or disreputable nature - perhaps were even dishonest. That is our perception of the overall impression that the ordinary reader would be likely to gain. We are

Copyright Juta & Co Ltd

therefore in respectful agreement with the conclusion reached by the learned judge.

THE FULL COURT

The third stage of the test - termed ``the right thinking test'' involves a determination as to whether the meaning which I have found would probably be assigned by the ordinary reasonable reader to the sentence, was one calculated to bring the respondent into contempt or undue ridicule; or to diminish the willingness of others to associate with him; or to lower him in the esteem of right thinking or reasonable members of society generally. See *Madhimba* v *Zimbabwe Newspapers (1980) Ltd supra* at 407F-H.

We share the view of the learned trial judge that the right thinking test was clearly met. Accordingly, we are satisfied that the contention raised on behalf of the appellants that the second sentence cannot be regarded as defamatory must be rejected.

We turn now to the second defence relied upon by the appellants, that of fair comment. This defence was not specifically dealt with by the learned judge but it is clear that he dismissed it (see the judgment, *supra* at 652H).

The requirements of this defence were set out by BARTLETT J in the *Madhimba* case *supra* at 410F-H as being that:

(1) the allegation in question must amount to comment (opinion);

(2) it must be fair;

(3) the factual allegations on which the comment is based must be true;

(4) the comment must be on a matter of public interest;

(5) the defence must be based on facts expressly stated or clearly indicated, in a document or speech, which contains the defamatory words.

It is necessary to be clear as to what is the ``sting'' of the defamation as it applies to the respondent. We are not concerned with the remarks about *The Times* newspaper. We are concerned only with the remarks about the respondent. Those remarks are contained only in the last phrase of the passage complained of - ``the General's goings-on in his beloved Bindura-Shamva area''.

The phrase involves an implied statement or assumption that the respondent's activities in the area are morally questionable, worthy of censure, such as to merit disapproval. In the same way, the well-known question ``Have you stopped beating your wife?'' may be said to be defamatory, not because it is an impertinent question, but because it involves the necessarily implied assumption that at some earlier stage you did beat your wife. Compare the words of INNES CJ in *Roos* v *Stent & Pretoria Printing Works* 1909 TS 988 at 997, last paragraph.

It is therefore the necessarily implied statement that the respondent's activities in the area were

Copyright Juta & Co Ltd

morally questionable that is the nub and sting of the defamation.

The statement is in reality a comment in the form of a statement. The plea of the first, second and third appellants adequately makes this point in para 4, as follows:

THE FULL COURT

> ``In any event, the first and second defendants aver that the contents of the second sentence in the passage from the article set out in para 7 of the plaintiff's declaration constitute a comment on matters stated in the article and known to the readers of the article, and that such comment was a fair and *bona fide* comment on such facts.''

It is trite that comment may masquerade as a statement of fact (see eg Burchell *The Law of Defamation in SA* pp 223-4). Here it is clear that ``goings-on'', which is a noun and thus a ``fact word'', necessarily involves a value judgment. It means, as we have shown, ``activities which are morally questionable''. It thus contains in itself a comment upon those activities. The first basis of the defence of fair comment is thus established.

The second basis is that the comment must be fair. Assuming, for the moment, that there is some foundation for it, the comment cannot be said to be unfair in the sense that it is intemperate or exaggerated. An honest person could hold that opinion - see Burchell, *supra* at p 235. The comment, in fact, is a mild one; no more, one might say, than a verbalised raising of the eyebrow.

The third requirement, and in the present case perhaps the most important, is that the factual allegations on which the comment is founded must be true. What factual basis is there for the remark that, in effect, the respondent's activities in the area are morally questionable?

The factual basis was, and there is no dispute in this regard, that the respondent had acquired business interests in the Bindura-Shamva area contrary to the Leadership Code of the governing party of which he was a prominent member in a leadership role. He was a member of the ZANU (PF) Central Committee and of the ZANU (PF) Politburo.

When this was put to the respondent he admitted that what he did was a breach of the Leadership Code but said that ``he had sought authority from his seniors''. Whether or not the admitted breach of the Leadership Code was approved by his seniors does not alter the fact that he admitted a breach of the Leadership Code, specifically by acquiring business interests in the Bindura-Shamva area.

The learned trial judge remarked, during the course of his judgment that:

> ``If the author of the article had indicated in some way that the `goings-on' referred to in his article are the acquisition of the property referred to above and admitted by the plaintiff, the defences of fair-comment and justification would, in my view, more than likely have succeeded'' (see at 652A-B).

But, with respect, the learned judge overlooked two facts. One was that the comment was limited to activities/goings-on ``in the Bindura-Shamva area''. It was thus wrong to assume, as he did, that the ``goings-on'' could be taken to refer to a cartoon elsewhere in the publication about military men discussing missing army vehicles. That had nothing to do with the

Copyright Juta & Co Ltd

Bindura-Shamva area.

THE FULL COURT

Furthermore, and in the context, the ``defamatory'' comment was clearly linked to the respondent's *business* activities in that area, which activities could reasonably be regarded as morally questionable or improper. What, one may ask, was the virtue of a Leadership Code, designed to demonstrate the moral propriety and integrity of the country's leaders, if private exemptions from that Code could be granted? Thus, even if an exemption was granted - and there is only the respondent's word on that exemption - it is surely fair comment to say that the acquisition of business interests in those circumstances is an activity of questionable moral integrity.

The fourth criterion is that the comment must be on a matter of public interest. Again, it would seem self-evident that the public has a legitimate interest in the extent to which political leaders adhere to their professed standards of public morality.

Insofar as there is a fifth requirement (see *Madhimba supra* at 404H), it is that the defence is available only if it is based on facts expressly stated or clearly indicated in a document or speech which contains the defamatory words. In this case, it is argued, the facts behind the allegation are not stated in the relevant article.

We must, however, be cautious about incorporating this requirement into our law as an absolute pre-requisite for the defence. It is worth examining the reported decisions upon which BARTLETT J relied for his enunciation of this fifth requirement.

We begin with the remark of INNES CJ in *Crawford* v *Albu* 1917 AD 102. In that case, certain men, among them Crawford, had been deported from South Africa in connection with labour troubles and disturbances in the Witwatersrand area in 1913-14. A member of the Chamber of Mines referred to these men in a speech as ``criminals in the fullest sense of the word''. In the court *a quo*, the defence of fair comment was upheld. In the appeal court, by a majority of two to one SOLOMON JA dissenting) the appeal was allowed. The defence was rejected. But a mere £5 was awarded.

At p 114 the learned CHIEF JUSTICE in outlining the requisites for the defence of fair comment said:

> ``It must be based upon facts expressly stated or clearly indicated *and admitted or proved to be true*'' (emphasis added).

In *Golding* v *Torch Printing and Publishing Co (Pty) Ltd* 1948 (3) SA 1067 at 1078-81, OGILVIE-THOMPSON AJ (as he then was) went to some lengths to emphasise that the so-called requirement set out earlier in this judgment is overstated. He concluded, at 1082-3 that:

> ``... the requirement prescribed by *Crawford* v *Albu supra*, that comment `must be based in facts expressly stated or clearly indicated' is capable of being satisfied when a statement which the court construes to be fair comment is

Copyright Juta & Co Ltd

made upon a matter of public interest which

THE FULL COURT

is known to the hearers or readers of the statement and is identified by them as the matter commented upon, even though such matter be not specifically mentioned in the statement in question."

That view was upheld in the Appellate Division in the judgment of VAN DEN HEEVER JA in *Johnson* v *Beckett & Anor* 1992 (1) SA 762 (A) at 774G-I.

Accordingly, we are of the view, with respect, that the addition of this fifth criterion to the four originally set out by JANSEN JA in *Marais* v *Richards en 'n Ander* 1981 (1) SA 1157 (A) at 1167 is unwarranted in the form in which it is expressed. While we do not wish to reformulate the criterion, we would incline to the view that it might be expressed as follows:

``The comment must be based upon facts expressly stated or referred to in the document or speech concerned, or generally known to the relevant audience.''

Against this background we revert to the facts of the case. The article concerned referred to the respondent's ``goings-on in his beloved Bindura-Shamva area.'' In the context of the article, (``*The Times* is owned by Herbert Munangatire of Lonrho, independent shareholders, and Kestrel Holdings, an organisation in which army commander General Mujuru has large interests'') it is evident that the writer is referring to the general's business activities as being questionable or of dubious morality.

At the time, as proved by the documents put in as evidence, there was a Leadership Code in force among the leaders of the governing political party which put very strict limitations on the business activities of its leaders. The Code had been widely publicised, as had allegations that it was being ignored by some of the leaders concerned. The Code explicitly provided:

``A leader may not own a business, a share or an interest in a business organised for profit, provided that this shall not be interpreted as prohibiting such petty side-line activities as chicken-runs, small plots and gardens on one's residential property.''

So, *prima facie* any involvement at all in business activity (apart from the petty exceptions referred to) was morally questionable.

The very fact that the respondent was involved in business activities in ``his beloved Bindura-Shamva area'' was not disputed. Nor was it disputed that the extent of those business activities exceeded the limits laid down in the Code. The respondent expressly admitted as much.

So in the result, if we spell out laboriously the full meaning of what is contained in the phrase ``the general's goings-on in his beloved Bindura-Shamva area'' in the context of what was widely known and discussed at the time, it may be broken down as follows:

(1) The general is involved in business activities in Bindura/Shamva.

(2) It is widely known that the ZANU (PF) Leadership Code prohibits such activities.

Copyright Juta & Co Ltd

THE FULL COURT

(3) The writer considers such involvement to be morally questionable.

The first is a statement of fact which is correct. The second is true and was admitted to be correct. This third is a comment upon those two facts which cannot, in our view, be described as unfair.

It may be, as was hinted by INNES CJ in *Crawford* v *Albu supra*, that a plea of justification should have been added, and might also have succeeded. But here, it seems to us that even if one accepts the fifth criterion as stated by FRIEDMAN JP in *Heard* v *Times Media Ltd & Anor* 1993 (2) SA 472 (C) at 477A-B, that criterion is satisfied. The ``fact clearly indicated'' was that the respondent was involved in business activity in his beloved Bindura/Shamva area. The comment, in the light of the Code, was that he should not have been.

In the light of this conclusion, the defence of fair comment is upheld. It is unnecessary to consider the alternative defence of the third, fourth and fifth appellants, which *prima facie*, is not without merit. Accordingly, the appeal is allowed with costs. The order of the court *a quo* is altered to read:

> ``The plaintiff's claim is dismissed with costs''.

Kantor & Immerman, appellant's legal practitioners

Gula-Ndebele and Partners, respondent's legal practitioners

BINZA *v* ACTING DIRECTOR OF WORKS & ANOR 1998 (2) ZLR 364 (HC)

Court **High Court, Harare**

Devittie J

Opposed application

5 May & 14 October 1998Judgment No. HH-169-98

Flynote

Administrative law - audi alteram partem rule - denial to other party of access to document - decision to dismiss employee made on basis of report by municipality's investigating committee - contents of report not disclosed to court or to dismissed employee - rule not complied with

Costs - de bonis propriis - local authority - action against urban council - councillors disregarding town clerk's advice and opposing application - costs awarded against councillors personally

Evidence - privilege - public interest - confidentiality - not a ground on which to claim privilege - extent to which local authority can raise defence of privilege

Local authority - urban council - accountability to ratepayers - right of ratepayers to challenge administrative

Copyright Juta & Co Ltd

actions taken by local authority

Headnote

The applicant was one of several employees recruited by the Harare City Council in breach of laid down procedures. The council appointed a committee to investigate the matter. The committee recommended that the applicant and another employee be summarily dismissed. The respondent, on the instructions of the Council's Executive Committee, advised the applicant that he had been dismissed. The decision was challenged on the grounds that the report of the investigating committee was never made available to the applicant and he was never given an opportunity to be heard. The report was not disclosed to the court. The council claimed that it was confidential and privileged on public interest grounds.

Held, that the council appeared to misconceive the duties and responsibilities of a local authority in a democracy. Local authorities are subject to the rule of law and must act in accordance with statutory authority. They may only do what the enabling statute permits them to do.

Held, further, that the law recognises the right of a ratepayer to challenge the validity of decisions taken by a local authority, because local authorities owe the ratepayer a fiduciary duty. Ratepayers can thus play an important function in enforcing accountability.

Held, further, that the Council's blanket claim of privilege may have been rooted in a misconception by the Council about its responsibilities and duties. If allowed to continue, this misconception would frustrate the rights of ratepayers to challenge local authority actions. While privilege may be claimed for documents on the grounds that disclosure

DEVITTIE J

would be detrimental to the public interest, the court must balance the public interest against the interests of the litigant and, if necessary, require an inspection of the documents. Confidentiality may be a material factor in balancing these interests, but is not decisive. In this case, the claim of privilege was ill-founded.

Held, further, that because the applicant was not given access to the documents and was not given an opportunity to refute the allegations against him, a violation of the *audi alteram partem* rule had occurred.

Held, further, that as the former Town Clerk had advised the Council that the dismissal was unlawful, and that advice had not been heeded by the Council, unnecessary costs had been incurred. Rather than make the ratepayer foot the bill, the individual councillors who made the decision to dismiss the applicant should personally bear the costs.

Cases cited:

Dir of Education, Tvl v *McCagie & Ors* 1918 AD 616

Copyright Juta & Co Ltd

Nyageni v *Min of Bantu Administration & Development* 1961 (1) SA 547 (E)

Pentecost & Anor v *London District Auditor & Anor* [1951] 2 All ER 330 (KB)

Prescott v *Birmingham Corp* [1955] CH 210

Short v *Poole Corp* [1926] 1 Ch 66; [1925] All ER Rep 74 (CA)

van der Linde v *Calitz* 1967 (2) SA 239 (A)

Case Information

E Mandizha, for the applicant

E W W Morris, for the respondents

Judgment

DEVITTIE J: At some time prior to September 1997, one or more senior officials within the City of Harare's Department of Works devised a corrupt scheme. They recruited people to work in the Department of Works. As I understand the facts, all recruitment procedures were flouted and no authority was sought for these persons to be employed and paid. It seems that the scheme was a deliberate fraud. The papers do not reveal for how long this practice existed.

In September 1997, it came to the attention of the Executive Mayor of Harare that a number of employees in the Department of Works had been engaged through unlawful means. On 16 September 1997, he established a committee to inquire into the irregular recruitment of employees within the City of Harare's Department of Works. In the course of its investigations, the committee interviewed several employees of the City of Harare including the applicant. On 14 October 1997, the investigation committee concluded its investigations. It found that an amount in excess of $2.9 million had been lost through the unauthorised employment of casual employees in the Department of Works. On 20 October 1997, the Executive Committee of the Council met to consider the recommendations of the investigation committee and made the following recommendation:

> ``The two employees named in paragraph 4:4:1 of the Strictly Confidential Report (of 17 June 1997) by the Acting Director of Works be summarily discharged from Council with

> effect from the 27 October 1997 in terms of s 141(2)(b) of the Urban Councils Act [*Chapter 29:15*] as read with clause 18 of the General Conditions of Service Agreement (S I 66/92)."

At the time, the applicant was employed as a senior official within the Department of Works. I presume that he is one of the employees referred to in the above recommendation, because on 21 October 1997 the Acting Director of Works wrote to the applicant in these terms:

> ``I regret to advise that the Executive Committee of the Harare City Council considered the report of the investigation committee on excess labour in the Department of Works and resolved that in terms of s 141(4) of the Urban Councils Act [*Chapter 29:15*] as read with clause 18 of the General Conditions of Service (SI 66/92) you be

Copyright Juta & Co Ltd

suspended from Council services without pay or allowance with effect from 31 October 1997 pending the decision by full Council.''

Council made its decision on 30 October 1997. The Acting Director of Works wrote to the applicant advising him of his dismissal. The letter reads as follows:

``I regret to inform you that with the approval of Council, you have summarily been dismissed from Council service with effect from 21 October 1997. Please call personally to Lord Mount building (Staff salaries) where you will be advised of your terminal benefits.''

The applicant challenges his dismissal principally upon the ground that he was not given an opportunity to be heard. He states that he was one of several persons interviewed by the investigation committee but that at no stage were any charges proffered against him. It is common ground that the report of the investigation committee was not made available to him at any stage.

The dismissal is also challenged on the ground that, in terms of s 141 of the Urban Councils Act, it is the head of department and not the Executive Committee who has the power to suspend employees. The former Acting Town Clerk of the City of Harare, Swinffen Mutongwizo, has deposed to an affidavit on behalf of the second respondent. He does not deny that no formal disciplinary inquiry was held. Nor does he deny that no formal opportunity was afforded to the applicant to challenge the allegations against him. This is what he states:

``Applicant's suspension and subsequent dismissal were a result of the findings of a properly constituted investigation committee which found that the applicant had been responsible for the regular recruitment of staff with the second respondent's Department of Works. The applicant was given an opportunity to respond to the allegations. After hearing the applicant's response to the allegations against him and carrying out its own investigations the investigating committee arrived at the conclusion that the applicant was one of the persons responsible for the irregular employment of employees within the City of Harare's Department of Works. It proceeded to recommend to the second respondent that the applicant be discharged from employment. The second respondent's Executive Committee then put in a report to the investigation committee and resolved as to whether to discharge the applicant from council services.''

DEVITTIE J

I do not construe the above statement as asserting that a formal inquiry was held and the applicant afforded the opportunity to defend himself. There does seem to be a suggestion that charges were preferred against the applicant and that he was given the opportunity to respond. It is not stated whether the Town Clerk was part of the inquiry. The Town Clerk fails to deal with the applicant's response to the charges and indeed the basis upon which a finding was made as to applicant's guilt. For these reasons, I have little difficulty in accepting the applicant's claim that no opportunity was afforded for him to answer the allegations. Even I, as I write this judgment, am completely in the dark as to the merits of the decision to find applicant guilty. Nor I am aware of the precise allegations against the applicant. This notwithstanding, the respondents have asked this court to rule the applicant's dismissal lawful. They say that the report of the investigations committee resolved applicant's guilt. In seeking the dismissal of the applicant's claim, they rely wholly upon the confidential report. That report has not been given or even shown to the applicant. The respondents claim that the report is strictly confidential and

Copyright Juta & Co Ltd

that it is privileged. In the opposing affidavit, the deponent states:

> ``The second respondent does not have any legal obligation to make the report in question available to the applicant neither is applicant entitled to know the contents of the report which report contains privileged information."

In effect, this court is being asked to accept the conclusion on applicant's guilt reached in a report, the contents of which have not been disclosed. The second respondent does not even attempt to justify its claim of privilege in regard to the document which formed the basis of the decision which affects the livelihood of its employee. That stance leads to the unfortunate impression that the second respondent misconceives the duties and responsibilities of a local authority in a democracy. The attitude of the second respondent, which seems to be that it has the right to raise a blanket claim of privilege in proceedings against it, has the potential to undermine the right which the ratepayers of the City of Harare have to challenge the validity of its acts in a court of law. I consider therefore that I am not digressing outside the context of this judgment if I comment briefly on the responsibilities and duties of local authorities in our system of government.

Local authorities in this country are subject to the rule of law. Before they can do any act, impose charges or incur expenditure on anything, they must be able to point to statutory authority which authorises such action. When a court finds a local authority acting beyond its powers, it will declare such action to be unlawful. Unlike a private organisation or company which can act in any way, it wishes as long as it is not forbidden by law, local authorities may only do what the law expressly allows them to do. In terms of the *ultra*

vires principle to which all local authorities are subject, the acts of a local authority may be impugned in a court of law upon very wide grounds. Thus, the acts of a local authority may be declared invalid not only where such acts are expressly forbidden by statute, but upon wider grounds such as corrupt motives or gross unreasonableness. As WARRINGTON LJ stated in *Short* v *Poole Corporation* [1926] 1 Ch 66 (CA); [1925] All ER Rep 74:

> ``It may also be possible to prove that an act of the 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. My view then is that the only case in which the court can interfere with an act of a 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 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."

I have not found any reported cases in this country, but our law recognises the right of a ratepayer to challenge the validity of decisions taken by a local authority. The rationale is that local authorities are accountable to the ratepayer, for the proper and efficient use of public funds.

Baxter on *Administrative Law* at 658-659 discusses the justification for the courts extending to the ratepayer the right to challenge administrative action taken by a local authority. The learned

Copyright Juta & Co Ltd

author says:

> ``Although the courts have refused to recognise the general right of standing to a taxpayer, ratepayers have fared better. It has been recognised in a number of cases that ratepayers may challenge the validity of action taken by the local authorities, and this represents some departure from the relatively narrow approach traditionally adopted towards the rules relating to standing.
>
> Various reasons are advanced to justify treating ratepayers differently from taxpayers. To recognise a group as wide as that of taxpayers would come close to recognising a general right of standing on the part of the public to challenge any administrative action financed from the fiscus. Local authorities, unlike central government, are still said to operate on the analogy of corporations whose members, to whom are owed fiduciary duties, are the ratepayers. The power of the municipalities exists solely by virtue of statute. Thus the policy elements in local authority decision making tend to be more circumscribed. Taxpayers have a specific parliamentary remedy. Municipal councillors are likely to be less trustworthy than the great officers of the State. Of course, it need hardly be said that these arguments for distinguishing ratepayers from taxpayers are scarcely valid, let alone persuasive. A more realistic explanation of the anomaly is that the courts fear that by recognising taxpayers' standing, in the same way as they recognise the standing of ratepayers, they might open the floodgates to the rush of challenges to official action to an extremely wide group of potential litigants.''

It should be evident from the aforegoing that the law affords ratepayers effective remedies to ensure that local authorities put public funds to proper and efficient use.

DEVITTIE J

In *Director of Education Transvaal* v *McCagie & Ors* 1918 AD 616 at 627, JUTA JA stated that:

> ``On the other hand, the courts in several instances held that a ratepayer in a municipality has a *locus standi* to interdict the municipal council from dealing contrary to law with the municipal funds or property: *Dormer* v *Town Council of Cape Town* (1886) 4 SC 240, *Cairn Cross* v *Oudtshoorn Town Council* (1897) 14 SC 272, *Maberley* v *Woodstock Municipality* (1901) (18) SC 443, the principle for such decision being apparently that there is a relationship of trust between the Council and the ratepayers in respect of municipal funds and property.''

In England, too, the right of a ratepayer to challenge the validity of an action by a local authority is recognised on the ground that local authorities owe the ratepayers a fiduciary duty. In *Prescott* v *Birmingham Corp* [1955] Ch 210 at 235, JENKINS LJ stated:

> ``Local authorities are not, of course, trustees for the ratepayers, but they do we think owe an analogous fiduciary duty to their ratepayers in relation to the application of funds contributed by the latter. Thus local authorities running an omnibus undertaking at the risk of the ratepayers, in the sense that any deficiencies must be met by an addition to the rates are not, in our view, entitled, merely on the strength of a general power, to charge different fares to different passengers or different classes of passengers, to make a gift to a particular class of persons of rights of free travel on their vehicles, simply because the local authority concerned are of the opinion that the favoured class of persons ought, on benevolent or philanthropic grounds, to be accorded that benefit ...
>
> In the absence of clear statutory authority for such a proceeding (which to our mind a mere general power to charge differential fares is not), we would, for our part, regard it as illegal, on the ground that, to put the matter bluntly, it would amount simply to the making of a gift or present in money worth to a particular section of the local community at the expense of the general body of ratepayers.''

The above case illustrates the far reaching powers ratepayers have to challenge the rationality of expenditure by a local authority.

The fiduciary principle, in terms of which local authorities hold a position analogous to that of

---

Copyright Juta & Co Ltd

trustees in respect of ratepayers funds requires for its effective realisation a body of ratepayers who assert their legal rights. In England, the propriety of payments made under a contract awarded by a local authority are often subjected to public scrutiny in a court of law at the instance of aggrieved ratepayers. Ratepayers in this country are accorded the same protection.

In *Pentecost* v *London District Auditor* [1951] 2 All ER 330, the relevant local government statute provided as follows:

> ``It shall be the duty of the District Auditor at every audit held by him to surcharge the amount of loss of deficiency upon any person whose negligence or misconduct the loss or deficiency has been incurred.''

The ratepayers objected to certain payments made on a building contract by the local authority. They contended that the local authority had been

negligent in paying for defective work under the building contract. The District Auditor refused to surcharge individual councillors for the loss incurred as he was empowered to do, on the grounds that, although there were some instances of defective work, they were not so frequent as to justify a finding that, but for the gross negligence on the part of the Council's supervising officers, these deficiencies would have been brought to light. The ratepayers brought an action, in which they argued that the District Auditor was wrong in law and that in conducting the audit he had not had proper regard for his duties. The argument of the ratepayers was not upheld. However, the case demonstrates the important function ratepayers can play in enforcing accountability. The provision under English law that empowers an auditor to surcharge individual councillors personally where losses are incurred through their gross negligence is a practical application of the fiduciary principle. Indeed, if financial loss is caused which is directly attributable to gross negligence by councillors, no good reason exists why the ratepayers should bear the loss. If our law made provision for an independent auditor to impose a personal surcharge on councillors, as I believe it should, the councillors of the City of Harare, including the executive mayor, may have had to suffer a personal surcharge to make good the loss of $2.9 million through the employment of excess labour if the auditor found that the loss was in some way attributable to misconduct on their part.

It will be plain to see that the second respondent's blanket claim of privilege, even though raised in the context of an employer/employee relationship, may be rooted in a serious misconception by the second respondent about its responsibilities and duties in our system of government. It is equally plain that, if allowed to continue, it is a misconception that would frustrate the rights of the ratepayers to challenge local authority actions, which are open to attack on the ground that they are *ultra vires*. A ratepayer may require documents to be discovered relating to details of council expenditure before he institutes proceedings in order to prepare his case. It would run counter to the principles upon which local authorities ought to operate in this country if, as in this case, a local authority could raise a defence of privilege with impunity.

Although no grounds were given for the claim of privilege, I suspect that what was intended to be raised was a claim of public interest privilege. The general principle of the common law is that public interest privilege may be claimed for documents and other evidence on the grounds

Copyright Juta & Co Ltd

that its disclosure in judicial proceedings will be detrimental to the public interest. In *van der Linde* v *Calitz* 1967 (2) SA 239 (A) it was stated that:

> ``The claim of privilege must be made by the political head of department or provincial administration, who must have personally considered the matter. Further, that it would

> only be in exceptional circumstances that a professional head would be permitted to make the claim.''

In this application, the former town clerk was not the political head and neither did he make any attempt to give the matter mature consideration.

The second respondent also contends that the report is confidential. In *Nyageni* v *Minister of Bantu Administration & Development* 1961 (1) SA 547 at 574, it was held that confidentiality is not in itself a ground of privilege.

In English law, ``public interest immunity'' may be claimed by any party without the need for a political head to depose to an affidavit. In considering a claim of public interest immunity, the function of the court is to balance the public interest against the interest of the litigant and, in so doing, the court may require an inspection of the documents. The fact that information was supplied in confidence does not, in itself, afford protection from disclosure. Confidentiality, may, however, be a material factor in balancing the conflicting interests. The claim of privilege in this case is clearly ill-founded.

I turn now to consider the relief sought by the applicant. He seeks his reinstatement from the date of his suspension with full benefits. In terms of s 141(4) of the Urban Councils Act, the power to suspend a council employee, other than a senior official, vests in the head of department. The applicant's head of department was the Director of Works. The decision to suspend was taken by the Executive Committee. Section 141(6) provides that upon receipt of a report on the suspension of an employee, council shall without delay convene an inquiry to determine the allegations against the employee. I am unable to accept that the interview of the applicant carried out by the investigation committee constituted a proper inquiry into the allegations against the applicant. The former town clerk, in a recommendation to the second respondent, advised that all employees, who had been dismissed in accordance with the recommendations of the confidential report, including the applicant, be reinstated and that a proper inquiry be held in terms of s 141 of the Urban Councils Act. He stated:

> ``It has since been realised that all employees did not appear before a Council Inquiries Committee as stipulated in the Urban Councils Act. It is therefore imperative that Council follow the right procedures in the Act to avoid legal law suit on unfair practices.''

As the applicant was not given the opportunity to controvert the allegations against him, a violation of the *audi alteram partem* principle occurred and there is no basis upon which the second respondent's contentions can be sustained. It is, of course, open to the second respondent to convene a further inquiry and to commence dismissal proceedings against the applicant. In regard to costs, I have this observation to make.

Copyright Juta & Co Ltd

It is evident that the Council did not heed the advice of the former town clerk, who expressly pointed out that the applicant's dismissal was unlawful.

DEVITTIE J

Instead, it opposed the present application. As a consequence, unnecessary costs have been incurred. In the circumstances, if I order the second respondent to bear the costs, it is the ratepayer that will ultimately foot the bill. I consider that the individual councillors who made the decision to dismiss the applicant and failed to heed the advice of the former Town Clerk should personally bear the costs.

It is accordingly ordered as follows:

1. The applicant's dismissal is hereby set aside;
2. The applicant be and is hereby reinstated into his employment with full salary and benefits from the date of his suspension;
3. The individual councillors who made the decision to dismiss applicant are to personally bear the applicant's costs *de bonis propriis* on a *pro rata* basis.

Hove Dzimba and Associates, applicant's legal practitioners

Kanokanga & Partners, respondents' legal practitioners

DEPUTY SHERIFF, HARARE *v* SHERWOOD MOTORS (PVT) LTD 1998 (2) ZLR 373 (HC)

Court **High Court, Harare**

Chatikobo J

Civil application

7 & 14 October 1998 Judgment No. HH-176-98

Flynote

Lien - repairer - extent of right given by lien - loss of possession when item attached in execution of judgment obtained by third party - no right of repairer to recover item or claim share in proceeds of sale

Headnote

A garage had repaired a car. The owner of the car had not paid the garage for these repairs and the garage had retained possession of the car under a lien until the owner paid his garage bill. A creditor had, however, obtained judgment against the car owner for a debt. At the behest of the creditor, the deputy sheriff attached the debtor's car and the car was removed from the garage to be sold in execution. The garage had objected to the removal of the car which it was holding under the lien as it wished to retain its right of retention. The garage had only yielded

Copyright Juta & Co Ltd

possession of the car to the deputy sheriff after it was assured by the deputy sheriff that the amount owing to it by the car owner for repairs would be paid from the proceeds of the sale in execution. However, after the sale in execution, the creditor claimed the full amount realised by the sale in execution, contending that the garage had lost its lien after it had surrendered possession. On the other hand, the garage claimed that it was entitled to be paid the amount owing for the repairs out of the proceeds of the sale in execution. The court was asked to adjudicate on the competing claims of the creditor and the garage.

Held, that once a person voluntarily gives up possession of property in respect of which he has a lien, the lien ceases to operate.

Held, further, that although the garage had no option but to deliver up possession of the car in obedience to the writ from the court, by surrendering possession of the car it has lost its lien. Where a person loses possession of the item in respect of which he has a lien as a result of irresistible judicial pressure, the only course of action open to that person is to apply for the setting aside of the attachment.

Held, further, that the deputy sheriff had not simply demanded obedience to the writ but had lulled the garage into a false sense of security by assuring it that it would be paid out of the sale in execution. Had he not done so, the garage might have sought to retain possession of the car. It is possible that the garage had a claim against the deputy sheriff arising out the erroneous advice that he gave relating to payment of the garage out of the proceeds of the sale in execution.

Held, further, as the garage did not have a court judgment in its favour for the debt owed to it by the car owner, it had no right to participate in the proceeds of the sale in execution and the judgment creditor was entitled to the entire amount of the proceeds of the sale.

1998 (2) ZLR p374

CHATIKOBO J

Cases cited:

Assurity (Pvt) Ltd v *Truck Sales (Pvt) Ltd* 1960 R & N 236; 1960 (2) SA 686 (SR)

Marinus v *Taljaard* 1952 (1) SA 49 (C)

Orbit Motors (Pty) Ltd v *Reeds (Cape) Ltd* 1957 (2) SA 333 (C)

Savory v *Baldochi* 1907 TS 523

Case Information

Miss *C Makoni*, for the applicant

I Magwaliba, for the respondent

Judgment

CHATIKOBO J: The second respondent (Farah) obtained judgment against one Benjamin

Copyright Juta & Co Ltd

Burombo for the sum of $45 000 on 28 September 1995. At that time, Burombo was the owner of a Mercedes Benz motor vehicle registration number 508-794L. This motor vehicle was in the custody of the first respondent (Sherwood Motors) to whom it had been taken by Burombo for certain repairs to be carried out. Sherwood Motors repaired the vehicle but Burombo did not pay the repair costs amounting to $24 000. As a result, Burombo's failure to pay the costs of repair, Sherwood Motors exercised the lien which they had acquired by virtue of their having expended their labour and materials on the motor vehicle and refused to release the vehicle to Burombo.

While the vehicle remained in the custody of Sherwood Motors, it was attached by the deputy sheriff at the behest of Farah and it was removed to be sold in execution. At the time of attachment, Sherwood Motors protested to the deputy sheriff in an endeavour to protect their right of retention. They only yielded possession after they were assured by the deputy sheriff that their repair costs would be paid from the proceeds of the sale in execution.

After the vehicle was sold (for $21 000), Farah demanded, through his lawyers, the full amount realised at the sale, contending that Sherwood Motors lost their lien when they relinquished possession, thus prompting the deputy sheriff to institute interpleader proceedings requesting the court to adjudicate on the competing claims.

A *jus retentionis* is a passive right, which confers on its holder a passive advantage, namely, the right to retain possession of the object of the lien against all the world until the lien holder's claim has been satisfied.

> ``If he for any reason gives up possession of the cart, and relinquishes his right to hold it, the *jus retentionis* is absolutely gone, and when the respondent allowed the sheriff to attach the cart in satisfaction of the judgment which he had obtained against Kent, his *jus retentionis*, to my mind, was absolutely gone:''

per SMITH J in *Savory* v *Baldochi* 1907 TS 523 at 525.

Even if the article were to revert to the possession of the lien holder, a lien, once lost, cannot be received by regaining possession except by a further

CHATIKOBO J

agreement. Hence, OGILVIE THOMPSON J (as he then was) was driven to hold in *Marinus* v *Taljaard* 1952 (1) SA 49 (C) at 54 that:

> ``It appeals to me as logical that the surrender of possession by the creditor should not only suspend, but also extinguish, the lien previously enjoyed and that, consequently, the mere regaining of possession by the creditor will, in the absence of further express or tacit agreement, not revive the lien; and I so decide.''

The facts of *Orbit Motors (Pty) Ltd* v *Reeds (Cape) Ltd* 1975 (2) SA 333 (C), which followed *Savory* v *Baldochi supra,* are interesting. There, the creditor obtained judgment against the debtor for the costs of repair. Thereafter he caused the vehicle which he had repaired and over which he enjoyed a lien, to be attached and sold in execution. Unbeknown to the creditor, the vehicle had been sold to the debtor in terms of his purchase agreement, which did not confer ownership on the debtor. When the true owner claimed his vehicle the creditor instructed the messenger of court to release the vehicle from attachment and to return it to him in order to

Copyright Juta & Co Ltd

revive his lien. At 336B-C of the judgment DIEMONT J held that:

> ``A lien is a very limited right of security over goods; it remains good only so long as the lien holder does not part with the possession of the goods. He loses his lien by dealing with the goods in any way inconsistent with its continuance. The important question is whether he has voluntarily parted with possession or taken any steps, which must result in loss of possession. In this case, he has voluntarily set the wheels of execution into motion and by so doing brought about a loss of possession."

In the present case, one must also ask if Sherwood Motors voluntarily parted with possession. They tried to resist the attachment and only yielded possession after being assured by the deputy sheriff that they would be paid from the proceeds of the sale. That assurance had no basis in law.

The first point is that the deputy sheriff was holding a writ from the court. Sherwood Motors had no option but to deliver up possession in obedience to the command of the writ. A refusal on their part to yield to the attachment may have been visited with one form of sanction or another. And, where possession is lost as a result of irresistible judicial pressure, the only choice which he creditor has is to apply for the setting aside of the attachment. See *-Assurity (Pvt) Ltd* v *Truck Sales (Pvt) Ltd* 1960 R&N 236; 1960 (2) SA 686 (SR).

The second point, which I find worrisome, is that the deputy sheriff did not simply demand obedience to the writ, he lulled Sherwood Motors into a false sense of security by wrongly assuring them that they would be paid. Had such assurance not been given, Sherwood Motors may have acted as best as they might have been advised to protect their lien. This, however, is not an aspect which I need to resolve in order to arrive at a decision in this matter. Sherwood Motors may have a claim against the deputy sheriff or they may not. For present purposes, the important thing is that they did not apply for the restoration of their lien.

CHATIKOBO J

The vehicle has been sold. As already observed, all that Sherwood Motors ever had was a lien, a passive advantage which only entitled them to hold the vehicle until they were paid. Such a right does not entitle its holder to payment or, for that matter, to participation in the proceeds of a sale in execution in the absence of a judgment. Farah, and Farah alone, should receive the proceeds of the sale, unless there are other creditors who qualify.

As far as costs are concerned, it must be borne in mind that Sherwood Motors were prompted to claim from the proceeds of the sale by the erroneous advice received from the deputy sheriff. When the interpleader proceedings were launched they did not participate. It would be unjust if they were to be ordered to pay the costs of these proceedings. The deputy sheriff is himself not free from blame. There is no good reason why he should recover the costs of these interpleader proceedings.

In the premises, it is ordered as follows:

1. That the first respondent and all those claiming through it be and are hereby barred as against the applicant from making any claim on the property in question;

Copyright Juta & Co Ltd

2. The costs of execution shall be in costs the cause of the main case H-5273-95;

3. Each party is to pay its own costs of these interpleader proceedings.

V Nyemba and Associates, applicant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

S *v* MASHONGA 1998 (2) ZLR 377 (HC)

Court **High Court, Harare**

Garwe J & Chinhengo J

Criminal review

21 October 1998 Judgment No. HH-180-98

Flynote

Criminal law - statutory offences - possession of prepared dagga - what is ``prepared'' dagga - dealing in dagga - mere possession not included in definition

Criminal procedure - trial - conduct of - undefended accused - plea of guilty - obligation of magistrate to explain charge and essential elements, especially where offence involves complex elements

Criminal procedure (sentence) - statutory offences - mandatory minimum sentence for dealing in drugs - not applicable to mere possession of drugs

Headnote

The accused was found in possession of two kilogrammes of dagga. She was charged with contravening s 4(a) of the Dangerous Drugs Regulations 1975. She pleaded guilty and was convicted. She was not legally represented at her trial. On review, the court dealt with two main issues, namely, whether the accused was convicted on the correct charge and whether the mandatory penalty provided in s 19(3) of the Dangerous Drugs Act was applicable.

Held, that, although the charge sheet had referred to possession of prepared dagga, no evidence had been led that the dagga had been prepared and was ready for smoking and the State had thus not established that the dagga was ``prepared''. The accused had, however, been charged with contravening s 4(a) of the Regulations, which offence requires only that the accused be in possession of dagga and therefore the accused was correctly convicted of this offence.

Held, further, that s 19(3) of the Dangerous Drugs Act [*Chapter 15:02*] lays down that, in the absence of special circumstances, a mandatory prison sentence of not less than fifteen and not more than twenty years must be imposed for an offence under this Act involving the unlawful dealing in certain drugs, one of which is prepared dagga. This mandatory sentence does not apply to the offence of mere possession of prepared dagga in contravention of s 9(b) of the Dangerous Drugs Act. If the case of *S* v *Nyambo* 1997 (2) ZLR 333 (H) ruled to the contrary, it

---

Copyright Juta & Co Ltd

is incorrectly decided. If the accused charged with mere possession admits that he had the intention to supply the drug to others, the offence remains one of possession and not of dealing and therefore the mandatory minimum sentence does not apply, although the court can take the admission of intention to sell as an aggravating feature. However, the proceedings could be stopped in terms of s 54 of the Magistrates Court Act when the accused makes his admission and the Attorney-General could then

GARWE J

substitute a charge that could attract the mandatory minimum sentence such as contravening s 9(a), 9(c), 9(d) and 11 of the Dangerous Drugs Act. If this is not done, the accused can only be sentenced in respect of the crime charged and cannot be sentenced in respect of some more serious offence with which he has not been charged. The mandatory sentence will not apply where the accused has been found guilty of dealing in unprepared dagga or where the dagga has not been prepared for smoking, although it may have been prepared for some other purpose. Clearly the mandatory minimum sentence is intended for persons proved to have derived commercial benefit from their dealings in prepared dagga or the other proscribed drugs.

Held, further, that the magistrate had failed properly to explain the charge and the essential elements of the charge to the undefended accused as he was required to do, especially given the complex and technical nature of the offence. Had he done so the fact that the problems in relation to whether or not the dagga was prepared would have emerged.

Held, further, that the legislature should consider amending the definition of ``prepared dagga'' so as to provide greater clarity.

Cases cited:

R v *Conrad & Ors* 1966 RLR 626 (A); 1967 (1) SA 88 (RA)

S v *Nyambo* 1997 (2) ZLR 333 (H)

S v *Noach* HH-395-85

S v *Pengapenga* HH-76-98

S v *Samboko* HH-347-85

Judgment

GARWE J: The accused in this matter was charged with contravening s 4(a) of the Dangerous Drugs Regulations 1975 (RGN 1111/75), it being alleged she had been found in possession of 2 kg of prepared dagga. She pleaded guilty, was duly convicted and sentenced to 24 months' imprisonment, of which 10 months was suspended for a period of 5 years on the usual conditions of good behaviour.

In view of the allegation that the dagga was prepared, two main issues arise in this case. These are (a) whether the accused was correctly convicted of contravening s 4(a) of the Dangerous

Copyright Juta & Co Ltd

Drugs Regulations 1975 and (b) whether the mandatory penalties prescribed under s 19(3) of the Act apply in respect of a contravention of s 9(b) of the Act, ie in cases where one is found in possession of dagga that is prepared and ready for smoking. There are other areas of concern namely, the manner in which both the charge was framed and the essential elements explained to the accused, but these will not form the subject of this review judgment.

It is necessary to look at the two issues against the relevant statutory provisions.

Section 4 of the Dangerous Drugs Regulations provides:

> "`No person who is not an authorised or licensed person shall -
>
> (a) acquire or possess a Part I drug."

Although the Regulations refer to a Part I drug, this in fact refers to Part II of the Act. Part II

of the Act applies, *inter alia*, to Indian hemp. The same part defines Indian hemp as:

> ``the whole or any portion, whether green or dry, of the plant, including the seeds thereof ... "

Part III of the Act deals with prepared opium and prepared Indian Hemp.

PROPRIETY OF THE CHARGE OF CONTRAVENING SECTION 4(A) OF THE REGULATIONS

It was not in dispute that, upon her arrest, accused had in her possession 2 kg of dagga. The charge sheet alleges that the dagga was prepared. The State outline merely makes reference to ``dagga''. No other evidence was adduced to establish whether the dagga was prepared and ready for smoking.

In *S* v *Nyambo* 1997 (2) ZLR 333 (H), a judgment by SMITH J, the issue that arose was whether for purposes of s 9(b) of the Act it was sufficient for an accused person to admit that the dagga was prepared without the need for the State to prove by other evidence that the dagga was indeed prepared. SMITH J's remarks, with which I agree, are pertinent. He stated at p 336:

> ``The accused was not represented. He is hardly likely to have appreciated the significance of the word `prepared' in this context ... I agree with the opinion expressed by the Attorney-General that preparation envisages some process or activity which is intended to ensure that the dagga is ready for smoking. I cannot accept, however, that merely packing dried leaves from a dagga plant into a bag or sack and bringing them to town for the purpose of selling them constitutes preparation for smoking. The legislature in enacting [*Chapter 15:02*] clearly intended that dagga which has been prepared for smoking should be dealt with differently to dagga which has not been so prepared. Then when one looks at subs (3) of s 19 one finds that the mandatory minimum penalty applies if the offence involves the unlawful dealing in any drug to which Part III of the Act applies (ie including prepared Indian Hemp) and to any drugs, other than Indian Hemp, to which Part II of the Act applies. ... "

I agree that, in the present case, there being no evidence that the dagga was prepared and ready for smoking, the charge under s 4(a) of the Regulations is the correct one. In cases such as this one, the prosecution must do more than simply allege that the dagga was prepared. It is now a requirement that it be established that the dagga was in fact prepared and ready for

Copyright Juta & Co Ltd

smoking. The conviction for contravening s 4(a) of the Regulations is accordingly confirmed.

THE MANDATORY SENTENCE: WHEN IT MAY BE INVOKED

Following remarks by SMITH J in *S* v *Nyambo supra*, it appears the impression has been created that the mandatory minimum sentence prescribed in s 19(3) applies in all cases where an accused person possesses dagga

GARWE J

proved to have been prepared and ready for smoking. It is unclear whether this is what the learned judge meant when he stated at p 336 G that -

> ``It would mean that his (ie accused's) sentence would be more than double if the dagga was in fact prepared for smoking.''

If this was the conclusion reached in the above review matter then I am not, with respect, persuaded that the conclusion is a correct one.

Section 9(a) of the Dangerous Drugs Act provides:

> ``No person shall manufacture, sell or *otherwise deal in* prepared opium or prepared Indian hemp '' (my emphasis).

Section 9(b) on the other hand provides:

> ``No person shall *have* in his possession any prepared opium or prepared Indian hemp'' (my emphasis).

The penalty section is to be found in s 19. Subsection (1)(a) thereof provides that any person who contravenes any provision of this Act shall be guilty of an offence and liable to a fine not exceeding $10 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment. The mandatory sentence is to be found in s 19(3), which provides:

> ``(3) Notwithstanding any other provisions of this section, any person who is guilty of an offence under this Act involving the *unlawful dealing* in any of the drugs other than Indian hemp, to which Part II applies, or any drug to which Part III or Part IV applies, shall be liable to:
>
> (a) imprisonment for a period of not less than fifteen years or more than twenty years; and
>
> (b) a fine of not less than fifteen thousand dollars or, in default of payment, imprisonment for an additional period of not less than five years or more than ten years;
>
> and, notwithstanding anything to the contrary contained in any other enactment, the court shall not order that the operation of the whole or any part of the sentence be suspended.
>
> Provided that, where upon conviction the convicted person satisfies the court that there are special circumstances in the particular case ... ''

It is my considered view that s 19(3) does not apply in cases that involve mere possession of prepared dagga. The Attorney-General, to whom I referred the matter for an opinion, agrees with me in this respect. In his response, he has remarked:

> ``It is submitted with respect that a conviction for a contravention of s 9(b) of the Act, in view of the provisions of s

Copyright Juta & Co Ltd

19(1) of the same Act, does not automatically oblige a court to impose the mandatory penalties provided for in s 19(3) of the Act. To hold otherwise would be tantamount to saying that s 19(1)(a) does not apply to a contravention of s 9(b) of the Act."

On a correct interpretation of s 19(3), I am satisfied that the above comments are correct. Section 19(3) provides that any person who is guilty of an offence under this Act involving the unlawful dealing in any of the drugs listed in Part II (except Indian Hemp) or to which Part III and Part IV applies

GARWE J

shall be liable to receive the mandatory minimum sentence. The important words to emphasise are:

``an offence under this Act *involving* the unlawful dealing in any of the drugs listed.''

In other words the mandatory minimum sentence applies only to offences *involving the unlawful dealing* in any of the drugs listed. The term ``dealing in'' has been defined in subs (7) to mean:

``in relation to any drug, includes to sell or to perform any act, whether as a principal, agent, carrier, messenger or otherwise, in connection with the delivery, collection, importation, exportation, transhipment, supply, administration, manufacture, cultivation, procurement or transmission of such drug.''

Whilst I accept that the definition section is wide enough to include possession with an intention to supply, I am of the view that regard should also be had to the intention of the legislature in creating separate offences in s 9 ie paras (a) to (g) and, in particular, paras (a) and (b). Section 9(a) clearly applies to persons who manufacture, sell, or otherwise deal in (as defined) prepared opium or prepared Indian Hemp. In other words, s 9(a) is an offence *involving the unlawful dealing* in drugs and in respect of which the mandatory minimum sentence would apply. Section 9(b), on the other hand is *not* an offence involving the unlawful dealing in drugs. The offence is complete as soon as one has possession (ie both physical as well as *animus possidendi*). Other offences prescribed by s 9, such as smoking or using prepared dagga (s 9(f)) and inciting or influencing another person to smoke or use dagga (s 9(g)), are also not offences involving dealing in such drugs. The Attorney-General also agrees with my interpretation in this regard. He has commented in his minute:

``Consequently, and with the greatest respect it is humbly submitted that to the extent that s 9(b) does not require an accused to have `dealt in' drugs but simply to have `possessed' prepared Indian Hemp it is competent for a court to punish an accused person in terms of s 19(1)(a) of the Act. In the result, a mandatory minimum sentence in terms of s 19(3) is not competent.''

I am satisfied that it could not have been the intention of the legislature for mere possession of prepared dagga to be the subject of the mandatory minimum sentence. Had that been the intention clear words to that effect would have been used. Instead the legislature has made it clear the mandatory minimum sentence applies only in respect of offences involving the unlawful dealing in particular drugs. Unlawful possession of prepared dagga, contrary to the provisions of s 9(b) of the Act, is clearly not an offence involving the unlawful dealing in drugs. The offence is complete when one has possession of prepared dagga in the legal sense. On the other hand, dealing in drugs implies more than mere possession. It includes doing any one of

Copyright Juta & Co Ltd

the things listed in subs (7) of s 19.

GARWE J

I am aware that in a number of cases accused persons are charged with contravening s 9(b) of the Act and during mitigation tell the court that they intended to sell the dagga. Even in such cases, the mandatory minimum sentence is not competent as the offence remains one of possession and not dealing in prepared dagga. In short, the situation is that the State, as *dominus litis*, must ensure that the correct charge is preferred against the accused. If the accused is charged with mere possession, but he thereafter admits that he intended to supply, the provisions of s 19(3) will not apply unless the proceedings are stopped in terms of s 54 of the Magistrates Court Act and the Attorney-General substitutes a charge of contravening s 9(a) or other relevant sections of Part II, III and IV of the Act. The fact that accused admits he intends to sell the prepared dagga would not justify the imposition of the mandatory minimum sentence in cases where the charge is one of contravening s 9(b) of the Act. Whilst a court can take as an aggravating feature the fact that the accused intended to sell the dagga, there would be no legal basis for holding that the offence is one involving dealing in drugs. The position is now settled that the sentence imposed in a particular case must have a bearing to the actual offence of which accused has been convicted and not in respect of some other or more serious offence: see *S* v *Samboko* HH-347-85; *S* v *Noach* HH-395-83.

These two cases followed remarks in *R* v *Conrad* 1966 RLR 626 (A) that:

> ``In assessing sentence, the limits which must be observed are always that the sentence must be in respect of the crime of which the accused has been convicted, and not in respect of some other more serious offence; and there must be no risk of the accused being prosecuted in another trial in respect of the matters which have been taken into account in assessing sentence."

In summary, therefore, where an accused is charged with and convicted of unlawfully possessing prepared dagga, contrary to the provisions of s 9(b) of the Act, he cannot, even if he tells the court he intended to sell the prepared dagga, be sentenced to the mandatory minimum sentence provided for in s 19(3). Indeed, all offences under Part II, Part III and Part IV of the Act which do not involve the unlawful dealing in any of the drugs specified are not subject to the mandatory minimum sentence. Indian hemp, as defined, has been excluded from the category of drugs specified in s 19(3) of the Act. As a corollary, therefore, a person who deals in *unprepared* Indian hemp, as defined under Part II of the Act, would also not be liable on conviction to receive the prescribed mandatory minimum sentence. Clearly, the mandatory minimum sentence was intended for persons who derive a commercial benefit from dealings in the dangerous drugs listed in Part II (except dagga), Part III and Part IV of the Act and are charged with offences involving the

CHINHENGO J

unlawful dealing in such drugs. It seems to me that offences involving dealing in such drugs and in respect of which the prescribed mandatory sentence would be warranted, would include

Copyright Juta & Co Ltd

a contravention of ss 4 (except Indian hemp), 9(a), 9(c), 9(d) and 11.

SENTENCE

I consider the sentence imposed to be appropriate although, speaking for myself, a lesser sentence may have been warranted, regard being had to the accused's age and personal circumstances. In the absence of a misdirection on the part of the trial magistrate, I find no basis for interfering with the sentence he imposed.

In the result, the sentence is certified as being in accordance with real and substantial justice.

CHINHENGO J: I am broadly in agreement with the judgment of GARWE J. I need however, to make further observations on two issues - the confusion surrounding the framing of the charge in respect of which the magistrate was not helpful and the circumstances in which an accused should properly be convicted of dealing in prohibited drugs and the mandatory sentence can properly be imposed.

The accused was charged with the crime of contravening s 4(a) of the Dangerous Drugs Regulations 1975 (RGN 1111/75) (the Regulations) which provides that no person who is not an authorised or licensed person shall acquire or possess a Part I drug (the reference should be to a Part II drug as stated in the lead judgment). Indian hemp (dagga) which has not been prepared for smoking is a Part II drug. The immediate impression created by charging a person under s 4(a) of the Regulations is that the accused was in possession of dagga not prepared for smoking.

In the body of the charge, it is stated that the accused ``unlawfully had been found in possession of (2 kg) two kilograms of prepared Indian hemp (dagga)''. Prepared Indian hemp is not a Part II but a Part III drug and the unlawful possession of such a drug should be charged as a contravention of s 9(b) of the Dangerous Drugs Act [*Chapter 15:02*] (the Act).

The heading to the outline of the State case reads ``charged with the crime of contravening Section 9(b) ARW. Section 19(1) of the Dangerous Drugs Act [*Chapter 5:02*]: Found in possession of dagga''. The facts as summarised reveal that the accused was found in possession of dagga which was not prepared for smoking. It is apparent that the person who framed the charge was not at all clear as to the distinction between prepared dagga and dagga

CHINHENGO J

which is not prepared. He was equally confused as regards the provision under which the accused should be charged, dependent on whether the factual allegation is that the accused was in possession of prepared dagga or dagga which was not prepared.

The magistrate was equally not alive to the issues involved. He did not clarify the charge or seek such clarification. Compounding on confusion already evident on the papers, he dealt with the matter in a most cursory and unsatisfactory manner. The record bears testimony to this. It reads:

Copyright Juta & Co Ltd

``Charge:put and understand.

Plea: guilty 271(2)(b).

Facts: *read.*

Q. Do you agree with the facts?

A. Yes.

Q. Do you have anything to add or subtract?

A. No.

Essential elements:

Q. On 24/5/98 you were found in possession of 2 kg of dagga?

A. Yes.

Q. Any lawful right?

A. No.

Q. Any defence to offer?

A. No.

Guilty as charged.''

Section 271(2)(b) of the Criminal Procedure and Evidence Act requires the magistrate in plea proceedings, where the accused is not represented by a legal practitioner, to explain the charge and the essential elements of the offence and inquire from him whether he understands the charge and the essential elements of the offence. Of particular significance, the magistrate is required to inquire whether the accused's plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor. The record of proceedings in this case discloses a failure by the magistrate to explain the charge and the essential elements of the offence which involves some complex concepts and to make an inquiry as enjoined of him by the law. See *S* v *Pengapenga* HH-76-98. If he had properly explained the charge and the elements of the offence, the inadequacies in the charge and the erroneous reference to the sections allegedly contravened would have become manifest. This failure by the magistrate resulted in the conviction of the accused on a charge which was improperly framed in the light of the facts alleged. In the result, too, no evidence was led to establish whether the dagga was prepared for smoking or not. The charge must be altered by the deletion of ``prepared'' in the body thereof (see *Nyambo*'s case, *supra*). With such an amendment, which is not prejudicial to the accused, I agree that the conviction should be confirmed.

CHINHENGO J

The second issue raised in the lead judgment, which I think does not arise for decision in this matter but which is nonetheless important for the future guidance of judicial officers, is whether

Copyright Juta & Co Ltd

the mandatory sentence prescribed by s 19(3) applies in respect of the contravention of s 9(b).

I agree that the legal position is that it does not apply. Section 9 creates several offences. Section 9(b) prohibits the possession of prepared dagga. The other paragraphs create several offences in relation to prepared dagga. It prohibits the manufacture, sale or dealing in prepared dagga (9(a)). It prohibits the occupier of premises from giving permission to use such premises for preparing dagga for smoking and from using the premises for the sale or smoking thereat of prepared dagga (9(c)). It prohibits the possession of pipes or other utensils for use in connection with the smoking or preparation for smoking of dagga (9(e)), the smoking or other use of prepared dagga and frequenting a place used for the purpose of smoking dagga and the inciting or influencing of other persons to smoke or otherwise use prepared dagga or procure or supply prepared dagga. Any person who contravenes s 19(1) shall be liable on conviction to a fine not exceeding $10 000 or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment.

Section 19(3) prescribes a mandatory sentence for dealing in drugs, excluding unprepared dagga. I respectfully agree with the lead judgment that the contravention of s 9(b) does not attract the mandatory sentence. Section 19(3) prescribes the penalty for contravening s 9(a), ie the manufacture, sale or otherwise dealing in prepared dagga. That, however, is not, in my view, the full scope of the subsection. Indian hemp in Part III of the Act is defined thus:

> ``means India hemp which has been prepared for smoking ... ''

The qualification ``for smoking'' is important. If the accused is found to have dealt in Indian hemp which has not been prepared for smoking but has been prepared for other purposes, then the mandatory sentence is also not applicable. The mandatory sentence can be imposed only on two conditions:

(1) that the accused dealt in prepared Indian hemp; and

(2) that the dagga had been prepared for smoking.

It is essential that where an accused admits to dealing in prepared dagga, a further inquiry should be conducted to establish whether the prepared dagga was so prepared for smoking. Support for this statement is to be found in *Pengapenga*'s case where GILLESPIE J said at p 3 of the cyclostyled judgment:

> ``In this case, the relevant concept is the term `prepared for smoking'. As the judgment in *Nyambo*'s case shows, this is a term which is undefined in statute and to which a clear

CHINHENGO J

> meaning is not easily ascribed. The need for evidence as to when the substance is prepared for smoking is alluded to as is the need to adduce facts that the substance in question was in a state that could properly be called `prepared for smoking' ...
>
> I say, in addition, that even such a question as this will not be adequate unless the State produces proof that the substance recovered is prepared for smoking. It is a perfectly simple procedure to produce in each such prosecution an affidavit of an expert stating that he has examined the substance concerned, that it is a dangerous

Copyright Juta & Co Ltd

drug in terms of the Act and that it is prepared for smoking. Such an affidavit should be regarded as a requirement, just to the same extent as a medical affidavit is a requirement in a case of assault with intent to do grievous bodily harm."

Subject to these observations, I am in agreement with the lead judgment in this case. I am also of the view that the restrictive interpretation of s 19(3) is necessary in view of the very heavy penalty it prescribes. In *Nyambo*'s case *supra*, at 337F SMITH J expressed the concern that consideration should be given to amending the definition of prepared dagga in s 7 of *Chapter 15:01* and subs (3) of s 19, in so far as it applies to dagga. In view of the conclusion reached in the lead judgment and the further restriction I have mentioned herein, this goes some way to address that concern but nonetheless the legislature may have to step in and provide the clarity which is necessary to put the matter beyond any doubt.

TRUST MERCHANT BANK LTD *v* LEWIS MURODZO ENTERPRISES (PVT) LTD & ANOR 1998 (2) ZLR 387 (HC)

Court **High Court, Harare**

Gillespie J

Chamber application

21 October 1998 Judgment No. HH-181-98

Flynote

Costs - legal practitioner - award against - poorly presented pleadings, containing much unnecessary material - legal practitioner not entitled to recover fees for such work

Practice and procedure - pleadings - contents - case based on contents of documents - how such contents should be pleaded - practice of attaching documents of evidentiary nature - when such documents may be attached

Headnote

There is no formal rule that a party should attach to his pleadings any documents at all, even a document on which the claim is founded. The decision whether or not to attach a document, or merely set forth its material portions or even simply refer to it, will depend on the bulk of the document or documents and more importantly on the desirability or otherwise of having the whole document available on the pleadings. Where it is essential to attach a document in order to set out the cause of action, that should be done if it can be done without surplusage: for example, a standard deed of suretyship. But in other situations - for example, a case depending on an insurance policy - a reproduction of the material parts, or a referral to the document, will be preferable.

Bank statements, invoices, delivery notes, receipts and the like should not be attached. They are all evidentiary documents which do not found the cause of action.

It is no compliance with the rules of court, and is an affront to the court, to attach to the summons or declaration lengthy and bulky statements of account containing masses of raw

Copyright Juta & Co Ltd

material which require critical appraisal, collation and analysis. It is the duty of the legal practitioner to reduce this information to a simple schedule or calculation. The egregious and excessive attachment of documents is contrary to the rule against pleading evidence. It is a discourtesy to the court and seeks to place on the court the function of preparation and quantification which the legal practitioner expects to be paid for. Such pleading will not be tolerated, and practitioners should not be surprised to find themselves visited with the costs.

Cases cited:

Bantry Head Invstms (Pty) Ltd & Anor v *Murray & Stewart (Cape Town) (Pty) Ltd* 1974 (2) SA 386 (C)

Chikomwe & Ors v *Standard Chartered Bank Zimbabwe Ltd & Anor* S-152-98

GILLESPIE J

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

Jordaan Ex p: in *Grunow Ests (Edms) Bpk* 1993 (3) SA 448 (O)

Simoes v *Hasewinkel & Anor* 1966 (1) SA 579 (W)

Legislation referred to:

High Court Rules 1971 (RGN 1047/1971), rr 13(4), 13(5) 99(c) and 103(2)

Judgment

GILLESPIE J: The plaintiff has instituted action for the repayment of a debt. It claims the alleged amount outstanding on certain financial facilities extended by the plaintiff to the first defendant, its customer, and to the second defendant as surety to the first. The amount claimed is $663 945.30.

The particulars of claim allege that:

> ``as at 31 March 1998, the first defendant owed plaintiff a total amount of $663 945.30 in respect of the capital amount and interest thereon. Attached hereto are two schedules showing, firstly, debits and credits made to the first defendant's loan account with the plaintiff, and secondly, the applicable market rate of interest and the amount of interest debited by the plaintiff to the defendant as at 31 March 1998. The schedules are marked Annexures `C' and `C1' respectively.''

The two schedules, which are said to be attached to the claim, are in fact detailed monthly statements of each transaction pertaining to the account. The so-called schedule C consists of 23 such statements covering the period May 1996 to March 1998. Schedule C1 is some 46 such statements, showing daily calculations of interest over the same period, intended to support interest debits appearing in each of the statements comprising schedule C. The pages are not all in chronological order. Schedule C1 in particular is in complete disarray. This renders the task, which the attorney concerned intends thus to impose upon the judge, of checking and

---

Copyright Juta & Co Ltd

correlating all the entries, quite intolerable.

The growing tendency amongst legal practitioners to attach to pleadings lengthy documents, and in particular documents of an evidentiary nature, is becoming increasingly troubling. The practice carries with it not only a breach of the rules of pleading evidence but also generally involves unnecessary expense in reproducing a multiplicity of documents. This would be avoided if practitioners would bear in mind the simple rules concerning the attachment of documents to pleadings.

There is in fact no formal rule that a party should attach any document to his pleadings, even a document upon which is claim his founded. The practice that has subsisted for ages is that:

> ``a pleader who relies upon a written document [ought] to do one of three things:
>
> (a) to annex the document on which he relies; or
>
> (b) to set forth the material portions thereof; or

GILLESPIE J

> (c) to `refer to' the material portions thereof.'' 1(99)

By ``referring to'' the material portion is meant that the document and its material portion should be sufficiently identified in the pleading to inform the other party of the case.

This practice is reflected in, or is consistent with, two rules of court. First that:

> ``Whenever the contents of a document are material, it shall be sufficient in pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.'' 2(100)

This expressly excludes any duty (that might otherwise be thought to exist) to attach documents. The decision whether or not to attach a document, or merely to set forth its material portions or even simply refer to it, will depend generally upon the bulk of the document or documents in question and more importantly upon the desirability or otherwise of having the whole document available on the pleadings. Thus where it is essential to attach a document in order to set out the cause of action, then that should be done if it can be done without surplusage. As an example, consider a standard form deed of suretyship - a document upon which a cause of action is based which contains the material terms and will generally not contain unnecessary matter. Where the cause of action can be set out by reproducing the material portion of a document, and where that document contains much that is unnecessary, then a reproduction or summary of that term, or a referral to the document, will be preferable. As an example, consider an insurance policy that covers risks to household, farming, crop, livestock and motor vehicles. Such a bulky contract, even if it forms the basis of the cause of action in respect of one particular risk, would not advantageously be attached to a pleading because of all the unnecessary matter it contains. 3(101)

The second rule is that:

Copyright Juta & Co Ltd

``A pleading shall -

...

contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved ... " 4(102)

Invoices, statements of account, delivery notes, receipts and multitudinous other such documents - which attorneys will insist upon attaching to pleadings, or will persist in demanding for the purpose of pleading - are all

GILLESPIE J

evidentiary documents. They do not found the cause of action. They are not the facts, to be pleaded; they are documents constituting the evidence by which the facts are to be proved. In particular, all the annexures in this case that are statements of account and transaction schedules constitute the evidence by which the fact of indebtedness in a certain principal debt and interest is to be proven.

A further consideration arises concerning the attachment of these unnecessary documents in this case. It arises from the recent amendment to the rules of court concerning to the particularisation, for the purposes of the *in duplum* rule, of claims sounding in money relating to capital and interest thereon, or to bank overdrafts, following the decision in *Commercial Bank of Zimbabwe Ltd* v *MM Builders & Suppliers (Pvt) Ltd & Ors*. 5(103) This amendment requires certain particulars to be endorsed clearly on the summons. 6(104) Obviously, if an endorsed summons is not used, the particulars must be contained in a declaration. It is no compliance with this rule to attach to the summons or declaration lengthy and bulky statements of account containing masses of ``raw'' information that still require critical appraisal, collation and analysis. It is in fact an affront to the court to present information in this way. It is the duty of the legal practitioner to reduce this unprocessed information to a simple schedule or calculation. If it is too much work for him, then he ought not to accept instructions.

It is, further, the duty of the legal practitioner to avoid wastefulness and prolixity in litigation.

``It is, in my view, proper for the court, in an appropriate case, to exercise its discretion as to costs in order to discourage and penalise wastefulness and undue prolixity.

If an attorney out of cupidity or stupidity has burdened the record of an application 7(105) with a substantially greater quantity of paper than was reasonably required for the presentation of his client's case, his opponent should not be ordered to bear the resulting burden of unnecessary costs." 8(106)

A legal practitioner who is responsible for an unreasonable escalation in costs of litigation need not be surprised if he finds himself visited with those costs.

In this case, the summons does not comply with the directions in the *MM Builders*' case, nor with r 13(4) and (5). The egregious and excessive attachment of documents is contrary to the rule against pleading evidence and is not in conformity with the practice pertaining to attachment of documents.

Copyright Juta & Co Ltd

GILLESPIE J

Those documents do not provide the particularity required. They do not constitute a clear and concise statement of the facts relied upon. They entail an unnecessary expense and wastefulness. They are a discourtesy to the court and seek to place upon the court the function of preparation of a case and quantification of a claim that the legal practitioner expects to be paid for. This sort of pleading will not be tolerated.

In the event, the plaintiff's claim is dismissed. Messrs Gill, Godlonton & Gerrans are to recover no fees or disbursements in respect of the summons, particulars of claim, service or application for default judgment. Since this decision is not made on the merits of the claim (which are by no means evident on the summons), it is open for the plaintiff to proceed afresh for the same claim on the same cause with a summons that does not contain the same cause for complaint.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

S *v* MUNDOWA 1998 (2) ZLR 392 (HC)

Court **High Court, Harare**

Smith J & Omerjee J

Criminal appeal

21 October 1998 Judgment No. HH-182-98

Flynote

Criminal procedure (sentence) - common law offences - indecent assault - mature man assaulting young girl in attempt to persuade her to have sex with him - severe punishment appropriate

Criminal procedure (sentence) - general principles - appeal - limits on appeal court's powers to interfere with sentence passed by trial court

Headnote

A sentence of 14 months' imprisonment, of which 5 months were suspended on conditions relating to good conduct, was upheld where a 39 year old married man indecently assaulted a 14 year old school girl, who was staying at his house, and attempted to persuade her to have sex with him.

An appeal court does not have a general discretion to ameliorate the sentences of the trial courts. It cannot interfere unless the discretion was not judicially exercised, that is, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court would have imposed it.

Cases cited:

Copyright Juta & Co Ltd

S v *Buhwa* S-49-90

S v *de Jager & Anor* 1965 (2) SA 616 (A)

S v *Dube* HH-50-98

S v *Dziva* HB-93-96

S v *Jack* HH-52-88

S v *Matobomo* HB-62-94

S v *Ndlela* HB-100-94

S v *Nhumwa* S-40-88

S v *Phiri* HH-219-93

S v *Tauya* S-4-95

S v *Tigere* HB-8-80

Case Information

L T Muringani, for the appellant

N Mushangwe, for the respondent

Judgment

SMITH J: The appellant was charged with indecent assault. He pleaded not guilty but was convicted and sentenced to 14 months' imprisonment, of which 5 months were suspended on condition of good conduct. He has

SMITH J

appealed against that sentence. The facts of the case are as follows. The complainant is a 14 year old school girl. Her brother was a lodger at a house belonging to the appellant. On 10 January 1998, she spent the night at the appellant's house, sharing a room with the appellant's daughter. The appellant entered the room after the two girls had gone to sleep. He got under the blankets of the complainant and started to fondle her. He touched her thighs and her breasts and woke her up. He asked her if she would have sexual intercourse with him and offered her $40. She refused and left the room to go to her brother's room. Unfortunately, he was out and his room was locked.

The appellant left the room and then returned a short while later, wearing only a pair of shorts, which he then removed, leaving him naked. It was only after the complainant had woken the appellant's daughter that he left the complainant alone and returned to his room.

Mr *Muringani* argued that the sentence was excessive. He submitted that the appellant intended

Copyright Juta & Co Ltd

to proposition the complainant and not to rape her. He argued that the actions of the appellant did not constitute a serious offence and that a fine would have been an appropriate sentence. If, however, a custodial sentence was imposed, then it should have been suspended on condition the appellant performed community service.

Mr *Muringani* also submitted that the sentence was not in line with those imposed in earlier cases, such as *S* v *Phiri* HH-219-93 and *S* v *Buhwa* S-49-90, where fines were substituted for custodial sentences that had been imposed by the trial court. In his reasons for sentence, however, the trial magistrate did refer to *Buhwa*'s case and distinguished it on the basis that in that case there was no fondling of the complainant's breasts and he pointed out that the judge had commented that had the appellant's conduct extended to fondling the complainant's breasts or private parts, there would have been aggravating features. In *Phiri*'s case, the indecent assault was not serious and there were strong mitigating features.

The magistrate also referred to *S* v *Jack* HH-52-88 and *S* v *Dziva* HB-93-96, where custodial sentences were imposed. In the *Jack* case, where the accused climbed into the complainant's bed and touched her breasts, he had been sentenced to 12 months' imprisonment. REYNOLDS J reduced the sentence to 6 months' imprisonment. In doing so, he commented:

> ``Although the complainant was humiliated by this attack upon her person, the offence itself was not gravely injurious, and other members of the public did not witness her being subjected to an assault in this way.''

Mr *Muringani* conceded that where a female has been indecently assaulted and the intention of the accused was to rape her, a custodial sentence is called for - *S* v *Tauya* S-4-95, *S* v *Tigere* HB-8-8: and *S* v *Ndlela* HB-l00-94. He argued, however, that where the intention of the accused was merely to

SMITH J

proposition the complainant, then a fine would be appropriate, as was done in *S* v *Phiri supra*.

Mr *Mushangwe* argued that indecent assault was a serious offence, which could have a serious traumatic effect on the victim, and supported the sentence imposed by the magistrate. In *S* v *Matobomo* HB-62-94 BLACKIE J said:

> ``... sexual assault on a child is a serious offence. Even first offenders are usually imprisoned for it. Imprisonment is considered necessary to discourage offenders from repeating the offence and to deter others from repeating it.''

And in *S* v *Tauya*, *supra*, MUCHECHETERE JA said:

> ``... sexual molestation of children appears to be distressingly on the increase and the courts have indicated that deterrent sentences ought to be imposed in such cases ... ''

In that case, the appellant was 44 years old whilst the complainant was only 13 years old.

The aggravating features in this case are the disparity in the ages of the appellant and the complainant, the fact that he was wanting to commit what would have been a serious offence if he had been successful and the lengths he went to in trying to persuade his victim to indulge in sexual intercourse. He is 39 years old and she is only 14, an age gap of 25 years. He is old

Copyright Juta & Co Ltd

enough to be her father. Had he been successful in persuading her to succumb to his advances, he would have contravened s 3(a) of the Criminal Law Amendment Act [*Chapter 9:05*]. Not only did he stroke parts of the girl's body but he also stripped naked before he got under the blankets the second time. Furthermore, he tried to tempt her with a bribe of $40. Such conduct is totally unacceptable in our society. Young girls must be protected from indecent advances by men such as the accused.

In *S* v *Dube* HH-50-98 I reviewed three cases which involved a contravention of s 3(a) of the Criminal Law Amendment Act [*Chapter 9:05*]. In all of the cases reviewed, the accused had been sentenced to pay a fine; the proceedings were not certified as being in accordance with real and substantial justice because it was felt that custodial sentences should have been imposed. The courts have pointed out that the rationale of the 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. In present day circumstances, with the very high prevalence of the HIV virus and AIDS, the dangers are even greater. Young girls would be very susceptible to being infected and the consequences would be life-threatening. Many young girls would not appreciate fully the dangers involved. Those elderly sugar daddies, who try to tempt young girls by offering them money or a good time, must realise that if they are caught they are likely to end up in prison. Even if he is not

successful in his quest to have sexual intercourse, if he commits an indecent assault in his attempt to seduce the girl, then he must be punished severely.

The sentence imposed by the magistrate in this case is severe. However, it seems to me that the magistrate did not misdirect himself. He considered suspending part of the sentence on condition that the appellant perform community service but decided that that would not be appropriate in this case. I cannot disagree with that assessment. In *S* v *Nhumwa* S-40-88 KORSAH JA, at p 5 of the cyclostyled judgment, said:

> ``It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severer than one that the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court.''

He referred with approval to *S* v *de Jager & Anor* 1965 (2) SA 616 (A) at 628-9 where HOLMES JA said:

> ``It would not appear to be sufficiently realised that a court of appeal does not have a general discretion to ameliorate the sentences of the trial courts. The matter is governed by principle. It is the trial court which had the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard, an accepted test is whether the sentence induces a sense of shock, that is to say, if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.''

Copyright Juta & Co Ltd

Accordingly, the appeal is dismissed.

OMERJEE J: I agree.

Mugabe and Partners, appellant's legal practitioners

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

---

BANGURE *v* GWERU CITY COUNCIL 1998 (2) ZLR 396 (HC)

Court **High Court, Harare**

Gillespie J

Chamber application

1 & 21 October 1998 Judgment No. HH-184-98

Flynote

Landlord and tenant - tenant - rights - tenant having planted crops before leaving land - crops planted after expiry of lease - tenant not entitled to access to tend and harvest crop

Property - occupier - improvements effected by - tenant having planted crops - rights of access after expiry of lease - right to compensation for improvements

Headnote

The applicant had for many years occupied land belonging to the respondent council. He had done so in terms of a written lease which expired in 1994. Proceedings were brought to eject him and he was in due course evicted. After his eviction, he sought an order for access to tend and harvest the crop he had planted before he was evicted. The crop had been planted after the eviction proceedings had begun.

Held, that while a possessor of property who has improved the property has certain rights in respect of the improvements, special rules apply to leases. A lessee can only claim compensation for improvements; he has no right to use or retain the leased property in order to assert a claim for compensation. The only exception to this is the limited one of a lessee who plants in due season, during the currency of the lease, and with every reasonable expectation that he will reap before the end of the lease. Only where that expectation is frustrated by unforeseen weather conditions would it be fair and equitable to permit a right of access to the crop, because this would prevent an unjust enrichment of the lessor at the expense of the lessee.

Held, further, that no such right could be enjoyed by the applicant. He had been in unlawful occupation for some years. He had planted the crop although under an order of eviction. To grant his application would be to condone a lasting invasion of the arable lands of the respondent and further delay the date upon which the respondent could make use of its own property.

Copyright Juta & Co Ltd

Cases cited:

de Beers Consol Mines v *London & SA Exploration Co* (1893) 10 SC 359

Hansen & Latelle v *Crafford* (1909) 26 SC 426

Japhta v *Mills' Exors* 1910 EDL 150

Lessing v *Steyn* 1953 (4) SA 193 (O)

Omarshah v *Karasa* 1996 (1) ZLR 584 (H)

Scheepers v *Robertse* 1973 (2) SA 508 (N)

GILLESPIE J

Case Information

S Hwacha, for the applicant

R C Bridges, for the respondent

Judgment

GILLESPIE J: The applicant has for many years been holding over in occupation of land belonging to the respondent. Originally, in fact from 1988, he had occupied the land in terms of a written agreement of lease. That contract expired in 1994. The respondent commenced proceedings in Bulawayo for the eviction of the applicant. These proceedings terminated with the giving of summary judgment in favour of the present respondent, in default of appearance by the present applicant. Thereafter the applicant moved rescission of judgment. He was unsuccessful. He has since appealed the refusal to rescind judgment. The respondent moved leave to execute judgment, by evicting the applicant, pending appeal. That leave was granted in June this year by the same learned judge who had refused to rescind the judgment. The applicant has since (and very recently) been evicted from the property. He now brings this urgent application in chambers for a provisional order allowing him access to the property from which he has been evicted for the purpose of tending, and ultimately harvesting, a standing maize crop which he planted this year.

An immediate difficulty which arises is whether I would have any power to intervene, even were I minded to do so. There is the existing order of my learned Brother in Bulawayo which might be thought to prevent any consideration of an alleged claim to be excused the consequences of execution of the judgment of eviction. That order is final in effect and is arrived at on the merits. Its basis is a balancing determination of the merits on appeal of the claim to occupation as against the prejudice to be wrought should judgment be executed pending appeal. Normally, such a decision would necessarily involve consideration, amongst all other relevant factors, of crops under cultivation. That would effectively prevent the repetitive raising of the point after the decision is reached in an application such as this for limited access to the property despite the eviction. There is, however, one factor concerning the giving of leave to execute pending appeal

---

Copyright Juta & Co Ltd

that, in my view, permits me to entertain this application and, if appropriate, to grant it.

That circumstance is that the application for leave to appeal was moved in October 1997. The judgment was only given in June this year. At the time the application was made, the crop presently in dispute did not exist. The learned judge, in making his decision, could not have taken into account any question of this crop. In fact, the judgment does not include amongst its reasons any mention of the need to bring to fruition any crops. The present issue, therefore, is not one upon which a decision has been made.

It would therefore be proper for me to entertain the application. It is to be

---

GILLESPIE J

determined according the principles governing the grant of an interdict - in this case a mandatory interdict - permitting access to the lands for the specified purpose. I therefore ask myself what right the applicant has which is entitled to protection.

The lease agreement contained a term providing that:

> ``it is especially agreed that in the event of this agreement terminating by effluxion of time and in the event of the lessee having unreaped crops on the said properties, then in the event that the lessee shall have planted such crops prior to 31 March 1994, the lessee shall have the right to reap such crops ... ''

This clause is of no assistance to the applicant. In its terms, it reserves a right to reap standing crops only where the lease expires by the effluxion of time and where these had been planted before the end of March 1994 (the year in which the fixed term of the lease did in fact expire).

If there is any basis for the application, therefore, it must be found in the common law. It may be said generally that improvements to property adhere to the property and are acquired by the owner of the property through the process of *accessio. Inaedificatio* is the type of non-natural accession by which movables accede to immovables when sufficiently attached and become the property of the landowner. 1(107) *Plantatio* or *satio* are the means of non-natural accession by which, subject to any agreement to the contrary between planter and landowner, growing things accede to the soil and become the landowner's property. 2(108) The intention of the planter is irrelevant to the operation of this law. 3(109)

Possessors or occupiers of property who improve the property retain certain rights in respect of the improvements. Thus the improver or planter enjoys the *ius tollendi*. The right, during the currency of occupation of the property, to remove the improvement if this can be done without damage to the earlier state of the property itself. 4(110) A further right enjoyed by the possessor or occupier who improves property is an entitlement to compensation for the improvements, and even a *ius retentionis* to enforce that claim, is permitted to various classes of possessor or occupier of property. 5(111)

Where the occupation of property, however, was in terms of a lease, then special rules apply. These rules derive from the Placaat of Holland of 1658. 6(112) This parochial legislation provided in its article 10 that -

---

Copyright Juta & Co Ltd

GILLESPIE J

> ``provided, nevertheless, that whenever the owner of any lands, takes them for himself, or lets them to others, he is bound to pay the old lessee, or his heirs, compensation for the structures, which the lessee has erected with the consent of the owner, as well as for ploughing, tilling, sowing and seed-corn to be taxed by the court of the locality, without, however, the lessees being allowed to continue occupying and using the lands, after the expiration of the term of the lease, under pretext of (a claim for) material or improvements, but may institute their action for compensation after vacating (the lands)." 7(113)

This law has been received into the law of South Africa and that of Zimbabwe. 8(114) The effect of this law is unequivocally that a lessee, whatever his right to claim compensation for improvements, has no claim to retain or use the leased property after the expiry of the lease in order to assert a claim for compensation.

Despite the apparent clarity of this rule, there have been two decisions which uphold the right of a lessee in such circumstances to enter on to the leased property, after expiry of the lease, in order to harvest crops planted during the currency of the lease. In *Hansen & Latelle* v *Crafford* 9(115) at issue was the claim by an occupier of land against the former lessee of that land for the delivery of a number of gourds, or their value. These gourds were the fruits of a crop cultivated on the land by the previous lessee during the currency of the lease but not yet ripened or harvested at its expiry. The former lessee had vacated the property at the termination of the lease. Thereafter, however, without the consent of the owner or of the new occupier, he had entered upon the land and harvested and removed the crop. A magistrate had found in favour of the former tenant. The appeal by the occupier of the farm failed. It was held that ownership of the crop had always vested in the erstwhile tenant. The proprietary right was held so to vest on the basis that the crop was planted during the period of the lease without any notice, or reason to believe, that the right of occupation of the property would expire prior to the maturity of the crop. In such a case, it was held, the tenant

> ``does not forfeit his proprietary rights in such crops, and to go upon the land merely for the purpose of reaping or collecting them when ripe, unless it can be shown that he has done damage, will not be in itself any ground for maintaining an action of trespass against him." 10(116)

This view of the law was approved in *Japhta* v *Mills' Executors*. 11(117) In that case, the former lessee, the appellant, was resisting eviction on the ground that he had not been given due notice. In the alternative, he claimed damages being the value of unharvested crops. The appellant, having failed on the

GILLESPIE J

main ground, failed also in the alternative on the basis that he would suffer no loss since he had the right to go onto the land to harvest his vegetables when they would have ripened.

Both of these decisions have been disapproved. 12(118) Undoubtedly, there is error in any finding that title to the crops remained vested in the erstwhile lessees. This result would be entirely inconsistent with the basic principle *omne quod implantatur solo cedit*. 13(119) This has

Copyright Juta & Co Ltd

been recognised by Kerr, 14(120) who nevertheless mounts a spirited and, with respect, by no means unconvincing, defence of the reasoning in the two decisions, apart from this error in principle. The learned author considers the approach in the two decisions from the standpoint of an unjust enrichment.

He submits that the purpose of the Placaten was to restrict a claim by a lessee for a *ius retentionis*. As far as crops are concerned, it is written, the abuse to be checked would be a deliberate planting at the end of the lease, knowing the crops could not possibly ripen before the date of termination, in order to secure some enforced extension of the right of use or occupation, or entry onto, the property. Professor Kerr concludes:

> ``Having in mind [this] illustration of possible circumstances in which the Placaten would apply if the parties had reached no agreement on the point, it can readily be seen that the case of a lessee who plants a crop which is prevented from ripening in time only by adverse weather conditions is very different and does not fall within the scope of the Placaten." 15(121)

The learned author's support for the acknowledgement of a right of entry onto property after the expiry of a lease, where the contract does not provide for the point, to tend and to harvest a crop approaching maturity is, however, limited. It is confined to the case of a lessee who plants in due season, during the currency of the lease, and with every reasonable expectation that he will reap before the end of the lease. Only where that expectation is frustrated by unforeseen adverse weather conditions is it suggested that it would be fair and equitable to permit a right of access to the crop. To afford such a right would prevent an unjust enrichment of the lessor at the expense of the lessee.

In this case, there can be no such right enjoyed by the applicant. The lease expired many years ago. He wrongfully held over in occupation thereafter. He has been in unlawful occupation for some years. He has used the property to his own advantage and in despite of the owner's interests in the property. He planted the present crop, although under order of eviction, in one of the prime areas of irrigated land on the property. He does not bring himself within the scope of any protection, or argued protection, which might be extended

to a lessee, who uses the land in good faith. To grant his application would be to condone a lasting invasion of the arable lands of the respondent and would delay further the date upon which the respondent can finally make the use it wishes of its property.

I accordingly dismissed the application with costs on the day of hearing.

Dube, Manikai and Hwacha, applicant's legal practitioners

Danziger and Partners, respondent's legal practitioners

Copyright Juta & Co Ltd

402 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Civil appeal

19 & 27 October 1998 Judgment No. S-171-98

Flynote

Delict - passing off - requirements - proof of reputation - mere use of famous name not enough - user of name must establish that it has acquired business reputation that is associated with that name - proof of misrepresentation - whether reasonable probability exists that members of public of public will be deceived

Headnote

The appellant 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 had the right to use the name of F W Woolworth, the name of the person who started the original chain of stores. The company 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 had 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 the appellant regarding the use of the company name. No agreement could be reached, so the decision was made to trade under the title of ``The W Store''. A new store was opened in a prestigious shopping complex on the outskirts of Harare. Advertising material was distributed which brought about a clear 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 of which 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 logogram 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 appellant'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.

Copyright Juta & Co Ltd

GUBBAY CJ

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

The appellant sought an interdict, on the grounds of passing off, restraining the respondent from opening and using the appellant's name, trade-mark, logogram or get-up; from using the name Woolworths; and from selling goods with the trade mark Woolworths. The High Court rejected the application. On appeal:

Held, that the purpose of the action for passing off is to protect a business against misrepresentation by the defendant that his business, goods or services is that of the plaintiff or associated therewith. This delict is only committed in relation to a business that has acquired goodwill. Goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business. As passing off harms the reputational element of goodwill, the plaintiff must prove that he has acquired a business reputation associated with his business name. The plaintiff must also prove that the defendant misrepresented his business, goods or services as bring those of the plaintiff or associated therewith. In order to do this, he must establish that there was a reasonable probability of members of the public being deceived or confused into believing that the defendant's business was that of the plaintiff. In this regard factors such as the nature of the businesses, how they operate and the localities in which they operate will be taken into account.

Held, further, that the court *a quo* had been correct in holding that the appellant had failed to prove that the delict of passing off had been committed.

Held, further, that the court *a quo* had correctly found that although the appellant had been trading in the name of a famous international company for some time, it had not proved that it had acquired a reputation in that name, in the sense that its name attracted customers or that it had an established clientele. On the contrary, it seemed only to have a passing trade rather than a secure customer base. The lower court had also correctly found that the appellant had failed to establish that it had acquired a reputation by the use of certain marks.

Held, further, that the court *a quo* had also correctly concluded that in the circumstances of this case the appellant had failed to prove that there was a reasonable likelihood that members of the public would be deceived or confused into believing that the goods of the respondent were those of the appellant. There was no likelihood of ordinary members of the public being deceived or confused, as the two businesses were radically different in character.

Cases cited:

Bon March, (Pvt) Ltd v *Brazier & Anor* 1984 (2) ZLR 50 (S)

Caterham Car Sales Ltd v *Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA)

F W Woolworth & Co (Zim) Pvt Ltd v *The W Store* 1998 (1) ZLR 93 (H)

Copyright Juta & Co Ltd

Kellogg Co v *Cairns Foods Ltd* 1997 (2) ZLR 230 (S)

Pick-'n-Pay Stores v *Pick-'n-Pay Superette (Pvt) Ltd* 1973 (1) RLR 244 (G)

Saybrook (1978) (Pvt) Ltd & Anor v *Girdlestone* 1986 (2) ZLR 185 (S)

Case Information

A P de Bourbon SC, for the appellant

J C Andersen SC, for the first respondent

No appearance for the second respondent

Judgment

GUBBAY CJ: This appeal is against the judgment in *F W Woolworth & Co (Zim) (Pvt) Ltd* v *The W Store* 1998 (1) ZLR 93 (H) in which GILLESPIE J dismissed with costs (i) an application against the first respondent for the grant of a number of interdicts based upon the alleged passing-off of its

GUBBAY CJ

business, goods or services as those of the appellant; and (ii) a further application against the second respondent restraining that official from registering certain trade marks applied for by the first respondent. The parties will be designated as in the court *a quo*.

The material facts which form the background to the dispute are comprehensively and accurately narrated in the judgment cited at 95G-101B. No useful purpose will be served by recapitulating them.

The learned judge held against the appellant on two grounds. First, he found that no goodwill or business reputation had been proven; second, and in any event, that the applicant had failed to establish that the first respondent had misrepresented that its business, goods or services were, or were associated with, those of the applicant (see at 105C-D).

Before turning to an examination of these features and of whether the conclusions reached by the learned judge with respect to them are correct, it is as well to focus briefly on the general principles of passing-off.

These principles were lucidly identified, with reference to leading authorities, in *Caterham Car Sales & Coachworks Ltd* v *Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) where, at 947E-948B, HARMS JA said:

> ``The essence of an action for passing-off is to protect a business against a misrepresentation of a particular kind, namely that the business, goods or services of the representor is that of the plaintiff or is associated therewith (*Capital Estate & General Agencies (Pty) Ltd & Ors* v *Holiday Inns Inc & Ors* 1977 (2) SA 916 (A) at 929C-D). In other words, it protects against deception as to a trade source or to a business connection (*Reckitt & Colman SA (Pty) Ltd* v *SC Johnson & Son SA (Pty) Ltd* 1993(2) SA 307 (A) at 315B). Misrepresentations of this kind can be committed only in relation to a business that has goodwill or a drawing power (Afrikaans: `werfkrag').

Copyright Juta & Co Ltd

Goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business (*cf A Becker & Co (Pty)* v *Becker & Ors* 1981 (3) SA 406 (A) at 417A). The components of goodwill are many and diverse (*O'Kennedy* v *Smit* 1948 (2) SA 63 (C) at 66; *Jacobs* v *Minister of Agriculture* 1972 (4) SA 608 (W) at 624A-625F). Well recognised are the locality and the personality of the driving force behind the business (*ibid*), business licences (*Receiver of Revenue, Cape* v *Cavanagh* 1912 AD 459), agreements such as restraints of trade (*Botha & Anor* v *Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) at 211H-I) and reputation. These components are not necessarily all present in the goodwill of any particular business.

The only component of goodwill of a business that can be damaged by means of a passing-off is its reputation and it is for this reason that the first requirement for a successful passing-off action is proof of the relevant reputation (*Hoechst Pharmaceuticals (Pty) Ltd* v *The Beauty Box (Pty) Ltd (in liquidation) & Anor* 1987 (2) SA 600 (A) at 613F-G; *Brian Boswell Circus (Pty) Ltd & Anor* v *Boswell-Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (A) at 479D; *Williams t/a Jennifer Williams & Associates & Anor* v *Life-Line Southern Transvaal* 1996 (3) SA 408 (A) at 419A-B, 420B). Misrepresentations concerning other components of goodwill are protected by other causes of action such as claims for injurious falsehoods.''

I am in respectful agreement with both HARMS JA and GILLESPIE J (see at

---

GUBBAY CJ

103B-104B) that proof of reputation is a prerequisite to a successful passing-off action. Indeed, in this jurisdiction, such a requirement was acknowledged some time ago in *Pick-'n-Pay Stores Ltd* v *Pick-'n-Pay Superette (Pvt) Ltd* 1973 (1) RLR 244 (G) at 246 *in fine*- 247A; *Bon March, (Pvt) Ltd* v *Brazier & Anor* 1984 (2) ZLR 50 (S) at 55C-E and 60F-G; *Saybrook (1978) (Pvt) Ltd & Anor* v *Girdlestone* 1986 (2) ZLR (S) at 189A; although the point of its essentiality was left open in *Kellogg Co* v *Cairns Foods Ltd* 1997 (2) ZLR 230 (S) at 234G-H as being unnecessary for the resolution of the appeal.

Thus, the crisp issue was whether the applicant had shown that the name ``Woolworth'', or the marks ``W'' or '' " " '' had become by its use in the country, specifically distinctive. In giving careful consideration thereto GILLESPIE J said at 104B-F:

``[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 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.''

And continued at 105A-C:

``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

---

Copyright Juta & Co Ltd

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.''

Two grounds were advanced by Mr *de Bourbon* for the submission that the learned judge ought to have found that reputation had been established. The first was that the applicant had traded from outlets under the name Woolworth since 1956. This is true, but it does not follow that as a consequence the appellant acquired a reputation in the name. It could only attract such a

reputation through its own endeavours. I am bound to agree with the learned judge that, despite the invitation for it to do so, the applicant failed to adduce any evidence in support of its bold averment that it enjoyed a reputation in the use of the famous international name ``Woolworth''. To my mind, the manner in which the applicant operated the stores - their overall appearance and the heavy reliance on passing trade - as so graphically portrayed by the learned judge - suggests the opposite effect.

The second ground urged was that the first respondent had sought to enter into an agreement with the applicant to acquire the name ``Woolworth''. That is so. Nonetheless, I agree with Mr *Andersen*'s contention that such negotiations did not constitute an admission that the applicant had a reputation in the name. Certainly, the name had a value to the South African company Woolworths (Pty) Ltd, with which the first respondent was associated. Moreover, there was the understandable desire on the part of both that company and the first respondent to avoid becoming embroiled in just the type of litigation that subsequently ensued.

Accordingly, I would uphold the decision of GILLESPIE J on the failure of the applicant to prove that it held a reputation in the name ``Woolworth''.

It is as well, however, that I indicate that I am also in entire agreement with the alternative finding made by the learned judge. This was that the first respondent was not shown to have misrepresented that its business, goods or services were those of the applicant or associated therewith; that a reasonable likelihood existed of members of the public being deceived or confused into so believing.

Whether there is a reasonable likelihood of such deception or confusion occurring is, of course, a question of fact which has to be determined in the light of the circumstances of each case. That determination was made by the learned judge, and, in my opinion, is one beyond criticism. Again I can do no better than to quote from the relevant passages of the judgment, the quality of which denies any apology for length. This is what was said at 105D-106D:

``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 imitative of the applicant's name nor as a representation that the first respondent's business is connected with that of the

Copyright Juta & Co Ltd

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 foreswearing 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

GUBBAY CJ

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 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 W of the first respondent's and the disused 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."

The reasoning concluded at 107C-109C:

``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 emphasized 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 suggest

Copyright Juta & Co Ltd

the likelihood of business being

GUBBAY CJ

diverted. This circumstance is rarely regarded as indicative of the probability of confusion amongst customers. 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. 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 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."

It was not argued that the learned judge misdirected himself as to the law or the facts; only that he erred in the value judgment arrived at. Clearly, he had the considerable benefit of an inspection of both businesses and therefore, the ability to form, at first hand, an impression of the impact customers would be likely to experience. He was thus placed in a more advantageous position

GUBBAY CJ

Copyright Juta & Co Ltd

to evaluate the reasonable likelihood of confusion than an appeal court confined to a reading of the record.

Be that as it may, I am entirely satisfied that the judgment is unassailable in respect of both grounds raised by the applicant.

So far as the appeal against the second respondent is concerned, Mr *de Bourbon* found himself unable to advance any meaningful submissions. This was understandable. Plainly, the decision of whether or not to register any trade mark applied for by the first respondent was, as the learned judge remarked, properly to be left to that official.

In the result, the appeal is dismissed with costs.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Ali Ebrahim, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

DIANA FARM (PVT) LTD *v* MADONDO NO & ANOR 1998 (2) ZLR 410 (HC)

Court **High Court, Harare**

Smith J

Opposed application

16 & 28 October 1998 Judgment No. HH-188-98

Flynote

Administration of estates - executor - requirement to deliver assets of estate to executor - duty of executor to recover and safeguard property of deceased estate

Practice and procedure - parties - representation - company - must be represented by legal practitioner

Practice and procedure - stare decisis - decisions of the High Court - single judge departing from ruling made by two judges - breach of stare decisis principle

Spoliation - lawful possession - when established - need to show necessary intention to possess as well as physical possession - wrongful possession by spoliator - what is - administrator of deceased estate removing estate property - not an unlawful removal

Headnote

The executor of a deceased estate took livestock from a farm belonging to the applicant company. The livestock had belonged to the late brother of a director of the company. The company sought a spoliation order, claiming that it was in peaceful and undisturbed possession of the livestock and that the executor had wrongfully deprived it of such possession. When the

---

Copyright Juta & Co Ltd

proceedings were first brought, a director of the company had appeared to represent the company.

Held, that the company owned the farm but the evidence was that the livestock had been in the possession of the deceased. Although the livestock was on the company's farm, there was no evidence that it had ever possessed the livestock, as it did not have the requisite intent in respect of the stock.

Held, further, that the first respondent had established that the stock he removed was properly identified as having belonged to the deceased. The Administration of Estates Act [*Chapter 6:01*] requires that any person having custody of any property or asset belonging to a deceased estate should forthwith deliver the property or assets to the executor or report the particulars of the property to the Master. The removal of the property was therefore lawful.

Held, further, that the applicant did not show that it had not consented to the removal of the property. The deceased's brother, a director, was shown to have been present at the time and to have acquiesced in the removal.

SMITH J

Held, further, that the applicant had to be represented by a legal practitioner. There was a decision by two judges of the High Court to this effect. Although a single judge had later given a judgment to the opposite effect, the *stare decisis* principle requires that he should have followed the earlier judgment.

Cases cited:

Bennett Pringle (Pvt) Ltd v *Adelaide Municipality* 1977 (1) SA 230 (E)

Botha & Anor v *Barrett* 1996 (2) ZLR 73 (S)

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

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

Levin & Co Ltd v *Berg River Flour Mills* 1920 WLD (not reported)

Pumpkin Construction (Pvt) Ltd v *Chikaka* 1997 (2) ZLR 430 (H)

Yeho v *Qana* 1973 (4) SA 735 (A)

Zimbabwe Banking Corp Ltd v *Pindi Electrical & Hardware (Pvt) Ltd & Ors* 1998 (2) ZLR 210 (H)

Legislation considered:

Administration of Estates Act [*Chapter 6:01*], s 42

Legal Practitioners Act [*Chapter 27:07*], s 9(2)

Copyright Juta & Co Ltd

Case Information

M Shortgame, for the applicant

W Ncube, for the first respondent

Judgment

SMITH J: The first respondent (hereinafter referred to as ``Madondo'') is the executor of the estate of the late Charles Chikerema. As executor he made an attempt to collect the assets which form part of the estate. He collected cattle, goats, sheep, ostriches and a horse from Diana farm, which is owned by the applicant, and from a farm in Msengezi Purchase Area. The applicant applied for a spoliation order for the return of the livestock which had been taken by Madondo - case No. HC-7815-98. The application was dismissed - HH-139-98 - on the grounds that the applicant had sued the wrong parties. He had not sued the executor of the estate of the late Charles Chikerema. The applicant then filed the application for a provisional order for the return of 184 head of cattle and 68 goats and sheep, which it alleged Madondo had taken from its possession. A provisional order was granted by ADAM J without Madondo being given an opportunity to file an opposing affidavit. Madondo then applied for the return date to be fixed as soon as possible.

The founding affidavit was made by James Chikerema, elder brother of the late Charles Chikerema. He is a director of the applicant which he alleged carries on farming operations at Diana farm and on the family farm, No. 1 Msengezi Purchase Area. He alleged that Madondo unlawfully removed 236 head of cattle, 34 ostriches, 140 goats and sheep and 1 horse from Diana farm and the Msengezi farm. The livestock were, so he claimed, in the possession

of the applicant. He also claimed that he had not been present when the livestock were removed and that he had not consented to their removal. He claimed that some of the livestock belonged to other members of the family. Of the livestock removed from the farms, the applicant recovered 52 head of cattle, 20 ostriches and 72 goats and sheep, 10 of which were new offspring, subsequent to obtaining the first provisional order granted by MUBAKO J on 9 July 1998.

Madondo, in his opposing affidavit, admitted that he had removed from the farms and taken custody of 197 head of cattle, 84 goats and sheep, 20 ostriches and one horse. Before doing so, he had written to the applicant advising it of his intention. When the cattle were removed James Chikerema was present and did not object; he merely drove away from the scene soon after the removal of the cattle commenced from Diana farm. The goats, sheep, ostriches and horse were removed from the Msengezi farm and were not in the applicant's possession.

In addition to opposing the confirmation of the provisional order, Madondo filed a counter-application for the return to his custody of the livestock, which the applicant has recovered by virtue of the two provisional orders it obtained, and for the delivery to him of all the property which belonged to the late Charles Chikerema and which is presently being held by the

Copyright Juta & Co Ltd

applicant. The property in question consists of 225 head of cattle, 134 goats, 48 sheep, 7 horses, 34 ostriches, about 200 pigeons, about 30 turkeys, 3 geese, 2 cultivators, 2 ploughs, one water engine and one scotch cart.

Mr *Shortgame* submitted that the applicant was entitled to the spoliation order it had applied for, in that it had shown that it was in peaceful and undisturbed possession of the livestock in question and that Madondo had deprived it of such possession forcibly or wrongfully against its consent. Since the application is for a spoliation order, it is not necessary to establish the ownership of the livestock. With regard to the counter-application, Mr *Shortgame* submitted that it had no merit and should be dismissed. He therefore submitted that the provisional order should be confirmed and that the counter-application should be dismissed.

Mr *Ncube* argued that the applicant had not discharged the onus of establishing that it was entitled to the spoliation order it claimed. He submitted that the applicant had not established that it was in possession of the livestock and neither had it established that it was forcibly dispossessed of the livestock. He also submitted that the removal of the livestock by Madondo was not unlawful since he was acting in terms of s 42 of the Administration of Estates Act [*Chapter 6:01*]. As regards the counter-application, he submitted that Madondo had shown that he was entitled to the order sought.

SMITH J

I will deal firstly with the provisional order and then with the counter-application.

CONFIRMATION OF PROVISIONAL ORDER

The law relating to the basis on which a mandament van spolie will be granted is well settled. In *Davis* v *Davis* 1990 (2) ZLR 136 (H) at 141 ADAM J quoted with approval the following statement by HERBSTEIN J in *Kramer* v *Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 753:

> ``... two allegations must be made and proved, namely (a) that applicant was in peaceful and undisturbed possession of the property, and (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.''

The onus is on the applicant to prove the two essential elements set out above. Part of the second element is lack of consent. In *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 79-80, it was said by GUBBAY CJ:

> ``It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:
>
> (a) that the applicant was in peaceful and undisturbed possession of the property; and
>
> (b) that the respondent deprived him of the possession forcibly or wrongfully *against his consent* [the court's emphasis].
>
> ...
>
> It was for the respondent to show that he had not consented to being deprived of possession. No onus rested

Copyright Juta & Co Ltd

upon the appellants, as the learned judge perceived, to establish the respondent's consent.

Consent to the deprivation may be expressly given, as where the possessor is present at the time, is spoken to and gives his permission. Or it may be implied from the conduct of the possessor both before and after the removal of his property. *In casu*, as I have mentioned, it was for the respondent to satisfy the court on a balance of probabilities that any actions or omissions bearing upon his loss of possession, did not warrant a finding that he had been a consenting party.''

Furthermore, the applicant's possession must not be mere physical possession. Physical possession must be accompanied by requisite animus or intent. This was clearly expressed by ADDLESON J in *Bennett Pringle (Pvt) Ltd* v *Adelaide Municipality* 1977 (1) SA 230 (E) at 233G-H as follows:

``In terms of all the authorities cited, the `possession', in order to be protected by a spoliatory remedy, must still consist of the *animus* - the `intention of securing some benefit to' the possessor; and of *detentio*, namely the `holding' itself ... If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is: (a) making physical use of property to the extent that he derives a benefit from such use; (b) intends by such use to secure the benefit to himself; and (c) is deprived of such use and benefit by a third person.''

SMITH J

The statement was cited with approval in *Davis*' case *supra* at 141. See, too, *Yeho* v *Qana* 1973 (4) SA 735 (A) at 739.

I agree with the submissions of Mr *Ncube* that the applicant has not discharged the onus which rested on it. The three essential elements are peaceful possession, wrongful deprivation and lack of consent and I will deal with each in turn.

Peaceful possession: the cattle were undoubtedly kept on Diana farm, which is owned by the applicant. Prior to the death of Charles Chikerema, although they were on the farm, they were undoubtedly in his possession. In the founding affidavit, James Chikerema merely states that the applicant carried out ``farming business operations'' on the farms and that the livestock were in its possession. There is no evidence as to the *animus* or intention of the applicant in relation to the livestock, which had belonged to the late Charles Chikerema. Moreover, whilst the applicant has established that the cattle on Diana farm were in its physical possession, in that it owned the farm, there is no proof that the ostriches, goats, sheep and other livestock on the Msengezi farm were in its possession.

Wrongful possession: whilst there are disputes on the papers as to the ownership of some of the cattle that were removed from Diana farm, on balance I feel that Madondo has established that the cattle he removed were properly identified by the former employees of the late Charles Chikerema. The affidavits by members of the Chikerema family as to the cattle owned by them that were kept on Diana farm are very vague and indefinite, in so far as they relate to the identification of individual animals. Section 42 of the Administration of Estates Act [*Chapter 6:01*] provides as follows:

``Every person not being the executor of the estate of a deceased person duly appointed in Zimbabwe who has custody of any property or asset belonging to such estate shall *forthwith* either deliver such property or asset to the duly appointed executor, if any, then being in Zimbabwe or report the particulars thereof to the Master ... '' (my

Copyright Juta & Co Ltd

emphasis).

The clear intention of that section is to require any person who has custody of property which belonged to a person who has died to surrender the property to the executor of the estate of the deceased. He cannot, in my opinion, withhold such property from the executor on the grounds that he has reported to the Master. In this case, there is no allegation that any such report was made. Madondo has a duty to recover and safeguard all property, which forms part of the estate of the late Charles Chikerema. I am satisfied, on the papers, that Madondo took all reasonable steps to identify the cattle and other livestock that belonged to the late Charles Chikerema and that he was fully justified in his decision to remove the livestock from Diana farm and the Msengenzi farm. Therefore, I find that the removal of the livestock was not unlawful.

SMITH J

Lack of consent: James Chikerema denies that he was present when the cattle were removed from Diana farm. He also denies that he received the letter from Madondo advising that he intended to remove the livestock. Madondo produced a copy of the letter he wrote to James Chikerema advising him of his intention to take possession of the livestock. He also deposed that James Chikerema was present when he arrived at Diana farm to fetch the cattle. Praxedes Chikerema, widow of the late Charles Chikerema, and Isaac Jenjere and Jonah Shanganani, former employees of the late Charles Chikerema who assisted in identifying the cattle that Madondo removed, also deposed that James Chikerema was present when they arrived on Diana farm and started to identify which cattle should be removed. They all said that James Chikerema did not try to stop this or forbid them taking the cattle. He watched for a while and then left. Accordingly, I find that the applicant has not established that it did not consent to the removal of the livestock

For the reasons set out above, I consider that the provisional order should not be confirmed.

COUNTER-APPLICATION

I do not consider that there is any basis in law for the submission by Mr *Shortgame* that Madondo is not entitled to make a counter-application and join it with his opposition to the application made by the applicant.

It seems to me, as I have said earlier, that Madondo took all reasonable steps to identify the livestock which belonged to the late Charles Chikerema and which now form part of the estate. The affidavits by the former employees of the late Charles Chikerema have the ring of truth and can, I feel, be accepted and relied upon. Jonah Shanganani, who herded the cattle, has identified the cattle. It was his job to look after them on a daily basis. He branded some of them and those he is able to identify through their brand marks. Of the cattle, which were branded before Charles Chikerema's death, there can be no dispute about their ownership. Those are in the overwhelming majority, ie l80 of them.

Of the remaining 45, which were not branded by the time of their removal, 2 were Brahman bulls, which were clearly bought by Charles Chikerema and still carry the brand marks of the person from whom they were bought. Once again there is no possible ground for disputing the

Copyright Juta & Co Ltd

estate's ownership of these two bulls. The remaining 43 cattle had their ears pierced by their herdboy and tagged to identify them.

It has also been clearly established that the ostriches belonged to Charles Chikerema. Titus Ruwizhi, who looked after them from the time Charles

SMITH J

Chikerema started the venture into ostriches, clearly established that they form part of the estate property. Likewise, his affidavit and that of Emmanuel Dombe clearly established that the sheep and goats belonged to Charles Chikerema. Ownership of the horses and other property claimed by Madondo is not disputed by the applicant.

Accordingly, I consider that Madondo is entitled to the order sought in his counter-application.

REPRESENTATION OF APPLICANT

On the return date for the confirmation of the provisional order, there was no appearance for the applicant. James Chikerema was present in court but I advised him that he was not entitled to represent the applicant. The hearing was accordingly postponed so that a legal practitioner could be obtained. My advice was based on the judgment delivered in *Pumpkin Construction (Pvt) Ltd* v *Chikaka* 1997 (2) ZLR 430 (H). My attention has been drawn to *Zimbabwe Banking Corp Ltd* v *Pindi Electrical & Hardware (Pvt) Ltd & Ors* 1998 (2) ZLR 210 (H) where MUBAKO J arrived at a different conclusion. In that judgment, MUBAKO J said at p 211B:

> ``I assume that that you base your assertion on the South African law or Zimbabwean law prior to 1981. Since then a company or partnership may self-act in *any court* through its director, or officer in its sole employment and doing so for no extra pay or reward. Legal Practitioners Act 1981, s 9(2)(c).''

At p 211C-D, he went on to say:

> ``I am aware that our rules have not incorporated the provisions of s 9(2)(c) and that certain decisions have sought to point to this as proof that the old prohibition over self-action still subsists eg *Pumpkin Construction (Pvt) Ltd* v *Chikaka*. However, it is self evident that neither an omission to alter the rules of the High Court nor decisions of judges can amend or nullify a right granted by Act of Parliament - namely the right of self-acting by corporations or partnerships. For a clear statement of the law since 1981, see also Professor Christie's *Business Law In Zimbabwe* 1985 p 421.''

The Legal Practitioners Act 1981 is part of the present Revised Edition of the Laws. Its proper title now is the Legal Practitioners Act [*Chapter 27:07*]. Section 9 (2) thereof reads as follows:

> ``(2) Subject to any other law, no person other than a registered legal practitioner who is in possession of a valid practising certificate issued to him, shall -
>
> (a) sue out any summons or process or commence, carry on or defend any action, suit or other proceeding in any court of civil or criminal jurisdiction in the name of any other person; or
>
> (b) for or in expectation of any fee, commission, gain or reward in any way instruct or assist any other person to sue out or threaten to sue out any summons or process or to commence, carry on or defend any action, suit or other proceeding in any court of civil or criminal jurisdiction; or

Copyright Juta & Co Ltd

SMITH J

(c) appear, plead or act in the capacity of a legal practitioner for or on behalf of any other person in any action, suit or other proceeding in any court of civil or criminal jurisdiction:

Provided that, nothing in this subsection contained shall prevent any director or officer in the sole employment of a corporation or any member of a partnership doing any such act as is mentioned in paragraph (a) in the name of such corporation or partnership.''

Paragraph (c) of s 9(2) does not confer any rights on a company or partnership to self-act. In fact, it sets out prohibited acts. I presume that the learned judge in fact meant to refer to the proviso to s 9(2), and not to para (c) thereof, when he said that ``our rules have not incorporated the provisions of s 9(2)(c)''. The implication in his judgment is that the proviso to s 9(2) was inserted for the first time in the statute law of this country by the Legal Practitioners Act 198l - hence his reference to Christie's *Business Law in Zimbabwe* for a clear statement of the law since 1981. The Legal Practitioners Act 198l repealed and replaced the Attorneys, Notaries and Conveyancers Act [*Chapter 218 of 1974*]. Section 21 of that Act dealt with offences by unqualified persons. Subsection (2) thereof was virtually identical to s 9(2) of the Legal Practitioners Act, 198l. It, too, contained a proviso, which is virtually identical to the proviso to s 9(2). Chapter 218 of the 1974 Revised Edition of the Law appeared as [*Chapter 202*] in the 1939 Revised Edition of the Laws. That Act replaced the original Attorneys, Notaries and Conveyancers Act 3 of 1938 which contained a proviso almost identical to the present proviso to s 9(2) - see s 25(2) thereof. The assertion by MUBAKO J that the Act of 198l changed the law that was previously in force in relation to the right of companies and partnerships to be represented by a director or officer or a partner, as the case may be, is simply not true. The provision contained in the proviso to s 9(2) of the present Act has been part of our law since 1938.

I therefore reiterate the views expressed in the *Pumpkin Construction* case, *supra*. The proviso to s 9(2) of the Act does not, in my view, permit a company or partnership to be represented by a person other than a legal practitioner. It does not permit a director or officer to represent a company in legal proceedings.

It merely provides that subs (2)(a) shall not prevent such representation. Therefore, the Magistrates Court Rules, which authorise such representation, are not inconsistent with s 9(2)(a) and so cannot be held to be *ultra vires*. As pointed out in the *Pumpkin Construction* case, *supra*, there is no equivalent provision in the High Court Rules. Until such time as a similar provision is inserted in the High Court Rules, a company cannot, in my opinion, be represented by a director or officer in proceedings before the High Court.

In Joubert *The Law of South Africa* vol 5 at para 481 the learned author explains the meaning and object of the *stare decisis* principle as follows:

SMITH J

``This expression means `to stand by decisions' and refers to a doctrine that must be borne in mind by every

Copyright Juta & Co Ltd

court when rendering a decision involving a legal principle, both as to common law and as to statutory law. The object of the doctrine is to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as to uphold the dignity of the court."

At para 486, dealing with decisions of provincial and local divisions, the learned author goes on to say:

``A single judge will always be bound by a decision of two or more judges of the same division and a single judge will always consider himself bound by another judge of the same province, unless he is satisfied that his brother was clearly wrong."

In *Levin & Co Ltd* v *Berg River Flour Mills* (WLD September 1920, reported in a note in 1938 WLD at 94) WARD J cited the following from In re *Hotchkiss's Trusts* (8 Eq 643):

``I should without expressing any opinion of my own, simply have followed the decision of the Vice-Chancellor in that case, because I should not think it seemly that two branches of a court of co-ordinate jurisdiction should be found coming to contrary decisions upon similar instruments and encouraging as it were a race, by inducing persons who wish for one construction to go to one court and those who wish for another construction to go to another court."

It is ordered that:

1. The provisional order granted to the applicant is discharged with costs;

2. An order in terms of the draft order annexed to the counter-application is granted.

Karuwa & Associates, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

DE JAGER *v* DE JAGER 1998 (2) ZLR 419 (HC)

Court **High Court, Harare**

Garwe J

Divorce action

28 October 1998 Judgment No. HH-203-98

Flynote

Family law - husband and wife - divorce - jurisdiction - domicile - husband an alien residing by virtue of temporary residence permit - not domiciled in Zimbabwe - marriage celebrated in Zimbabwe and wife having resided continuously for two years before commencement of action - court having jurisdiction to determine matter

Headnote

The defendant husband in a divorce action was a New Zealander who resided in Zimbabwe by virtue of a temporary residence permit. The parties were married in Zimbabwe in 1993, lived outside Zimbabwe until June 1996, then resided in Zimbabwe. In his affidavit, the husband

---

Copyright Juta & Co Ltd

stated that he was not domiciled in Zimbabwe. The court *mero motu* raised the question of whether it had jurisdiction to hear the matter.

Held, that domicile is a question of fact, and the facts giving rise to domicile must be placed before the court. A person is domiciled in the place which he regards as his permanent home, which is not necessarily where he resides. The husband was not domiciled in Zimbabwe.

Held, further, that the wife was ordinarily resident in Zimbabwe and had been so for more than two years before the commencement of the action. By virtue of s 3(1)(b) of the Matrimonial Causes Act, the court in this situation had jurisdiction, even though the husband was not domiciled here.

Cases cited:

Howard v *Howard* 1966 RLR 182 (G); 1966 (2) SA 718 (R)

Robinson v *CoT* 1917 TPD 542

Sinclair v *Sinclair* [1967] 1 All ER 905 (P)

Legislation considered:

Matrimonial Causes Act [C*hapter 5:13*], s 3

Case Information

Miss *W T Miles*, for the plaintiff

No appearance for the defendant

Judgment

GARWE J: In this action, the plaintiff seeks divorce on the grounds of irretrievable breakdown and other ancillary relief. The action is unopposed, the parties having signed a consent paper dealing with the issues of custody, maintenance for both the plaintiff and the minor children of the union,

GARWE J

division of the matrimonial estate and costs. Both parties are agreed that the marriage relationship has irretrievably broken down and that there is no possibility of the restoration of a normal marriage relationship between them.

The issue that arises in this case is whether this court has jurisdiction to entertain the claim. It would seem from the papers filed in this and other cases set down on this roll that some legal practitioners are not entirely clear as to the basis upon which this court exercises its jurisdiction in divorce cases.

The defendant in this case was born in New Zealand. He first came to Zimbabwe in 1993. He

Copyright Juta & Co Ltd

and the plaintiff got married at Lake Chivero near Harare on 6 February 1993. Immediately after the marriage, the couple left Zimbabwe for New Zealand where they remained until June 1996 when they returned to Zimbabwe. Both have lived in Zimbabwe continuously since then. The defendant, in his affidavit of waiver, however, states that he is "not domiciled in Zimbabwe and am here by virtue of a temporary residence permit". The papers do not indicate the citizenship of the plaintiff.

On these facts, does this court have jurisdiction to entertain this action?

The jurisdiction of this court in divorce matters is regulated by both the common law and statute.

THE COMMON LAW

The common law position is that the jurisdiction of this court in matters of divorce depends upon the domicile of the husband at the time when the action is instituted - Howard v *Howard* 1966 RLR 182 (G); 1966 (2) SA 718 (R); *Sinclair (formerly Steinbock)* v *Sinclair (formerly Steinbock)* [1967] 1 All ER 905 (P); Boberg *The Law of Persons and the Family* pp 57-58.

THE MATRIMONIAL CAUSES ACT [*Chapter 5:13*]

Section 3 of the Matrimonial Causes Act gives additional jurisdiction to the High Court in cases where the wife is the *plaintiff or applicant*. That section provides:

> **"3 Additional Jurisdiction**
>
> (1) Without prejudice to any other basis of jurisdiction which the High Court has, the High Court shall have jurisdiction to entertain an action for divorce, judicial separation or nullity of marriage, where the *wife is the plaintiff or applicant* -
>
> (a) if the wife has been deserted by her husband and immediately before the desertion, the husband was domiciled in Zimbabwe, notwithstanding that the husband has changed his domicile since the desertion; or
>
> (b) if the marriage was celebrated in Zimbabwe and the wife has resided in Zimbabwe for a period of at least two years immediately before the date of

GARWE J

> commencement of the action and is still so residing, notwithstanding that the husband has never been domiciled in Zimbabwe; or
>
> (c) if at the date of commencement of the action the wife is a citizen of Zimbabwe and, immediately before that date, she has been ordinarily resident in Zimbabwe for a period of not less than two years and is still so residing."

THE MEANING OF DOMICILE

Whether a litigant is domiciled in Zimbabwe is a question of fact. Accordingly, all the relevant facts must be placed before the court so that the court can determine whether or not a litigant is so domiciled. The fact that a litigant stays in Zimbabwe does not necessarily mean he is domiciled in Zimbabwe. A statement such as:

Copyright Juta & Co Ltd

"Defendant was born in Zimbabwe, has lived in Zimbabwe most of his life and considers Zimbabwe to be his permanent home"

or

"Defendant immigrated to Zimbabwe in 1980. He has lived in Zimbabwe since then. He has no intention of emigrating and considers Zimbabwe his permanent home"

would put it beyond doubt that this court has jurisdiction. It is not sufficient to simply state that a particular party is domiciled in Zimbabwe without giving the facts which support such a statement. A person is said to be domiciled in that country which the law regards as his permanent home. This is frequently also the country in which he in fact lives permanently, though it may also be a country in which he has never dwelt or which he has never heard of. The latter possibility arises with domiciles of origin and of dependence: *The Law of Persons and the Family supra* at p 63.

It is important to stress that domicile is not the same as residence. As distinct from residence, domicile does not only involve a physical element. There is also a mental element consisting of an intention to settle in a certain country. Domicile is the place which is or which the law considers to be the permanent home of a person. Two principles flow from this: every person must have a domicile and no person can have more than one domicile at a particular time, although a person may be homeless or have more than one residence: E Spiro *Law of Parent and Child* 4 ed pp 131-132.

THE MEANING OF RESIDENCE

Residence means a "man's home for the time being": *Robinson* v *Commissioner of Taxes* 1917 TPD 542 at 548. Unlike a domicile of choice, a new residence may be acquired without the intention of staying in the new home permanently, in the sense of a stay of indefinite duration. The addition

of the word "ordinarily" to "resident" in s 3(1)(c) of the Matrimonial Causes Act underlines the need for a fair degree of permanence. A person is not ordinarily resident in a locality unless being there is part of his ordinary life: Hahlo *The South African Law of Husband and Wife* 5 ed at p 437.

THE PRESENT CASE

In the matter under consideration, the wife is the plaintiff. The marriage between the two was celebrated in Zimbabwe and the wife has resided in Zimbabwe for a period of at least two years immediately before the date of commencement of the action. She is still so residing. By virtue of s 3(1)(b) of the Matrimonial Causes Act, this court has jurisdiction to entertain this action, notwithstanding that the husband does not consider Zimbabwe to be his permanent home.

In the light of the above conclusion, and being satisfied that the papers are in order, this court makes the following order:

Copyright Juta & Co Ltd

1. That a decree of divorce be and is hereby granted.

2. That the consent paper signed by the parties and filed of record and annexed to this order shall regulate the following matters:

   (a) The custody of, access to and maintenance for the two minor children, namely, BENJAMIN JOHN DE JAGER (born 10 September 1992) and JORDAN RUSSEL DE JAGER (born 28 April 1995) and all other payments and benefits for the minor children;

   (b) The proprietary rights of the parties as between themselves and;

   (c) All other matters specified in the consent paper, including the question of costs.

Lofty & Fraser, plaintiff's legal practitioners

Scanlen & Holderness, defendant's legal practitioners

S *v* TENDAI & ANOR (Juveniles) 1998 (2) ZLR 423 (HC)

Court **High Court, Harare**

Gillespie J & Bartlett J

Criminal review

28 October 1998 Judgment No. HH-187-98

Flynote

Criminal procedure - trial - conduct of - juvenile accused - wherever possible a juvenile should be assisted by his parents or guardian, if not a lawyer

Criminal procedure (sentence) - general principles - juvenile offenders - correct approach to adopt generally and in relation to juveniles who have committed rape

Headnote

As the age of majority is 18, every person under 18 is a juvenile. However, this is too narrow a definition, as the law makes express provision for special treatment of young offenders up to age of 20. A juvenile or young offender is anyone up to the age of 20 years.

Where a juvenile is put on trial, he ought, wherever possible, to be assisted by his parents or guardians, if not by a lawyer. It is asking too much to expect a child to defend himself without any assistance in an alien environment of adversarial proceedings.

Magistrates must ensure that they obtain proper information on juveniles that they are sentencing. It is a sad reflection of the way in which we permit juveniles to be treated in our courts that the obtaining of a probation officer's report is generally regarded as an unnecessary technicality rather than as a virtually indispensable aid to proper sentencing.

It has always been regarded as wrong in principle to sentence a juvenile as an adult. The court

Copyright Juta & Co Ltd

should be exceedingly slow to impose on a juvenile the same punishment it would impose on an adult, rather than adopting some measure designed to correct juveniles. Where the offence is so serious that the court must consider imposing a prison sentence, the court should first obtain the report of a probation officer. The probation officer will place before the court vitally important information about the circumstances of the juvenile and his character and background. The court should pay the greatest regard to the probation officer's report as the probation officer is an expert in this field. While the court is not compelled to accept this expert's evidence at face value, where the evidence is honestly given and supported by sound reasons, which are not contradicted in evidence, the court should be slow to disregard his opinion. Where juvenile offenders have been attending school, it may be possible to obtain further information about the offenders through an officer of the psychological services unit in the Ministry of Education.

Just as the probation officer's report is vitally important for the proper formulation of a scheme of management for a juvenile offender, so too is the involvement of the juvenile's family in the management of the juvenile. It is enormously important, before sentencing a juvenile, to ascertain whether the juvenile has a stable family environment and family

members who might be able to take some responsibility in his sentence and his rehabilitative process.

As regards sentencing of juvenile rapists, there has been recent research in Zimbabwe into the management of sexual offenders, particularly juvenile sexual offenders. This research shows that sexual offenders are likely to repeat their offences many times and that supposed deterrent sentences are unlikely to curb their sexual misconduct. However, a programme of management and counselling, particularly of juvenile offenders, does offer some prospect of bringing about reformation. If sexual offenders can be reformed when they first start committing such offences, many potential child and women victims will be saved. This research suggests the advisability of an altered approach towards sentencing of juvenile sexual offenders which lays emphasis upon trying to reform such offenders.

A magistrate sentencing a juvenile who has committed a rape has various options available to him:

- the sentence most commonly sentence imposed upon first-time juvenile rapists is corporal punishment. However, even if this sentence is combined with the suspended sentence of imprisonment, it is unlikely to bring about the desired end result of putting a stop to the juvenile's sexual misconduct. This punishment is likely to have counterproductive effects in respect of juvenile rapists.
- the next most frequently imposed sentence is imprisonment. If there are no programmes of counselling and management in prison, this sentence does not address in any way the primary objective of rehabilitation An adult prison environment is unsuitable for juveniles and imprisonment of juveniles should be a last resort. Incarceration in a prison for young adults is less objectionable. However, the best option would be a juvenile ``boot camp'', combining enforced discipline with education, training and counselling. Although imprisonment will achieve temporary prevention,

Copyright Juta & Co Ltd

when it ends, the offender will be released back into the community without any supervision and he is likely to commit further sexual offences. In serious cases of rape, some period of imprisonment may be unavoidable. However, lengthy imprisonment may simply turn young first-time sexual offenders into hard-core, repeat offenders who are likely to abuse many more women in the course of their lives. Where based on appropriate reports and recommendations there is a real prospect of rehabilitation of the juvenile offender, the court should seek to impose a shorter term of imprisonment combined with a suspended sentence on conditions which will ensure proper counselling and probation of the offender on release.

- another option for the magistrate (or for the juvenile court to which the juvenile has been referred) is to sentence the juvenile to placement in a juvenile institution. Regrettably, due to economic constraints, places in such institutions are extremely limited. In such institutions offenders receive training and counselling and on release they are still subject to supervision by the institutions for a period of time.

- finally, there is an option of a suspended prison sentence. Either the whole or a part of the sentence may be suspended. This is intended to provide a measure of individual deterrence. The recent research suggests that individual deterrence may not work in respect of sexual offenders. However, more salutary results could possibly by attaching appropriate conditions of suspension. An imaginative magistrate, properly armed with the report of a probation officer, and such other information as is available, should be able to impose conditions of suspension which bring about the continued supervision of a juvenile offender, whether or not he spends some time in prison. For instance, he might impose conditions that lead to a period of probationary supervision, coupled with regular counselling, under the immediate supervision of a community service officer with the ultimate supervision of a probation officer.

GILLESPIE J

A national committee should be established to co-ordinate the management of juvenile offenders, similar to the national committee on community service, and with comparable objects and functions.

Cases cited:

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

S v *Barry; S* v *Chemaly* 1973 (2) RLR 1 (A)

S v *C (a juvenile)* 1997 (2) ZLR 395 (H)

S v *Matanhire* 1982 (1) ZLR 139 (H)

S v *Muzoriwa* HH-179-97

S v *N & Anor* 1976 (1) RLR 279 (A)

Copyright Juta & Co Ltd

S v *Panganayi & Ors* 1968 (2) RLR 201 (G)

S v *S & Ors* 1977 (1) RLR 245 (A)

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

Judgment

GILLESPIE J: I am reminded of the exhortation to himself by McNALLY J (a newly appointed puisne judge, as he then was):

> ``Whether or not to send first offenders to prison is perhaps the most difficult of all decisions for a magistrate to make. It is undoubtedly a fact that each time one sends a man to prison it becomes that much easier to send the next man to prison. The fine edge of the agony of the decision becomes blunted with use. It is perhaps one of the roles of the reviewing judge to sharpen that edge from time to time. One does this with humility, and in the hope that one has chosen an appropriate occasion.'' 1(122)

The occasion which prompts me to attempt to re-hone the judicial conscience is the conviction and punishment, by the same regional magistrate, of two boys on unconnected charges of rape.

The first boy, Tendai, is 16 years of age. He pleaded guilty to what is undeniably a serious offence. On 23 May, he was out walking with the complainant, a 9 year-old girl. His victim is his first cousin. They live in the same house. During the walk, he seized her, forced her down, and raped her.

The second boy, Fungayi, is no more than 17 years old. His precise age is unclear. He likewise pleaded guilty to rape, although the circumstances of his offence are markedly different from those relating to Tendai. The complainant is his aunt - his mother's young sister. She is nevertheless appreciably younger than him, being 11 years of age. The two of them, most unusually, shared the same sleeping mat in the same hut - the kitchen hut of their rural home. During the course of the night of 9 August, the accused had non-violent sexual intercourse with the complainant while she slept. The girl awoke during the course of the act and raised the alarm.

Both of these two young people were at school, and from apparently stable families. Both were first offenders. They were nevertheless dealt with in very different ways.

GILLESPIE J

Tendai was sentenced to corporal punishment - 5 strokes - and to 4 years' imprisonment, wholly suspended for 5 years on condition that he would not commit rape within that period. No inquiry was made by the regional magistrate into the delay of over two and a half months between the date of the offence and the date of trial, and it is not clear from the record where the accused was during that period. Unfortunately, the magistrate's reasons for sentence are apparently lost from the record.

Fungayi was sentenced to 6 years' imprisonment, of which 21/2 years were suspended for 5 years on condition that he would not commit rape within that period. In passing sentence, the regional magistrate was particularly moved by the notion that the offence involved an incestuous

Copyright Juta & Co Ltd

act of intercourse. It was aggravating, he held, that -

> ``the complainant will never forget that her own nephew, her `son' by African custom, had sexual intercourse with her, a thing which is taboo.''

He was persuaded that relations within the family would be strained for a long time.

In neither case was a probation officer's report received. One was requested in each instance. In *Tendai*'s case the prosecutor requested a postponement after conviction for the purpose of obtaining a probation officer's report. Upon resumption, however, no report was tendered, no officer called, and no explanation given for the lack. A birth certificate was produced showing the boy to be 16 years old, and that is as far as the inquiry was taken.

In *Fungayi*'s case, the accused had stated in mitigation that he was 15 and gave a date of birth supporting that age. The following inconsistent exchange appeared later on the record:

> ``Ct - We may need a probation officer's report.
>
> PP - They don't do reports for 17 year olds.
>
> Ct - He says he was born in 1985.
>
> PP - He is changing.
>
> A - I was born in 1981.''

And that was the end of that investigation.

The imposition upon juvenile offenders of a punishment that involves treating them as adults is a serious step to take. It has always been regarded as wrong in principle to sentence a juvenile as an adult. This principle has been acknowledged in our courts even in those turbulent times of the liberation struggle when juveniles were being prosecuted for attempting to leave the country to undergo military training. 2(123) Where the offence in question is so serious that such a punishment must be contemplated, then it is a most defective exercise of a discretion to impose the punishment without first obtaining the report of a probation officer.

GILLESPIE J

A court should be exceedingly slow to expose a juvenile offender to the same rigours of punishment which may befall an adult rather than to adopt some measure specially designed to correct the young offender in question.

> ``The decision as to which course to take is no doubt a judicial discretion to be exercised according to all the circumstances of the case. I cannot see, however, that the discretion can be properly and judiciously exercised if a magistrate does not call for the report and recommendation of a probation officer.'' 3(124)

This report, once received deserves in addition due respect and weight.

> ``[T]he greatest regard should always be paid to the report of the probation officer, when it is clear from the evidence of that officer that he has gone to the trouble in arriving at his evaluation to which the probation officer in these cases went. It must be remembered that these officers are experts in their own field, and while a court is never compelled to accept any expert evidence at its face value, where that evidence is honestly given and

Copyright Juta & Co Ltd

supported by sound reasons, which are not contradicted in evidence, a court should not lightly disregard that opinion." 4(125)

Even our appeal court attaches weight to the report and recommendations of a probation officer and will postpone appeals pending such reports where these have not been obtained earlier. 5(126)

The need to seek the advice of a probation officer or some such expert has also been acknowledged by the Office of the Attorney-General:

``It seems to me also that before a magistrate imposes a prison sentence on a juvenile he should obtain a report from a social welfare officer as to the desirability of the accused serving a prison sentence. A social welfare officer could also provide information as to the accused's character and background, etc." 6(127)

The failure to obtain and act upon the advice and recommendation of a probation officer is therefore a serious omission in this case. It is no answer to say that the relevant office does not report on 17 year olds. Even if that is a true statement of general practice, nevertheless upon a direction by the court, there will be an obligation to produce the required report.

These cases reveal a sad reflection upon the way we permit juveniles to be treated in our courts. It is unacceptable that the situation has arisen where the necessary step of inquiring, with the assistance of a probation officer, into their circumstances, character and background, is now scarcely even considered. If it is thought of at all, it is generally regarded as an unnecessary technicality rather than virtually indispensable as an aid.

This lack of conscientiousness is seriously aggravated by the placing on trial of juveniles without any assistance from a guardian or representation by

a lawyer. There are two points to be made from this. The first I have already attempted to make elsewhere:

``The concept of placing a juvenile, particularly a very young child, unrepresented, and unassisted by its parents, on trial before a magistrate, is one that is inherently repugnant. The same juvenile would be regarded in a civil court as incapable of enforcing or defending its rights. What is it about the criminal system of justice that affords the unassisted minor the capacity to defend himself? It might well be thought that to place such a child in a position where he or she is expected to conduct his own defence in an alien environment in adversary proceedings is to expect far too much." 7(128)

Where the first point touches on the propriety of the trial, the second point addresses the passing of sentence. It must be an enormously important consideration, in sentencing a juvenile convicted of an offence, whether he has a stable family environment and family members, who might be able to take some responsibility in his sentence and rehabilitative process. Just as a probation officer's report is indispensable to the proper formulation of a scheme of management for a juvenile offender, so too might be the involvement, in that management, of the young offender's family and immediate community.

Where juveniles have to be put on trial, they ought, wherever possible, to be assisted by their parents or guardians, if not by a lawyer, during the legal process. If they must be sentenced,

Copyright Juta & Co Ltd

then the report of a probation officer is indispensable, and the involvement of the family desirable if it can be practicably ordered. Failure to advert to such considerations seems to me to reveal a distressing lack of conscientiousness and sensitivity to the question of trial of juveniles. It is precisely this lack of scruple in dealing with juveniles, which prompts me to recall the admonition of McNALLY J, as I did at the commencement of this judgment. I respectfully apply that admonition to the issue of sentencing juveniles in the hope that it might bring about a greater vigilance to protect juvenile offenders from unnecessary harm.

Having identified error on the part of the regional magistrate in failing to receive probation officer's reports, I am bound to make an acknowledgment somewhat in his favour. This is that the sentences he imposed in each case are more or less in accordance with guidance coming from this court. The punishment inflicted upon Tendai has the blessing of a long-standing practice. For ages, young boys who commit rape have been whipped and set free. The physical punishment is invariably joined with a suspended sentence of imprisonment. The sentence imposed upon Fungayi is also in accordance with recent authority.

In *S* v *Zaranyika & Ors*, 8(129) this court, through BARTLETT J, attempted to

GILLESPIE J

bring some rationality to the difficult area of sentencing offenders aged between 17-19 years. Such persons were not normally beaten - corporal punishment cannot be imposed upon persons 18 years and above. After a careful review of authorities on the principle of imprisonment for young offenders and of precedents in sentencing, the learned judge concluded:

> ``While Zimbabwe would not want to be a nation where rapists of the accuseds' age are not dealt with appropriate severity, it would also not, to my mind, want to be a nation where 17- and 18-year-olds are treated as fully grown mature adults and sent to prison for many years for offences such as rape. As I have previously indicated, a balance needs to be drawn.'' 9(130)

The learned judge drew the balance in the four cases before him by recommending sentences of 5 to 6 years imprisonment, with 11/2 to 21/2 years suspended - in the case of rapes of girl children by 17 and 18 year-olds, and a sentence of 5 years, all of which was suspended, in the case of a similar offence by a 15 year-old, where institutionalisation would have been appropriate but could not be put in place. These sentences replaced punishments of 6 to 10 years, which had been imposed by the magistrates concerned.

That judgment has been successful in ensuring that a necessary distinction is drawn in sentencing older juveniles and young adults, as opposed to more mature offenders. That success has been limited, however, to achieving only a reduction in the overall punishment. Without wishing to detract from that judgment at all, I nevertheless have the (unearned) advantage of my learned Brother, in that more recent research into the subject of sexual offences against children and management of sexual offenders, particularly juvenile sexual offenders, suggests the advisability of an altered approach to sentencing.

I acknowledge that I have not received any evidence on the point, but nevertheless I think it

Copyright Juta & Co Ltd

appropriate to take into account certain indications arising from the recent work in this country. 10(131) This research shows, amongst other things, the likelihood that sexual offenders repeat their offence many times; that supposedly deterrent sentences are not generally calculated to curb their conduct; but that a programme of management and counselling, particularly of juvenile offenders, does have some prospect of bringing about reformation. The hope of the reformation of a potential sexual offender at the very commencement of his predatory career holds out the promise of the saving, by this means, of many children and women who might otherwise fall his victim. This promise alone would warrant serious consideration being given to a reconsideration of the manner in which young sexual offenders are dealt with. The further fact shown by the research - that sexual offenders are

GILLESPIE J

by no means a homogenous group - leads to a further conclusion. It is that in passing sentence a supposed ``general run of sentencing'' is either of no use at all, or at least of very little assistance, in providing for a rehabilitative approach to sentencing juvenile offenders. One is therefore compelled to re-examine the various sentencing options available to a magistrate who has convicted a juvenile.

Before doing so, it would be as well to examine what might be meant by juvenile, or young, in this context. As one knows, the legal age of majority is 18 years. Therefore every person under 18 is a juvenile. That, however, is too narrow a definition of the concept for the present purpose. After all, the law makes express provision for special treatment of young offenders extending to the age of 20 years. 11(132) In addition, as a matter of principle, as I have already suggested, persons up to the age of 21, and even older. are generally treated as young offenders and with more leniency than other adults. A juvenile, or young, offender, for these purposes, therefore, ought to be anyone up to the age of 20 years.

At the conclusion of the trial, the court has an important choice to make as to the management of the offender. Regrettably, this choice is all too often not adverted to. The choice is between specific juvenile management and established sentencing procedures.

Special provision is made by law for the punishment of juveniles. 12(133) This includes:

- the placement of the juvenile in a reform school in South Africa 13(134) or a training institute in Zimbabwe; 14(135)
- corporal punishment; 15(136)
- or the referral of the matter to a juvenile court. 16(137)

The last option carries with it, of course, the wide powers of the juvenile court to make an order in respect of a child in need of care. 17(138)

On the other hand, established sentencing procedures permit as, standard sentencing options:

- imprisonment

Copyright Juta & Co Ltd

- suspension or postponement of sentence of imprisonment on conditions
- fine.

GILLESPIE J

As indicated above, it is improper to sentence a juvenile as an adult, but this is not held to preclude sentencing a juvenile to any of these punishments.

In order to determine which of these methods of punishment or management is most appropriate, it is worthwhile to consider the objectives of punishment. These, as is well known, are said to include retribution, deterrence - both of the individual offender and of other future wrongdoers - prevention and rehabilitation. The differing objectives will receive greater or lesser priority, depending upon the nature of the offence and the circumstances of the offender.

In the case of juvenile sexual offenders, the subject of this judgment, it is therefore important to bear in mind, along with all other relevant considerations, all that research might persuasively suggest. As I have intimated, the research does indicate a strong propensity to recidivism amongst sexual offenders. Discouraging as this may be for the prospects of rehabilitation of adult offenders, it seems in addition that those most likely to benefit from careful management are the young - before they become hardened offenders. If this is so, then these become important considerations towards adopting towards juvenile sexual offenders an approach best calculated to address a propensity towards sexual violence. Rehabilitation of such a person would not only have the inherent desirability of making him a person more acceptable to society, but could in addition have the effect of saving many, who might otherwise become the victim of his likely future depredations. Prevention in a much wider sense than merely cutting the wrongdoer off from the world for a fixed (even if lengthy) period.

Undoubtedly, the nature of the offence under consideration is that repugnant that the element of retribution cannot be ignored. Sexual violence, particularly against those most vulnerable such as the very young, is rightly regarded with abhorrence. I would nevertheless suggest that in the case of the juvenile first offender an unbending desire to punish rather than to reform is misplaced. I would, rather, suggest that the object of punishment towards a juvenile sexual offender should where possible seek the reformative and preventive (in the wider sense) rather than the exemplary and punitive.

With this in mind I propose to examine, for their suitability or otherwise, the sentencing options already set out.

First, corporal punishment. This is the sentence most commonly imposed upon first-time juvenile rapists. The infliction of corporal punishment upon juvenile sexual offenders is in accordance with current sentencing principle and law. The desirability of such a punishment, however, must be subject to no little doubt, given the decision in our Supreme Court declaring it to be

Copyright Juta & Co Ltd

GILLESPIE J

inhuman and degrading. 18(139) It is true that the Constitution of Zimbabwe specifically exempts this form of punishment from an adverse finding that it is unconstitutional. 19(140) That in itself, however, does not remove any serious objection that there might be to the efficacy or desirability of the punishment in any particular case. 20(141)

Looked at purely from the point of view of sentencing for the offence of rape, there is every reason to doubt the virtue of whipping as a punishment. It addresses only the principle of retribution and must therefore be regarded as inherently suspect. It undoubtedly achieves the object of inflicting pain and humiliation upon the offender. Knowledge that such a punishment is inflicted might even bring a vengeful glee to the offender's victim. Every father, however, knows that a beaten boy can be expected to react to such violence with indignation, resentment and rebellion. He may or may not exhibit a temporarily chastened attitude. But a fleeting act of violence is scarcely likely to bring about a lasting reformation. The expedient, in my view, of beating a juvenile rapist and sending him straight back into the same environment where he previously found his victim and committed his offence, is no solution at all.

When corporal punishment is ordered, it is usually imposed (as in the case of Tendai) together with a suspended sentence of imprisonment. In my view, the additional threat of a suspended sentence of imprisonment does not meet the situation. Whether or not it has been preceded by a beating, the suspended sentence is really no more than a warning to the sexual offender not to get caught again. If it is true that sexual criminals rarely offend only once 21(142) then the appetite for violent sexual domination of girls or women is unlikely to be sated by the threat of gaol - which threat exists even without a suspended sentence in place.

The next most frequently imposed sentence - imprisonment - combines retribution with temporary prevention. It may be thought to involve a degree of deterrence although that should be the subject of some doubt. None of these address the primary objective of rehabilitation. In the absence of programmes of counselling and management within the prison environment, no degree of rehabilitation can be hoped for. An adult prison environment is completely unsuitable for a juvenile. A prison which has as its inmates only

young adults might be less objectionable, but cannot be as well- calculated as a juvenile ``boot camp'', combining enforced discipline with education, training and counselling. Actual imprisonment does at least have the advantage that the offender will temporarily be removed from society. Nevertheless, his incarceration will end. And it will end with the release into the community, without any further supervision, of an offender whose carnal appetite can be expected to have been heightened by long denial. Imprisonment of young first offenders is, at best, a necessary evil to be imposed as a last resort.

Perhaps every prison sentence imposed on a juvenile is at least partly suspended. Most are completely suspended. The condition of suspension is invariably that the offender does not commit a similar offence within a specified period of time. This is thought to provide a measure

Copyright Juta & Co Ltd

of individual deterrence. If the research to which I have referred is accurate then serious doubt may be cast on this theory of individual deterrence. This treatment, or the postponement of passing of sentence, however, with more imaginative conditions, might be under-utilised. Indeed it is just such a technique, that I propose in due course to recommend.

The next option - that of a fine - would be entirely unsuitable for a juvenile sexual offender.

Referral to a juvenile court is the path that would generally lead to institutionalisation (see below) and would be preferred for the youngest offenders who would have an extended period of management.

Institutionalisation, in this context, is intended to mean committal to a reform school or training institute. It combines the minimal benefits of imprisonment with the more important benefit of subjection to a programme of education and counselling. Unfortunately, places are extremely limited and appear largely to be taken up by those unfortunate children in need of care known as ``street kids''.

The duration of any period of institutionalisation is fixed at three years and is intended to be followed by a period of supervision. Neither type of management, however, can extend beyond the 20th year of the offender. 22(143) This would thus normally be the preferred option for offenders of an age to spend a meaningful time in an institution. Older offenders, however, might also benefit by a period of disciplined management, including counseling, followed by a period of supervision or probation.

Probation, under that name, however, is only provided for young adults between the ages of 19 and 21 and then only for crimes other than murder, treason or rape. 23(144) Nevertheless, I suggest that a type of probation is still

available by the imaginative use of suspended sentences. The passing of sentence may be postponed, or a sentence of imprisonment may be suspended on condition of:

> ``(e) submission to instruction or treatment;
>
> (f) submission to the supervision or control of a probation officer ... or... of any other suitable person;
>
> (g) compulsory attendance or residence at some specified centre for a specified purpose.'' 24(145)

A probation of this type would address the requirements of rehabilitation and prevention and possibly also individual deterrence. Whether it would satisfy ``the public thirst for vengeance'' is debatable. It could be seen as an unacceptably ``soft option''. As I have attempted to show, however, undue weight should not be attached to the retributive element in punishment of juvenile sexual offenders; particularly those who are first offenders.

With these ideas in mind let us examine the sentences that have been imposed. First, *Tendai*'s case. He is very young - only 16. The violence that he was prepared to use suggests that he might already have been on the road to physical, sexual domination of females. Of course, one

Copyright Juta & Co Ltd

cannot treat him as anything other than a first offender. Nevertheless, the circumstances of this offence seem to me to show a pressing need for the urgent intervention of discipline, management and counseling. He gets none of these from the sentence imposed. Rather he is momentarily and painfully brutalised and returned to the world, entirely at his own devices, with an unintimidating threat of future imprisonment. A prime candidate for further violence against women or girls.

Fungayi's offence is in my estimation less serious. Although it involves an incestuous intercourse, so too does that of Tendai. At least with Fungayi, no overt violence was used. The folly of permitting two people of that age to share the same sleeping arrangements must also have contributed to the situation not a little. He might be expected to be one who would benefit from careful management and who might well be turned from a future path of sexual violence. Instead of any such management, however, he has been sent to prison for a number of years.

What alternative was there? Regrettably, economic considerations in Zimbabwe are such that juvenile facilities and ongoing management of juvenile offenders are by no means well catered for. Nevertheless, a magistrate sentencing a juvenile has available the option of referring the matter to a juvenile court or passing sentence himself. 25(146) An indispensable aid in making the decision is the report of a probation officer. A further important point in

respect of both juveniles is that they were both at school and both from apparently stable family backgrounds. In respect of each case, therefore, there was also available to the magistrate the assistance and intervention of an officer of the school psychological services unit, in the Ministry of Education, and concerned family members. The magistrate ought to have applied his mind to these resources, and to the various options available to him, rather than passing sentence apparently automatically.

Even if a magistrate imposes sentence himself, he still has a choice. There are juvenile institutions; these encounter, however, a considerable pressure of placements. For those offenders committed to such institutions, there is available group and individual counseling and a variety of training programmes. A person released from an institution is subject to supervision by the management of that institution for a period of time. 26(147) Young persons not committed to a juvenile institution but rather to prison might, if they are fortunate, find themselves in Wha Wha prison, which holds convicted males generally between the ages of 18 and 25 years. There is in this prison the facility of academic education and a small programme of technical courses but no programme for managing or rehabilitating sexual offenders. Whether to send a juvenile to prison or to an institute is something best decided after hearing a probation officer's report and the reports and suggestions of all other persons whom I have already suggested can be consulted.

In the absence of specific order by a court, there is no follow-up or supervision of persons released from prison. There is, however, the theoretical availability of such a programme of probation. This arises from the provisions of statute permitting the suspension, or postponement of passing, of prison sentences on condition, inter alia, of submission to

Copyright Juta & Co Ltd

instruction or treatment; of submission to the supervision or control of a probation officer or any other suitable person, or of compulsory attendance or residence at some specified centre for a specified purpose. 27(148)

An imaginative magistrate, properly armed with the report of a probation officer, and such other information as is available, should be able to formulate a sentence which brings about the continued supervision of a juvenile offender, whether or not he spends some time in prison, by suspending a sentence upon appropriate conditions. A period of probationary supervision, coupled with regular counselling, under the immediate supervision of a community service officer with the ultimate supervision of a probation officer might well be of assistance to the appropriate person.

None of this potential, however, can be utilised unless magistrates are

GILLESPIE J

prepared to shoulder the extra work of insisting upon the production of probation officer's reports and other relevant resources in every case involving a juvenile, and upon some evaluation of the suitability of every individual for alternative methods of management. I recognise that there is a considerable practical constraint upon magistrates, particularly those outside the main cities, in that there is little in the way of resource or information immediately available. The practical difficulties faced by courts include difficulty in identifying or obtaining access to resources such as probation officers; counsellors - both governmental and non-governmental; potential supervisors and the like, who would be able to provide information on and access to facilities for non-custodial management of juvenile offenders.

In a similar situation, however, a national committee on community service was established by the Ministry of Justice in order to provide co-ordination and management of resources towards implementing the community service programme. A similar body to administer a juvenile offender management programme would be desirable. I would suggest that the time has come for the establishment of a national committee co-ordinating the management of juvenile offenders, similar to the national committee on community service, and with comparable objects and functions.

It remains for me to pronounce upon the result in each case. The law prevents me from altering a sentence already passed in such a way as makes that sentence more severe. I am accordingly unable to interfere with the sentence in *Tendai*'s case. I have attempted to show that the sentence does not accomplish any desirable purpose. For that reason, I am obliged to withhold my certificate that case number RMU 190/98 is in accordance with real and substantial justice. I realise that in doing so I am casting doubt upon what has become a traditional method of dealing with such young sexual offenders. The time has come, however, recognise the existence of that doubt.

In the case of Fungayi, the sentence is a fairly substantial prison term. I cannot effectively interfere with that sentence in the absence of the information that the regional magistrate did not obtain. It seems to me that the best I can do in that instance is to remit the matter to the

Copyright Juta & Co Ltd

magistrate with instructions to make the necessary investigation. Since the offender was attending school there should be available the services of an officer of the psychological services unit in the Ministry of Education, as well as those of a probation officer, to report on the juvenile's background and prospects of successful management. These reports should be received and considered. Sentence should then be considered afresh in the light of this judgment and of any recommendations given. I therefore make the following order:

1. The sentence in case number RMU 191/98 is set aside.

BARTLETT J

2. The matter is remitted to the regional magistrate, Mutare, to pass sentence afresh.

3. Pending the passing of sentence, the accused shall be removed from prison and lodged in a place of safety.

4. In considering sentence, the court shall receive and take into account the report of an educational psychologist of the psychological services unit of the Ministry of Education and of a probation officer and any other useful information and report.

5. The sentence eventually imposed shall not exceed that originally ordered at first instance.

BARTLETT J: I agree with the judgment and order of GILLESPIE J. I would like to add a few observations of my own.

I emphasised in *S* v *Zaranyika* 28(149) that the guidelines I was suggesting were not carved in stone. 29(150) The research recently carried out by the Child and Law Project on the prevention of child sexual abuse provides cogent support for those observations. If undue incarceration of young sexual first offenders simply concretes them into hard-core, repeat offenders who are likely to abuse many more women in the course of their lives, but an alternative route of proper counselling and probation, together with punishment falling short of lengthy incarceration, can provide a real prospect of reformation and rehabilitation - then with young first offenders such alternative route should be actively considered. It will require careful consideration of detailed reports prepared by probation officers in consultation with other appropriate officials.

As I stated in *Zaranyika*:

> ``the assessment of a proper sentence as always must involve the careful exercise of a discretion based upon as full as possible an assessment and consideration of all relevant factors." 30(151)

Those relevant factors would include a careful consideration as to whether, after receipt of appropriate reports and recommendations, there is a realistic prospect that a young first offender may be reformed, rehabilitated and turned from a probable future of continual repeat offending by a sentence not involving unnecessary incarceration.

I appreciate that regional courts are busy, but running pell-mell through a court roll, and not giving full and proper assessment to sentence, is not going to produce justice. To achieve justice is what the courts are there for -

Copyright Juta & Co Ltd

BARTLETT J

something magistrates sometimes forget in the rush of cases that engulf them. It will take time to obtain probation officers' reports and to obtain recommendations from the appropriate sources. It will also take care, experience and wisdom to assess and balance all the competing factors. But that is what is expected of a regional magistrate doing his job properly. If the national consultative committee suggested by my learned Brother GILLESPIE is formed and finds its feet, assistance will be available to the regional magistrates. But until then, it is up to the regional magistrates themselves.

MATAMISA v MUTARE CITY COUNCIL (ATTORNEY-GENERAL INTERVENING) 1998 (2) ZLR 439 (SC)

Court **Supreme Court, Harare**

Ebrahim JA, Sandura JA & Korsah AJA

Constitutional application

29 October 1998 Judgment No. S-174-98

Flynote

Appeal - hearing - nature of - whether oral argument essential - Conduct of hearing

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 24 - constitutional application to Supreme Court - dismissal without hearing - competence - when court may dismiss application without hearing - s 18 - right to fair hearing - applicability to appeal hearings - oral argument - whether failure to hear oral argument amounts to failure to give a fair hearing

Costs - de bonis propriis - legal practitioner - practitioner bringing application which he must have known was frivolous

Legal practitioner - conduct and ethics - duty to adopt a disinterested approach

Headnote

The applicant had been dismissed from his position as town clerk of Mutare. He applied successfully to the High Court for reinstatement, but the City Council appealed. The appeal was upheld in the Supreme Court. The applicant alleged that he had not received a fair hearing and that the Supreme Court had already made up its mind about the matter. He brought a constitutional application before a differently constituted Supreme Court, seeking to have the previous proceedings set aside.

In dismissing this application without hearing the application:

Held, that judgments of the Supreme Court are neither appealable nor reviewable. They are final.

Copyright Juta & Co Ltd

Held, further, that the legal practitioner had totally misunderstood the nature of appeal proceedings, which are different from trial proceedings. Before the appeal the appeal judges will have read the record. Usually, they will also have read the heads of argument. Time permitting, the judges will have researched the issues of law involved. One of the purposes of heads of argument it to shorten oral argument. Having read the heads of argument, the judges may then decide that it is not necessary to waste time by allowing counsel simply to read these out. The appeal court is at liberty to decide not to hear oral submissions which will not advance a party's case any further. Sometimes the appeal court.

may ask counsel to deal only with particular points. It may advise counsel that it does not want to hear him at all, because its *prima facie* view is that counsel's written argument is correct, and will then ask the other side to present its argument. The judges may well make comment during oral argument which indicated their *prima facie* views about the merits and demerits of the arguments being advanced. They will often put their views to counsel in order to give counsel an opportunity of persuading the court to change their perceptions. The Supreme Court is not obliged to discuss and dismiss or accept every argument by counsel. It decides the case on what it considers to be the real point, which point may not even have been raised by counsel. The parties may have missed a crucial point. The counsel may decide that some point raised by counsel is unimportant and that some point is crucial, provided that counsel have been given the opportunity to address the court on the issue. It most certainly cannot be said that a party has not been given a fair hearing simply because counsel for that party feels the court has missed the point or has not grasped the argument he has advanced.

Held, further, that there was absolutely no doubt that the applicant and his counsel had been given a fair hearing during the appeal proceedings.

Held, further, that s 18(9) applies to trial proceedings and not have the same application to appeal hearings. An appeal court does not reach a decision in the same way as a court of the first instance. The appeal court has before it the record, together with the court of the first instance, and the submissions of counsel made through written argument. The oral hearing is in reality indulgence which is as much for the benefit of the appeal judges as it is for the benefit of the litigants.

Held, further, that the application was totally without merit and was frivolous and vexatious. A legal practitioner has a duty towards the court as well as to his client. His legal duty towards the court requires that he adopts a disinterested attitude in a case and remains in a position to give impartial and objective advice to his client. The legal practitioner in the present case had become deeply personally involved in this application. It would have been far more appropriate for him to have sworn an affidavit in his own name and to have left it to another legal practitioner to submit argument in support of this application. If this had been done, it is doubtful that the case would have proceeded any further. The legal practitioner had come close to committing contempt of court by bringing this application. He had come close to crossing the line between fair and impermissible criticism of the court. The assertion that the Supreme Court had not given a litigant a fair hearing might be said to have imputed corrupt or dishonest conduct on the part of the judges in the discharge of their judicial office, or to have reflected in an improper and

Copyright Juta & Co Ltd

scandalous manner on the administration of justice by them. However, as the allegation formed part of legal proceedings, no matter how ill-conceived those proceedings were, the court was prepared to give the legal practitioner the benefit of the doubt as to whether he had acted unlawfully with the requisite intent for contempt of court.

Held, further, that the legal practitioner should be ordered to pay costs *de bonis propriiis* as he had abused the legal process and had acted with *mala fides* and in a highly reprehensible fashion in bringing such a frivolous and vexatious application.

Cases cited.

Mutare City Council v Matamisa 1998 (1) ZLR 512 (S)

In re *Phelan* (1877) Kotzé 5

Matamisa v Mutare City Council 1997 (2) ZLR 122 (H)

Omarshah v Karasa 1996 (1) ZLR 584 (H)

Re *Reed (a debtor)* [1979] 2 All ER 22 (ChD)

EBRAHIM JA

Techniquip (Pvt) Ltd v Allan Cameron Eng (Pvt) Ltd 1994 (1) ZLR 246 (S)

London Street Tramways Co Ltd v London County Council [1989] AC 375

Legislation referred to:

Constitution of Zimbabwe 1980, ss 18(9) and 24(4)

Case Information

S V Hwacha, for the applicant

A P de Bourbon SC, for the respondent

Mrs *L R Goredema,* for the Attorney-General

Judgment

EBRAHIM JA: The applicant ("Matamisa") was employed by the Mutare City Council ("the Council") as its town clerk. In February 1996, the mayor suspended him without pay. He was informed of his suspension in writing. The mayor had acted in terms of s 139(3)(a) of the Urban Councils Act [*Chapter 29:15*]. This provides as follows:

> "(3) If it appears to the mayor or chairman, as the case may be, that the town clerk of the council has been guilty of such conduct that it is desirable that the town clerk should not be permitted to carry on his work, he -

Copyright Juta & Co Ltd

(a) may suspend the town clerk horn office and require him forthwith to leave his place of work."

An enquiry was held by a committee appointed by the Council to enquire into the allegations of Matamisa's misconduct and, following its report, the Council resolved to discharge Matamisa and sought the approval of the Local Government Board ("the Board') to do so.

Approval was given and Matamisa was notified of the Board's decision. He took the matter on review to the High Court, it being his argument that the approval of the Minister responsible for the administration of the Labour Relations Act [*Chapter 28:01*] *was* required. The High Court ruled in favour of Matamisa (see *Matamisa v City of Mutare* 1997 (2) ZLR 122 (H)). The council appealed and this court upheld the appeal (see *City of Mutare v Matamisa* 1998 (1) ZLR 512).

Matamisa was represented at the appeal by Mr *Hwacha,* while Mr *Biti* appeared for the City of Mutare. The hearing of the appeal was set down for 14 February 1998 but was postponed due to the illness of Mr *Hwacha.* It was finally heard on 14 May 1998, with the judgment being handed down on 8 June 1998. The court which deliberated on this matter comprised of GUBBAY CJ, MCNALLY JA and MUCHECHETERE JA. The CHIEF JUSTICE delivered the judgment, with which the other two judges agreed. It is apparent from a reading of this judgment that this court arrived at its conclusion based largely on the question of statutory interpretation.

This court decided two main issues: (1) that it was not necessary, where the Council was seeking to terminate the employment of its town clerk, to comply with the Labour Relations (General Conditions of Employment)

EBRAHIM JA

(Termination of Employment) Regulations 1985 (SI 371 of 1985); and (2) that the Council could withhold the town clerk's pay and other benefits beyond the end of the six month period which began on the date of his suspension from duty.

Matamisa now seeks the following relief in terms of his draft order filed before this court:

"1. The proceedings of the Supreme Court in Case 548/97 be and are hereby declared to have contravened section 18 of the Constitution of Zimbabwe.

2. The proceedings and order of the Supreme Court in Case 548/97 be and are hereby set aside and/or declared void.

3. The dismissal of (the) applicant from the position and office of Town Clerk of the City of Mutare be and is hereby declared null and void and of no legal force.

4. The first respondent is ordered to pay the applicant's costs in case H-11135-96 and S-548-97."

From his affidavits which he has filed as pan of his papers, what Matamisa is saying is that:

1. at the hearing of the appeal the judges presiding had already made up their minds and the hearing was a meaningless exercise;

2. before the legal practitioner for the Council had "hardly settled in his submissions", as he

Copyright Juta & Co Ltd

put it, the CHIEF JUSTICE said: "You are knocking on an open door".

3. the CHIEF JUSTICE said during the course of the hearing to Mr *Biti* "'Is the respondent not merely abusing court process?"

4. the court had already made up its mind about the case and this led to it missing the point of his case and led to it making rulings on points not raised and to ignoring submissions which were made to the court.

In essence, what is being said is that the Supreme Court did not give Matamisa a fair hearing. In reality, what is being sought is for this court to reverse the decision that it made on 8 June 1998 to one in favour of Matamisa.

What appears to have been overlooked by both Matamisa and Mr *Hwacha* are the provisions of s26(1) of the Supreme Court Act [*Chapter 7:13*], which provide as follows:

> "26 **Finality of decisions of Supreme Court.**
>
> (1) There shall be no appeal from any judgment or order of the Supreme Court."

Section 24 of the Constitution of Zimbabwe ("the Constitution") allows an application to this court in respect of alleged violations of the rights set out in the Declaration of Rights. This, however, does not mean this court is obliged to hear every such application, for s 24(4)(a) allows this court to determine an application *without a hearing* where such an application is frivolous and vexatious and to make an appropriate order.

Section 24(4)(a) of the Constitution provides as follows:

EBRAHIM JA

> "(4) The Supreme Court shall have original jurisdiction -
>
> (a) to hear and determine any application made by any person pursuant to subsection (1) or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious."

In my view, there is absolutely no doubt that Matamisa and his counsel were given a fair hearing in this matter on 14 May 1998 and that the judgment which followed was patently correct. It is also my view that the application we now have before us is frivolous and vexatious. What we have is an attempt by a disgruntled litigant to try and obtain redress under the guise of a constitutional application. I take exception to Mr *Hwacha* being a party to application. He is a legal practitioner of some standing and must have known better.

The provision of the Constitution that the applicant claims was breached is s 18(9), which entitles him to be afforded a fair hearing by an independent and impartial court. He bases his attack on the contention that the applicant did not receive a fair hearing because:

1. the judges of this court hearing this matter had made up their minds on his appeal and the hearing was merely a formality.

Copyright Juta & Co Ltd

2. the judges missed the argument entirely.

3. the applicant was not heard at all. (In his affidavit, Matamisa states: "In every sense therefore, I was not heard at all").

This last assertion is clearly nonsense when viewed against the fact that this court declined to hear the appeal on 10 February 1998 when Mr *Hwacha* was ill, and in particular declined to determine the matter based solely on the heads of argument filed. On 14 May 1998, both counsel addressed the court at length. The learned judges then reserved judgment and only gave the judgment three weeks later.

Mr *Biti*, the Attorney-General and the mayor of Mutare have filed affidavits response to the applicant's complaint in this matter.

Mr *Biti*'s impression of the conduct of the case is entirely different to Mr *Hwacha*'s. He says he did not find the hearing any different from the many others he had attended at the Supreme Court. He made his submissions, some points of which were not in his original heads. He says that a comment was made to the effect that: "You are knocking [or pushing] at an open door", but that MCNALLY JA made the comment, and that it occurred well into his argument. He has no recollection of any comment to the effect that there was an abuse of process, but does recall the CHIEF JUSTICE asking whether Matamisa was correct in bringing his matter as an application for a declaratory order when it should have been a review.

The mayor of Mutare opposes the application. In his affidavit, he is critical of Matamisa's character.

EBRAHIM JA

The Attorney-General points out the difference between trial and appeal hearings, and the fact that an appeal court, having read the record and the heads of argument, may well have tentatively made up its collective mind about the merits of the respective arguments. He says that:

1. the court may then decide not to hear oral submissions which win not advance a party's case any further;

2. the judges may well make comments during argument which indicate their views about arguments being put, whether favourable or unfavourable.

3. the Supreme Court is not obliged to discuss and dismiss or accept every argument put up by counsel, but is to decide the case on what it considers to be the real point, which may not even have been raised by counsel.

In his opinion, the Attorney-General considers that Matamisa's application is an abuse of process and simply an attempt to have "a second bite at the cherry.

The facts are not common cause. The nature of the remarks made, when they occurred and what they meant are clearly in dispute. This in itself makes it questionable whether the matter

Copyright Juta & Co Ltd

should be taken up at all. I also have doubts as to whether there is any substance in the complaint that the court did not deal with the relevant issues. The crisp issue, as I see it, is whether the court acted unfairly.

The comments of the Attorney-General about the nature of a hearing at the Supreme Court are, in my view, correct. An appeal is not a trial. It is not necessary to go over everything at the appeal hearing. Heads of argument are submitted, amongst other reasons, to shorten oral argument. The court win almost certainly have read these before the hearing. If so, it may consider that it is not necessary to waste its and counsel's time while counsel simply reads out what he has already put in writing. Sometimes the court may ask counsel to deal only with particular points. It may advise counsel that it does not want to hear him at all, because its *prima facie* view is that counsel's written argument is correct, and will ask the other side to present its argument. If the members of the court have not read counsel's heads of argument before the hearing, counsel will invariably be allowed to present his argument in full.

All this is part of the way this court and courts of appeal elsewhere in the world have always conducted their proceedings.

Most counsel should be aware (and Mr *Hwacha* should be no exception as he has appeared in this court frequently) that before an appeal is heard, the panel of judges hearing a matter have access to the record as well as to the heads of argument. We prepare for the hearing, having considered these documents and, time permitting, having researched the issues of law involved.

It is often the case, that members of the court will put their views to give

counsel the opportunity of persuading members of the court to change their perceptions.

It is also to be noted that in the United States Supreme Court Rule 28 allows parties only thirty minutes each to present oral argument, inclusive of the time taken to answering questions put to them by the justices of the court.

In the case of Re *Reed* (*a debtor*) [1979] 2 All ER 22 at 26 GOULDING J stated:

> "For my part, reading that transcript, I am not at all persuaded that the registrar was prejudiced or had made up his mind before hearing the solicitor appearing for the debtor, otherwise acted unjudicially. It is the commonest thing for a judge to express, and indeed express decidedly, his mind at a particular moment the proceedings, before he has heard the addresses that are to be put to him. Any person who has dealt with judicial business knows that after forming a strong view one way you may be completely turned round by an advocate who draws matters to your attention which you had overlooked or forgotten, who shows the weakness of some reasoning that appealed to you before. I, for my part, nothing in the transcript to suggest any failure of judicial consideration on the part of registrar."

This court is not obliged to decide a matter on the points raised by die parties. The parties may have missed a crucial point. It is a matter of common knowledge that this court may decide that some point raised by counsel is important and that some other point is crucial, provided counsel for the s have been given the opportunity to address the court on the issue. While counsel may feel that the court has missed the point, or has not grasped argument, this could

Copyright Juta & Co Ltd

hardly be indicative of a party not being given a fair hearing.

Be that as it may, it is my view that the court did deal with Mr *Hwacha's main* point and with one of his dime secondary points. It was not necessary to deal with all the points raised by him, as the court's finding resulted in their becoming irrelevant.

The provision of the Constitution which the applicant claims was breached is s 18(9), which provides:

> "... every person is entitled to be afforded a fair hearing within a reasonable time by an dependent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

This subsection does not apply to in the same way appeal hearings, as it to hearings by courts of first instance.

I agree with the submissions of Mr de *Bourbon* when he says:

> "It must be remembered that an appeal court does not reach a decision in the same way as court of first instance. The appeal court has the benefit of a record, together with the views of the court of first instance, and the submissions of counsel made through the written argument. An oral hearing on top of all that is in reality an indulgence given as much for the benefit of the appeal Judges as it is for the benefit of the litigants.
>
> As MURPHY J said:

EBRAHIM JA

> 'Oral argument on appeal is not an essential ingredient of due process ..',
>
> See *Price v Johnston* (1948) 334 US 266 at 286; 92 L Ed 1356 at 1369 (US Sup Ct). Indeed, the four Justices who dissented in that matter went further and held that the presence of the prisoner is not necessary for the Appellate Court to exercise its jurisdiction, see pages 298, 1376.
>
> It is well established in the field of administrative law that an oral hearing is not a necessary ingredient of the rules of natural justice and, depending on the circumstances, a hearing after written submissions will accord with the concepts of a fair hearing and the *audi alteram partem* rule, see for example *Lloyd v McMahon* [1987] AC 625; [1987] 1 All ER 1118 (HL). See also Baxter *Administrative Law* at p 552, and the cases there cited.
>
> Although the applicant specially disavows bias, it is pertinent to note that it has been held that preconceived opinions, though it is unfortunate that a judge should have any, do not constitute bias, and even the expression of such opinions do not constitute bias, for it does not follow that the evidence will be disregarded, see *Rex v The London County* Council; Re *The Empire Theatre* 71 LT 638 at 639, cited with approval in *R v Milne and Erleigh (6)* 1951 (1) SA 1 (A) at p 11."

It is our view, therefore, that this application is totally without merit and is frivolous and vexatious.

In this matter, an important ethical question needs to be dealt with. To what extent should a legal practitioner pursue a case in which he personally is deeply involved?

Mr *Hwacha* has submitted the heads of argument in this application. Although the affidavit in support of this application is. in the name of Matamisa, it is clear that Mr *Hwacha* must have

---

Copyright Juta & Co Ltd

been deeply involved in its preparation. Indeed, it would, in my view, have been far more appropriate for Mr *Hwacha* to have sworn an affidavit in his own name, and for him to have left it to another practitioner to submit argument in support of this application, as Mr *Biti* did. For *Mr Hwacha to* have acted as he has done in this application runs perilously close to him overlooking his duty to the court, which is every bit as important as his duty to his client. The legal practitioner's duty to the court requires him to adopt a disinterested attitude. He should be in a position to give impartial, objective advice to his client. It is difficult to see how Mr *Hwacha* could, in the circumstances, have discharged this duty. Because of his closeness to the matter, he should unquestionably have sought the views of another practitioner less involved in the case. Had he done so, I doubt whether this application would have been proceeded with.

The line between fair and impermissible criticism is not always easy to draw. Into the latter falls:

> "... anything spoken, written or printed, imputing corrupt or dishonest motives, or conduct, to a judge in the discharge of his judicial office, or reflecting in an improper and scandalous manner on the administration of justice [by him]."

See In re *Phelan* (1877) Kotzé 5 at 8, quoted in Hunt *SA Criminal Law and Procedure* Vol II 1 ed p 195. Several examples are cited by Hunt of

allegations and statements found to constitute contempt. It seems to me that to state that the Supreme Court did not give a litigant a fair hearing might impute corrupt or dishonest conduct on the part of the judges in the discharge of their judicial office, or reflects in an improper and scandalous manner on the administration of justice by them.

Before it can be said that contempt of court was actually committed, it must shown that the statement was made unlawfully and with the necessary *mens rea*. See Hunt *op cit* pp 180-182. It seems to me that as the allegation the basis of legal proceedings, no matter how ill-conceived those proceedings are, I am prepared *to* give Mr *Hwacha* the benefit of the doubt. However, should a similar case occur, a different conclusion might well be reached.

From what I have said earlier in this judgment, it must be apparent that I consider the application was ill-conceived and without merit. Having concluded that this application is without merit, what about costs? It should never have been brought. Costs must be awarded to the first respondent and the intervener on the higher scale. The only question which has exercised my mind is whether Mr *Hwacha* should be made to pay those costs *de bonis propriis.* Mr *Hwacha* was asked to address us on this issue and did so.

Costs de bonis propriis will be awarded against a lawyer as an exceptional measure and in order *to* penalise him for the conduct of the case where it has been conducted in a manner involving neglect or impropriety by himself: *Omarshah v Karasa* 1996 (1) ZLR 584 (H) at 591 *per* GILLESPIE J. Such costs are only awarded in reasonably grave circumstances. Generally speaking, dishonesty, *mala fides* wilfulness or professional negligence of a high degree fall into this category: *Techniquip (Pvt) Ltd v Allan Cameron Engineering (Pvt) Ltd* 1994 (1) ZLR 246 (S) at 248G *per* GUBBAY CJ. I consider that Mr *Hwacha's* conduct falls into the category of *mala*

Copyright Juta & Co Ltd

fides and his behaviour highly reprehensible. In *Omarshah supra,* the learned judge was reluctant to penalise a lawyer for taking points which were in the circumstances untenable. He said:

> "One is always more or less displeased with parties or practitioners who take points that cannot reasonably be supposed to be tenable or even arguable. Since there can, however, be considerable divergence of views as to what may or may not be arguable, I think it a mistake to be too free with punitive orders as to costs merely because one considers points not to have been reasonably available. One does not wish unduly to discourage ingenuity in the taking of points since it is in no small measure by means of such inventiveness that the law develops. Only where the defences raised can be said to be vexatious or their argument to constitute or to involve an abuse of process should sterner measures than an expression, in medis rebus, of judicial displeasure be invoked."

Judgments of this court are neither appealable nor reviewable. They are

---

EBRAHIM JA

final. Compare *London Street Tramways Company Ltd v London County Council* [1898] AC 375.

As I have said, this application was in-conceived and I consider application made frivolous and vexatious. Had Mr *Hwacha* adopted a more objective approach, he might well have seen that this was so. I do not accept that Mr *Hwacha* genuinely believed that he had a tenable argument. Indeed had there been any factual basis at all for suggesting that the Supreme Court did not give Matamisa a fair hearing, there would have been grounds for trying to remedy the situation. Consequently, I will order that Mr *Hwacha* pay the costs *de bonis propriis.*

Accordingly, the application is dismissed with costs on the scale of legal practitioner and client and to be paid *de bonis propriis* by Mr *Hwacha.*

SANDURA JA: I agree.

KORSAH AJA: I agree.

Dube, Manikai and Hwacha, applicant's legal practitioners

Bere Brothers, first respondent's legal practitioners

Attorney-General's Office, intervener's legal practitioners

GDC HAULIERS (PVT) LTD v CHIRUNDU VALLEY MOTEL 1988 (PVT) LTD 1998 (2) ZLR 449 (SC)

Court **Supreme Court, Harare**

McNally JA, Muchechetere JA & Sandura JA

Civil appeal

Copyright Juta & Co Ltd

29 September & 29 October 1998 Judgment No. S-170-98.

Flynote

Damages - negligence - proof - article damaged through defendant's negligence - claim for cost of repairs - what must be shown by plaintiff

Headnote

A vehicle belonging to the defendant collided with an electricity pole at the defendant's hotel causing an electrical blackout and resultant damage to some electric motors. The driver of the vehicle was admittedly negligent. Repairs were carried out on the motors. The plaintiff sought to rely on the account from the repairer to establish the quantum of damages.

Held, that where a persons claims damages arising out of repairs following damage caused by another's negligence, he must show that the repairs were necessary and that the cost of the repairs was fair and reasonable. The repairs must also be shown to be necessary to bring the article back to its pre-accident condition. It is not enough for the plaintiff merely to produce an account from the repairer. Without such evidence, the damages cannot be proved.

Cases cited:

de Jager v Grunder 1964 (1) SA 446 (A)

de Witt v Heneck 1947 (2) SA 423 (C)

Enslin v Meyer 1960 (4) SA 520 (T)

Heath v le Grange 1974 (2) SA 262 (C)

Malamba & Anor v Matambanadazo S-3-94

Reid v L S Hepker & Sons (Pvt) Ltd 1971 (1) RLR 284 (A); 1971 (2) SA 138 (RA)

Scrooby v Engelbrecht 1940 TPD 100

Case Information

P C Paul, for the appellant

A A Debwe, for the respondent

Judgment

MUCHECHETERE JA: This is an appeal against the decision of the High Court, Harare, on 3 February 1997, in which the respondent was awarded the sum of $27 797.60 as damages, together with interest thereon and costs of suit, in connection with an accident which occurred some time in April 1994.

The appeal is against the award and the *quantum* of damages only.

The facts in the matter are that the respondent owns and runs a motel in Chirundu. On 1 April

Copyright Juta & Co Ltd

1994, the appellant's driver, one Nkobani Machipisa,

MUCHECHETERE JA

who was driving one of the appellant's trucks, registration number AAL 6329T, collided with an electricity pole. This resulted in an electricity blackout at the respondent's motel.

The appellant alleged that the collision had the effect of causing the three phase electricity supply to its motel to be reduced to two phase and that this in turn caused electricity motors in the motel to get burnt. It was also alleged that as a result the following items had to be repaired or replaced:

"6.12	Air conditioners valued at	$13 889.39
6.215	UP cold room motor	$ 5025.00
6.35	HP motor	$ 2915.65
6.43	HP motor	$ 2 107.60."

And the respondent also incurred labour costs in connection restoration of the above items amounting to $3 860.

Although the appellant in its plea denied knowledge of the collision an the blackout of the respondent's motel, it did not challenge the evidence adduced by the respondent in that respect. That is why liability is not appealed against. The appellant, in its plea, denied knowledge of any damage to the respondent's equipment and put the respondent to the proof thereof. It also stated that if the damage to the equipment was caused as a result of the damage to the electricity pole, that damage was too remote to render the defendant liable.

It is clear that during the hearing the appellant persisted with the demand that the respondent prove its damages and the quantum thereof. In this connection, the respondent produced three invoices and a statement which were alleged to be proof of the damages.

Mr *Paul,* for the appellant, firstly submitted that the onus was on the respondent to establish the extent of the damages. And that the aim of damages in matters of this nature is to bring about as far as possible *restitutio in integrum.* See *de Jager v Grunder* 1964 (1) SA 446 (A) at 456.

Mr *Paul* also submitted that in this case the respondent's damages would be the difference in value of the various motors before and after the accident. He went on to state that, instead of establishing the pre-accident values of the various motors and their post-accident values, the respondent attempted to establish the cost of repairs. And that, although this was an acceptable method of establishing the patrimonial loss, provided it was economical to repair the motors, the respondent had to show that the repairs were necessary and that the costs of the repairs were fair and reasonable. The repairs must also be shown to be necessary to bring the damaged article back into its pre-accident condition. And that it was therefore not sufficient for the

Copyright Juta & Co Ltd

respondent merely to produce the account from the repairer. See *Enslin v Meyer* 1960 (4) SA 520 (T); *Heath v le Grange* 1974 (2) SA 262 (C); *de Witt v Heneck* 1947 (2) SA 423 (C); and *Scrooby v Engelbrecht* 1940 TPD 100.

MUCHECHETERE JA

The respondent's only witness, one Frederick Mike Hickey, was the person who produced the invoices and the statement. He is not an electrician and he did not carry out the repairs. He was also unable to say what work was done. Under cross-examination, the following occurred.

[*His Lordship then cited the relevant* passages *of the evidence, and continued:*]

I agree with Mr *Paul*'s submissions and also that an examination of the four documents produced by Mr Hickey reveals that, apart from the statement, the three accounts do not show what work was done on the motors. The fist two accounts do not even reflect the item of machinery which was being repaired and the third does not reflect whether the motors were being repaired or whether the items in question were sold. And the statement, item 4, would seem to indicate that new motors were purchased. It also appears from the statement which was from the company which supplied the motors as if the motors which were supplied were new, in which case the respondent would be placed in a better position.

I also agree with Mr *Paul*'s submission that, in regard to the first two invoices, no details were provided of what labour was carried out and what materials were supplied. It cannot be said that those invoices establish that the labour and materials were necessary. And for the same reason, it cannot be said that the costs of labour and materials were shown to be fair and reasonable.

I therefore agree that where, as in this case, the quantum of the respondent's claim is specifically put in issue in the plea, it is not sufficient for the respondent simply to produce the invoices. There is need for a witness to be called to adduce evidence on the concerns raised above. There was none called in this case, to the detriment of the respondent's claim. See *Scrooby* v *Engelbrecht supra* at pp 103-104 where RAMSBOTTOM J said:

> "Mr *de Wet* argued that the appellant had been misled into thinking that the amount of damages was not disputed, since he was not cross-examined on the point. But I do not think this can be maintained. The amount was put in issue in the pleadings, and it was for the plaintiff to prove his case. There was no occasion to cross-examined him as to the amount claimed, because the defendant might have well thought the person who had done the repairs would be called. Moreover the point was taken at the close of the plaintiff's case, and I have no doubt that if the plaintiff had then applied for leave to lead further evidence on the point he would have been allowed to do so."

Although the decision in *Scrooby*'s case is criticised in *Reid v L S Hepker & Sons (Pvt) Ltd* 1971 (1) RLR 284 (A); 1971 (2) SA 138 (RA), I consider that the facts in this case are different from those in *Reid's* case. In the latter, costs adduced in the matter were those actually incurred in completing the

MUCHECHETERE JA

Copyright Juta & Co Ltd

unfinished work. In this case, it is not indicated whether the costs incurred were necessarily incurred in restoring the damaged items to their former state or whether new items were purchased instead.

In any event, I consider that the law on such issues is properly set out in *Heath v le Grange supra* at p 266, where THERON J also pointed out that the factual situation in *Reid's* case was different to that in *Scrooby*'s case. He expressed the view that he was not convinced that the criticism of *Scrooby*'s case was proper, and in conclusion accepted what was stated in Scrooby's case. The decision in *Heath v le Grange supra* was accepted and followed by GUBBAY CJ in *Malamba & Anor v Matambanadzo* S-3-94 at p 3 of the cyclostyled judgment, where he said.

> "No confirming invoices were tendered in support of these amounts. Nor did the defendant call someone who was qualified as an expert in the trade to testify that the cost of repairing these four items was reasonable at that time. It was essential to do so. See, for instance *Heath v le Grange* 1974 (2) SA 262 (C) at 263 *in fine*- 264A ... "

In the result, I am therefore of the view that the respondent failed to prove its damages in this case.

In connection with Mr *Paul*'s submission that the damage claimed was too remote, I am inclined to agree with Mr *Debwe*'s contention that the appeal conceded this issue during the hearing. The first question in cross-examinination quoted above in my view supports the contention. This is confirmed by the following questions, also in cross-examination:

> "Q. I am putting it to you that this is, it's almost inevitable, it's not just to (be) a break occurrence, it actually will happen just about every time. Have not thought (about) regarding (guarding) yourself against that possibility?
>
> Q. (*By the court*) Do you understand the question? The question is that when ever a phase is removed, it is almost inevitable that motors get burnt, have you done anything to prow yourself against that eventuality ... ?
>
> Q. I am also instructed that the loss of only one phase can be quite a common occurrence and *because of the damage that it will inevitably cause,* ZESA in fact will have a mechanism whereby if one phase goes down they will automatically close the others, if one phase goes down they will automatically close the other phases *to prevent the damage that you sustained.* Do you know anything about that?
>
> A. Not to my knowledge" (emphasis is mine).

In my view, there is an implication in the question that the damage suffered was caused by the collision. No question was ever put to the effect that the damage was too remote. What was being questioned was whether the respondent could have prevented the damage in one way or another. There is therefore, in my view, an implied concession on remoteness.

All in all, the respondent can only be said to have failed to prove its damages. The question of interest raised by the appellant in its application to amend the appeal falls away.

MUCHECHETERE JA

In the result, the appeal is allowed with costs. The order of the court *a quo* is set aside and the

Copyright Juta & Co Ltd

following is substituted instead:

> "The defendant is granted absolution from the instance with costs."

McNALLY JA: I agree.

SANDURA JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

Mapfumo, Debwe & Partners, respondent's legal practitioners

STUDENTS UNION, UNIVERSITY OF ZIMBABWE & ORS *v* VICE CHANCELLOR, UNIVERSITY OF ZIMBABWE & ORS 1998 (2) ZLR 454 (HC)

Court **High Court, Harare**

Kamocha J

Review application

27 & 28 August, 15 September &

4 November 1998 Judgment No. HH-192-98

Flynote

> Administrative law - review - closure of University after violence - emergency situation - closure not ultra vires the powers of the Vice-Chancellor - audi alteram partem rule - application of - students not entitled to hearing before closure - breach of rule not to allow them an opportunity to be heard after the closure

Headnote

Following demonstrations, disruption of classes and violence by students at the University of Zimbabwe, the Vice-Chancellor closed the University for an indefinite period, suspended all the students and ordered them to leave the campus. The University remained closed for a period over four and a half months before it was reopened.

Some of the excluded students applied to have the decision of the Vice-Chancellor urgently reviewed by the High Court, arguing *inter alia* that the Vice-Chancellor had acted *ultra vires* his powers and had breached the principle of *audi alteram partem* by failing to allow the students to make representations before closing the University.

Held, that the Vice-Chancellor had not acted *ultra vires* in closing the University. In terms of s 8(2) of the University of Zimbabwe Act [*Chapter 25:16*] he was made responsible for maintaining good order and efficiency and effectiveness at the University. He was faced with an emergency involving violent student disturbances. In these circumstances the University could no longer function efficiently and effectively and s 8(2) empowered him to close the University in these circumstances.

Copyright Juta & Co Ltd

Held, further, that because the Vice-Chancellor was faced with an emergency he had to act immediately to prevent further violence, injury and property damage. He was therefore not obliged to hear from the students and their leaders before closing the University. Time did not permit this. However, after closing the University, he was then obliged to observe the *audi alteram partem* rule. It was a breach of natural justice for him to keep the University closed for a period of over four and a half months without giving the students a hearing. If he had afforded the students an opportunity to be heard, they could have made representations through the Students Union and their student leaders who would then have had an opportunity to offer undertakings acceptable to the Vice-Chancellor and the University. They were denied this opportunity. The decision to keep the University closed for this protracted period without allowing the excluded students an opportunity to make representations was thus unlawful and the purported ratification of this decision by the University Council was of no force and effect.

KAMOCHA J

Held, further, that as the respondents had kept the University closed for a long period in flagrant violation of the *audi alteram partem* rule, they should be ordered to pay costs on a legal practitioner and client scale.

Case Information

A P de Bourbon SC, with him *B Kagoro*, for the applicants

J C Andersen SC, with him *F Girach*, for the respondents

Judgment

KAMOCHA J: The applicants sought for a provisional order in the following terms:

``1. TERMS OF FINAL ORDER SOUGHT

1.1 That the respondents show cause to this Honourable Court why a final order should not be made in the following terms:

(a) The late filing of the application for review be and is hereby condoned.

(b) The closure of the third respondent by the first respondent and the purported ratification of the same by the second respondent be and is hereby declared null and void and set aside.

(c) The ejectment of the first applicant's members from their halls of residence on campus be and is hereby set aside.

(d) The first applicant's members be allowed to enjoy all the rights and privileges they were entitled to prior to the closure of the third respondent

(e) The costs of this application shall be paid, by the respondents jointly and severally, the one paying the others to be absolved, on an attorney/client scale.

2. INTERIM RELIEF

2.1 Pending finalisation of this matter, the first applicant's members are granted the following relief:

Copyright Juta & Co Ltd

(a) That the respondents be and are hereby directed to reinstate all of the first applicant's members to the third respondent on or before 24 August 1998;

(b) That the respondents be and are hereby directed to re-instate all rights and privileges that first applicant's members were entitled to prior to the closure of the third respondent;

(c) That this provisional order shall remain binding notwithstanding the noting of any appeal."

The first applicant is the Students Union - University of Zimbabwe (hereinafter referred to as the ``Students Union''). It is a *universitas* established under its own constitution. The Students Union represents the general body of students at the University of Zimbabwe through elected representatives who form the Students' Executive Council. It is an autonomous body responsible for its own administration.

The second applicant Mr Fortune Mguni, is the president of the Students Union and also chairman of the Students' Executive Council. As such he is the official representative of the Students Union which authorised him to depose to an affidavit on its behalf. The third to the eleventh applicants who are all students at the University of Zimbabwe authorised Mguni to represent them in these proceedings. They each filed supporting affidavits.

KAMOCHA J

The first respondent is the Vice-Chancellor of the University of Zimbabwe. He was cited in these proceedings in his official capacity as the chief academic administration and disciplinary officer of the University.

The second respondent is the chairman of the University of Zimbabwe and was cited in his official capacity as such.

The third respondent is the University of Zimbabwe. It is a statutory body established in terms of the Royal Charter.

In terms of s 3 of the University of Zimbabwe Act [*Chapter 25:16*], it was continued as a body corporate with perpetual succession and may sue and be sued in its corporate name. The University of Zimbabwe is physically located in Mount Pleasant at the corner of Churchill Road and Second Street Extension.

There were two preliminary issues raised before the main issue was heard. The first one was one of whether or not the matter was urgent. After hearing, Mr *Kagoro* and Mr *Girach* in chambers, I held that the circumstances surrounding this matter were such as to render it different from the ordinary run of cases and deserved of immediate favour and had to be entertained urgently.

The second issue was whether or not the application should be entertained since it had been lodged out of time. This however was not pursued when the matter came to trial as the parties were agreed that they were no longer going to concern themselves with technicalities. They were anxious to have the main issue resolved.

A large number of students from the University of Zimbabwe was involved in protest marches

Copyright Juta & Co Ltd

from 28 May 1998 to 1 June 1998. On the first day of June 1998, the protest march left a trail of considerable destruction of property both on campus and in the central business district of Harare. The students through their leadership had vowed to continue the protest and destruction of property the next day.

Faced with that state of affairs, the Vice-Chancellor issued a news release on 2 June 1998 closing the University. The contents of the news release were these:

``University of Zimbabwe

INFORMATION

News Release 2 June 1998

As a result of the criminal damage to University property by a large group of students during the night of Monday, 1 June, 1998 and the continuing student unrest, it has become impossible for the University to continue to operate normally.

Consequently, with immediate effect, the University is closed to students until further notice. Students are hereby directed to leave campus by 10.00am today, Tuesday 2nd June 1998. Those students staying in residence should surrender keys for their rooms in Halls of Residence before leaving campus. Conditions for re-entry to the University will be announced at a later date.

KAMOCHA J

The University College of Distance Education and the Bindura College of Science Education are not affected by this directive.''

The applicants claim that the protest marches were organised by the Zimbabwe Students' Union from all the Universities and tertiary institutions of learning in Zimbabwe. Mr Fortune Mguni was the vice president of ZINASU at the time of the protest marches which started on 28 May 1998.

The applicants claimed that students in all Universities and tertiary institutions of learning under the auspices of ZINASU embarked on the nation-wide protest. Their protest was to press for, *inter alia*, the following demands:

``(a) The setting up of an anti-corruption commission; and

(b) A review of the loans and grants availed to students studying locally; and

(c) The setting up of a commission of enquiry into the brutalization of the citizens by the police force; and

(d) That extensive consultations with and all stakeholders should precede the intended privatisation of the department of accommodation and catering services at the University of Zimbabwe.''

The applicants asserted that save for the isolated incidents of violence in Harare on 1 June 1998, the ZINASU protests were peaceful. Their executive council, through its legal practitioners, requested for and was provided with a police escort. It was also their claim that those students, at the University of Zimbabwe who did not wish to participate in the ZINASU protest march were left to go about their business. They continued with their lectures without hinderance. There was certainly no stoppage of lectures at the medical school and the law faculty. Other than the incidents on the night of 1 June 1998, there were no prior or subsequent

Copyright Juta & Co Ltd

incidents of violence, intimidation or disruption at the University.

As far as the applicants were concerned, these incidents were completely unrelated to what they termed the national protest. The disturbances, according to them, were caused by some unruly elements.

It was averred that the Students Union and the Dean of Students' Affairs had publicly declared that the disturbances were caused by a handful of mostly male students. Reliance was placed on the fact that the University Council had acknowledged that the majority of the students were not guilty of any wrong-doing.

They argued that since the disturbances were said to have occurred just before midnight it followed that those students who were not resident on the main University campus could not have been involved. Further it seemed officials of the University exonerated almost all the female students from any wrong-doing. It was alleged that the disturbances occurred long after the demonstration had ended on 1 June 1998. The Students Union had distanced itself from the disturbances and also claimed that ZINASU was not connected

KAMOCHA J

in any way. They pointed out that culprits had not been apprehended and it was thus unclear who was responsible for the disturbances.

Dealing with the immediate effect of the closure, applicants stated that all members of the Students Union were immediately suspended from attending classes. They were evicted from their halls of residence and were thereby effectively prohibited from entering or remaining on the University campus for an indefinite period. It was their view that the closure occurred without complying with the suspension requirements set out in the Act. They complained that neither the Students Union nor ZINASU were invited to make representations.

I would interpose here and observe that at the time the matter came to a final hearing on 15 September, the University had been closed for a period of over three months and by the time it re-opens on 25 October a period of over four and half months will have lapsed.

The applicants alleged that, although the University had remained closed for all that period, the Vice-Chancellor had arbitrarily lifted the suspension of some of the students in different faculties and departments such as medicine, final year veterinary science (where the Vice-Chancellor was a former dean of that faculty), and the Distance Education (where the Vice-Chancellor was the pro-Vice-Chancellor responsible for that department). As far as the applicants are concerned, this re-admission of some students and lifting of the suspension raised a number of concerns. They were concerned that the suspensions had been lifted without a prior determination of the culpability of the students so admitted. It seemed to the applicants that there had not been any discernible criterion for what they term the arbitrary lifting of suspensions and consequent re-admission of the students referred to above.

The applicants contend that what they described as a lottery approach to justice was an

Copyright Juta & Co Ltd

indication of the irrationality of the respondents' actions.

To illustrate that point, they alleged that whilst all students had been effectively suspended by the closure of the University, the Vice-Chancellor had formerly suspended only 9 students who had been charged with various acts of misconduct. Four of these had been called to appear before the Student Disciplinary Committee. Of those one had the charges against him withdrawn after the close of the University case. Despite having been exonerated, the acquitted student could not go back to the University because it was effectively closed. The applicant felt it was absurd for the rest of the students who had not been formally charged to be still precluded from exercising their rights and privileges as students.

To that extent, therefore, the applicants attacked the Vice-Chancellor's actions as being invalid, irrational, unreasonable and liable to be set aside for the following reasons:

KAMOCHA J

``(a) The first respondent's decision to close the University was *ultra vires* the University of Zimbabwe Act [*Chapter 25:16*];

(b) The effective summary suspension of the entire student body without a prior hearing or prior determination of the individual culpability of each student,seriously violated the rules of natural justice;

(c) The action of the first respondent was so grossly unreasonable and manifestly irrational so as to demonstrate that he did not apply his mind to the decision he was making;

(d) It follows that the University Council's ratification of the first respondent's unlawful action is also of no force and legal effect;

(e) Even if the University Council had legal authority to ratify the first respondent's actions aforementioned, I contend that it failed to apply its mind to the rationality and effect of the decision taken by the first respondent. Further, the University Council failed to observe the most basic tenets of natural justice;

(f) Further, it is evident that the Council was pre- disposed to ratify first respondent's unlawful actions aforementioned, and was therefore biased in its decision; and

(g) In any event, the respondents' decision was motivated by irrelevant and extraneous political considerations."

The contention of the applicants was that the actions of the Vice-Chancellor in suspending all students were *ultra vires* the Act and accordingly null and void. They contented that his disciplinary powers are set out in s 8(3)(a) to (g) as read with subss 8(4) and 8(5) of the Act.

The relevant provisions of s 8 of the Act are these:

``8 The Vice-Chancellor

(1) The Vice-Chancellor shall be appointed by ...

(2) Subject to the general control of the Council, the Vice-Chancellor shall be the chief academic administrative and disciplinary officer of the University with general responsibility for maintaining and promoting the efficiency, effectiveness and good order of the University.

Copyright Juta & Co Ltd

(3) Subject to subsections (4) and (5) the Vice- Chancellor may -

(a) suspend from duty any member of staff of the University;

(b) subject to section *five*, prohibit the admission of a student or any person to the University;

(c) prohibit, indefinitely or for such period as he may specify, any student or group of students from attending any class or classes;

(d) prohibit any student or group of students or persons or group of persons from entering or remaining on such part or parts of the University campus as he may specify;

(e) expel or suspend, indefinitely or for such period as he may specify, any student or group students;

(f) dissolve or suspend indefinitely or for such period as he may specify, the students' union or any of its committees or organs or prohibit or suspend indefinitely or for such period as he may specify, any activity or function of the students' union or any of its committees or organs;

(g) impose any other penalty or give any other order in respect of;

(i) a member of staff, which is recommended by the Staff Disciplinary Committee in terms of subsection (6) of section *twenty-two*; or

KAMOCHA J

(ii) a student, which is recommended by the Student Disciplinary Committee in terms of subsection (6) of section *twenty-three*.

(4) The Vice-Chancellor shall not expel a student for misconduct unless the student has been found guilty of that misconduct by the Student Disciplinary Committee in terms of section *twenty-three*.

(5) Any action taken by the Vice-Chancellor in terms of subsection (3) shall be subject to ratification by the Council."

It was the applicants' contention that since the Vice-Chancellor acted in terms of subs (2) of s 8 of the Act *supra*, the purported ratification by the Council was of no force or legal effect because subs (5) of s 8 only empowers the Council to ratify actions taken in terms of subsection (3).

The next point raised by the applicants was that the Vice-Chancellor failed to apply the rules of natural justice. It was their contention that he was obliged to afford the students affected an opportunity to be heard and that he should have exercised his powers judiciously. They claimed that if the Vice-Chancellor had afforded members of the Students Union an opportunity to know and to answer any allegations or suspicions they would have done so. Hence there was no justification for suspending all students without according any of them an opportunity to be heard. The *audi alteram partem* rule was not duly observed. The students had legitimate expectations that they would be heard before they were suspended from the University. They contended that the Vice-Chancellor had no authority to penalise students in the absence of adverse information or on the basis of inadequate information.

They alleged that the fact that the decision to close the University and thereby effectively suspend all students was neither informed nor rational was apparent from the following.

The Vice-Chancellor made a blanket suspension of all students. Among them was Graciano

Copyright Juta & Co Ltd

Masauso who was not at the University at all during the period of the disturbances. He, in fact, was in the intensive care unit at Parirenyatwa Hospital at the relevant time.

He also suspended Alice Kanyenze, a second year Bachelor of Science (Agriculture) student who during the period of the disquiet had been attending classes throughout as she was preparing for her semester examinations which were to be written in June 1998.

He suspended Wadzanai Vengai, a second year pharmacy student, who was not resident on the University campus since she resided in Kuwadzana 4 and had not participated in the demonstrations at all.

They alleged that the Vice-Chancellor ignored the fact that the majority of the students at the University were not resident on the main campus and by that fact alone they could not have been involved in the disturbances.

Some students believed that spouses of top state officials and certain

---

KAMOCHA J

Council members had been bidding to take over the Department of Accommodation and Catering Services.

In the light of the above, they alleged that the Council could not have been impartial in its decision as some of its members were a subject of the student petitions that culminated in the protest marches and the subsequent closure of the University. They allege that the actions of the Vice-Chancellor and Council were hasty and irrational due to numerous extraneous considerations.

It was their assertion that in purporting to ratify the actions of the Vice-Chancellor the University Council erred as it compounded the Vice-Chancellor's action by not giving the students a chance to be heard with the result that the real reasons for the University closure had never been properly and formally given to the students.

The second and third respondents authorised the acting Vice-Chancellor of the University of Zimbabwe, Mr Levi Martin Nyagura, to represent them and to swear to an affidavit of opposition. The Vice-Chancellor was in Canada on business at that time.

In his averments, Mr Nyagura chronicled the events leading to the closure of the University. *Inter alia,* he averred that he believed the main cause for the protest marches was Government policies on the funding of Higher Education. As far as he was concerned Government had not changed its policy in that regard.

Previously, the Government funded all of students' accommodation and tuition fees. But now Government is only prepared to fund 50% of these fees. The remaining half must be found by the students' parents or guardians or from some other source.

It was his view that students had clearly indicated their intentions to persist with that request until Government policy had changed. If the University had not been closed on 2 June 1998

Copyright Juta & Co Ltd

there was every indication that the students would have continued to demonstrate until their request or requests had been met.

As regards the suggestion by Mr Mguni that ``some unruly elements'' created disturbances at the University on the night of 1 June 1998, Mr Nyagura alleged that Mr Mguni had been less than frank with the court. He referred to some reports by some four University security officers namely, Mr M T Tarambwa, Mr Samson Chamboko, Mr Charles Kanonge and Mr W C Ncube. Their reports are filed of record.

The reports reveal that Mr Mguni was at the forefront of what was happening. He was advocating for violence, according to the reports. Further, according to reports, the suggestion that members of the Students Union and ZINASU were not connected to the disturbances is false. Mr Mguni was fully aware of their involvement since he actively led the members. In the light of

that, Mr Nyagura suggested Mguni was untruthful when he said what he did.

Mr Nyagura claimed that the demonstration on 1 June 1998 involved 1 500 to 2 000 students. In his view, a sizeable number took part in the demonstration regard being had to the fact that there were approximately 5 500 students at the University.

When dealing with whether or not the actions of the Vice-Chancellor were *ultra vires* the Act, the respondents contended that the Vice-Chancellor had power to suspend students from attending classes and even entering the University premises. They alleged that the last time that took place was in 1988. They stated that the Vice-Chancellor was the Chief Academic and Administrative Officer of the University. He was responsible to the Council for maintaining and promoting the efficiency and good order of the University. It was their suggestion that if that efficiency and good order were threatened, then the Vice-Chancellor could and should act in the manner in which he did on 2 June 1998.

The respondents denied that they should have afforded the students an opportunity to be heard before closing the University to them. They claimed that the Vice-Chancellor acted in an emergency situation. The measure was taken to protect the property of the University, to protect any injury or damage to persons and property and generally to re-establish good order. They claim that the Vice-Chancellor made an informed decision after receiving all pertinent facts.

Mr Nyagura averred that he personally went to the University at approximately 9 pm on 1 June 1998. Whilst he was there he saw a number of students running amok within the University premises. He then personally went and called the Vice-Chancellor from his home. Both of them remained on University premises for about two hours. During the period, they noted acts of violence and vandalism which had occurred. It came to their knowledge that stones were thrown at motor vehicles driving along Mount Pleasant Drive.

Mr Nyagura rejected the conclusion by Mguni that since most of the students at the University were not resident on the main campus they could not have been involved in the disturbances.

Copyright Juta & Co Ltd

He alleged that non resident students have every opportunity of involving themselves in the student activities, including demonstrations and disturbances. I find that there is merit in what Mr Nyagura said on that point.

The applicants' conclusion is untenable. In any event, it is not correct to say most of the students were not resident on the main campus because out of an enrolment of approximately 5 500 about 4 200 students were resident on the campus.

The respondent denied that the actions they took were motivated by bias

KAMOCHA J

and that the decision was in anyway unreasonable. After the University was closed to students, the Council took the opportunity to put in place measures which would ensure that what took place on 1 June 1998 did not recur. Mr Nyagura claimed that the respondents had tried to act fairly to the students. All of them would be allowed back to the University from 25 October 1998 to 20 November 1998 to complete the studies which they had missed since the closure. They would return to the University during February 1999.

In as far as semesterisation was concerned, he said it had nothing to do with the disturbances. In fact, 8 of the 10 faculties had already been semesterised before the disturbances. The deans of faculties had been advised of the semesterisation in 1996.

He also mentioned that the University was in the process of privatising the halls of residence, canteens etc, which had previously been run by the Department of Catering and Accommodation Services. The exercise was still in progress and would take two or three more months to finalise.

On his return from his overseas business trip, the Vice-Chancellor was allowed to file a supplementary affidavit in which he adhered to contents of Mr Nyagura's affidavit. Commenting on the students not affected by the closure, he stated that fourth year geology students were part of a post-graduate programme. They had never been affected by the closure. He said medical students lived in the city or at Parirenyatwa Hospital. After the closure, he had received a deputation from the Faculty of Medicine and representatives from the Ministry of Health. An appeal had been made to him that the medical students continue with their studies so that the country's health service would not be adversely affected. Having carried out an investigation of the matter, he was able to say that traditionally students from the faculties of medicine and veterinary science did not normally participate in demonstrations. He was satisfied that those students should continue with their studies. He also mentioned that the Faculty of Veterinary Science ran a Veterinary Hospital which gave a twenty-four hour service to members of the public. The hospital was manned by students and it was imperative that it continued to run.

Fourth year Rehabilitation students fall under the Faculty of Medicine and the same principles applied to them as applied to the other medical students. The Rehabilitation students were also attached to hospitals.

The Vice-Chancellor averred that by 28 May 1998 three weeks of teaching time had already

Copyright Juta & Co Ltd

been lost through a series of class boycotts and demonstrations which had been orchestrated by Mguni. There was wide-spread bullying and intimidation carried out by the military wing of the Students Executive Council. Mr Mguni himself actually forced the library to be closed during that period.

KAMOCHA J

He denied that students not wishing to participate in the march were allowed to continue with their lectures. There was a general disruption of classes. Some three weeks of teaching had been lost because of the disruptions.

He confirmed that he was present at the University on the night of 1 June 1998. He had personally witnessed hundreds of persons involved in unruly and violent behaviour. There were hunting groups prowling around the University campus causing havoc and damage. He confirms that Mguni addressed the students that very night advocating violence. He therefore concluded that many University students were involved in the disturbances. In his view, the reports from security officers verified that Mguni and the student leadership promoted violent behaviour on 1 June 1998 and were directly responsible for what subsequently transpired.

The Vice-Chancellor claimed that he was faced with an emergency situation and was therefore entitled and in fact obliged to act as he did. He made the decision to close the University taking into account what had happened in the preceding weeks before 1 June 1998, having witnessed for himself what occurred on 1 June 1998 and having received reports from the Security Department of the University. He gave a full explanation of what had transpired to the Council which met on 4 June 1998 and which then ratified the decision which he had taken.

Further, he contended that, had he not closed the University on 2 June 1998, further demonstrations and disruptions which had been planned would have gone ahead. Had he left the University open, there was a serious danger that individuals would have been injured and further property damaged. The University could not function normally or efficiently during that period. The trend continued and culminated in the violence during the night of 1 June 1998.

Finally, he averred that it was incumbent upon him as the Vice-Chancellor of the University to ensure that the University functioned in an orderly way. It was his duty and that of Council to ensure that demonstrations and disruptions were kept to a minimum. The University had no wish to stop students from demonstrating where good reasons existed for such demonstration. The University, however, could not condone unruly behaviour and violence. For that reason, when students return to the University, each student would be requested to sign a certain document. Effectively, what the document proposes is that a peaceful demonstration involving a class boycott can proceed provided that the majority of students in a faculty agree. The minority decision cannot prevail.

In the light of the foregoing and what is contained in documents filed of record, I make the following findings. I accept that the sequence of events leading to the closure of the University is as related by Mr Nyagura and the

Copyright Juta & Co Ltd

KAMOCHA J

Vice-Chancellor. Mr Mguni was clearly untruthful in his narration, for obvious reasons. His narration is unreliable and unacceptable. He and the student leadership promoted violent behaviour on 1 June 1998. He spoke to the students that very night advocating violence. Mguni and the student leadership had vowed to continue the next day with acts of violence and damage to property. University property was damaged. There were further reports that property was also damaged in the central business district of Harare. So the threats of Mr Mguni and the students leadership to continue with the demonstrations and disruptions could not have been taken lightly. Further acts of violence and damage to property would have occurred. Quite clearly, the University could not function efficiently and effectively under such circumstances. I agree with the Vice-Chancellor that he was faced with an emergency situation and therefore entitled to act as he did as he is so empowered by the provisions of subs (2) of s 8 of the Act. I hold that the closing down of the University due to disturbances was not *ultra vires* the Act.

Having done so was the Vice-Chancellor entitled to close the University for a period of over four and half months without affording the affected students who had a legitimate expectation entitling them to a hearing, an opportunity to be heard? He of course could not have heard them before closing down the University since he was faced with an emergency situation.

The same cannot be said about the decision to close the University for over four and half months. Closing down the University in an emergency situation temporarily and closing it down for a period of four and half months are two different things. While in the former situation the Vice-Chancellor may not have the time to observe the *audi alteram partem* rule, he certainly has ample opportunity to do so in the latter and is obliged to act within the framework of the rules of natural justice.

If he had afforded them such an opportunity, they could have made representations through the Students Union and their leadership who could have easily made undertakings acceptable to the Vice-Chancellor and the University. It should be remembered that the students had paid their fees and many of them expected to complete their degrees at the end of this year. They therefore would have persuaded the Students Union and their leadership to make representations on their behalf but they were not afforded that opportunity. The Vice-Chancellor just decided that since he had closed the University in an emergency he would only re-open it on 25 October 1998. He did that in breach of the *audi alteram partem* rule. The decision to keep the University closed until 25 October 1998 was unlawful. The University Council went on to ratify what was unlawful. The ratification was of no force of effect.

KAMOCHA J

The applicants prayed that the costs of suit be paid by the respondents jointly and severally, the one paying the others to be absolved on an attorney and client scale. It is my view that they are entitled to what they asked for. The respondents decided to keep the University closed for a period of over four and half months in a complete disregard of the *audi alteram partem* rule,

Copyright Juta & Co Ltd

which is a fundamental principle of natural justice. The court must show its displeasure of the flagrant disregard by awarding costs on a higher scale.

Finally, while I found that subsection (2) of section 8 of the University Act empowers the Vice-Chancellor to close the University in order to protect property from destruction and persons from injury, he was not entitled to close it for a period of over four and half months without affording the affected students an opportunity to be heard. The closure was in breach of the *audi alteram partem* rule and is hereby declared unlawful. The respondents are ordered to pay the costs of this application on an attorney and client scale and they are liable for these costs jointly and severally, the one paying the others to be absolved.

Kantor & Immerman, applicants' legal practitioners

Winterton, Holmes & Hill, respondents' legal practitioners

SIDIMELI *v* KWANGWARI & ORS 1998 (2) ZLR 467 (HC)

Court **High Court, Harare**

Smith J

Civil application

4 & 5 November 1998 Judgment No. HH-214-98

Flynote

Statutes - interpretation - time - calculation of - Magistrates Court (Civil) Rules - time within which to file plea - calculation of period within which such step must be taken

Headnote

Section 33(2) of the Interpretation Act [*Chapter 1:01*] provides that where a period of time is to begin on or to be reckoned from a particular day, that day is not to be included in the period. This is a clear indication of the intention of the legislature that portions of a day should not be taken into account in calculating periods specified in legislation, unless a contrary intention is clearly expressed in the particular legislation. There is no such indication in relation to the provisions of the Magistrate Court (Civil) Rules 1980. For example, Order 16 r 1(1) provides that the defendant must file a plea within seven days after the appearance to defend. In calculating the seven-day period, the day on which the appearance is made must be ignored and the seven days is reckoned from the following day, as long as that is not a Saturday, Sunday or public holiday.

Cases cited:

Founders Building Soc v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 (H)

Holmes v *North Western Motors (Upington) Ltd* 1968 (4) SA 198 (C)

Copyright Juta & Co Ltd

Independent Mining (Pvt) Ltd v *Soko* S-188-93

Joubert v *Enslin* 1910 AD 6

Kleynhans v *Yorkshire Ins Co Ltd* 1957 (3) SA 544 (A)

Min of Home Affairs v *Vuta* 1990 (2) ZLR 338 (S)

Legislation referred to:

Interpretation Act [*Chapter 1:01*], s 33(2)

Magistrate Court (Civil) Rules 1980 (SI 290 of 1980), Order 16 r 1

Case Information

G M Mabuye, for the applicant

First respondent in person

No appearance for the second and third respondents

Judgment

SMITH J: The applicant has made an urgent application for the suspension of the order granted by a magistrate in case No. 26092/98 pending the determination of the appeal he has lodged. The dispute between the parties concerns the sale of a house which the applicant purchased from the first

SMITH J

respondent. The first respondent claims that the applicant breached the agreement of sale and so he cancelled the sale and applied to the magistrate's court for the eviction of the applicant from the house. The magistrate granted the eviction order. The applicant lodged an appeal. The first respondent applied for an order that the eviction order be enforced notwithstanding the appeal. His application was successful.

The first respondent initiated his action by way of a summons issued on 15 June. The applicant entered appearance to defend. On 16 July, his lawyer received a notice to plead within 48 hours. The period expired on 20 July since a weekend intervened. When his lawyer tried to file a request for further particulars on 20 July, the record could not be found. It later transpired that the first respondent had obtained default judgment on 20 July. The first respondent argues that, because the notice to plead was served at 10.30 am on 16 July, the 48 hours expired at 10.30 am on 20 July and therefore he was entitled to obtain default judgement on the afternoon of 20 July.

Section 33(2) of the Interpretation Act [*Chapter 1:01*] provides as follows:

> ``Where in an enactment a period of time is expressed to begin on, or to be reckoned from a particular day, that

Copyright Juta & Co Ltd

day shall not be included in the period."

That provision applies in the interpretation of the provisions of the Magistrates Court (Civil) Rules 1980, where, for example, Order 16 r 1(1) requires that the defendant shall file a plea within seven days after entry of appearance. Therefore, in calculating the period within which the plea must be delivered, the day on which entry of appearance is made must be ignored and the seven days is then reckoned from the following day, as long as that is not a Saturday, Sunday or public holiday. Since that is the interpretation to be applied to the rules generally, it must also, in my opinion, be applied where one party requires another party to file or produce a document within a specified period, whether that period is expressed in days or hours.

The question of calculating periods of time has come before the courts on many occasions. In *Holmes* v *North Western Motors (Upington) Ltd* 1968 (4) SA 198 (C), CORBETT J (as he then was) set out, with the lucidity that is his hall-mark, the three possible modes of computation of time. That was at 202F-H where he said:

``The computation of such a period of time raises a familiar legal problem and one upon which our courts have frequently pronounced. It would seem from the decisions in these cases that when a period of time running from the occurrence of an event has to be reckoned there are three possible modes of computation. These are (i) the *computatio naturalis*, which took into account fractions of a day and whereby the period was calculated *de momento ad momentum*, i.e. from the exact moment of the day when the event occurred to the corresponding moment on the final day of the period; (ii) the ordinary civilian method of computation (*computatio civilis*), which treated the calendar day as the unit and

SMITH J

in determining the period included the first day; and (iii) the extraordinary civilian method which also took no account of broken days but included both the first and the last days. In the leading case of *Joubert* v *Enslin* 1910 AD 6, the Appellate Division, approving a decision given by the Cape Supreme Court some 50 years before, held that where it becomes necessary to calculate a definite period of time fixed by a contract and where the parties have not indicated how such period should be reckoned, the computation should as a general rule be in accordance with the ordinary civilian method and should be made by including the first day and excluding the last day ... "

In *Kleynhans* v *Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A), the court's decision was set out as follows in the headnote:

``In computing a period of prescription, the clear wording of a statute or contract may lead to the rejection in any particular case of the ordinary civil rule in favour of the natural *de momento in momentum* rule or in favour of the exceptional civil rule, which includes both the first and the last days, but there is a desirability of certainty in these matters. The court should not depart from the ordinary civil rule unless from the language it is clear that such departure was intended by the contracting parties or the lawgiver ... "

STEYN JA, at 553D, referred to *Joubert* v *Enslin* 1910 AD 6 and quoted with approval the following statement by LORD DE VILLIERS:

``I do not, however, purpose to reconcile the different Dutch authorities with each other, because the question at issue appears to me to be settled by a carefully considered judgment of the Cape Supreme Court in the case of *Cock* v *Cape of Good Hope Marine Assurance Co* 3 Searle 114 ... It was laid down that as a general rule time must be computed civilly *de die in diem* and not *de momento in momentum*, and that in such civil computations fractions of a day are not admitted, but the term expires at the commencement of the last day."

Copyright Juta & Co Ltd

In this case, the first respondent is relying on the *computatio naturalis* mode of calculation and calculating the period *de momento ad momentum*. I consider that he has erred in that regard. Section 33(2) of the Interpretation Act [*Chapter 1:01*] is, to my mind, a clear indication of the intention of the legislature that portions of a day should not be taken into account in calculating periods specified in legislation, unless a contrary intention is clearly expressed in particular legislation. There is no such indication in the Magistrates Court (Civil) Rules 1980.

Accordingly, in my view, in the calculation of the 48 hours specified by the applicant, the day on which the notice was served must be ignored. The period starts to run on the following day. Therefore the 48 hours in this case expired at 4.00 pm or 4.30 pm (depending on when the registry closes) on 20 July and not at 10.30 am. Hence, the first respondent was not entitled to be granted default judgment on 20 July.

This is a clear case of a party snatching at a judgment, a practice which is deplored by the courts. See *Minister of Home Affairs & Ors* v *Vuta* 1990 (2) ZLR 338 (S), *Independence Mining (Pvt) Ltd* v *Soko* S-188-93 and *Founders* Building Society v *Dalib (Pvt) Ltd & Ors* HH-89-98. In this case,

SMITH J

it is obvious to me that the first respondent acted prematurely, as did the magistrate concerned.

The applicant is entitled to the order he seeks.

It is ordered that:

1. the judgment of the magistrate, Harare, in case No. 26092/98 is suspended pending the determination of the appeal lodged by the applicant in civil (A) 181/98.

2. pending the determination of the said appeal, the applicant is entitled to occupy stand 3987 Dzivaresekwa Township, Harare.

3. if the first respondent fails or refuses to vacate the said stand on or before Saturday, 7 November 1998, the Deputy Sheriff, Harare, be and is hereby authorised to evict him and all persons claiming occupation through him.

4. the first respondent pay the applicant's costs.

Mabuye & Company, legal practitioners for the applicant

MAKWIRAMITI *v* FIDELITY LIFE ASSURANCE OF ZIMBABWE (PVT) LTD & ANOR 1998 (2) ZLR 471 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Muchechetere JA

Copyright Juta & Co Ltd

Civil appeal

2 & 10 November 1998Judgment No. S-175-98

Flynote

Customary law - marriage - marriage under Customary Marriages Act [Chapter 5:07] taking place after marriage under Marriage Act [Chapter 5:11] - subsequent marriage null and void and not valid for any purposes

Pensions - benefits from pension fund - payment to widow - deceased marriage first under Marriage Act and then later under Customary Marriages Act - second wife not a widow for purposes of Pension and Provident Funds Regulations 1991

Headnote

The appellant and her late husband were married in 1970 under the Marriage Act. The marriage was never dissolved. In 1989, he married another woman, the second respondent, under the Customary Marriages Act. On the deceased's death, the respondent insurer started paying a pension solely to the appellant. It then discovered the existence of the second marriage and started paying the second wife, reducing the payments to the appellant. It considered that the second wife was a ``surviving spouse'' in terms of the Pension and Provident Funds Regulations 1991, which defined the term as meaning the widow of a deceased member of a pension fund, including the widow of a polygamous person. The appellant brought the matter before the High Court, which held that although the second marriage was null and void, the second wife remained a wife under an unregistered customary union and thus entitled to share in the benefits from the deceased's pension policy.

Held, that the second marriage did not exist in law. By marrying under the Marriage Act, the deceased had waived his customary privileges of polygamy. He ceased to be a ``polygamous person''. He could not be married monogamously and polygamously at the same time. The second respondent was not entitled to any benefits as a widow.

Cases cited:

Claassen v *van der Walt* 1969 (3) SA 68 (T)

Friedman v *Harris* 1928 CPD 43

Katiyo v *Standard Chartered Zimbabwe Pension Fund* 1995 (1) ZLR 225 (H)

Mudzingwa v *Mudzingwa* 1989 (2) ZLR 182 (S)

R v *Francis* 1947 SR 95

R v *Moyo* 1946 SR 12

R v *Tarasanwa* 1948 SR 6

Copyright Juta & Co Ltd

GUBBAY CJ

Legislation considered:

Pension and Provident Funds Regulations 1991 (SI 323 of 1991), ss 2 and 28(2)

Case Information

W Ncube, for the appellant

Miss *E Mushore*, for the first respondent

C Hungwe, for the second respondent (at the request of the court)

Judgment

GUBBAY CJ: The late Milton Anthony Makwiramiti married the appellant, ``Rosaria'', on 30 August 1970 in terms of the Marriage Act [*Chapter 5:11*], formerly *Chapter 37*. Their marriage subsisted until his death.

On 18 September 1989, the deceased purported to enter into a marriage with the second respondent, ``Rosemary'', in terms of the Customary Marriages Act [*Chapter 5:07*], then the African Marriages Act [*Chapter 238*]. The marriage certificate issued to them referred to the deceased as a polygamist and that the marriage was his second.

The deceased was a member of the retirement annuity fund established by the first respondent and registered under the Pension and Provident Funds Act [*Chapter 24:09*]. At the time of his death, on 24 December 1991, the benefits payable to him from the Fund amounted to $43 357.89.

Under the Pension and Provident Funds Regulations 1991 (SI 323 of 1991) (``the Regulations''), provision is made in s 28(2) that upon the death of a member or pensioner, benefits from the Fund are payable in descending order:

> ``(a) to the surviving spouse; or
>
> (b) if he leaves no surviving spouse, to his dependant children; or ... ''

The term ``surviving spouse'' is defined in s 2 to mean:

> ``(a) a widow of a deceased member, including the widow of a polygamous person; and
>
> (b) ...
>
> of a pension fund."

Rosaria elected to commute a portion of the benefits payable to her in the sum of $3 105.29 with the uncommuted balance of $40 252.60 to be utilised in the purchase of an annuity policy. Thereafter, and for a few years, payments were made regularly to her by the first respondent.

On 13 December 1994, the first respondent informed Rosaria in writing that it had come to its knowledge that Rosemary was also a surviving spouse of the deceased; and that:

Copyright Juta & Co Ltd

``In view of this, we are going to stop payments to yourself and resume payment to the other widow until such time as she has benefited to the extent you have benefited so far and thereafter we will divide the pension between yourselves equally.''

Notwithstanding Rosaria's insistence that she was the sole widow of the deceased, the first respondent was true to its word and commenced to make the payments to Rosemary. She claimed to be the second surviving spouse, having married the deceased and borne him four children.

GUBBAY CJ

The dispute was brought before the High Court for determination. GARWE J, to whom argument was addressed, held that although the ``marriage'' between the deceased and Rosemary was bigamous, and therefore null and void, Rosemary remained, nonetheless, a wife under an unregistered customary union. She was therefore entitled as ``the widow of a polygamous person'' to share equally with Rosaria in the benefits payable by the first respondent. A declaration to that effect was made with Rosaria being ordered to pay the costs of both opponents.

The learned judge was undoubtedly correct in his view that the marriage of the deceased and Rosemary was bigamous and, consequently, illegal and of no validity. This was because at the time it was contracted the deceased was married to Rosaria under a monogamous or civil type marriage entered into under the Marriage Act. By embracing a monogamous regime, the deceased was deemed by law to have waived his customary privileges in respect of polygamy and, for as long as he remained married, to have submitted to the general law of the land. He was precluded from marrying another person, not only under the general law, but under customary law as well. He suffered from absolute incapacity to marry. See *R* v *Moyo* 1946 SR 12; *R* v *Francis* 1947 SR 95; *R* v *Tarasanwa* 1948 SR 6; *Mudzingwa* v *Mudzingwa* 1989 (2) ZLR 182 (S); *South African Criminal Law and Procedure* 3 ed vol III at 263 *in fine*- 264; Goldin & Gelfand *African Law and Custom in Rhodesia* at 270; Ncube *Family Law in Zimbabwe* at 139. Indeed, so jealously does the law guard against the profanation of the Christian ceremony of marriage that it criminally punishes bigamy and delictually punishes adultery. Moreover, it renders null and void a promise of marriage made by a married person even where that promise is conditional upon divorce or the death of the promisor's spouse. Such a promise, being *contra bonos mores*, debars an action for breach of contract. See *Friedman* v *Harris* 1928 CPD 43 at 45 *in fine*- 46; *Claassen* v *van der Walt* 1969 (3) SA 68 (T) at 70B-C.

It may thus be asserted with confidence that the deceased's marriage to Rosemary did not exist. Put differently, Rosemary never became the deceased's spouse.

It is apparent from what I have said that I do not agree with the learned judge that, although the marriage of the deceased and Rosemary was null and void, Rosemary nevertheless fell within the category of ``the widow of a polygamous person'' as she must be taken to have been married to the deceased under an unregistered customary union. This approach conflicted directly with that adopted by the same judge in *Katiyo* v *Standard Chartered Zimbabwe Pension Fund* 1995 (1) ZLR 225 (H).

Copyright Juta & Co Ltd

A person can only be polygamously married if the law recognises him as

GUBBAY CJ

being polygamously married. The deceased was monogamously married to Rosaria, and remained so until death. If his subsequent ``marriage'' to Rosemary never came into existence, it must follow that he was not a ``polygamous person'' but a monogamous person. It is not possible for a person to be monogamously and polygamously married at one time.

I am satisfied that the framer of the definition of ``surviving spouse'' in the Regulations was minded merely to extend the payable benefits to the widow or widows in truly polygamous marriages. If the intention were to recognise as a ``surviving spouse'' the ``widow'' of a bigamous marriage, the word ``bigamous'' in addition to ``polygamous'' would have been used. To speak of a spouse or widow of a bigamous marriage is clearly a contradiction of language.

For the aforegoing reasons, the appeal must be allowed.

I do not consider that Rosemary should be ordered to pay the costs of the appeal. It was the first respondent which actively participated in the proceedings both in the High Court and this court. Rosemary did not appear before us on 14 July 1998 when the matter was postponed. She was then content to allow the first respondent to support the judgment of the court *a quo*. This court, in her absence, appointed Mr *Hungwe* to present argument on her behalf, and is grateful to him for having done so.

In the result, I would order that:

1. The appeal is allowed with costs to be paid by the first respondent including the wasted costs of 14 July 1998.

2. The order of the court *a quo* is set aside and is substituted by the following:

   ``1. It is hereby declared that Rosaria Makwiramiti, as the sole surviving spouse of the deceased Milton Anthony Makwiramiti, is entitled to the benefits payable by Fidelity Life Assurance of Zimbabwe (Pvt) Ltd.

   2. Fidelity Life Assurance of Zimbabwe (Pvt) Ltd and Rosemary Makwaramiti are to pay the costs in case numbers 726/96 and 7785/96127 jointly and severally, the one paying the other to be absolved.''

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Mangwana & Partners, appellant's legal practitioners

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

JANGARA *v* NYAKUYAMBA & ORS 1998 (2) ZLR 475 (HC)

Copyright Juta & Co Ltd

Court **High Court, Harare**

Gillespie J

Civil application

11 November 1998Judgment No. HH-200-98

Flynote

Contract - enforceability - lease to buy - clause prohibiting cession of rights by lessee-buyer without permission of lessor-seller - position of third party when lessee-buyer cedes rights to him contrary to non-cession clause

Headnote

Considerable problems have arisen in relation to lease-to-buy agreements containing clauses prohibiting cession of rights by the lessee-buyer without written permission from the lessor-seller. These problems arise where the lessee-buyer, without written permission, purports to cede his rights to a third party in breach of the clause barring cession of rights. The question of the rights of the third party in this situation remains a source of confusion and uncertainty notwithstanding a number of judgments on this point.

The cession of the rights in breach of the non-cession clause creates rights between the lessee-purchaser and the third party, but it cannot bind the lessor-seller. This agreement is not illegal and invalid, but is only unenforceable against the lessor-seller. At the instance of the third party, the court may enforce the contract as against the lessee-purchaser but it cannot make an order, such as an order of transfer, that can bind the lessor-seller. The court has the discretion to order the lessee-purchaser to make transfer if he is in a position to do so or to take transfer of the property in order to give transfer to the third party. Where the lessor-seller is joined in the action and does not oppose the transfer, the court can exercise a discretion to order specific performance of a contract which, had the lessor-seller objected to transfer, would only have been enforceable by way of damages.

Depending on the circumstances, the court may confine the third party to an alternative claim for damages against the lessee-buyer. It seems that this alternative relief can be claimed whether or not the third party is aware of the defect in the title as, in the absence of an agreement to the contrary, the agreement by the transferor must be taken to include an undertaking to acquire the right in order to transfer it. If this is so the awareness that the transferor does not hold the right cannot disqualify the transferee from relief.

Cases cited:

Chanda v *Mutandadzi & Anor* S-74-94

Guta v *Chimbunde & Anor* HH-194-94

Hundah v *Marauro* 1993 (2) ZLR 401 (S)

Magwenzi v *Chamunorwa & Anor* 1995 (2) ZLR 332 (S)

Copyright Juta & Co Ltd

Nkomo v *Mujuru* 1997 (1) ZLR 155 (H)

Pedzisa v *Chikonyora* 1992 (2) ZLR 445 (S)

GILLESPIE J

Case Information

M Madzivanzira, for the applicant

Miss *N P Gonese*, for the respondents

Judgment

GILLESPIE J: This application raises an issue concerning ``township houses'' acquired under the well-known ``lease-to-buy'' scheme administered by municipalities throughout the country. The question of the rights of a person who acquires the inchoate rights of a lessee-purchaser, in contravention of a *pactum de non cedendo* incorporated in the original agreement between municipality and lessee-purchaser, remains a source of confusion and uncertainty notwithstanding a number of judgments on the point.

In the judgment in *Pedzisa* v *Chikonyora*, 1(152) the Supreme Court was considering the right of a lessee-purchaser to evict from the premises an occupant alleged to be in possession in terms of a sub-lease but who claimed to have acquired the lessee-purchaser's rights from him. The subsequent agreement was contrary to the terms of a pactum de non cedendo written into the original agreement, and reserving the rights of the owner, the municipality, to grant or withhold consent to any purported cession of rights by the lessee-purchaser. The Supreme Court analysed the rights created as follows:

- The lessee-purchaser acquires a personal right from the municipality to claim transfer upon performance of his obligations under the original contract. 2(153)
- The subsequent agreement contrary to the prohibition of sub-letting or cession of rights ``is valueless and confers no rights on the third party; for he can acquire no greater rights in the property than the lessee has''. 3(154)
- The subsequent agreement is moreover invalid because of the lack of a contractual formality - the written approval of the municipality to cession. 4(155)
- The third party could accordingly be evicted from the premises at the instance of the lessee-purchaser but would be entitled to a claim for damages for disturbance in occupation of the property if unaware at the time of the contract of the formal defect. 5(156)

This judgment was followed by *Hundah* v *Marauro*. 6(157) Here the Supreme Court was faced with an application by a third party, who had acquired from a lessee-purchaser the latter's rights to a house, in non-compliance with *a pactum de non cedendo,* for transfer to him of that

Copyright Juta & Co Ltd

property. The court reasoned as follows.

GILLESPIE J

- The lessee-purchaser is not the owner of the property and cannot transfer it.
- The municipality is the only *persona* that can transfer the property and should always be joined as a party to such a claim ``in order to ensure that it is bound by whatever judgment is given''. 7(158)
- An intimation by the municipality that it will abide by the judgment of the court is not a consent to a judgment authorising transfer to such a third party. 8(159)
- A third party who does not obtain an order of specific performance of such a contract may be entitled to claim damages 9(160) from the lessee-purchaser.

In a later unreported judgment, 10(161) the Supreme Court nevertheless gave an order enforcing transfer of a property the subject of identical agreements. A perceived inconsistency between this later judgment and the two earlier decisions prompted a judgment of this court preferring the approach of granting transfer at the instance of the third party purchaser. 11(162) In that decision, the learned judge addressed the competing rights as follows:

> ``Clearly, it is the policy of the city council that it must be able to approve of the persons who are to purchase or occupy Stand 5887. If that property is sold or occupation is given by [the lessee-purchaser] to a person who is not acceptable to the council, the council can call on [the lessee-purchaser] to rectify the breach and, if he fails to do so ... it can cancel the agreement. On the other hand, if the new purchaser or occupier is acceptable, the council may condone the breach ... It seems to me that it would be anomalous to hold the agreement between [the third party] and [the lessee-purchaser] to be illegal or invalid and therefore void if the city council has no objection thereto.'' 12(163)

In fact, the suggested contradiction between *Hundah*, on the one hand, and *Chanda*, on the other, is (subject to something I say below) more apparent than real. The Supreme Court expressly placed reliance in *Chanda* upon the fact that the City Council, joined as a party to the action, had not opposed the relief sought. This circumstance permitted the Supreme Court to exercise a discretion to order specific performance of a contract which, had the city council objected, would only have been enforceable by way of damages.

In a subsequent case, 13(164) the Supreme Court apparently gave some consideration to whether *Pedzisa* and *Hundah* were wrongly decided. Once

GILLESPIE J

again it was faced with the claim by a third party purchaser for transfer from the original lessee-purchaser of property acquired from a city council in non-compliance with a *pactum de non cedendo*. The court declined to find the two earlier cases to have been incorrectly decided but distinguished *Pedzisa*. The basis of the distinction was that in the case before the court the third party had paid in full the purchase price due to the lessee-purchaser. This had in fact

Copyright Juta & Co Ltd

included the obligation to pay to the city council all that had been due to it under the original agreement. In consequence of the payment of the municipality's requirements, the lessee-purchaser had taken transfer of the property. At the time of the institution of proceedings by the third party purchaser, so the court held, the agreement, originally unenforceable, as opposed to invalid, 14(165) had become enforceable.

> ``Once the [lessee-purchaser] had taken transfer of the property, he was entitled to sell it. The [lessee-purchaser] had agreed to sell at a time when he was not the registered owner. All the time that the City of Harare remained the owner, the agreement to sell was unenforceable, because the [lessee-purchaser] could not transfer ownership without the consent of the municipality. Once the municipality's consent was not required, however, the contract became enforceable.'' 15(166)

A final judgment to be considered is that of the late, and greatly missed, ROBINSON J in *Nkomo* v *Mujuru*. 16(167) In that matter, the court faced the same issue in circumstances where the lessee-purchaser, having exercised an option to purchase land originally acquired subject to a *pactum de non cedendo*, purported to cancel a subsequent cession to a third party. The ground advanced was that the third party had erected structures on the land without approval. During argument, the additional point was raised that the cession was invalid for want of the approval of the original seller to the cession. It was argued for the lessee-purchaser that *Pedzisa* was correctly decided but for the wrong reasons; more particularly that the cession agreement was void not for want of a contractual formality, but on the grounds that:

> ``the *pactum de non cedendo* contained in the ... lease agreement creating the rights and obligations which the applicant purported to assign to the respondent goes to the substance of those rights and obligations, with the result that any purported assignment of those rights and obligations without the previous written consent ... is null and void.'' 17(168)

I am bound to say that I find it extremely difficult to perceive a difference of substance, rather than of semantics, in the two allegedly different reasons. In any event, ROBINSON J correctly, in my respectful opinion, rejected the

argument. 18(169) In doing so, he also commented upon the decision in *Magwenzi*'s case, 19(170) expressing respectful difficulty with the justification advanced for *Pedzisa*'s case and *Hundah*'s case. He suggested that if *Magwenzi* were correct then it necessarily followed that any finding, as in *Pedzisa*, that the cession was invalid must be incorrect. 20(171) The learned judge thus concluded:

> ``That being the position, while it is quite clear that, on the one hand, the sale/assignment agreement is unenforceable and ineffective as against the [original seller] at the instance of either the [lessee-purchaser] or the [third party purchaser], on the other hand, since the sale/assignment agreement is not, to use the words of SMITH J in *Gutu*'s case at p 7 of the cyclostyled judgment, `prohibited by statute or common law, it is not contrary to public policy or *contra bonos mores* and there are no statutorily required formalities to be complied with', the agreement is, in my respectful opinion, legally binding *inter partes*.'' 21(172)

I am bound to express my respectful concurrence in the correctness of this statement of principle.

It is not for me to say whether or not any of the decisions of the Supreme Court were wrong in

Copyright Juta & Co Ltd

any way, nor would I wish it to be thought that I were embarking upon so foolhardy a venture. Some respectful observations, I nevertheless hope, may not be out of place. Thus, a distinction undoubtedly exists between *Pedzisa* and the other cases considered. *Pedzisa* was not an attempt by either party to enforce as against the original owner rights that the original owner had not alienated; that, however, does not account for the difference in approach between *Pedzisa* and *Magwenzi*. The correctness of the *dictum* in *Pedzisa* that the cession or sub-letting, in despite of the *pactum de non cedendo*, could not give the third party greater rights *vis-à- vis* the original owner than those enjoyed by the lessee-purchaser, has never been doubted (indeed, with the greatest of respect it could not be doubted). The statement that such a cession or sub-letting is invalid, however, has been reconsidered by the Supreme Court, to the extent that the statement might be taken to mean an invalidity as between the parties to the cession or sub-letting. To that extent, the statement has been departed from and effectively (although not expressly) disapproved.

The contrary formulation 22(173) that the cession or sub-letting is not invalid but merely temporarily unenforceable, becoming enforceable once the lessee-purchaser eventually acquires title, perhaps requires elucidation. It is beyond my competence to explain a *dictum* of a judge of appeal, but it seems to me, with respect, that the unenforceability alluded to is the discretion of a court

GILLESPIE J

to extend specific performance rather than confining a party to performance *per aequipollens*. Thus, for as long as the original holder of the rights has the power to, or does, oppose a cession, a court will not specifically enforce a transfer by the lessee-purchaser to the third party. It will, however, enforce the contract by way of damages.

In this context, any suggestion that the alternative relief is only available to a party who is unaware of a defect in title is not a binding *ratio decidendi*, since in none of the cases has that point fallen for decision. I would respectfully suggest a preference for a contrary view that an undertaking by a person, who does not have a right to transfer that right to a third party, includes, in the absence of agreement to the contrary, an undertaking to acquire that right in order to transfer it. If this is so, then awareness that the transferor does not hold the right cannot disqualify the transferee from relief. It is this principle that is at the heart of the implied warranty against eviction so well known to our law. Although this point was dealt with somewhat dismissively by McNALLY JA in *Hundah*, 23(174) the comments by the learned JUDGE OF APPEAL cannot possibly be taken as disapproving the principle. Rather, I understand His Lordship to be pointing out that that warranty is of no use to a third party attempting to enforce rights, as against the original owner, ceded to him by a person with no authority to cede them.

A further point arising from *Hundah*'s case is the need, therein referred to, to join in any application to enforce such a contract the municipality which enjoys the protection of a *pactum de non cedendo*. It will be recalled that it is the joinder of the town council, and its presumptive acquiescence in the order sought, which persuaded the court in *Chanda* and *Gutu* 24(175) to order the specific performance of a contract of sale of property despite the *pactum de non cedendo*. Undoubtedly, if the conclusion can properly be drawn that the municipality has no

Copyright Juta & Co Ltd

objection to such an order that the property be transferred to the third party, it can properly be granted. As I have suggested above, an order directing the lessee-purchaser to transfer to the third party can be granted even without that conclusion being drawn, on the basis that the lessee-purchaser can be ordered to take transfer from the town council in order to give it to the third party. I would venture the reminder, however, that in no circumstances can the municipality be ordered to effect transfer to the third party, at the instance of the third party. The reason is simply that the third party has no *vinculum juris* with the municipality and enjoys no cause of action entitling it to claim such an order.

I am therefore of the respectful view that the following statement of principle is to be gleaned from the Supreme Court decisions. A cession of a

GILLESPIE J

right, originally acquired subject to *a pactum de non cedendo*, but in breach of that reservation, creates rights as between the parties to that subsequent cession, which rights, however, cannot bind the original holder of those rights. The court may, at the instance of the third party, enforce that contract as against the lessee-purchaser; no order, however, may be given which can bind the original holder of those rights. Thus no order of transfer can be given against that original holder. An order of specific performance of transfer may, at the court's discretion, be given against the lessee-purchaser; such an order has the effect of obliging that party to effect transfer if he is in a position to do so, or to take transfer of the property in order to give it, if such be necessary. Depending on the circumstances, however, the court may confine a third party to an alternative claim against the lessee-purchaser in damages. This statement of principle explains completely the results in all the other judgments, and was the principle expressly applied by SMITH J and ROBINSON J in *Gutu* and *Magwenzi*.

This brings me to the facts of this case. The applicant claims to have acquired rights in an immovable property from the third respondent. The property is high density housing originally acquired by that party on a lease-to-buy agreement and subject to *a pactum de non cedendo*. The municipality, the fourth respondent, declined when that was demanded of it, to approve the cession of rights from the third respondent to the applicant.

Litigation has been instituted between the third respondent and the applicant with the former claiming the eviction of the latter from the property. The latter in turn made a claim in reconvention for transfer of the property. Before closure of pleadings in that matter, the third respondent sold the property to the first and second respondents. The municipality consented to that arrangement and cession of the rights has been registered in the records of the council. The third respondent thereafter failed to appear at a pre-trial conference in the pending litigation. The applicant did not inform the learned judge presiding of the full facts and latest developments, and in the face of the default, an order was given striking out the claim and the defence to the reconvention. Leave was given to move default judgment on production of the written approval of the municipality to that effect.

The applicant was obviously unable to produce such a consent and accordingly devised the scheme represented by the present litigation. It is an application for an order setting aside the

Copyright Juta & Co Ltd

transfer of the property as between the first and second respondents and the third respondent. The ground advanced is the alleged fraud of those parties in entering into the agreement with the knowledge of, and deliberate intention to frustrate the applicant's rights in the property. Fraud is denied in terms creating a substantial dispute of fact.

GILLESPIE J

I consider that the application is ill advised and untenable for a number of reasons. The first is the dispute of facts that has arisen. The dispute is in fact of long-standing and factual controversy was inevitable. It was most inappropriate in the circumstances to choose to proceed by way of application rather than action. The second is that the applicant has no contractual privity with the first and second respondents. He is not entitled to sue them in order to have a contract of theirs set aside. Thirdly, even if the relief claimed be interpreted as a prayer for the avoidance, not of the contract but of the performance thereof, ie the cession of rights and its registration by the council, no more favourable result can be achieved. As I have shown by the analysis above, the applicant acquired no rights in the property as against the municipality and cannot purport to sue it in order to prevent it dealing with its property according to its rights.

The applicant undoubtedly has a claim, as yet undetermined, against the third respondent. Indeed the third respondent is in the position where he is presently barred from disputing that claim. The question thus arises how the applicant could enforce that claim bearing in mind the direction given at pre-trial conference. It seems to me clear from the legal principles disclosed by the foregoing analysis of the cases, that the applicant's only recourse was to:

- apply to join the first and second respondents in the existing litigation - this because they have now acquired rights, which are inconsistent with his claim against the third respondent, and the court would have to consider those rights in determining whether or not to enforce the applicant's specifically.
- amend his claim against the third respondent so as to include an alternative claim for damages lest a claim for specific performance be denied.
- serve all relevant papers on the municipality because of its interest in the matter.

That, however, is as far as I am prepared to speculate on how the applicant might better have pursued litigation if he were so advised.

As it is, the application has been shown to be procedurally incorrect, the cause of action bad in law and the relief claimed not available. I am accordingly obliged to dismiss the application with costs, without determination of whatever merit may exist in the underlying dispute as to the competing rights in the property in question.

Madzivanzira & Partners, applicant's legal practitioners

Mushonga & Associates, first and second respondent's legal practitioners

Ahmed & Ziyambi, third respondent's legal practitioners

Copyright Juta & Co Ltd

S *v* MUZIVIRWA & ORS 1998 (2) ZLR 483 (HC)

Court **High Court, Harare**

Gillespie J

Criminal review

11 November 1998 Judgment No. HH-208-98

Flynote

Criminal procedure - prosecutor - concessions by - accused advancing improbable facts - prosecutor's duty to query such facts, not accept them without explanation - court not bound by such concession in absence of explanation

Headnote

The technique of plea bargaining is not part of our legal system. The prosecutor is required to prove his case in accordance with his evidence. He must not make concessions which are contrary to the evidence in order to obtain a plea from the accused or to lighten his work load. If the accused advances improbable facts, and the prosecutor has evidence with which to refute those facts, he must lead such evidence. Even if he does not have direct evidence, he is expected by presentation, cross-examination and argument, to assist the court to the proper finding in relation to these improbable facts. On the other hand, if the prosecutor has reason to believe that a defence, although improbable, may be true, it is proper for him to make a concession in favour of the defence.

In a case in which the accused advances improbable facts and the prosecutor does not dispute those facts or makes what appears to be an unjustified concession about those facts, the magistrate is not obliged to accept the improbable facts or to accept the concession made by the State. However, in such a situation the magistrate must make clear to the parties the difficulty he is having in accepting the undisputed or agreed facts so that the accused will then have an opportunity to give evidence to establish those facts. The magistrate can thus require substantiation of implausible assertions of fact by the defence which are not challenged by the State. He may also consider whether concessions made by the State are properly made and he is not bound slavishly to accept such concessions. In exercising these powers he must, of course, ensure that he remains even-handed. He must show that he is impartially committed to justice and truth and not give the impression of intervening to rectify a defective or badly-presented State case.

In the present case, the magistrate should have queried improbable facts advanced by the accused and conceded by the State. The prosecutor would then have had an opportunity to indicate whether or not he had evidence or information tending to confirm the improbable scenario. If he did, then that would have removed any doubt about the propriety of his concession. In addition, the court should have probed an innocent explanation by the accused as this was in contradiction to unequivocal admissions they had made earlier in confirmation of

Copyright Juta & Co Ltd

their pleas.

Cases cited:

R v *Hartley* 1966 RLR 522 (A)

GILLESPIE J

S v *Chakanetsa* 1981 ZLR 48 (A)

S v *Chiromo* A-143-76

S v *Fusirayi* 1981 ZLR 56 (A)

S v *Mpofu* 1983 (2) ZLR 118 (H)

S v *Ndebele* 1988 (2) ZLR 249 (H)

Judgment

GILLESPIE J: The accused were charged with and convicted of the possession of an elephant tusk. 1(176) The trophy weighed 2,5 kilograms and is said to have had a value of $1 000. A statement of agreed facts stated that the first and second accused, brick moulders, had ``found an elephant tusk hidden underground whilst they were moulding bricks'' in a high density suburb in Karoi. They had given their find to the third accused for safekeeping. The accused all admitted knowing the nature of their supposed treasure trove and admitted that they wished to sell it. They were in fact arrested when, as a result of information as to their possession of it, a police trap was established to which the accused sold the ivory. The magistrate convicted the accused on the basis of this statement of facts and invited their submissions on the question of special circumstances why the mandatory sentence 2(177) should not be imposed.

In explaining the concept of special circumstances, the magistrate gave as an example of a special circumstance:

> ``For example that you did not know that what you were having were elephant tusks and that you believed that they were a cow or goat horn.''

The accused then each made submissions. The first claiming, *mirabile dictu*, that he did not know that the object was an elephant tusk, and stressing that he had found it fortuitously while digging at the site of a house being built. The second agreed that they had no idea the object was ivory and actually threw it away, after finding it by chance, until the police informer told them its nature and offered to find a buyer for it. The third made no claim of ignorance merely saying that, having found the tusk with his friends, he did not know it was an offence to keep or trade it and hoped only to make a bit of money.

The magistrate found the foregoing to constitute special circumstances. He imposed upon the accused a sentence of imprisonment that was wholly suspended, partly upon conditions of good behaviour and in respect of the balance upon conditions of community service.

Copyright Juta & Co Ltd

The case is reminiscent of the decision in *S* v *Chakanetsa* . 3(178) In that case, the accused had been found in possession of uncut emeralds. He claimed that,

GILLESPIE J

having taken his girlfriend to Mberengwe for a holiday, he experienced the need to relieve himself in the bush. There he happened to find under a stone, beside the spot he selected for his purpose, a plastic bag containing what he recognised to be precious stones in their rough state. The Appellate Division had this to say concerning the explanation:

> ``It is quite clear that the explanation by the appellant for his possession of these emeralds is patently absurd, and it is a matter of some astonishment to me that the prosecutor was prepared to accept that as an agreed statement of fact ... The appellant may consider himself fortunate that the prosecutor was prepared to accept a story of this nature, either because he was extremely naïve or because he wanted a plea of guilty in order to get rid of the case quickly.'' 4(179)

Reference was made to an hitherto unreported *dictum* of the former Chief Justice, Sir Hugh Beadle, who in similar circumstances had expressed the hope that:

> ``from now on, prosecutors will not, simply in the interests of expeditiously getting rid of cases, willy-nilly make admissions of fact which are not only wrong but unjustified.'' 5(180)

The same principle was, very shortly thereafter, restated in even wider terms.

> ``The inter-relationship between the prosecution and the court is a very important one. Both are concerned with the impartial administration of justice. There is a danger of at least a suspicion of favouritism if prosecutors agree with the defence an improbable version of the facts which greatly mitigates what might otherwise be a serious offence, and like Caesar's wife, the prosecution must be above any trace of suspicion. It is not enough that the prosecutor has no evidence to refute an improbable version put forward by the defence: unless he has evidence or information on which he believes that that version may well be true - in which case he should explain his position openly to the court - he should not just accept the defence story. It is always open to him to lead his evidence of what occurred and leave it to the court to draw the proper inference in the light of what the accused may or may not say; and if the accused does give an improbable version in evidence he always has available the weapon of cross-examination.'' 6(181)

The technique of the plea-bargain has never been part of our legal system. The prosecutor is required to prove his case in accordance with his evidence and not to make concessions in the face of that evidence for the sake of obtaining a plea. The principle does not end there: even if there is no direct evidence, the prosecutor ought not to make a concession which is improbable, far less improper, in order to lighten his roll. He is rather expected by presentation, cross-examination and argument, to assist the court to the proper finding on any improbable defence that might be advanced. A

GILLESPIE J

concession in favour of the defence can, and indeed must, be made where there is reason to suppose that the defence, however improbable, is or may be true. The rationale of the concession should, however, be explained openly to the court.

Copyright Juta & Co Ltd

The position of a magistrate, before whom an improbable statement of facts is advanced, or an incredible or unpersuasive concession made, by the state, has also been made clear on authority. Just as a court is not obliged to accept as true factual statements made during argument in mitigation, so also it is not necessarily bound by improbable facts agreed or conceded in the absence of that frank explanation by the prosecutor of the basis of the concession, that was anticipated by FIELDSEND CJ in the *dictum* cited above. Rather, as the learned CHIEF JUSTICE observed:

> ``It is still open to the court to reject the facts agreed but it should be slow to do so except in obvious cases and in any event should make clear to both parties the difficulty it has in accepting the agreed facts. This will give the accused the opportunity of giving evidence to establish any disputed facts relied upon.'' 7(182)

The magistrate has a duty to examine critically the concessions as well as the evidence of the State. He has the power to query the propriety of the bringing of a lesser charge where the facts indicate a more serious charge should properly be brought. He is expected to consider the basis of concessions made, and not to accept them slavishly. He ought to require substantiation of implausible assertions of fact by the defence not challenged by the State. In exercising these powers, of course, he must ensure that he remains entirely even-handed. He must show that he is impartially committed to justice and truth and not give the impression of intervening to rectify a defective or badly-presented State case. Of course, a court cannot go behind a prosecutor's deliberate decision, advisedly made and properly explained when questioned.

> ``The prosecutor may oust [the magistrate's] discretion by categorically and unequivocally electing to proceed on a certain charge, but the view that the magistrate is an automated slot machine, designed simply to dispense the required item at the request of the State or defence, is patently incorrect.'' 8(183)

In this case, it seems to me that the initial concession, as to the circumstances in which the accused came into possession of the ivory, is most questionable. It is one that the magistrate should have queried, so improbable is it on its face. A statement by the prosecutor that he has evidence or information tending to confirm that improbable scenario may have been all that was needed to remove any doubt as to the propriety of the concession, but that explanation should have been sought. The accuseds' subsequent averments of ignorance of the nature of the ivory are also most dubious. They contradict

the earlier unequivocal admissions, in confirmation of the pleas of guilty, that they were aware that what they attempted to sell to the police trap was ivory.

As a result of the complaisant acceptance of improbable facts, the court has reached a finding that special circumstances exist. In consequence of that finding, the accused have avoided the mandatory penalty. Had the facts been properly queried, a very different result might have been achieved. On the facts as found, the favourable decision is most debatable, while a sentence of community service is positively inappropriate. The punishment does appear to debase that which the legislature has for good reason, including international commitments, perceived as a serious offence and one that needs to be strictly controlled if any trade in, or exploitation of, endangered species, for the betterment of the nation as a whole, is to be permitted.

Copyright Juta & Co Ltd

In the result, I do not consider that substantial justice has been done and I decline to give a certificate to that effect.

GEORGIAS & ANOR *v* STANDARD CHARTERED FINANCE ZIMBABWE LTD 1998 (2) ZLR 488 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Ebrahim JA & Sandura JA

Civil appeal

5 October & 16 November 1998 Judgment No. S-183-98

Flynote

Interest - in duplum rule - subsequent compromise between debtor and creditor - effect of compromise that debtor pays interest over the double - validity of compromise

Practice and procedure - judgment by consent - rescission of - considerations to be taken into account

Headnote

When considering an application for rescission of a judgment entered into by consent, , the court should have regard to:

(1) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;

(2) the *bona fides* of the application;

(3) the *bona fides* of the defence on the merits of the case which *prima facie* carries some prospect of success. A balance of probability need not be established.

Too much emphasis should not be placed on any of these factors. They must be viewed in conjunction with each other and with the application as a whole. An unsatisfactory explanation may be strengthened by a very strong defence on the merits. In general terms, what an applicant must show is something which entitles him to ask for the indulgence of he court.

The *in duplum* rule is one based on a public policy designed to protect borrowers from the exploitation of lenders by prohibiting usurious abuse. There are two main objectives: protection of a debtor against exploitation and enforcement of sound fiscal discipline on a creditor. The rule cannot be waived either in advance or during the course of a loan. It cannot be excluded by means of a contractual provision.

Different considerations apply, however, where there has been a compromise. Compromise is the settlement by agreement of disputed obligations, or of a law suit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something - either diminishing his claim or increasing his liability. The purpose of compromise is to end doubt and to avoid the inconvenience and risk

Copyright Juta & Co Ltd

inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. The cause of action that may previously have existed is extinguished; the party sued cannot rely on defence to the original cause of action.

A compromise does not defeat the object of the *in duplum* rule. The debtor, in agreeing to settle

GUBBAY CJ

his obligations and pay the creditor a sum which includes or embraces interest over the double, puts himself outside the purposes of the rule. He is not being exploited; he is making an informed choice. Similarly, the dilatoriness of the creditor is not being rewarded.

Cases cited:

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

Cachalia v *Harberer & Co* 1905 TS 457

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

D v *National Soc for the Prevention of Cruelty to Children* [1977] 1 All ER 589 (HL)

Dennis Peters Invstms (Pty) Ltd v *Ollerenshaw & Ors* 1977 (1) SA 197 (W)

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

Georgias & Anor v *Standard Chartered Finance Zimbabwe Ltd* 1998 (1) ZLR 356 (H)

Gollach & Gomperts (1967) (Pty) Ltd v *Universal Mills & Product Co Ltd & Ors* 1978 (1) SA 914 (A)

Hamilton v *van Zyl* 1983 (4) SA 379 (E)

Karson v *Min of Public Works* 1996 (1) SA 887 (E)

Leech & Ors v *ABSA Bank Ltd* [1997] 3 All SA 308 (W)

Nagar v *Nagar* 1982 (2) SA 263 (ZH)

Roland & Anor v *McDonnell* 1986 (2) ZLR 216 (S)

Standard Bank of SA Ltd v *Oneanate Invstms (Pty) Ltd (in liq)* 1998 (1) SA 811 (SCA)

Stockil v *Griffiths* 1992 (1) ZLR 172 (S)

Syfrets Mortgage Nominees Ltd v *Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SEC)

Tauber v *von Abo* 1984 (4) SA 482 (E)

Copyright Juta & Co Ltd

Washaya v *Washaya* 1989 (2) ZLR 195 (H)

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

Case Information

B W Burman SC, with him *G S Wernberg*, for the appellants

A P de Bourbon SC, for the respondent

Judgment

GUBBAY CJ:

INTRODUCTION

This appeal is against the judgment in *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (1) ZLR 356 (H), in which BLACKIE J dismissed with costs an application to set aside an order of the High Court granted on 17 December 1996 and expressed as being given by consent. It is convenient to designate the parties as in the court *a quo*, namely, as ``Georgias'', ``Trinity'' and ``the Bank'' (albeit the latter is a finance company).

On 4 June 1993, the Bank instituted proceedings against Georgias as a principal debtor under two hire purchase agreements, and against Trinity as surety. It claimed against Trinity as the principal debtor in terms of both a third hire purchase agreement and an agreement of lease, and against Georgias as a surety thereof. It sought against Georgias and Trinity, jointly

---

GUBBAY CJ:

and severally: (1) payment of the sum of $1 256 954.70, with interest on $1 187 707.10 at the rate of 45% per annum from 30 April 1993 to the date of payment, in respect of the three hire purchase agreements; and (2) payment of the sum of $252 600, with interest thereon at the rate of 44% per annum from 27 February 1993 to the date of payment, in respect of the agreement of lease. And as against Trinity: (1) confirmation of the termination of the agreement of lease; (2) delivery of the leased goods; and, (3) forfeiture of all rentals paid.

A plea and claim in reconvention were filed by Georgias and Trinity on 17 November 1993. The essence of the dispute in relation to the claim in convention was the quantum of the capital claimed by the Bank and the amount of interest alleged to have accrued thereon. Liability in respect of capital was admitted in an amount of $2 033 013.38. Under the claim in reconvention damages in an amount of $15 000 000, were sought against the Bank. The ground relied upon was the breach of its duty of utmost good faith as banker and financier in alleging to certain customers that its clients, Georgias and Trinity, were financially unsound and liable to close down the business.

The action was set down for trial on 23 September 1996, but was postponed on that day due to the illness of Georgias. It was re-set down on the continuous roll for the week commencing 18 November 1996. Georgias and Trinity were represented by Mr George Chikumbirike

---

Copyright Juta & Co Ltd

(``Chikumbirike''), who had been retained by Mr Jonathan Muganhu of the firm Gollop & Blank. Mr Mordecai Mahlangu (``Mahlangu'') of the firm Gill, Godlonton & Gerrans represented the Bank.

Discussions designed to effect a settlement took place between the parties over the period 18 to 20 November 1996. On 20 November 1996, Chikumbirike and Mahlangu appeared in Chambers before SMITH J, who was to preside at the trial. Upon being advised that a settlement of the Bank's claims had been reached, and having written down the terms thereof as recounted by counsel, His Lordship required the submission of a draft written order to incorporate the agreement. This was prepared by Mahlangu and was signed by the learned judge on 17 December 1996. The order reads:

``1. Judgment be and it is hereby entered against the first and second defendants jointly and severally, the one paying the other to be absolved, as follows:

(i) payment in the sum of $4 351 269.77;

(ii) interest at the rate of 40% *per annum* on the sum of $4 351 269.77, from 1 February 1997 to the date of payment in full;

(iii) a contribution to costs in the sum of $15 000;

(iv) payment of the amounts ordered in paragraphs (i), (ii) and (iii) above shall be made in four equal instalments, on 28 February 1997, 28 May 1997, 28 August 1997 and 28 November 1997, the payment being appropriated in the first instance to interest, then to costs and thereafter to capital;

GUBBAY CJ:

(v) in the event of default in respect of any of the payments as provided for in paragraph (iv) above, the full amount outstanding at the time of default shall become due and payable.

2. The first, second and third properties fully described in paragraphs 22, 25 and 28 of the plaintiff's Particulars of Claim are declared to be executable.

3. The Claim in Reconvention is postponed sine die and the second defendant is required to procure that it is set down for trial not later than 28 February 1997. In the event that the second defendant should fail to procure the set down of the matter as herein provided, then it shall withdraw the Claim in Reconvention and each party will pay its own costs of suit. In the event, however, that the second defendant procures the set down of the Claim in Reconvention then it shall pay the plaintiff's wasted costs of this postponement.''

A copy of the document presented to the learned judge was provided to Georgias, at his request, by Mahlangu on 27 November 1996. But it was only on 20 January 1997 that Georgias obtained a copy of the signed High Court order.

On 7 March 1997, an application for the rescission of the judgment granted by SMITH J was instituted. And on 28 May 1997, an interlocutory application was made to prevent payment of the second instalment due under the judgment. This relief was granted the next day, with the hearing of the main application set down for 1 July 1997.

THE BASIC ISSUES

The grounds upon which it was sought to have the judgment set aside were re-stated by

Copyright Juta & Co Ltd

Georgias in his answering affidavit as follows:

> ``The applicants contend that a final agreement was not reached to which they agreed, and that Mr Chikumbirike did not have authority to agree on their behalf. They also contend that even if it is found that they agreed to a final agreement, that the judgment sum includes interest above the double and that the DUPLUM Rule has been breached, thereby entitling the applicants to have the Consent Order set aside.
>
> Finally, it is contended that the respondent's papers do not set out sufficient details and do not comply with the Practice Direction by the Honourable Mr Justice Smith in his judgment HH-140-96 in the four cases involving the COMMERCIAL BANK OF ZIMBABWE and the ZIMBABWE BANKING CORPORATION (`*ZIMBANK')*. For this reason, the alleged Consent Order should be set aside. Non-observance of this important Practice Direction constitutes good and sufficient cause in terms of Rule 56 for setting aside the Order.''

The contention that it was necessary for the Bank in obtaining the judgment to comply with the practice direction was not relied upon before this court. It was conceded by Mr *Burman* who, with Mr *Wernberg*, argued the appeal, that a determination of whether, as a matter of law, it was permissible for a debtor to waive the benefit of the *in duplum* rule in a compromise reached with a creditor, would be decisive of the third ground as well.

GUBBAY CJ:

III. THE CRITERIA TO BE CONSIDERED IN AN APPLICATION TO SET ASIDE A JUDGMENT THAT WAS ENTERED INTO WITH THE CONSENT OF THE PARTIES

Counsel were agreed that even where a judgment granted with the consent of the parties falls outside rr 54 and 56 of the Rules of the High Court - as clearly the application in this matter did - the court enjoys an inherent power to set it aside. What was in dispute was whether all an applicant had to prove was the fact that consent had not been given. Or, as Mr *de Bourbon* submitted, was the court required in deciding whether to grant the indulgence sought to take into account such other factors as the nature of the defence to the main action, the delay in bringing the application, and the importance of finality in litigation?

In *Washaya* v *Washaya* 1989 (2) ZLR 195 (H) it was said by GREENLAND J at 201E-F that:

> ``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 that 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. This court is not concerned with the other merits of the application ... ''

In the court *a quo*, BLACKIE J considered that such an approach was far too restrictive (see at 357G-358A). I am in agreement with him. Although lack of consent is undoubtedly the predominant factor in the decision of whether or not to set aside a judgment purported to have been given with the consent of the parties, regard must also be had, in my view, to the factors alluded to by BLACKIE J and mentioned by Mr *de Bourbon*. I think that only where the defence offered to the action is virtually unarguable, or the delay in bringing the application inordinate and unsatisfactorily explained, should a court decline the relief of rescission.

In *Washaya*'s case the applicant's counsel read out to the court the terms of a settlement and requested that judgment be entered in accordance therewith. Counsel for the respondent

---

Copyright Juta & Co Ltd

confirmed the terms. The presiding judge accepted that the dispute had been settled and incorporated what had been dictated in the order marked ``by consent''. In fact, the applicant had not authorised his counsel to consent to judgment. The latter had acted in an irresponsible and grossly negligent manner, there being no basis upon which he could reasonably have expected ratification of his action in unilaterally consenting to judgment. On this scenario, there can be little doubt that GREENLAND J was correct in rescinding the judgment and in ordering the errant counsel to pay the costs of the application *de bonis propriis*. But, with respect, he erred in ruling that an applicant need show only that he did not

GUBBAY CJ:

consent to the order. Indeed, the contrary was decided by this court in *Roland & Anor* v *McDonnell* 1986 (2) ZLR 216 (S). It was there laid down that a judgment given by consent may be set aside on ``good and sufficient cause''; an inquiry to be determined in accordance with the same principles as are applicable to the grant of the indulgence of rescission of a judgment given by default (see at 226D-F).

The adoption of those principles to an application to rescind a judgment given by consent enjoins the court to have regard to:

(a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;

(b) the *bona fides* of the application for rescission;

(c) the *bona fides* of the defence on the merits of the case which prima facie carries some prospect of success; a balance of probability need not be established.

As has been stated repeatedly, too much emphasis should not be placed on any one of these factors. They must be viewed in conjunction with each other and with the application as a whole. An unsatisfactory explanation may be strengthened by a very strong defence on the merits. See, for instance, *du Preez* v *Hughes NO* 1957 R&N 706 (SR) at 709A-F; *Stockil* v *Griffiths* 1992 (1) ZLR 172 (S) at 173F. In general terms, what an applicant must show is something which entitles him to ask for the indulgence of the court. See *Arab* v *Arab* 1976 (2) RLR 166 (A) at 173E.

It is to a consideration of these factors that I must now turn:

(1) *Whether Georgias provided the court* a quo *with a reasonable explanation of the circumstances in which judgment was entered against him and Trinity*

Of course, if Georgias established that he had not consented to the order of 18 December 1996, and that Chikumbirike acted contrary to authority in informing SMITH J that the Bank's claims against him and Trinity were settled, then it necessarily followed that the explanation was acceptable. Otherwise it was not.

It was beyond doubt that Georgias had been actively concerned in the issue of *in duplum*. It was he who, on 30 October 1996, had written to Chikumbirike and Messrs Gollop & Blank, bringing

Copyright Juta & Co Ltd

to their notice the judgment delivered on that day in *Commercial Bank of Zimbabwe Ltd* v *MM Builders and Suppliers (Pvt) Ltd & Ors*, subsequently reported in 1996 (2) ZLR 420 (H) and 1997 (2) SA 285 (ZH). Then on 12 November 1996 he wrote directly to the Bank's legal practitioners drawing attention to the necessity to comply with the *in duplum* rule and the practice direction, and to furnish particulars

GUBBAY CJ:

to enable the defendants to determine whether there had been such compliance. And on 18 November 1996 he wrote to Chikumbirike stressing the implications of the *in duplum* rule and adding that it was still necessary for the requested information to be provided for the determination to be made of whether the rule had been breached and how much money, if any at all, was owed.

Although this background provides an insight into Georgias' attitude to the claims of the Bank, of crucial relevance, so it seems to me, were the events that occurred on 18, 19 and 20 November 1996. For it was over this period that negotiations for a settlement took place.

[*The learned Chief Justice considered the evidence and concluded:*]

Upon a full conspectus of the papers, I am not persuaded that the learned judge erred in holding that Georgias and Trinity had failed to show that a final agreement had not been reached on 20 November 1996. I find as unacceptable the statement by Georgias that he and Chikumbirike did not withdraw to consider the final offer; and that he left the courtroom without having authorised Chikumbirike to accept such an offer. The cogent and credible evidence of the two legal practitioners denies the possibility of Georgias being under the impression that the Bank's final offer had not been accepted before he left the courtroom. He permitted Chikumbirike to announce its acceptance in his hearing. He added no protest nor any qualification thereto, such as the need to consult with Trinity's other directors and shareholders. He was there on his own behalf and as the authorised representative of Trinity.

I would stress that the dispute of fact on the critical issue was clearly resolvable on the affidavits against Georgias and Trinity without there being any reasonable possibility of causing either of them an injustice. That being so, there was, as found by the learned judge *a quo*, no necessity to send the matter to trial to determine whether or not there had been a settlement of the Bank's claims. See *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) at 339C-D.

(2) *The* bona fides *of the application for rescission*

I did not understand Mr *Burman* to suggest that if the learned judge *a quo* was justified in finding that Georgias and Trinity had not discharged the onus of showing that a final agreement was not reached on 20 November 1996, it was still open to consider whether the application for rescission of the judgment on that ground was *bona fide*. The contention was rather that if the terms of the settlement breached the *in duplum* rule, then Georgias and

Copyright Juta & Co Ltd

GUBBAY CJ:

Trinity were not in law entitled to waive compliance therewith. Accordingly, so it was urged, the application to rescind on this second ground should be regarded as *bona fide*.

> (3) *Whether it was shown* prima facie *that the amount of $4 351 269.77, which Georgias and Trinity were ordered to pay under the judgment entered by consent, was in breach of the* in duplum *rule; and, if so, whether it was permissible for them in law to conclude a compromise of the Bank's claims*

In considering whether Georgias and Trinity discharged the onus in respect to this second defence, I am prepared to assume in their favour that they were able to show *prima facie* that the sum entered in the consent judgment included interest above the double. What remains to be decided, therefore, is whether in the circumstances which pertained on 20 November 1996, the *in duplum* rule had any applicability.

Counsel were agreed that as the *in duplum* rule is one based upon a public policy designed to protect borrowers from the exploitation of lenders by prohibiting usurious abuse, it cannot be waived either in advance or during the course of a loan; it cannot be excluded by means of a contractual provision. This is correct. See *Commercial Bank of Zimbabwe Ltd* v *MM Builders & Suppliers (Pvt) Ltd supra* at 465F-466B (ZLR) and 321F-I (SA); *Leech & Ors* v *ABSA Bank Ltd* [1997] 3 All SA 308 (W) at 314g-h; *Standard Bank of South Africa Ltd* v *Oneanate Investments (Pty) Ltd* (In Liquidation) 1998 (1) SA 811 (SCA) at 828D-E.

In casu there is, of course, no question of a waiver in advance or during the course of loans of money by the Bank. The issue, as I perceive it, is whether the same principle of public policy that taints those incidents affects a compromise of liability as well.

In the *Commercial Bank of Zimbabwe* case *supra* GILLESPIE J drew a distinction between the invalidity attaching to an agreement to waive in advance the *in duplum* rule and one to agree to novate the debt. He observed obiter at 466D-F (ZLR) and 322B-E (SA):

> ``This is not necessarily to say that the parties are unable, *ex post facto*, that is once the debt is called up, to agree a novation of the debt. That is, for instance, to contract a new loan in terms of which money is advanced by the creditor in an amount of the outstanding capital and accrued interest up to the double in order to permit of the repayment of the outstanding indebtedness. This new debt would then be repayable on agreed terms. This would be a true capitalisation of the interest on the previous debt ... 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."

GUBBAY CJ:

It may be possible to infer from these remarks, as Mr *Burman* contended, that the learned judge was of the opinion that any *ex post facto* agreement to pay capital plus interest over the

Copyright Juta & Co Ltd

double would be unlawful.

After quoting the above passage, BLACKIE J went further in saying at 360H-361A:

> ``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 the double is lawfully recoverable by the Bank.''

He then proceeded to consider whether in relation to the compromise the *in duplum* rule had been breached, and at 361E-F held that:

> ``It is for the applicants to show, on a balance of probabilities, that the consent judgment has been entered in an amount which contravenes the provisions of the *duplum* rule.''

The clear implication from these words is that the *in duplum* rule applied to the compromise; for otherwise it would have been quite unnecessary to resort to a determination of whether there had been a breach of the rule at all.

With respect, however, to the approach of BLACKIE J and, insofar as they may be to the contrary to the *obiter dicta* of GILLESPIE J, it seems to me that different considerations apply where there has been a compromise.

Compromise, or *transactio*, is the settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something - either diminishing his claim or increasing his liability. See *Cachalia* v *Harberer & Co* 1905 TS 457 at 462 *in fine*; Tauber v *von Abo* 1984 (4) SA 482 (E) at 485G- I; *Karson* v *Minister of Public Works* 1996 (1) SA 887 (E) at 893F-G. The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. See *Nagar* v *Nagar* 1982 (2) SA 263 (ZH) at 268E-H. As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action. See *Hamilton* v *van Zyl* 1983 (4) SA 379 (E) at 383H. But a compromise induced by fraud, duress, *justus error*, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court. See *Gollach & Gomperts (1967) (Pty) Ltd* v *Universal Mills & Produce Co Ltd & Ors* 1978 (1) SA 914 (A) at 922H. Unlike novation, a compromise is binding on the parties even though the original contract was invalid or even illegal. See *Hamilton* v *van Zyl supra* at 383D-E; *Syfrets Mortgage Nominees Ltd* v *Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SEC) at 288E-F.

GUBBAY CJ:

Reverting to the considerations behind the *in duplum* rule, they are correctly summarised and stated to be based on

> ``a policy to protect a debtor who has not serviced his loan from facing an unconscionable claim for accumulated

Copyright Juta & Co Ltd

interest and to enforce sound fiscal discipline upon a creditor'':

per GILLESPIE J in the *Commercial Bank of Zimbabwe* case at 465G (ZLR) and 321G (SA). Thus there are two main objectives:

(a) protection of a debtor against exploitation; and

(b) enforcement of a sound fiscal discipline on a creditor.

It follows that a waiver of the *in duplum* rule in advance cannot be sanctioned, for to do so would defeat these two objectives.

However, a compromise *ex post facto* involves different considerations. Where there is a dispute about monies owing and the debtor, knowing that he cannot be forced to pay accrued interest over the double for good cause agrees to settle his obligations and pay the creditor a sum which includes or embraces such interest, he has put himself outside the purpose of the rule. He is no longer exposed to the ``perceived evils which the rule is formulated to combat''. He is not being exploited and does not need protection against himself. He is now making an informed choice.

If the creditor is able to secure such a compromise, the policy of the law is not being defeated. To allow him to rely on the new agreement will not amount to an avoidance of the enforcement of sound fiscal discipline against him. It is only by virtue of the fact that he has secured a new agreement that he may recover his money. The rule which disadvantaged him for his dilatoriness is not being breached. His right of recovery is on account of his securing a compromise. In short, where an obligation to pay accrued interest in excess of the unpaid capital is included in a compromise, the public policy behind the original causa no longer applies. It may still technically be accrued interest that the debtor has agreed to pay, but in enforcing the compromise no exploitation of the debtor occurs, and the dilatoriness of the creditor is not being rewarded.

Contrast the position governing betting transactions, the enforcement of which is contrary to public policy. See *Gibson* v *van der Walt* 1952 (1) SA 262 (A) at 267. The policy behind the recovery of a betting debt being unenforceable may also be divided into two limbs: the need to protect the debtor against wasting his money, and to prevent the creditor recovering money on the basis of idle chance. A compromise of such a debt would still breach the public policy element. The debtor would still be paying wasted money and the creditor collecting money gained on the basis of idle chance. A gambling debt always remains just that. Its essential character or the public policy behind it is not altered by its being the subject of a compromise.

In *Leech & Ors* v *ABSA supra* the trustees claimed from a bank a sum of

GUBBAY CJ:

money which they had paid the bank and which they alleged represented an accumulation of interest in excess of a capital sum previously loaned to the trust. The bank conceded this but averred that by a subsequent agreement the trustees had waived the benefits of the *in duplum*

Copyright Juta & Co Ltd

rule. BORUCHOWITZ J assumed for the purposes of the case that there had been a purported waiver of the *in duplum* rule and found against the bank on the ground that as the rule was founded on public policy it could not be waived. See at 312g-h and 314d. Premised on a purported waiver, the decision was not approached from the point of view as to whether there had been a compromise; and, if so, what effect that had on the issue. The facts seem to show, however, that there might well have been a compromise by the trustees (see at 311d and 312e-f).

In my view, the case of *Dennis Peters Investments (Pty) Ltd* v *Ollerenshaw & Ors* 1977 (1) SA 197 (W) is analogous and the reasoning apposite. The facts were that the plaintiff company sued the three defendants jointly and severally for provisional sentence. The action was based on a written acknowledgement of debts in terms whereof the defendants admitted owing the plaintiff the sum of R6 500 for moneys lent and advanced. They averred that the payments to them were in fact substantially money-lending transactions upon which the plaintiff had charged usurious rates of interest. The acknowledgment of debt, however, had been given to the plaintiff pursuant to a settlement of its claims. In rejecting the contention that the action for provisional sentence either be refused or postponed until the plaintiff's representative had been examined under the provisions of the Limitation and Disobedience of Finance Charges Act 1968, MELAMET J said at 202H-203A:

> ``It was contended on behalf of the defendant that ... the original causa was invalid and, therefore, the defendant is entitled, despite the subsequent compromise, to go behind the settlement. I am of the opinion that there is no merit in this contention - such loan is not invalid, it is merely that the finance charges above the permitted rates may not be recovered. But even if it were invalid, such invalidity would not affect the subsequent transaction or compromise.''

It is important to note that even assuming the defendants had been charged usurious rates of interest contrary to law and offensive to good morals and public policy, the learned judge was not prepared to go behind the acknowledgement of debt.

Finally, it ought not to be overlooked that the sanctity afforded the implementation of a compromise is also a matter of public policy. In the words of LORD SIMON OF GLAOSDALE in *D* v *National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 (HL) at 606e-f:

> ``(It) is only the rare case which has to be fought out in court. Many potential disputes, civil

GUBBAY CJ:

> especially, are obviated or settled on advice in the light of the likely outcome if they had to be fought out in court. This is very much in the interest of society; since a lawsuit, though a preferable way of settling a dispute to actual or threatened violence, is wasteful of human and material resources.''

IV. DISPOSITION

While respectfully differing from the implicit opinion of BLACKIE J that public policy continues to operate to render invalid a compromise which has the effect of waiving the *in duplum* rule, I am satisfied nonetheless that the decision to dismiss the application with costs was correct.

Copyright Juta & Co Ltd

Accordingly, and for the reasons given, I would similarly dismiss the appeal with costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Winterton, Holmes & Hill, appellants' legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

CHIVINGE *v* MUSHAYAKARARA & ANOR 1998 (2) ZLR 500 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Ebrahim JA & Sandura JA

Civil appeal

26 October & 16 November 1998 Judgment No. S-177-98

Flynote

Employment - contract - termination - dismissal - on notice - permanent employee - code of conduct in existence - no provision for termination on notice of permanent employee - dismissal on notice not permissible

Legal practitioner - conduct and ethics - use in affidavit of language disparaging and contemptuous of other party - impropriety of

Headnote

The appellant was employed by the National Social Security Authority (NSSA). NSSA purported to terminate his employment on notice. He was a permanent employee and was not employed on a fixed term or casual basis. NSSA had in operation a registered employment code of conduct. The question arose as to whether it was lawful for NSSA to terminate the appellant's contract by notice. In deciding that such dismissal was unlawful:

Held, that, with statutory bodies such as NSSA, permanent employees enjoy security of tenure and such contracts cannot usually be terminated by the employer by notice, but the employee can only be dismissed if he is found guilty of misconduct.

Held, further, that previously under the labour regulations a contract of employment could not be terminated on notice without the prior written approval of the Minister. However, these regulations had been amended in 1990. The effect of the 1990 amendment seemed to be that, where there was no registered code of conduct, Ministerial approval for dismissal was necessary, whereas if there was such a registered code of conduct providing for dismissal on notice of an employee, Ministerial permission was unnecessary. There were fairly strong arguments that this was the effect of the amendment. The provision for codes of conduct was indicative of a clear shift in labour policy from direct State control to more labour autonomy. Employees were now being encouraged to negotiate collective bargaining agreements dealing comprehensively with their conditions of service. It may well be that the State considered that if

Copyright Juta & Co Ltd

employees were competent to negotiate a code of conduct, they were capable of looking after their own interests. The State may well also have thought that, as dismissal for misconduct was a major area of contention, once a code of conduct was put in place, the need to regulate misconduct would be covered; hence if it was no longer seen as being necessary to provide protection in this area under the labour regulations, it might well be that it was also seen as being unnecessary to continue with the subsidiary protection of requiring Ministerial approval for dismissal.

Held, further, that, properly construed, the NSSA code of conduct did not allow for the dismissal of a permanent employee by notice. Whereas the code specifically allowed for dismissal by notice of contract and casual workers, it did not make provision for termination of the contracts of permanent employees by notice. Whereas there was provision for unilateral

GUBBAY CJ

resignation by an employee, there was no provision permitting NSSA unilaterally to terminate the employment of a permanent employee. The implication was that the employer was not legally permitted to terminate the employment of a permanent employee by notice. The same conclusion would be reached applying the test of the officious bystander test. If a bystander had asked the parties why the contact provides for unilateral resignation by the employee but not dismissal on notice, they would have replied that whereas the weaker party, the employee, was entitled to resign, the employer was only entitled to remove the employer by one of the methods provided for in the code of conduct. Finally, applying the *expressio unius est exclusio alterius* maxim, the specific mention of the instances of permissible discharge led to the unavoidable inference that it was not the intention of the parties to the contract to allow termination on notice of permanent employees.

Held, further, that strong disapproval had to be expressed of the many unnecessarily offensive and contemptuous remarks made of NSSA and its personnel in the affidavits deposed to by the appellant. The legal practitioner had acted improperly and with total lack of restraint in putting such disparaging and insulting language into the mouth of the deponent.

Cases cited:

Art Corp Ltd v *Moyana* 1989 (1) ZLR 304 (S)

Chidyausiku v *Nyakambambo* 1987 (2) ZLR 119 (S)

Commercial Careers College (1980) (Pvt) Ltd v *Jarvis* 1989 (1) ZLR 344 (S)

Graham & Ors v *Kramer* 1982 (1) ZLR 164 (S)

Hewlett v *Min of Finance & Anor* 1981 ZLR 571 (S)

Masundire v *Willowdale Mazda Motor (Ind) (Pvt) Ltd* (High Court, Harare, 6 December 1995)

Muringi v *Air Zimbabwe Corp* 1997 (2) ZLR 488 (S)

Copyright Juta & Co Ltd

National Automobile & Allied Workers Union v *Borg-Warner* 1994 (3) SA 15 (A)

RB Ranchers (Pvt) Ltd v *Est McLean & Anor* 1986 (1) ZLR 79 (S)

Reigate v *Union Mfg Co (Ramsbottom) Ltd* [1918] 1 KB 592 (CA)

R v *Ndlovu (1)* 1980 ZLR 96 (G)

S & T Import & Export (Pvt) Ltd v *Contr of C & E* 1981 ZLR 284 (A)

Taylor v *Prime Minister & Anor* 1954 SR 94; 1954 (3) SA 956 (SR)

Case Information

L T Biti, for the appellant

A P de Bourbon SC, for the respondent

Judgment

GUBBAY CJ: The appellant, an accountant by profession, was employed as a senior manager (finance) by the second respondent (``NSSA''), whose board of directors is chaired by the first respondent.

On 4 November 1996, the appellant was informed in writing that NSSA's board of staff appeals committee had resolved to dismiss him from employment, with effect from 31 October 1996, on the ground of his having committed certain acts of misconduct. The appellant responded immediately by taking the proceedings of the above-named body on review before the High Court (case No. H-10150-96, filed on 21 November 1996). NSSA did not oppose the application. It conceded the existence of a procedural impropriety, in that a Mr C C Mushambi, who had ratified the alleged acts of

misconduct by the appellant, had sat in at the appeal hearing, acting in an advisory capacity to the members of the appeals committee. The dismissal of the appellant was accordingly revoked.

The appellant, who up until that time had been on forced paid leave, then strove to return to the workplace. Once more, he was placed on forced paid leave. Amicable negotiations soon opened between the parties in an effort to agree upon a suitable termination package for the appellant. Though protracted they proved unsuccessful.

On 30 May 1997, the general manager of NSSA wrote to the appellant advising him that:

> ``In the exercise of its common law right as an employer and in terms of s 12 of the Labour Relations Act [*Chapter 28:01*], the authority hereby gives you the requisite one month's notice of termination of your contract of employment.''

The letter proceeded to instruct the appellant to surrender the Mazda 323 motor vehicle which

Copyright Juta & Co Ltd

had been allocated to him, by 30 June 1997, the date of expiry of the period of notice.

This action prompted the appellant to yet again approach the High Court for relief. The proceedings he instituted were in the nature of a review combined with a claim for the issue of a declaratur. What was sought in the founding affidavit was, first, the setting aside of the termination of the contract of employment on the specific grounds of impeachment alleged in the previous application (which, numbering some seventy pages, was quite unnecessarily annexed) and on the additional ground that, in any event, the termination of his employment on notice was unlawful. And, second, an order that (i) he be reinstated to his original position as on 30 June 1997 without loss of benefits; and (ii) NSSA pay to him all arrear salaries and benefits with effect from 1 July 1997 to the date of reinstatement.

The need to rely on the grounds which featured in the previous application - all of which, apart from the procedural irregularity, were denied by NSSA - is difficult to appreciate. For the right to terminate the employment was no longer based upon any misconduct but on the giving of notice. And if the aspect as to whether the appellant's contract of employment was terminable by notice fell within the High Court's powers of review, which is doubtful, then there would have been no need to seek the declaratory orders. See *Muringi* v *Air Zimbabwe Corporation* 1997 (2) ZLR 488 (S) at 490F-G.

In his opposing affidavit, the general manager of NSSA maintained the right to terminate the appellant's employment on notice. He stressed that the acts of misconduct which were the subject of the past disciplinary proceedings were completely irrelevant and had played no part in the decision to terminate on notice. A counter-application was filed in which NSSA sought an order for the return of the Mazda 323 motor vehicle.

GUBBAY CJ

Against this background it is perhaps not surprising that the learned judge who heard the matter overlooked the importance of dealing with the critical issue of whether termination by notice was lawful. He held that the giving of notice was simply a ploy by NSSA to dismiss the appellant on account of the acts of misconduct previously charged against him. With respect, such a conclusion was not justified on the evidence. Having then set aside, under his powers of review, what he regarded as the unlawful dismissal of the appellant, the learned judge proceeded to find, on the facts reflected in the affidavits, that reinstatement of the appellant was not appropriate. What he did order, however, was the return of the motor vehicle to NSSA, with all costs to be borne by the appellant.

Were it not for the substantive order relating to the return of the motor vehicle, and that of costs, there would have been no need for the appellant to challenge the judgment, since its main effect was to restore him to employment with NSSA.

Mr *de Bourbon*, who appeared for NSSA, supported the order that the appellant return the motor vehicle, not upon the reasons given for it, but on the sole basis that the appellant's employment had been validly terminated on notice. That approach was legitimate. See *Chidyausiku* v *Nyakambambo* 1987 (2) ZLR 119 (S) at 124D-E.

Copyright Juta & Co Ltd

Cases such as *Art Corporation Ltd* v *Moyana* 1989 (1) ZLR 304 (S) at 308G-309B and *Commercial Careers College (1980) (Pvt) Ltd* v *Jarvis* 1989 (1) ZLR 344 (S) at 346G-H have decided that the effect of s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985) (``the Regulations''), was that a contract of employment could not be terminated on notice without the prior written approval of the Minister. And that s 12 of the Labour Relations Act does not enshrine the right of an employer to terminate a contract on notice; it merely states the periods of time where termination on notice is permitted.

If the law had remained as it was NSSA would have been prohibited by s 2 of the Regulations from unilaterally terminating the appellant's contract of employment on notice. The law, however, changed with effect from 7 December 1990. On that day the Regulations were amended by SI 377 of 1990 with the insertion of s 1A. It reads:

> ``Sections 2 and 3 shall not apply to employees to whom the provisions of an employment code of conduct, registered in terms of section 3 of the Labour Relations (Employment Codes of Conduct) Regulations, 1990, apply.''

This amendment to the Regulations was also published on 7 December 1990.

NSSA has an employment code of conduct registered in terms of s 101(2) of the Labour Relations Act. It is solely concerned with the rules of conduct

to be observed in the workplace and with procedures for settling grievances. See s 4 of the Labour Relations (Employment Codes of Conduct) Regulations, 1990 (SI 379 of 1990). It makes no mention of -

(a) obtaining the Minister's written approval for termination of the contract of employment of an employee by notice;

(b) termination of the contract by agreement;

(c) termination of the contract by expiry of time on completion of specific tasks;

as set out in the Regulations.

To give s 1A its literal effect will mean that employers and employees who have not negotiated a code of conduct are bound by the Regulations and the Minister's approval applies to the termination of a contract of employment; while such protection is lost to employees who fall under a registered code of conduct. It may be asked whether the lawmaker could have intended such a result. Why simply because the disciplinary problems that may arise between employer and employee become subject to a code should the other protections be dispensed with?

In *Masundire* v *Willowvale Mazda Motor (Ind) (Pvt) Ltd* (an unreported judgment dated 6 December 1995) BARTLETT J was of the opinion that a literal interpretation of s 1A is so illogical as to lead to absurdity. I am not sure he was right. It could be argued fairly strongly that

Copyright Juta & Co Ltd

the introduction of employment codes of conduct in December 1990 heralded a clear shift in labour policy from direct State control to an increase in labour autonomy. It may well be that it was considered that if employees in a particular undertaking were competent to negotiate a code of conduct, the indication was that they had reached a position where they were capable of looking after their own interests and solving their own problems. Secondly, employees were now being encouraged to negotiate collective bargaining agreements dealing comprehensively with their conditions of service. (See, for instance, Collective Bargaining Agreement: Commercial Sectors, SI 45 of 1993, which in s 24 clearly envisages that notice may be included in individual contracts). Then again it may have been thought that, as dismissal for misconduct was a major area of contention, once a code of conduct was put in place, the need to regulate misconduct would be covered; hence if there was no longer the necessity in that area for the protection which existed under the Regulations, the other subsidiary protections might just as well be repealed. Finally, there is no ambiguity in what s 1A provides. It clearly specifies that, once a code of conduct has been registered, ss 2 and 3 do not apply. Nothing could be clearer.

It is, however, unnecessary to resolve the question. For I am of the view that upon a proper construction of the contract of employment,

GUBBAY CJ

NSSA is not empowered to terminate by notice the employment of a permanent employee.

The contract provides that employment endures and will terminate only -

(a) when the employee reaches sixty years of age (clause 22(1));

(b) if the employee himself retires during the five years before his sixtieth birthday (clause 22(2));

(c) if the employee himself resigns by giving the requisite period of notice (clause 23);

(d) if the employee is discharged -

(i) due to abolition of office;

(ii) in accordance with the code of conduct;

(clause 24);

(e) if notice is given to a contract employee (clause 25(7)) or to a casual employee (clause 25(12)).

There is no mention of notice being given to a permanent employee. I do not regard this omission as in any way unusual, having regard to the fact that NSSA is a statutory body set up under the National Social Security Act [*Chapter 17:04*]. It is well known that established officers in the Public Service enjoy security of tenure. Their employment cannot be terminated by notice. A public servant's post endures until he reaches retirement age, voluntarily resigns, is requested to resign on stated grounds following upon an enquiry, or is discharged for

Copyright Juta & Co Ltd

misconduct. See Public Service (General) Regulations, 1992 (SI 125 of 1992). Even in employment fields outside the Public Service it is recognised that notice may be excluded as a method of termination by the employer. Section 24(5) of Collective Bargaining Agreement: Commercial Sectors 1993 provides for termination of service by notice ``in terms of the contract''. In context, this must mean if the contract provides for notice. Section 25(4)(c) also adverts to this. It provides a calculation of the applicable period ``unless it has been agreed to the contrary''.

The implication that in the case of NSSA's contract the termination of employment of a permanent employee by notice is excluded, is compelling for a number of reasons. These are:

(1) all the other methods of termination are clearly specified, making the absence of so material a method significant;

(2) where notice may be given it is confined to the situations of the contract and casual employee;

(3) the unilateral act of an employee leaving the employment of NSSA is elaborately detailed in clause 23. The silence of any reciprocal provision permitting NSSA to unilaterally terminate is noteworthy.

In sum, I consider that the clauses of the contract referred to deliberately

GUBBAY CJ

exclude the possibility of implying a term permitting NSSA to terminate by notice the employment of a permanent employee.

But if I am wrong in this perception, the test to apply in order to determine whether the term NSSA claims must be read into the contract, is that of the notorious bystander, as laid down by SCRUTTON LJ in *Reigate* v *Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 (CA) at 605:

> ``A term can only be implied if it is necessary in the business sense to give efficacy to the contract; ie if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: `What will happen in such a case?' they would both have replied: `Of course so and so will happen; we did not trouble to say that; it is too clear'.''

The test has found favour with this court. See *S & T Import and Export (Pvt) Ltd* v *Controller of Customs and Excise* 1981 ZLR 284 (A) at 288A; *Graham & Ors* v *Kramer* 1982 (1) ZLR 164 (S) at 176B-D; *R B Ranchers (*Pvt) Ltd v *Estate of the late R R McLean & Anor* 1986 (1) ZLR 79 (S) at 83B-E. Although used to decide whether a term is included, by parity of reasoning it may also be applied to determine if something is excluded.

If in the present matter one asked the permanent employee: ``Why does the contract not mention notice?'', he would have replied: ``Of course it was not mentioned because I have security of tenure. We intended that whilst I, the weaker party, could unilaterally resign, the corporation could only remove me by one of the methods laid down''. Likewise NSSA, properly

Copyright Juta & Co Ltd

directed, would have replied to similar effect.

The same result is arrived at, so it seems to me, by a cautious application of the maxim *expressio unius est exclusio alterius*. See *Taylor* v *Prime Minister & Anor* 1954 SR 94 at 105; 1954 (3) SA 956 (SR) at 965B-D; *R* v *Ndhlovu (1)* 1980 ZLR 96 (G) at 100A-D; *Hewlett* v *Minister of Finance & Anor* 1981 ZLR 571 (S) at 595C-E; *National Automobile & Allied Workers Union* v *Borg-Warner* 1994 (3) SA 15 (A) at 26H-I. The specific mention of the instances of permissible discharge, of termination on notice by a permanent employee and by NSSA in the case of the contract and casual employee, to my mind leads to the unavoidable inference that it was not the intention of the parties to the contract to allow termination on notice of a permanent employee.

It follows that the appeal succeeds with costs. But the costs incurred in incorporating as an annexure the record of the proceedings instituted on 21 November 1996 were not justified. Accordingly, it is ordered that:

1. The appeal is allowed with costs payable by the second respondent.

2. The judgment of the lower court is altered to read:

``(i) The termination of the applicant's contract of employment is set aside.

(ii) The counter-application is dismissed.

GUBBAY CJ

(iii) The second respondent is to pay the costs of the proceedings save for those incurred in annexing to the founding affidavit a copy of the record of the proceedings instituted on 21 November 1996.''

Before concluding, I feel obliged to express my strong disapproval of the many unnecessarily offensive and contemptuous remarks made of NSSA and its personnel in the sets of affidavits deposed to by the appellant in both proceedings. These affidavits were drawn for the appellant by his legal practitioner, Mr *Biti*, who happened to represent the appellant before the staff appeals committee of NSSA on 23 October 1996.

The affidavits make reference to a ``kangaroo internal appeals committee''; ``a recent kangaroo meeting between the so-called board of appeals''; and to one of NSSA's officers being ``tainted with turpitude''. NSSA is accused of ``treating the labour laws of the country with contempt'' and, in another instance, of ``pure ignorance of the labour laws of the country''. Some of the averments made on NSSA's behalf are termed ``spurious'', ``ridiculous'', ``ludicrous'', ``preposterous'' and ``absurd''. Finally, there is the implied aspersion that in seeking to terminate the appellant's employment on notice, NSSA did not adhere to ``the basic values of morality, decency and good faith''.

For a legal practitioner to put such disparaging and insulting language into the mouth of a deponent, is unbecoming conduct and reflects a total lack of restraint. It sullies the reputation for propriety and dignity that the legal profession in this country is so anxious to preserve.

Copyright Juta & Co Ltd

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Scanlen & Holderness, respondents' legal practitioners

S *v* MALUME 1998 (2) ZLR 508 (HC)

Court **High Court, Bulawayo**

Cheda J & Sibanda J

Criminal appeal

10 February & 23 November 1998Judgment No. HB-52-98

Flynote

Criminal procedure - agreed facts - court rejecting fact - court must inform accused before refusing to accept the fact

Criminal procedure (sentence) - general principles - factors affecting - restitution - accused making full restitution before trial - weight to be given to this factor

Headnote

The accused was convicted of thirty-six counts of theft by conversion. It had been accepted in evidence during the trial that the accused had been motivated to commit this crime by need and not by greed. Before the accused was tried, he had voluntarily made full restitution and had made good the loss caused by his theft. The trial court had sentenced the accused to six years' imprisonment, two of which had been conditionally suspended. The accused appealed against sentence.

Held, that if the trial magistrate decides not to accept a particular fact that has been placed before him and is not disputed by the State, he must inform the accused of this so that the accused can, if he so wishes, lead evidence to establish this fact. Not to inform the accused is unfair to the accused. In the present case, if the magistrate was disinclined to accept that the crime was motivated by need and not greed, he should have communicated this fact to the accused.

Held, further, that where the accused has voluntarily made full restitution for the loss he has caused by theft, full weight must be given to this mitigatory fact in assessing the appropriate sentence. Although the impression must not be created that the making of full restitution will almost invariably lead to a non-custodial sentence, the court should consider whether, in the circumstances of the particular case, the making of full restitution constitutes evidence not only of contrition and repentance, but more importantly of reformation. If it does the court may decide, where appropriate, that a custodial sentence will defeat the object of reformation.

Copyright Juta & Co Ltd

Held, further, that in the circumstances of the present case, an appropriate sentence was a fine plus a wholly supended prison sentence.

Cases cited:

A-G v *Mantwana* S-20-82

R v *Barclay* 1975 (2) RLR 87 (A)

R v *Hartley* 1966 RLR 522 (A)

S v *Beatrice* 1983 (2) ZLR 305 (H)

S v *Fusirayi* 1981 ZLR 56 (A)

SIBANDA J

S v *Gwarada* 1981 ZLR 17 (A); 1981 (2) SA 531 (ZA)

S v *Kazingiza* HH-402-88

S v *Mayberry* HH-248-86

S v *Mpofu (2)* 1985 (1) ZLR 285 (H)

S v *Mugwenhe & Anor* 1991 (2) ZLR 66 (S)

S v *Ncube* HB-56-89

S v *Ndlovu* S-28-94

S v *Nxumalo* HB-126-93

S v *Powell* 1981 ZLR 508 (A)

S v *Rumuvinga* HH-37-89

S v *Sengweni* S-67-94

S v *Sharawakanda* 1981 ZLR 239 (A)

S v *Sidambi* HH-122-85

S v *Zindoga* 1988 (2) ZLR 86 (S)

Case Information

J James, for the appellant

J Mhlanga, for the respondent

Copyright Juta & Co Ltd

Judgment

SIBANDA J: This is an appeal against sentence only, of 6 years' imprisonment with labour, of which 2 years imprisonment with labour was suspended on good behaviour, following appellant's conviction on 36 counts of theft by conversion.

The appellant has raised several grounds of appeal, *inter alia*, that the trial magistrate misdirected himself on point of facts in that he failed to consider giving the appellant the option of a fine, he failed to appreciate that the crime was committed out of need rather than greed, and he failed to give due weight to the fact that appellant had effected full restitution, on his own accord and therefore there was no prejudice caused to the complainant and that the appellant did not benefit from his own criminal conduct.

The appeal is opposed by the State on the general grounds that the trial magistrate did not misdirect himself in assessing sentence and that the custodial sentence is appropriate and meets the justice of the case.

In passing sentence, the judicial officer grouped the various 36 counts into two groups, for purposes of sentence which of course he is free to do, but if he does, I am not saying that he must, it would be preferable and better to state the reasons for doing so. See *R* v *Barclay* 1975 (2) RLR 87 (A); *S* v *Rumuvinga* HH-37-89 at p 3 of the cyclostyled judgment.

In passing sentence, he did not fully and properly take into account the accepted evidence, that the appellant was motivated by need to commit the crime. Without advising counsel for the appellant that he did not accept the motive advanced for the commission of the offence, he proceeded to sentence the appellant on the basis that he was motivated by greed. The trial magistrate was obliged to notify both the State and the counsel for the appellant that he did not accept the motive advanced for

---

SIBANDA J

the commission of the crime. This constituted a misdirection on the part of the judicial officer.

In *R* v *Hartley* 1966 RLR 522 (A) at 526A BEADLE CJ, when considering a similar point, said:

> ``... and it seems to me that if a court is not going to accept those facts as outlined, it is the duty of the court to inform the parties before it passes sentence; otherwise the defence is lulled into a false sense of security in believing that the facts which have been put before the court are acceptable to the court.
>
> If the court feels that it cannot accept any particular facts that are placed before it, the accused and his legal representative must be informed of this, and in these circumstances, the accused must decide whether he wishes to lead evidence to establish this fact or not. To reject the fact without first informing the accused is, I think, unfair to the accused."

See also *S* v *Powell* 1981 ZLR 508 (A) at 511C-E; *S* v *Fusirayi* 1981 ZLR 56 (A) at 60A.

Further, the approach adopted by the judicial officer has been said to be highly undesirable as the trial court is bound by the evidence on the record.

Copyright Juta & Co Ltd

In *S* v *Beatrice* 1983 (2) ZLR 305 (H) at 307A, WADDINGTON J had this to say:

> ``It is highly irregular and highly undesirable for a trial court to sentence an accused person on the basis of facts which do not appear on the record.''

See also *S* v *Sharawakanda* 1981 ZLR 239 (A) at 241A.

To enable the court to properly assess sentence, it ought to make a factual finding and in this case it was essential for the trial court to make a fact finding as to whether the motive behind the commission of the crime was one of greed or need.

Mr *James*, for the appellant, has submitted that ``more than full restitution'', whatever that means, was made by the appellant before trial. That the appellant made strenuous effort to effect restitution. The trial magistrate says he took into account in assessing sentence the fact that full restitution was made. There is, however, merit in Mr *James*' submission that, the sentence passed does not reflect that, account for restitution was given.

It certainly has become a major consideration in this jurisdiction that, in imposing a custodial sentence in cases such as this, part of the sentence be suspended on condition an accused effects restitution to the victim of his crime. The underlying principle in this approach to punishment is to mitigate, if not altogether extinguish, the victim's loss or prejudice occasioned by the crime.

The full weight of restitution, as a mitigating factor, the effect it has and ought to be accorded in assessing punishment the undesirable and adverse effect it would have, in the event of failure to take due cognisance of it, in particular to a first offender, and to the criminally minded, was ably spelt out by GUBBAY JA (as he then was) in *S* v *Zindoga* 1988 (2) ZLR 86 (S) at 98F where he said:

SIBANDA J

> ``Full restitution in crimes such as theft particularly in the case of first offenders, is rightly regarded as a weighty mitigating factor.''

The learned JUDGE OF APPEAL then continued at 90B:

> ``What I do say however, is that having restituted in full the appellant does not deserve to be incarcerated for four years. To leave the sentence in its present form would be to give insufficient credit to the appellant's efforts in making good the loss he caused. If such sentence as this were allowed to stand, it would be viewed by the criminally minded as a disincentive to make restitution.''

Similar sentiments have been expressed in a number of decisions by our courts. See also *S* v *Mpofu (2)* 1985 (1) ZLR 285 (H) at 293E; *R* v *Zindoga* 1980 RLR 86 (A); *S* v *Mambo* S-14-85 at 5-6:

In *Attorney-General* v *Mantwana* S-20-82 FIELDSEND CJ, when considering the same issue, said:

> ``When the accused is able to undo the wrong he had done by making substantial reparation so that he does not

Copyright Juta & Co Ltd

benefit from his offence the option of a fine should be granted."

Counsel for the State has submitted that the imposition of a custodial sentence was justified, notwithstanding the full restitution made by the appellant to the complainant. Of course, it has been held that restitution does not *per se* mean that a custodial sentence may not be imposed. It may, in an appropriate case, be and has been imposed. See *R* v *Zindoga supra*; *S* v *Mayberry* HH-248-86; *S* v *Zindoga supra*.

However, in the course of considering an appropriate sentence, should it become apparent that the accused has the means to make restitution to his victim, a fresh consideration should be given as to what would, in the circumstances, be a suitable punishment. The ability of the accused to make restitution raises ``two competing interests'', as was stated by GUBBAY JA (as he then was).

In *S* v *Zindoga supra* at 89H at 90A-C, when considering the same issue, he said:

> ``Where an accused person is in a position to make restitution, two competing interests arise and a balance must be struck between them: On the other hand, there is the interest which the public has in the avoidance of loss by the victims of the crime; and it is the court's duty, where possible, to provide an incentive to the accused person in the manner of its punishment to make good that loss. On the other hand, there is the public interest in the passing of a sentence which will deter others from perpetrating such offences.
>
> The impression must not be permitted to go abroad that the making of restitution will almost invariably be regarded as countering the dishonest transgression to the extent of resulting in an non-custodial punishment. Each case must be adjudged on its own merits, and the mitigatory feature of restitution taken in conjunction with others which reduced the moral blameworthiness of the miscreant, are to be weighed against the nature of the offence and any aggravating features which relate to it.''

See also *R* v *Zindoga supra*; *S* v *Mayberry supra*.

SIBANDA J

It seems to me that, in cases of theft of this nature, there is need to consider the desirability of adopting three approaches when assessing an appropriate sentence. Such consideration may be given during submissions in mitigation:

Firstly, where an accused during submissions is shown to be unable to make any restitution.

Secondly, where an accused is shown to be in a position to make restitution, and

Thirdly, where an accused, on his own accord and initiative and prior to sentencing makes restitution, be it in full or only in part.

Under the first approach, the accused should be dealt with in the usual way *ie* he should be given a custodial sentence with a portion suspended on good behaviour. Although it would seem, on the face of it, that under this heading, to be a hollow exercise to purport to suspend part of the sentence on condition accused paid restitution, when it is obvious that the accused cannot satisfy that condition, nonetheless, consideration should be given to encouraging the accused to effect restitution, by suspending a portion of the sentence on those conditions.

Copyright Juta & Co Ltd

Under the second approach, the accused should merit consideration along the lines set out by GUBBAY JA (as he then was) in *S* v *Zindoga supra* at 90A where he said:

> ``... and it is the court's duty, where possible, to provide an incentive to the accused person in the manner of its punishment to make good that loss ... ''

Such an incentive may be found in giving the accused, in an appropriate case, the option of a fine coupled with a wholly suspended prison term on condition he paid restitution. Even where the appropriate punishment is a custodial sentence, the accused should nonetheless be given such incentive by suspending part of the sentence on condition he pays restitution.

It is to be observed that the judicial officer did not suspend any portion of the sentence on condition the appellant paid restitution. This was clearly a misdirection. The mere fact that he had made restitution on his own initiative and not as per order of court did not disentitle him to a suspended sentence on condition he paid restitution.

Under the third approach, the accused should deserve further and certainly a somewhat different consideration from the first two situations, as to whether such voluntary conduct does not constitute evidence, not only of contrition and repentance, but more importantly, of reformation.

However, I am, with the greatest respect, of the view that where an accused, on his own accord and at his own initiative, makes full restitution to his victim prior to sentence and comes to court and says, ``I have paid back all the money to the complainant'', then the assessment of an appropriate and suitable punishment should take a new and further dimension. I would, however, add

a rider to this, that is, provided the accused made such restitution on his own account and initiative as distinct from a recovery of the stolen money by the police during the course of their investigations, for in that event, consideration of neither contrition, repentence nor reformation arises. What I mean is that an accused may not claim credit for such recovery, as he would in case of restitution, although such recovery would, invariably, have a bearing as a mitigating factor.

The inquiry should then be, whether his voluntary restitution should not be regarded as sufficient evidence and proof of his reformation. For that, such conduct on his part is proof of his contrition and repentance should be beyond question, unless of course such conclusion is not justified by evidence.

It is my respectful submission that in such circumstances the further issue then for determination must be whether such an accused may not properly be regarded and thus treated as a reformed criminal. Of course, there can be no generalisation on the issue. It is, however, imperative that each case be adjudged on its own merits.

The significance and importance of reformation and a reformed criminal is considered by Burchell and Hunt *South African Criminal Law and Procedure* Vol I *General Principles* at p 67

Copyright Juta & Co Ltd

and the authorities cited therein.

The learned authors, when examining ``The purposes of punishment'', state:

> ``For thousands of years, it has been recognised that punishment, to be justified, must be rationally motivated, and the pages of juristic and sociological literature have, over the centuries been flooded with a sea of words propelling one theory of punishment or other. The essential conflict here, as in deciding what behaviour to punish, is one between the interest of the individual and those of the community generally. A balance has to be struck between the protection of society and the welfare of the offender. The theories of punishment, stripped of their pomp and ceremony, boil down to: (1) retribution (including the ideas of expiation, atonement, revenge and denunciation); (2) prevention; (3) individual deterrence; (4) general deterrence; and (5) reformation. Some of these, like general deterrence, prevention and most forms of retribution, are concerned solely with the interests of the community. *Reformation, on the other hand, views the welfare of the individual and also, since by definition a reformed criminal commits no crime, the community as well*'' (emphasis added).

Where an accused has made full restitution on his own initiative, sending him to prison must yield adverse and negative effects upon other prisoners who come into contact with him in prison. It would be a source of great amusement and laughter to other prisoners to be told that despite making full restitution an accused was nonetheless sent to prison.

I am in respectful agreement with GUBBAY JA (as he then was) when, in *S* v *Zindoga supra* at 90E said:

> ``... if such sentence as this were allowed to stand it could be viewed by the criminally minded as a disincentive to make restitution.''

SIBANDA J

I am equally in agreement with FIELDSEND CJ who in *Attorney-General* v *Mantwana supra* at p 4 said:

> ``... when the accused is able to undo the wrong he had done by making substantial reparation so that he does not benefit from his offence the option of a fine should be granted.''

In my respectfully considered opinion, voluntary restitution by an accused, should, *in an appropriate case,* provide irrefutable proof of reformation and sending a reformed accused to prison may amount to punishment without purpose and objective. Of course, each case ought to be considered on its own merits.

Further, the trial magistrate misdirected himself on a point of law, in that he failed to give any consideration to giving the appellant the option of a fine. It is accepted as settled law that the correct approach in sentencing a first offender is to consider the possibility of imposing a non-custodial sentence and, only if that is inappropriate, to then, as a last resort, consider sending an accused to prison. See *S* v *Gwarada* 1981 ZLR 17 (A) at 19; 1981 (2) SA 531 (ZA) at 533.

In *S* v *Sidambi* HH-122-85, it was held that:

> ``... every effort should be made to keep first offenders out of prison unless the nature of the offence makes this course inappropriate.''

Copyright Juta & Co Ltd

See also *S* v *Ncube* HB-56-89; *S* v *Kazingiza* HH-402-88; *S* v *Nxumalo* HB-126-93 at p 5; S v *Sengweni* S-67-94 at 3.

It ought to be imperative that, when considering the appropriate punishment to impose upon a first offender, a judicial officer, has regard to the devastating effect imprisonment would have upon the individual concerned. If it is apparent to the court that an accused may not survive the crushing and demeaning effects of a prison term, it should give that accused the option of a fine or community service. Imprisonment ought to be the last resort and only if it is necessary that the offender be removed from society; if the primary objective sought to be achieved by the sentencing court cannot be attained by any alternative punishment. See *S* v *Ndlovu* S-28-94; *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66 (S) at 69F.

The trial magistrate merely made reference to community service and apparently rejected it out of hand without advancing any reasons for doing so.

It was incumbent upon him to advance reasons why he rejected community service. To simply say that, were community service to be the alternative punishment, the public would lose faith in the administration of justice, without saying how and why, was too much of a generalisation. Community service has been deemed appropriate, even in offences that normally attract a custodial punishment. See *S* v *Ndlovu supra*.

SIBANDA J

It has been submitted by Mr *James*, for the appellant, that as a result of his incarceration, he has not only lost his old employment, but also his new employment. Indeed, the loss of employment has always been regarded by this court as a mitigating factor.

In the instant case, the trial magistrate did not properly exercise his discretion in assessing sentence.

The mitigating factors far outweigh the aggravating factors. The appellant did not benefit from his criminal conduct. The complainant did not suffer any prejudice.

To decline to interfere with the present sentence would be a failure to give credit to the appellant's efforts to redress the loss he caused to the school. If the sentence is allowed to stand in these circumstances, it would constitute a disincentive to make restitution to the criminally-minded elements.

Accordingly, the appeal is upheld and I would substitute the following sentence for that imposed by the trial magistrate:

> ``$4 000 or in default of payment 8 months' imprisonment with labour.
>
> In addition, 4 months' imprisonment with labour wholly suspended for 5 years on condition the accused is not, during that period convicted of any offence of which dishonesty is an element for which he is sentenced to imprisonment with labour without the option of a fine.''

The accused has already served the alternative sentence, he shall not, therefore, be called

---

Copyright Juta & Co Ltd

upon to pay the fine. The warrant of liberation has already been arranged.

CHEDA J: I agree.

CHAMBOKO *v* CHAMBOKO & ANOR 1998 (2) ZLR 516 (HC)

Court **High Court, Harare**

Chinhengo J

Stated case

13 & 25 November 1998 Judgment No. HH-218-98

Flynote

Family law - marriage - husband married in solemnised customary union subsequently purporting to enter into a marriage with another woman under the Marriage Act - -- whether second marriage valid

Headnote

Where a man enters into a customary union which is solemnised in terms of the Customary Marriages Act [*Chapter 5:07*] he may not, during the subsistence of that marriage, contract a marriage to another person in terms of the Marriage Act [*Chapter 5:11*]. If he does so he commits the crime of bigamy. In civil law, although the competence of a person married under the Customary Marriages Act remains intact, s 16 of the Act provides that a marriage registered under the Act can only be dissolved by a court of competent jurisdiction. This means that the where a man is married in terms of the Customary Marriages Act and he wishes to enter into a marriage with another woman in terms of the Marriage Act he must first seek a dissolution of his customary marriage by a court. If he purports to enter into the second marriage under the Marriage Act before he has divorced his customary law wife, the second marriage will be invalid.

In order to give proper guidance to the public about the impermissibility of contracting a marriage under the Marriage Act without first dissolving a prior customary law union, the legislature should give serious consideration to amending the statutory law in this regard, so as to make it quite clear that a marriage solemnised in terms of the Customary Marriage Act is a complete bar to a marriage in terms of the Marriage Act, unless such marriage is contracted between the same parties. The provisions of s 16 of the Customary Marriages Act alone do not give proper guidance to the public in this regard.

Cases cited:

Chikosi v *Chikosi* 1975 (1) RLR 140 (G)

Jenah v *Nyemba* 1986 (1) ZLR 138 (S)

Makwiramiti v *Fidelity Life Assurance of Zimbabwe (Pvt) Ltd & Anor* 1998 (2) ZLR 471 (S)

Nyambula v *Linda* 1951 (1) SA 377 (A)

Copyright Juta & Co Ltd

R v *Kaodza* 1915 SR 160

R v *Nkabi* 1918 SR 60

R v *Ncube* 1959 (2) R & N 466 (SR)

Legislation considered:

Customary Marriages Act [Chapter 5:07], ss 12 and 16

Case Information

G M Mabuye, for the plaintiff

T Mangwaliba, for the defendant

CHINHENGO J

Judgment

CHINHENGO J: This matter was on my continuous roll for the week beginning 9 November 1998. It did not proceed to trial as the parties agreed to bring it as a stated case. The facts as agreed between them, to which I shall confine myself, are the following:

``1. The plaintiff and the first defendant were both married to the deceased Cephas Bernard Chamboko. The deceased passed away on 13 May 1996.

2. The plaintiff's marriage to the deceased was in terms of the African Marriages Act (Chapter 238) (now the Customary Marriages Act [*Chapter 5:07*]).

3. The first defendant was married to the deceased on 20 December 1990 in terms of the Marriage Act (then Chapter 37) (now [*Chapter 5:11*]).

4. The second defendant was appointed the Executor to the Estate of the deceased but later renounced the appointment.

5. The plaintiff and the first defendant both have minor children with the deceased.

6. In case no. H-2815-97, the first defendant obtained an order entitling her to the Pension Benefits due to a widow in terms of Pension Regulation (*sic*) of the deceased husband's employer, the Zimbabwe National Army.

7. At the hearing of the matter, the plaintiff amended her claim and now seeks an order declaring the first defendant's marriage to the deceased as having been null and void and that an entry be made on the Death Certificate that the deceased died a divorce(e).

8. On the basis of the stated case, the parties now request the court to decide whether the relief set out in para 7 hereto should be granted.''

These facts, though agreed between the parties, are not entirely reflective of the case made out on the pleadings. Certain facts are omitted. For instance, it is not mentioned that the plaintiff was separated from Cephas Chamboko (Cephas) from 1985 and that when Cephas married the first defendant in 1990 he was still separated from the plaintiff. It is also not mentioned that in

---

Copyright Juta & Co Ltd

1993 Cephas obtained a decree of divorce in respect of his marriage to the plaintiff. Further, the issue underlying the proceedings was not as stated in para 6 above - the payment of pension benefits to the first defendant - but a claim by the plaintiff for a share in a house which she says was acquired by her and Cephas before they separated. For the purposes of my decision, as I have already stated, I shall confine myself to the facts as agreed between the parties. I must however emphasise that it is necessary for the parties to stick to their pleadings in submitting a stated case. The notice of amendment filed by the plaintiff reduced the relief she sought to that specified in para 7 above. She no doubt has an interest in the declaration she seeks.

The single issue for decision is whether the first defendant's marriage to Cephas is null and void. To put the single disputed issue clearly for easier understanding, it may be stated thus: Cephas was married to the plaintiff under the Customary Marriages Act [*Chapter 5:07*]. During the subsistence of this marriage, Cephas contracted another marriage with the first defendant under the Marriage Act [C*hapter 5:11*]. The question before me is whether the latter marriage is null and void.

CHINHENGO J

The plaintiff's marriage to Cephas, for so long as it lasted, was a valid marriage in terms of s 3 of the Customary Marriage Act, which provides that a marriage contracted according to customary law shall be valid only if it is solemnised in terms of the Act. If such marriage is not so solemnised and *ipso facto* ``not a valid marriage'' in terms of s 3(1) it shall, in terms of s 3(5), be regarded as a valid marriage for the purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage. The first defendant's marriage to the deceased was contracted in terms of the Marriage Act and it is a monogamous marriage.

The situation created by this case is one of a serious conflict between customary law and civil law. This country has maintained a dualism in family law which produces, in certain circumstances, almost insurmountable problems for a court of law and calls for intervention by the legislative branch of the State.

The reverse situation to the present case was dealt with by the Supreme Court in the recent case of *Makwiramiti* v *Fidelity Life Assurance of Zimbabwe (Pvt) Ltd & Anor* S-175-98. *(184) There the appellant was married to Milton Makwiramiti in terms of the Marriage Act. Later, Milton Makwiramiti married the second respondent in terms of the Customary Marriages Act. In resolving this conflict, the CHIEF JUSTICE stated at p 473B-D, the following:

> ``The learned judge was undoubtedly correct in his view that the marriage of the deceased and Rosemary (second respondent) was bigamous, and consequently illegal and of no validity. This was because at the time it was contracted the deceased was married to Rosaria (the appellant) under a monogamous or civil type marriage entered into under the Marriage Act. *By embracing a monogamous regime, the deceased was deemed by law to have waived his customary privileges in respect of polygamy and, for so long as he remained married, to have submitted to the general law of the land.* He was precluded from marrying another person, not only under the general law, but under customary law as well. He suffered from an absolute incapacity to marry'' (emphasis mine).

Copyright Juta & Co Ltd

And at p 473E -

> ``Indeed, so jealously does the law guard against the profanation of the Christian ceremony of marriage that it criminally punishes bigamy and delictually punishes adultery. Moreover, it renders null and void a promise of marriage made by a married person even where such promise is conditional upon divorce or death of the promisor's spouse. Such a promise, being c*ontra bonos mores*, debars an action for breach of contract."

And at p 473H-474B, he says -

> ``A person can only be polygamously married if the law recognises him as being polygamously married. The deceased was monogamously married to Rosaria and remained so until his death. If his subsequent `marriage' to Rosemary never came into existence, it must follow that the person was not a `polygamous person' but a `monogamous person'. It is not possible for a person to be monogamously and polygamously married at one time."

CHINHENGO J

I conceive the CHIEF JUSTICE's statement as laying down the principle of election. How far does this principle go? The words I have underlined seem to me to mean that a person may elect to be a ``polygamous person'' or a ``monogamous person'' on contracting a marriage union. If he elects to be a ``monogamous person'' he is deemed to have waived the customary privileges in respect of polygamy and is precluded from marrying another person whatsoever during the subsistence of the monogamous marriage as he will be suffering from an absolute incapacity to marry. So not only does he make an election but incapacitates himself also. But the same cannot be said of a person who elects to be a ``polygamous person'', as least initially and as long as his marriage remains potentially polygamous, and the question arises whether such person waives the privilege of becoming a ``monogamous person'' and further whether he is precluded from marrying the same person or a different person under the general law. Does he suffer, as in the case of an election to be a ``monogamous person'', absolute incapacity to marry either the same person under the civil law or another person under both of the forms of marriage?

If the principle of election is adopted, which I think it must be, then it seems to me that an election is made at the time that the person decides to contract for the very first time a marriage under our dual system of marriage. It is at that point that he elects to be polygamous or monogamous, depending on whether he contracts a marriage in terms of the Customary Marriages Act or the Marriage Act. It is unclear, going by the provisions of the Customary Marriages Act, whether a person who contracts a potentially polygamous marriage and solemnises it in terms of the Customary Marriages Act can in fact similarly solemnise a second marriage or more marriages under the same Act, although the certificate of marriage prescribed in the Schedule to the Customary Marriages Act and the case of *R* v *Ncube* 1959 (2) R&N 466 (SR) would seem to suggest that this is possible. His marriage, being potentially polygamous, may permit him to marry another woman by customary rites but I very much doubt that he may be allowed by law to register or solemnise any such marriage in terms of that Act. I am not called upon to decide on this point and I prefer to leave it open.

The law, however, seems clear in respect of a marriage contracted in terms of the Customary Marriages Act where the person concerned decides to convert the potentially polygamous

---

Copyright Juta & Co Ltd

marriage to a civil marriage with the same spouse. In *Chikosi* v *Chikosi* 1975 (1) RLR 140 (G) where this matter came up for decision, MACAULAY J said at 143B-F:

> ``However, to say that the parties were already validly married according to the law of Rhodesia (African Marriages Act [*Chapter 105*]) is only partly correct. Their registered customary union is not recognised here as a valid marriage for all purposes but as valid only

CHINHENGO J

> 'according to African law and custom'. (See s 7 (of Chapter 105) *supra*; *R* v *Tsipa* 1958 (2) SA 384 (SR) and *R* v *Ncube* 1960 (2) SA 179 (SR)).
>
> By s 12 of the African Marriages Act, Africans are given the right to contract a civil marriage under the Marriage Act, now Act 18 of 1964; nothing in the former Act denies this option to Africans who, having already contracted a registered customary union, desire to convert the potentially polygamous character of their married status into a monogamous one, governed by the Marriage Act. Nor can I see anything in logic or principle to prevent such a course. Unlike *Thyne v Thyne* [1955] 3 All ER 129 at 140, the second marriage is not devoid of content and ineffective to bring about some change in their status. It converts their earlier potentially polygamous status into a monogamous one with all the personal incidents associated with the latter. See *R* v *Tarasanwa* 1948 (2) SA 29 (SR). It also establishes their marriage as one recognised henceforward in Rhodesia for all purposes and not merely one `according to African law and custom'. Section 13 of the African Marriages Act impliedly recognises this by preserving in such a marriage only the proprietary rights of the parties as they exist according to African law and custom.''

(Section 13 has since been repealed by the Administration of Estates Amendment Act 1997).

MACAULAY J deals with s 16 of the Customary Marriages Act and says at 143G-H:

> ``It is true that s 16 provides that the registered customary union may only be dissolved by a court of competent jurisdiction, but I do not view this as requiring a prior dissolution of the registered customary union (if only potentially polygamous) before the same parties thereto convert to a monogamous status. On this view of the matter, it would seem that all that remains of the registered customary union is the matter of the proprietary rights of the parties as s 13 in fact indicates.''

And at p 144B:

> ``I conclude therefore that the parties could have contracted a valid civil marriage in Rhodesia had they married here under the Marriage Act, and this notwithstanding the fact that their earlier registered customary union has not been dissolved by a court under s 16 of the African Marriages Act.''

Clearly, therefore, the decision in *Chikosi* v *Chikosi* is that a man and a woman who are married in terms of the Customary Marriages Act may, between them, validly contract a marriage in terms of the Marriage Act. The implication is that a marriage in terms of the Marriage Act is superior to that in terms of the Customary Marriages Act. The superiority of a marriage in terms of the Marriage Act has been recognised in this country since the beginning of this century - see remarks in *R* v *Nkabi* 1918 SR 160 at 161 and *R* v *Kaodza* 1915 SR 6 at 8.

Chikosi v *Chikosi supra* has stood the test of time. Approving of this decision, GUBBAY JA (as he then was) said in *Jenah* v *Nyemba* 1986 (1) ZLR 138 (S):

> ``Plainly, the civil marriage of the plaintiff and her husband replaced their solemnised customary law marriage. Their prior potentially polygamous union was converted into a monogamous one with all the personal incidents

Copyright Juta & Co Ltd

associated with the latter. The parties

CHINHENGO J

therefore incurred all the consequences of a civil marriage unless such consequences are excluded by clear and express statutory provision."

This approval puts paid to any argument based on s 16 of the Customary Marriages Act that a marriage solemnised in terms of the Customary Marriages Act should be dissolved by an order of a court of competent jurisdiction in terms of the Matrimonial Causes Act [*Chapter 5:13*] before the parties to it may convert their marriage to one in terms of the Marriage Act. But this is as far as the case law goes. Neither *Chikosi*'s case nor *Jena*'s case were concerned with the situation, as in this case, where one of the parties to a marriage in terms of the Customary Marriages Act purports to marry another person in terms of the Marriage Act. Section 16 aforesaid remains of full force in respect thereto. In my thinking, the true basis for the conclusion that parties married in terms of the Customary Marriages Act may convert their marriage to a civil law marriage is s 12 of the Act. It provides that whenever Africans desire their marriage (ie a valid marriage in terms of s 3 of the Customary Marriages Act or any customary marriage as defined in s 2) to be solemnised in terms of the Marriages Act they may do so by complying with the requirements of that section. In my view, another basis for the conclusion is that whereas parties in a customary marriage who wish to upgrade it to a civil marriage are changing their status, they in fact are not dissolving the earlier marriage but merely upgrading it.

The situation is not as clear in our law, where the one spouse to a valid registered customary marriage marries another person in terms of the Marriage Act. The position in South Africa has been clarified by the Black Administration Act 38 of 1927 as amended by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. June D Sinclair *The Law of Marriage* (vol 1, 1996 ed) explains the position in South Africa at p 222-223 as follows:

``Section 22(1) of the 1927 Act now provides that a man and a woman who are partners in a customary `union' are competent to contract a civil marriage with each other if the man is not also a partner in a subsisting customary `union' with another woman. But, and this change is fundamental, apart from the concession in subs (1), no person who is married according to customary law `shall be competent' to enter into a civil marriage while the customary `union' subsists: s 22(2). Since this subsection refers expressly to competence, that is, capacity, it must be assumed that a civil marriage contracted after the commencement of the 1988 legislation in contravention of this provision is void ... Section 22(3) goes on to impose upon marriage officers the duty not to solemnise the marriage of a Black man until a declaration has been taken from him that he is not a partner in a customary `union' with a woman other than the one he intends to marry at civil law."

The learned author states, correctly in my view, that this legislation is an impediment to a civil marriage except between the same parties. This is a clear legal position worth emulating in this country.

CHINHENGO J

The emphasis in *Chikosi* and *Jena*'s cases *supra* is on competence or capacity to marry. Does a person who is married in terms of the Customary Marriages Act lose his capacity to marry

Copyright Juta & Co Ltd

another person? This question can only be answered in the negative. A marriage in terms of the Customary Marriages Act is potentially polygamous and thus it leaves the capacity of a partner in it intact, that is to say, such a person may marry another person. Logically, therefore, such a person, being competent to marry another, may do so again either in terms of the Customary Marriages Act or in terms of the Marriage Act. Subject to what I have said in regard to solemnisation of more than one marriage under the Customary Marriages Act, if he does so in terms of the former Act he becomes a ``polygamous person''. If he does so in terms of the latter Act he elects to be a ``monogamous person'' and the earlier marriage falls away or is discarded. The rationale for this position has been more expressedly articulated in South Africa than it has been in Zimbabwe where it would appear that before the 1988 amendment to the Black Administration Act the earlier marriage was discarded. This is to be found in *Nkambula* v *Linda* 1951 (1) SA 377 (A), in particular at 384B-C, where FAGAN JA stated:

> ``To my mind, a partner to a Native Customary Union who contracts a civil marriage with a third person thereby creates a situation so incompatible with the continuance of the conjugal relationship as to make the act tantamount to desertion and to free the other partner from the obligation of continuing the habitation.''

While the competence of the person married under the Customary Marriages Act remains intact so that he can marry another person in terms of the Marriages Act, it seems that our statutory law has curtailed significantly the possibilities in that regard and in fact taken away the privilege arising from having such competency. Section 16 of the Customary Marriages Act provides that:

> ``No marriage solemnised in terms of this Act or the Marriage Act or registered under the Native Marriages Act (*Chapter 79 of 1939*) or contracted under customary law before 1 April 1918 shall be dissolved except by order of a court of competent jurisdiction in terms of the Matrimonial Causes Act [*Chapter 5:13*].''

The injunction is clear - any valid marriage, whether under the Customary Marriages Act or under the Marriage Act, shall be dissolved only by order of a court of competent jurisdiction. This means that where a person is married in terms of the Customary Marriage Act to one spouse, and wishes to marry another person in terms of the Marriage Act, he should first seek the dissolution of the former marriage before he can enter into the latter marriage. Putting it broadly, it means that if a person wishes to marry another person and he has a subsisting marriage in terms of either of the two marriage statutes, he must first be divorced at law. The only exception is where the

person wishes to upgrade his customary marriage to one under the Marriage Act, because in that case no dissolution is intended and in any case such course is permitted by s 12 of the Customary Marriages Act. Section 16 above does not therefore permit an implied dissolution of a marriage by contracting another marriage under a different regime. If this were to be the case, then persons married under the Customary Marriages Act would only have to contract another marriage with a different person under the Marriage Act to dissolve the earlier marriage. Section 16 prohibits it. This reasoning is supported by the principle of election alluded to in *Makwiramiti*'s case *supra*. I therefore come to the conclusion that a man who is married to a woman (and *vice versa*) in terms of the Customary Marriages Act cannot go through a marriage in terms of the Marriage Act with a third party without seeking first the dissolution of the earlier

Copyright Juta & Co Ltd

marriage. Such conclusion lends consistency to and brings the civil law into line with our law of bigamy, which makes it an offence for a person to go through the civil law type marriage while the marriage to another person in terms of the Customary Marriages Act still subsists: *R* v *Nkabi supra*. J R L Milton *South African Criminal Law and Procedure* Vol II 3 ed at p 263-264 states:

> ``It may be noted that the Zimbabwean courts have reasoned that the crime of bigamy is directed at the profanations of the civil marriage ceremony, and that it is therefore committed in the case of polygamous marriages even perhaps if unregistered, when either the first or the second marriage is a valid Christian or civil marriage but not where both `marriages' are polygamous unions. It follows that Zimbabwean bigamy indictments must specify that at least one of the marriage is by Christian or civil rites. In order, therefore, to give effect to what Zimbabwean Courts conceive to be the essential *ratio* of the crime of bigamy, customary unions are given a limited degree of recognition, which however the Zimbabwean Courts have refused to extend to the crime of incest."

What must not be lost sight of, however, is that the crime of bigamy, as conceived in this country, by itself does not determine which of the two marriages, the one in terms of the Customary Marriages Act or the one in terms of the Marriage Act, is the valid one after the clash. This is because bigamy is committed, if the first marriage is a customary one, upon going through a civil marriage ceremony, and, if one is married under the civil law, upon going through a customary marriage. The crime revolves around the Christian or civil marriage. The law is clearly unsatisfactory and in my view runs counter to the essential elements of the crime of bigamy as the offence is committed if one goes through a marriage ceremony whilst already married. Clarity in our law of bigamy is called for. As the law stands, however, it assists in the resolution of the dispute in the present case.

A person who goes through a Christian or civil type of marriage with another during the subsistence of a customary marriage solemnised in terms of the Customary Marriages Act commits the crime of bigamy. It follows that

the second marriage as in the present case can only be invalid. Dealing with double marriages in Zimbabwe, T W Bennett *Application of Customary Law* in Southern Africa states at p 214:

> ``The more complex situation is where the husband has one or more wives under customary law and enters into a civil/Christian marriage with one of his wives or with another woman. The law in Zimbabwe regarding the effect of the civil and Christian marriage is not entirely clear. According to decisions of three cases (*R* v *Nkabi* 1918 SR 160; *R* v *Sigiwe* 1918 SR 68; *R* v *Moyo* 1946 SR 12), the husband could be convicted of bigamy if he married a woman other than his customary law wife. These decisions assumed that the customary marriages and the civil and Christian marriage had equal validity."

I think that assumption was as correct then as it is today. There is nothing in the Act to show the inferiority of a customary marriage duly solemnised in terms of the law compared to the civil and Christian marriage. Section 16 of the Customary Marriages Act requires that the first marriage should be dissolved and dissolved only by a court of competent jurisdiction. Thus our law does not permit the discarding of a spouse under a registered customary marriage by the act of contracting a civil or Christian type marriage. The only spouse who can be discarded without statutory formality in the circumstances is the one married under an unregistered customary marriage. It seems to me that the question of which of the two marriages is superior

Copyright Juta & Co Ltd

should now be revisited. Legislative developments as in the Matrimonial Causes Act [*Chapter 5:13*] and other Acts render suspect the validity of the assertion that the customary marriage duly solemnised is valid only ``according to African law and custom''. No cogent reason has so far been given for this assertion.

Generally speaking, Zimbabwe, as a nation, and its courts in particular, appear to me to have up till now adopted moral views in respect of a civil marriage and a standard relative thereto which would preclude the recognition of the continued validity of a marriage in terms of the Customary Marriages Act in circumstances similar to those of the present case. Such moral views are not, in my opinion, entirely justified and must be discarded as patronising and colonial. Unfortunately, our legislation on marriage and our criminal law of bigamy have not gone far enough and the position has so far remained unclear. There is, however, a need for some clear legislative provision for the protection of the proprietary rights of the discarded wife and children in the same way as the South African legislation did prior to 1988 if the law has to take a different direction. Unfortunately again, the recent amendment to the Administration of Estates Act [*Chapter 6:01*] (ie Act No. 6 of 1997) seems to me to have further confused the position in the interest of convenience. Following upon this amendment, s 68 of the Administration of Estates Act now provides that although a marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of Part IIIA

CHINHENGO J

notwithstanding that it has not been solemnised in terms of the Customary Marriages Act, such marriage shall not be regarded as valid for the purposes of that Part ``if, when it was contracted, either of the parties was married to someone else'' in accordance with the Marriage Act . See the proviso to subs (3). Further, in subs (4), it is put beyond doubt that a marriage contracted according to the Marriage Act shall be regarded as valid for the purpose of Part IIIA ``even if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage was solemnised in terms of the Customary Marriages Act [*Chapter 5:07*]''.

The position, as it has developed through case law and as indicated by the Administration of Estates Amendment Act 1997, would be against a finding in the present case that the marriage entered into between the first defendant and Cephas is null and void. This marriage would in fact be the marriage that is valid; the one between the plaintiff and Cephas would be the one which is invalid. But I find that s 16 of the Customary Marriages Act is so worded as to leave no doubt that, if a person does not seek the dissolution of an earlier marriage by order of court, the subsequent marriage cannot be valid. The law of bigamy also penalises the person who marries another person under civil and Christian rites during the subsistence of such person's marriage under a duly solemnised customary marriage. This is the law which I will apply in this case.

Despite the conclusion which I have reached, I think the legislature should give serious consideration to amending the statutory law relating to this matter so that the existence of a marriage solemnised in terms of the Customary Marriages Act is a complete bar to a marriage in terms of the Marriage Act unless such marriage is contracted between the same parties.

Copyright Juta & Co Ltd

Section 16 alone is not adequate to give proper guidance to the public.

In the result, it is declared that the marriage between the first defendant and Cephas Bernard Chamboko (deceased) was null and void.

Mabuye & Co, plaintiff's legal practitioners

Wintertons, first defendant's legal practitioners

PYRAMID PRODUCTS (PVT) LTD *v* STANBIC FINANCE ZIMBABWE LTD 1998 (2) ZLR 526 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Civil appeal

9 & 26 November 1998 Judgment No. S-191-98

Flynote

Hire-purchase - agreement - validity - agreement whereby finance house paid for goods being acquired by another company - purchaser paying finance house in instalments - whether in breach of hire purchase legislation such that sale should be deemed to be instalment sale agreement at lower purchase price

Headnote

The appellant company wished to import machinery into Zimbabwe for use in its business. It needed finance to do this. A finance house, Stanbic, agreed to advance the money to the company, but only if the matter was dealt with as a hire-purchase agreement. The machinery was imported and, after it was paid for, was delivered to Pyramid and installed in its business premises.

Pyramid applied for the hire purchase agreement to be treated as a sale on credit at 25% less than the stated purchase price. The basis for this application was that the agreement had, in various respects, breached the hire purchase legislation and the penalty for such breaches provided for in the legislation was that the hire purchase agreement was to be deemed to be a credit sale at 25% less than the stated price.

Held, that the agreement was a genuine hire-purchase agreement and not a sham as alleged by Pyramid. Stanbic had acquired ownership in the machinery and had then sold it to Pyramid on hire-purchase. Pyramid had acted as Stanbic's agent in taking possession of the machinery. As the hire-purchase legislation requires payment of the deposit before delivery of the goods in terms of the agreement, the parties must be deemed to have agreed that Pyramid would possess the goods as hirer-purchaser only after the deposit was paid. Prior to that Pyramid had mere physical *detentio* as agent for Stanbic. Delivery of the goods had taken place *brevi manu* immediately on payment of the deposit.

Copyright Juta & Co Ltd

Held, further, that it had not been shown that the agreement contravened the Hire Purchase Act and therefore the penalty provisions of the Act did not apply.

Cases cited:

Bowmakers (CA) (Pvt) Ltd v *Wood NO* 1958 R & N 964; 1959 (1) SA 766 (SR)

Pyramid Products (Pvt) Ltd v *UDC Ltd* S-200-95

SAR&H v *National Bank of SA Ltd* 1924 AD 704

Standard Chartered Finance Zim Ltd v *Marongwe Tpt (Pvt) Ltd* 1998 (2) ZLR 317 (H)

Legislation considered:

Hire-Purchase Act [*Chapter 14:09*], s 5(1)(b)

McNALLY JA

Case Information

A P de Bourbon SC, for the appellant

J C Andersen SC, for the respondent

Judgment

McNALLY JA: I will refer to the parties as Pyramid and Stanbic respectively. Pyramid is a button manufacturing company. Stanbic is a finance company. Pyramid needed financing for the importation of machinery for use in its business. It approached Stanbic. Stanbic agreed, but only if the matter could be dealt with as a hire-purchase agreement. This was accepted. The hire-purchase agreement was entered into. The machinery was imported and paid for, delivered to Pyramid and installed at their premises in Ruwa.

The time frame for these events runs from 30 January 1991, when project approval for the foreign currency expenditure was given by the Zimbabwe Investment Centre, to July 1991 when the machinery was delivered at Ruwa. The hire-purchase agreement was signed on 26 August 1991.

The dispute was brought before the High Court on 24 February 1995 when Pyramid applied for an order that:

1. the Hire Purchase agreement dated 26 August 1991 be deemed to be a sale on credit at 25% less than the purchase price reflected therein.

2. Stanbic repay to Pyramid $194 112.15 plus interest at 25% *per annum* from 26 January 1995.

3. any guarantees or suretyships in favour of Stanbic in respect of the Hire Purchase

Copyright Juta & Co Ltd

agreement be declared invalid. (This was not pursued on appeal).

4. Stanbic pay the costs.

The application was opposed, and on 3 December 1997 it was dismissed with costs on the higher scale. Pyramid now appeals. I will deal in turn with each of the three points that it raises.

1. *The agreement must be deemed to be a sale on credit at 25% less than the purchase price reflected therein.*

The allegation is that the agreement is, in various respects, in breach of the Hire Purchase Act then applicable, Chapter 284 of 1977 (now *Chapter 14:09*). Accordingly, the penalty provided in the Act must apply, namely that the transaction be deemed to be a credit sale at 25% less than the stated price.

A. *The agreement was a sham.*

The first contention put forward by Mr *de Bourbon* was that the agreement was a sham. It was in reality a loan disguised as a hire-purchase agreement. This is an odd argument, bearing in mind the remedy Mr *de Bourbon* is seeking. He is saying:

McNALLY JA

1.Stanbic did not sell the machinery to Pyramid. Pyramid bought the machinery from someone in Italy and simply borrowed the money to do so from Stanbic.

2. Therefore, Stanbic must be deemed to have sold the goods to Pyramid on credit.

If Pyramid merely borrowed money from Stanbic, how can that transaction be deemed to be a sale? A sale of what?

The purpose of the Hire Purchase Act is to control one type of sale - the hire-purchase sale. The penalty for breach is to deem the sale to be another kind of sale - an instalment sale agreement. If we are dealing with a loan, the remedy sought under the Act is entirely inappropriate.

But in any event, I do not find the submission convincing. There was never any dispute on the affidavits about the fact that the agreement was a hire-purchase agreement. The remedy sought is a remedy available in respect of a hire purchase agreement, albeit one whose terms do not comply with the Act. No-one ever disagreed with Stanbic when it said that it would only become involved on the basis that the transaction would take the form of a hire-purchase agreement.

It is of course trite and true that, as Joubert puts it in *General Principles of the Law of Contract* p 81:

> ``In the interpretation of contracts, the court may disregard the plain meaning of the words of the parties and give effect to their true intention as found by the court.''

Copyright Juta & Co Ltd

But it is equally true, as stated in *SAR & H* v *National Bank of South Africa Ltd* 1924 AD 704 at 715-6 that:

> ``... the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement.''

Where, as here, representatives of substantial companies meet and the one says to the other, in effect: ``We are not prepared to lend you the money. We prefer to deal with the matter through the medium of a hire-purchase agreement'' the meaning is, to my mind, perfectly clear. He is saying ``We will acquire ownership of the machinery. We will then sell it to you on hire-purchase''.

It is not necessary then to spell out the details. Subsequent dealings are to be deemed, as between the parties, to be conducted on that basis. If compliance with the agreement, and the Act, required that when the machinery was physically delivered to Pyramid's premises, it would be deemed to be held by Pyramid as Stanbic's agent, so be it. Similarly, since the Act required the payment of the deposit before delivery of the goods in terms of the agreement, the parties must be deemed to have agreed that Pyramid would possess the goods as hire-purchaser only after the deposit was paid. Prior to that, Pyramid had mere physical *detentio* as agent for Stanbic.

McNALLY JA

It does not seem to me to be necessary to establish whether or not the parties addressed their minds to these details, or whether they understood the legal concept of *constitutum possessorium*. (Indeed, I think we are really concerned with delivery *brevi manu*. See Wille & Millin *Mercantile Law of South Africa* 17 ed p 158.)

Once they agreed that the matter would be dealt with as a hire-purchase agreement under the Act, the rest followed. And indeed the agreement did provide, and record, that payment of the deposit had been made before delivery. The only way that could be true would be if delivery took place *brevi manu* immediately upon payment of the deposit. So we must assume that that is what happened. Otherwise, as MORTON ACJ remarked in *Bowmakers (CA) (Pvt) Ltd* v *Wood NO* 1959 (1) SA 766 (SR) at 770, the purchaser would be ``an unscrupulous buyer profiting by his own deceit''.

Mr *de Bourbon* submits that:

> ``there was never any intention by Pyramid Products to confer ownership on Stanbic Finance, save in the very technical sense required to give effect to a hire-purchase agreement.''

I have difficulty in understanding that submission. Pyramid's directors never had any doubt that in law they were hire-purchasers, which meant that ownership remained with Stanbic. That is what hire-purchase means. They did not ``confer'' ownership in Stanbic. Stanbic was the legal owner. Stanbic paid indirectly for the machinery. That payment was not a mere technicality.

B. *The sale by Pyramid to Stanbic was unlawful*

Copyright Juta & Co Ltd

The next point on this aspect made by Mr *de Bourbon* was that the approval from the Zimbabwe Investment Centre and the import licence prohibited the sale of the machinery. I assume he means ``by Pyramid to Stanbic''. Such a sale, he submits, would have contravened s 13 of the Control of Goods (Import and Export) (Commerce) Regulations 1974 (SI 766/74).

The approval by the Zimbabwe Investment Centre was for the expenditure of the foreign exchange involved. The condition imposed by the ZIC was ``goods not to be sold or disposed of in any manner other than in the process of manufacture by the applicant''. (A condition I would have thought more appropriate for the importation of raw materials than for the importation of machinery).

Given the objects of the ZIC as set out in *Chapter 24:16*, I very much doubt whether the Centre would have regarded this transaction as a breach of the condition it imposed. There is no affidavit from the Centre. Nor is it suggested by the relevant Ministry that the terms of the import licence have been breached. It must surely have been envisaged that imports of this size would be financed in some way, and that the goods themselves would

inevitably be at least pledged by way of security. Even a pledge could arguably breach the condition. I do not accept that the transaction in this case, breached the condition in the ZIC letter or the provisions of s 13(c) of SI 766/74.

The prohibition on ``sale or disposal'' must be read in the context to mean ``sale or disposal in the course of business'' rather than ``sale or disposal for the purpose of financing the acquisition''. Finally, I may say that it is not entirely clear to me that Pyramid actually did sell the machinery to Stanbic.

C. *Alleged breach of s 5(1)(b) of the Act*

The final point relied upon by Pyramid to reduce the agreement from a hire-purchase to a sale on credit at a lower price was the alleged breach of s 5(1)(b) of the Act (S 4(1)(b) of the old Act).

It was alleged that a sum of $20 979.45 was wrongly included in the statement of the cash price. Therefore the stated cash price was incorrect. Therefore there was a breach of the section. Therefore the penalty provisions came into force.

It does not seem to me to matter whether this sum is called interest or bank charges (though it seems clearly to be the former). It is covered directly by the reasoning in the judgment in *Pyramid Products (Pvt) Ltd* v *UDC Ltd* S-200-95. It is a charge which, in the words I used in that case, ``could properly be built in to the cash price of the goods''. I see no reason to change that view. Mr *de Bourbon* said in his heads of argument that ``the correctness of (that) decision is respectfully questioned.'' He offered no argument in support of that somewhat cavalier suggestion, and at the hearing of the appeal sought only to distinguish it. On this point, it is indistinguishable.

Copyright Juta & Co Ltd

I am satisfied that this was a genuine hire-purchase agreement; that it has not been shown to have contravened the provisions of the Act; and that therefore the penalty provisions of the Act do not apply.

I agree therefore with the conclusion of the learned judge on this first point.

2. *There has been an over payment by Pyramid to Stanbic of $194 112.15 which is repayable plus interest at 25% per annum from 26 January 1995.*

This submission is based on the application and interpretation of s 27 of Chapter 284 of 1977 (now ss 28 and 29 of *Chapter 14:09*).

On the date (26 August 1991) on which the agreement was concluded, the extent to which the ``purchase price'' was allowed to exceed the ``cash price'' was controlled, under s 27 of the old Act, by SI 58 of 1990. This provided (if I may omit the complexities) that the permissible finance charges should be not more than 161/2 of ``the balance of the cash price remaining unpaid before the due date of each instalment''.

McNALLY JA

It is apparently common cause that in this case the rate used was 201/2. I take the parties' word for that. Therefore, it is contended, an unlawful and excessive level of finance charges was raised and paid. It should be refunded.

On the face of it, this contention is unanswerable. But the relevant section of the Act has been amended in a number of ways. I will not deal with the amendment in Act 13 of 1993 or that in s 23 of Act 20 of 1994 which backdated the operation of Act 13 of 1993 to 20 October 1993.

But s 11 of Act 20 of 1994 introduced a new sub-section to what is now s 29 of the Act. The amendment came into effect on 20 January 1995. It read as follows:

> ``(2) For the purpose of calculating any amount owing under a financial lease or hire-purchase agreement which subsisted at any time between 1 April 1990 and 20 January 1995, subsection (4) of section *twenty-eight* shall be deemed not to have applied to such financial lease or hire-purchase agreement during that period.''

For the sake of completeness, I set out s 28(4) as follows:

> ``A provision in an agreement shall be of no effect in so far as it provides for the payment of a purchase price exceeding the cash price by more than the appropriate amount, fixed for the time being in terms of subsection (1), and the amount of each instalment payable under an agreement containing such a provision shall be decreased accordingly.''

This is a strange provision. It provides that bodies in the position of Stanbic, who charged unlawfully high purchase prices, and who would otherwise have to refund the difference between their price and the lawful price, do not have to do so:

1. if the hire-purchase agreement (or financial lease) subsisted at any time during the period 1.4.90-20.1.95; and

---

Copyright Juta & Co Ltd

2. in respect of that period.

The present hire-purchase agreement was signed on 26 August 1991, so it is covered by condition 1 above. Therefore the overcharge *during that period only* is condoned and does not have to be repaid. I note further that on 20 January 1995, SI 203/95 was published, which *prima facie* legitimates a higher rate of interest in the present case from that date forward. But in any event, Pyramid's last payment was made on 26 January 1995. It declined to make further payments.

Accordingly, this final contention by Pyramid must also fail. I am glad to note that SMITH J recently (30 September 1998) came to the same conclusion in *Standard Chartered Finance Zimbabwe Ltd* v *Marongwe Transport (Pvt) Ltd* HH-164-98. *(185)

McNALLY JA

3. *In any event, costs in the court* a quo *should not have been awarded on the higher scale*

The award of costs on the higher scale is within the discretion of the presiding judge, and, provided that discretion is judicially exercised, this court will not interfere. The reasons for her decision, as set out by the learned judge at p 8 of her judgment, seem to me to be proper reasons, and thus there are no grounds for interference.

4. *Costs in this court*

Mr *Andersen* sought a similar order for costs in this court. However, in this court, many of the more contentious issues in the court *a quo* were not pursued. The issues argued were substantial, and, in respect of s 29 of the Act, novel. I see no reason to depart from the normal rule.

The appeal is dismissed with costs.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

S *v* BANANA 1998 (2) ZLR 533 (HC)

Court **High Court, Harare**

Chidyausiku JP & Assessors

Criminal trial

Copyright Juta & Co Ltd

26 November 1998 Judgment No. HH-221-98

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 23 - protection from discrimination on the grounds of sex - sodomy - fact that sexual intimacy between females is not criminal does not mean that sodomy is protected

Evidence - similar fact evidence - admissibility - evidence on one count being strikingly similar to evidence on another - court entitled to consider such evidence in deciding guilt on each count

Headnote

The accused was charged with a number of sexual offences, committed mostly during the time he held office as President of Zimbabwe. The allegations were all of sodomy or indecent assault, committed in respect of males who were, in most instances, low ranking officers in the uniformed services who were at State House in the course of their duties, or other persons of relatively humble status. The question arose whether the evidence on one count should be admissible as evidence of another. The defence also argued that sodomy as an offence has been abrogated by disuse; alternatively, that the constitutional protection against discrimination on the grounds of sex has altered the common law and decriminalised consensual sodomy.

Held, that similar fact evidence is not generally admissible if it merely shows that the accused is the sort of person likely to commit the offence charged. However, it is admissible as evidence in relation to another count in the same indictment if the evidence shows that those alleged offences share with the offence which is the subject of the charge common features of such an unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity is explicable on the basis of coincidence. There were such features in the present case and the evidence on one count could be used as evidence in relation to another.

Held, further, that for a law to be regarded as having been abrogated by disuse it must be shown that there has been no observance of the law for a considerable time, particularly where a usage contrary to the law is observed or must have existed. There have in recent years in Zimbabwe been a number of prosecutions and convictions involving consensual homosexual acts and it could not be said that the crime of sodomy had been abrogated by disuse.

Held, further, that the real constitutional question was not whether sexual intimacy between males should be allowed on the grounds that such intimacy between females was not criminal. It was whether the Constitution created and conferred on anyone the fundamental right to penetrate another male *per anum*. No such right was created. If the framers of the

CHIDYAUSIKU JP

Constitution had intended to alter the common law position relating to consensual sodomy, one would have expected a provision such as exists in the South African Constitution relating to discrimination on the grounds of sexual orientation.

Cases cited:

Copyright Juta & Co Ltd

Boardman v *DPP* [1974] 3 All ER 887 (HL)

DPP v *Boardman* [1975] AC 421 (HL)

Green v *Fitzgerald* 1914 AD 88

Harris v *DPP* [1952] AC 694

Makin v *A-G for New South Wales* [1894] AC 57 (PC)

S v *C* 1976 (1) RLR 55 (G)

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

R v *Masuku* 1968 (2) RLR 332 (G)

S v *Meager* 1977 (2) RLR 327 (A)

S v *Roffey* 1991 (2) ZLR 47 (H)

R v *Sims* [1946] KB 531

R v *Smith* (1915) 11 Cr App Rep 229

R v *Thomson* [1918] AC 221

Legislation considered:

Constitution of South Africa 1993, s 8(2)

Constitution of Zimbabwe 1980, s 23

Case Information

A V M Chikumira, for the State

J C Andersen SC, for the defence

Judgment

CHIDYAUSIKU JP: The accused in this case is the Reverend Canaan Sodindo Banana, the first non-executive President of Zimbabwe. He is charged with two counts of sodomy, three counts of attempted sodomy and six counts of indecent assault. The offences are alleged to have occurred between the period from January 1984 to December 1996. Some of the offences were allegedly committed by the accused while he was still Head of State and others after his departure from office in 1987. When the charges were put to the accused he pleaded not guilty to all the counts. Mr *Andersen* who appears for the accused advised the court that the plea was in accordance with his instructions. Thereafter, the State opened its case.

[*His Lordship then dealt in detail with the evidence of the prosecution witneses and continued:*]

The State also sought to rely on similar fact evidence in support of its case in all counts, including counts 2 and 3 involving Jefta Dube. All in all, the accused is charged with eleven

Copyright Juta & Co Ltd

counts of sodomy, attempted sodomy and indecent assault. There are ten complainants. The State contends that

CHIDYAUSIKU JP

evidence on one count should be admissible as evidence in the other counts, and *vice versa*, because of the striking similarity in the evidence on each of the counts.

The following are the allegations of each of the complainants in each count. In count one the accused is charged with sodomy. The complainant Ngwenya alleges that after meeting the accused in Bulawayo City Centre he was invited to spend the night with the accused at a City Hotel. Thereafter he met the accused on a number of occasions and would have sexual intercourse *per anum* with the accused. His evidence was that before the sexual intercourse he and the accused would engage in some form of acrobatics, fondling and some ballroom dancing, with partners facing each other with one set of arms outstretched and clasping each other and the other arms holding each other around the waist.

In counts 2 and 3 involve Dube. I have already set out in detail what transpired between the accused and Dube. The striking features the State sought to rely on were the invitation to the accused's house or office, the general discussion about the complainant's background, the playing of the game of cards - crazy 8, the offer of a drink, the enquiry whether complainant could dance, the offer to teach the complainant dancing which was followed by ballroom dancing to radio cassette music, the accused's attempt to kiss or the kissing of the complainant in the mouth, the accused's grip on the complainant and the sexual advances.

In count 4, Patric Gunda was led into one of the guest rooms. He was pushed on to the bed and the accused placed his erect penis between the complainant's legs and ejaculated after making some sexual movements. This was repeated on the second occasion and on the third occasion the complainant ran away and escaped. He too was kissed.

In count 5, Fortune Masawi, the complainant, was employed as a security guard at State House. He was invited to the accused's office. Upon getting to the accused's office, the accused started playing ballroom dancing music on a radio cassette. He was invited to dance. He said he could not dance and accused offered to teach him. They danced facing each other. The accused's penis was erect and accused made sexual movements. He attempted to kiss the complainant but complainant broke away. Masawi was offered a book and some money.

In count 6, the complainant Kembo Kaitano, a gardener, was picked in the street by the accused and taken to the accused's office at the University. He was offered a drink. He was invited for a dance. When he responded that he could not dance the accused offered to teach him. Ballroom dancing music from a radio cassette was switched on and dancing followed with the partners. The accused's penis got erect and the accused made sexual

CHIDYAUSIKU JP

Copyright Juta & Co Ltd

advances kissing the complainant in the mouth. The complainant broke away and insisted he wanted to leave.

In count 7, the complainant Gwatidzo, as attached to the accused as a security guard. He was invited to the accused's office. He was told to remove his grenade launcher and bandolier. Accused switched on music on a radio cassette and invited the complainant for a dance. The accused and complainant danced facing each other - the accused grabbed complainant with the grip becoming tighter and tighter as the dancing progressed. The accused's penis became erect and he rubbed it against the complainant's body. He attempted to kiss the complainant. The complainant broke away and shouted for help. The accused's wife entered the room and the accused let go.

In count 8, the complainant Christopher Machingauta, was invited to the accused's office. He was offered a drink. Discussed general matters and took complainant for a walk in the grounds of State House. He tried to lift the complainant. The accused became very excited as he lifted the complainant made for his mouth wanting to kiss him. The complainant broke away and threw the accused into a swimming pool.

In count 9, Lovemore Dundu, the complainant, was one of the accused's aides-de-camp. He was invited to the accused's office. He was offered a drink. He drank two tots of whiskey. The accused put on some music and invited the witness for a dance. As they danced the accused gripped him very tightly and as the accused advanced to kiss him, he pulled away and broke off the dance and left the office.

In count 10, Christopher Ndonya is the complainant. He, too, was an aide-de-camp to the accused. He was invited to the accused's office. The complainant was invited to the accused's office. He was offered some drinks, he was then invited to play a game of cards. After that accused switched on some music and invited the complainant to a dance. During the dance as partners were facing each other, the accused grabbed the witness very closely to his body. The accused started breathing fast. The witness felt the accused's erect penis. He pushed off the accused and left.

In count 11, involves Ignatius Gota as the complainant. He worked at State House as a security officer. He was called to the accused's office. He was offered a drink. Music was switched on. He was invited for a dance. When he indicated that he could not dance the accused offered to teach him to dance. As the dance progressed, he realised the grip was becoming more and more tight and the accused was pushing him close to him. He felt the accused's erect penis. The accused was very excitable and made for the complainant's mouth, wanting to kiss him. The complainant pushed away the accused and left.

These in brief are the allegations made by the various complainants in the

different counts. It is the State's contention that because of the striking similarities of the evidence in respect of each count the evidence on one count should be admissible as evidence

Copyright Juta & Co Ltd

of another and *vice versa*. Mr *Andersen* for the accused contends otherwise.

The general rule is that similar fact evidence is not admissible. In a case of plurality of accounts the evidence on one count cannot be used as evidence in another count. Each count must be considered separately. As Mr *Chikumira* correctly submitted, it is forbidden in law to reason thus: the accused is bad, therefore he is guilty; or the accused is the kind of person likely to have committed the offence with which he has been charged because he has done it before. In this regard, it is the chain of reasoning that is prohibited and not necessarily the statement of fact. See *DPP* v *Boardman* [1975] AC 421 (HL). If evidence is adduced to further the conclusion, by process of reasoning, that the accused is a bad man and, therefore, likely to have committed the offence, the evidence is excluded; if there is some relevant probative purpose for it other than the prohibited chain of reasoning it may be received but, when it is received, the trier of fact must eschew the forbidden reasoning: *DPP* v *Boardman supra*.

In what has become the *locus classicus* on similar fact evidence, namely, *Makin* v *Attorney General for New South Wales* [1894] AC 57 (PC) at 65, LORD HERSCHELL formulated the rule on the admissibility or otherwise of similar fact evidence in the following terms:

> ``It is undoubtedly, not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the jury; and it may be so relevant if it bears upon the question of whether the acts alleged to constitute a crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused.''

In a situation such as the present case, where there is a plurality of counts, it is not a question of admissibility of the evidence. The evidence is perfectly admissible in respect of the particular count. It is a question of using the evidence in one count as evidence in another count. When is that permissible and when is that not permissible? In *S* v *Gokool* 1965(3) SA 461 (N) HARCOURT J had this to say at p 475 E:

> ``It is clear that each count brought against an accused person must be considered separately and that the admissibility of evidence on each count must be tested as if that count had been the only count against such accused - *S* v *Butelezi* 1944 TPD 254. But this does not prevent material which could be admissible under the rules relating to similar fact evidence from being received merely because a plurality of counts is involved in a case.''

CHIDYAUSIKU JP

The test for when similar fact evidence is admissible was set out in *S* v *Meager* 1977 (2) RLR 327 (A). The ratio of that case is accurately summarised in the headnote to that case as follows:

> ``In exceptional cases, evidence that the accused has been guilty of other offences is admissible if it shows that those offences share with the offence which is the subject of the charge, common features of such an unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity is explicable on the basis of coincidence. In such cases, the evidence is admissible if its probative force in relation to an issue in the trial outweighs its prejudicial effect and there is no possibility of collaboration between the witnesses.''

In *Meager*'s case the Appellate Division followed and approved the decision in *Boardman* v *DPP*

Copyright Juta & Co Ltd

[1974] 3 All ER 887. In *Meager's* case, the accused was charged with seven counts of committing seven unnatural offences against three complainants aged 15 and 16. Counts l-4 inclusive involved three complainants and were all allegedly committed at the house occupied by the appellant. Counts 5-7 were allegedly committed at a flat owned by the accused. It was common cause that on three occasions when three of the offences were committed the accused was in bed with two teenage boys. All those complainants were reluctant to give evidence against the accused. The complainants did not report the case to their parents and were reluctant to talk about the case. The court admitted similar fact evidence.

MACDONALD CJ gave the following reasons for the admission of similar fact evidence at p 33F:

> ``I have mentioned that in four of the counts there was a common feature present. The common feature was that the appellant at night shared a double bed with teenage boys, aged l5 to 16. The appellant, as I have said, is a married man aged 37. In my view, it is conduct of an unusual and striking nature that he should have behaved in this way on three occasions relating to the four counts that I have mentioned. It is strange and unnatural conduct for a married man aged 37 to share a double bed at night with teenage boys.
>
> I am satisfied, therefore, that as far as counts 1,2, 3 and 4 are concerned it is permissible to have regard to the evidence in one count in deciding the guilt on another.''

In *R* v *Sims* [1946] KB 531 the accused was tried on various counts of sodomy and gross indecency with four different men, the offences being alleged to have taken place in his bungalow. Sims did not deny that the complainants had come to visit him, but said that no indecent acts had taken place. The issue therefore involved a direct conflict of evidence between prosecution and defence on whether alleged acts had been committed. The Court of Criminal Appeal held that in considering the evidence on each count and deciding whether the complainant was telling the truth, the jury could have regard to the fact that three other men had given very similar evidence.

LORD GODDARD commented on *Sims*' case *supra* in *Harris* v *DPP* [1952] AC 694 at 709-10 as follows:

CHIDYAUSIKU JP

> ``The judge was right to try all four cases together, because the fact that not one but four men, who admittedly had gone to the prisoner's house to spend the evening on different occasions, all said exactly the same advances had been made to them by the prisoner and that, exactly the same acts had been committed on them, which tended to show that the association which the prisoner had with these men, was a guilty and not an innocent one.''

The principle that merges from the above authorities is that similar fact evidence is not admissible or in the case of plurality of counts not admissible as proof of another count. However, similar fact is admissible or admissible as evidence on another count in the same indictment if similar fact evidence shows that those offences or the co-counts share with the offence which is the subject of the charge or the co-counts common features of such an unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity is explicable on the basis of coincidence. Thus in *R* v *Thomson* [1918] AC 221 the appellant's defence to a charge of gross indecency against two young boys was that the two complainants had mistakenly identified Thomson. There was other evidence to establish that

Copyright Juta & Co Ltd

Thomson was a homosexual. The House of Lords held that evidence was admissible to confirm the complainants on the issue of identity. It was held that it would have been strange coincidence if, out of all the people whom the boys could have mistakenly identified, they had happened to pick on someone who was a homosexual.

In *Makin* v *Attorney General for New South Wales supra*, evidence tending to show that the accused had murdered two of her children previously was admitted on account of the improbability that they had all died from natural causes. In *R* v *Smith* (1915) 11 Cr App Rep 229, the accused was charged with the murder of his wife. The defence raised was that the deceased had accidentally drowned in the bathroom. Evidence that two previous wives of the accused had died the same way was held to be admissible. In *R* v *Sims supra,* the accused was charged with sodomising four different men. The evidence of one count was held admissible in respect of the other count and vice versa on the basis that it was highly improbable that four men would invent exactly similar lies.

In the present case, there are several features common to all the counts and of such unusual nature and strikingly similar that it would be an affront to common sense to assert that the similarity is explicable on the basis of coincidence. The following are some of the strikingly similar features.

In counts 2 and 3, 5, 6, 7, 8, 9, 10, 11, there was an invitation to the accused's office at State House. In count 6, the invitation was to the accused's office at the University of Zimbabwe, the rest were invited to the accused's office at State House. The most significant feature here is that the accused was Head of State at the time. The complainants were low ranking officers. In my view,

it is unusual for a Head of State to invite such officers to his office for the purpose of socialisation. In the case of the complainant in count 6, the complainant was a gardener. Without being discriminatory, it is highly unusual for a former Head of State to socialise with a strange gardener. Indeed, the complainant felt it was not his place to socialise with the former Head of State. The invitation was followed by an offer of a drink and small talk about the complainant's background. This was so in counts 2 and 3, 5, 6, 9, 10 and 11, After the offer of a drink and small talk or a game of cards was then followed an invitation to a dance. When the complainant said he could not dance the accused offered to teach the complaint to dance. The dance in all the cases was to ballroom dance music played on a radio cassette - this is in the case of counts 2 and 3, 5, 6, 7, 9, 10 and 11. Once on the dance floor, the accused held the complainant tight, his penis became erect and he proceeded to kiss or attempt to kiss the complainants by putting his tongue into the complainants' mouths. At the point, the various complainants got the uninvited French kiss, they broke away and released themselves from the accused. In our view, it is most unusual that a male would want to dance with another male. It is also unusual that a male would get an erection by dancing with another male. On the evidence before the court, it is possible that complainants, Jefta Dube and Ndonya, might have discussed their experience with the accused, as well as Gwatidzo with Gota, and Machingauta with Dunhu.

Copyright Juta & Co Ltd

There is no possibility of connivance among the other complainants.

The accused maintains that all the complainants are falsely accusing him of homosexual advances towards them. Here is a situation where nine complainants describe in almost identical terms how the accused attempted to lure them into homosexual activities. To explain this occurrence on the basis of coincidence is an affront to common sense. For these reasons, the court is satisfied that this is a proper case for using the evidence in one count as evidence in another count and vice versa. In particular the court is satisfied that there is no possibility of collaboration between Jefta Dube and complainants in counts l, 4, 6, 7, 8, 9 and 11 thus the evidence in anyone or all of those can safely be used in counts 2 and 3.

The court, as previously stated, is mindful of the need to treat the evidence of Jefta Dube with caution. The court has treated Jefta Dube's evidence with extreme caution for the following reasons:

(a) this is a sexual offence;

(b) Dube's evidence contains a number of unsatisfactory features, such as contradictions and lack of particularity in previous statements of complaint;

(c) Dube was shown to have lied in his previous trial.

I have dealt with these aspects of Dube's evidence at some length already.

CHIDYAUSIKU JP

Despite these criticisms, we are satisfied that Dube is telling the truth in his account of what occurred on or about the 16 December 1983 the first incident, the second incident of June 1984 and that Dube was subsequently sodomised and indecently assaulted, by the accused as and when he chose during the period 1985 and 1986. The court is satisfied that Dube in counts 2 and 3 is not falsely incriminating the accused. I have already outlined why the court believes Jefta Dube's evidence in this regard. To recapitulate the following are the main reasons:

[*His Lordship set out the reasons and continued:*]

In the result, the court has come to the only possible conclusion on the evidence before it that Dube is essentially telling the truth and there is no risk at all of him having falsely incriminated the accused.

Having regard to the way the charge is framed, what offence then should the accused be convicted of? The two counts as charged present some problems as they are not entirely consistent with the evidence presented by the State.

[*His Lordship considered the details of Dube's evidence and concluded:*]

Given these findings by the court, what then are the appropriate verdicts to return?

[*The court then dealt in detail with the evidence on the various counts and continued:*]

Copyright Juta & Co Ltd

The court is satisfied on the evidence before it that, that sexual intercourse was consensual. Does that constitute an offence?

That then leads me to the submission by Mr *Andersen* that consensual sodomy between consenting adults is not an offence in Zimbabwe. As I understand his submission, his contention is that a law criminalising sodomy between consenting male adults contravenes s 23 of the Constitution of Zimbabwe, which protects individuals from discrimination on grounds of sex. He also submitted that the common law offence of sodomy has been abrogated by disuse.

Mr *Chikumira* argued to the contrary. He submitted that the Constitution has not altered the common law, which has not fallen into disuse.

It cannot be disputed that at common law, sodomy has been or is an offence. Any conclusion that it is not an offence, must therefore, be necessarily based on the two grounds advanced by Mr *Andersen.* Thus, common law has either

been abrogated by disuse or has been altered by the provisions of the Constitution.

For a law to be regarded as having been abrogated by disuse, it must be shown that there has been no observance of the law for a considerable time and particularly where a usage contrary to the law is observed or must have existed. See *Green* v *Fitzgerald* 1914 AD 102 and *R* v *Masuku* 1968 (2) RLR 332 (G). In Zimbabwe, there have been a number of prosecutions and convictions involving consensual homosexual acts such as in *S* v *Roffey* 1991 (2) RLR 47 (H). There has even been prosecution, conviction and punishment in respect of mutual acts of masturbation, as in *S* v *C* 1976 (1) RLR 55 (G). On these premises, the court is satisfied that the law creating the offence of sodomy cannot be said to have been abrogated through disuse.

I now turn to consider if the Constitution has altered the common law. Section 23 of the Constitution proscribes discrimination on the grounds of sex. It provides as follows:

> ``*Protection from discrimination on the grounds of race, etc.*
>
> (1) Subject to the provisions of this section -
>
> (a) no law shall make any provision that is discriminatory either of itself or in its effects; and
>
> (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
>
> (2) For the purpose of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or gender are prejudiced -
>
> (a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or
>
> (b) by the according to persons of another such description of a privilege or advantage which is not

Copyright Juta & Co Ltd

accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed or gender of the persons concerned ... ''

It has been argued that sexual intimacy between consenting female adults is not an offence, so why should sexual intimacy between consenting male adults be an offence? Criminalising sexual intimacy between male adults is therefore discrimination on the grounds of sex prohibited by the Constitution. Indeed, there are also other powerful arguments, such as that criminalising sodomy committed in private between consenting adults is an invasion of privacy, contrary to the constitutional or fundamental right to privacy. These arguments, in my view, are very interesting but when all is said and done the question remains of one of interpretation of the provisions of the Constitution.

CHIDYAUSIKU JP

Does the Constitution create and confer on the homosexual a fundamental right to penetrate another male *per anum*? Does the Constitution seek through its provision to protect such a right? I am not aware of any provision in the Constitution that creates such a right or seeks to protect an already existing right of a homosexual to penetrate another *per anum*. I am not here addressing myself to the desirability or otherwise of creating such a right. I will probably address that issue when I come to the question of an appropriate sentence.

The framers of the Constitution were aware that in terms of common law consensual sodomy between males was an offence. If it were their intention to alter that position one would have expected them to use more explicit language, as indeed is the case in the South African Constitution. Section 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993 provides as follows:

``No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual *orientation*, age, disability, religion, conscience, belief, culture or language'' (emphasis is mine).

It is quite clear from that the South African provision against discrimination is intended to strike down any law that outlaws homosexual activity. The Zimbabwean Constitution, s 23 in particular, contains no similar wording on that point.

In the result, the court is satisfied that at common law sodomy is an offence and that law has not been abrogated by disuse or altered by the Constitution.

The accused is therefore found guilty as charged on Count 1.

Finally, I wish to deal with Mr *Andersen*'s application to stay proceedings because of the undue delay in bringing the accused to trial. In respect of count 1, I do not accept that there was undue delay in prosecuting the matter. The offences were committed in 1995 and 1996 and prosecution was launched in 1997, within a year of commission of the offence. In regard to the rest of the counts, that is counts 2 to 11, there was indeed inordinate delay in the prosecution of

Copyright Juta & Co Ltd

the accused. The cause of the delay in respect of each count appears different. In respect of counts 2 and 3 involving the complainant, Dube the main reason for the delay appears to be the status of the accused and the use of that status by the accused to intimidate the complainant. The evidence before the court, which the court has accepted, is that the accused told the complainant that he was above the law. The complainant believed that and as a result he was not willing to lay a charge against the accused. He categorically told Mukurazhizha, the then Commissioner of Police, that he was not willing to make a complaint against the accused for the purpose of prosecution. With the complainant unwilling to lay a charge, there is no way a prosecution would have succeeded. The complainant was unwilling to lay

CHIDYAUSIKU JP

a charge because of the wrongful actions of the accused in intimidating the complainant.

In these circumstances, it would be wrong to stay prosecution on counts 2 and 3, as that would be allowing the accused to benefit from his own wrongdoing.

It was also erroneously believed at the time of the commission of the offence by both the complainant and the number one policeman Mukurazhizha that a sitting head of state cannot be prosecuted. The provision prohibiting the prosecution of a sitting President was only introduced in 1987. So delay in this matter was partly due to the misconception of the true legal position regarding the prosecution of a sitting President.

Further, a judge of this court, BARTLETT J, directed that investigations into the allegations made by Dube against the accused be instituted. Those investigations were intended to be carried to their logical conclusion, namely prosecution. I am satisfied that, should those investigations reveal sufficient evidence for the mounting of a prosecution, it is open to this court to stay such prosecution. However, it would be highly undesirable and prejudicial to the administration of justice for this court to be seen to order investigations into the commission of an offence and then not allow those investigations to progress to their final conclusions and prosecution. This is particularly so where the court was aware at the time of making the directive the lapse of time when it so ordered the investigation. Transparency and the need to see justice being done which are essential for the good of the administration of justice demand that prosecution be allowed to its logical conclusion unless there are cogent and compelling reasons to the contrary. In the present case, there are no such reasons. In the present case, the accused's defence is not one of alibi which would make time of the essence. The accused's defence is one of denial that there was any sexual intimacy with the complainants. The court, however, accepts that the accused has suffered some prejudice in that because of the lapse of time and lack of precision in the allegations as to the time of the commission of the offence he is unable to account for his whereabouts at the time of the alleged offences. Such prejudice does not outweigh the other considerations I have referred to. Indeed, such prejudice is bound to occur in every indictment that alleges commission of offences on a date unknown to the prosecutor or on various occasions over a period of time.

As far as the other counts are concerned, that is counts 4 to 11, it would appear that indecent assaults were committed and reports were made to the complainant's superiors and nothing

Copyright Juta & Co Ltd

else ever happened. In virtually all the instances, the complainants were prepared to let the matter rest at that because of the position of the accused. The matter only proceeded because of a directive from this court. The court also declines to exercise its

CHIDYAUSIKU JP

jurisdiction to stay execution in respect of the rest of the counts for similar reasons.

In the result, the accused is found guilty on all the eleven counts. The accused is found guilty as charged on all counts except for counts 2, 3, 4, 7 and 9, in respect of which there has been alterations as to particulars of the offence for which the accused is convicted. For the avoidance of doubt, the court returns the following verdicts:

COUNT 1

The accused is found guilty of the crime of sodomy as charged.

COUNT 2

The accused is found guilty of sodomising Jefta Dube on various occasions during the period of extending from 1 January 1984 to 31 December 1986. The period during which the offence occurred has been amended to include the period of up to December 1986.

COUNT 3

The accused is found guilty of the offence of committing an unnatural act on Jefta Dube on various occasions during the period extending from December 1983 to 31 December 1986 and not attempted sodomy as charged.

COUNT 4

The accused is found guilty of indecent assault on Patrick Gunda and not attempted sodomy as charged.

COUNT 5

The accused is found guilty of indecent assault on Fortune Masawi as charged.

COUNT 6

The accused is found guilty of indecent assault on Kembo Kaitano as charged.

COUNT 7

The accused is found guilty of indecent assault on Robert Gwatidzo and not attempted sodomy as charged.

COUNT 8

Copyright Juta & Co Ltd

The accused is found guilty of indecent assault on Christopher Machingauta as charged.

CHIDYAUSIKU JP

COUNT 9

The accused is found guilty of common assault on Lovemore Dhundu and not indecent assault as charged.

COUNT 10

The accused is found guilty of indecent assault on Christopher Ndonya as charged.

COUNT 11

The accused is found guilty of indecent assault on Ignatious Gota as charged.

STANDARD CHARTERED FINANCE ZIMBABWE LTD *v* GEORGIAS & ANOR 1998 (2) ZLR 547 (HC)

Court **High Court, Harare**

Smith J

Civil trial

17 September, 21 October,

2-3 November & 2 December 1998 Judgment No. HH-170-98

Flynote

Court - judicial officer - recusal - allegation of bias - applicant must show real possibility of bias, based on objective grounds

Delict - vicarious liability - employer's liability for delictual acts of servant - test as to whether act is performed in course of employment

Practice and procedure - absolution from the instance - when should be granted - could should lean in favour of case continuing

Headnote

In an application to a judge to recuse himself, the test to be applied is not easily defined. Some cases favour the view that the test is whether, as a matter of fact, there is a real possibility of bias. Others accept that it is sufficient that there is a reasonable belief that a real likelihood of bias exists. However, there is no real difference between these approaches, since, unless there were a real likelihood of bias, a reasonable or right-thinking man would not believe that there was such a likelihood. In deciding whether this test has been satisfied, it is necessary to look,

Copyright Juta & Co Ltd

not only at the facts known by the applicant, but at all the relevant facts.

The applicant must show a reasonable fear, based on objective grounds, that the trial will not be impartial. It should also be remembered that judges are trained and experienced in the administration of the law. The mere possibility of bias apparent to a layman is not in itself sufficient to warrant the recusal of a judicial officer. On the other hand, a judge should not regard an application for refusal as an affront. He should bear in mind that what is required is conspicuous impartiality.

In considering an application for absolution from the instance, a judicial officer should always lean in favour of the case continuing. If there is reasonable evidence on which the court might find for the plaintiff, the case should continue.

A master will be liable for the acts of his servant committed in the course of his employment; but an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment. But, provided the servant is doing his masters's work or pursuing his masters's ends, he is acting within the scope of his employment, even if he disobeys his master's instructions as to the manner of doing the work or as to the means by which the end is to be attained. Other tests have also been enunciated, whereby the courts invoke the

agency doctrine of actual or ostensible authority. The servant's acts must have some connection with his work, whether subjectively or objectively viewed. What has to be considered in the final analysis is whether the servant's departure from the path of duty constituted such an abandonment of, or deviation from, his prescribed task as to dissociate his wrong from the risk created by his employment and exonerate his master from liability.

Cases cited:

City & Suburban Tpt (Pty) Ltd v *Local Bd of Road Transportation, Johannesburg* 1932 WLD 100

Danisa v *British & Overseas Ins Co Ltd* 1960 (1) SA 800 (D)

Feldman (Pty) Ltd v *Mall* 1945 AD 733

Fawcett Security Ops (Pvt) Ltd v *Omar Entprs (Pvt) Ltd* 1991 (2) ZLR 291 (S)

Foya & Matimba v *R & Jackson NO* 1963 R & N 318 (FS)

Macala v *Maokeng Town Council* 1993 (1) SA 434 (A)

Metropolitan Properties Ltd v *Lannon & Ors* [1968] 3 All ER 304 (CA)

Mkwanazi v *van der Merwe & Anor* 1970 (1) SA 609 (A)

Copyright Juta & Co Ltd

Moch v *Nedtravel (Pty) Ltd* 1996 (3) SA 1 (A)

Monnig & Ors v *Council of Review & Ors* 1989 (4) SA 866 (C)

Nott v *ZANU (PF)* 1983 (2) ZLR 208 (S)

Quintessence Co-ordinators (Pvt) Ltd v *Govt of the Republic of Transkei* 1993 (3) SA 184 (Tk)

R v *Camborne Justices* ex p *Pearce* [1954] 2 All ER 850 (QB)

R v *Milne & Erleigh (6)* 1951 (1) SA 1 (A)

Romansrivier Ko-op Wynkelder v *Chemserve Mfg (Pty) Ltd* 1993 (2) SA 358 (C)

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

Smit v *Minister van Polisie* 1997 (4) SA 893 (T)

SAR&H v *Marais* 1950 (4) SA 610 (A)

Squire v *Sasol Mynbou (Eds) Bpk en Andere* 1993 (3) SA 298 (T)

Supreme Svc Stn (1969) (Pvt) Ltd v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A)

Case Information

A P de Bourbon SC, for the plaintiff

G S Wernberg, for the defendant

Judgment

SMITH J: On 4 June 1993, the plaintiff (hereafter referred to as ``SC Finance'') issued summons claiming from the defendants, jointly and severally, payment of certain amounts which it claimed were due and owing by them. The defendants (hereinafter referred to as ``Georgias'' or ``Trinity'' or ``the defendants'', as may be appropriate) opposed the claims and Trinity made a claim in reconvention for US$3 512 170.10. The basis for the counter-claim was as follows. Trinity had concluded a contract with a company operating in Botswana (hereinafter referred to as ``Sinatla'') to supply Sinatla with 97 triaxle interlink trailers for a unit price of US$36 207.94 each. In January 1993, an employee of SC Finance, called Bell, acting in the course and scope of his employment, had phoned the managing director of Sinatla, a man called Khera, and told him that Georgias and/or Trinity were in financial difficulties. As a result of that telephone conversation, Sinatla withdrew from

the contract. As a consequence, the defendants suffered the damages claimed. At the commencement of the hearing of this case Mr *Wernberg* gave notice that he intended to reduce the defendants' claim by deducting the costs that Trinity would have incurred in manufacturing

Copyright Juta & Co Ltd

the trailers. However, he had not been able to quantify such costs.

The case was set down for hearing on 27 September 1996. At the request of the defendants the hearing was postponed because of the ill-health of Georgias. It was then set down for hearing in November 1996. The legal practitioners requested a further postponement as they were discussing the possibility that the claim by SC Finance could be settled. Eventually, on 27 November, a draft order, which had been prepared with the consent of the legal practitioners of the parties, was submitted ordering the defendants to pay SC Finance $4 351 269.77, with interest thereon at the rate of 40% *per annum* from l February 1997 to date of payment. It also ordered that the claim in reconvention be postponed *sine die* but Trinity was required to procure that it be set down for trial not later than 28 February, 1997. If Trinity failed to do so, then it would withdraw its claim.

That order was issued on 17 December, 1996. Subsequently, the defendants claimed that they had not consented to the draft order. They applied for rescission of the order. Their application was dismissed by BLACKIE J on 8 April 1998 - see 1998 (1) ZLR 356 (H). The appeal from that decision of BLACKIE J has been dismissed by the Supreme Court - see *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 485 (S).

Trinity's claim in reconvention was set down for hearing in April 1997, August 1997 and May 1998. On each occasion the hearing was postponed at the instance of Trinity. Finally, the matter was set down for hearing in the week commencing l4 September 1998. At the hearing, Trinity applied for me to recuse myself. The application was based on an affidavit deposed to by Georgias. In his affidavit, Georgias made a number of allegations. A number of them are false and others are fanciful and figments of his imagination. I will deal separately with each of the allegations.

[*The learned judge dealt with and rejected the several allegations and continued:*]

After hearing argument on the application I dismissed the application, saying that my reasons for doing so would be given later. My reasons are as follows.

In an application for recusal, the test to be applied is not easily defined since decided cases are not entirely consistent, with some judges favouring the view that the test is whether, as a matter of fact, there is a real likelihood of bias, whilst others accepted a reasonable belief that a real likelihood of

bias existed as being sufficient. To my mind, however, there is no real difference between the two approaches since, unless there were a real likelihood of bias, a reasonable or right-thinking man would not believe that there was such likelihood.

This is illustrated by the remarks of GREENBERG J in *City and Suburban Transport (Pty) Ltd* v *Local Board of Road Transportation, Johannesburg* 1932 WLD 100 at 106:

> ``The test appears to be whether the person challenged has so associated himself with one of the two opposing

Copyright Juta & Co Ltd

views that there is a real likelihood of bias or that a reasonable person would believe that he would be biased."

In *Foya & Matimba* v *R & Jackson NO* 1963 R&N 318 (FS) at 321E CLAYDEN CJ described the test as being:

``whether the impression was reasonably created in the mind of the applicant that he would not have a fair trial."

After referring to certain cases the learned CHIEF JUSTICE proceeded at p 122F to say:

``The cases must, I think, be reconciled on the basis that although on facts known there might be a reasonable suspicion of bias, that will not suffice if proper enquiry would have shown that there was no real likelihood of it ... I consider therefore that what the applicants had to show was not necessarily personal animosity towards them. If they showed that the position was such that a reasonable man in their position would have thought that he would not have a fair trial in the circumstances and that there was nothing in further facts disclosed to indicate that that was not a real likelihood, that would be enough."

Possibly the most helpful description of the test to be applied is found in *Metropolitan Properties Ltd* v *Lannon* [1968] 3 All ER 304. LORD DENNING, after being referred to a number of earlier cases, said at 310A-D:

``... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at 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 impartial 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, and if he does sit, his decision cannot stand; ... Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough ... 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 enquire whether he did, in fact, favour one side unfairly. 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'."

It is emphasised that it is ``a real likelihood" of bias, which satisfies the test and not ``a mere possibility".

SMITH J

In deciding whether or not the above test has been satisfied, it is necessary to look, not only at facts known by the applicant, but at all relevant facts. In *R* v *Camborne Justices*, ex p *Pearce* [1954] 2 All ER 850 (QB) the court held at 855:

``... that a real likelihood of bias must be made to appear not only from the material in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his enquiries."

A further fact to which regard must be had is that judges are trained and experienced in the administration of the law. According to Voet:

``It seems that we would rather believe that those who are bound by a sworn and tested loyalty, and have been raised to the function of judging for their eminent industry and dignity, will not so readily and for such slender causes depart from the straight path of justice and give judgment to defiance of their own inner sense of duty."

(*Commentary on the Pandects*, translated by Gane, vol 2 (Books V to XII) at p 55). This must

Copyright Juta & Co Ltd

undoubtedly have been the attitude of the court in *R* v *Milne and Erleigh (6)* 1951 (l) SA 1 (A) where CENTLIVRES JA said at 11H:

> ``... The mere fact that a judge holds strong views on what he conceives to be an evil system of society does not, in my view, disqualify him from sitting in a case in which some of the evils may be brought to light. His duty is to administer the law as it exists but he may in administering it express his strong disapproval of it.''

In *Danisa* v *British and Overseas Insurance Co Ltd* 1960 (1) SA 800 (D) at 801B-C HENOCHSBERG J suggested the following:

> ``It seems to me that the test that is to be applied is whether the applicant can show a reasonable fear that the trial will not be impartial. The matter must be looked at from the point of view of a reasonable lay litigant; but the test is an objective one; the likelihood of bias. It is almost, if not quite, as important that justice should be believed to be impartially administered, as that it should actually be so, but it must also be borne in mind that the mere possibility of bias, apparent to a layman, on the part of a judicial officer is insufficient in the absence of an extra-judicial expression of opinion in relation to the case or in the absence of one of the other recognised grounds upon which an application for recusation is granted.''

The test enunciated above was quoted with approval by CONRADIE J in *Monnig & Ors* v *Council of Review & Ors* 1980 (4) SA 866 (C) at 876C. The learned judge also referred to *S* v *Herbst* 1980 (3) SA 1026 (E), saying that EKSTEEN J (as he then was) had restated the effect of South African judgments regarding applications for recusal in the following words:

> ``The approach of our courts to an application for recusal has been set out in a number of cases and the principle which they seek to enshrine is that no reasonable man should, by reason of the situation or action of a judicial officer, have grounds for suspecting that justice will not be administered in an impartial and unbiased manner.
>
> He stressed, however, that the mere possibility of bias apparent to a layman would not be sufficient to warrant the recusal of a judicial officer.''

Finally, I would refer to *Moch* v *Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A). At 12H HEFER JA said:

SMITH J

> ``It was for the petitioner to satisfy the court that the grounds for her application were not *frivolae causae* (*South African Motor Acceptance Corporation (Edms) Bpk* v *Oberholzer* 1974 (4) SA 808 (T) at 812C *ad fin*), ie that they were legally sufficient to justify the recusal of the presiding judge.

The learned JUDGE OF APPEAL went on at 13-14 to say:

> ``A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. (Compare *S* v *Bam* 1972 (4) SA 41 (E) at 43G-44.) If he does, he is likely to get his judgment clouded; and, should he in a case like the present openly convey his resentment to the parties, the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, judge is primarily concerned with the *perceptions* of the applicant for his recusal for, as TROLLIP AJA said in *S* v *Rall* 1982 (1) SA 828 (A) at 831 *in fine*- 832:
>
> > `(T)he judge must ensure that ``justice is done''. It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.'

Copyright Juta & Co Ltd

(See also *S* v *Malindi & Ors* 1990 (1) SA 96 (A) at 969G-I and cf *Solomon & Anor NNO* v *de Waal* 1972 (1) SA 575 (A) at 580H, *S* v *Meyer* 1972 (3) SA 480 (A) at 484C-F.) A judge whose recusal is sought should accordingly bear in mind that what is required, particularly in dealing with the application for recusal itself, is `*conspicuous* impartiality'."

I have set out earlier the numerous points set out by Georgias in his affidavit on which his alleged fears are based and my response to each. It is significant that he did not file an affidavit from Mr Paul supporting those allegations he made which concerned Mr Paul. I am satisfied that the application is not *bona fide*. Trinity has not satisfied me that the grounds for its application are not *frivolae causae.* I am also satisfied that I will be able to deal with the matter in an impartial and unbiased manner. Accordingly, the application for recusal was dismissed with costs.

[*The learned judge then dealt with the evidence for the defendants relating to their claim in reconvention, and continued:*]

After the close of *Trinity*'s case Mr *de Bourbon* moved for absolution from the instance. In doing so he referred the court to *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) ZLR 1 at 5D where BEADLE CJ said:

``The test, therefore, boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make - a definition which helps not at all".

Further on, at 5-6, the learned CHIEF JUSTICE went on to say:

``Before concluding my remarks of the law on this subject, I must stress that rules of

procedure are made to ensure that justice is done between the parties, and, so far as is possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance. I might usefully quote here what was said by SUTTON J in *Eramus* v *Boss* 1930 CPD 204 at 207:

> `In *Theron* v *Behr* 1918 CPD 443, JUTA J at p 451 states that according to the practice in this court in later years judges have become very loath to decide upon questions of fact without hearing all the evidence on both sides.'

We in this territory have always followed the practice of the Cape courts. In case of doubt at what a reasonable court `might' do, a judicial officer should always, therefore, lean on the side of allowing the case to proceed."

In *Quintessence Co-ordinators (Pty) Ltd* v *Government of the Republic of Transkei* 1993 (3) SA 184 (Tk) at 185B-D HANCKE J said:

``The legal test to be applied at this stage appears to be common cause, namely whether there is evidence upon which a reasonable man might find for the plaintiff: *Claude Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403 (A) at 409.

Copyright Juta & Co Ltd

> Mr *Findlay*, counsel for the defendant, accepted that at this stage of the trial neither the weight of any of the evidence tendered, nor any evaluation of the probabilities are relevant to the enquiry, save where such findings are clearly manifest from the evidence. I also agree with his submission that, where the question is exclusively one of law or involves the application of a legal principle in the light of the onus-bearing party being required to establish certain material facts essential to its cause of action, if I uphold the legal contention in favour of the defendant or find that essential material facts have not been established at all in order that there be a finding favourable to the plaintiff, then I can properly, in the exercise of my discretion, grant the application for absolution.''

Mr *de Bourbon* based his application on four grounds. Firstly, he submitted that Trinity had not established that Bell had been acting in the course and within the scope of his employment and therefore that SC Finance was vicariously liable for his actions. Secondly, he submitted that Trinity had not established that the contract between Senatla and Trinity would have been concluded but for Bell's telephone call. Thirdly, he submitted that Trinity had not established that there was a banker-client relationship between it and SC Finance or that there had been any *dolus* on the part of SC Finance when it allegedly interfered with Trinity's contractual relationship with Senatla. Fourthly, he submitted that Trinity had not produced the best evidence possible to prove the quantum of its damages.

Mr *Wernberg* argued that Trinity had established an arguable case that Bell had acted in the course, and within the scope, of his employment and so Trinity was vicariously liable. He also submitted that it was clear that Trinity had faced great difficulties on formulating its claim but Trinity had done the best it could be expected to do. The court might be constrained to reduce the

amount awarded by 10% or 20% of the amount claimed but it was clear that Trinity was entitled to some damages.

I granted SC Finance absolution from the instance and ordered that Trinity pays its costs. In doing so, I was very conscious of BEADLE CJ's comments in the *Supreme Service Station* case, *supra*, that in case of doubt, a judicial officer should always lean on the side of allowing the case to proceed. In this case I had no doubt in the matter.

My reason for granting absolution from the instance was because I was satisfied that Trinity had not established, on a balance of probabilities, that Bell had been acting in the course, and within the scope, of his duties when he made the alleged telephone call to Khera. At this stage, for the purposes of the application for absolution from the instance, it is necessary to assume that Bell did make the alleged telephone call, but I would point out that the evidence led is very suspect. It was only at a very late stage in the trial that Georgias alleged that Bell had come to visit him at his office and, in the presence of Leopold Joseph and Stavros Rose, admitted that he had telephoned ``the people in Botswana''. Furthermore, Leopold Joseph and Stavros Rose were not very convincing witnesses.

As BECK JA said in *Nott* v *Zimbabwe African National Union (Patriotic Front)* 1983 (2) ZLR 208 (S) at 210, the doctrine of vicarious liability of a master for such delictual acts of his servant as are committed in the servant's employment is part of our law. In *South British Insurance Co* v *du Toit* 1952 SR 239; 1952 (4) SA 313, TREDGOLD CJ at 315G-H accepted that the ``general

Copyright Juta & Co Ltd

principle upon which the liability of a master for the delicts of his servants'' is, as was stated in *Mkize* v *Martens* 1914 AD 382 at 390:

> ``... that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment. Such an act cannot be said to have taken place `in the exercise of the functions to which he (the servant) is appointed'.''

In *Feldman (Pty) Ltd* v *Mall* 1945 AD 733 WATERMEYER JA at 736 expressed his views on what is meant by the phrase ``scope of employment'' as follows:

> ``... but the expression `scope of employment' is apt to be misleading, unless one is alive to the fact that the words `scope of employment' are not equivalent to `scope of authority'. One is apt, when using the expression `scope of employment' in relation to the work of a servant, to picture to oneself a particular task or undertaking or piece of work assigned to a servant, which is limited in scope by the express instructions of the master, and to think that all acts done by the servant outside of or contrary to his master's instructions are outside the scope of his employment; but such a conception of the meaning of `scope of employment' is too narrow. Instructions vary in character: some may define the work to be done by the servant, others may prescribe the manner in which it is to be accomplished;

SMITH J

> some may indicate the end to be attained and others the means by which it is to be attained. Provided the servant is doing his master's work or pursuing his master's ends, he is acting within the scope of his employment even if he disobeys his master's instructions as to the manner of doing the work or as to the means by which the end is to be attained. A servant may even omit to do his master's work, and if such omission constitutes a negligent or improper performance of his master's work and causes damage, the master will be legally responsible for such damage. Consequently a servant can act in disobedience of his master's instructions and yet render his master liable for his acts.''

At 741 the learned JUDGE OF APPEAL went on to say:

> ``It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm.''

See, too, *Squire* v *Sasol Mynbou (Edns) Bpk en andere* 1993(3) SA 298(T).

In *Nott*'s case *supra*, BECK JA considered what test should be applied when determining whether an employee has acted in the course of his employment when, having embarked on conduct which is within his province as an employee to perform in the furtherance of his employer's affairs, he has, for purposes of his own, deviated from what he set out to do and, in the course of such deviation, has committed the delictual act that has damnified the plaintiff. At 211-12, he set out how the problem had been dealt with in a leading South African decision. He said:

> ``The leading South African decision in which extensive consideration was given to the problem that is presented by the servant's delictual act committed when he has diverted from the immediate furtherance of his master's

Copyright Juta & Co Ltd

affairs, is the case of *Feldman (Pty) Ltd* v *Mall* 1945 AD 733. Two of the judgments in that case stress that it is the degree of the servant's deviation from the execution of his master's work, or, looked at conversely, the degree of the servant's retention of his master's work, that is the determining factor. WATERMEYER CJ at 742 said:

> `If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs.'

TINDALL JA put the matter this way at 756:

> `In my view, the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately

---

SMITH J

> the question resolves itself into one of degree and in each particular case a matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed.'

In the earlier case of *Union Government* v *Hawkins* 1944 AD 556 the South African Appellate Division had adopted the same approach. In a judgment in which all concurred, CENTLIVRES JA (as he then was) said at 563:

> `Even when a servant makes a deviation solely for his own purposes the master may remain liable for any negligence committed by the servant while he is on that deviation. In each case, it is a question of degree ...'

The learned judge went on to discuss the extent of the particular deviation under consideration and concluded this passage in his judgment by saying that the deviation `was not such a complete relinquishment or abandonment of his master's business in favour of some activity of his own as to relieve his master from liability for any damages caused by the negligent driving'.''

The tests enunciated in the *Mkize* and *Feldman* cases that were referred to by BECK JA in *Nott*'s case *supra*, were also cited with approval by GUBBAY CJ in *Fawcett Security Operations (Pvt) Ltd* v *Omar Enterprises (Pvt) Ltd* 1991 (2) ZLR 291 (S). He also referred to other tests, which have been enunciated; at 298-9 he said:

> ``A somewhat different test to the issue of whether the employer is vicariously liable for the loss caused to a third party by the intentional wrongdoing for his own benefit by the employee, is suggested by the Australian academic, Professor John Fleming, in his acclaimed work *The Law of Torts* 7 Ed at p 356. Relying on a passage in the judgment of DIXON J (as he then was) in *Deatons (Pty) Ltd* v *Flew* (1949) 79 CLR at 381, he writes:
>
> > `In order to attract vicarious liability, the servant's dishonesty must consist of acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master.'
>
> It is pre-eminently in this context that the courts have forsaken the `course of employment' test and reduced the employer's responsibility by invoking the agency doctrine of actual or ostensible authority, borrowed from the law of contract.
>
> A similarity of thought is to be found in the majority judgment of JANSEN JA in *Minister of Police* v *Rabie* 1986 (1) SA 117 (A) in which he said at 134J-135A that by appointing van der Westhuizen as a member of the Police

---

Copyright Juta & Co Ltd

Force:

> `... and thus clothing him with all the powers involved, the State created a risk of harm to others, *viz* the risk that van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution'.''

The judgment *in Rabie*'s case, which was referred to by the learned CHIEF JUSTICE, has also been cited in other cases. In *Macala* v *Maokeng Town Council* 1993 (1) SA 434 (A) at 440-1 GOLDSTONE JA said:

``In support of this approach counsel relied upon the majority judgment of JANSEN JA in *Minister of Police* v *Rabie* 1986 (1) SA 117 (A). In particular, we were referred to the following passage at 134I-135B:

> `By approaching the problem whether van der Westhuizen's acts were done ``within the course or scope of his employment'' from the angle of creation of risk, the

SMITH J

> emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing van der Westhuizen as a member of the Force, and thus clothing him with the powers involved, the State created a risk of harm to others, viz the risk that van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. Van der Westhuizen's acts fall within this purview and in the light of the actual events, it is evident that his appointment was conducive to the wrongs he committed'.

I would make the following comments with regard to this passage:

1. The reference to `unjustified arrest, excess of force constituting assault and unfounded prosecution' related to the facts of the *Rabie* case. There, unlike the present case, the policeman announced that he was a policeman, that he was arresting Rabie and taking him to the police station.

2. In their context, the words in the passage `to abuse or misuse those powers' could only have been a reference to powers exercised *qua* policeman, ie in relation to police work. That follows from an earlier passage in the judgment where JANSEN JA stated (at 134C-E):

   > `It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf *Estate van der Byl* v *Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.'

In other words, the cardinal question is always whether the policeman is acting in the course and scope of his employment as such and, in order to find that he was so acting, his acts must have some connection with police work, whether subjectively or objectively viewed.''

In *Smit* v *Minister van Polisie* 1997 (4) SA 893 (T), the court held that the employee, a policeman, was busy with his own interests and activities, which were not related to those of his employer, and therefore his employer was not liable. In *Romansrivier Koop Wynkelder* v *Chemserve Manufacturing (Pty) Ltd* 1993 (2) SA 358 (C) at 366B-G VAN DEVENTER J, after

Copyright Juta & Co Ltd

referring to the *Feldman* and *Rabie* cases and many others, summarised the position as follows:

> ``The test of a master's liability for a wrong committed by his servant in the course of unauthorised activity is not whether it occurred while the servant was engaged in his master's affairs.
>
> The question to be considered in the light of the facts in each case is whether the wrong was committed in the course of the servant's employment.
>
> The course or scope of a servant's employment is an expansive concept, that encompasses such unauthorised acts as can be regarded as wrongful or unauthorised modes of performing an authorised task. In this respect, a subjective test may be appropriate, though

SMITH J

> not necessarily conclusive, for, if there is, objectively tested, a sufficiently close link between the servant's act for his own interests and purposes and his master's business, the latter may nevertheless be liable.
>
> The question ultimately resolves itself into one of degree. What has to be considered in the final analysis is whether the servant's departure from the path of duty constituted such an abandonment of or deviation from his prescribed task as to disassociate his wrong from the risk created by his employment and exonerate his master from liability.
>
> In each case a matter of degree will determine whether the servant can be said to have ceased to perform the functions to which he was appointed, like the servant in the case of *SAR & H* v *Albers supra*, or whether his unauthorised acts can be regarded as wrongful or unauthorised modes of performing his prescribed task.
>
> It stands to reason that the less precisely the scope of the servant's duties is defined, the more likely it becomes that a deviation from his prescribed duties will be regarded as merely an unauthorised mode of performing his authorised tasks.''

There is no evidence that when Bell made the alleged phone call to Khera he was ostensibly doing work with which he had been charged by SC Finance. Khera did not say that Bell purported to be acting as a representative or employee of SC Finance; neither did he say that he thought that Bell was a senior executive in the employ of SC Finance or was ``clothed with the powers'' of the institution. In *South African Railways & Harbours* v *Marais* 1950 (4) SA 610 (A) at 619-20 WATERMEYER CJ said:

> ``In my opinion, a master cannot be held liable for the death of a person which is caused by an extra danger to such person not created by a negligent performance of the master's work but by an act done by his servant for his own purposes and entirely outside the scope of his employment.''

The crux of the matter is whether or not Trinity has established, *prima facie*, that Bell was acting in the course or scope of his employment. Whilst it is accepted that Bell was an employee of SC Finance, there is no evidence at all as to what his duties were in early 1992 or what position he held. All that Khera knew was that Bell had phoned him from Harare and, given SC Finance's telephone number. Khera did not say that Bell had said that he was an employee of SC Finance; he said that Bell had said that Trinity owed SC Finance a lot of money. With regard to Bell's position or duties with SC Finance, Georgias said that in trying to get a loan from SC Finance he had had discussions with Bell and other officials at the bank and also that Bell had come to him three times on one day to try to get money he owed SC Finance. The fact that Bell was sent on such an errand, if true, would indicate that Bell could not have held a

Copyright Juta & Co Ltd

senior position at the time. It is clear, from Georgias' own admissions, that it would be against the interests of SC Finance for the contract with Senatla to be scuttled. In my opinion, there is nothing before the court which can be regarded as evidence that Bell was acting in the course or scope of his duties. We do not know what those duties were. Georgias

SMITH J

said that he thought there was a personal vendetta. That, to my mind, sums up the position.

With regard to the question of proof of quantum, in *Mkwanazi* v *van der Merwe & Anor* 1970 (1) SA 609 (A) at 631, VAN WINSEN JA referred with approval to *Herman* v *Shapiro & Co* 1926 TPD 367 at 379 where STRATFORD J said:

> ``Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages.
>
> ...
>
> It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in these circumstances the court is justified in giving, and does give, absolution from the instance.''

He also referred to *Klopper* v *Mazoko* 1930 TPD 860 where, at 855, TINDALL J said:

> ``... when a plaintiff is in a position to lead evidence which will enable the court to assess the figure he should do so and not leave the court to guess at the amount.''

As is said in Visser & Potgieter *Law of Damages* at p 437:

> ``It is not the task of the court to award an arbitrary amount of damages where a plaintiff has not produced the best evidence upon which a proper assessment of the loss could have been made.''

It is not for the court to reduce the quantum claimed by Trinity by 10% or 20%, as suggested by Mr *Wernberg*, because it is not satisfied as to the evidence led by Trinity.

The above are my reasons for granting SC Finance absolution from the instance and ordering that Trinity pay costs of suit.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Gollop & Blank, defendant's legal practitioners

CHOGA *v* JOHNSTON'S MOTOR TRANSPORT (PVT) LTD 1998 (2) ZLR 560 (HC)

Court **High Court, Harare**

Chatikobo J

Copyright Juta & Co Ltd

Opposed application

12 November & 2 December 1998 Judgment No. HH-220-98

Flynote

Employment - contract - termination - dismissal - employee's agreement to termination - must be in writing - if agreement not in writing, termination a nullity

Waiver - what is - fadure to pursue legal remedies - when may amount to waiver - requirement to plead waiver - what may be waived - action by other party a legal nullity - not possible to waive a nullity

Headnote

The applicant was under investigation at his place of work. At the end of the investigation, he was told he was being summarily dismissed. His employer alleged that the applicant had agreed to the termination, although the agreement had not been in writing. The applicant did not pursue his remedies under the labour legislation until after the 180 day prescriptive period had elapsed. The employer argued that the applicant had therefore been forced to seek reinstatement from the High Court, a remedy which the courts are reluctant to order. Alternatively, it was argucd, the applicant had, by not pursuing his remedies, waived his rights.

Held, that as the purported agreement to terminate the contract was not in writing signed by both parties, as required by the regulations, it was a nullity.

Held, further, that the respondent could not rely on waiver. In the first place, waiver, like estoppel, must be specially pleaded. This had not been done. Secondly, waiver only applied to acts which were voidable because of irregularities. In that situation, the affected person could waive the irregularity or consent to or acquiesce in unfair treatment. Here the act complained of was a nullity. A nullity cannot be cured by conduct amounting to waiver; one cannot waive something that is not there to be waived.

Cases cited:

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

Chidziva & Ors v *ZISCO* 1997 (2) ZLR 368 (S)

Commercial Careers College (1980) (Pvt) Ltd v *Jarvis* 1989 (1) ZLR 344 (S)

Essex County Council v Essex Inc Congregational Church Union [1963] AC 808

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

Madonko v Zimbabwe Cycle Industries HB-15-96

North-Eastern Districts Assn (Pty) Ltd v Surkhey Ltd & OrS 1932 WLD 181

Ruturi v Heritage Clothing 1994 (2) ZLR 374 (S)

Copyright Juta & Co Ltd

CHATIKOBO J

Winterton Holmes & Hill v *Paterson* 1995 (2) ZLR 68 (S)

Case Information

E T Matinenga, for the applicant

R M Fitches, for the respondent

Judgment

CHATIKOBO J: What is in issue in this case is the legality of the dismissal of the applicant from the respondent's employ. The applicant was, until 19 February 1996, employed by the respondent as a stores controller. On 19 February 1998, he left his employment. The circumstances under which he left employment are not common cause. The parties' respective contentions, which are diametrically opposed, raise serious disputes of fact. Happily for me, the matter can be resolved on the basis of whether the respondent's contention amounts to a defence to the applicant's assertions.

The applicant says that he was told to stay away from work in order to facilitate certain internal investigations which involved him. He was told that he would be called back to work. Nothing happened until he consulted lawyers in August 1996, some five months later. It was then that he was advised that he had been summarily dismissed. He asserts that he was never told that he was being dismissed at the material time.

The respondent's stance emerges clearly from para 3 of the opposing affidavit deposed to by Peter Moore. In it he states:

> ``He (applicant) therefore agreed to being dismissed and authorised me and Mr Marongwe to process his terminal benefits and instructing the responsible authority that he be refunded his pension contributions. I must emphasise that it was all by agreement that he had been dismissed and that he accepted the dismissal and that he would be paid his salary up to 19 February 1996 and that he also be paid a month's salary in lieu of notice (which he now says was a bonus)."

What I have to decide is whether it was lawful to terminate a contract of employment in the manner alleged in this passage.

The Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (the regulations), provide in s 2(1)(b) thereof that no employer shall summarily or otherwise terminate a contract of employment with an employee unless he and the employee mutually agree, in writing, that the contract should be terminated. I did not understand Mr *Fitches*, who appeared for the respondent, to dispute the clear statement of law upon which the decision in *Ruturi* v *Heritage Clothing (Pvt) Ltd* 1994 (2) ZLR 374 (S) at 379A-H was based, namely, that if the law requires, as s 2(1)(b) of the regulations does, that an agreement should be reduced to writing, it implies that the writing must bear the signatures of both parties. See also *Madonko* v *Zimbabwe Cycle Industries* HB-15-96. Nor is it open to doubt that any purported termination of a contract of employment which does

Copyright Juta & Co Ltd

not comply with the regulations is a nullity. See *Commercial Careers College (1980) (Pvt) Ltd* v *Jarvis* 1989 (1) ZLR 344 (S).

Mr *Fitches*, however, sought to circumvent the difficulty in the way of his case by arguing that the applicant chose not to pursue the remedies given to him under the Labour Relations Act [*Chapter 28:01*] (the Act) until the prescriptive period of 6 months expired. As a consequence, the applicant has been compelled by that circumstance to seek reinstatement from the High Court, which he can only do in terms of the common law and, at common law, the courts are reluctant to order reinstatement. He thus entreated me to exercise my discretion against the applicant. This argument, which might seem ingenious at first blush, cannot withstand the weight of a modicum of scrutiny. In essence, what is being contented is that there exists in this branch of the law a dual set of remedies which permits an employee to proceed either in terms of the common law or under the Act. The cases upon which reliance was placed by Mr *Fitches* do not bear him out. The first such case is *Commercial Careers College (1980) (Pvt) Ltd* v *Jarvis supra*. While that case reiterated that the remedy of reinstatement was discretionary, that was not the most important part of the judgment, which I perceive to be that a dismissal carried out without compliance with the regulations is a nullity. This much is apparent from what GUBBAY JA (as he then was) stated at p 348D-E of the report:

> "(The) termination was not in accordance with statutory provisions because the written approval of the Minister was not first obtained. Consequently, it may be argued with some force that the employee falls into the same category as that of a public servant, making the principle discussed by INNES CJ in *Schierhouts*' case *supra* at 109 applicable. It is `that a thing done contrary to the direct prohibition of the law is void and of no effect. So that what is done contrary to the prohibition of the law is not only void, but must be regarded as never having been done - and that whether the law-giver has expressly so decreed or not; the mere prohibition operates to nullify the act'."

This lucid statement serves to demonstrate that *Jarvis*' case is not authority for the proposition advanced by Mr *Fitches* that an employee who seeks a remedy at common law in these circumstances cannot place reliance on the employer's non-compliance with the relevant statutory provisions. Equally, unhelpful is the second case on which Mr *Fitches* placed reliance, that of *Winterton Holmes & Hill* v *Paterson* 1995 (2) ZLR 68 (S). This case is clearly distinguishable. The Supreme Court was concerned, not with the legality of the dismissal but with the advisability of ordering reinstatement in the light of the proven sour relationship between the employee and her employers. What had happened is that the trial court could not resolve on the papers the question whether the dismissal of the employee was wrongful or not. It had accordingly referred the matter to trial. An appeal having been noted with leave, the point taken on appeal was that, irrespective of any possible

illegality of the decision, the court below should have found that reinstatement was undesirable. The learned CHIEF JUSTICE summed up counsel's submission on this point in these terms at p 74C:

> ``Mr *Andersen* went on to submit that on the facts revealed in the affidavits of both parties, the learned judge

Copyright Juta & Co Ltd

ought to have come to the conclusion that it was wholly inappropriate for the respondent to be reinstated in employment. *He ought not to have referred that issue to trial even though he considered that the validity or otherwise of the respondent's suspension and dismissal could only be resolved after the reception of* viva voce *evidence*" (my emphasis).

Had the Supreme Court been called upon to adjudicate on the legality of the decision, I have no doubt it would have held, in line with its earlier judgment in the *Jarvis* case, that the failure to comply with the regulations rendered the dismissal nugatory. Perhaps, Mr *Fitches* may have been led astray by the passage in *Paterson*'s case which appears at p 73G-H:

``Mr *Andersen* emphasised in argument that it was the respondent who had resorted to civil proceedings before the High Court, seeking an order which, effectively, was for her reinstatement and that, accordingly, the contentious matters of her suspension/dismissal and reinstatement did not fall to be decided under the Labour Relations legislation in terms of which, if the suspension was found by the determining authority to be unlawful, there was no option but to order reinstatement. See *Masiyiwa* v *T M Supermarkets* 1990 (1) ZLR 166 (S) at 170F-171A; *United Bottlers (Pvt) Ltd* v *Murwisi* 1995 (1) ZLR 246 (S) at 251. The question fell to be decided under the common law. See *Commercial Careers College(1980) (Pvt) Ltd* v *Jarvis* 1989 (1) ZLR 344 (S). I agree. Indeed it was noted by the learned judge that it was expressly acknowledged by both parties that the High Court had jurisdiction to determine the dispute. If the respondent wished to obtain what she terms `statutory reinstatement' she should not have taken the common law route, which permitted a discretion to refuse reinstatement even though the dismissal of the employee was found to be unlawful. She should have left the issue of her suspension to be determined by a labour relations officer in accordance with the relevant legislation."

Two observations are pertinent. The first is that these observations were valid at the time they were made, but are no longer so in view of the Supreme Court's subsequent decision in *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 in which it was held, overruling *Murwisi supra,* that a labour relations officer has the power to specify an award of damages as an alternative to reinstatement. The second and more apposite observation to be made is that the applicant seeks only a declaration that the termination of his contract of employment is a nullity by virtue of the failure to comply with the relevant statutory provisions. Because what happened was a nullity, it is as if it never happened. Such a conclusion would not in any way be inconsistent with the *ratio* in *Paterson* or *Jarvis*.

I have to hold therefore that the purported dismissal of the applicant was a nullity.

- However, Mr *Fitches* had another arrow in his quiver. It was his

submission, based on the majority judgment in *Chidziva & Ors* v *Zimbabwe Iron & Steel Co Ltd* 1997 (2) ZLR 368 (S), that the applicant waived his rights as he did nothing between February, when he was dismissed, and August, when he first consulted a lawyer. Waiver or estoppel must be specially pleaded. This much is apparent from both the majority and the minority judgments in *Chidziva*. The nearest plea of waiver in this case is the assertion made on behalf of the respondent that the applicant accepted his dismissal. This assertion is so hotly contested that even if I were to find that waiver is a defence open to the respondent, I would not be able to decide it on the papers in view of the factual dispute. As Christie *The Law of Contract in South Africa* 3 ed p 493 observes:

``An allegation of waiver or anything akin to it should be specially pleaded and because close investigation of the

Copyright Juta & Co Ltd

facts and surrounding circumstances will almost always be necessary the court is unlikely to be able to dispose of the matter on affidavits.''

I find myself gazing in the face of similar difficulty. It is my considered view, however, that unlike their Lordships in *Chidziva*'s case, it is not open to me to consider the issue of waiver. In *Chidziva*'s case different regulations were being considered *viz* the Labour Relations (Retrenchment) Regulations 1990. These regulations permit the works council to broker an agreement between an employer and his employees. If an agreement is reached and the employees accept their packages, that is the end of the matter. If not, the matter is referred to a retrenchment committee. In *Chidziva*, all but two employees accepted their packages. It is this conduct, coupled with the inordinate delay in taking action, which gave rise to a plea of waiver. On the other hand, there is no provision in the regulations with which I am concerned which obliges or empowers an employee to accept a wrongful dismissal. The only possible exception is where the employee voluntarily resigns. More importantly, the decision which was challenged in *Chidziva* to which the waiver related was not a nullity. *In casu* it is a nullity. One cannot waive something which is not there to be waived. That a nullity cannot be cured by conduct amounting to waiver, acquiescence or consent on the part of a person affected by the decision derives support from the *dictum* of MUCHECHETERE J in *Bulawayo Bottlers (Pvt) Ltd* v *Minister of Labour & Ors* 1988 (2) ZLR 129 (H) at 143D where he said:

``In this case, the re-hearing by Mr Chinduta is a nullity and the petitioner could not therefore have waived its right to object to it.''

This *dictum* derives strong support from respectable authority. In de Smith's *Judicial Review of Administrative Action* 4 ed p 153 the observation is made concerning conduct which amounts to waiver, acquiescence or consent that:

``The general rule is that want of jurisdiction cannot be cured by such conduct on the part

CHATIKOBO J

of the person over whom the purported jurisdiction is exercised, whereas voidable acts may become unimpeachable as a result of such conduct.''

In other words, while one can waive irregularities in a voidable act, one cannot waive something which never was. The point is made rather well by the legendary LORD DEVLIN in *Essex County Council* v *Essex Incorporated Congregational Church Union* [1963] AC 808 at 834, where he says that when a superior court is questioning the jurisdiction of an inferior tribunal:

``It has to be satisfied that the tribunal has general jurisdiction, that is, jurisdiction to enter upon the inquiry. A statute, besides laying down conditions precedent to the entry upon the inquiry, often lays down conditions which have to be satisfied before the tribunal takes some step in the course of the inquiry or makes interim or final orders. If these conditions are not satisfied, it is then sometimes said the tribunal had no power to take the step or make the order. That is not what is meant by general jurisdiction. If the tribunal makes an order it ought not to have made, it may thereby fall into an error of law which can be corrected but the error does not deprive it of jurisdiction. This distinction is made clear in the opinion of the Judicial Committee in the well known case of *Colonial Bank of Australasia* v *William* (1874) LR 5 PC 417 (PC) where it is said:

`*... the question is, whether the inferior court had jurisdiction to enter upon the inquiry, and not whether*

Copyright Juta & Co Ltd

there has been miscarriage in the course of the inquiry'" (my emphasis).

I perceive the words, I have emphasised to mean, in modern or local parlance, that the issue of waiver or acquiescence or consent does not arise where the act complained of is a nullity. It is only in respect of acts which are voidable on account of irregularities committed by an authority who had the power to act, that the person affected by the decision can elect to waive the irregularity or to consent to or acquiesce in the unfair treatment. That seems to be what LORD REID had in mind when, in his speech in the *Essex County Council* case at p 820 he said:

> ``... it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.''

It is my firm view, therefore, that ``action which is *ultra vires* is unauthorised by law, outside jurisdiction, null and void, and of no legal effect'' (Wade *Administrative Law* 6 ed p 349) and consequently not condonable.

In any event, I consider it sound to say that the delayed enforcement of a right, of itself and without more, can never deprive a person of a right except by prescription. In *North Eastern Districts Assn (Pty) Ltd* v *Surkhey Ltd* 1932 WLD 181 at 186, KRAUSE J stated:

> ``It is not by mere delay that a man loses his rights, even if he is aware of the fact that another has infringed his rights. Delay or `standing by', as it is called, may be taken into consideration by the court in arriving at the conclusion as to whether or not the man did or did not lose his rights.''

CHATIKOBO J

In *Chidziva*'s case at 384C KORSAH JA, speaking of delay, said:

> ``In such circumstances their conduct and neglect, *though perhaps not waiving the remedy*, yet put the respondent in a situation in which it would be unreasonable to place it if the remedy were afterwards to be asserted ... Thus giving the respondent the impression that they had waived their rights ... ''

I understand His Lordship to be saying that, delayed action does not amount to waiver but can give rise to estoppel, which, like waiver, should be specially pleaded. As the respondent has not raised the issue of estoppel I cannot consider it in this judgment.

Finally, I must dispose quickly of the suggestion by Mr *Fitches* that the application in this case is one for a review of the respondent's decision and that, as it was not brought within the eight week period, it is time barred and that in the absence of an application for condonation it should fail on that account. I respectfully associate myself with the remarks of MUCHECHETERE J in the *Bulawayo Bottlers*' case at p 142H-143A that:

> ``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 rehearing by Mr Chinduta was regular or lawful. Its whole position is that the re-hearing was irregular or unlawful and therefore a nullity.''

I find these remarks to mirror those of the Judicial Committee quoted with approval in the *Essex County Council* case at p 834 that ``the question is, whether the inferior court had jurisdiction to enter upon the inquiry, and not whether there has been a miscarriage in the course of the

---

Copyright Juta & Co Ltd

inquiry".

A distillation of these *dicta* leads me to the conclusion that a person who comes to court asking for a declaration to the effect that a certain action which affects him is of no force or effect, is not asking the court to review the process by which the action was arrived at, but is merely asking the court to declare that the purported action was a non-event from the beginning. He need not comply with the eight-week period provided for in the rules of court.

In the result, the application must succeed with costs. Accordingly, it is ordered that the termination of the applicant's contract of employment with the respondent is of no force or effect and it is set aside.

Mukushi Foroma & Partners, applicant's legal practitioners

Wilmot & Bennett, respondent's legal practitioners

CHIRAMBASUKWA *v* MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS 1998 (2) ZLR 567 (SC)

Court **Supreme Court, Harare**

Ebrahim JA, Muchechetere JA & Sandura JA

Civil appeal

23 February & 16 December 1998 Judgment No. S-40-98

Flynote

Administrative law - administrative decision - notification of - affected person can only claim benefit of decision when it is formally notified to him - until then, it may be reversed, varied or suspended

Headnote

The appellant had been appointed to the post of Deputy Ombudsman. In terms of the Ombudsman Act [*Chapter 10:18*], his salary and allowances were fixed by the President. In September 1989, a Cabinet Minute was signed by the Acting President, fixing a higher salary and allowances than had been paid previously. This Minute was sent to the Ministry of Justice, which was responsible for the administration of the Ombudsman's Office, but was not sent on to the Ombudsman's Office. Shortly after the Minute was sent to the Ministry, the Secretary to the Cabinet sent an instruction to the Ministry that the new salary and allowances were not to be implemented, as the President wished to reconsider the matter. Although the appellant was not formally notified of the contents of the Minute, he became aware of them unofficially. He claimed the difference between his old salary and the higher one set out in the Minute. It was argued on behalf of the Minister that as the appellant had not been formally notified of the new salary and allowances, he was not entitled to them.

Held, that the maker of an administrative decision, like a judge, becomes *functus officio*. In the case of the administrative decision maker, this happens when the decision has been officially

---

Copyright Juta & Co Ltd

notified to the person affected. Until then, the decision-maker can vary, revoke or suspend the decision.

Cases cited:

Garlick's Est v *CIR* 1934 AD 499

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

Leyds NO v *Simon & Ors* 1964 (1) SA 377 (T)

Case Information

P Nherere, for the appellant

L Hove, for the respondent

Judgment

SANDURA AJA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's claim against the respondent for payment of the sum of $26 760.50, interest thereon at the prescribed rate and

SANDURA AJA

costs of suit. *(186) The sum claimed represented the difference between the salary and allowances paid to the appellant as Zimbabwe's Deputy Ombudsman and what he alleged ought to have been paid to him in terms of Cabinet Minute No. 250 of 1989 (``the Cabinet Minute'') from 1 May 1990 to 15 May 1991.

The background facts in this case are as follows. The appellant was the Deputy Ombudsman of Zimbabwe from 14 July 1987 to 15 May 1991. His conditions of service were governed by s 5(1) of the Ombudsman Act [*Chapter 10:18*] (``the Act'') which reads as follows:

> ``5 (1) The Ombudsman and the Deputy Ombudsman shall hold office on such terms and conditions, including terms and conditions relating to the payment of salary, allowances and pension benefits as the President may fix.''

On 6 September 1989, the Acting President (``the President'') signed the Cabinet Minute already referred to. The Cabinet Minute amended the appellant's conditions of service and granted him a greater salary and housing allowance than he was previously entitled to.

The Cabinet Minute was subsequently sent to the Ministry of Justice, Legal and Parliamentary Affairs (``the Ministry''), the Ministry responsible for the Office of the Ombudsman. Shortly thereafter, Dr Utete, whose official designation at the time was Secretary to the President and Cabinet, wrote the following letter to the Secretary for Justice, Legal and Parliamentary Affairs (``the Secretary'') on 21 September 1989:

> ``Reference is made to Cabinet Minute No. 250/89 signed by your Minister and the Honourable Vice President in

Copyright Juta & Co Ltd

the above regard.

Please be advised that as His Excellency the President would wish to examine this document, *nothing* should be done to bring about the changes to the salary and housing allowance for the Deputy Ombudsman as stated in your minute signed by the Minister.''

Subsequently, on 26 September 1989, Mr Galloway, acting on behalf of Dr Utete, wrote to the Secretary as follows:

``I refer to your minute reference A/21/5 dated 22 September 1989 which merely acknowledges our minute 38/97/11 dated 21 September 1989 without referring to the President's directive.

You are accordingly asked to confirm that no action will be taken to alter the Deputy Ombudsman's Conditions of Service until the matter has been reviewed by the President.''

It was common cause that a copy of the Cabinet Minute subsequently came into the appellant's possession. However, what was not common cause was whether the Cabinet Minute had been officially sent to the Ombudsman's Office by the Ministry as alleged by the appellant. That allegation was denied by Mr Justice Cheda who was the Secretary at the time.

However, because of Dr Utete's letter, the increased salary and housing allowance were not paid to the appellant. Consequently, the appellant instituted a claim for the shortfall of $26 760.50.

SANDURA AJA

Mr *Nherere*, who appeared for the appellant, submitted that when the President signed the Cabinet Minute he fixed the appellant's new salary and housing allowance in terms of s 5(1) of the Act and that the appellant was, therefore, entitled to the new salary and housing allowance. He submitted that the official communication of the provisions of the Cabinet Minute to the appellant was not necessary for the provisions to come into effect. I disagree.

Whilst I agree that when the President signed the Cabinet Minute he fixed the new salary and housing allowance payable to the appellant in terms of s 5(1) of the Act, there is nothing in law which would have prevented the President from amending, revoking or suspending the operation of the Cabinet Minute before its provisions were officially communicated to the appellant.

Commenting on the exercise of statutory powers and the reversal of administrative decisions previously made, the learned author, Lawrence Baxter, after stating that administrative legislation may be varied, amended or repealed, says the following at p 372 of his well-known legal textbook, *Administrative Law*:

``The law relating to other administrative acts requires much closer examination. It has been said that `[t]he general rule is that the same authority, which introduces anything, may also abolish it ... *Cujus est instituere ejus est abrogare*' ... Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interests, it is said that the decision-maker

---

Copyright Juta & Co Ltd

has discharged his office or is *functus officio*."

The issue to be determined is the stage at which the decision-maker becomes *functus officio.* In my view, he or she becomes *functus officio* when his or her decision has been officially communicated to the person affected. I am, of course, only concerned with favourable decisions, because it is hardly likely that any person would object if a decision which is unfavourable to him or her is changed to his or her benefit. In my view, until the decision has been officially communicated to the person affected the decision-maker can vary, revoke or suspend it. However, when it is officially communicated to the person affected the point of no return is reached.

I say so because it seems to me that the common law principle which governs the alteration of judgments applies to administrative decisions. That principle was set out by DE VILLIERS JA in *Estate Garlick* v *Commissioner for Inland Revenue* 1934 AD 499 at 502 as follows:

``His point is that by the Roman-Dutch law an order of court, once it has been pronounced by the word of mouth of the judge, cannot as a rule be thereafter altered or amended by that

SANDURA AJA

judge. There can be no doubt that the rule was as stated. Thus Damhouder ... lays down that all final judgments must be pronounced by word of mouth of the judge, or of one judge on behalf of the majority of the court, and that such judgment must be pronounced publicly, in the day-time, and in the presence of the parties or at any rate after due notice to the parties, and that the judge, once having so uttered a definitive judgment, is thereupon *functus officio*, so that he cannot thereafter alter, supplement, amend, or correct the judgment ... To this general rule there are certain exceptions ... "

That principle has been applied to decisions made by corporate bodies.

In *Leyds NO* v *Simon & Ors* 1964 (1) SA 377 (T), the creditors of a company in liquidation passed a resolution in August 1963 instructing the liquidator of the company to withdraw an action, pending in the Supreme Court of South Africa, between the company and one Frankel. Thereafter, certain information came to the liquidator's notice, and the creditors subsequently passed another resolution in September 1963, instructing the liquidator that the action should not be withdrawn but that the right of action should be offered for sale. Frankel had not been officially informed of the earlier resolution. It was argued on behalf of Frankel that the resolution to withdraw the action against him, which had been adopted in August 1963, amounted to an abandonment of the claim and that accordingly, there was no claim against Frankel which could be sold. Commenting on that submission, VILJOEN J said the following at 383B-D:

``It is clear law that the resolution taken by a corporation can always be rescinded and that that corporation is not bound by the resolution until such time as it has been communicated to the person affected: *Rajee* v *Zeerust Town Council* 1938 TPD 283; *Theron* v *Town Council Springs* 1945 TPD 55 at p 59; and *Hopf* v *Pretoria Municipality* 1947 (2) SA 752 (T).

The resolution to withdraw the claim was never officially communicated to Frankel and the subsequent resolution to sell the claim amounts, in my view, to a rescission of the former resolution."

Subsequently, in *Lek* v *Estate Agents Board*, 1978 (3) SA 160 (C), the appellant, a resident of Cape Town, appealed against the respondent's refusal to issue a fidelity fund certificate to him.

Copyright Juta & Co Ltd

The respondent's decision had been taken at a meeting held at its office in Johannesburg and had been communicated to the appellant by means of a letter addressed to him at his residence in Cape Town. Before hearing the appeal the court had to consider whether it had jurisdiction to hear it. Counsel for the respondent argued that the court did not have jurisdiction. He submitted that the only court with jurisdiction was the court to whose jurisdiction the respondent, as a juristic person, was subject, or the court having jurisdiction at the place where the meeting in question, ie the meeting where the decision was taken, was held. He therefore submitted that the only courts with jurisdiction were the Transvaal Provincial Division and the Witwatersrand Local Division of the Supreme Court.

The court ruled that it had jurisdiction because the respondent's decision

---

SANDURA AJA

had been pronounced in Cape Town, ie within the area of the court's jurisdiction. FRIEDMAN J had this to say at 167 *in fine*- 168A-C:

> ``The meeting was held in Johannesburg but the decision (to refuse the application) was communicated to appellant, i.e. pronounced, in Cape Town (by means of the letter referred to above). A decision taken by a corporate or juristic person like the respondent has no legal efficacy until such time as it has been communicated to the person concerned. Until such communication takes place, there is no decision which could form the subject-matter of an appeal or a review ... The common law in respect of judgments of the court is clear, *viz* that it is the pronouncement of the decision that is the decisive moment. Until a judgment is pronounced, the judge may change his mind but, once a judgment has been pronounced, the judge becomes *functus officio*. (See *Estate Garlick* v *Commissioner for Inland Revenue* 1934 AD 499 at 502). The same principle applies in the case of decisions taken by a corporate body, ie the latter is not bound by its resolution until it has been communicated to the person affected."

I can see no reason why this principle should not apply to the decision taken by the President when he signed the Cabinet Minute. In my view, until the provisions of the Cabinet Minute were officially communicated to the appellant, the President could amend, revoke or suspend the operation of the Cabinet Minute.

Finally, I would like to consider whether the provisions of the Cabinet Minute were officially communicated to the appellant.

[*The learned Judge of Appeal considered the evidence in this regard, and continued:*]

In the circumstances, there is no doubt in my mind that the Cabinet Minute was not officially sent to the appellant by the Ministry. As the appellant appears to have had easy access to the Vice President's office, it may very well be that he was given a copy of the Cabinet Minute by an official in that office. However, I should add that the appellant denied having obtained the document from that source, but admitted that it would have been improper for him to obtain it in that manner.

I am, therefore, satisfied that in order to succeed in his claim against the respondent in the court *a quo* the appellant should have established that the provisions of the Cabinet Minute had been officially communicated to him by the Ministry. I have no doubt that he failed to do that.

Copyright Juta & Co Ltd

In the circumstances, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Gill Godlonton & Gerrans, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners

MACHIELS *v* COGHLAN WELSH & GUEST (LAW SOCIETY INTERVENING) 1998 (2) ZLR 572 (SC)

Court **Supreme Court, Harare**

McNally JA, Muchechetere JA & Sandura JA

Civil appeal

28 September & 16 December 1998 Judgment No. S-176-98

Flynote

Legal practitioner - fees - charges raised for work done by law graduate, not yet admitted as a practitioner, and working under supervision of partner - entitlement of firm to recover fees

Headnote

A firm of legal practitioners employed a law graduate from a South African university. In order to obtain a Zimbabwean practising certificate, he had to pass certain local examinations. While these and other formalities were pending, he worked under the supervision of a partner. He was given an office and suitable clients were referred to him, among them the appellant. She was not made specifically aware of his unqualified status, although she was aware that he was working under supervision. The gradate then proceeded to act for her in respect of two related High Court matters. He did not sign any process, but he prepared the documents, wrote letters in his own name, made telephone calls, and took instructions. He also appeared before the taxing officer in the High Court when the appellant required her bill of costs to be taxed. At the taxation, the taxing officer accepted the appellant's argument that the attendances by the graduate should only be allowed at a rate substantially less than that billed. The firm took this decision on review to the High Court, which ruled that the taxing officer had misconceived the charging rate and referred the matter back to him.

On appeal to the Supreme Court, the appellant argued that no charge at all was permissible in respect of legal work done by an unqualified person. She contended that the graduate had committed an offence in terms of s 9 of the Legal Practitioners Act [*Chapter 27:07*].

Held, that although at might at first appear that a person in the graduate's position had contravened s 9, that conclusion flew in the face of history. The legislation nowhere referred to legal work done by legal clerks, but such work had been done from time immemorial, and been

---

Copyright Juta & Co Ltd

paid for it. The conclusion must be that to undertake legal work in the office of and under the supervision of a qualified lawyer is not to practice as a qualified lawyer. The phrase ``to practise as a legal practitioner'' means to practice independently, in a professional sense, exercising one's own independent professional judgment.

Held, further, that although the gradate appeared to have offended against s 9(2)(b) by instructing or assisting the appellant to commence an action in the High Court, and to do so for or in expectation of gain or reward in the form of his salary, this literal interpretation could not be adopted. His work should be seen as the work of the supervising partner.

Held, further, that though the graduate's appearance before the taxing officer would not have been allowed in South Africa, it was not appropriate to make a ruling on whether Zimbabwean practice was the same, no argument having been directed to this point.

McNALLY JA

Held, further, that although neither the High Court tariff nor the Law Society's general tariff of fees specifically provided for work done by a practitioner through the agency of an unqualified clerk, this did not mean that no charge could be made for such work.

Cases cited:

Bills of Costs (Pty) Ltd v *The Registrar, Cape, NO* 1979 (3) SA 925 (A)

Caietta & Anor v *Gess* 1988 (2) SA 395 (SWA)

Goldschmidt & Anor v *Folb & Anor* 1974 (3) SA 778 (T)

Green v *Hoyle* [1976] 2 All ER 633 (QB)

Harvey v *McKenzie* 1978 (3) SA 803 (C)

Hudgell Yeates & Co v *Watson* [1978] 2 All ER 363 (CA)

Law Soc of Zimbabwe v *Lake* 1988 (1) ZLR 168 (S)

Malan v *Meyer* 1974 (1) SA 476 (T)

Masterson In re 1974 (1) RLR 138 (G)

Masterson Ex p 1974 (2) RLR 33 (A)

R v *Zeiss* 1961 (1) SA 610 (T)

Way v *Bishop* [1928] Ch 647

Legislation considered:

Legal Practitioners Act [*Chapter 27:07*], s 9

Copyright Juta & Co Ltd

Case Information

Appellant in person

A P de Bourbon SC, for the respondent

E W W Morris, for the Law Society

Judgment

McNALLY JA: When is a lawyer not a lawyer? Or, more prosaically but perhaps more exactly, when can a firm of legal practitioners charge for legal work done by a supervised law-graduate assistant who is not yet in possession of a valid practising certificate in terms of s 3(3) of the Legal Practitioners Act [*Chapter 27:07*] (the Act)?

I have set out the background to this particular case in judgment No. S-46-98 in which I granted leave to appeal. Since then, as proposed in that judgment, the Law Society of Zimbabwe has been granted leave to intervene - compare *Whaley & Ors (Law Society of Zimbabwe intervening)* v *Cone Textiles (Pvt) Ltd* 1989 (1) ZLR 54 (S) at 58E *et seq*.

I will refer to the parties as ``the client'' ``the law firm'' and ``the Law Society'' respectively. I will refer to the graduate assistant as ``the unqualified clerk''.

What happened was this. The law firm employed a young Zimbabwean graduate with a law degree (B. Comm, LL. B) from South Africa. In order to obtain a valid practising certificate he had to pass certain law examinations to bring him up-to-date on the law of Zimbabwe as it differed from that of South Africa. He also had to satisfy the other provisions of s 5 of the Act; have his application for registration granted by the High Court; and finally pay for his practicing certificate. He was in the process of doing these things. But he

had not yet done them. Hence, he was employed by the law firm, but placed under the supervision of one of the partners. He was given his own office and suitable clients were referred to him, among them the client in this case. There is a dispute on the papers, the details of which cannot really be resolved without oral evidence, as to what exactly she was told about his status. His supervisor swears that the client was at all times aware that he was supervising the unqualified clerk, and that the clerk did the majority of the work, but on his, the supervisor's, instruction.

The clerk himself says that the client ``was at all times aware of the fact that I could not act alone, and that I was at all times under the constant supervision of (my supervisor)''.

It will be noted that there is no statement by either the clerk or the supervisor that she was made aware specifically of his unqualified status. Being under supervision is not necessarily the same as being unqualified. Nor is it said how she allegedly became aware of this. He clearly did not hand to her a legally prepared statement as to his status, and require from her a signed acknowledgment of her acceptance of his services on these terms. If what was done was less

Copyright Juta & Co Ltd

than that, what was she told, and by whom?

She, on the other hand, claims she was never told, either that he was unqualified or that he was under supervision. She found out that he was unqualified only when, being dissatisfied with the service rendered, she enquired from the Law Society as to his status and discovered that he was not a registered practitioner. She had originally gone to the law firm and asked to see ``a junior legal practitioner.''

Be that as it may, he advised her that his ``charging rate'' was $200 an hour, and she accepted that. However, she says, and there is no reason to disbelieve her, that she accepted this on the understanding that he was a junior legal practitioner. She would not have agreed had she known he was an unqualified clerk.

The unqualified clerk then proceeded to act for her in respect of two related High Court matters. One was an action for damages. The other was an application for review in the High Court of a Rent Board decision. He did not sign any process. That was done by his supervisor. But he prepared the documents, he wrote letters in his own name, he made telephone calls, he took instructions. What he did was ``legal work''. This is not disputed. And it seems, though not anywhere explicitly stated, that he appeared before the taxing officer in the High Court when the client required that her bill of costs as between practitioner and client be taxed.

At the taxation, the taxing officer accepted the client's contention that attendances by the unqualified clerk should be allowed only at the rate of $28 per hour. He arrived at this rate by applying the rate of $7 which appears in

---

McNALLY JA

the High Court (Fees and Allowances) Rules 1994 (SI 164B of 1994) for ``formal attendance by an employee of a legal practitioner''. See s A para 3 of the First Schedule to the Statutory Instrument. *(187) He treated this as ``$7 per quarter hour'' (which it was not) and thus converted it to $28 per hour.

The law firm took this decision on review to the High Court. It contended that a rate of $200 per hour should have been allowed, alternatively a fair and reasonable rate.

The learned judge ruled that:

1. The rate of $28 per hour was misconceived;

2. The matter should be referred back to a different taxing officer to make a decision on the rate on a proper basis.

The client appealed against this order. Initially she sought to defend the ``$28 per hour'' ruling. Realising this was indefensible, she amended her grounds. In effect, she sought a directive that no charge was permissible in respect of legal work done by an unqualified person. She relies, in essence, on s 83 of the Act. She contends that an offence in terms of s 9 of the Act has been committed and there is no tariff of fees for clerks.

Copyright Juta & Co Ltd

The simple question on appeal is, therefore, whether a law firm may charge a client for legal work done by an unqualified person. One might think it is a simple matter of looking at the Act (the Legal Practitioners Act [*Chapter 27:07*]. But I have found nothing whatever in the Act about work done by unqualified clerks. Nor in r 308 about fees in respect of clerks' work. Nor in the Law Society tariff about clerks' work. I think this is because the Act is the 1981 descendant of a long line of legislation going back hundreds of years into English legal history. Certain things were ``understood''. They ``went without saying''. Legal draftsmen became unwilling to change phraseology hallowed by use, interpreted by courts, sanctioned by practice. Young lawyers entering the profession say to themselves ``I don't understand this, but my seniors seem to be able to work with it. So no doubt I will come to understand it in time''.

And so, like the fable of the Emperor's clothes, people continue to read into the Act what is not there. It may be the only way to make it workable. But it seems to me not to be a very satisfactory way.

The Act and Rules and the Law Society Tariff need revision to provide clearly for charges in respect of legal work done by supervised unqualified clerks. The veil of mystery should be lifted. Transparency towards the public is important.

Meanwhile, we have to make of it what we can.

The 1981 Act was the Act which introduced the fusion of the legal

McNALLY JA

profession, so that advocates, attorneys, notaries and conveyancers all become simply legal practitioners. (The latter two have since been resurrected). But as far as attorneys were concerned, it was essentially a continuation of the old Attorneys, Notaries and Conveyancers Act, Chapter 218 of the 1974 Revised Edition of the Statutes. The major difference was the disappearance of the articled clerk.

Part III of the present Act is very similar to Part V of Chapter 218 of 1974. It is entitled ``Privileges, Restrictions and Offences in Connection with Practice''. It has four possibly relevant sections entitled:

8. Privileges of registered legal practitioners.

9. Offences by unqualified persons.

10. Prohibition against unqualified persons preparing certain instruments.

11. Prohibition against practice by or in association with unqualified persons.

We are not here concerned with the provisions of ss 10 and 11. The latter, despite its heading, is concerned with unqualified persons who were formerly qualified. Not the sort of person with whom we are here concerned.

Section 8 is entirely permissive, rather than exclusionary or prohibitive. It states that a registered

Copyright Juta & Co Ltd

legal practitioner who is in possession of a valid practising certificate (I will call him a qualified lawyer) may ``practise the profession of law''. That phrase is not defined. It does not say ``only a qualified lawyer ... ''

Section 9 contains important prohibitions. It is necessary to set out subss (1) and (2) in some detail:

> ``(1) No person other than a registered legal practitioner, registered notary public or registered conveyancer shall practise as such or in any manner hold himself out as or pretend to be or make use of any words or any name, title, designation or description implying or tending to the belief that he is a legal practitioner, notary public or conveyancer, as the case may be, or is recognised by law as such.
>
> (2) Subject to any other law, no person other than a registered legal practitioner who is in possession of a valid practising certificate issued to him shall -
>
> (a) sue out any summons or process or commence, carry on or defend any action suit or other proceeding in any court of civil or criminal jurisdiction in the name of any other person; or
>
> (b) for or in expectation of any fee, commission, gain or reward in any way instruct or assist any other person to sue out or threaten to sue out any summons or process or to commence, carry on or defend any action, suit or other proceeding in any court of civil or criminal jurisdiction; or
>
> (c) appear, plead or act in the capacity of a legal practitioner for or on behalf of any other person in any action, suit or other proceeding in any court of civil or criminal jurisdiction ... ''

At first blush, it would seem that the unqualified clerk in the present case has offended against subs (1) and subs (2)(b). Such action is a punishable offence under subs (5) and on that basis, the client/appellant would have to

be upheld in contending that no fee could be allowed. That is essentially the argument of the client.

But that conclusion flies in the face of history and of decided cases to such an extent that one is forced to examine the wording more astutely. Bennion *Statutory Interpretation* describes this approach, at para 119, as the Informed Interpretation Rule:

> ``that the interpreter is to infer that the legislator, when settling the wording of the enactment, intended it to be given a fully informed, rather than a purely literal interpretation (though the two usually produce the same result).''

What is meant by ``practise the profession of law'' in s 8(1)? What is meant by ``practise as such'' in s 9(1)? What is meant by ``for ... gain or reward in any way instruct or assist any other person ... '' in subs 9(2)(b)?

1. ``*Practise the profession of law'' contrary to s 9(1)*

I do not take this phrase, in the present context, to be different from the phrase ``practise as such'', when that means ``practise as a legal practitioner''. Both may be dealt with together.

Neither is defined in the Act. But before venturing into an examination of the case law it is

Copyright Juta & Co Ltd

necessary to remark that nowhere in the legislation is there any reference to legal work done by legal clerks in legal offices. Yet we know that from time immemorial, legal clerks have worked in legal offices. They have been paid by their employers. Has this always been illegal?

Cordery on Solicitors (I have access only to the fifth edition of 1961) says at p 426 under the heading ``Clerks generally - 1. General Considerations'' the following:

> ``Much of the solicitors work is, of course, done by admitted or unadmitted managing clerks acting under the general supervision of a partner.''

It is not said that such persons commit an offence. Yet English law contains substantially the same provisions as ours about offences committed by unqualified persons who ``do or purport to do the work of a solicitor'' (*Cordery op cit* p 44).

The answer, one is forced to conclude, is that to undertake legal work in the office of and under the supervision of a qualified lawyer is not to practise as a qualified lawyer - not to practise the profession of law.

That conclusion is borne out by the decision in *Way* v *Bishop* [1928] Ch 647 at 660 where RUSSELL LJ said:

> ``In my opinion, `practising as a solicitor' connotes a person who is acting as a principal; it connotes a person who has clients; it connotes a person in short who has a practice; and the words are not apt words to describe the position of a person who is acting as the servant of another who is practising as a solicitor.''

McNALLY JA

Way v *Bishop* was cited, but without comment, in *R* v *Zeiss* 1961 (1) SA 610 (T), a not very helpful decision which turned on the facts and in which the law was inconclusively mentioned.

Malan v *Meyer* 1974 (1) SA 476 (T) was a review of taxation in a matter between the two parties. Malan's attorney employed one Maree who, very like the ``unqualified clerk'' in the present case, was close to qualification but unqualified. He worked under supervision, and the attorney and client bill of costs had included charges in respect of attendances and work done by Maree.

The submission made at the taxation had been, as here, that no fees were claimable in respect of the services provided by Maree. But, perhaps unfortunately for the value of the decision as a precedent in this case, on review that point was abandoned. The matter was argued on the basis - ``according to what tariff should the firm be compensated for services performed by an unqualified person such as Maree?''

The learned judge, NICHOLAS J, later an eminent judge of appeal, was thus able to hold that, in an attorney and client bill, the items in the recommended tariff are no more than a guide. He was ``not persuaded that the taxing master's opinion was erroneous''.

While I find it strange that no reference was made, in the judgment, to the legislation equivalent to s 9 of our Act, the fact is that an experienced judge on the busy Transvaal bench had no problem in allowing a charge to be raised in circumstances virtually identical to those in the

Copyright Juta & Co Ltd

case in hand. The case was followed in *Goldschmidt & Anor* v *Folb & Anor* 1974 (3) SA 778 (T). See also *Harvey* v *McKenzie* 1978 (3) SA 803 (C) at 805-6.

Hudgell Yeates & Co v *Watson* [1978] 2 All ER 363 (CA) was an odd case about three partners in a firm of solicitors, one of whom, by oversight, forgot to renew his practising certificate so that he was disqualified from practising as a solicitor between 1 January and 2 May 1973. A client (who had had no dealings at all with that partner) tried to argue that the firm could not recover from him for any work done during that period. The account was from the partnership, one of whom was not a licensed solicitor. He failed.

The decision illustrates that it is the partner, not the partnership, who raises the charge. But the judgment of WALLER LJ at 373d is instructive on the point of work done by a clerk. He said:

> ``In this case much of the work was done by the managing clerk, Mr Frost, who was employed by the partnership. Counsel for the Law Society submitted (and His Lordship clearly agreed) that for every action as managing clerk there was a partner responsible. The work was always being done by an individual solicitor although it might be through a managing clerk working on his behalf.''

The conclusion to which all these cases lead is that ``to practise the

McNALLY JA

profession of law'' or ``to practise as a legal practitioner'' means to practise independently, in a professional sense. Such a person may well be a ``professional assistant'' ie an employee. But he exercises his own independent professional judgment. It does not therefore include ``to do legal work while unqualified, under the supervision of a qualified practitioner''. The same principle emerges from the two cases cited in respect of practising as an advocate - In re *Masterson* 1974 (1) RLR 138 and Ex p *Masterson* 1974 (2) RLR 33.

I am fortified in this conclusion by the decision of the present CHIEF JUSTICE in *Law Society of Zimbabwe* v *Lake* 1988 (1) ZLR 168 (S). I refer in particular to his references at pp 174-175 to the essentiality of the concept of ``professional independence'' and freedom from control. These are the basic ingredients of the practice of the profession of law. An unqualified clerk under supervision does not have, or purport to exercise, professional independence. He is not free from control. He thus does not practise the profession of law. He does not practise as a legal practitioner. He does not offend against s 9(1) in that respect. Whether on the facts of this case he offended against the other aspect of s 9(1), namely by holding himself out or pretending to be a practitioner, is another matter. I will revert to it later.

2. *Offence against s 9(2)(b)*

It seems clear to me that on a literal interpretation of s 9(2)(b), the unqualified clerk in this case did offend against this subsection. The ``gain or reward'' was his salary. ``For or in expectation of'' that salary he ``(instructed or) assisted another person (the client) ... to commence ... an action ... in the High Court.''

But again, against the historical background, and in the light of the case law cited, the literal interpretation is not to be adopted. An informed interpretation indicates that his work is to be

Copyright Juta & Co Ltd

seen as the work of the supervising partner, even though, and perhaps illogically, it is charged at a rate well below the charging rate of the partner, and at a rate considered appropriate for work done by the particular unqualified clerk.

3. *Charges for other non-legal work done by employees of a law firm*

The point was made during argument: ``What about charges for work done by other unqualified (though often highly skilled) persons in the employ of law firms - onveyancing clerks, estates department personnel, typists, secretaries, messengers, etc?''

Although not strictly relevant, some observations may be made about these various categories of employees.

McNALLY JA

In general, there is a proviso to s 11(4) of the Act which states:

> ``Provided that nothing in this subsection shall be construed as preventing a legal practitioner from paying a salary to a person in his employ who is not a registered legal practitioner.''

Typists and secretaries fall into this category, but their work is not charged to the client so no problem arises. *Conveyancing clerks* too, fall into this category. However the ruling in *Green* v *Hoyle* [1976] 2 All ER 633 (QB) was that it is the qualified conveyancer who ``prepares or draws the instrument of transfer''. The deed itself is normally a standard form document, and the clerk is regarded as ``merely'' (I mean no disrespect to highly skilled conveyancing clerks by the use of that word) taking instructions so as to compile the details to be included on the deed, such as the names and particulars of the parties, the correct description of the property, etc. Moreover, the charge for conveyancing is not specifically related to the work of the clerk, but is an *ad valorem* charge, related to the value of the property.

Estates department personnel. These persons, though again doing skilled work, do not ``practise the profession of law''. GALGUT AJA in *Bills of Costs (Pty) Ltd* v *The Registrar, Cape, NO* 1979 (3) SA 925 (A) at 945B-C said:

> ``I am not aware that, either in the Roman Law or in Holland, the winding up of an estate was the prerogative of the profession.''

Messengers. These employees perform at least one service, commonly called ``attending to file and serve'' for which the charge of $7 (in 1995) was allowed - s A3 of the First Schedule to SI 164B of 1994. There is no reason why the same section should not cover similar attendances by ``unqualified clerks''. But such a charge is intended only for what I may call ``non-intellectual attendances''. So no problem arises out of s 9 of the Act.

4. *Appearance before a taxing officer*

It is significant that the South African Appellate Division ruled, in the *Bills of Costs* case *supra* that:

> ``Accordingly the only persons who can appear before a taxing master in a Supreme Court are persons who are

Copyright Juta & Co Ltd

permitted to practise in such court."

Accordingly, if the unqualified clerk attended taxation in either of these two disputed taxations, the charge for his attending taxation should be disallowed, if that decision is to be followed. However, the practice in our courts may be different, and I do not propose to make a ruling without having heard specific argument on the point.

This, to my mind, is an application (perhaps unwarranted) of the principle in *Caietta & Anor* v *Gess* 1988 (2) SA 395 (SWA). There the foreign, locally unqualified attorney was actually present in court, and the issue of a charge

McNALLY JA

for his presence arose in connection with a party and party bill of costs. Had it been in our court he might well have offended against s 9(2)(c), if a charge had been raised for his presence. He could not claim to be a ``clerk under supervision''. For that reason *Caietta supra* does not apply in the present case.

5. *Taxation of costs generally*

I have not referred specifically to the distinction between practitioner and client costs, on the one hand, and party and party costs on the other. It is quite a complex distinction; see *Cilliers on Costs* 2 ed at p 46 *et seq*. But for our purpose we may say that practitioner and client costs are what the client has to pay her own practitioner. Party and party costs are the costs she may recover from the other side if the matter goes to court and she is awarded the costs.

The legislation is concerned primarily to look after the losing party in a contested court action, to ensure that her party and party bill is not too high. Hence the existence of a High Court tariff. That tariff, in the discretion of the taxing officer, limits what can be claimed by the winning party. See Order 38 r 308 (1) and (2) of the High Court Rules.

But where there is no winning or losing party, as here, there are still charges raised by the practitioner, payable by his own client, for legal services rendered. The client is protected by being entitled to have those costs taxed to ensure she is not overreached. See *Mheresi* v *McNaught Wickwar* 1997 (2) ZLR 386 (S). In such a case, r 308 (3) applies, and the taxing officer is directed to be guided, not by the High Court tariff, but by the recommended general tariff published from time to time by the Law Society.

There is no provision in that tariff for a charge by a practitioner in respect of work done under his supervision by an unqualified clerk. That, of course, is consistent with the client's argument. There is no provision, she says, because there is no right to charge.

I have dealt with that argument earlier. I have said there is no offence against s 9 of the Act because the clerk does not act as a practitioner. I have said that the supervising practitioner is entitled to charge for the work as done by him through the agency of the clerk under supervision. I have said that he charges a lower rate because (in effect) the time of the clerk is less valuable than his.

Copyright Juta & Co Ltd

I must say that I cannot understand why the Law Society's revised General Tariff of Fees does not cater for such work. It may properly be categorised as work done by the supervising practitioner through the agency of the supervised clerk. I would have thought that the hourly rate would range, according to the clerk's seniority, somewhere below the rate prescribed for

McNALLY JA

the most junior (0-2 years' experience) practitioner under the heading ``Fees: General Professional Services''. I do not think the supervising practitioner could be accused of undercharging (s 23(1)(p)).

Be that as it may, r 308(3) as amended provides only that a taxing officer ``shall be guided as far as possible'' by the Law Society tariff. The taxing officer then has a broad discretion, even where, as here, there is no actual specific provision.

6. *Holding out or pretending to be a ``qualified lawyer''*

It remains to consider this point, left over earlier for consideration.

I must say at once that there is no basis on which I could find, by reference to the affidavits alone, that the law firm or the unqualified clerk himself contravened the section by pretending that the clerk was a ``qualified lawyer''.

But I would stress that it is a matter of real importance that law firms make sure that this allegation cannot be made. The Law Society should consider whether to make rules, as I have suggested earlier, providing for a written statement and a written acknowledgment.

It will be apparent that I am not going to find in favour of the appellant on the main issue. However, because of the importance of the matter to the legal profession, the obscurity of the point in issue, and the possibility that the status of the clerk in question was not adequately explained to the client, I feel justified in proposing a special order as to costs.

7. *Costs*

(a) Since the appeal is to be dismissed there is no reason to interfere with the order as to costs made in the High Court.

(b) The wasted costs of the brief and abortive hearing on 24 November 1997 were reserved in the order made on 7 April 1998. Mr *de Bourbon* asked that these wasted costs be paid by the client/appellant. His submission was simply that he had to appear once the matter was set down. I agree that the fault lay largely with the Registrar, who should not have set the matter down. But the respondent knew the facts and chose to go for judgment by default. In my view, there should be no order as to those wasted costs.

(c) There will be no order as to the costs of the application to amend the grounds of appeal.

Copyright Juta & Co Ltd

(d) In the light of the considerations mentioned earlier, the appellant will be required to pay half the respondent's costs of appeal.

(e) There will be no order as to the costs of the intervening Law Society, whose assistance is appreciated.

McNALLY JA

8. *Order*

In the circumstances, the appeal is dismissed. The appellant is to pay half the costs of the respondent.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Coghlan, Welsh & Guest, respondent's legal practitioners

SMALL ENTERPRISES DEVELOPMENT CORP *v* PAPERSALES & SERVICES (PVT) LTD & ORS 1998 (2) ZLR 584 (HC)

Court **High Court, Harare**

Chinhengo J

Stated case

24 November & 16 December 1998 Judgment No. HH-241-98

Flynote

Company - shares - loan for purchase of - scheme whereby loan advanced to company which enabled new shareholders to purchases shares, assets and goodwill - not prohibited under Companies Act

Headnote

The second and third defendants negotiated with the previous shareholders in the first defendant company to buy the shares owned by the previous shareholders. The plaintiff company lent a sum of money to the first defendant to enable them to do so. The loan funds were paid directly to the sellers. The result of the transaction was that the second and third defendants

purchased all the shares in the first defendant, and the owners of 50 paid of shares of $1 each. The balance of the loan of some $123 000 was used to pay for the assets and goodwill of the company.

When the company got into financial difficulties, the plaintiff sought to recover the loan, plus

Copyright Juta & Co Ltd

interest. The suit was resisted on the grounds that the transaction had been unlawful, it being alleged that t contravened s 78 of the Companies Act [*Chapter 24:12*] as it was a loan to the first defendant for the purchase of shares in itself.

Held, that the true purpose of the loan was to enable the second and third defendants to purchase the company as a going concern, on the basis of the value of its assets plus goodwill. It was not for the purchase of its shares, which had a nominal value only. In any event, the object of s 78 was to ensure that purchasers of shares pay for their shares, not to prohibit quite innocent transactions.

Cases cited:

Karnovsky & Ors v *Hyams* 1961 (2) SA 368 (W)

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

Lipschitz NO v *UDC Bank Ltd* 1979 (1) SA 789 (A)

Mfrs Development Co (Pty) Ltd v Diesel & Auto Eng Co 1975 (2) SA 776 (W)

Rabonowitz & Anor v de Beers Consol Mines Ltd & Anor 1958 (3) SA 619 (A)

Straiton & Anor v Cleanwell Dry Cleaners (Salisbury) (Pvt) Ltd & Anor 1959 (2) R&N 385

Legislation considered:

Companies Act [*Chapter 24:12*], s 78

Case Information

G V Mamvura, for the plaintiff

E W W Morris, for the defendants

CHINHENGO J

Judgment

CHINHENGO J: This is a stated case the agreed facts of which are the following.

The plaintiff is a statutory body, commonly called a parastatal. It is established in terms of the Small Enterprises Development Corporation Act [*Chapter 24:12*] (``the Act''). Its functions are set out in s 18 of the Act. It is mandated to encourage and assist in the establishment of co-operatives and small commercial and industrial enterprises and to provide financial assistance, management counselling and training, information and general advice to such co-operatives and enterprises.

In 1992, the second and third defendants negotiated with VV Kilpin and BA Peillis (the sellers), then the shareholders of the first defendant, the purchasing of the sellers' business in the first defendant. The sellers were represented by their daughter, Mandy Betty Kilpin. An agreement

Copyright Juta & Co Ltd

of sale was concluded between the parties. Thereafter the second and third defendants approached the plaintiff for a loan in order to purchase the business. They were successful and the plaintiff lent and advanced to the first defendant the sum of $122 958. The second and third defendants stood guarantors for the first defendant and bound themselves as sureties and co-principal debtors for the due repayment of the loan and interest. Before the loan was granted, a Miss R Muzenda of the plaintiff perused the agreement between the second and third defendants and the shareholders of the first defendant, whereupon the plaintiff approved the loan to enable the second and third defendants to pay the purchase price for the business, as well as provide them with the initial capital.

The loan funds were paid out directly into an account belonging to County Supplies at Zimbank, Douglas Road Branch, that being the only operative account of the sellers. In the result, the second and third defendants purchased all the shares in first defendant and each one of them became the registered owner of fifty fully paid shares of one dollar each. Thus they purchased all interest in the business from the previous owners and became the sole directors of first defendant.

The actual purchase price of the business of first defendant was the sum of $140 000, of which the sum of about $40 000 was paid by the second and third defendants without any assistance from the first defendant or from the plaintiff.

The second and third defendants took over the running of the first defendant. No sooner had they done so than they discovered that there were undisclosed liabilities of first defendant which the first defendant was unable to pay. The business failed and the first defendant folded.

In this action, the plaintiff seeks to recover the amount of the loan plus interest in terms of the loan agreement. The defendants resist the claim,

alleging that the loan was for a *turpis causa*. This is a principle of the unenforceability of contracts contained in the maxim *ex turpi causa non oritur actio.*

The agreement between the second and third defendants and the sellers of first defendant is a short one. It reads, in the relevant part, as follows:

> ``The parties hereto have entered into and concluded the following agreement, that is to say:
>
> 1. That the Seller hereby agrees to sell and the Purchasers hereby agree to purchase the said Papersales and Services (Pvt) Ltd (first defendant), (description of goods for sale attached hereto).
>
> 2. That the purchase price of the said business and goods is $140 000, the total amount payable in cash before any goods, the subject of this Agreement, is made available to the Purchasers or concluded.
>
> 3. That unless and until the full purchase price is paid, the goods and business shall be and remain the sole property of the Seller and the purchasers shall remain the bailee only thereof."

To this agreement is attached a schedule of assets, inclusive of goodwill, the total value (being

Copyright Juta & Co Ltd

the purchase price) of which is $140 000.

In his written submissions, Mr *Morris* stated that though the wording of the agreement is ambivalent, the true nature of the sale, as contemplated by the parties, was a sale of shares in the first defendant and not a sale of assets. He submitted that this was evident from the fact that the preamble to the agreement of sale mentions that the second and third defendants were buying fifty shares each. He submitted that this was also evident from the following further facts: that payment by the plaintiff was made, not to the company as in a sale of assets, or even of goodwill, but to the shareholders as in a sale of shares; that the second and third defendants took transfer of the shares into their names and became the sole directors of the first defendant; that the first defendant continued to trade under the control of the second and third defendants; that the debts of the first defendant impacted on the business of second and third defendants and that the second and third defendants' personal emoluments were limited to the payment of dividends.

Mr *Morris* argued that if the sale was one of assets and goodwill, payment would have been made to the company, which would then have declared a divided from net profit and pay out to its shareholders, and further, that had it been a sale of assets, the second and third defendants could in no way have been prejudiced by the debts existing in the company. He argued that, on the contrary, the payment directly to the sellers was consistent only with a purchase of shares and the schedule attached to the agreement of sale was only a means of showing the value of the shares and of warranting the assets that existed in the company. He argued that the transaction was, in effect, one where the first defendant assisted the second and third defendants in the purchase of shares in itself and that the assistance ``took the form of a primary

liability to repay an amount borrowed so that its shares could be paid for *and* the provision of security for the debt by way of a bond over its assets''. He submitted further that such a transaction or the agreement entered into by the parties was in contravention of s 58 of the Companies Act [*Chapter 190*] in the form in which that section existed at the time ie prior to the promulgation of Act 6 of 1993 by which it was amended and, as such, it was an illegal, void and unenforceable act. The money was lent to the first defendant so that it could be used for an illegal purpose and the plaintiff, with full knowledge of the purpose for which the money was required, connived in the illegality by making the payment direct to the selling shareholders and looking to the first defendant for repayment. In conclusion, he submitted that the loan upon which plaintiff sued the defendants is inextricably linked with the illegal transaction that it is itself unenforceable.

The plaintiff's counsel, Mr *Mamvura*, submitted that it was never the intention of the parties that the plaintiff would lend money to the first defendant so that that money could be used by the second and third defendants for the purchase of the shares in the first defendant. He referred to the schedule of assets attached to the agreement of sale and said that that schedule specifically consisted of assets and excluded shares. He argued that the share price was only $100 and that the second and third defendants raised on their own and without the assistance

Copyright Juta & Co Ltd

of the plaintiff about $40 000. This amount, he argued, covered the actual purchase price of the shares as opposed to the price of the business itself. The loan was given with a different and permissible objective of paying for the assets including goodwill and did not result in the impoverishment of the first defendant.

Mr *Mamvura* submitted, in the alternative, that even if the transaction between the first and second and third defendants did constitute a contravention of s 58 of the Companies Act as it then existed, such contravention did not affect the validity of the transaction as between the plaintiff and the defendants. The loan agreement between the first defendant and the plaintiff was a separate juristic act and quite removed from the transaction in terms of which the first defendant gave financial assistance to the second and third defendants for the purchase of its shares. He went on to argue that even if the plaintiff knew that the loan was to be used in a manner constituting a contravention of s 58 that did not render the loan and the sureties by second and third defendants invalid.

The issue for decision is whether the plaintiff provided assistance to the defendants to enable the first defendant to possess funds with which, in turn, it would enable the second and third defendants to purchase shares in itself. Thus the issue is whether the plaintiff connived with any of the parties in this transaction. In broad terms, the question is whether the cause upon which the

plaintiff has sued the defendants is tainted with an illegality rendering the whole transaction void and unenforceable.

With the issue for decision defined in these terms, I do not think that it is necessary for me to determine what the true nature of the transaction between the second and third defendants and the seller was, that is to say, whether it was a sale of shares or a sale of assets. In the final analysis, whether one defines it as a sale of shares or a sale of assets, what is critical as between the plaintiff and the defendants is the purpose for which the loan was given. Section 58(1) of the Companies Act, as it then was, read as follows:

> ``It shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company.''

Of this provision, Tett and Chadwick *Zimbabwe Companies Law* 2 ed at p 92 have this to say:

> ``As to what constitutes such assistance, whatever contract is entered into by the parties and whatever they call it, the court will peer behind the transaction and assess its real effect. The enquiry is `whether or not the acts contemplated by the transaction would amount to giving of financial assistance within the meaning of the subsection'.''

The learned authors outline the mischief intended to be curtailed by the legislature and state that the section is designed to penalise any device to avoid eventual payment in full for shares. It is to my mind, the heart of s 58 that a purchaser of shares in any company should pay for them. Any device or arrangement coming with the confines of the section and intended to avoid

Copyright Juta & Co Ltd

such payment is to be visited by the sanction of the unenforceability of any such device or arrangement. Further, although the provision against the giving of financial assistance is couched in very wide terms (*Lipschitz NO* v *UDC Bank Ltd* 1979 (1) SA 789 (A)), it is designed to safeguard the paid up capital of the company. Hence in *Lewis* v *Oneanate (Pty) Ltd & Anor* 1992 (4) SA 811 (A) at 818B-C NICHOLAS AJA said:

> ``The object of a provision such as (this) is the protection of creditors of a company who have a right to look to its paid up capital as the fund out of which their debts are to be discharged. (See *Trevor* v *Whitworth* (1887) 12 AC 409 (HL) at 414). The purpose of the legislature was to avoid that fund being employed or depleted or exposed to possible risk in consequence of transactions concluded for the purpose of or in connection with the purchase of its shares. (Compare *Lipschitz NO* v *UDC Bank Ltd supra* at 801C).''

Some guidance may be obtained from the case of *Straiton & Anor* v *Cleanwell Dry Cleaners (Salisbury) (Pvt) Ltd & Anor* 1959 (2) R&N 385 where the facts were quite similar to the present. In that case, the plaintiffs S and A agreed to sell their shareholding in a company to K, M and H. They recorded in their agreement of sale that the company owed £12 000 to S and A and that on the date when payment fell due £3 500 of the debt of £12 000

CHINHENGO J

was to be paid by the purchasers and that the company would bond all its movable assets as security for the balance of £8 500. K undertook to pay this balance by instalments on the company's behalf and bound himself as surety and co-principal debtor. He defaulted in making paying and S and A claimed provisional sentence on the bond for the balance against the company and K jointly and severally. They sought to hold the company liable on the bond which had been signed by S, purporting to act on behalf of the company as director in terms of a resolution of the company authorising him to do so. S had, however, resigned as director before signing the bond and it was contended that S's signature did not bind the company. It was also argued in the alternative that the giving of the bond by the company constituted ``the provision of security'' in terms of s 58 of the Companies Act and was therefore void. The court found that S had terminated his capacity to sign the bond when he resigned as a director and that the company was not bound by his signature. Relevant to this case is that the court found that the purchase of shares and the undertaking to pay the company's loan indebtedness were inextricably linked and the passing of the bond therefore constituted ``the provision of security'' within the meaning of s 58 of the Act. It found that the bond was *void ab initio* and the maxim *ex turpi causa non oritur actio* applied. At 391C-D, the learned judge said:

> ``Mr *May* submitted that by passing the bond the company did not provide financial assistance in connection with the purchase of the plaintiff's shareholding in the company. In my view the purchase of the shares and the undertaking to repay the company's loan indebtedness were inextricably linked, and it seems probable that plaintiff would not have agreed to the sale unless the purchaser provided security for the repayment of the company's debt. This security the company gave in the form of a bond and it constituted `the provision of security' within the meaning of s 58.''

The facts in the above case did not involve a third party, as in the present case. In that case, the arrangement was between the purchasers and the sellers of the shares and the dispute arose between them. In the present case, a third party, the plaintiff, is involved. The defendants' assertion, which is intended to defeat the plaintiff's claim, is that the plaintiff appreciated the

---

Copyright Juta & Co Ltd

purpose for which it was advancing the money to defendants and connived with them to contravene s 58 of the Act. This assertion arises from Miss Muzenda's involvement when she perused the agreement between the buyers and sellers of the business of first defendant and forms the basis of the allegation of connivance. I am certain that in the use of the word ``connivance'' no dishonourable connotations are intended or implied against the plaintiff. None such connotations can be inferred from the facts. The undesirable effect of s 58 in certain situations was aptly summarized in *Lipschitz NO* v *UDC Bank Ltd supra* at 797G-H where MILLER JA, discussing a similar South African provision, said:

CHINHENGO J

> ``The terms of the section have been the subject of considerable criticism not only in South Africa but also in England and elsewhere, where a similar prohibition is contained in legislation concerning companies. In the report of the Jenkins Company Law Committee (1962) in England it was observed that the statutory prohibition had
>
> > `proved to be an occasional embarrassment to the honest without being a serious prohibition to the unscrupulous'
>
> and that the fear had been expressed by some witnesses that
>
> > `the section prohibited a number of quite innocent transactions'.''

In the *Lipschitz* case the learned JUDGE OF APPEAL correctly observed that the section has ``two main elements; one is the giving of financial assistance, the other is the purpose for which it is given (or the `in connection with' provision)''. He said that ``the two elements are linked to form a single prohibition, but although so linked they are vitally different in concept'' (at 799D-E). The learned JUDGE OF APPEAL analysed the facts in that case and, in dealing with the ``in connection'' provision, said at 804C-D:

> ``If given their literal meaning, the words `in connection with' may have a very wide connotation but it is probably seldom that they are used in legislation in their wide literal sense. An act only remotely associated with an event may be said, literally, to have been an act in connection with such event, but unless the subject matter of the legislation and the context of the particular provision clearly indicate otherwise, it would not ordinarily be accepted that even the most remote connection was intended to be visited with sanctions or penal consequences.''

At 804E-F, the learned JUDGE OF APPEAL quote with approval SCHREINER JA's words in *Rabinowitz & Anor* v *de Beers Consolidated Mines Ltd* 1958 (3) SA 619 (A) at 631F to the effect that the phrase ``may be limited to the closer or more direct forms of association indicated by the context''. He concluded at 805A-H that where a purpose other than the purchase of the company's shares is established it cannot be said invariably that the act was performed in connection with the purchase of shares. He gave a very lucid example to illustrate his conclusion. This reasoning appeals to me in my consideration of the present case.

The second and third defendants intended to purchase the first defendant as a going concern. All its shares were issued and fully paid up - one hundred of them each of one dollar in value. The sellers' shareholding had not been revalued so as to give another value to the shares. Thus in order to sell and buy the business as a going concern, the parties agreed on the basis of the value of its assets, including goodwill. And when the plaintiff advanced the loan to the company, its purpose was to enable the second and third defendants to purchase the first

Copyright Juta & Co Ltd

defendant as a going concern and not to finance the two defendants in a transaction whereby using the funds advanced to the company, they would be enabled to purchase shares in it. The loan advanced by the plaintiff was, to my mind, advanced for the purpose of purchasing the business as a whole and not for the company to provide

CHINHENGO J

financial assistance for the purchase of its shares. Therefore it cannot be said that the funds were provided in connection with the purchase of shares and that s 58 was contravened. In any case, the evidence on Miss Muzenda's involvement is thin on the ground. The mere fact that she perused the agreement between the sellers and the buyers of first defendant does not go far enough to establish the ``connivance'' on which the defendants' case rests.

Further, and in any event, s 58 (now s 78) of the Act was primarily designed to ensure, as stated by Tett and Chadwick (above cited) to place severe limitations on any device whose result is that the purchaser of shares does not ultimately pay for them. The ``impoverishment test'', applied in several cases cited in *Lipschitz supra* and discussed at some length in that case, is hardly of any assistance to the defendants. The assistance given to the first defendant was not, in my view, ``in connection with'' the purpose of shares. It was given with a different and permissible object, the payment for the assets and goodwill of the company as a going concern, and I cannot see how it can be said to have resulted in the impoverishment of the first defendant.

The transaction between the first defendant and the plaintiff is a separate juristic act. It is separate from any arrangement between the first defendant and the second and third defendant. Shorn of the alleged connivance between the plaintiff and the other parties, its separate juristic nature becomes all the more apparent and the contravention of s 58, even if admitted as between the first defendant on the one hand and the second and third defendants on the other hand would not, in my opinion, affect the validity of the transaction as between the plaintiff and the first defendant nor the guarantees given by the second and third defendants. In my opinion, the mere knowledge that the funds would be used *partly* for the purchase of shares in first defendant would not invalidate the agreement between the plaintiff and the first defendant nor the sureties given by the second and third defendants (see *Manufacturers Development Co (Pty) Ltd* v *Diesel & Auto Engineering Co* 1975 (2) SA 776 (W) at 778C-D, with which I agree only to the extent that it means that the third party does not know of the purpose to which the money will be put). The plaintiff in this case cannot be said to have been aware that the company intended to use the money in contravention of s 58. As stated in *Henochsberg on the Companies Act* at p 76, the onus in a case such as this is on the party alleging that the financial assistance was given to facilitate the purchase of its own shares. That onus has not been discharged in the present case. I am quite comfortable in stating that the true nature of the transaction in this case was, as far as the plaintiff was concerned, simply to enable the second and third defendants to buy a business. The modalities thereof did not preoccupy the plaintiff nor its agent, Miss Muzenda. I cannot see the basis of alleging ``connivance'' so as to affect or defeat the plaintiff's claim. Even if there is

Copyright Juta & Co Ltd

CHINHENGO J

some merit in regard to the true nature of the transaction between the first defendant and the second and third defendants as contended by Mr *Morris*, that, in my view, is a juristic act, legal or otherwise, quite separate from that between the plaintiff and the defendants. I see no basis for the application of the maxim *ex turpi causa non oritur action*. If it were to be otherwise, many business transactions which have as their purpose the granting of a loan to prospective buyers of a business would be affected. That could not have been the intention of the legislature in enacting s 58. The intention was to deal with the mischief outlined by Tett and Chawick and in *Lewis* v *Oneanate Pty) Ltd & Anor supra*. There is merit in the observation by RC Beuthin ``Section 86*bis(2*) - A Test for Financial Assistance'' (1973) 90 *SALJ* 211 at 215, where he says that the courts have exhibited the greatest reluctance to stigmatise as financial assistance anything which is not immoral or opposed to sound business methods and quotes the following from *Karnovsky & Ors* v *Hyams* 1961 (2) SA 368 (W) at 370 where CLAASSEN J said:

> ``If a transaction is real and not fictitious, and in the ordinary course of sound business methods, the court would, in my view, be slow to condemn such a transaction on the basis of s 86*bis*(2), unless the court, when in possession of the full facts, could say that on a balance of probabilities the transaction if carried out would constitute a criminal offence ... [In the present case], the sellers of the shares are stepping completely out of the company and are giving up any control they may have through the board of directors. While they still had control they may have been satisfied to leave the debts owing to them by the company unsecured but when they step out completely and the control passes into other hands, it seems to me that, while not demanding payment, they are acting normally and in business-like manner in stipulating that their loan accounts be secured by mortgage bond over the fixed assets of the company. In doing that, there is nothing immoral or contrary to sound business methods.''

I am satisfied that when the plaintiff granted the loan to the defendants it intended only to carry out its mandate and it followed sound business practices. There is nothing immoral in the transaction nor can it be said that what it has done constitutes a criminal offence. The allegation of connivance has absolutely no basis in fact or in law. In my view, this is a classic case in which if s 58 of the Act (as it then existed) is interpreted in the manner contended by the defendants the result would be to ``prohibit quite innocent transactions''.

Judgment will be entered for the plaintiff with costs as prayed in the summons. It is so ordered.

Scanlen and Holderness, plaintiff's legal practitioners

VENGESAI & ORS *v* ZIMBABWE GLASS INDUSTRIES LTD 1998 (2) ZLR 593 (HC)

Court **High Court, Harare**

Gillespie J

Application for declaratory order

1 July & 30 December 1998 Judgment No. HH-244-98

Copyright Juta & Co Ltd

Flynote

Appeal - noting of - effect - stay of execution pending appeal - whether applies to all tribunals or only to superior courts - appeal to Labour Relations Tribunal - Minister approving of retrenchment of employees but altering retrenchment package - employer appealing against package - whole of Minister's determination suspended pending outcome of appeal

Legal practitioner - conduct and ethics - presentation of legal argument - requirement to cite all authorities, including adverse ones - need for practitioner to do all relevant research and not leave original research to judge

Headnote

The respondent company needed to retrench some of its staff. The retrenchment was disputed by the employees, but after the matter was eventually placed before the Minister, the retrenchment was approved. However, the Minister ordered that the employees be given a retrenchment package somewhat more generous than had been proposed by the company.

The company noted an appeal against part of the Minister's determination, in particular the financial package. It took the position that the implementation of the package had been suspended, but that the retrenchment itself had not. The employees sought a declaratory order, that they remained employees pending the determination of the appeal. Their contention was that the partial appeal suspended the whole of the Minister's decision. The employees subsequently cross-appealed against the retrenchment itself.

Held, that the accepted common law rule of practice whereby the execution of a judgment is automatically suspended by the noting of an appeal does not apply to any court, tribunal or authority other than a superior court of inherent jurisdiction. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. Where the enactment does not provide for suspension pending appeal, an aggrieved person is not left without remedy: he may approach the High Court to move an appropriate stay or interdict.

Held, further, that the decision in *Phiri & Ors* v *Industrial Steel & Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S), to the effect that an appeal suspends the Minister's determination, meant that the employees were not retrenched, nor were they to be treated as retrenched.

GILLESPIE J

Held, further, that argument on the law, with appropriate citations of all relevant cases, including adverse decisions, is rare among legal practitioners. Yet it to counsel that a judge must look for appropriate research and argument. It is the duty of counsel to do all relevant research and to present that research to the court; a judge cannot be expected to undertake all the original research in every case. Similarly, counsel should not merely refer to a single passage in a judgment without ensuring that the context is apposite.

Quaere: whether the statement of law in *Phiri & Ors* v *Industrial Steel & Pipe (Pvt) Ltd* 1996 (1)

Copyright Juta & Co Ltd

ZLR 45 (S) and in other cases, that an appeal from any court has the effect, at common law, of suspending the decision appeared against, is correct.

Cases cited:

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

Mhowa v *Beverley Bldg Soc* 1998 (1) ZLR 546 (S)

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

Phiri & Ors v *Industrial Steel & Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S)

PTC v *Mahachi* 1997 (2) ZLR 71 (H)

PTC v Mahachi (2) HH-183-98

Ruby's Cash Store (Pty) Ltd v *Est Marks & Anor* 1961 (2) SA 118 (T)

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

Case Information

D Mwonzora, for the applicants

P Nherere, for the respondent

Judgment

GILLESPIE J: The simple point at issue in this application is whether an appeal from an inferior labour relations forum, in this case a retrenchment committee, to the labour relations tribunal has the effect of suspending the determination of the lower authority. The material facts are not in dispute and may be very simply stated.

The respondent conceived of a need to retrench the applicants and gave to them the appropriate notice, making the offer it considered proper. The applicants declined the offer, resisting retrenchment in principle. The dispute was eventually placed before the retrenchment committee in terms of the relevant labour legislation. This body's deliberations were, as is required, placed before the Minister responsible who gave a decision on 31 July 1997. The decision was to approve the retrenchment of the applicants, subject to a package somewhat more generous than that proposed by the respondent.

The respondent duly noted an appeal against part of the determination, in particular against the financial package. On this basis, it took the position that that portion of the determination appealed against - the package - had been suspended pending the appeal, whereas the uncontested portion was effective. In consequence it regarded the applicants as duly retrenched but not yet due any payment; neither wages nor retrenchment package.

This attitude prompted the applicants to bring the present proceedings, seeking relief in an order declaring them to be employees of the respondent pending determination of the appeal

Copyright Juta & Co Ltd

and directing the payment to them of

GILLESPIE J

their wages. The application was based on the proposition that the partial appeal had the effect of suspending the whole decision, even that part not appealed against. The applicants did not contest the determination timeously. Shortly before the hearing, however, or so I was advised from the Bar, and well after the present papers were complete, they had obtained from the labour relations tribunal an order condoning the late noting of a cross-appeal. This enabled them to add the argument that their own cross-appeal against the approval of retrenchment had the effect of suspending that portion of the determination even if it were not already suspended by the appeal.

There is authority directly in point, and which in fact favours the applicant. It is the decision in *Phiri & Ors* v *Industrial Steel & Pipe (Pvt) Ltd.* 1(188) In that judgment, it was held that an appeal from the decision of the Minister, consequent upon the deliberations of the retrenchment committee, suspends the determination, but only to the extent of the appeal. Hence, on this authority, the respondent's contention, prior to the noting of the cross-appeal, is to be regarded as correct; whereas after the noting of the cross-appeal, the respondent's argument is to be favoured.

In addition to this decision, there is an unhappy divergence of opinion amongst learned judges of this court, as reflected in three judgments. The first is a judgment of GREENLAND J in the matter of *Mushaishi* v *Lifeline Syndicate* & Anor. 2(189) In that case, the learned judge held that an administrative decision is suspended pending an appeal on the grounds that it would be -

> ``anomalous if an administrative decision of a quasi-judicial nature to be put on a different footing from court judgments and orders.'' 3(190)

The second decision is the judgment of SMITH J in *Chatizembwa* v *Circle Cement Ltd*. 4(191) In this, the learned judge held that a decision of an employer in terms of a registered code of conduct is not suspended when the employee notes an appeal to the labour relations tribunal. This judgment was delivered before the Supreme Court decision in *Phiri* but was not referred to therein.

In the third relevant case, CHATIKOBO J in *Posts & Telecommunications Corporation* v *Mahachi*, 5(192) held that the noting of an appeal from the labour relations tribunal to the Supreme Court has the effect of suspending the decision of the lower tribunal. The learned judge approved the decision of GREENLAND J in *Mushaishe* and distinguished the decision of SMITH J in *Chatizembwa* on the basis that that judgement concerned the act of an individual employer rather than the decision of an established court.

Most recently, SMITH J has, in *Posts & Telecommunications Corp* v

Copyright Juta & Co Ltd

GILLESPIE J

Mahachi (2), 6(193) commented upon the divergence of views thus disclosed. The learned judge, in expressing his adherence to the views he had originally stated, noted that the common law principle, quoted in each case where a contrary view is preferred, is the proposition that at common law all judgments are suspended pending appeal. He observed that this principle has an important corollary, namely, that the court giving the judgment has the inherent discretion to permit execution pending appeal. Any court other than a court of inherent jurisdiction, however, has no such discretion. The learned judge therefore asked:

> ``if it cannot order, in appropriate circumstances, that its judgment be executed, is it right to say that the judgment is automatically suspended?'' 7(194)

In none of these decisions since *Phiri*'s case has that judgment actually been considered. This is unfortunate and has led to the perpetuation of a controversy so as to create uncertainty. Much of the blame for this must rest upon the legal practitioners concerned, who failed to cite the relevant authority. I have to say that argument on the law, with appropriate citation of all relevant cases, including adverse decisions, is as rare amongst legal practitioners as are hens' teeth. Yet it is to counsel that a judge must look for appropriate research and argument if he is to be able to give judgments efficiently and correctly. It is that duty of him, who would undertake the responsibility of an advocate, a duty owed both to the client and the court, to do all relevant research and to present that research to the court. A judge cannot be expected to undertake himself all the original research in every case.

Slightly less remiss than not citing the relevant authorities is citing them by reference to a single passage in the judgment without ensuring that the context is apposite. This is something which may well have happened in the relevant cases here. In each case that has adopted, as a general statement of law, the proposition that at common law all judgments are suspended, the undoubted authority of CORBETT JA (as he then was) has been relied upon:

> ``...it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment.'' 8(195)

I feel obliged to express a few respectful remarks concerning this passage and the manner in which it has been applied in the decisions referred to. In making these remarks, I must acknowledge that they have no force other than

GILLESPIE J

an expression of personal opinion. For the purpose of deciding this application, the law as it is binding upon me is that stated in *Phiri*'s case. Nevertheless, since there is some difference of opinion expressed in this court, and lest the Supreme Court might feel inclined to reconsider the decision in *Phiri*'s case, I venture to express my view, with appropriate diffidence and the greatest respect. In mitigation of my temerity, I would respectfully draw attention to another decision of the Supreme Court, *Mhowa* v *Beverley Building Society*. 9(196) In that case, the distinction between the decisions of *Phiri* and *Chatizembwa* was noted and the correctness of

Copyright Juta & Co Ltd

Chatizembwa's case was left open. Uncertainty remains, therefore, and it may be that the correct, and most expedient, way of removing that uncertainty is to reconsider the entire question.

In my opinion, the *dictum* of CORBETT JA, cited above and approved in the various judgments referred to, does not, and was not intended, to apply to a judgment of any court, tribunal or authority other than a superior court of inherent jurisdiction. I say this for the following reasons. The Roman law pertaining to appeals was expressed in the maxim

> ``*nihil innovari appellatione interposita*.'' 10(197)

This law is expressed by Voet in the terms:

> ``The effect of an appeal is that the decision is suspended, that all things must be left in their original condition and that no new step can be taken in terms of the heading of this title.'' 11(198)

The heading to which Voet refers is the maxim stated above. That the learned author was citing the Roman law, not the Roman-Dutch law of his time, is clear from a later passage which compares the Roman law embodied in the maxim to clauses commanding a stay of execution normally inserted in an order of an appeal in his time. 12(199)

The procedure in Voet's time for noting an appeal (as we now call it), and obtaining a stay of execution pending that appeal, is authoritatively explained by JANSEN J (as he then was) in *Ruby's Cash Store (Pty) Ltd* v *Estate Marks & Anor*. 13(200) If I might be so bold as to summarise. The noting of an appeal involved an application to the court *a quo* for a *mandament van appèl* or order of appeal. As part of this order it was open for the prospective appellant to move a *clausula inhibitionis* or inhibitory clause. The effect of such an inhibitory clause would to put in place an *inhibitie* or stay of execution

GILLESPIE J

pending the appeal. The need to approach the court to order an *inhibitie* was expressly, according to Voet -

> ``since there are many cases in which both by the Civil law and by the customs of today decisions are put into execution notwithstanding that an appeal has been lawfully brought.'' 14(201)

The prospective respondent on appeal had the opportunity, faced with a *mandament van appèl* containing a *clausula inhibitionis*, to sue for the revocation of that order. He could even seek to prevent an order of *inhibitie* by suing out in advance a claim known as the *requesta antidotalis*.

This all shows that, according to Voet, it was general usage, and apparently generally necessary, to obtain a specific order staying execution at the time the order of appeal was granted in the court a *quo*. According to JANSEN J 15(202) the Roman law that an appeal automatically suspends execution had little or no application to appeals to the Court of Holland and the granting or withholding of an *inhibitie* was discretionary.

I respectfully accept the authority of, and agree with the correctness of, this summary and these conclusions. It appears to me that CORBETT JA did so as well. His *dictum* cited above is

Copyright Juta & Co Ltd

prefaced with the remark:

> ``Whatever the true position may have been in the Dutch Courts and more particularly the Court of Holland (as to which see *Ruby's Cash Store (Pty) Ltd* v *Estate Marks & Anor* ...) ... 16(203)

If this understanding is correct, then the subsequent general statement concerning the common law pertaining to stay of execution can only properly be applied to courts of inherent jurisdiction. This conclusion indeed appears to be indicated in the words of the learned JUDGE OF APPEAL.

In stating the common law, CORBETT JA referred to the automatic stay of execution upon the noting of appeal, as a rule of practice. That is, not a firm rule of law, but a long established practice regarded as generally binding, subject to the court's discretion. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. Moreover, the authorities cited by CORBETT JA are authorities relevant to appeals from superior courts. 17(204)

The reference to this rule as a rule of practice shows the acceptance by the learned judge of appeal of the analysis by JANSEN J. This analysis leads

inexorably to the conclusion that the grant or withholding of a stay of execution is, at common law, a matter of discretion reserved to a court in which such a discretion is imposed. It follows that, in the absence of any statute specifically conferring such a discretion on an inferior tribunal or authority, or otherwise regulating the question of enforcement of judgments pending an appeal from that authority, no such discretion can exist. Such a court or authority can exercise only the powers conferred by statute. It cannot order the suspension of its own judgment pending an appeal. It has no discretion to enforce its own judgment notwithstanding an appeal. The only basis upon which its judgment or order can be supposed to be stayed is where its enabling statute provides for the situation.

This, in my view, is persuasive support for the view expressed by SMITH J in *Mahachi*'s case: namely, that the grant, whether automatic or not, of a stay of execution of a judgment pending appeal is an inseparable part of an exercise of discretion by the court from which the appeal lies, to order the enforcement of its judgment notwithstanding the appeal or any temporary stay. It follows that the question of enforcement pending appeal of judgments from an inferior court or authority cannot possibly be regulated according to a rule of practice, derived from common law, and applicable in superior courts of inherent jurisdiction.

I would suggest that this does not mean that a person aggrieved by a decision, judicial or administrative, which is not covered by any enactment providing for its suspension pending appeal, and who wishes to appeal and whose prospects of success are sufficient, is left without a remedy. He may approach this court, as a matter of urgency if required, in order to move the appropriate stay or interdict.

Copyright Juta & Co Ltd

If the foregoing were recognised to be the law, then in the instant case, and in *Phiri*'s case, it would have been proper, if the appropriate relief were prayed and substantiated, to have granted the order that I would otherwise have considered to be just. Such an order would be to declare that the appeal does not stay any action in consequence of the judgment but that the prospect of success in the proposed appeal, and the question of prejudice depending upon the outcome of the appeal, is such that the employer ought to be obliged to pay to his retrenched employees at least that amount which he tenders as a retrenchment package. It seems to me that to retain the retrenched persons as employees receiving their wages perpetrates as unjust a result against the employer as would to hold (as in *Phiri*'s case) that the employees, although entrenched, can receive neither pay nor retrenchment benefits pending the appeal.

Nevertheless, I am bound by the *ratio decidendi* in *Phiri*'s case. The exigency of that *ratio* is that the appeal to the tribunal suspends the Minister's

GILLESPIE J

decision. It therefore follows that the employees are not yet retrenched nor to be treated as retrenched.

The declaratory order that is prayed is far-reaching. Were I to grant it in the terms prayed it might be supposed to pre-empt subsequent argument as to whether any court has the power to order the enforcement of the order notwithstanding the appeal. It may be that such a power is necessary if the decision in *Phiri*'s case is not reconsidered. I would not wish to be understood as prejudging any such argument. In my discretion, I would therefore limit the declaration which I feel otherwise obliged by authority to make to a statement that, pending the appeal, no steps may be taken under the authority of the order appealed against, which decision is to be regarded as suspended. The effect of such a declaration, in the absence of any other litigation, may well be to oblige the payment to the applicants of that which they demand. That, however, it is not necessary nor, I think, desirable for me to declare. The consequence must be that, I am compelled to declare, as I do:

1. Pending the determination of the appeal and cross-appeal, the whole of the decision of the Minister authorising the retrenchment of the applicants is deemed to be suspended.

2. The costs of this application are to be borne by the respondent.

Mwonzora & Associates, applicants' legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

S *v* CHIRUNGA 1998 (2) ZLR 601 (HC)

Court **High Court, Harare**

Gillespie J

Copyright Juta & Co Ltd

Criminal review

30 December 1998 Judgment No. HH-243-98

Flynote

Criminal law - common law offences - housebreaking with intent to steal - employee of building society being let into premises after hours by cleaner - employee not authorised to be there during that time - housebreaking established

Criminal law - common law offences - theft - scheme whereby employee of building society fraudulently increased credit balances in customers' accounts - customers withdrawing money - appropriate charge should have been fraud - verdict of theft by false pretences sustainable

Criminal procedure - review - court's powers on review - alteration of verdict - substitution of verdict of theft by false pretences for verdict of theft - no application by State or submissions by defence - undesirability of altering verdict

Criminal procedure - verdict - competent verdict - charge of theft - whether conviction for theft by false pretences is proper

Headnote

The accused had been charged with housebreaking with intent to steal and theft, but convicted of theft only. He was an employee of a building society. He conspired with a cleaner at the society's premises to let him into the premises after hours, at a time when he had no authority to be there. While there, he used the society's computer to make fictitious deposits in the accounts of two other persons. These persons thereafter withdrew money from their accounts. The magistrate acquitted the accused of housebreaking on the grounds that he had been allowed into the premises by the cleaner, who was lawfully inside.

Held, that the accused should have been convicted of housebreaking. Although the cleaner was lawfully in the premises, he had no right to permit the accused to enter. There was a ``breaking'' in the legal sense, the breaking was unlawful, and it was done with intent to commit an offence.

Held, further, that the crime the accused intended to commit was fraud, rather than theft, and he should have been charged with housebreaking with intent to commit fraud, and fraud. However, there had been a theft by false pretences committed when the two account

holders withdrew the money. Theft by false pretences is a species of theft, the accused was a party to that theft, and a verdict of theft could on this basis be sustained.

Held, further, that it would not be proper to alter the verdict to one of theft by false pretences. This would be a verdict for a more serious offence, and the State had not applied for such an alteration in the verdict, nor had the accused made any submissions. Although the court was empowered on review to make such an alteration, in the circumstances this would be unfair.

Cases cited:

Copyright Juta & Co Ltd

R v *Dombo* 1969 RLR 83 (A); 1969 (2) SA 591 (RA)

R v *Faison* 1952 SR 54; 1952 (2) SA 671 (SR)

R v *Hyland* 1924 TPD 336

S v *Kellner* 1963 (2) SA 435 (A)

S v *Kudjiwane* 1975 (3) SA 335 (O)

S v *Malinga* 1963 (1) SA 692 (A)

S v *Ndhlovu* 1978 RLR 305 (G)

R v *Nemashakwe & Ors* 1967 RLR 127 (A); 1967 (3) SA 520 (RA)

S v *Salemane* 1967 (3) SA 691 (O)

R v *Teichert* 1958 (3) SA 747 (N)

R v *Tusi & Anor* 1957 (4) SA 553 (N)

Legislation considered:

High Court Act [*Chapter 7:06*], s 29(2)

Judgment

GILLESPIE J: The accused was charged with the offence of housebreaking with intent to steal and theft. He was convicted of theft and sentenced to seven years imprisonment of which two years were suspended on conditions of good behaviour, and one year was suspended on condition of restitution of the sum of $9 000.

The facts, as found by the learned regional magistrate, show that the accused was a former employee of the Zimbabwe Building Society. His employment had terminated in circumstances of alleged disciplinary misconduct. He had thereafter conspired with a number of people to perpetrate a fraud upon the building society. The first of his conspirators was Hubert Masvova, a cleaner at the Chitungwiza branch of the institution, where the accused had been working immediately prior to losing his job. Other conspirators were a friend, Timothy Mangoma, and the accused's own wife, Pauline.

Hubert's part in the conspiracy was to meet the accused at the Chitungwiza branch office after hours and to facilitate the accused's unlawful access to the premises. Timothy and Pauline were to supply to the accused their passbooks to accounts genuinely held by them at the Zimbabwe Building Society. The accused, for his part, planned to take advantage of his unlawful access to the office to use the office computer to make various false accounting entries, including entries in the passbooks, in order to reflect false deposits, creating a fictitious balance, in the accounts of the two account holders. By this,

Copyright Juta & Co Ltd

means the accused gained access to the premises and to the computers and created the impression by the various entries that the amounts of $65 000 and $42 000, had been deposited in the accounts of Pauline and Timothy respectively. This facilitated the withdrawal by Pauline and Timothy from the complainant institution of amounts of $3 000 and $6 000 to which they were not entitled. The total prejudice to the society was therefore $9 000.

I am satisfied that the magistrate's finding of facts was correct. I consider it worthwhile, however, to examine the conviction which resulted on that finding. I also think it necessary to alter the sentence imposed. In fact, the accused was convicted of theft. The first point I wish to consider is whether he should have been convicted as charged with housebreaking with intent to steal and theft. On this issue, the magistrate's reasoning was:

> ``there is no evidence to support housebreaking by the accused. He was allowed into the bank by Hubert who was lawfully inside the bank cleaning and doing his duties. So you (*sic*) can't (*sic*) be said to have broken into the bank. The use of keys by both men to open the back doors is not supported by evidence. So, as we have shown earlier this was an offence committed by two people working in concert and I believe that it is appropriate to convict the accused of theft of money not housebreaking. That is the verdict."

This conclusion seems to involve a factual finding somewhat different from that mentioned above. It would therefore be appropriate to examine the evidence.

In Hubert's own words, describing two meetings between himself and the accused:

> ``On first day, he explained to me what he wanted when we were outside. He wanted to raise some money from the bank which he would use to repay the prejudice to ZBS [referring to a missing amount previously suspected to have been the responsibility of the accused] he did not tell me his processes how he would get money.
>
> He knew I kept some keys. He said if all would work out he would give me some money.
>
> We agreed he would return following day as we close bank. He would wait until my colleague the teller in charge had left and I was left in bank alone ...
>
> Next day about 4 pm, he came (bank closed at 3.30 pm). I was cleaning in the bank, the front part the counters. He came in the public doors. They were not fully locked because I was still inside. The bank had closed to public at 3.30 pm ... "

Under further questioning, Hubert admitted his awareness that the accused was not entitled to enter the bank premises. The situation is, therefore, that Hubert, induced by the promise of reward, arranged to meet the accused at the bank premises after business hours at a time when nobody else would be present. He undertook to, and did, permit the accused access to the premises, knowing that such access was not lawful, in order that the accused could ``raise money''.

The question is whether the accused had committed a ``breaking'' of the premises. The essential element of ``breaking'' in this offence is a term of art. It means only some physical displacement of an obstruction that forms part

Copyright Juta & Co Ltd

of the premises, and can occur without any damage being caused at all. 1(205) A breaking, however, is not criminal unless unlawful, and it is generally held that it is not an unlawful breaking for a person who has lawful access to premises to exercise that access, albeit for an unlawful purpose. Although -

> ``it is strongly arguable that as a servant's entry is lawful only by virtue of his master's permission to enter, and as this permission must be regarded as conditional upon the servant's entering at the permitted time and place, by the permitted means and for the permitted purpose'' 2(206)

the courts have not regarded the illicit purpose as rendering the entry unlawful. Hence a servant, who is permitted to enter premises and who ``breaks'' and enters premises in accordance with that permission, does not commit housebreaking with intent to commit an offence even if the sole purpose of his entry is to commit an offence and not to go about his duties.

This law might be thought to support the magistrate's decision not to convict the accused of housebreaking, I do not, however, consider that it does. Assuming, in the accused's favour, that the effect of the evidence of Hubert is that he left the door to the bank open, and not simply closed but unlocked, and that the accused did not have to displace the door at all (in which case he would have committed a breaking of his own), the accused should still be convicted of housebreaking.

The principles I apply in reaching this conclusion are the following. Any person who commits an act through another person is taken as having committed it himself - *qui facit per alium, facit per se*. 3(207) According to this principle, a person who by means of threats causes some other person to break open a house for him, is nevertheless guilty himself of housebreaking. 4(208) Secondly, people who acting together in with a common purpose are each guilty of the acts of the other committed in pursuance of that common aim. The *actus reus* of each is the participation by association with the criminal purpose. The *mens rea* is the intention, actual or constructive, that the act would be committed in fulfilling the common purpose. 5(209) Thirdly, a person may be convicted as a *socius criminis* to an offence that he could not commit as principle offender. 6(210) The two plotted and acted together to bring about the accused's unlawful entry to the bank with intent to commit an offence.

It may be that the actual breaking was not the accused's own act - it was

that of Hubert. It may have been lawful for Hubert to break the premises so that he could enter and clean. It may also be that even had Hubert entered himself solely to steal that he could not be convicted of housebreaking. Hubert, however, had no right to permit entry to the accused. The accused had no right to enter, and Hubert's actions could not regularise his entry. The two acted together in order to secure the unlawful entry and in doing so, Hubert perpetrated a breaking which was beyond his authority. Not only was this foreseen, it was actually intended by both parties. I have no doubt that both parties committed the offence of housebreaking with intent to commit an offence on the basis of their common purpose. 7(211)

Copyright Juta & Co Ltd

The next question is: What offence did they intend to commit by means of the housebreaking? The evidence shows unmistakably that they intended to commit fraud. In fact the charge that ought to have been preferred against the accused was housebreaking with intent to commit fraud and fraud. One thus has to inquire into what offence, if any, the accused can be convicted of in these circumstances. In fact, although fraud was the proper offence to charge, the elements of theft have been established. There was a taking of money, not immediately in the housebreaking, and not by the accused personally, but the fraudulent transaction perpetrated in the housebreaking made possible the later theft by Pauline and Timothy. The theft was in fact a theft by false pretences. This, however, is simply a species of theft. Housebreaking with intent to steal and theft, therefore, while an inept charge, is sustainable.

Fraud is not a competent verdict to a charge of theft and accordingly there can be no question of substituting the verdict given for one of fraud. A verdict of theft by false pretences, however, may be competent to a charge of theft. This has been held to be so in both the Transvaal and in Natal, on the reasoning that theft by false pretences is in fact a theft. That although it is convenient that the details of the offence be set out, this is not necessary, particularly where there is no doubt at all that the accused knows exactly what acts are charged against him. In these circumstances, so it is held, there is no prejudice whatever in that the actual charge, averring theft, does not contain the words ``by false pretences''. 8(212) The contrary has been decided in the Orange Free State, it being clearly enunciated in that division that theft by false pretences is not a competent verdict on a charge of theft. 9(213)

Faced with this controversy, I am obliged to say, the greatest of respect to the learned judges of the Orange Free State, that I prefer the views, and the persuasive authority of HOLMES J and JANSEN J (as each of those learned judges then was) who spoke for the Natal view. It seems to me that theft by

GILLESPIE J

false pretences, although a distinct offence, is nonetheless a species of theft. It differs from theft only in that sufferance of the taking is not brought about by stealth or furtiveness but by deceit. Provided, therefore, that the evidence adduced establishes that deceit and that the accused is not prejudiced in his defence to any such allegation of deceit not embodied in the charge, I can see no objection in a conviction of the more specific species of the offence, even though it is alleged in its general terms.

In this case, as I have already shown, the accused is party to the theft. It is, moreover, he who perpetrated the original fraud which constituted, and gave verisimilitude to, the false representation involved in the presentation of the altered pass books. The evidence traversed these facts fully, they were outlined in the outline of the state case, and the accused was able to mount his defence to them fully. It therefore seems to me that the appropriate verdict on the accused in this charge, would have been a conviction for housebreaking with intent to steal, and theft by false pretences.

It remains to be considered whether I can now substitute that verdict for the one given by the magistrate. The potential difficulty is that the verdict is for a more serious offence and the State

Copyright Juta & Co Ltd

has not moved me to do so. The High Court Act specifies the following power to this court on review. If the proceedings are not in accordance with real and substantial justice, it may:

> ``alter or quash the conviction; or reduce or set aside the sentence ... or ... generally give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given ... or if the convicted person has been convicted of an offence and the inferior court or tribunal could on the indictment summons or charge have found him guilty of some other offence, whether because it was, according to law, a competent verdict or because that other offence has been alleged as an alternative count ... the High Court may, when quashing the conviction, substitute for the judgment of the inferior court or tribunal a judgment of guilty of that other offence, whether or not the convicted person had been acquitted of that offence at the trial.'' 10(214)

The only provision prohibiting the imposition of a more serious judgment on review is that section which prevents a more serious sentence being imposed on review except in restricted circumstances. 11(215)

On the face of it, therefore, there is nothing in principle to prevent me from substituting for the judgment of the magistrate that verdict which on the evidence ought to have been given. Nevertheless, in obedience to the paramount dictates of fairness, I do not consider that I ought so to act. There has been no appeal by the State against the conviction, and no submissions by either party, particularly the defence, as to whether such an interference might not have some unforeseen prejudice. I am therefore obliged to deal

---

GILLESPIE J

with the accused on the basis of the existing conviction, which conviction I must say, I do not consider to be in accordance with real and substantial justice.

The sentence on the present conviction, and even if the accused had been convicted as I suggest he ought, is manifestly excessive. He perpetrated a planned and careful conspiracy. This involved a housebreaking and fraudulent alteration of computer records. He was willing to defraud the bank of a substantial sum, if he could, and was frustrated only by the early arrest of his confederates as they attempted to withdraw more money. In the event, however, the total unrecovered prejudice to the building society was no more that $9 000. The accused is a first offender and is fairly youthful at 24 years. He has a family - a wife (whom he involved in the offence) and one young child.

In all the circumstances, I consider a period of imprisonment is inevitable. It should, however, have the greater part of it suspended on conditions of good behaviour and of restitution. This to act as a deterrent against future dishonesty and to ensure that he does not profit from the present wrongdoing. I would therefore set aside the sentence imposed and substitute it with the following:

> ``Three years' imprisonment, of which 15 months is suspended for three years on condition that the accused does not within that period commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine, and of which a further 9 months is suspended on condition that the sum of $9 000 is restored to the complainant through the clerk of court Harare by no later than 31 January 1999.''

BARTLETT J agrees.

Copyright Juta & Co Ltd

Endnotes

1 (Popup - Popup)

This judgment was published too late to be included in volume 1 of the 1998 Reports. - *Editor*

2 (Popup - Popup)

See my judgment in *S v Mupatsi* 1998 (1) ZLR 224 (H) for an exposition of these circumstances.

3 (Popup - Popup)

South African Criminal Procedure Act 51 of 1977, which permits a judge a discretion, where one of multiple accused is absent when verdict is to be delivered, to deliver verdict in respect of all accused, or to withhold it until all are present, or to deliver verdict in respect only of those present.

4 (Popup - Popup)

Constition of Zimbabwe s 18(3).

5 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*] s 194(1).

6 (Popup - Popup)

Ibid s 334(1).

7 (Popup - Popup)

Bell's *South African Legal Dictionary* (1901) p 571, *sub voce* "trial".

8 (Popup - Popup)

Per DUMBUTSHENA CJ in *Poli v Minister of Finace* 1987 (2) ZLR 302 (S) at 309F.

9 (Popup - Popup)

It has held that "trial" only concludes upon the giving of verdict - *S v Sparks v Anor* 1972 (3) SA 396 (A) - that case, however, was dealing with the question whether the trial included the sentencing procedure after verdict.

10 (Popup - Popup)

Digest 48.17.1 - Marcianus: "It is a rescript of the divine Severus and Antoninus the Great that no person should be punished in his absence: and this we hold to be the law, that the absent ought not to be condemned: and that a system of fairness does not suffer anyone to be condemned on a cuase unheard." (My trans.).

Copyright Juta & Co Ltd

11 (Popup - Popup)

Digest 48.17.

12 (Popup - Popup)

Digest 48.19.5 - Ulpian: "The divine Trajan issued a rescript to Julius Frontonus that an absentee ought not to be criminally condemned, and to Adsidius Severus that no-one ought to be condemned on suspicions: for it is preferable that the conduct of the criminal be unpunished than that the innocent be condemned." This passage appears as 48.19.5 in some editions and is cited by Voet as such, but also as 48.17.2 in others.

13 (Popup - Popup)

Groenewegen *De Legibus Abrogatis*, ad Dig 48.17.1: "Today the guilty, absent in contumacious defiance, may be condemned ... but then they may be permitted to purge themselves after a year by a remedy of restituiton extended in respect of their contumaciousness."

14 (Popup - Popup)

Voet *Ad Pandectas* 48.17.1 & 2.

15 (Popup - Popup)

Huber *Heedensdaegse Rechtsgeleertheyt* 6.21.30.1.

16 (Popup - Popup)

Manfred Nathan *Common Law of South Africa* vol IV, §2757.

17 (Popup - Popup)

See Archbold on *Crinimal Pleadings* 43 ed, vol 1, §3-44; Halsbury's *Laws of England* 4 ed, Vol 11, §227, p 139; *R v Lee Kun* [1916] 1 KB 337 at 341; *R v Jones* [1972] 1 WLR 887 (CA) at 891.

18 (Popup - Popup)

R v Streek (1826) 2 C & P 413; 172 ER 187.

19 (Popup - Popup)

Ibid, per PARK J.

20 (Popup - Popup)

Constitution of Zimbabwe, s 89.

21 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 332.

Copyright Juta & Co Ltd

22 (Popup - Popup)

Ibid, s 333(1).

23 (Popup - Popup)

The evidence of substance abuse was led by the defence.

24 (Popup - Popup)

Presumably mis-transcriptions for "bruising" and "causing", respectively. - *Editor*.

25 (Popup - Popup)

Hoffmann & Zeffertt *The South African law of Evidence* 4 ed 448.

26 (Popup - Popup)

See generally J M Burchell *South African Crinimal Law and Procedure* Vol 1, 3 ed p 153.

As examples of the recognition of the importance of the enquiry in our law see *S v Mayo* and *S v Chamunorwa & Ors* infra n 31.

27 (Popup - Popup)

Vide s 78(1) of the Criminal Procedure Act 51 of 1977.

28 (Popup - Popup)

1969 (1) SA 201 (A).

29 (Popup - Popup)

Ibid per BOTHA JA at 204E (p 53 of official translation).

30 (Popup - Popup)

Per WESSLES J (as he then was) in *R v Fowlie* 1906 TS 505 at 508.

31 (Popup - Popup)

Gardiner & Landsdowne *South African Criminal Law and Procedure* Vol I, 6 ed p 95; Burchell & Hunt *South African Criminal Law and Procedure* Vol I, p 228; *S v Johnson supra* n 6 at 208-9 (see p 57 of official translation).

32 (Popup - Popup)

Fowlie's case *supra* n 5.

33 (Popup - Popup)

Copyright Juta & Co Ltd

Per WESSELS J *supra* (n 5) at 508 *in fine* - 509.

34 (Popup - Popup)

R v Bourke 1916 TPD 303.

35 (Popup - Popup)

Per WESSELS J *supra* (n 9) at 307-8.

36 (Popup - Popup)

Famed as he is for stories of his irascibility as for his great learning.

37 (Popup - Popup)

Per CURLEWIS J (as he then was) at 308.

38 (Popup - Popup)

Per Gregorowski J at 309.

39 (Popup - Popup)

R v Ngobese 1936 AD 296.

40 (Popup - Popup)

Ibid per CURLEWIS JA at 300.

41 (Popup - Popup)

At 300.

42 (Popup - Popup)

At 301.

43 (Popup - Popup)

Per CENTLIVRES JA *R v Innes Grant* 1949 (1) SA 753 (A) at 765.

44 (Popup - Popup)

E M Burchell "The Defence of Voluntary Intoxication" (1969) 86 *SALJ* 127 at 128.

45 (Popup - Popup)

Supra n 6.

46 (Popup - Popup)

Copyright Juta & Co Ltd

At 204.

47 (Popup - Popup)

Per BOTHA JA at 205 *in fine*- 206.

48 (Popup - Popup)

Per WESSELS J in *R v Bourke supra* (n 9) at 306.

49 (Popup - Popup)

1971 (2) RLR 23 (G).

50 (Popup - Popup)

At 25E.

51 (Popup - Popup)

1981 (1) SA 1097 (A).

52 (Popup - Popup)

Cf Burchell & Hunt, op cit (n 9) p 234; E M Burchell "The Defence of Voluntary Intoxication" *supra* (n 21) pp 130-131; J M Burcell "Intoxication and the Criminal Law" (1981) 98 SALJ 177 at 189, A St Q Skeen "Chretien: A Riposte and Certain Tentative Suggestions for Reform" (1982) 99 *SALJ* 547 at 547-8, 50 and 552.

53 (Popup - Popup)

1997 (1) ZLR 229 (H).

54 (Popup - Popup)

S v Mayo HH-468-86 and *S v Chamunorwa & Ors* S-137-86.

55 (Popup - Popup)

In *Mayo* a conviction for assault with intent to do greivous bodily harm was substituted on review with a conviction for common assault because there had been no proper investigation an admission to cause greivous harm or of the degree of intoxication. This decision, with respect, would have been entirely correct on the special intent doctrine without reference to *Chretien*. In *Chamunorwa*, an appeal against a conviction of murder was dismissed in the absence of any doubt of intoxication to a relevant degree, it being suggested that intoxication could only be a defence where it was shown that a person was, in terms of *Chretien's* case, acting purely mechanically and spasmodically without conscious volition

56 (Popup - Popup)

Copyright Juta & Co Ltd

Dube supra (n 32) at 248F.

57 (Popup - Popup)

J M Burchell *op cit* (n 4) *supra* at 188. The emphasis is the author's.

58 (Popup - Popup)

J R du Plessis "Chretien: Guest Uninvited, Geographer Extraordinary, Witness First Class" (1982) 99 *SALJ* 189 at 203.

59 (Popup - Popup)

J M Burchell *op cit* (nn 4 and 35) at 200.

60 (Popup - Popup)

A J Kerr "The Courts and the Law" (1969) 86 *SALJ* 179 at 192.

61 (Popup - Popup)

That extension has itself been occasionally inconsistent with the doctrine of special intent which does not recognise rape as a crime of special intent. See *Leary v The Queen* (1977) 74 DLR 3d 103. Yet in Southern Africa, the rduction of rape to indecent assault has not infrequently been cited as a typical example of the workings of the special intent doctrine. See n 21 *supra*.

62 (Popup - Popup)

Johnson's case *supra* (nn 6 and 23-5) at 205; p 54 of official translation.

63 (Popup - Popup)

Op cit (n 8) *supra* at 230.

64 (Popup - Popup)

Cf J M Burchell *supra* (nn 3, 34 and 36) at 188.

65 (Popup - Popup)

LORD STEYN *Michael Corbett: A Tribute to a Great Judge; The Quest for justice: Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa*, ed Kahn, 115.

66 (Popup - Popup)

See *Stubbings v Webb* [1991] 3 All ER 949. - *Editor*.

67 (Popup - Popup)

See pp 233-234 of the judgment of the European Court of Human Rights. - *Editor*.

Copyright Juta & Co Ltd

68 (Popup - Popup)

Although the remark is frequently attributed to Voltaire, it is apparently a paraphrase of what he actually said. See Ellison Kahn *A Trimestrial Potpourri* (1977) 114 SALJ 772. - *Editor*.

69 (Popup - Popup)

DE Butler *The Electoral System in Britain since 1918* 2 ed (Clarendon Press).

70 (Popup - Popup)

Comelius & Jerry *The Elimination of Corrupt Practices in British Elections 1868-1911* (Clarendon Press, 1962) p 233.

71 (Popup - Popup)

There are no subparagraphs (ii) and (v) in s 45(1)(a). - *Editor*.

72 (Popup - Popup)

A not infrequent but most reprehensible occurrence which, as I recall from my time in practice, was a cuase of substantial inconvenience to persons whose attendance at court was required.

73 (Popup - Popup)

I am informed by OMERJEE J, with whose concurrence in this judgment I am favoured, that this expression means that the police closed the docket as incomplete with the accused not located and would thereafter have made periodic attempts to locate him.

74 (Popup - Popup)

S v Tau 1997 (1) ZLR 93 (H) at 100D.

75 (Popup - Popup)

Smythe v Ushewokunze 1997 (2) ZLR 544 (S) at 555H and In re *Mlambo* 1991 (2) ZLR 339 (S) at 346G and 348D-F.

76 (Popup - Popup)

Section 18(2) of the Constituiton of Zimbabwe.

77 (Popup - Popup)

Note 4 *supra* at 349G et seq.

78 (Popup - Popup)

Mlambo (*supra*, n 4), at352F-H.

79 (Popup - Popup)

Copyright Juta & Co Ltd

Per GUBBAY CJ in *S v Banga* 1995 (2) ZLR 297 (S) at 301B-D.

80 (Popup - Popup)

S v Chakwinya 1997 (1) ZLR 109 (H) at 114B; *S v Tau* (*supra*, n3), at 99F-100A.

81 (Popup - Popup)

Per GUBBAY CJ in *Smyth v Ushewokunze* (*supra*, n 4), at 557C.

82 (Popup - Popup)

407 US 514 (1972) at 532.

83 (Popup - Popup)

Fikilini v Attorney-General 1990(1) ZLR 105 (S) at 112-4; *S v Ruzario* 1990 (1) ZLR 359 (S) at 367F.

84 (Popup - Popup)

Supra (n 8) at 300H-301A.

85 (Popup - Popup)

Per GUBBAY CJ. The emphasis appears in the original.

86 (Popup - Popup)

Ibid (nn13 and 14) at 301E.

87 (Popup - Popup)

Mlambo (*supra*, n 4), at 351G-352E.

88 (Popup - Popup)

Rahey v R (1988) 33 CRR 275 at 297.

89 (Popup - Popup)

Rahey, *supra*, at 287.

90 (Popup - Popup)

Ibid at 286.

91 (Popup - Popup)

Mlambo (*supra*, n 4), at 352E. The emphasis is that of the learned CHIEF JUSTICE.

Copyright Juta & Co Ltd

92 (Popup - Popup)

Constitution of Zimbabwe, s 24(4).

93 (Popup - Popup)

S v Chakwinya (*supra*, n 9), at 115C-D.

94 (Popup - Popup)

Despite an earlier *dictum* apparetly to the contrary in *S v Mbiri* 1997 (1) ZLR 579 (S) at 581 - which *dictum*, however, cannot be taken as applying to the High Court, but only to the magistrates court.

95 (Popup - Popup)

In *Banana v Attorney-General* 1998 (1) ZLR 309 (S) at 313. In this judgment, no reference was made to *Chakwinya, supra.* See also DEVITTIE J in *S v Kusangaya* 1998 (2) ZLR 10 (H).

96 (Popup - Popup)

Compare WILSON J in *Rahey, supra*, at 295.

97 (Popup - Popup)

Cf WILSON J in *Rahey, supra*, at 295.

98 (Popup - Popup)

Cf GUBBAY CJ in *Mlambo, supra*, at 355C-D.

99 (Popup - Popup)

Bantry Head Investments (Pty) Ltd & Anor v Murray & Stewart (Cape Town) (Pty) Ltd 1974 (2) SA 386 (C) at 392H *et seq*.

100 (Popup - Popup)

High Court Rules 1971, r 103(2).

101 (Popup - Popup)

Cf Beck's *Theory and Principles of Pleading in Civil Actions* 4 ed pp 52-3, §32.

102 (Popup - Popup)

High Court Rules 1971, r 99(c).

103 (Popup - Popup)

1996 (2) ZLR 420 at 471.

Copyright Juta & Co Ltd

104 (Popup - Popup)

Rule 13(4) and (5).

105 (Popup - Popup)

Or the pleadings, for that matter.

106 (Popup - Popup)

Per COLMAN J in *Simoes v Hasewinkel & Anor* 1966 (1) SA 579 (W) at 583 *in fine*. See also Ex p *Jordaan*: In Re *Grunow Estates (Edms) Bpk* 1993 (3) SA 448 (O) and *Chikomwe & Ors v Standard Chartered Bank of Zimbabwe & Anor* S-152-98.

107 (Popup - Popup)

Carey-Miller *The Acquisition and Protection of Ownership* p 22

108 (Popup - Popup)

Ibid p 20.

109 (Popup - Popup)

Scheepers v Robertse 1973 (2) SA 508 (N) at 517C.

110 (Popup - Popup)

De Beers *Consolidated Mines v London and South African Exploration Co* (1893) 10 SC 359.

111 (Popup - Popup)

See generally Silberberg & Schoeman *The Law of Property* 3ed p 150 *et seq*.

112 (Popup - Popup)

Placaet vam de Staten van Hollandt tegens de Pachters ende Bruyckers van de landen, 1658; re-enacted 1696.

113 (Popup - Popup)

Translation given in Cooper *The South African Law of Landlord and Tenant* p 300 n 3.

114 (Popup - Popup)

See *Omarsah v Karasa* 1996 (1) ZLR 584 (H) at 589A-589F.

115 (Popup - Popup)

(1909) 26 (S) at 426.

Copyright Juta & Co Ltd

116 (Popup - Popup)

Ibid per LAURENCE J at 431-2.

117 (Popup - Popup)

1910 EDL 150.

118 (Popup - Popup)

See Cooper *op cit* p 303 and *Lessing v Steyn* (4) SA 193 (O).

119 (Popup - Popup)

All plants accede to the soil.

120 (Popup - Popup)

Kerr *The Law of Sale and Lease* p 304 *et seq*.

121 (Popup - Popup)

Ibid 306.

122 (Popup - Popup)

S v Matanhire 1982 (1) ZLR 139 (H).

123 (Popup - Popup)

S v N & Anor 1976 (1) RLR 279 (A) at 282D-E, although it must be said that in this particular case much more should have been done to uphold the principle.

124 (Popup - Popup)

As I said in *S v C (a juvenile)* 1997 (2) ZLR 395 (H) at 402B-D.

125 (Popup - Popup)

Per BEADLE CJ in *S v Barry; S v Chemaly* 1973 (2) RLR 1 (A) at 6-7.

126 (Popup - Popup)

Eg *S v S & Ors* 1977 (1) RLR 245 (A) at 246E.

127 (Popup - Popup)

Extract from a minute on review by the then Director of Public Prosecutions, quoted with approval in *R v Panganayi & Ors* 1968 (2) RLR 201 (G) at 203E.

128 (Popup - Popup)

Copyright Juta & Co Ltd

S v C (a juvenile) supra n 3 at 400G-401A.

129 (Popup - Popup)

1995 (1) ZLR 270 (H).

130 (Popup - Popup)

Ibid, per BARTLETT J at 278C.

131 (Popup - Popup)

The reports of the Child and Law Project - Information and Prevention of Child Sexual Abuse.

132 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 351 and 352.

133 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 351.

134 (Popup - Popup)

[*Chapter 9:07*], s 351(2)(b).

135 (Popup - Popup)

Ibid.

136 (Popup - Popup)

[*Chapter 9:07*], s 353.

137 (Popup - Popup)

[*Chapter 9:07*], s 351(2)(a).

138 (Popup - Popup)

Children's Protection and Adoption Act [*Chapter 5:06*], s 20 - ranging from placement in the care or custody of any person to institutionalisation

139 (Popup - Popup)

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

140 (Popup - Popup)

Constituiton of Zimbabwe 1980, s 15(3)(b) - subsection inserted by s 5 of Act 30 of 1990.

Copyright Juta & Co Ltd

141 (Popup - Popup)

See generally the remarks in *S v Muzoriwa* HH-179-97.

142 (Popup - Popup)

The research I have considered shows that of a sample prisoners, convicted of raping young girls, interviewed by researchers, 31% admitted having sexually assaulted one child besides the one they were convicted for. However, another third (35%) stated that they had abused three other children.

143 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 351 and 352.

144 (Popup - Popup)

[*Chapter 9:07*], s 351(3)(a).

145 (Popup - Popup)

[*Chapter 9:07*], s 358(3)(e)-(g).

146 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 351(2).

147 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 351 and 352.

148 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 358(3)(e)(f) and (g).

149 (Popup - Popup)

Supra n.

150 (Popup - Popup)

See pp 283F-284A.

151 (Popup - Popup)

At 284A.

152 (Popup - Popup)

1992 (2) ZLR 445 (S).

Copyright Juta & Co Ltd

153 (Popup - Popup)

At 451A-C.

154 (Popup - Popup)

Per GUBBAY CJ at 453B.

155 (Popup - Popup)

At 454A-B.

156 (Popup - Popup)

At 454C.

157 (Popup - Popup)

1993 (2) ZLR 401 (S).

158 (Popup - Popup)

Per McNALLY JA at 404F.

159 (Popup - Popup)

At 405D.

160 (Popup - Popup)

At 405H.

161 (Popup - Popup)

Chanda v Mutandadzi & Anor S-74-94.

162 (Popup - Popup)

Gutu v Chimbunde & Anor HH-194-94.

163 (Popup - Popup)

Per SMITH J at 8-9.

164 (Popup - Popup)

Magwenzi v Chamunorwa & Anor 1995 (2) ZLR 332 (S).

165 (Popup - Popup)

At 355G-H.

Copyright Juta & Co Ltd

166 (Popup - Popup)

Per EBRAHIM JA at 335F.

167 (Popup - Popup)

1997 (1) ZLR 155 (H).

168 (Popup - Popup)

At 159H-160B.

169 (Popup - Popup)

At 162G-163D.

170 (Popup - Popup)

Supra n 13.

171 (Popup - Popup)

At 161B-H.

172 (Popup - Popup)

At 162B.

173 (Popup - Popup)

In *Magwenzi, supra,* which drew comment from ROBINSON J.

174 (Popup - Popup)

Cf n 6 *supra* at 403G.

175 (Popup - Popup)

Supra n 11.

176 (Popup - Popup)

In contravention of s 82(1) of the Parks and Wild Life (General) Regulations 1990 (SI 362/1990).

177 (Popup - Popup)

Enacted by s 128(5) of the Parks and Wild Life Act [*Chapter 20:14*].

178 (Popup - Popup)

1981 ZLR 48 (A).

Copyright Juta & Co Ltd

179 (Popup - Popup)

Per LEWIS JP at 49C and G.

180 (Popup - Popup)

At 50A *supra* citing *S v Chiromo* A-143-76 (unreported). See also *S v Mpofu* 1983 (2)ZLR 118 (H).

181 (Popup - Popup)

Per FIELDSEND CJ in *S v Fusirayi* 1981 ZLR 56 (A) at 58B-D.

182 (Popup - Popup)

Ibid at 60B. See also *R v Hartley* 1966 RLR 522 (A).

183 (Popup - Popup)

Per MUCHECHETERE J (as he then was) *S v Ndebele* 1988 (2) ZLR 249 (H) at 257B-C.

184 (Popup - Popup)

See p 471 of this volume. - *Editor*.

185 (Popup - Popup)

See p 317 of this volume. - *Editor*.

186 (Popup - Popup)

See 1996 (2) ZLR 94 (H). - *Editor*.

187 (Popup - Popup)

The Schedule has since been replaced and is now numbered differently. - *Editor*.

188 (Popup - Popup)

1996 (1) ZLR 45 (S).

189 (Popup - Popup)

1990 (1) ZLR 284 (H).

190 (Popup - Popup)

At 287D.

191 (Popup - Popup)

Copyright Juta & Co Ltd

HH-121-94 (unreported).

192 (Popup - Popup)

1997 (2) ZLR 71 (H).

193 (Popup - Popup)

HH-183-98.

194 (Popup - Popup)

At p 2.

195 (Popup - Popup)

In *South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544 *in fine*.

196 (Popup - Popup)

1998 (1) ZLR 546.

197 (Popup - Popup)

Translation: "nothing new may be done when an appeal has intervened."

198 (Popup - Popup)

Voet *Commentarius ad Pandectas* 47.7.1 - Gane's translation.

199 (Popup - Popup)

Ibid.

200 (Popup - Popup)

1961 (2) SA 118 (T) at 120H-123F.

201 (Popup - Popup)

Ibid 47.7.3 (Gane's translation).

202 (Popup - Popup)

Ibid (n 13) at 123E.

203 (Popup - Popup)

Ibid (n 8).

Copyright Juta & Co Ltd

204 (Popup - Popup)

I would go further and suggest that the very use by CORBETT JA of the upper case when referring to a court in the passage cited at n 8 above shows that he intended to refer to superior courts (a convention not followed in our law reports).

205 (Popup - Popup)

R v Faison 1952 SR 54 at 55; 1952 (2) SA 671 (SR) at 673 and Hunt *South African Criminal Law and Procedure* Vol II 3 ed by Milton p 798.

206 (Popup - Popup)

Milton's Hunt, *supra*, at 797 n 40.

207 (Popup - Popup)

See *R v Dombo* 1969 RLR 83 (A) at 85; 1969 (2) SA 591 (RA) at 592A-D.

208 (Popup - Popup)

S v Ndhlovu 1978 RLR 305 (G) at 307D.

209 (Popup - Popup)

S v Malinga 1963 (1) SA 692 (A) at 695; *R v Nemashakwe & Ors* 1967 RLR 127 (A) at 130-1; 1967 (3) SA 520 (RA) at 523.

210 (Popup - Popup)

S v Kellner 1963 (2) SA 435 (A) at 446.

211 (Popup - Popup)

See *R v Tusi & Anor* 1957 (4) SA 553 (N).

212 (Popup - Popup)

R v Hyland 1924 TPD 336; *R v Teichert* 1958 (3) SA 747 (N).

213 (Popup - Popup)

S v Kudjiwane 1975 (3) SA 335 (O), following *S v Salemane* 1967 (3) SA 691 (O).

214 (Popup - Popup)

High Court Act [*Chapter 7:06*], s 29 (2).

215 (Popup - Popup)

Ibid s 29 (2) (b) (ii) proviso.

Copyright Juta & Co Ltd